



DETENTION CONDITIONS IN A COSMOPOLITAN EUROPE

By

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Abstract

[English]

This dissertation provides an empirical analysis of the standard setting and policy-making processes at the Council of Europe (CoE) and the European Union (EU) in the area of detention conditions for prisoners and asylum seekers. In this way, the dissertation contributes to the emerging research area of European Criminology. The theory of cosmopolitanism is the theoretical framework that guides this dissertation. Cosmopolitanism entails a unity in diversity in which diversity is not a problem as long as certain common norms and standards are accepted.

The research findings are based on a qualitative methodological approach: a literature review, a document analysis, and expert interviews with key policy-makers and external experts. To further narrow the scope of this dissertation, the following selected policy moments and outcomes are analysed. For the CoE: the European Prison Rules and the CPT recommendations regarding immigration detention; for the EU: the Green paper on detention and the recast Reception Conditions Directive. The analysed policy moments and outcomes are considered as reflections of the increasing unity in diversity in Europe regarding the issue of detention conditions for prisoners and asylum seekers.

The theoretical framework of cosmopolitanism is operationalised by applying a policy and social network approach to the selected policy outcomes. By focusing on the actors involved and the relations between these actors, this provides us with increased insights into the standard setting and policy-making process at the European level and helps explain why this greater unity in Europe regarding the issue of detention conditions occurs.

The research findings show that the topic of detention conditions in Europe is considered a very specialised area that involves only a limited number of active actors. Despite the limited number of actors, a solid block of common norms and values is present, such as the rule of law, the protection of human rights, and solidarity with the involved policy-makers and experts. This is important, because for cosmopolitanism to work, it has to be grounded on commonly accepted norms. While cosmopolitanism implies that national rhetoric is superseded, after digging deeper into the selected policy outcomes, it becomes evident that the priorities and considerations by

the member states play an influential role in taking certain initiatives and driving a policy-making or standard setting process forward. The European Courts have an influential role in triggering policy change and give meaning to what is acceptable and what is considered substandard in Europe.

[Dutch]

Dit onderzoek analyseert op een empirische manier de totstandkoming van normen en standaarden met betrekking tot detentieomstandigheden voor gedetineerden en asielzoekers in de Raad van Europa en de Europese Unie. Het onderzoek draagt op die manier bij tot het opkomende onderzoeksdomain van Europese Criminologie. Het theoretisch kader van kosmopolitanisme vormt het referentiekader van dit onderzoek. Kosmopolitanisme betekent een eenheid in verscheidenheid waarbij diversiteit een troef is op voorwaarde dat er gemeenschappelijke aanvaarde normen en standaarden zijn.

De bevindingen zijn gebaseerd op een kwalitatieve onderzoeksbenadering: een literatuurstudie, een documentanalyse en expert interviews met beleidsmakers en externe deskundigen. In het onderzoek wordt de focus gelegd op diverse beleidsuitkomsten. Voor de Raad van Europa: de Europese gevangenisregels en de aanbevelingen van het CPT inzake immigratie detentie; voor de EU: het Groenboek detentie en de hervormde opvangrichtlijn. De geanalyseerde beleidsuitkomsten worden beschouwd als voorbeelden van de toenemende eenheid in verscheidenheid in Europa met betrekking tot detentiecondities voor gedetineerden en asielzoekers.

In dit onderzoek wordt het theoretisch kader van kosmopolitanisme in de praktijk toegepast door een actor en sociale netwerk benadering uit te voeren op de geselecteerde beleidsuitkomsten. Door de focus te leggen op de betrokken actoren en de relaties tussen deze actoren is het mogelijk inzicht te verwerven in de totstandkoming van standaarden en beleidsprocessen op Europees niveau. Het laat ook toe om de toenemende Europese eenheid in verscheidenheid met betrekking tot detentiecondities voor gedetineerden en asielzoekers te verklaren.

Het onderzoek toont aan dat het thema van detentiecondities in Europa beschouwd wordt als een uitermate gespecialiseerd thema waarbij een gelimiteerd aantal actoren actief zijn. Ondanks dit beperkte aantal actoren is er een stevig fundament aanwezig van een aantal gemeenschappelijke normen en waarden zoals de bescherming van de rechtstaat, mensenrechten en solidariteit. Dit is cruciaal omdat kosmopolitanisme gebaseerd moet zijn op een aantal gemeenschappelijke normen en standaarden. Kosmopolitanisme impliceert ook dat nationale retoriek is achterhaald en wordt overstegen. De analyse van de beleidsuitkomsten

toont aan dat de prioriteiten en overwegingen van de lidstaten een invloedrijke rol spelen in het nemen van bepaalde initiatieven en het ontwikkelen van nieuwe standaarden inzake het politiek gevoelig thema van levensomstandigheden voor gedetineerden en asielzoekers. De Europese rechtbanken hebben een unieke rol om beleidsveranderingen teweeg te brengen en een betekenis te geven wat aanvaardbaar en ondermaats is in Europa met betrekking tot detentieomstandigheden.

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List of abbreviations

AFSJ: Area of Freedom, Security and Justice

AG: Advocate General

AWP: Asylum Working Party

CDCJ: European Committee on Legal Cooperation

CDDH: Steering Committee for Human Rights

CDPC: European Committee on Crime Problems

CEAS: Common European Asylum System

CEP: Confederation of European Probation

CJ-DAM: Committee of Experts on the Administrative Detention of Migrants

CJEU: Court of Justice of the European Union

CM: Committee of Ministers

CoE: Council of Europe

Coreper: Committee of Permanent Representatives

CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

DMP: Data Management Plan

DSFS: Data Storage Fact Sheet

EC: European Commission

EComHR: European Commission of Human Rights

ECtHR: European Court of Human Rights

EP: European Parliament

EPR: European Prison Rules

ESMR: European Standard Minimum Rules for the Treatment of Prisoners

EU: European Union

EuroPris: European Organization of Prison and Correctional Services

FD: Framework Decision

FRA: European Union Fundamental Rights Agency

FRONTEX: European Border and Coast Guard Agency

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Commission of Jurists

ICRC: International Committee of the Red Cross

IRCP: Institute for International Research on Criminal Policy

MR: Mutual Recognition

NATO: North Atlantic Treaty Organization

NPM: National Preventive Mechanism

OPCAT: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

PACE: Parliamentary Assembly

PC-CP: Council for Penological Co-operation

SCIFA: Strategic Committee on Immigration, Frontiers and Asylum

SG: Secretary General

SPT: UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

UNCAT: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UDHR: Universal Declaration of Human Rights UDHR

UNICEF: United Nations International Children's Fund

UN SMR: United Nations Standard Minimum Rules for the Treatment of Prisoners

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1. INTRODUCTION

1.1 Background of the study

Under the influence of the international human rights regime, especially in the aftermath of the Second World War, Europe has been very active in multiple ways in the area of detention norms and standards for both prisoners and asylum seekers. A decision to deprive a person of his/her liberty is amongst the gravest decisions a state can take. Traditionally, in countries which have abolished the death penalty, detaining law-breaking citizens is the most extreme expression of state power and coercion on those within the sovereign borders of the state (Bosworth, Hasselberg, & Turnbull, 2016). According to Welch and Schuster (2005), the seriousness of the deprivation of liberty is even greater under circumstances in which persons are held, not under criminal detention, but after fleeing persecution and discriminatory grounds in their home country. Asylum seekers are detained for administrative purposes, unlike pre-trial detainees or prisoners who are detained after being suspected of or condemned for committing a criminal offence. The facilities in which migrants are held in detention (e.g. asylum seekers, individuals whose application for protection has been rejected, or those whose residence permit has expired) are quasi-penal institutions that hold foreign nationals in order to expedite immigration-related aims such as identification, removal, or deportation, and the prevention of abscondence (Bosworth et al., 2016).

The fact that European standards and policies are developed in this field is remarkable. These domains, which include the punishment of law-breaking citizens and the control over who enters and exits a country, have, for centuries, been the prerogative of the sovereign nation-state. Consequently, these policy areas are regarded as politically sensitive and are deeply politicised. When placing this policy shift from the national to the European level in a broader framework, we can perceive that during the second half of the 20th century, there was a rise and gradual juridification of cosmopolitan values, and the creation of a network of international bodies (Amenbrink, 2008; Beardsworth, 2011). These cosmopolitan values are especially reflected in the emergence of the international human rights regime. Furthermore, an increasing number of adopted norms and standards related to the issue of detention might reflect a greater unity in Europe, despite being a sensitive topic. Also, the increased interconnectedness has

challenged the traditional role of the nation-state as the exclusive source of power and the exclusive protector of the rights of its legal subjects (Amentbrink, 2008). According to Beck (2005a), this human rights regime is one of the key issues where the boundaries between national and transnational contexts becomes blurred and disappear. Despite international efforts in protecting human rights and developing legally binding (and non-binding) principles and standards, many of the world's systems where people are deprived of their liberty fall short of respecting these international standards. We might live in a "*human rights era*" but simultaneously we also live in a world where human rights violations are pervasive, particularly when it comes to conditions accompanying the deprivation of liberty (Bennett, 2016).

During the last decades, European institutions have become key players in developing and establishing an increasing number of legal instruments and recommendations which tackle the issue of detention for both prisoners and asylum seekers. Europe can have many different meanings. This dissertation defines Europe from an institutional perspective, with an exclusive focus on the Council of Europe (CoE) and the European Union (EU). Both institutions are considered key actors in the norm and standard setting process in the area of detention conditions for prisoners and asylum seekers in Europe.¹ The CoE has a rich history concerning norm and standard setting in the area of detention conditions. The reports and visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) are increasingly important in the soft standardisation of the area of detention conditions and are frequently used to substantiate rulings by the European Court of Human Rights (ECtHR) (Daems, van Zyl Smit, & Snacken, 2013; Murdoch, 2006; van Zyl Smit & Snacken, 2009). Furthermore, the recommendations by the CoE Committee of Ministers (CM), the Parliamentary Assembly (PACE) Committee on Migration, Refugees and Displaced persons, the Special Representative of the Secretary General on Migration and Refugees, and the function of the Commissioner for Human Rights, each contribute in their way to the sensitisation and the soft standardisation of various aspects of detention policies and practices in the area of penology and asylum. Also, the jurisprudence of the European Court of Human Rights (ECtHR), especially since the beginning of the new millennium, has strengthened the

¹ This does not mean the author does not acknowledge the diverse and multidimensional European space that consists of more organizations that are stimulating and facilitating cross-border cooperation such as, for example, the Schengen area, the Benelux Union, the Organization for Security and Cooperation in Europe (OSCE), the Organization for Economic Cooperation and Development (OECD), etc.

protection of offenders and persons deprived of their liberty against violations of their fundamental rights (Snacken & van Zyl Smit, 2013; van Zyl Smit & Snacken, 2009).

Next to the CoE, also the EU has become increasingly active in this matter. For the EU, the establishment of the Area of Freedom, Security and Justice (AFSJ), which includes policy domains related to citizenship, immigration, asylum, borders, and judicial, and police cooperation is one of the key political priorities. As a result, during the last two decades, the EU has become increasingly active in facilitating judicial cooperation in criminal matters and developing a Common European Asylum System (CEAS). The foundation and underlying principle of facilitating cooperation in judicial matters and asylum is mutual trust. This implies the assumption that human rights are respected across the member states. In the specific area of detention, it is assumed that detention conditions within the EU member states do not violate human rights. The Commission's Green paper on detention (European Commission, 2011b), recognised that detention conditions can have a direct impact on the smooth functioning of the mutual trust principle. Various CPT reports, ECtHR case law, and research (Vermeulen et al., 2011b) confirm that detention conditions are often substandard across EU member states. Also, the European Parliament (EP) regularly calls on the Council to take further initiatives to ensure the respect for, and protection of, the fundamental rights of prisoners (European Parliament, 2011, 2017a). Within the framework of asylum, the Reception Conditions Directive² and its successor, the recast Reception Conditions Directive³ aim to provide a dignified standard of living across the member states for those in need of international protection. Furthermore, these legally binding instruments establish minimum standards concerning material conditions for the reception of asylum seekers (Court of Justice of the European Union, 2012; European Council on Refugees and Exiles, 2015). The very introduction of the recast Reception Conditions Directive reflects an awareness of substandard reception conditions for asylum seekers in the different EU member states. As a result, this instrument is based on a certain level and climate of distrust in each other's asylum, reception, and detention systems. Hence, it was eventually deemed necessary to install an instrument that would guarantee adequate reception conditions for asylum seekers (Deruiter & Vermeulen, 2016).

² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The policy shift in the area of judicial cooperation and asylum, and more specifically in relation to the issue of detention, from the national to the European level, occurred simultaneously with dramatic changes in the cultural, economic, political, and social landscape in Europe. This is due to increased global interconnectivity, but also because of the influence of European enlargement and EU exit plans. However, on frequent occasions, questions and concerns are being raised about the competence, necessity, and importance of the European framework, especially in the context of the EU.

The 2015 asylum crisis in which EU member states located at the periphery were confronted with a disproportionate influx of asylum seekers, revealed a deep division in the core European foundations of solidarity, the protection of human rights, and the free movement of people. During the negotiations on how to tackle this crisis, member states' own interests and capacities were at the forefront of the debates. Furthermore, negotiations were framed in terms of security narratives and perceived threats towards a state's identity, citizenship, and social infrastructure. Solidarity between the EU member states was questioned. Some member states went so far to increase border controls and to build fences or walls to protect their national borders. The measures taken by the EU to tackle the asylum crisis led to a division of, and possible cracks in, the uniting principle of solidarity between the member states. In 2015, a Council decision was adopted, which established a binding relocation mechanism that aimed to distribute 120,000 people who were in need of international protection from Italy and Greece to other member states⁴ (Council of the European Union, 2015b). This decision was adopted by a qualified majority vote, which is remarkable within the Council. The Visegrad countries refused to respect the emergency relocation scheme. Two EU member states, Slovakia and Hungary, supported by Poland, brought the binding Council decision on the relocation mechanism before the CJEU. This caused a clear division between the EU member states because Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden, and the Commission intervened in support of the Council.⁵ In its reasoning, the CJEU dismissed the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers. A few months later, the Commission, after launching infringement procedures against

⁴ This measure was based on article 73 (3) TFEU which states: "In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

⁵ Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union, 6 September 2017.

the Czech Republic, Hungary, and Poland, referred these countries to the CJEU due to their non-compliance with their legal obligations on relocation (European Commission, 2017b).

1.2 Research questions

This dissertation follows a cosmopolitan outlook and aims to analyse the extent to which the European institutions can be considered as cosmopolitan actors in the area of detention conditions for prisoners and asylum seekers. Following the reasoning of Beck and Levy (2013), the assumption is made that Europe is already a unity in diversity. This unity is reflected in the adopted norms and standards regarding the sensitive issue of detention conditions despite varying positions in both the CoE and the EU. In order to put the theory of cosmopolitanism into practice, a network approach is used because the European framework is built upon a vast amount of policy and social networks. These networks consist of a whole array of different actors who each have their own priorities, values, and norms related to the specific area of detention conditions for prisoners and asylum seekers. The actors in the network interact with each other, forming all types of formal and informal relations and ties which influence the policy-making and standard setting process. This network approach allows the identification of which actors are active in setting detention norms and standards for prisoners and asylum seekers at the European level. Secondly, it permits the digging deeper into the formal rules and “*rules of the game*”⁶ of the policy-making and standard setting processes at both the CoE and the EU. Furthermore, the network approach also permits the unravelling of informal relations and ties between the different actors. As a result, this dissertation addresses the following research questions:

1. What is cosmopolitanism and what is its relevance for standard setting in the area of detention conditions in Europe?
2. Which unity in diversity norms and standards have been created by the CoE and the EU in the area of detention conditions for prisoners and asylum seekers?

⁶ Rules of the game are defined as recognised and accepted boundaries, or the playing field, in which the standard setting and policy-making process occurs.

3. Which policy and social networks can be identified in the process of establishing European detention norms for prisoners and asylum seekers?
 - i. Which actors are present in this process?
 - ii. What are the relational ties between the CoE and the EU?
 - iii. To what extent is the formal structured context of both the CoE and the EU shaped by certain rules of the game?
 - iv. Is the formal structured context of both the CoE and the EU complemented by informal and less visible structures and relations? If so, what is the role of these informal structures in the standard setting process?
 - v. To what extent are formal structures receptive to outsiders in the shape of, inter alia, experts, epistemic communities, and civil society? If so, what is their role in the standard setting process?

4. Which actor and relational features in European standard setting processes in the area of detention explain Europe's unity in diversity?

1.3 Aims of the study

The first aim of this dissertation is to map and to understand policy-making and standard setting at the CoE and the EU in the area of detention conditions for prisoners and asylum seekers. In doing so, the dissertation wants to make sense of Europe's expanding role in the area of detention conditions while taking into account the various challenges of the member states and the global environment, its changing institutional architecture and geographical scope. In the context of the CoE, the update of the European Prison Rules (EPR), which were adopted in 2006, offers a substantive guide for the protection of fundamental rights for persons deprived of their liberty. These Rules were inspired by the CPT standards and the jurisprudence by the ECtHR (van Zyl Smit & Snacken, 2009). In the area of asylum at the CoE, a feasibility study on European Rules for the administrative detention of illegal migrants concluded that the existing standards related to immigration detention are scattered amongst various instruments of mixed legal value, that are deficient in content and inconsistent (Achermann, Künzli, & Von Rütte, 2013). Within the EU, substandard detention conditions and the risk of inhuman or ill-treatment, are important areas of concern due to the mutual trust assumption which facilitates

judicial cooperation in criminal matters and the creation of a Common European Asylum System (CEAS).

The second aim of this research is to apply the theory of cosmopolitanism to the policy-making and standard setting process at the CoE and the EU in the area of detention conditions for prisoners and asylum seekers. As a result, the theory of cosmopolitanism will be used to interpret and to analyse shared norms, perspectives, and values in the policy-making and standard setting process. In order to put the theory of cosmopolitanism into practice, a network approach is applied which unravels the often hidden process of policy-making and standard setting in the area of detention conditions. The main focus of this network approach consists of two components: the actors and the relational ties between them. Furthermore, the context in which these actors function is also taken into account. The relevant actors and ties are analysed by using a set of actor-related features (e.g. working methods, composition and membership, norms, priorities and ideas, resources, external influences, and belief system) and relational features (e.g. formal and informal ties, cooperation with other actors, shared or contrasting norms, priorities, and ideas). By focusing on these features, it is possible to analyse, *inter alia*, how standards in the area of detention conditions are developed, which actors are involved, and what ideas the actors aim to spread in the negotiations and eventual policy outcomes. Network literature and research has focused almost exclusively on the EU. This is in sharp contrast to the available research concerning the area of detention conditions, which predominantly focuses on the CoE. This dissertation aims to address this imbalance, whereby the EU deserves much more attention in the area of European penology (Daems & Robert, 2017) and the CoE deserves much more attention in the network literature.

According to the Memorandum of Understanding between the CoE and the EU (Council of Europe & European Union, 2007), both institutions aim to achieve a greater unity in Europe through respect for shared values such as, *inter alia*, human rights. These proclaimed shared values can be perceived as the common norms and standards which need to be respected in order for cosmopolitanism to work. But how are these common standards translated in the area of detention conditions for prisoners and asylum seekers? Do these policy-making and standard setting processes in the area of detention conditions for prisoners and asylum seekers reflect a greater unity between CoE member states, or a unity in diversity, as the EU proclaims to be? According to Andrew Coyle (2002), detention facilities do not exist in a vacuum, but instead reflect, to a large extent, the values to which each society adheres. Consequently, European

detention norms and standards tell us something about “*European*” values and European society. Following this reasoning, the question can be raised of whether the way we deal with penal questions can reveal something about ourselves as Europeans? (Daems, 2013) This dissertation will encourage discussion of how the CoE and the EU deal with people who are deprived of their liberty and what values both institutions therefore follow and disseminate.

A third aim of this dissertation is to contribute to the area of European Criminology. Academic paradigms to understand state power, especially in the area of punishment, have often struggled to follow with the shifting design of the nation-state and sovereignty under the challenges of globalisation (Kaufmann, 2015). Two main approaches have developed in international penological research. On the one hand, there is a group of scientists who highlight the continuous strong influence of national political institutions, cultures, and historical traditions (Cavadino & Dignan, 2006b; Lacey, 2008; Melossi, 2004; Whitman, 2003). On the other hand, there is a group of authors who focus on similarities and processes of convergence between different Western societies that are subjected to similar structural and cultural changes (Garland, 2001; Pratt, 2002; Wacquant, 2009). The two approaches tend to neglect the European institutional dimension (Daems, 2013). Also, in the area of asylum and migration, scholars have documented an increased penal severity across Europe. Different explanations point in the direction of structural elements (such as economy, labour markets, social welfare) but also cultural differences, national belonging, and group membership play a role in the increased incarceration and the criminalisation of migration (Balibar, 2010; Bosworth, 2008; Bosworth & Guild, 2008; Franko Aas, 2007, 2011; Huysmans, 2006; Wacquant, 1999; Zedner, 2010). During the last two decades, European institutions, such as the CoE and the EU, have developed an increasing number of norms and standards in the area of detention conditions for prisoners and asylum seekers. Both the CoE and the EU are predominantly analysed from a legal or normative perspective and have only received limited attention in criminological and comparative research (Daems et al., 2013; van Zyl Smit & Snacken, 2009). Despite this increased policy attention, only a few criminologists have dug deeper into these European institutions. This research aims to address this gap and positions itself in the emerging research area of European penology (Daems & Robert, 2017; Daems et al., 2013; van Zyl Smit & Snacken, 2009). With this research, we therefore aim to counter the tendency towards methodological nationalism in criminological research and in the broader area of social sciences. Beck (2006, 2011; Beck & Grande, 2007) argues that we still use old maps to orientate ourselves in this interconnected world. This is reflected in academic research, which remains

biased towards organisational and regulatory systems that were designed to conceive of the European institutions, such as the CoE and the EU, in the image of the nation-state. As a result, the national outlook is the primary principle for the analysis of social, political, and cultural processes. Nation-states, then, are treated “as though they were closed, autonomous and self-contained units” (Fine, 2006, p. 7). Also, in discussions concerning the deprivation of liberty, the nation-state is the assumed frame of analysis (Kaufmann, 2015). Such a perspective tends to overstate the sovereignty and autonomy of nation-states and feeds the (wrong) impression they are in full control of their destinies (Daems, 2013). This has consequences for data collection routines and it filters out Europe’s complex realities and space for interactions. Furthermore, this methodological nationalism denies the empirical reality of Europe, which is already a unity of diversity (Beck & Levy, 2013). In order to counter methodological nationalism in social sciences and criminology, this dissertation will exclusively focus on the CoE and the EU as key institutions in setting detention norms and standards for prisoners and asylum seekers. The impact or implementation of this norm and standard setting process at European level will not be analysed at a national level.

A fourth aim of this dissertation is to promote a multidisciplinary approach. This dissertation is a multidisciplinary study where criminology is considered, as David Downes put it, a “*rendezvous*” subject which is situated at the crossroads for exchange with other social sciences, such as political science, international relations, law, and sociology, and where each discipline has turned some part of itself in the study of crime and punishment (Downes, 1988; Holdaway & Rock, 1998). As a result of this multidisciplinary approach, criminology can be continuously animated and rejuvenated by concepts and ideas imported from outside (Loader & Sparks, 2012). For this dissertation, in order to put the theory of cosmopolitanism into practice, inspiration is drawn from a policy and social network approach. These are concepts that are predominantly used in political sciences, international relations, and public administration. The specific area of detention conditions for prisoners and asylum seekers is also a *rendezvous* issue, where various kinds of interests are reflected from a diverse crowd of stakeholders such as politicians, interest groups, academics, policy-makers, and people deprived of their liberty. Despite the increasing importance of the European level and academic studies acknowledging this (Daems et al., 2013; Vermeulen et al., 2011a, 2011b), criminologists tend to neglect this European level and the relationships between the deprivation of liberty, sovereignty, and citizenship remains underdeveloped. Furthermore, the actors and networks

which shape these European standards regarding detention conditions, and the beliefs and values they apply, are currently not incorporated into criminological research.

To a large extent, research in the social sciences predominantly analyses those without influence and over whom power is exercised rather than the decision makers and the bearers of political influence and power (Odendahl & Shaw, 2002). As a result, the actors and relations which influence the policy-making and standard setting process at the CoE and the EU will be the explicit focus of this dissertation. Individual nation-states will not be analysed; neither will the implementation of detention norms and standards in national legislation and practices. Also, the UN framework, although extremely relevant, will not be taken into account. Regarding the norms and standards for persons deprived of their liberty, only detention conditions for adult prisoners and asylum seekers will be taken into account. Specific conditions for children, juveniles, women, mentally-ill offenders, or other vulnerable groups are not incorporated in the dissertation.

1.4 Structure of the dissertation

This dissertation is organised into an introduction, a methodological section, and three parts: a literature review, the results of the empirical study, plus the final conclusion. The methodological section (chapter 2) highlights the research design together with quality requirements, data management, and retrospective accounts of this dissertation. The literature review (part 1) of this dissertation consists of two chapters (chapter 3 and 4). Chapter 3 provides an analysis of the theoretical framework guiding this dissertation: cosmopolitanism. Chapter 4 discusses the existing norms and standards in the area of detention conditions for prisoners and asylum seekers in the CoE and the EU. This chapter elaborates on the backgrounds of both punishment and immigration detention in Europe together with the existing CoE and EU actors which are deemed crucial in setting detention norms and standards for prisoners and asylum seekers.

The empirical results are the main focus of the second part of this dissertation, which consists of four chapters. The results in the area of detention conditions for prisoners are analysed in chapter 5, followed by the results in the area of detention conditions for asylum seekers in chapter 6. Throughout this second part, the role and case law by the European Courts (The European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU)) are also

taken into account. The cooperation between the CoE and the EU is the focus of chapter 7. The last chapter of this second part (chapter 8) discusses the uniting principles in Europe which makes it possible, according to the respondents, to establish norms and standards in the sensitive area of detention conditions in Europe.

The conclusions of this dissertation are discussed in the third and final part of this dissertation. In this part, the answers to the research questions will be summarised. Furthermore, recommendations for further academic research will be made.

2. RESEARCH DESIGN AND METHODOLOGY

In this chapter, the research strategy for this dissertation is discussed. This dissertation will operationalise the cosmopolitan framework by drawing inspiration from a policy and social network analysis. In doing so, the main focus is on the actors who are active in setting detention norms and standards for prisoners and asylum seekers within the CoE and the EU, the relational ties between the actors and the context in which the actors need to function. In order to answer the aforementioned research questions, a qualitative research design is applied that consists of three components: a literature review, a document analysis, and semi-structured interviews with key policy-makers at the European level. After explaining the network theory as an analytical tool for explaining the increasing unity in diversity in Europe regarding detention conditions, the used methodology, together with the ontological and epistemological assumptions underlying this dissertation, are described. Subsequently, the choice of a qualitative research approach and the use of a literature review, a document analysis, and expert interviews is explained, together with the more technical aspects of the dissertation such as the sample of respondents, data collection methods, challenges, and obstacles. This is followed by ethical considerations together with the validity and reliability of this dissertation. Finally, this chapter concludes with retrospective accounts.

2.1 Clarification of decisions

2.1.1 Why Europe?

In this dissertation it is argued that in the area of human rights, and specifically in the area of detention conditions, Europe has been a pioneer in both the protection and legal enforcement of human rights. This does not mean that detention conditions are ideal within Europe and that human rights violations, for example in the area of detention conditions, do not occur. The explicit focus of the dissertation on the European level of policy-making and standard setting makes the dissertation vulnerable to the critique of Eurocentrism. Also, on other levels, such as the global United Nations (UN) level, policies are developed regarding various aspects of

detention conditions⁷ and monitoring mechanisms.⁸ Nonetheless, as Daems (2013) argues, one cannot deny the reality that certain ideas or visions related to the deprivation of liberty have their origins in Europe. In the post-war era, Europe has, in various ways, positioned itself as the protector of certain core principles, such as the respect for human dignity, liberty, democracy, equality, the rule of law, and respect for human rights.⁹ This is not only an internal aim for both the CoE and the EU which is, for example, reflected in the successful abolishment of the death penalty across Europe. European standards are also exported to other regions of the world, which highlights the relevance of these standards and the pioneering role of Europe in standard setting in the area of detention conditions. A reflection of this can be witnessed in the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). Several members of this UN Committee are also members of the European Committee for the Prevention of Torture (CPT), ex-members, or were involved in this European Committee in another capacity (Bicknell & Evans, 2017).

2.1.2 Why detention conditions?

The member states of the CoE all signed the ECHR, which stipulates in article 3 the prohibition of torture, inhuman or degrading treatment, or punishment. All the state parties further agreed to have a judicial mechanism in the form of the European Court of Human Rights (ECtHR) to assess whether state practices violate Convention principles. A dignified standard of detention conditions are stipulated in the ECHR along with a whole range of CoE actors, policy outcomes, and committees that are active in this matter, which is reflected in the European Prison Rules (EPR); the country and annual reports by the CPT; the Parliamentary Assembly (PACE) Committee on Migration, Refugees and Displaced persons which issues recommendations, reports, and resolutions on the matter of asylum; the Special Representative of the Secretary General on Migration and Refugees, which was created in January 2016; and the Commissioner for Human Rights, who, through country visits, can observe and assist member states in the implementation of CoE human rights standards. Next to this rich history of standard setting in

⁷ For example the Standard Minimum Rules for the Treatment of Prisoners that were first adopted in 1957 were revised, adopted and renamed in 2015 as the Nelson Mandela Rules (United Nations General Assembly, 2015).

⁸ In the framework of the Optional Protocol to the Convention against Torture (OPCAT) the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) was created together with the national preventive mechanisms (NPMs) (United Nations General Assembly, 2002).

⁹ These are explicitly stated in article 2 of the Lisbon Treaty and in the London Treaty which is the founding Treaty of the CoE.

the area of detention conditions in the CoE, also in the EU detention conditions are an essential prerequisite for a smooth and effective functioning of judicial cooperation in criminal matters and the Common European Asylum System. Both areas are based on mutual trust in which the assumption was made that fundamental rights across the Union are respected, and subsequently detention conditions are not substandard. Reality and the case law by both the ECtHR and the CJEU proves otherwise and will be elaborated in section 5.3 (detention) and 6.5 (asylum).

2.1.3 Why asylum seekers?

The dissertation focusses on detention conditions for prisoners and asylum seekers. Asylum seekers are not irregular migrants, although the persons concerned may become so should their asylum application be rejected and their leave to stay in a country rescinded (CPT, 2009). Under the 1951 Convention relating to the Status of Refugees there are only specific and narrow exceptions to asylum seekers right to freedom of movement. According to the convention, asylum seekers should not be detained solely on the basis of lodging a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum (Parliamentary Assembly, 2010b). The CoE recommendations, and more specifically the recommendations by the CPT, dominantly focus on immigration detention. According to the CPT factsheet on immigration detention: *‘Whenever asylum seekers are deprived of their liberty, as an exceptional measure, pending the outcome of their application, they should be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants and should be kept separately from foreign nationals who have not lodged an application for international protection’* (CPT, 2017b). As a result, the detention standards for illegal migrants are only the minimum standards which need to be available for asylum seekers which, due to their vulnerability, deserve a wider range of safeguards.

While the CoE standards are applicable on immigration detention and asylum seekers, the EU, with the creation of the CEAS, the focus is explicitly on asylum seekers with the exception of the Return Directive.¹⁰ The Reception Conditions Directive¹¹ and its successor, the recast Reception Conditions Directive¹² aim to provide a dignified standard of living across the

¹⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

¹² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

member states for those in need of international protection. Furthermore, these legally binding instruments establish minimum standards concerning material conditions for the reception of asylum seekers (Court of Justice of the European Union, 2012; European Council on Refugees and Exiles, 2015).

2.1.4 Why networks?

The justification of focusing on networks is because both the CoE and the EU are characterised by policy processes involving a wide and complex variety of actors in overlapping and interactive activities (Christiansen, 2013; Jachtenfuchs & Kohler-Koch, 2004; Marks, 1993; Marks, Hooghe, & Blank, 1996; Nugent, 2010). These networks provide a framework for the coordination of interests and actions of a plurality of stakeholders (Börzel, 1998; Enroth, 2011; Mazey & Richardson, 1993). The challenge is therefore to disentangle this policy-making web in order to gain increased insights and shed light on the actors and their relational ties. By applying a set of actor-related and relational features, it will become clear which network features influence the policy-making and the norm and standard setting process at the CoE and the EU. Following the reasoning of Bauman (2004, p. 2), Europe is “*a mission, something to be made, created, built*”. Furthermore, an “*identity is more fully defined by the values Europeans cherish than by any other of their characteristics*” (Bauman, 2004, p. 125). Subsequently, to what extent are the networks in the CoE and the EU contributing to a cosmopolitan identity or a cosmopolitan Europe?

2.2 Putting theory into practice: A policy and social network approach

By adopting both a descriptive (what are the unity in diversity norms and standards in the area of detention conditions?) and an interpretative analysis (how is this unity created?), this dissertation will operationalise the cosmopolitan framework by using a network approach. When drawing inspiration from a network approach, the basic assumption is that the existence of policy and social networks in which the formal and informal structures of such networks, plus the relationships amongst interacting social entities, affects both policy processes and outcomes (Börzel, 1998; Marsh & Smith, 2000; Peterson, 2004; Wasserman & Faust, 1994).

The network approach applied in this dissertation is inspired by a policy and social network approach which focuses on the actors and structures within the networks of both the CoE and

the EU. Due to the applied methodology, it is not feasible to conduct a complete network analysis of the policy and social networks in both the CoE and the EU. However, this dissertation draws inspiration extensively from the policy and social network literature. In this dissertation, the term *policy network* is to be understood as a generic label that embraces different sets of formal and informal institutional linkages between governmental and other actors which are structured around shared concerns in public policy-making or standard setting. In this dissertation, actors are individuals or collective social units with the following characteristics:

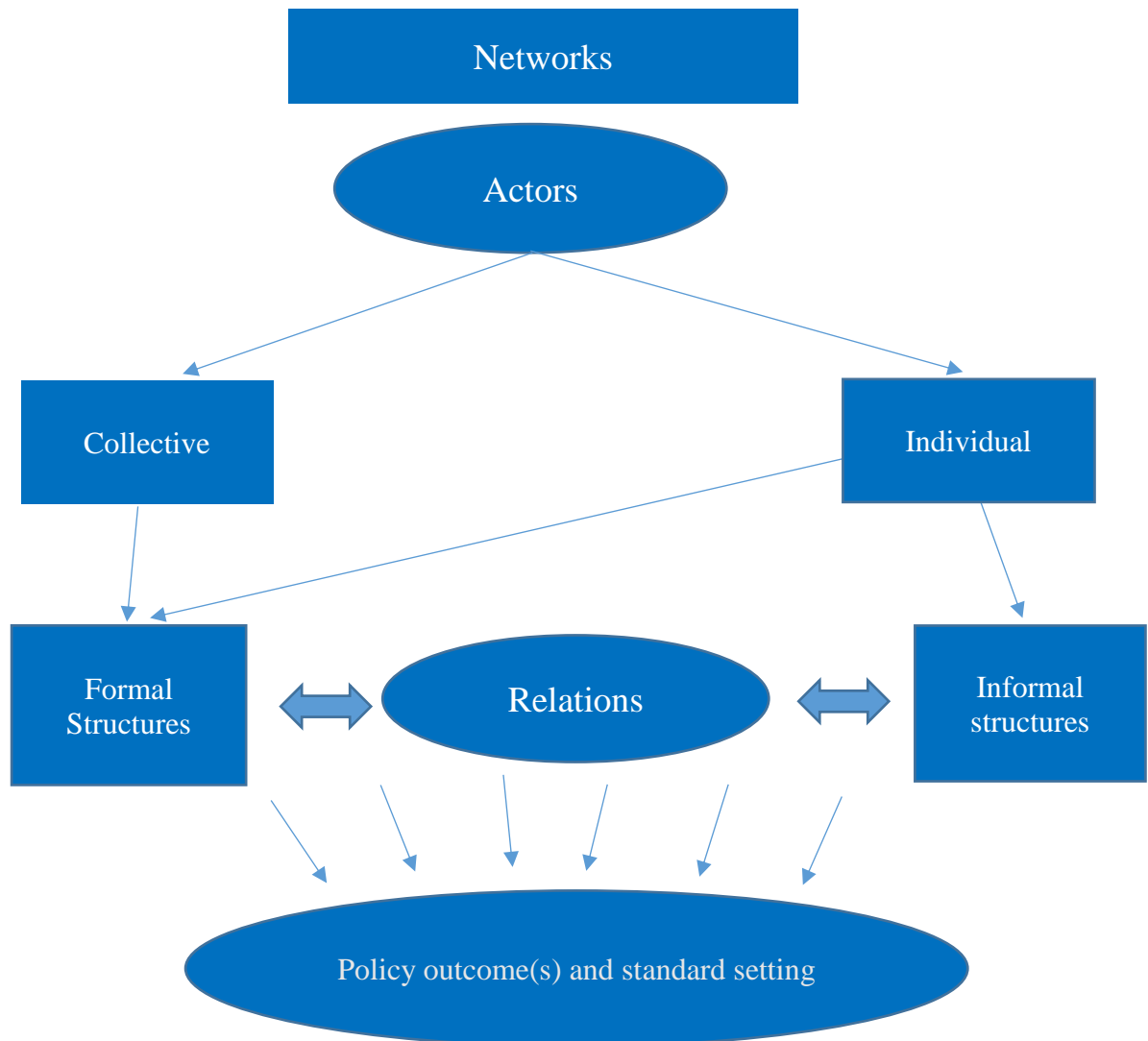
- They have specific preferences, interests, and perceptions, and pursue the aims of the organisation they belong to;
- Actors and their actions are interdependent;
- They are provided with resources;
- Actors build relations and maintain contacts with other actors by means of communication and the exchange of resources (either material or nonmaterial);
- The structure of those relations both constrains and facilitates action (Löblich & Pfaff-Rüdiger, 2011; Wasserman & Faust, 1994).

Due to the increased complexity level of certain policy fields, policy network literature argues that policy networks function as a tool for acquiring the necessary information to guarantee effective and efficient policy creation. Furthermore, networks are interdependent and policies emerge from the effective bargaining between the network members (Kriesi, Adam, & Jochum, 2006; Rhodes, 2007; Wasserman & Faust, 1994). Policy networks also function as a facilitator for a variety of stakeholders and experts who would otherwise not participate in the process or interact with each other. As a result, the focus of policy network literature is on the extent to which policy networks offer opportunities to reach policy goals between interdependent actors (Kriesi et al., 2006; Rhodes, 2006). These policy networks are essential in the policy-making process because policies are constructed by an increasing degree of informal political structures that exist outside conventional channels such as legislative, executive and administrative bodies (Kenis & Schneider, 1991; Peterson, 2004). As a result, a network is both influenced by the formal structures it needs to function, as well as the informal structures which are created to circumvent the formal structured context. Consequently, policy networks cut across formal boundaries and structures that exist between and within institutions (Christiansen, 2013). Because the policy network approach does not emphasise the relational ties between actors, this

dissertation also draws inspiration from a social network approach. A social network is a set of social interactions and personal relationships that are structured around shared interests (Wasserman & Faust, 1994). A social network approach implies that besides the individual characteristics of actors, the relations between these social entities and the implications of these relationships are equally important (Wasserman & Faust, 1994). The combination of a policy and social network approach allows an examination of the relevant actors and the relational ties in the formal and informal structured context of the CoE and the EU, which are perceived as the central aspects that influence policy-making or the standard setting process (Löblich & Pfaff-Rüdiger, 2011). It further allows us to examine certain features¹³ of such networks and to link these with the selected policy outcomes that reflect a greater unity in Europe in the area of detention conditions. In this way, we can not only gain increased insights into the policy process itself and the formal and informal ties and relations, but also into the uniting ideas and priorities the actors apply in the negotiations regarding the issue of detention conditions.

¹³ For an overview of the specific features that will be analyzed, see scheme 2.2 on page 22.

Scheme 2.1: Overview structure networks



2.2.1 The omnipresence of networks in policy-making

In the field of political sciences and international relations, a vast amount of research explores the existence and functioning of various networks in different policy fields.¹⁴ The specific area of detention conditions has not been subjected to a network approach or a network analysis. Furthermore, network literature has a dominant focus on the EU. As a result, the literature discussed in the next section mainly focuses on networks in the EU. This dissertation aims to

¹⁴ For example, see Elgström and Jönsson (2005), Kriesi et al. (2006), and Börzel and Heard-Lauréote (2009). For an analysis of policy networks in EU foreign policy see Keukeleire and Justaert (2008).

fill this gap by applying a network approach to both the CoE and the EU, as well as to the specific policy area of detention conditions for prisoners and asylum seekers.

It is widely acknowledged that we live in a world of networks in which policy-making is only feasible within networks. These policy networks provide a framework for the coordination of interests and actions for a variety of stakeholders (Börzel, 1998; Enroth, 2011; Mazey & Richardson, 1993). Networks may arise from diverse origins and differentiate amongst certain features such as, amongst others, purpose, flexibility, formality, and access (Marsh & Smith, 2000; Slaughter & Hale, 2011). Networks are not neutral because they simplify the policy process by limiting actions, problems, and solutions within their own culture, organisation, and rules of the game (Marsh & Smith, 2000). This is also the specific focus of one research question: To what extent is the formal structured context of both the CoE and the EU shaped by certain rules of the game? These rules of the game are recognised and accepted boundaries, or the playing field, in which the standard setting and policy-making process occurs. Next to the structured context of a network, policy outcomes are also shaped by strategically calculating actors. In addition, the linkages between the actors in networks serve as communication channels for the exchange of expertise, information, trust, and other material and nonmaterial resources (Kenis & Schneider, 1991). Policy networks link elites, thus the access, presence, or absence of these networks is a critical source of power and influence in the policy-making or standard setting process. As a result, both actors and structure shape policy outcomes because it are the actors who interpret and negotiate constraints or opportunities within a structured context: the specific network and the broader political institution (Elgström & Jönsson, 2005). Following Marsh and Smith's (2000) reasoning, there are three interactive relationships in policy networks: the structure of the network and the actors operating within them; the network and the context in which it operates; and the network and the policy outcome. These different interacting relations are also a key focus of this dissertation.

Networks can provide an alternative setting for solving tensions and conflicting interests. It is in the shade of these formal structures that informal and less visible structures also emerge in order to overcome the constraints of complex institutional settings, obstacles, or even deadlocks in the formal policy-making process (Elgström & Jönsson, 2005; Keukeleire & Justaert, 2008). This is the focus of another research question: Is the formal structured context of both the CoE and the EU complemented by informal and less visible structures and relations? If so, what is the role of these informal structures in the standard setting process? In this dissertation an

informal network is defined as: “A *group of individuals that finds it mutually beneficial to stay connected to each other. It is a human, social interaction based on trust, shared values, and beliefs, and allows the sharing of information. This sharing in turn helps to build a common understanding of issues important to the group*” (Atkinson & Moffat, 2005, p. 89). These shared priorities, goals, and ideas can be a prior element which inherently belongs to the individual actors. But shared ideas can also develop and evolve from working with each other and adapting one’s own views. The central role of informal and/or personal relationships is an additional dynamic in policy and social networks. When network members share the same world-view and frame policy issues in the same way, a club atmosphere appears. These informal networks coexist with formal structures and have constant fluctuating boundaries between formal and informal negotiations (Elgström & Jönsson, 2005). But not all relations or ties should be assumed positive, because networks are often the locus of conflict for competing policy ideas. These ties can also involve negative effects such as social pressure and a need for adaptation (Christopoulos, 2008; Löblich & Pfaff-Rüdiger, 2011).

The EU is characterised by its multi-level policy-making: policy processes involving a wide and complex variety of actors in overlapping and interactive activities and forms of cooperation going beyond the nation-state (Christiansen, 2013; Dassen, 2010; Jachtenfuchs & Kohler-Koch, 2004; Kenis & Schneider, 1991; Marks, 1993; Marks et al., 1996; Nugent, 2010). Furthermore, policy-making in this setting is not a process of setting rules, but a complex process of institutionalised negotiations (Löblich & Pfaff-Rüdiger, 2011). Policy-making in the EU is the result of, and takes places in, an extraordinarily complex labyrinth of committees and working groups that shape certain policy options before policies shift to the overtly political decision-making bodies such as the Council and the EP. In the policy-making process, the EU relies on technical committees of officials, experts, and other stakeholders to negotiate agreements, to overcome dissent, and to move the policy agenda forward. As a result, EU policies are significantly shaped and scrutinised by various kinds of experts and officials in the EU’s committee system. According to Elgström and Jönsson (2005), networks are omnipresent in the EU policy-making process. This derives not only from the existence of different committees but also from the multitude of participating actors with various interests, decision-making rules, and procedures. Furthermore, networks typically deal with policy issues involving complex political and technical implications and presuppose a significant amount of expertise from their members (Besussi, 2006; Jönsson & Strömvik, 2005; Kenis & Schneider, 1991). According to

Peterson (2004), policy networks in the EU lack clear hierarchies but are dominated by actors that represent the core institutions and member states' representatives.

2.2.1.1 Experts and epistemic communities in networks

Within the domain of international relations, networks can take many different forms and shapes¹⁵ which can vary across several dimensions of membership, participation, access, ideology, values, type of interaction, dependencies, etc. (Elgström & Jönsson, 2005; Jönsson & Strömviik, 2005; Rhodes, 2006). The transnational network which is particularly important in this dissertation involves epistemic communities. This type of network consists of knowledge-based experts who have an authoritative claim to policy-relevant knowledge within their area of expertise (Rhodes, 2006). Davis Cross (2012) stresses the increasing importance of epistemic communities in a progressively globalised world. Policy ideas from this type of network generally evolve independently rather than under the immediate influence of government authorities. The impact of epistemic communities is institutionalised through the active involvement of their members in the policy-making process, through their ability to acquire regulatory and policy-making responsibility, and by their ability to persuade others of the accuracy of their approach (Adler & Haas, 1992). Participation in EU networks rests on the combination of “*know-how*” and “*know-who*”. This is also why EU networks,¹⁶ according to Elgström and Jönsson (2005), have the character of epistemic communities: a network of professionals with a recognised expertise and competence in a certain domain and an authoritative claim to policy-relevant knowledge within that domain. This also raises questions about the specific role of these experts or epistemic communities is. Does the CoE and the EU allow (and to what extent) experts to give advice and information, and in what way can these experts influence the policy-making or standard setting process? Furthermore, whether both the CoE and the EU are receptive to experts, epistemic communities, and civil society (research question 3.5) is closely linked to access-related questions. How do these experts gain access to relevant policy networks? On what basis? Are these experts or civil society organisations handpicked? Elgström and Jönsson (2005) further argue that networks, in the form of expert

¹⁵ Such as transgovernmental networks (Slaughter, 2004), transnational advocacy networks (Keck & Sikkink, 1999), communities of practice (Adler & Pouliot, 2011; Wenger, McDermott, & Snyder, 2002), epistemic communities (Rhodes, 2006).

¹⁶ See for example Davis Cross (2014) and Puetter (2014) for the presence of epistemic communities in the Coreper framework.

groups, appear to be the most important in the agenda-setting and preparatory stages by the Commission. Later stages of the decision-making process in the EU tend to become increasingly formalised and intergovernmental.

2.2.1 A network approach: Actor and relational features

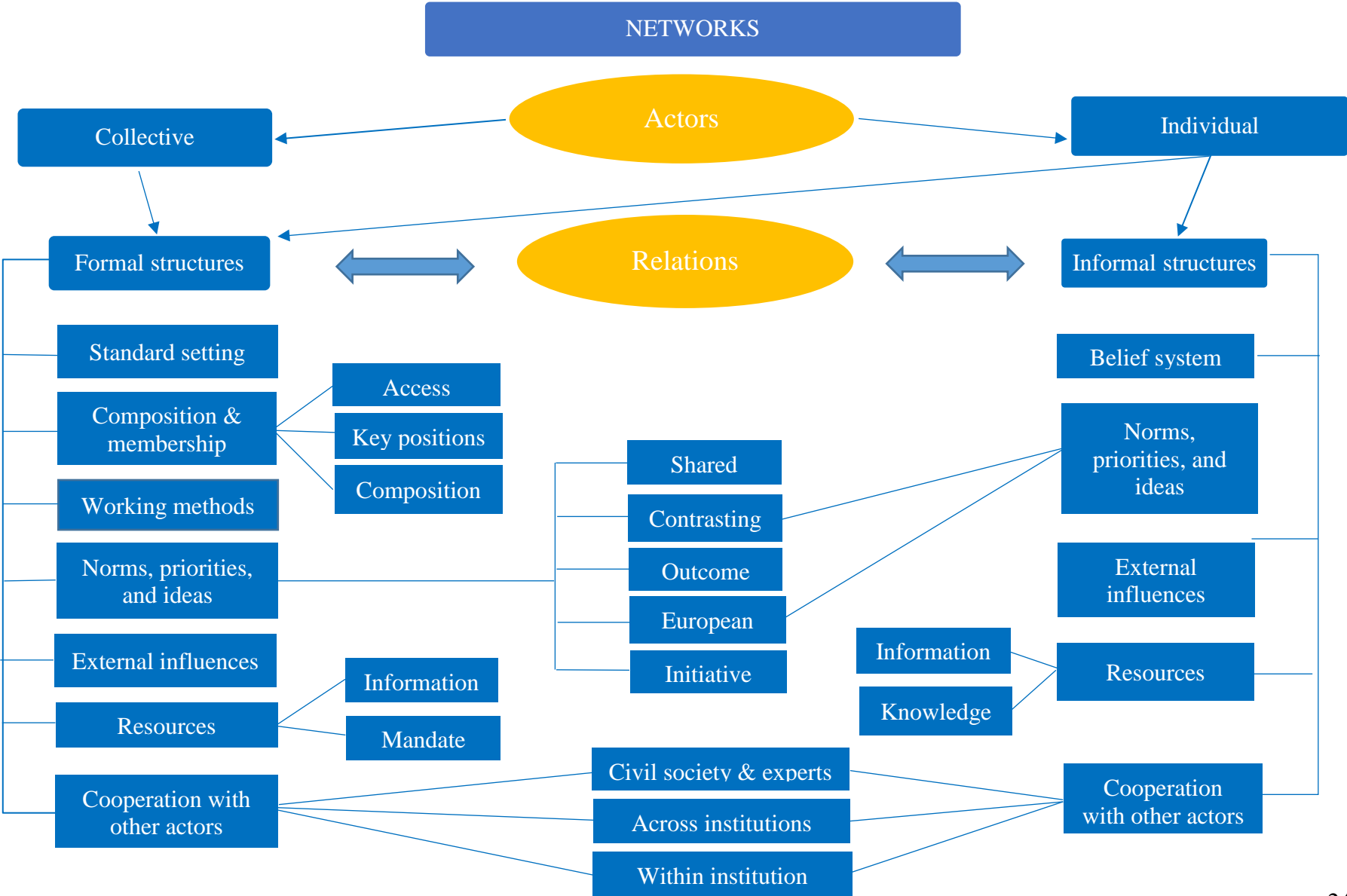
To examine the standard setting and policy-making processes in the area of detention conditions in the CoE and the EU, a set of actor-related features (to examine the actors' involvement) and a selection of relational features (to examine the relational ties between the actors) are applied. These features influence the policy-making and standard setting process and will help to explain why certain policy outcomes in the CoE and the EU in the area of detention conditions are adopted. Examining the actors in the formal policy-making and standard setting process by using these features makes it possible to examine whether these networks are a homogeneous or heterogeneous collective of actors. Arguably, one of these techniques includes informal relations which may complement the formal structured context. Actors situated in a network have different positions and are connected to each other by ties of different strengths. Weak ties are rather loose and serve to bridge distances within networks. Strong ties are relations which are intense and often built with actors of similar contexts and values. These strong ties produce solidarity and trust. Furthermore, strong ties require many more resources to maintain than weaker ones. Consequently, actors in a policy network tend to be selective and strategic in sustaining relations within a certain network because maintaining ties entails costs and resources. This creates limits and an actor bias because in a small, closed, long-established policy network most actors are acquainted with one another. Not all ties have the same strength or value, but the presence of strong ties does not mean that weak ties can be ignored (Granovetter, 1973). Weak ties can also tell us something about the dynamics in a specific network.

The scheme below gives an overview of the actor and relational features in formal and informal structures that this research will focus on. These features are based on literature concerning policy and social network analyses (Adam & Kriesi, 2007; Börzel, 1997; Börzel & Heard-Lauréote, 2009; Christopoulos, 2008; Coleman & Perl, 1999; Dowding, 1995; Jönsson, Bjurulf, Elgström, Sannerstedt, & Strömvik, 1998; Marsh & Smith, 2000). The actors can be a collective (e.g. the CPT secretariat, the Council, the EP) and function in a formal structure. Actors can

also be individuals who function in the formal structures (e.g. Justice and Home Affairs Counsellor in the EU Council framework, CPT member, member of the EP) but can also decide to engage in informal structures and relations with other actors. Certain network features which also influence standard setting and policy-making processes are not taken into account in this dissertation. Other features are perceived as more important by both the researcher and the respondents, plus the lack of data on these specific features does not allow for a thorough analysis. For example the feature “*frequencies of interaction*” between collective and individual actors is important in order to analyse which actors and relations are in frequent contact with each other. Respondents were not always able to respond to the questions related to this feature due to a lack of recollection. As a result, this feature will not be analysed in the empirical section. Furthermore, the feature of financial resources (collective or individual) is also not taken into account in the analysis because of the lack of data on this matter.

The formal and informal structural features which are used as codes to analyse the collected data will be further explained below. This is in order to stress the meaning and relevance of each selected feature.

Scheme 2.2: Analysed features in the CoE and EU networks



Two of the analysed features in the policy and social networks that are active in setting detention norms and standards in the CoE and the EU are the *formal and informal relations*. Informal contacts and relations can be a technique or coping mechanism for circumventing formal structures. This is also closely related to the degree of agency¹⁷ the individual actors enjoy (informal aspects) in the formal structure of the organisational entity in which these actors are active. Formal ties are the relations between actors in the structured context of the institution. Informal ties are human, social interactions that are based on trust, shared values, and beliefs, and which allow for the sharing of information which the individual actors within the network may find mutually beneficial. The formal structural features consist of collective and individual actors which influence the negotiations and standard setting process. The feature *standard setting* relates to any specific process-related references regarding the issue of detention conditions. This feature can refer to specific standards, changes, or difficulties regarding the standard setting process. The *composition and membership* of actors in a formal network is another relevant feature because the *access* to these networks can affect which ideas, priorities, and values are presented, discussed, and eventually adopted. Also, the *composition* of such a network (e.g. administrators, experts, academics, civil society) can influence the standard setting process and eventual outcomes. This is also related to the identification of *key actors* and positions within a network which are, due to their position and resources, able to influence the policy-making or standard setting process. Actors in the formal decision-making process can apply different *working methods*. For example, differences in the frequency of meetings, translation provisions, oral or written procedures, voting rules, etc.

Individual and collective actors in formal and informal networks can further have certain *norms, priorities, and ideas*. These can be either *shared* amongst the different actors or can be *contrasting*. The feature *outcome* includes any influences or relevant elements in the formal decision-making process that are linked to the specific outcome of a policy document or a standard setting process, for example, more information on how, or in what way, the final outcome was achieved or negotiated. Because outcomes are always formally adopted, this feature only applies to the formal structure. The feature *European* is linked to the norms, priorities, and ideas that are present in the formal and informal structures of the CoE and EU standard setting process which can be labelled as European (e.g. solidarity, mutual recognition, mutual trust). The feature *initiative* includes any references that are specifically linked to the

¹⁷ Agency refers to the capability of actors to make their own decisions and to act independently.

formal structured context in which the idea for the eventual policy outcome is developed. For example, how did this topic emerge on the policy agenda?

The feature *external influences* is related to any occurrences outside the formal and informal structures of the CoE and the EU that influenced the policy-making or standard setting process. An example of this is certain events triggering policy initiatives, increased political pressure, and influence by civil society or external experts. The feature *resources* is related to nonmaterial resources (*information* and *knowledge*) of the actors. The assumption is made that the available resources between actors are not equally divided. The *mandate* is also an incorporated feature because the mandate of a commission, working group, or function determines the scope in which a collective actor in the formal decision-making process is allowed to act. Another relational feature is *cooperation with other actors*. This feature entails the cooperation of actors in the formal decision-making process and in informal structures with other actors such as *civil society and experts, across institutions* (e.g. with the CPT and the EU), and *within the institution* (e.g. between the EP and the Commission, between the CPT and the PC-CP). A feature that only applies to individual actors in the informal structure is the *belief system* or the inherent driving factors of the actors. This belief system can be a certain morality, academic background, legal principles, political thoughts, etc. These features are the codes which are used to analyse the interviews with the policy-makers.

2.2.2 Ontological and epistemological assumptions

2.2.2.1 A philosophical diversity

Acquiring knowledge, developing understanding, and the collection and interpretation of data are some of the key guiding principles in conducting academic research. Consequently, researchers should hold a view on how they view knowledge and how we can make sense of our surroundings (Walliman, 2011). Connected with this is the variety of paradigms dealing with ontological (What is “*reality*” and how does this look?), epistemological (What is the nature of knowledge and how do we know things?), and methodological (How can the researcher gain knowledge about what he/she thinks is worth knowing?) assumptions. When looking at this continuum of paradigms, the two extremes are called positivism and interpretivism (Mortelmans, 2007; Walliman, 2011).

The positivist approach looks at the world, and the things surrounding us, as a reality which is observable and measurable. As such, social sciences and acquiring knowledge are perceived to be value-free and the researcher acts as a neutral observer. As a result, the researcher and its study object are independent entities. While the positivist approach relates closely to quantitative research methods, researchers have developed from a strict positivist perspective to a post-positivist approach to scientific research. Following this line of thought, the starting point is still the existence of a reality, although this reality can only be partially revealed due to the imperfection of observational instruments and the intangible nature of reality (Mortelmans, 2007). At the other side of the spectrum is the social constructivist point of view in social research, which argues that one objective reality does not exist (ontology). Social reality can never be objectively known. Following this approach, reality is rather a social construct: we can only see the world and the things surrounding us through personal perceptions which are influenced by our preconceptions, belief system(s), norms, and values. Subsequently, we are not neutral observers but part of the very society we study. The task of the researcher is then to reveal social phenomena which are already interpreted by the meanings created by humans, rather than existing as objective universal laws. Following this reasoning, there can be more than one single perspective and interpretation of a certain phenomenon (Walliman, 2011). This constructivist approach, or interpretative tradition, puts emphasis on the fact that every person has his or her own vision of reality. The shape and content of that reality depends on the social constructions which individuals and groups share with each other. Consequently, the researcher and the study object are connected in an ongoing interaction, and scientific knowledge is constructed during the research process (epistemology) (Mortelmans, 2007).

2.2.2.2 Choosing an approach

When taking a constructivist approach, science is a construct which is subjected to continual revision, reinvention, and change. There are multiple realities which are shaped by social, cultural, political, economic, gender, and ethnic factors. Furthermore, knowledge is socially and historically situated or constructed (Walliman, 2011). From an ontological point of view, the existence of a purely objective reality where the researcher can be disconnected from the research object is highly doubtful. Researchers, especially in social sciences, carry their own belief system(s), norms, and values while conducting their research and should be fully aware

of and transparent in relation to this. This dissertation shares, with many works in the social sciences and criminology, the assumption that reality is not naturally given, but is shaped by human beings in a meaningful way. This social constructivist approach implies that human practice makes the world intelligible and this is embedded in technological and social institutions and processes. Human beings interpret their surroundings and shape their identity, societies and natural environment on the basis of these interpretations and interactions (Huysmans, 2006). Furthermore, while gathering data there is an interactive link between the researcher and the participants of the study. During this dissertation, this social constructivist approach is the lens through which the researcher looks at the world.

2.2.3 Data collection methods

In this dissertation a qualitative methodological approach is used that gives more consideration to the actors and their influence on the policy-making process than a quantitative method would (Löblich & Pfaff-Rüdiger, 2011). This has consequences for the data-gathering process and the interpretation of these data because of its descriptive and interpretative nature or character (Walliman, 2011). To further narrow the scope of the dissertation, key policy moments and outcomes are selected which each contribute to the policy-making and standard setting process in the specific area of detention conditions for prisoners and asylum seekers. For each of these policy moments and outcomes, a policy and social network approach will be applied that focuses on the involved actors (collective and individual) and the relations between the actors in formal and informal structures. Furthermore, the context in which these actors and relations occurs will also be taken into account.

Table 2.3: Matrix of analysed policy moments and outcomes

	EU	CoE
Prisoners	Green paper on Detention (European Commission, 2011b)	European Prison Rules (Committee of Ministers, 2006)
Asylum Seekers	Recast Receptions Conditions Directive (European Union, 2013)	CPT standards regarding immigration detention

The decision to focus on four policy outcomes implies its limitations and scope of the research. However, when other relevant policy initiatives were taken in the CoE and the EU which are relevant for this research, they were also taken into account (for example with the CoE and the Committee of Experts on Administrative Detention of Migrants (CJ-DAM)).

The first stage, the desk research, consisted of an analysis of official documentation such as agendas, outcome notes, reports, draft resolutions and recommendations, speeches, etc. from both the CoE and the EU. For the CoE framework and the analysis of the EPR, documents were analysed from the PC-CP, CDPC, CM and the PACE from 2002 (the moment when the PC-CP was formally informed that the Bureau of the CDPC had adopted the terms of reference to update the EPR)¹⁸ until the adoption of the EPR in 2006. For the CPT standards related to immigration detention centres, the annual CPT reports were analysed, together with the CPT standards and visiting reports for countries which are located at the periphery of the CoE and the EU and are subsequently more affected by the influx of asylum seekers (Greece, Turkey, Italy, Malta, Cyprus). This pragmatic approach was chosen because the researcher assumes that the CPT will elaborate mostly on their standards related to immigration detention for those countries mostly affected by illegal migration. Also, the relevant case law of the ECtHR was taken into account whenever Convention violations (especially article 3 ECHR) were determined when detention conditions were substandard for either prisoners or asylum seekers.

For the EU framework, and more specifically to access Council documentation, official documentation was consulted using the public register.¹⁹ This was done for the relevant working group, especially in the area of asylum: the Asylum Working Party (AWP), Coreper, and the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). The Green paper on detention did not trigger any legislative process in the area of detention at EU level. As a result, the issue of detention was not discussed at the Council working party level (Working Party on Cooperation in Criminal Matters (COPEN)) or in the Coordinating Committee in the Area of Police and Judicial Cooperation in Criminal Matters (CATS). By using the register and the official abbreviations or codes for the relevant working groups (for asylum: ASILE, AWP, SCIFA), agendas, outcomes, Presidency notes, etc. could be consulted. Because of the focus on

¹⁸ See summary report of the 43rd meeting of the PC-CP, Strasbourg, 20-22 March 2002 (Council for Penological Co-operation, 2002).

¹⁹ The official register of the Council of the EU is available at:
<http://www.consilium.europa.eu/register/en/content/int/?typ=ADV>

specific policy outcomes and initiatives in this dissertation, certain time periods were defined for the document analysis in the Council. Initially, in the area of asylum and the period of analysis was 3 December 2008 (first Commission proposal on recast) and 26 June 2013 (adoption of recast Reception Conditions Directive). This period was prolonged when the Commission introduced a new legislative package of the CEAS and a third reform of the recast Reception Conditions Directive. As a result, official documentation is taken into account until 31 December 2017. Because the Green paper on detention is not a binding legal document, the only relevant documentation concerning this Green paper was in the structure of the Commission. Also, the case law of the CJEU was taken into account especially when detention conditions influenced the smooth functioning of the CEAS or judicial cooperation in criminal matters.

In a second stage, and in order to get insights in the policy-making processes at both the CoE and EU level, it was decided that semi-structured interviews would be conducted with experts who were key in the negotiation processes of the aforementioned policy outcomes.²⁰ The decision was made to use semi-structured interviews because they are believed to be the most appropriate and suitable way to acquire general and specific insights into politically sensitive issues, such as detention conditions. Interviewing involves conducting individual face-to-face conversations with a respondent in order to explore their perspectives on a particular idea or phenomenon (Decorte & Zaitch, 2009). This method is useful for getting in-depth information about a person's perspective and can provide more detailed information than other data collection methods such as a survey or questionnaire. This form of questioning seemed most appropriate for focusing responses on specific topics but also to make the best use of the short amount of time that is generally offered for the interview (Conti & O'Neil, 2007). This data collection method was also preferred due to a desire to unravel hidden processes, such as informal relations and ties, working methods, norms, and values. Also, an interview provides a more confidential atmosphere: people may feel more comfortable having a personal conversation than filling in a survey. However, interviews are very time-consuming because of the time it takes to contact respondents, to conduct the interviews, to transcribe them, and to analyse the results (Mortelmans, 2009a).

²⁰ They can be policy experts, policy advisors, legal officers, parliamentarians, academics, NGO representatives, etc.

2.2.3.1 Sampling: Policy-makers, experts, and elites

Several options are available for the collection of primary data, although researchers often neglect studying those very individuals or groups that are key or influential for the development and functioning of entire structures. The majority of the studies take into account those without influence and over whom power is exercised rather than the decision makers in a specific society (Odendahl & Shaw, 2002). Social scientists study experts and elites less frequently. Furthermore, the difference between elites and experts is not systematically made in academic research. In this dissertation, the elite are acknowledged as a specific group of experts who have “*the power to act*” (Littig, 2009). The lack of knowledge concerning elites contributes to obscure, and therefore to maintain, their position in society (Ostrander, 1993). As a result, conducting elite studies that spell out what elites do, how they do it, how they think about it, and what meaning it has for the larger society can provide increased insights into these elite policy networks along with their norms and the values they want to carry out. In academic literature, authors presume that the term “*elite*” is clear and see no need to elaborate the definition (Littig, 2009). However, the meaning of elite is not clearly defined, because this group can be identified in various contexts, settings, and approaches. For example, Zuckerman (1972, p. 160) uses the term “*ultra-elites*” to describe a thin layer of people who possess a great amount of influence, prestige, authority, or power within an already prestigious or elite setting. An extensive amount of research on elite settings focuses on corporate environments. For example McDowell (1998, p. 2135) targets a different setting of “*highly skilled, professionally competent, and class-specific group of bankers*” which she labels as elites. This group is not static but dynamic and heterogeneous which means that individuals may gain and lose elite status over time.

The term elite is closely linked with abstract notions of power and privilege. The designation of who or what is an elite depends on the area and scope of inquiry. Individuals and groups who are labelled as elites often occupy the top echelons of society and are an integral part in every institutional sphere, including government, community, occupation, etc. The responsibilities and privileges of this group are often not transparent or tangible. As a result, the world of elites is difficult to penetrate, as it is veiled with a cloak of privacy and its members are able to protect themselves from external members. The barriers to reaching this group of people are real and include, first and foremost, identifying who they are and getting past gatekeepers (e.g. secretary,

personal advisers, or assistants) Furthermore, the structure of many elite groups changes over time and is relatively fluid (Odendahl & Shaw, 2002).

For this dissertation, the category of experts is defined as persons who, because of their specific knowledge, occupation, and background have developed an expertise concerning the topic of detention conditions in the CoE and/or the EU. Elites are regarded as a specific group of experts that also have the power to act on a certain issue. An expert can also have a certain amount of decision-making power although this is not as obvious as the power, hidden or public, that elites have (Rice, 2010). Because this expert population in the CoE and the EU is not easy approachable, the technique of snowball sampling was used in order to further identify who could give useful information and insights on the selected policy outcomes and to respond the formulated research questions (Mortelmans, 2009b). After the document analysis was completed, a first list of experts was created and served as a first contact list. This list was adjusted during the course of the interviews in which other interesting respondents were highlighted. The last question of the interview always asked whether the respondent could pinpoint other possible respondents who could be interested in participating. When it was possible, a certain hierarchy was applied. For example in the context of the European Parliament, the policy advisers were interviewed first before the actual members of the European Parliament. For the Commission and the Council, the legal officers, and administrators were interviewed before heads of units or departments. For the CoE framework, the same logic was applied in which secretariats were first contacted followed by more senior members or officials. In total 41 interviews were done with 43 individuals (two interviews were with two respondents simultaneously). The following scheme gives an overview of the number of interviews corresponding to their institutional affiliation:

Table 2.4: Schematic overview of respondents

	CoE	EU	External experts²¹	ECtHR
Detention	1 PC-CP Secretariat	2 Commission (Legal officer) 1 EP policy adviser 1 FRA	4 experts	2 Registry staff 2 Judges
Asylum	5 CPT Member (current or previous) 3 CPT Secretariat 2 PACE Migration Committee	1 Commission (Legal officer) 3 Council Secretariat 4 JHA Counsellor 4 MEPs 1 policy adviser 1 MEP assistant 1 EP LIBE secretariat administrator 1 EASO	4 experts	
Total	11	20	8	4

2.2.3.2 Topic list and interview questions

The decision was made to conduct semi-structured interviews with open-ended questions. According to Mikecz (2012), semi-structured interviews provide the interviewer with more discretion over the conduct of the interview than structured interviews. The quality of the research design and the way the questions are asked strongly affect the nature of the answers that the interviewer will receive. For this dissertation, an interview schedule was prepared which provided a framework for the interview. This schedule consisted of a topic list with specific questions for each topic. The selected topics and questions were based on the literature review and the desk research. Depending on the flow of the interview, topics could shift in order. During the interview process, some of the questions or the interview guide were revised due to the information that was revealed in previous interviews and because of great variations

²¹ External experts consist of academics, international organisations and NGOs. This generic term is used in order to guarantee the anonymity of the respondents.

in the time available for the interview (Zuckerman, 1972). In this dissertation, the topic list and questions were tailored (but still comparable) for each type of actor: respondents active in the CoE or the EU framework, civil society, members of the Parliament, Commission, Council, Working group, Secretariats, international organisation, EU Agency, and external experts. The interview schedule covered key themes such as the actors' involvement in the policy outcome, informal processes, working methods, norms and belief systems, relations with other institutions, informal relations, etc.

Inviting the respondents for a face-to-face interview was done by e-mail attaching a formal letter with the institutional (IRCP) letterhead stating the purpose and aim of the research, how the respondents were selected, and practical arrangements. When the e-mail remained unanswered after sending one or two reminders, the researcher called the respondent to clarify his/her willingness to participate in the research. The aim was always to meet the respondent personally. When this was not possible, for example when the respondent was abroad, the interview took place using Skype or telephone. The preferred language of the researcher for the interviews was English, but interviews were also conducted in Dutch and French.²² Guarantees were offered in the invitation letter that the gathered information will, if the respondent so wishes, be analysed in such a way that it is not assignable to the specific respondent. At the beginning of each interview this was also reiterated. The letter further stated that after finalising the dissertation, the results of the research could be communicated back to the respondent. For every respondent the date, place, and timing of the interview was left open for the respondent to decide in order to provide as much flexibility as possible. As a result, the location of the interview was chosen by the respondent, which can have a considerable influence on the interview process.

2.2.4 Data analysis

The empirical part of this dissertation consists of two parts: a document analysis followed by semi-structured interviews with policy experts and elites. For the document analysis, relevant passages were copy and pasted into a separate document, and when possible, arranged

²² One interview was conducted in French, ten interviews in Dutch. The interviews are transcribed in the language of the interview.

chronologically and thematically according to the central concepts of the study (e.g. actors, composition of meetings, norms and standards, working methods, informal processes).

For the interviews, the digital recording from each interview was transcribed in full in the language of the interview (English, Dutch, or French). The recordings were transcribed using a denaturalist approach, in which grammar is corrected, interview noise (e.g., interruptions, and pauses) is removed, and nonstandard accents are standardised (Oliver, Serovich, & Mason, 2005). When audio recording was not allowed by the respondent, a transcription of the interview was made immediately after the interview based on the notes that were taken during the interview. The full transcription of the interviews proved to be a very time-consuming process, but it also allowed the researcher to think about the analysis, codes, links, and recurring themes. The technique of iterative categorisation was used to analyse the qualitative textual data (Neale, 2016). This technique enables the coding and analysis of data by topic, categories, themes, concepts, and theories. All transcriptions and other textual material when audio recordings were not allowed were read and re-read in order to ensure familiarisation with the content. Afterwards, the qualitative data analysis software programme NVivo was used to code the interviews. Coding interviews involves reviewing all data line-by-line and attaching segments of text to the codes. New codes can be added as additional themes or issues emerge in the data. Often this creates a hierarchical “*tree of codes*”. The coding process was used as a means of systematically ordering and sorting the data (Neale, 2016). All the gathered data were coded according to the features in scheme 2.2 on page 23. All the data were coded before the main analysis began. At a next stage, the raw (un-summarised) data from the coding stage were exported from NVivo to Microsoft Word. All the codes were printed, read, and re-read to identify patterns, associations, concepts, and explanations within the data and to ascertain how the findings complement or contradict literature in this area, theories, or policies. In this Microsoft Word file, relevant passages were highlighted, which were then used in the dissertation.

The following schematic overview are the codes used (see scheme 2.2 on 23) with the corresponding respondents.

Table 2.5: Used codes with corresponding respondents

Code	CoE – detention	CoE – asylum	EU – detention	EU – asylum
Belief system (individual)	5 CoE 1, 6, 8, 9, 12)	8 CoE 2, 3, 4, 5, 7, 10, 13, 14	2 Commission 1, EP 1 part 2,	9 External expert 1, 2, 3, 4, Commission 3, Council 1, EP 2, EP 6, EU Agency 1
Composition & membership: Access	4 CoE 1, 8, 9, 12	4 CoE 3, 7, 10, 13	/	3 External expert 1, 3, 4
Composition & membership: Composition	5 CoE 1, 6, 8, 9, 12	10 CoE 2, 3, 4, 5, 7, 10, 11, 13, 14, 15	/	15 External expert 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 1 part 2, EP 2, 5, 6, 7, EU Agency 1
Composition & membership: Key positions	3 CoE 1, 8, 9	6 CoE 3, 4, 11, 13, 14, 15	1 EP 1 part 1 & 2,	11 External expert 1, 2, 3, 4, Commission 3, Council 1, 3, 6, EP 1 part 2, EP 6, EU Agency 1
External influences (collective + individual)	3 CoE 1, 9, 12	9 CoE 2, 3, 4, 5, 7, 10, 11, 13, 15	3 Commission 2, EP 1 part 2, EP 5,	13 External expert 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 2, 5, 6, 7
Norms, priorities, and ideas: Contrasting (Individual)	4 CoE 1, 8, 9, 12	5 CoE 3, 4, 10, 13, 14	4 Commission 2, EP 1 part 1 & 2, EP 3, EU Agency 2	8 External expert 3, 4, Commission 3, Council 3, 4, 5, EP 6, EU Agency 1
Norms, priorities, and ideas: European (individual)	3 CoE 6, 9, 12	8 CoE 2, 4, 5, 10, 11, 13, 14, 15	2 Commission 2, EP 1 part 1	8 External expert 1, 3, Commission 3, Council 3, 4, 5, EP 2, 6
Norms, priorities, and ideas: Initiative	5 CoE 1, 6, 8, 9, 12	3 CoE 13, 14, 15	4 Commission 2, EP 1 part 1 & 2, EP 3, EU Agency 2	4 External expert 3, 4, Commission 3, EP 6
Norms, priorities, and ideas: Outcome	3 CoE 1, 6, 12	5 CoE 2, 4, 10, 13, 14	2 Commission 2, EP 1 part 2,	6 External expert 2, 3, 4, Council 1, 5, EP 6
Norms, priorities, and ideas: Shared	3 CoE 6, 9, 12	6 CoE 2, 3, 4, 10, 13, 14	1 EP 1 part 2	7 External expert 4, Council 1, 3, 4, 5, 6, EP 2
Resources: Information	/	7 CoE 2, 4, 5, 7, 10, 13, 14	2 Commission 2, EP 1 part 2,	3 External expert 1, 2, 3
Resources: Mandate	1 CoE 1	8 CoE 2, 3, 4, 5, 10, 13, 14, 15	3 Commission 1, Commission 2, EP 1 part 1	3 External expert 3, 4, Commission 3
Standard setting	3 CoE 6, 8, 9,	6 CoE 4, 5, 7, 11, 14, 15	5	16

			Commission 1, EP 1 part 1& 2, EP 4, EP 5, EU Agency 2	External expert 1, 2, 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 1 part 2, EP 5, 6, 7, EU Agency 1
Working methods	5 CoE 1, 6, 8, 9, 12	10 CoE 2, 3, 4, 5, 7, 10, 11, 13, 14, 15	7 Commission 1, Commission 2, EP 1 part 1 & 2, EP 3, EP 4, EP 5, EU Agency 2	15 External expert 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 1 part 2, EP 2, 5, 6, 7, EU Agency 1
Relations	5 CoE 1, 6, 8, 9, 12	6 CoE 2, 4, 5, 10, 13, 14	4 Commission 1, Commission 2, EP 1 part 2, EU Agency 2	14 External expert 1, 2, 3, 4 Commission 3, Council 1, 2, 3, 4, 5, 6, EP 6, EP 7, EU Agency 1
Cooperation with other actors: Across institutions (collective + individual)	5 CoE 1, 6, 8, 9, 12	9 CoE 2, 3, 4, 5, 7, 10, 11, 14, 15	7 Commission 1, Commission 2, EP part 1, EP 3, EP 4, EP 5, EU Agency 2	12 External expert 1, 2, 3, Commission 3, Council 2, 3, 4, 5, EP 2, 5, 6, EU Agency 1
Cooperation with other actors: Civil society & experts (collective + individual)	5 CoE 1, 6, 8, 9, 12	7 CoE 4, 5, 7, 11, 13, 14, 15	5 Commission 1, Commission 2, EP 1 part 2, EP 4, EU Agency 2	17 External expert 1, 2, 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 1 part 2, EP 2, 4, 6, EP 7, EU Agency 1
Cooperation with other actors: Within institution (collective + individual)	5 CoE 1, 6, 8, 9, 12	9 CoE 2, 4, 5, 7, 10, 11, 13, 14, 15	4 Commission 1, Commission 2, EP 1 part 1 & 2, EU Agency 2	13 External expert 1, 3, 4, Council 1, 2, 4, 5, 6, EP 1 part 2, EP 5, 6, 7, EU Agency 1
Formal & informal ties	5 CoE 1, 6, 8, 9, 12	8 CoE 2, 4, 5, 10, 11, 13, 14, 15	3 Commission 1, EP 1 part 2, EU Agency 2	14 External expert 1, 2, 3, 4, Commission 3, Council 1, 2, 3, 4, 5, 6, EP 6, 7, EU Agency 1
Norms, priorities, & ideas Contrasting (collective)	2 CoE 1, 9	3 CoE 4, 5, 10	/	6 External expert 1, 2, 3, Council 1, 4, 6
Norms, priorities, & ideas European (collective)	2 CoE 8, 9	5 CoE 5, 7, 11, 14, 15	2 Commission 2, EP 1 part 2	11 External expert 1, Council 1, 2, 3, 4, 5, 6, EP 1 part 2, EP 2, 4, EU Agency 1

2.2.5 Limitations and obstacles

Analysing policy networks at the European level entails obstacles. A first obstacle relates to the transparency of the policy-making process and the availability of current and historical data on network membership, structures, and functions (Keukeleire & Justaert, 2008). By using a qualitative method, such as data gathering and snowball sampling, it is almost impossible to identify the complete policy network and every single actor due to the multitude of actors involved. Furthermore, not all actors involved in a policy network dealing with detention conditions for prisoners or asylum seekers in the CoE and the EU were willing to participate in this research. Especially within the EU, officials change in functions and units. As a result, these persons declined the interview because they were no longer involved with the topic, they had left EU administration or they felt they could not provide relevant information. Consequently, the gathered empirical data do not represent the complete network at either the CoE or the EU. This is a clear limitation of the research. A total of 41 interviews with 43 respondents were conducted over a time period of one-and-a-half years. A clear limitation of this sample is the underrepresentation of higher-ranked officials in the CoE and the EU structure. For example, members of cabinet level, ex-commissioners, and staff of the CoE Human Rights Commissioner declined the interview or did not respond to the invitation. Their perceptions could also be very valuable for this research because these higher-ranked officials decide on the political priorities. However, it is assumed that at the technical working body levels, political instructions are followed and work according these instructions. As a result, this underrepresentation does not undermine the validity of this research because the political decisions of the higher-ranked officials trickle down to the lower levels, which were interviewed. The limited time frame available for the interview was sometimes an obstacle in order to dig deeper into certain topics and questions.

A second complication is that in the negotiation process, it is difficult to determine when a particular negotiation starts or ends because different negotiations may involve or affect different areas which are interlinked and/or overlap. Furthermore, no single actor is involved in the decision-making process from the beginning to the end (Elgström & Jönsson, 2005). It can also be difficult to differentiate between actor interests, ideas and strategic lines, or decisions set by the institution or organisation. Another drawback is that only visible decisions are taken

into account due to the fact that non-decisions and nonparticipation are often not publicly visible (Thatcher, 1998). This also applies for the actors. From the document analysis it is easy to get the official policy line of the institution, but it is a lot more difficult to track down which individual persons are involved in this. The snowball sampling method aimed to address this issue. The policy network literature is situated in the governance literature with an emphasis on the efficiency of policy-making processes. By using a qualitative research method, the level of efficiency of a certain network cannot be answered. Furthermore, other features can be taken into consideration of a policy network approach (e.g. gender, age). However, in order to make the link to the theory of cosmopolitanism, these features are less important for this research. Instead, the focus is on the working methods, relational ties, norms, values, and priorities that are applied by the actors involved.

2.3 Quality requirements in qualitative research: Verification strategies regarding reflexivity, validity, and reliability

The applied verification strategies to ensure the validity and reliability of this research are tackled in this section. There is a general consensus that qualitative researchers need to demonstrate that their research is credible (Creswell & Miller, 2000). The concepts of reliability and validity remain important for attaining rigour in qualitative research. As a result, the qualitative researcher is responsible for the reliability and validity of his/her research by implementing verification strategies. This with the aim of maintaining reliability and validity when the research is assessed by external reviewers (Morse, Barrett, Mayan, Olson, & Spiers, 2002).

A researcher's background and position affects what they choose to investigate, the angle of investigation, the methods used, the findings considered most appropriate, and the framing and communication of conclusions (Malterud, 2001). This also entails a commitment of reflexivity of the researcher and awareness of and transparency about it. The research topic was not chosen by coincidence, but because of my own international background where the mix of criminology, political science, and international relations has always been my main interest. A researcher's own background and position also influences the data collection method. The collection and analysis of the data is a mutual interaction between what is known and what one needs to know (Morse et al., 2002). It is also important to note that the "*quality*"

of the interview partner or respondent was not always equal. This is related to the extent to which the interviewed respondents meet the interviewer's expectations in the interview situation (Gläser & Laudel, 2009). In this research, the quality of the respondents was of a varying nature. Some respondents took the time for the interview and took an active interest in the research. This was reflected in the fact that these respondents prepared the interview and were very open to discussion. Other respondents were more reserved, had less interest in the study, had very limited time available, and did not go beyond the official policy line of the institution they represent. Other respondents apologised for their lack of memory of certain events.

Validity is the extent to which the research produces an accurate version of the world (Bloor & Wood, 2006). Validity further means "*appropriateness*" of the applied tools, processes, and data. Validity also means the degree to which the researcher's claims about knowledge correspond to the reality (or the research participants' construction of reality) which is being studied (Cho & Trent, 2006). Internal validity refers to whether the study investigates what it is meant to. External validity asks about the contexts in which the findings can be applied (Malterud, 2001). Methodological coherence is one verification strategy to ensure congruence between the research question and the applied method. The research questions need to match the method, which matches the data and the analytic procedures. This is not a linear process and questions and methods may change during the process (Morse et al., 2002). For this research, the method of data gathering through a document analysis and expert interviews was decided beforehand and did not change. The research questions were modified during the research process in order to respond better to the theoretical framework, the applied method, and data.

The sample of the document analysis and the expert interviews must be appropriate and consist of participants who best represent or have a thorough knowledge of the research topic. This means that sufficient data has been obtained in order to take into account all aspects of the phenomenon (Morse et al., 2002). A logbook was kept of all the persons who were contacted and asked whether they were interested in participating in the research. The logbook contains the name, function, date the request was sent, and the answer of the request (when given). In some categories, especially in the context of the CoE, the information obtained reached a point of saturation. In the context of the EU, it proved to be very difficult to have respondents representing all the different member states and the different political groups represented in the

Parliament, cabinet level, or senior officials. Persons from different member states, political groups, and hierarchy levels were contacted, but they did not reply, moved to other units with a different thematic focus, or did not have the time for an interview. The coding of the interviews was done in a relatively short period in order to avoid any shifts in meaning of the codes during the coding process. The codes were also predefined beforehand in order to try to avoid this.

Reliability is the extent to which research produces the same results when replicated (Bloor & Wood, 2006). For this research, the expectation is that other interviewers would not find exactly the same data (interrater reliability). This does not mean that our accounts and perceptions at the time of the interview are not reliable. To improve the reliability of the dissertation and the interviews, the researcher worked with topic lists and specific questions which were repeated in the different interviews. Also, for the coding of the interviews, the different codes were created and defined before the actual coding process. Especially in the area of asylum, the exceptional time period and pressure on the officials working in the EU institutions is believed to have an influence on the interview and the answers. For this dissertation to be reliable, the aim is to report about the theoretical framework, the methodological choices and the analytical practices as completely and truthfully as possible (see above). Furthermore, during the process of data gathering, analysing, and writing the dissertation, the literature, methodology, and analysis were presented at (inter-)national conferences, such as the American Society of Criminology, International Correctional Research Symposium, the European Society of Criminology, the Stockholm Criminology Symposium, and the GERN Doctoral Summer School on Crime, Deviance and Criminal Justice.²³ This was to allow other academics, practitioners, and experts to comment on the research.

²³ American Society of Criminology, presentation entitled: Detention Conditions in a Cosmopolitan Europe, 14-17 November 2017, Philadelphia. 1st International Correctional Research Symposium: Enhancing Comparability and Understanding, presentation entitled: European detention norms and standards: A policy-making perspective, 27-29 May 2017, Ghent. European Society of Criminology, presentation entitled: A policy network approach in setting European detention norms and standards: Challenges, obstacles and opportunities, 21-24 September 2016, Münster. Stockholm Criminology Symposium, presentation entitled: Transferring prisoners within the EU framework: Its cosmopolitan reflections and existing European detention norms, 8-10 June 2015, Stockholm. GERN Doctoral Summer School on Crime, Deviance and Criminal Justice, presentation entitled: The operationalization of cosmopolitanism in criminological research with a specific focus on European detention conditions, 7-9 September 2015, Paris.

2.4 Data management plan (DMP)

2.4.1 Confidentiality, ethics, and consent

At the beginning of each interview the interviewee was asked if the interview could be recorded. Also, the aim of this dissertation was reiterated (also written in the invitation letter), together with the focus of the interview. In the invitation letter and during the interview it was stated that the gathered information and data will, if the respondent so wishes, be analysed in such a way that it is not assignable to the specific respondent. The principle of informed consent basically ensures that the respondents who participate in the research are sufficiently informed so that these persons can make a conscious choice about whether or not to participate. This means that it is necessary to explain to the potential respondents the nature, purpose, and aim of the research. Furthermore, the role of the potential respondent needs to be explained; for example if the interviews are recorded, they need to know how the data will be analysed and the possible implications of participating in this research (whether full anonymity and confidentiality is granted) (O’Gorman, 2009). In the formal invitation letter that was sent to the potential respondents, the aim and purpose of the study were explained together with the question of whether the respondent would be interested in participating in this research. Furthermore, before each interview, the aim and purpose of the study was reiterated together with the question of whether the respondent consents to participate in the interview. The researcher preferred not to work with a written, but rather an oral informed consent of the participants at the beginning of the interview. The oral informed consent was the preferred option in order to save time and to avoid increasing the administrative burden of the policy-makers and experts. Every researcher has a responsibility regarding anonymity and confidentiality (O’Gorman, 2009). On some occasions the respondents were particularly interested in knowing who else participated in the research. When respondents asked about other participants, the aim was to answer in a vague way because this would damage the assurances given to the respondents regarding confidentiality and anonymity. However, some respondents already knew from their colleagues who also participated in the research.

2.4.2 Data documentation and storage

The gathered data (audio files, transcripts, interview notes) were pseudonymised by using codes so that the data is not assignable to the specific respondent. After each interview, the

respondents received an identification code consisting of the institution framework they represent (CoE, Commission, Council, EP, EU Agency, ECtHR, external expert) and a number. In the dissertation, these codes are also used in the analysis of the results. The coding schedule, in which the codes were matched with the names of the respondents, is a separate password protected Word file that was kept on the shared drive of the researcher's computer. Several measures were taken in order to guarantee the safe storage of the data and the accessibility of the data. During the period of the study, all data (document analysis, audio recordings, transcribed interviews) were saved on the researcher's computer, on the network hard drive. This computer is secured with a personal login and password that only the researcher knows. The computer was always locked or shut down when the researcher was not in the office. Back-ups from the data were made during the research period on several occasions on a portable hard drive which was password protected and stored in a closet in a university office. The office itself was always locked when no colleagues were in the office. Furthermore, printed transcripts and interview notes were always meticulously put away in order that nobody else could access or read the notes. A data storage factsheet of the storage of the data for this dissertation can be found in Appendix 1.

2.4.3 Data sharing and preservation after research

After the finalisation of the research, certain raw data (audio transcriptions) will be stored in the Ghent University data repository. The audio files will not be stored because this would jeopardise the anonymity of the respondents. The audio transcriptions will be transformed into a read-only PDF file in which each reference that could lead to the personal identification of the respondent is deleted. The analysed data (NVivo file, Word files with codes and relevant passages) will also be stored as read-only files at the depository. The usage of the data will go hand in hand with the signing of a non-disclosure agreement. Ghent University is considered the owner of the data.

2.5 Retrospective accounts

2.5.1 Negotiating and gaining access

The qualitative study of elites, or “*studying up*” (Nader, 1969), creates unique and “*classic*” methodological challenges and difficulties for the researcher. Studying those in “*power*”

positions invokes similar methodological problems to studying those excluded from power networks: access difficulties, identification of potential respondents, authority in the interview setting, problems related to language, etc. However, when studying elites, these methodological problems take on a different dimension and create new challenges: time and place constraints, locating and travelling to a very mobile social group, gaining access to elite settings, and breaking through networks of gatekeepers, mastering specialised forms of knowledge, issues of control, and power. In non-elite research, in most cases the researchers have the position of being an expert in that specific area. In elite studies, those who are being studied are the ones who are the knowledgeable ones and the labelled experts. Furthermore, the viability of researching elites or experts depends on their willingness to participate, to talk, and to open up (Conti & O'Neil, 2007; Mikecz, 2012; Odendahl & Shaw, 2002). Elite groups and settings are often characterised by complex interpersonal networks. As a result, getting access to the right key informant can set the course of the research because "*who knows whom*" matters (Odendahl & Shaw, 2002). In this dissertation, locating the potential respondents was partially done by using the internet and the websites of the selected institutions.²⁴ Conferences and seminars also proved to be a very valuable setting for encountering relevant respondents, to introduce the research, and to gain more informal and personal contacts with potential respondents. In this way, the research could be introduced in a more personal way and in a more informal environment. A significant element in contacting the respondents is the fact that, especially within the EU, administrators change units, roles, and functions. Because the selected policy outcomes were already adopted some years ago, a substantive number of actors had already changed units and no longer worked on the topic or in the specific institution. Part of the interview preparation was to collect background information of the respondents. This information was retrieved from public resources such as the internet. This was specifically useful for getting insights into his/her education and previous professional experience.

Gaining access to the selected respondent was the first challenge, but this is not the same as establishing the trust which is required in order to get useful data. For this dissertation, the specific names (and contact details) were needed in order to contact potential respondents. The first respondents were contacted using the contact details provided in the official documentations concerning the selected policy outcomes or found on the website of the corresponding institution. At the end of the interview, the respondent was always asked if he/she

²⁴ E.g. the PC-CP website, the CPT website, the DG justice website for the Commission, website of the Justice and Home Affairs Council, the LIBE Committee website for the EP.

knew anyone else who could provide useful information regarding this topic. A formal letter was sent by e-mail to the selected respondents introducing the research project and requesting their cooperation with the research. The aim was to start with actors who were working at working groups or in the secretariat; no high level officials were contacted at this point in order to give the researcher time to gain experience, confidence, and further knowledge. When making contact with the respondents, the option was provided to send the interview schedule prior to the interview. Some respondents specifically requested this in advance in order to prepare themselves better. When this was the case, the respondents were overall better prepared for the interview, having made personal notes on the interview schedule, and they had a better overall idea of the purpose of the research. Scheduling the interviews was sometimes challenging due to the occupied agendas of the respondents. However, when the interviews were rescheduled, these were never done last minute. Overall the respondents were mostly on time and took an active interest in the research. On frequent occasions it did happen that the respondent would indicate beforehand that he/she only had a specific amount of time available. To anticipate the limited available time, a list of core topics and questions was prepared when the respondent indicated he/she had only 30 minutes or less.

In the process of establishing the necessary rapport and trust, literature on elite interviews constantly refers to being “*checked out*” by the respondents as an ongoing process (Ostrander, 1993). Zuckerman (1972) states that in her experiences as being an interviewer, she was subjected to an almost continuous series of tests to ascertain the degree of her commitment, knowledge, and competence. An in-depth knowledge of the research topic and familiarity with the respondents’ norms of behaviour and culture facilitates gaining their trust, which is invaluable for gathering the respondent’s own perception of certain events. Once the trust of the respondents has been gained, it is important to maintain a neutral attitude towards this group, as its members have the tendency to converse easily, freely, and at great length. In addition, some of the more political actors tend to have a high level of persuasiveness (Mikecz, 2012; Ostrander, 1993). Another issue that the interviewer needs to be aware of is the notion or sense of authority by the interviewee and whether they apply strategies for mitigating that authority (Conti & O’Neil, 2007). On frequent occasions the respondent would check for familiarity with a specific document or a judgement. This is related to the process of checking-out the researcher. During the interviews, on a frequent basis a respondent would say “*have you read this*” or “*I am sure you are aware of*”. This did not prove to be very problematic because the document review was finished before doing the interviews. As a result, the main policy lines

and the main judgements were known. When this was not the case, the respondent was encouraged to elaborate more about the specific file and to give the reference number of the relevant document.

2.5.2 Interview setting

The choice for the location of the interview was always left open for the interviewee to decide. Literature points out that the location and environment where the interview takes place has an influence on the collected data (Odendahl & Shaw, 2002). An office setting can reflect the bureaucratic position and the responses obtained can reflect the formal or official position or the polished public relations version (Hunter, 1993; Mikecz, 2012). The preferred option was always to meet the respondent in person. Certain interviews were done by using Skype or telephone, which had technical difficulties from time to time. One respondent called from a car using the hands-free setting, which made it very difficult to understand them and also negatively affected the quality of the interview. In some cases the respondents preferred not to do the interview in their office but in a more neutral occasion, such as the cafeteria of the institution, a coffee bar, or a restaurant. The majority of the interviews were conducted in the office of the respondent. The influence of the location of the interview was not perceived as having a major influence on the interview. However, when the interview took place in the office of the respondent, the interview was more frequently interrupted (e.g. by telephone, people coming into the office) than when the interview took place outside the office of the respondent (e.g. separate meeting room, coffee bar, restaurant, etc.).

At the beginning of each interview, permission was asked to use a recorder in order to facilitate the conversation, to minimise the loss of information and to really focus on the interview instead of taking notes at the same time. In most cases, this was not a problem. In some instances, however, the use of this recorder was refused and respondents showed extreme caution. Respondents would then state “*this is off the record*” or “*do not quote me on that*”. When the respondent refused audio recording, notes were taken to restructure the answers of the respondent. On some occasions it was difficult to persuade respondents to give personal views. Respondents who did not work in that specific unit or institution were more open and willing to disclose details. Respondents who were still working in the same unit were very careful about

what they said and aimed to represent the position of the institution. Personal views were then perceived as irrelevant.

2.5.3 Role of interviewer

Not only does the quality of the research design and the way the questions are asked influence the nature of the answers, but the interaction between the interviewer and respondent also affects the received answers. This interaction is heavily influenced by the attitudes and reactions of the interviewees to the questions and can also vary greatly from one interview to another (Mikecz, 2012). The majority of the interviews were done in English, but a few respondents preferred to do the interview in Dutch or French.²⁵ The transcription of the interview was always done in the language of the interview. This dissertation cannot ignore a certain researchers' bias. For example the researcher's age, gender, language capacities, and other professional activities in a more civil society context may have played a role in conducting the expert interviews and the interactions during the interviews. The interviewed experts were equally represented in gender but were always older than the researcher. However, no negative influences were witnessed that were linked with the researcher's age, gender, or professional experiences. One interview was done in French, for which the researcher was only notified about at the last minute. This proved to be challenging for the smoothness of the conversation and the possibility of digging deeper into certain aspects. For respondents to remain on topic was sometimes challenging. Respondents would drift onto other topics, especially in the area of judicial cooperation in criminal matters and the Common European Asylum System, because negotiations are often interlinked between different policy files.

²⁵ The native language of the researcher is Dutch.

PART 1: LITERATURE REVIEW

3. A COSMOPOLITAN EUROPE: WHAT IS IT ABOUT?

The following section will outline and discuss the theory of cosmopolitanism, which is the theoretical framework for this dissertation. This part will answer research question 1: What is cosmopolitanism and how can it be made useful for this research?

3.1 What is cosmopolitanism?²⁶

Cosmopolitanism is a normative concept which includes a paradigm shift: an appreciation of differences, where diversity is not the problem, but rather the solution. By doing this, differences should not be replaced by common norms, values, and standards, or arranged hierarchically, but accepted as such (Beck, 2005a, 2009, 2011). Cosmopolitanism is the view that the moral standing of all peoples and of each individual person is equal and all human beings have equal moral standing despite their group identification (Van Hooft, 2009). In a philosophical way, following Kant, cosmopolitanism urges us all to be “*citizens of the world*”, creating a global community of humanity committed to common values and certain shared rights and obligations (Kaldor, 1999; Vertovec & Cohen, 2002). An ideal cosmopolitan space manages and upholds human diversity, celebrating and respecting the diverse ways that people choose to be human, without creating a priority of values (George, 2010). Within academic research, different interpretations of cosmopolitanism occur, such as moral, institutional, political, discursive, and ethical interpretations. What all these approaches share is the global outlook which transcends the state system. Cosmopolitanism means that we have responsibilities to all human beings; a belief that is grounded exclusively on the very fact that we are humans, without reference to race, gender, ethnicity, culture, political affiliation, religion, nationality, and location. As a result, the *other* is included and embraced, and justice is universally promoted (Brown, 2011; Slaughter, 2010; Strydom, 2012).

Due to the effects of globalisation, cosmopolitanism entails a far less pivotal role for the nation-state because it is no longer possible to see national societies isolated from the global context (Beck & Grande, 2007; Delanty, 2009; Delanty & Rumford, 2005). Globalisation is the backdrop against which cosmopolitan perspectives emerge and “*make sense*” (Rumford, 2013). Furthermore, globalisation generates cosmopolitan conditions in which society aims to capture

²⁶ An earlier development of the ideas in this section is published in Deruiter and Vermeulen (2016).

some of the consequences of the greater mobility of capital, together with many other forms of transnational interconnections, and has an immeasurable impact on every aspect of our daily lives. The central feature in this globalisation process is that territorial boundaries become less significant, plus it highlights the deepening and broadening of the political process where local, national, and global events constantly interact (Heywood, 2002). Due to this global network of interdependency and the emergence of global risks, nation-states cannot address cross-border issues (e.g. crime crossing more and more borders) with isolated action(s): global risks need global answers. These risks create unavoidable pressure to co-operate across national borders (Fine, 2006; Van Hooft, 2009). Consequently, the political space is no longer exclusively tied to state actors and institutions but to additional players, new roles, and unfamiliar rules, and therefore new contradictions or conflicts appear. As a result, the main issue in the globalisation debate is not the significance of the role of the nation-state and its sovereignty, but rather it is about gaining a new cosmopolitan perspective. In this perspective, the role of new actors, networks, power opportunities, strategies, and organisations are highlighted. This does not mean the nation-state no longer plays a role. The state is no longer *the actor* in the international system, but rather *one actor amongst others* (Beck, 2005a). It does mean that the classic concept of the nation-state is challenged. As such, cosmopolitanism entails a far less pivotal role for the nation-state because it is no longer possible to see national societies isolated from the global context (Beck & Grande, 2007; Delanty, 2009; Delanty & Rumford, 2005).

In this dissertation, cosmopolitanism will be interpreted following the reasoning developed by Ulrich Beck in which cosmopolitanism includes a paradigm shift: an appreciation of difference, where diversity is not the problem but rather the solution. As a result, what lies at the very core of cosmopolitanism is the acknowledgement of *otherness* where difference is accepted as such, actively tolerated, and treated equally. In doing this, differences should not be replaced by common norms, values, and standards, or arranged hierarchically, but accepted as such. By accepting these differences as they are, others are both different and at the same time equal (both/and principle). In this way, cosmopolitanism has to integrate various national norms and traditions and simultaneously counterbalance different means how to deal with diversity (Beck, 2005a, 2009, 2011). This is the opposite of universalism or nationalism, which is based on the either/or principle. Nationalism tries to realise the idea of equality within a nationally defined space. Universalism recognises that ultimately we are all the same and therefore the particularity of the other is sacrificed to an assumed universal equality, thereby denying its own interests. Another concept that is often used in academic research dealing with diversity and

cultural differences is multiculturalism. This concept also locates itself within the national space and refers to collective categories of difference. This is in sharp contrast to cosmopolitanism, which accepts and recognises difference but does not absolutise it like multiculturalism. The foreign should not be experienced and perceived as dangerous, disintegrating, and fragmenting, but as enriching (Beck, 2006, 2009, 2011).

For cosmopolitanism to work, it has to be grounded in a certain number of commonly shared norms which enable it to regulate its dealings with otherness. In short, it combines the tolerance of otherness with indispensable norms or a unity in diversity (Beck & Grande, 2007; Delanty & Rumford, 2005; Vertovec & Cohen, 2002). If these commonly accepted norms are missing, the danger exists that cosmopolitanism will degenerate into postmodern particularism and/or open violence (Beck, 2005a; Beck & Grande, 2007). From the above reasoning, the following definitions of cosmopolitanism will be used throughout the dissertation:

A unity in diversity grounded in commonly accepted norms, which is reflected in the protection of human rights for all people irrespective of race, ethnicity, geographical location, religion, etc.

Cosmopolitanisation can be labelled as the sociological expression of globalisation caused by shared perceptions of transnational risks, such as crime crossing more and more borders and the increased movement of people, including asylum seekers, which may potentially threaten national identities. Cosmopolitanisation is a long-term, irreversible, and multidimensional process through which nationhood is re-imagined and re-configured as an interactive relationship between global, local, universal, and particular levels. A cosmopolitan outlook further implies, due to the changed role of the nation-state, the emergence of non-state political actors (Beck, 2006; Levy, Heinlein, & Breuer, 2011). The ideal cosmopolitan state cooperates with other governments, NGOs, and globally operating organisations to tackle shared concerns. Simultaneously it enables and empowers national sovereignty to solve national problems. According to Beck (2008), national sovereignty does not make cooperation possible but rather the opposite: transnational cooperation makes national sovereignty possible. This re-imagination of nationhood evolves specifically in the context of global norms in the human rights area and their embeddedness in international organisations (Beck & Levy, 2013).

3.2 Cosmopolitanism in the European framework

“A cosmopolitan Europe is a more accurate designation of the emerging form of Europeanization as a mediated and emergent reality of the national and the global.”

(Delanty, 2005, p. 406)

While cosmopolitanism has a global outlook, this dissertation will focus exclusively on the European institutions. It is argued that certain ideas and visions related to the protection of people deprived of their liberty originated in Europe (Daems et al., 2013). Cosmopolitanism considers it important that all states honour the treaties between different nation-states because only in this way can the international legal order protect the rights of individuals (Van Hoof, 2009). According to Levy and Sznajder (2006), historical memories play a vital part in preventing human rights abuses. These memories are also a key mechanism for facilitating the institutionalisation of human rights principles and the transformation of state sovereignty. Human rights must be guaranteed, enforced, and protected beyond the boundaries of the sovereign nation-state, but also within the states and perhaps against their will. The human rights regime, and the protection of these fundamental rights, is the main illustration of how the discrepancy between the national and international is being superseded and how the international cosmopolitanisation of national societies is being promoted (Beck, 2006; Beck & Levy, 2013). During the last few decades, we have perceived in Europe a significant development of rights and law enforcement that go beyond the scope of the nation-state. Human rights are institutionalised in international courts and increasingly also in politico-judicial bodies, in and above the state, which control resources to enforce norm compliance (Eriksen, 2006). A core principle of the European institutions is the protection of human rights. This protection of human rights can be labelled as the commonly shared norm which makes it possible for cosmopolitanism to work in practice. The European institutions can only function because member states subscribe to a certain set of norms, but is this also the case in the area of detention conditions for prisoners and asylum seekers? Furthermore, can the CoE and the EU be considered as a cosmopolitan actor in this area?

The widespread internalisation of human rights norms through the cooperation of states and non-state actors has the result that disregarding or violating these rights incurs political liabilities at a national and international level. Some of the sovereign roles of the nation-state are preserved, but their legitimacy is not an exclusive matter conditioned by a convention with

the nation, but also by their adherence to and incorporation of nation-transcending human rights ideals (Beck & Levy, 2013; Levy, Sznaider, & Oksiloff, 2005). The continuous move towards far-reaching institutions and the proliferation of the scope, range, and intrusiveness of international norms, rules, and institutions is best illustrated by the growing influence and emphasis on human rights. The protection and enforcement of human rights as a universal accepted standard changes the fundamentals of world politics. First of all, it infiltrates all levels and areas of national society and politics. Secondly, it opens for external assessment, control, and intervention (Beck, 2006).

Europe is constantly evolving in its geographical scope, interconnectedness, self-identity, cultural heritage, and meaning to others. In doing so, it opens itself to the world and institutionalises cosmopolitan values (Fine, 2006). Following the cosmopolitan outlook, governments have responsibilities that go beyond their own territories (Delanty, 2005). Europe embraces complex interdependence and multilateral cooperation more than any other collection of states in the world (Lewis, 2009). High levels of interdependence offer European nation-states incentives to “*de-nationalise*” certain policy areas or to pool and limit their sovereignty in the interest to pursue a more sustained cooperation (Keohane, 2002). This system does not mean a complete demise of the nation-state; it operates on the basis of embedding the national in the European and the European in the national in opposition to the zero-sum language of state sovereignty (Laffan, D’Donnell, & Michael, 2000). The concept of a cosmopolitan Europe was initiated after the Second World War as a political antithesis to a nationalistic Europe, reflecting how national identities become more and more all-encompassing. The collective memory of the atrocities in the World Wars forms the basis of the growing awareness of global norms such as human rights. Post-war Europe was built on the sacred ideas of human dignity founded in the search for moral, historical, political, and economic reconciliation. These reconciliations were institutionalised through the creation of interdependence in different areas: economic, political, security, science, and culture. As a result, cosmopolitanism in Europe was initiated first and foremost as a reality not as a theory and the world has become cosmopolitan not by option but by condition (Beck, 2006, 2009).

The CoE is founded on the protection and enforcement of human rights. The policy outcomes of the CoE are non-binding. However, according to John Coleman (1999), the CoE acts as the “*conscience of Europe*” and often establishes norms and standards, for example in the area of detention conditions, way ahead of the EU. The willingness of European states to strengthen

and deepen collective decision-making and shifting sovereignty to another level is what sets Europe apart from other regions in the world. According to Beck & Grande (2007), the EU is an institutional arrangement which has long been inscribed with cosmopolitan values. The EU is a multi-level polity that does not supersede the nation-state, but exists alongside it in constantly changing relations. Therefore, the EU is not eroding the nation-state but it is a transformation of nationhood in Europe (Delanty, 2005). Furthermore, the international institutionalisation has shaped contemporary Europe by shifting Europe's understanding of sovereignty. Robert Keohane (2002, p. 744) formulates it for the EU as follows:

“The EU has begun to institutionalise a conception of limited and pooled sovereignty,²⁷ while at the same time successfully pursuing relatively autonomous policies, exercising influence in world politics, and maintaining very decent conditions of life for its citizens. Europe's emerging conception of pooled sovereignty affects all aspects of European life, from criminal justice to foreign policy.”

The cosmopolitan vision means that the EU can become neither a state nor a nation. Consequently, we cannot think about the EU by using the concept of the nation-state. Instead we need to acknowledge its national differences and to actively accept differences as such (Beck, 2005a, 2011). The EU is recognised by cosmopolitans as an illustration of a transnational unfinished project, which reflects the juridification of cosmopolitan values of fundamental rights, supported by an institutional framework that upholds these values (Amténbrink, 2008). Official rhetoric tends to highlight that the Union, in issues related to Justice and Home Affairs, has to be united in its diversity. This *unity in diversity* is a textbook reflection of cosmopolitan thinking, where the *other* is positively embraced and simultaneously perceived as equally good.²⁸ Furthermore, it requires a minimum of change at the national level and justifies a maximisation of interstate cooperation (Alegre, 2005). Delanty (2009) argues that the *unity in diversity* rhetoric appears to be a slogan referring to a supposed co-existence of nation-states and regions within the broader arena of the EU. Therefore, a cosmopolitan Europe involves more than just achieving a balance and the simple co-existence of differences. The unity in

²⁷ Pooled sovereignty in the sense that in many areas, the legal authority of different states over internal and external affairs is transferred to the community as a whole, authorizing action through procedures not involving state vetoes (Keohane, 2002).

²⁸ Opening statement of Justice Commissioner Věra Jourová at the European Parliament hearings, where she stated: “I want to build trust across the judicial systems in the EU. We should be united in our diversity, but we also need to make sure that our different cultural and legal traditions are not an obstacle to freedom, justice or the Single Market” (Jourová, 2014).

diversity rhetoric positions the EU in a contradictory situation where it has to define a common European culture and simultaneously cannot negate national and regional particularities (Delanty & Rumford, 2005). An essential question is whether this rhetoric is just empty, or can it, in reality, fulfil this proclaimed cosmopolitan thinking? It is important to note that the EU should not be seen as cosmopolitan in the sense that it aspires to be a world organisation, but in the sense that it subscribes to the principles of human rights, democracy, and the rule of law for dealing with difference(s) and *otherness*.

By moving to a cosmopolitan understanding, it is possible to comprehend the dynamics from which the transboundary practices of the European public domain are developing. A cosmopolitan sense of Europe does not threaten the nation-state; in contrast, it prepares, facilitates, modernises, changes, and opens it for the global age. Therefore, European cosmopolitanism is a specific kind of cosmopolitanism which has the power to transform, in a reflexive way, national interests (Beck, 2005a, 2005b, 2009; Beck & Grande, 2007). A specific example of the path towards cosmopolitanism is every time a country puts democracy and human rights above autocracy and nationalism. Finally, within a cosmopolitan Europe there will be contradictions, but it will find ways to overcome these tensions and to prevent fragmentation (Beck, 2009).

3.3 Europe as a normative power

The discussion what constitutes a cosmopolitan Europe can be linked to the portrayal of Europe as a normative power (Manners, 2002, 2009). A key factor of cosmopolitanism is the commonly accepted norms. Both the CoE and the EU are grounded on a broad normative basis, which is reflected in series of treaties, conventions, policies, and standards (Manners, 2002). According to Manners (2002), the EU represents a normative power of an “*ideational*” nature which is characterised by common principles. Respect for fundamental rights and fundamental freedoms are one of the norms of the broad normative basis of the EU.²⁹ The EU can be labelled as a policy-pusher, using its power to adopt regulations, directives, and framework decisions (Dolowitz & Marsh, 1996). But Europe is also characterised by other forms and shapes: as a civilian power (Telo, 2006), an ethical power (Aggestam, 2008), a postmodern power (Cooper,

²⁹ The other norms are, according to Manners (2002), the centrality of peace, the idea of liberty, democracy, and the rule of law.

2003), a structural power (Keukeleire & MacNaughtan, 2008; Metais, Thépaut, & Keukeleire, 2013), or a soft power (Nye, 2002, 2004, 2005). Normative power relies on persuasion, argumentation, discussion, and shaming. It is a type of discursive formation that relies on legitimacy, coherence, and voluntarism for its influence. The normative power of Europe is best illustrated in the way core fundamental rights came to be an indispensable issue from the 1990s onwards. This is also accomplished by an active civil society and grassroots human rights movements engaged in argumentation, persuasion, and shaming in the public sphere, the media, courts, state institutions, international organisations, etc. (Manners, 2009). The spread and juridification of the protection human rights is closely related to the institutional arrangement for their enforcement. In this case, the jurisprudence of the European Court of Human Rights (ECtHR) challenges the implementation and practices in the state parties. Also, the European Court of Justice (CJEU) has given increased guidance how to interpret certain framework decisions when detention conditions prove to be substandard in an EU member state. As a result, the way a state deprives individuals from their liberty is restrained and shaped by international and regional legal bodies. The debate of whether there is a normative power Europe is closely linked to whether Europe is a normative power by default or by design (Gerrits, 2009). While the former is a design of the European weakness (e.g. the lack of military power), the latter is a conscious and deliberate policy track. Labelling Europe as a distinct normative power combines the two approaches: carefully considered policy decisions and the very design of Europe, which is grounded on normative principles. It is important to note that in the literature, the concept of Europe as a normative power is predominantly framed in the external relations of the EU. In this dissertation, Europe as a normative power relates to the internal dimension and the normative power Europe has in influencing its own member states. For the EU that this normative power is by default and by design is also reflected in the Lisbon Treaty:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (European Union, 2007, p. 11).

3.4 Critical reflections

Like every theory, the theory of cosmopolitanism also has its criticism. Cosmopolitanism includes a tendency towards downgrading the importance of the sovereignty of the nation-states (Van Hooft, 2009). The role and function of the nation-state is a pivotal ingredient of globalisation. Robertson (2012) argues that globalisation does not undermine or override the nation-state because globalisation cannot undermine one of its own key ingredients, and the role of the nation-state is not less significant than before. Also, to a large extent, the implementation, protection, and enforcement of fundamental human rights is dependent on the actions of the nation-state. In this dissertation, the state is not considered as something obsolete, but it acknowledges that the concept of the nation-state has changed and other actors have appeared on the international stage that counter the traditional power of the nation-state.

Not everyone is convinced about the speeding up of globalisation processes and some argue that we have recently witnessed a process of de-globalisation since the economic crisis of 2008. Furthermore, we should not assume that globalisation always leads to homogenisation. The implications of this globalisation process for criminology are not always easy to pin down (Nelken, 2014). Overcoming these differences through the process of cosmopolitanisation may appear idealistic. Human practical judgement is just too multifaceted to be captured in an idyllic, harmonious, and all-inclusive theory which could serve as a standard guide for action. Furthermore, the moral principle of respecting otherness has, like most moral principles, a universal tendency, while institutions and cultures are vulnerable to particularising tendencies (Verlinden, 2010). Overcoming differences is not always a smooth endeavour in practice, especially where other political and economic incentives may be predominantly present. Across Europe, increasingly voices are emerging that question the added value of the European integration project. In the context of the asylum crisis, cracks in the assumed solidarity foundation across member states has become extremely visible with certain member states refusing to respect relocation schemes as adopted by the Council.³⁰ This raises questions on the perceived added value of the EU, the existence of European norms and values, and the European integration project as a whole.

³⁰ For example, the Council Decision 3 September 2015 establishes a temporary and exceptional relocation mechanism over two years from the frontline member states Italy and Greece to other member states. On 2 October 2016, Hungary organised a referendum with the question “Do you want the EU to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the parliament?” As a result, negotiated Decisions at EU level are questioned at the national level.

Cosmopolitanism may be labelled as a Western view of the world that includes a Western bias, an elite perspective, and, to a certain degree, is only available for the elite: people who have the resources to travel, learn other languages, discover other cultures, etc. This critique is partly true. The world has gotten more closely connected due to easier travel arrangements, internet, and technological innovations, although a certain proportion of the global population does not yet have access to these developments or the social foundations that support them. Consequently, cosmopolitanism is not equally available to everyone, nor is it equally empowering, and it obscures the social foundations on which these experiences and perspectives rest (Calhoun, 2008). Freedom of movement is still for the “*lucky few*”, while others are lost in various forms of illegal migration because during the last decades, border controls have become stricter.³¹ Beck states that there are ways to overcome diversity, but what about the socially marginalised in our society, those who are often ignored and who do not have access to the very institutions or the modes that shape a cosmopolitan society?

3.5 Conclusion: What is the relevance of cosmopolitanism for the standard setting in the area of detention conditions in Europe?

A theory is a foundational belief about how the world works. According to the theory of cosmopolitanism, diversity is not a problem if there are commonly accepted norms that create a “*unity in diversity*”. Consequently, cosmopolitanism provides a framework for how commonly accepted norms are created. In Europe, one reflection of these commonly accepted norms is in the norms and standards which are developed by both the CoE and the EU in the area of detention conditions for prisoners and asylum seekers. These norms set the boundaries for what is deemed acceptable in Europe when people are deprived of their liberty, and are a fragment of the broader human rights regime. The protection of fundamental rights is one of the areas of common interest across states and is an example of the commonly accepted norms in which a unity in diversity should be based upon. The theory of cosmopolitanism also allows for the rethinking and reframing of the nation-state. The national, regional, and global levels of policy-making and standard setting constantly interact in our globalised society. A

³¹ The list of countries which required a visa to enter the EU increased from 70 in 1985 to 131 in 2001. Council Regulation (EC) No 539/ 2001 lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

cosmopolitan actor cooperates with other state and non-state actors to tackle shared concerns. As a result, the nation-state does not operate in an isolated context but in interaction with other levels and policy areas. Therefore, the role of the nation-state and state sovereignty as a whole is transformed. However, the nation-states still play a vital role in both the CoE and the EU because the member states need to implement policy decisions, norms, and standards. In essence, cosmopolitanism helps us to explain why there is a greater unity in diversity in Europe in the area of detention conditions, which is reflected in the policy moments and outcomes that will be analysed in this dissertation.

4. DETENTION CONDITIONS IN EUROPE

European institutions have become increasingly active in developing norms and standards related to the deprivation of liberty. Over the last decades we could observe, to a certain extent, the transfer of certain policy areas from the national to the transnational European level. This partial shift also occurred in the area of penology and asylum. As a result, an increasing number of norms and standards are being, or have been, developed in the specific field of detention conditions by a variety of actors. The creation of the CoE and the EU³² was essential for this process. Both the CoE and the EU are considered to be the two most significant actors for the development of norms and standards in the area of detention conditions in Europe. This transfer from the national to the European level is remarkable. For centuries, the punishment of law-breaking citizens and immigration has always been the prerogative of the nation-state and comprises a key element in their sovereignty. The background of this development, together with the actors involved and the established norms and standards will be described in the next section.

4.1 The early developments in the area of detention conditions in Europe

The prohibition of certain forms of punishment is a relatively recent phenomenon that is linked to the rise of the 20th century movement for the recognition of universal human rights. Whitman (2003) argues that the Enlightenment had a crucial impact on punishment policies in Europe through the concept of human dignity. This further flourished in the period after the Second World War, which caused a watershed in the advancement of human rights instruments and penal policies in the wider framework of prohibiting torture or cruel, inhuman, or degrading treatment or punishment of people deprived of their liberty, both globally and within Europe. During this period, European states adopted a new legal and normative order that was based, not on the Westphalian conventions of sovereignty, but on the principles of democracy, the rule of law, and respect for human rights (Karstedt, 2014). The period of peace after the Second World War brought the chance to review the atrocities of the war. As a natural flow of events, the Universal Declaration of Human Rights (UDHR) adopted in 1948 embodied human dignity, equality under the law, basic judicial rights, and outlawed torture together with cruel, inhuman, or degrading treatment or punishment. The UDHR did not acquire the status of a legal binding

³² CoE: 47 member states; 28 states are also a member of the EU (situation in March 2018).

international rule. Although soon after, these principles were echoed in regional human rights conventions, such as the European Convention on Human Rights (ECHR) (van Zyl Smit & Snacken, 2009). Despite this adopted consensus in the area of human rights, in reality, the practice of torture and ill-treatment persisted. A report by Amnesty International (1973) concluded that on a global scale, torture was on the rise during the period after the two World Wars (Daems, 2012). According to Amnesty International, torture was becoming internationalised and sophisticated methods of torture were introduced to extract information and to control political dissents. Furthermore, practices of torture were directly linked to politics in which governments saw the use of torture as necessary for their survival. The report further states that few attempts were made to define and to eradicate the use of torture. In the aftermath of this publication, the issue of torture reached the UN agenda (Daems, 2012). This increased attention eventually resulted in the United Nations Convention against Torture (UNCAT).³³ At a later stage, an Optional Protocol (OPCAT)³⁴ was added. Also, on the regional level, initiatives were successfully accomplished, resulting in the European Convention against Torture³⁵ and the EU Charter of Fundamental Rights³⁶ (Bennett, 2016; Rodley & Pollard, 2009).

4.1.1 The development of punishment in Europe

Penal policies have far-reaching consequences for the individual, community, and society as a whole. These policies are intrinsically linked with security and liberty issues, positioned at the very core of democratic values and fundamental human rights. It is the state that needs to try to find, through law enforcement, the right balance between the protection of its citizens from crime and insecurity (crime control) and the simultaneous protection of its citizens from unlawful intrusions by law enforcement (due process). How societies balance these competing models varies across time and space (Tonry, 2001). According to Snacken, (2010, p. 287), a government must foster the general interest and protect the human rights of unpopular minorities, such as offenders and prisoners from the “*tyranny of the majority*”. The promotion of human rights, and by extension, also the rights granted to people deprived of their liberty, is

³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly resolution 39/46 of 10 December 1984.

³⁴ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002.

³⁵ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No.126, Strasbourg, 26/11/1987.

³⁶ Charter of Fundamental Rights of the European Union, Official Journal of the European Communities 2000/C 364/01, 18/12/2000.

an unobjectionable norm and is considered impossible to oppose openly (Elgström, 2005). Also, circumstances beyond the nation-state influence and shape domestic crime control policies. Certain scholars argue that globalisation and interdependence do not imply a global homogenisation of penal policies and practices. A continuous influence of national factors, such as institutions, economic regimes, traditions, history, welfare provisions, and culture have the result that crime and punishment policies diverge between countries (Cavadino & Dignan, 2006a, 2006b; Franko Aas, 2013; Lacey, 2008; Tonry, 2001; Whitman, 2003). According to Tonry (2001), these variations are best explained by parochial, national, and cultural influences. The world may be evolving into a global community with a global economy, but explanations of penal policies remain remarkably influenced by local characteristics. Consequently, strong cultural differences between countries remain. Whitman (2003) highlights the role of history and traditions of authority to explain variations in penal policies. Also, Melossi (2004) argues that differentiations in penal policies can be explained by cultural traditions, which are deeply affected by different concepts and experiences of religion. Furthermore, Cavadino & Dignan (2006a, 2006b) state that differences in punishment policies are likely to persist despite the varying effects of globalisation. One crucial reason for these differences is strongly linked to the different types of political economy. As a result, we can see an acceleration of penal convergence,³⁷ but we are a long way from global homogenisation of punishment, which may never occur. These scholars further argue that there has been little deliberate harmonisation between nations in the penal field. Even if penal globalisation exists, the process and effects are uneven. This argumentation is elaborated by Lacey (2008) who argues that the social construction of crime and punishment, plus a state's capacity for moderation and humanity in its penal policy, is not only influenced by economic mechanisms but by structures of education, skill formation, the political system, bureaucracy, and the welfare state. These essential institutional differences between advanced democracies help to explain variations in crime levels, penal severity, and the capacity for penal moderation or tolerance in otherwise relatively similar societies.

At the other side of the spectrum are authors who focus on the growing similarities and convergence of penal policies (Garland, 2001; Newburn, 2002; Wacquant, 2009). A

³⁷ According to Knill (2005, p. 768), policy convergence can be defined as: "Any increase in the similarity between one or more characteristics of a certain policy (e.g. policy objectives, policy instruments, policy settings) across a given set of political jurisdictions (supranational organizations, states, regions, local authorities) over a given period of time."

considerable volume of this research is concentrated on prison populations in the US and the punitive evolution or harshness in penal policies in Western countries. This convergence, positioned within the broader context of globalisation, increasingly leads to different nation-states adopting shared economic, cultural, and social policies. Two approaches can be identified for explaining and describing this move towards convergence. The first explanation is a structuralist approach that links similar developments in crime control policy and discourse in various jurisdictions to deeper cultural and structural changes which are being experienced in all late-modern capitalist societies. The second approach is agency-led, focusing on the political decision-making dimension and the occurrence of policy transfer and imitation (Jones & Newburn, 2002). Both sides of the spectrum (difference vs. convergence) do not argue against the fact that we live in a more interconnected world with increasing transnational networks. However, the two approaches do not agree on the implication of this process. It is also important to note that both approaches do not take into account the European dimension and only focus on the level of the nation-state.

European institutions have come to play an increasingly important role in the regulation of punishment. Prison policies and detention standards which are described explicitly “*European*”, and deliberately developed for the transnational application across large parts of Europe, are phenomena of the post-Second World War period (Stern, 2006; van Zyl Smit & Snacken, 2009). Since the 1970s, progressive lawyers-criminologists have emphasised a rights-based approach as a tool for protecting prisoners (Murdoch, 2006; van Zyl Smit & Snacken, 2009). In particular, the CoE was, from the beginning, very active in this area. The European Court of Human Rights (ECtHR) developed an accumulative set of jurisprudence related to detention conditions. Besides the ECtHR, there are also other bodies that focus on the prevention of torture or ill-treatment for people deprived of their liberty: recommendations by the CM (e.g. the 2006 European Prison Rules³⁸), the Council for Penological Co-operation (PC-CP), the European Committee on Crime Problems (CDPC), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and the function of the Commissioner for Human Rights. These bodies do not produce binding legal standards but are essential in the normative power of Europe.³⁹

³⁸ A more modern version of the United Nations Standard Minimum Rules for the Treatment of Prisoners (1955) (van Zyl Smit, 2013).

³⁹ See section 3.3 for more information on the concept of Europe as a normative power.

The interaction between these principles with the practical outcomes of penal policies, detention norms, and standards within the CoE and the EU differs (Snacken & van Zyl Smit, 2013). In the framework of the EU, the creation of the single market in the late 1980s has been accompanied by an acceleration of the Europeanisation of policing and security (Wacquant, 2009). Following Beck's reasoning, Europeanisation takes place according to the logic of side-effects or "*functional spill-over*": the unintended consequences of political decisions.⁴⁰ As a result, developments in penal policy at the European level are closely connected and intertwined with other policies of crime control or policies that are unrelated to crime (Daems, 2013). The emergence of an international consensus can also be a strong stimulus for policy change, or at least be a push factor. When the international community identifies a common problem or a common solution for a certain issue, nations will face increasing pressure by the international community to adopt this common solution. This is especially the case when a certain number of states have already implemented specific policies to address the issue (Dolowitz & Marsh, 1996).

4.1.2 Immigration detention in Europe

In the area of asylum and migration, scholars have documented an increased penal severity across Europe towards immigrants. Explanations for this trend point to the economic realm (e.g. globalisation, structure of labour markets, social welfare) as the driving force behind increased incarceration and the criminalisation of migration. Wacquant (1999) explains that the increased imprisonment of illegal immigrants followed significant growth in unemployment and structural changes in the labour markets during the mid-1980s and 1990s. Franko Aas (2007) argues that the criminalisation of migration can be understood as a contemporary form of racism or a reassertion of cultural essentialism. A growing body of literature develops a political theory of penal order and links the structure of governance, more specifically the structure of sovereignty, and the dynamic process of group membership to penal outcomes (Balibar, 2010; Bosworth, 2008; Bosworth & Guild, 2008; Franko Aas, 2011; Huysmans, 2006; Zedner, 2010). According to Barker (2012), this is very promising because another possible driving force of

⁴⁰ The spill-over effect is the result of an integration process in which integration in certain sectors spontaneously leads to integration in another sector. As a result, the initiation of integration creates the need for further policies to be harmonised. The basis for the development of policy spill-over is the interdependence of policy and issue areas (Lindberg, 2006). For example, the EU, which was first and foremost an economic project, expanded in different issue areas ranging from a monetary union to a Common European Asylum System (CEAS).

penal sanctioning in the context of globalisation is the aim of protecting national sovereignty and issues linked to group membership and national belonging. Following this approach, the increased penal severity is more likely the result of a crisis in governance and conflicts over national belonging than of labour market demands or existential insecurity.

Immigration detention is an administrative measure which is, in essence, not punitive in nature. It is applied by the state with the aim of restricting the movement of an individual so an immigration procedure or an asylum claim can be investigated, implemented, or executed. Asylum is a status given to persons who have fled their country due to persecution(s) or threats to their security and, as such, require international protection (Vermeulen & De Bondt, 2014). Seeking asylum is not an unlawful act, but often, asylum seekers are detained and deprived of their liberty, and may or may not be housed in specialist institutions. Consequently, they may face the same negative psychosocial effects as regular prisoners or offenders while being detained. The detention of asylum seekers poses numerous challenges. Detained asylum seekers face the increased risk of not being able to file, and meaningfully pursue, their asylum claim. The deprivation of liberty also has negative physical and psychological consequences on a population that is already considered vulnerable. Due to the severe nature of the practice, policy-makers have made attempts to rationalise the detention of asylum seekers aiming to render it a measure of last resort and a truly exceptional measure. Furthermore, European standards and EU legislation provide procedural safeguards and, in theory, the principles of necessity, proportionality, brevity, non-arbitrariness, and lawfulness should be respected (De Bruycker & Tsourdi, 2016; European Migration Network, 2014b). In general, asylum seekers in Europe are detained in specialised detention facilities. However, a study of the European Council on Refugees and Exiles (ECRE) documents that prisons and police facilities are also used to house asylum seekers in Europe (European Council on Refugees and Exiles, 2015). Furthermore, the study describes the large discrepancies in living conditions in specialised facilities across EU member states. Issues such as overcrowding, insufficient hygienic-sanitary conditions (no sufficient amount of showers and toilets, lack of cleaning products, etc.), inadequate housing conditions, lack of privacy, absence of basic furniture, lack of recreational activities, and absence of access to open air facilities are documented by ECRE.

4.2 The relevance of detention conditions in Europe

Detention as such negatively affects the people deprived of their liberty. When detention facilities lack appropriate accommodations, this may cause additional unnecessary suffering. Variations in member states' material detention conditions result in prisoners and asylum seekers being exposed to variable living conditions which may impact their general well-being and human dignity (Konstadinides & O'Meara, 2014). Furthermore, for asylum seekers, detention is highly undesirable, because it delays the start of the possible integration process and places undue hardship on people in a vulnerable position. Despite the fact that all CoE member states are signatories of the ECHR, and EU member states must comply with the EU Charter, doubts persist about the way standards are endorsed across the CoE and the EU. Adopting common standards regarding detention conditions is one reflection of a general consensus amongst European member states how detainees should be treated. However, in the 2014 report by the CoE's Secretary General, conditions of detention, including overcrowding in prisons, was still identified as one of the most serious challenges (Council of Europe Secretary General, 2014).

The CoE was involved in the area of detention a lot earlier than the EU. From the very beginning, the basis of the EU was an economic project focusing on controlling the means of production and the fusion of European markets with the key objective of economic integration, and with a long-term goal of political cooperation (Baker, 2013; Bond, 2012). Over the last two decades, the EU has taken decisive steps in transforming itself from a purely economic organisation to a political and social union and eventually, through the effects of spill-over, gradually making its way into criminal justice (Kerezsi, 2014) and asylum. The Area of Freedom, Security and Justice (AFSJ) has, in recent years, gone through a remarkable ascent from a humble inception to a fully-fledged and vigorous EU policy area that includes asylum and judicial cooperation. The AFSJ was formally created by the Amsterdam Treaty (1999) and has become one of the key political priorities for the EU. In such an area, barriers to the free movement of people across EU internal borders would be minimised without jeopardising the safety, security, and human rights of EU citizens. Being a vibrant policy area, the sensitive nature of the issues involved makes the progress towards increased cooperation in this area slow and difficult. Two main catalysts stimulated policy development in this area. First, the consequence of increased cross-border movements in and across Europe raised increased concerns about borders, migration, transnational crime, law enforcement and security. The

second catalyst was the signing of the Single European Act in 1986, which created new momentum in the European integration agenda (Uçcarer, 2013). In order to outline the EU's agenda, which drives policy development in the AFSJ, the Council adopted five-year political programmes⁴¹ (Guild & Carrera, 2010; Uçcarer, 2013). The first of its kind was the Tampere Programme (European Council, 1999), in which the first priority was to work towards the establishment of a Common European Asylum System (CEAS). This system should include a clear and workable determination of state responsibility for a fair and efficient asylum procedure, common minimum conditions for the reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.⁴² Furthermore, the Presidency Conclusions of the 1999 Tampere summit ratified the creation of a genuine European area of justice using mutual recognition as a cornerstone of judicial cooperation in criminal matters⁴³ (Murphy & Arcarazo, 2014). Both asylum and criminal justice have been regarded as politically sensitive issues. This is reflected in the continuous hesitations of certain member states in having "*more Europe*" in fields traditionally and deeply rooted in national sovereignty. Furthermore, the promulgation of these priorities in EU law and policy has been sensitive for events and political dynamics at the national, European, and international level (Guild & Carrera, 2010).

The principle of mutual trust is the cornerstone of developing an AFSJ, thereby reframing territoriality and national sovereignty, plus national and EU constitutional principles (Mitsilegas, 2006). Consequently, the EU has developed an AFSJ based on the assumption of mutual trust between the member states. All EU member states signed the ECHR. In the post-Lisbon era, the EU Charter of Fundamental Rights is a legally binding instrument and has the same legal value as the treaties. As a result, with the creation of the AFSJ, the assumption was made that EU member states respect their Convention and Charter obligations. This is crucial, because many policies within the AFSJ have the potential to affect individual fundamental rights (Rijpma, 2014). The assumption was also made that detention conditions in the member states do not violate Convention or Charter rights. As such, the asylum and judicial systems of all the member states were initially considered to be "*equally good*" (Deruiter & Vermeulen, 2016). The practical significance of imprisonment and detention conditions within the EU

⁴¹ Tampere in 1999, The Hague in 2004, Stockholm in 2009.

⁴² See par. 14 of the Tampere President Conclusions (European Council, 1999).

⁴³ *Ibid.*, par. 33.

increased in importance with the introduction of the European Arrest Warrant (EAW) in 2002⁴⁴ and the Framework Decision on the transfer of sentenced prisoners⁴⁵ (Vermeulen et al., 2011b). When instruments such as the EAW and the Framework Decision on the transfer of prisoners are used to surrender prisoners or offenders between the member states, this often takes place automatically without questioning the detention conditions of the receiving country. This is justified by the reasoning that the application of EU instruments, which facilitate interstate cooperation, are anchored in a high level of mutual trust between the Union states' criminal justice regimes and authorities. The essential issue in this debate is how to balance the different considerations of a borderless Area of Freedom Security and Justice while at the same time upholding the rule of law and fundamental rights and principles (Herlin-Karnell, 2014). This system of interstate cooperation, constructed on automaticity, speed, and trust, has been called into question by the ECtHR and the CJEU. Both European Courts have pointed out various shortcomings⁴⁶ (Carrera, Guild, & Hernanz, 2013; Mitsilegas, 2015).

The European Commission Green paper on detention acknowledged that detention conditions can have a direct impact on the smooth functioning of the MR principle (European Commission, 2011b). Also, research in the area of judicial cooperation in criminal matters in the EU member states concludes that the often detrimental material detention conditions in the member states' detention facilities could potentially infringe on prisoners' fundamental rights under the ECHR (Vermeulen et al., 2011b). This study also addressed the alarming fact that a considerable number of inferior standards derive from binding European and international norms and/or ECtHR jurisprudence. Allegations of poor treatment, prison overcrowding, and unhygienic facilities undermine the human rights framework of both the CoE and the EU. Furthermore, it challenges the mutual trust assumption, which is the very foundation that is needed to facilitate interstate cooperation in asylum and criminal matters. Also in the area of asylum, the Dublin system operates on the assumption that asylum laws and practices of the EU member states are based on the same common standards. Consequently, a similar level of protection in all EU member states was assumed. In reality, the conditions in which asylum seekers are deprived of their liberty differ substantially between EU member states. Following a cosmopolitan

⁴⁴ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states.

⁴⁵ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

⁴⁶ The role and case law by the European Courts in the area of detention conditions is analysed in section 5.3 (prisoners) and 6.5 (asylum).

framework, essentially this diversity is not problematic. It only becomes problematic when detention conditions for both prisoners and asylum seekers are substandard, thereby breaching Convention and Charter rights. For example, during the 2015 asylum crisis, EU member states at the periphery were not able to cope with the disproportionate influx of asylum seekers. This resulted in substandard reception and detention conditions for asylum seekers.

The following sections will provide an overview of the relevant actors for the CoE and the EU, which are key in the standard setting and policy-making process in the area of detention conditions for prisoners and asylum seekers. This is followed by an analysis of the case law by the ECtHR and the CJEU. These European Courts play a crucial role triggering policy initiatives and change. Furthermore, the European Courts give meaning and guidance on what is considered acceptable and substandard across Europe.

4.3 Different actors in setting standards for detention conditions in the CoE

The CoE is a significant presence in the European integration process. Its policy outputs include policies in politically sensitive areas, such as extradition and detention, which have been achieved in advance of any measures taken by the EU (Macmullen, 2004). Despite its wide range of policy outputs, the CoE is largely overlooked by social scientists. At present, the CoE is arguably the least visible European institution. When the CoE was created by the Treaty of London in 1949, the institution was seen as the necessary soft power to complement the hard power of the North Atlantic Treaty Organization (NATO). Furthermore, it was established as an effective European apparatus for the protection of human rights and does this with the help of a Parliamentary (initially a consultative) Assembly (PACE) and a Committee of Ministers (CM). In the CoE, the main instruments in the area of detention conditions are the recommendations by the CM, the norms and standards by the CPT, and case law from the ECtHR (Snacken & van Zyl Smit, 2013). In the specific area of migration, the PACE established a specialised Committee on Migration, Refugees and Displaced Persons, which specifically deals with issues related to asylum, and by extension, also the detention of asylum seekers. Another reflection of the increasing awareness of the importance of the issue of asylum is the creation of the function of Special Representative on Migration and Refugees by the CoE in January 2016. The creation of this function is politically a strong signal of the importance that is given to this matter within the CoE framework. Furthermore, the function of the Commissioner of Human Rights also prioritises the situation of asylum seekers, including

reception and detention conditions. An interesting development in the CM is the Committee of Experts on Administrative Detention of Migrants (CJ-DAM). This Committee is instructed to codify existing international standards related to the conditions in which migrants are to be held in closed administrative centres and other places of non-penal detention (Council of Europe, 2016d). This exercise should take the European Prison Rules as a model, but the focus is on immigration detention.

The CoE is an intergovernmental organisation where the decision-making power lays with the member states, represented by the CM. The formal decision-making power of the CoE lays with the CM. The CM is also the executive body acting as both the legislative and budgetary authority and oversees all CoE activities (Bond, 2012). To deliver its goals, the CM works through, and in cooperation with, approximately 20 steering committees, expert groups, and specialised conferences. The CM can make recommendations to member states and is also responsible for supervising member states' compliance with their commitments under the legal acquis of the CoE. Furthermore, the CM is in charge of the supervision of member states' execution of ECtHR judgements. The Committee can bring proceedings before the Court when a member state refuses to comply with a judgement (Bond, 2012; Kleinsorge, 2010b). In 1958, the CM established the European Committee on Crime Problems (CDPC). This Committee manages and coordinates the CoE's activities in the field of crime prevention and crime control. The CDPC identifies priorities for intergovernmental legal cooperation and makes proposals to the CM for resolutions, reports, and standards in the areas of criminal law and procedures, criminology, and penology, and manages the implementation of the proposals. The CDPC coordinates, supervises and monitors two subordinate bodies:

- the Committee of experts on the operation of European Conventions on Co-Operation in Criminal Matters (PC-OC)
- the Council for Penological Co-operation (PC-CP)

For this dissertation, the focus will be on the PC-CP. The PC-CP is responsible for following the developments in the area of the execution of penal sanctions and measures, European prison systems, assessing the functioning and implementation of the European Prison Rules, preparing binding and non-binding instruments, studies, and reports on penological matters; formulating opinions on penological issues, etc. The PC-CP is composed of one representative per member state in its plenary meetings. The working group consists of nine members. In the PC-CP

meetings, four times a year, representatives of the EU, the CPT, the CEP (Confederation of European Probation), and EuroPris (European Organisation of Prison and Correctional Services), as well as external experts/consultants can be present. Besides monitoring CoE standards, the PC-CP also organises the annual Conference of Directors of Prison and Probation Services.⁴⁷

The Parliamentary Assembly (PACE) is generally recognised as the motor and conscience of the CoE because it takes substantial initiatives in setting new standards and monitoring mechanisms through treaties, recommendations, and/or reports. The Assembly concentrates its activities on the core principles of the CoE: pluralist democracy, human rights, and the rule of law (Kleinsorge, 2010b). The PACE has relatively few formal powers but serves as a considerable moral authority with an advisory role to the CM. The statute of the CoE defines that the Assembly is the “*deliberative organ of the Council of Europe. It shall debate matters within its competence under this statute and present its conclusions, in the form of recommendations, to the Committee of Ministers*”.⁴⁸ This body has the right to elect certain positions within the CoE and is a political body where most of the work is carried out in specialist (sub-)committees. Unlike the Parliament of the EU, members of the PACE are not directly elected (Bond, 2012).

4.3.1 The PC-CP and the European Prison Rules

In the framework of the CoE, the most recent relevant instrument related to material detention conditions is the Recommendation on the European Prison Rules (EPR), which was adopted in 2006 (Vermeulen et al., 2011a). This policy outcome has a rich history, which began in 1955 when the United Nations aimed to develop Standard Minimum Rules for the Treatment of Prisoners (UN SMR).⁴⁹ These Rules were adopted in 1957 and in 2015, they were revised, adopted, and renamed as the Nelson Mandela Rules (United Nations General Assembly, 2015). The initial instrument of 1957 was used for the interpretation of proposals for the next

⁴⁷ For more information concerning the activities and responsibilities of the PC-CP see the terms of reference: <https://rm.coe.int/rma/drl/objectId/09000016807434ab>, last consulted on 20/03/2018. (Council for Penological Co-operation).

⁴⁸ Art. 22 Statute of the Council of Europe (1949).

⁴⁹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Source: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>

generation of conventions, such as the International Covenant on Civil and Political Rights (ICCPR)⁵⁰ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).⁵¹ The increased emphasis on human rights in the post-war period also influenced the development of prison policy in Europe (van Zyl Smit & Snacken, 2009). In 1973 the CM adopted the (European) Standard Minimum Rules for the Treatment of Prisoners (ESMR).⁵² These rules are closely related to and inspired by the 1955 United Nations Standard Minimum Rules and are considered the most substantial and comprehensive European instrument in norm setting in the area of detention (Rodley & Pollard, 2009). The influence of these European Rules was diverse, with some early interest at the national level; however, its impact and reflection in European jurisprudence and human rights law was very limited.⁵³ During the early 1980s, the CoE underwent a period of reorganisation and professionalisation. The most important realization was the creation of the Committee for Co-Operation in Prison Affairs, afterwards renamed in the Council for Penological Co-operation (PC-CP) (van Zyl Smit & Snacken, 2009). The PC-CP was established as a permanent standing Committee of the CDCEP and consisted of five members. These PC-CP members were selected not on the basis of their nationality, but due to their personal expertise in the area of penology. The PC-CP was a crucial actor in the drafting process of the European Prison Rules (EPR).

The PC-CP members were given the task of studying the impact of the ESMR. The input by the PC-CP was crucial for the decision to redraft the ESMR. After a long drafting process the ESMR were eventually replaced by the European Prison Rules in 1987. According to van Zyl Smit and Snacken (2009) these Rules were a significant development in the emergence of European prison policy because they demonstrated an official commitment to identifying general policies which are applicable to all aspects of European imprisonment. However, in practice, the impact of these Rules seems to be limited. For example the European Commission of Human Rights (EComHR) and the ECtHR made limited reference to these Rules. From the mid-1990s onwards, there was an increased public call for prison reform by bodies of both the

⁵⁰ Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with article 49. Source: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁵¹ Adopted and opened for signature, ratification, and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1). Source: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

⁵² Resolution (73) 5 on the standard Minimum Rules for the Treatment of Prisoners.

⁵³ In *Eggs v. Switzerland* and *X v. Germany*, the complaints were prohibited by the ESMR or the provisions of the ESMR were not applied, but the Commission judged in both cases that it did not amount to inhuman or degrading treatment or violate the ECHR (van Zyl Smit & Snacken, 2009).

CoE and the EU. The PACE played a pertinent role in connecting human rights concerns with prison issues.⁵⁴ After the turn of the century, the EU, and especially the EP, also became active in this area. In February 2004, the EP explicitly recommended for the Council to encourage the drafting of a European Prison Charter in conjunction with the CoE. The EP recommendation further states that if the CoE cannot fulfil the exercise of drafting a European Prison Charter in the near future, or if the result is unsatisfactory, “*the European Union will draw up a Charter of the rights of persons deprived of their liberty which is binding on the member states and which can be invoked before the Court of Justice*” (European Parliament, 2004). In a recommendation issued by the PACE in April 2004⁵⁵ it is stipulated that the process of updating the EPR is in progress and that “*it will be speedily completed*”. Furthermore, the PACE recommended the CM “*to draw up a European Prisons Charter in conjunction with the European Union*”. This charter should be “*binding on all CoE member states, and a clear and comprehensive reminder of prisoners’ rights and obligations*” (Parliamentary Assembly, 2004a, p. 427). In the recommendations by both the PACE and the EU, the link is always made to other international instruments dealing with general human rights issues and inhuman or degrading punishment or treatment (e.g. ECHR, UDHR, UN ICCPR, UN CAT and its Optional Protocol), secondary instruments (the 1987 EPR, the CPT reports and recommendations) and case law by the ECtHR.

The specific negotiation process of the EPR will be discussed in the second part of this dissertation in section 5.1. It is worth noting that the EPR is also applicable to asylum seekers when they are deprived of their liberty in prison accommodations. The commentary to Rule 10 of the EPR stipulates that people in categories other than remand or sentenced offenders can also be held in prisons. However, a prison is not a suitable place to detain a person who is neither under suspicion of committing a criminal offence nor convicted of a criminal offence. Consequently, immigration detainees and asylum seekers should only be held in prison accommodation in exceptional cases, e.g. potential for violence or when in-patient treatment is necessary and no other secure hospital facility is available (Council of Europe, 2006b).

⁵⁴ See, for example, Recommendation 1257 (1995), Conditions of detention in Council of Europe member states by the PACE. In this recommendation the PACE called to “*speed up and conclude as soon as possible the work at present being undertaken on a draft protocol to the European Convention on Human Rights concerning the rights of prisoners*”. Art. 11.4.

⁵⁵ Recommendation 1656 (2004) Situation of European prisons and pre-trial detention centres. Art. 2, 4, and 6.

4.3.2 *The CPT and its standards regarding immigration detention centres*

The work of the CoE goes further than adopting recommendations and resolutions concerning persons deprived of their liberty. Non-judicial monitoring mechanisms, such as the CPT, take a centre stage in the norm and standard setting process related to persons deprived of their liberty in Europe. Under the influence of military and dictatorial regimes across the world, the idea of creating a mechanism for preventing torture, inhuman and degrading treatment appeared in the mid-1970s under influence of the Swiss Committee against Torture (Rodley & Pollard, 2009). In 1975, the UN General Assembly adopted the Declaration against torture.⁵⁶ From 1979 to 1984, an open-ended working group of the UN Commission on Human Rights developed a draft of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which was adopted in 1984.⁵⁷ Meanwhile, due to the relative disinterest at the UN level for this mechanism, the homogeneity of most CoE countries, in combination with the widespread allegations of torture in the European region, the Swiss Committee against Torture, in cooperation with the International Commission of Jurists (ICJ), switched focus and examined whether their suggestions might prosper within the framework of a regional organisation. The CoE was the locus for this experiment (Rodley & Pollard, 2009). In 1981, in the framework of the International Convention against Torture, the PACE highlighted the necessity of regular visits without notice to places of detention which would make a considerable contribution to the prevention of torture.⁵⁸ It was not until 1983 that the PACE placed these visits in a European context: *“by establishing under the Council of Europe a system of visits without notice to places of detention, so as to protect the detainees against torture or cruel, inhuman or degrading treatment or punishment, the member states of the Council of Europe would, once again, be acting as pioneers in the field of human rights as they did in the case of the European Convention on Human Rights itself”*.⁵⁹ The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987⁶⁰ (Rodley & Pollard, 2009). This Convention is a somewhat unusual international

⁵⁶ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

⁵⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification, and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

⁵⁸ Parliamentary Assembly, Recommendation 909 (1981)1 International Convention against torture.

⁵⁹ Parliamentary Assembly, recommendation 971 (1983) Protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment.

⁶⁰ All 47 member states of the CoE have ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Source: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=8&DF=17/09/2014&CL=ENG>

instrument because it does not directly define the conduct that it proposes to prevent; neither does it require detailed reports from state parties (Kleinsorge, 2010b; van Zyl Smit & Snacken, 2009). Instead, a new monitoring mechanism was created with the Committee for the Prevention of Torture (CPT). The inspiration for such a mechanism derives from the International Committee of the Red Cross (ICRC), which was the pioneer in visiting detained persons (especially political prisoners) through an expert and impartial body. The purpose of their visits was to ensure the humane treatment of prisoners (Chetwynd, 2010; Rodley & Pollard, 2009).

The initiative for a monitoring body such as the CPT began at UN level and was then picked up by the CoE. The suggestions of the ICJ at the UN level were not ignored, although from the outset, the negotiations for the eventual adopted OPCAT were cumbersome. Eventually, in 2002, a compromise proposal was adopted which includes two pillars: a National Preventive Mechanism and the Sub-committee on the Prevention of Torture (SPT).⁶¹ The NPM is a national, autonomous body that can visit the places of detention and may formulate recommendations. The SPT can, in a similar way to the CPT, visit places worldwide where individuals are deprived of their liberty. From the very beginning of the SPT there have been issues regarding insufficient financing and challenges with executing the visits in each state party (Daems, 2012).

The CPT is an expert-based body and functions as an important safeguard for persons deprived of their liberty. It is a significant and influential source for developing minimum standards or new safeguards against ill-treatment and in monitoring existing norms in the penal field (Bond, 2012; Chetwynd, 2010). The CPT has unlimited access to any place where persons are deprived of their liberty in all the state parties of the European Convention for the Prevention of Torture. This includes the right to move inside such places without restriction, to interview, in private, persons deprived of their liberty, and to communicate freely with any person whom it believes can supply relevant information.⁶² The CPT not only visits places where people are deprived of their liberty through state visits (period and ad hoc), but also engages in an ongoing dialogue with the state under inspection (Bond, 2012). The CPT consists of a permanent secretariat and

⁶¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002.

⁶² Art. 8 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

national members, one person per state party, who are elected for a period of four years and who can be re-elected twice.⁶³ The European Convention for the Prevention of Torture further stipulates that members shall be of “*high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by the Convention*”. Furthermore, the members do not represent their country, but rather work in an individual capacity and need to be independent and impartial.⁶⁴ The country visits are prepared by the CPT secretariat, a permanent body which collects and analyses the different issues in the state parties which are deemed important for the CPT to inspect and to monitor. The secretariat does this by following national legislative processes. In addition, information and reports by civil society, national monitoring or inspection services, media, etc. are taken into account. The Executive Secretary is the head of the secretariat, which further consists of a Deputy Executive Secretary, Heads of Division, and other staff members who are appointed by the Secretary General of the CoE. The meetings of the CPT are chaired by the President of the CPT, who is elected for a two-year term, which is renewable once.⁶⁵ The CPT Bureau consists of the President and the Vice-Presidents (CPT, 2008). The deliberations of the CPT plenary meetings are confidential. In these meetings, only members of the Committee, members of the CPT secretariat, interpreters, and persons providing technical assistance may be present, unless the Committee decides otherwise (CPT, 2008). Before the end of each calendar year, the Committee draws up a provisional agenda of periodic visits for the upcoming year. Next to the periodic visits, the Committee may carry out ad hoc visits if this appears necessary due to certain circumstances. When the Committee is not in session, the Bureau can, in case of urgency, decide to carry out ad hoc visits.

A general rule is that CPT visits shall be carried out by at least two CPT members plus members of the secretariat and interpreters. The composition of the delegations is chosen by the Committee on a proposal from the Bureau. In cases of urgency the Bureau may decide over the composition. An essential strength of the CPT is its multidisciplinary composition, bringing together a wide range of experts in different fields: law, medicine, psychiatry, prison, and police matters (Chetwynd, 2010). When a specific expertise is not present inside the secretariat or with

⁶³ Art. 5 of the Explanatory Report of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe, 2002).

⁶⁴ Art. 4 and 5 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁶⁵ The term of office of the President or of a Vice-President shall end if he/she ceases to be a member of the Committee (CPT, 2008).

the CPT members, the delegation that visits a country can also include experts outside the CoE framework, such as medical experts (e.g. medical practitioners, psychiatrists, forensic experts), experts in criminal law, practitioners (e.g. prison governors), etc. A notification of the CPT's intention to carry out a visit is sent out to the relevant government prior to the visit. This notification includes the places the delegation wishes to visit, the Committee members responsible for carrying out the visit, and all persons assisting during the visit.

During a visit, the CPT delegation collects information concerning the conditions of detention, operational practices, and legal and administrative processes in the specific place where people are deprived of their liberty. Because the CPT always visits more than one facility in a country, the Committee can make an overall assessment of detention policies and conditions in that specific country. After a visit, the delegation collects its findings plus makes recommendations in a draft report. The information from the visit is the starting point for the dialogue with the state. The working methods of the CPT are built on the principles of co-operation and confidentiality between the CPT and the state under inspection.⁶⁶ The CPT visit and the subsequent dialogues with the state remain out of the public domain. The draft report is discussed and adopted by the CPT plenary meeting. The report which is transmitted to the country is confidential; the Committee will only publish it upon request by the country involved. The decision of a country to make the CPT report public is becoming more and more common practice. The publication of the report was optional at first, but throughout the years this became automatic for a lot of countries. The “*atypical*” countries that do not follow this norm are easily spotted in the CPT annual reports. In these reports, each country is listed together with the number of visits and how many reports are published. The practice of publishing CPT reports is also actively supported by the CM (Chetwynd, 2010; Daems, 2010). At the time of writing,⁶⁷ a total of 423 CPT visits had been carried out (250 periodic visits plus

⁶⁶ Cooperation is defined in article 2 and article 8 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: “Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority” (art. 2). The Committee shall notify the Government of the Party concerned of its intention to carry out a visit. After such notification, it may at any time visit any place referred to in article 2. A Party shall provide the Committee with the following facilities to carry out its task: access to its territory and the right to travel without restriction; full information on the places where persons deprived of their liberty are being held; unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction; other information available to the Party which is necessary for the Committee to carry out its task. In seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics. The Committee may interview in private persons deprived of their liberty. The Committee may communicate freely with any person whom it believes can supply relevant information. If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned.

⁶⁷ March 2018.

173 ad hoc visits) and 374 CPT reports were published.⁶⁸ According to the CPT, the (automatic) publication of the reports is a confirmation of the well-established trend in which states decide to lift “*the veil of confidentiality*” by placing the findings of the Committee in the public domain (CPT, 2017a). When the dialogue with a specific country fails or the improvements on the recommendations are insufficient, the CPT can decide, by a majority of two-thirds of its members, to issue a public statement⁶⁹ (CPT, 2008). The CPT can only use the practice of naming and shaming in order to try to convince the member state under scrutiny to comply with CPT standards.⁷⁰ Due to the confidentiality principle, the Committee’s procedures and plenary meetings are strictly confidential. While this is arguably a fundamental element of the fluctuating success of the CPT, the high level of confidentiality also has consequences and raises questions regarding the transparency of the CPT’s working methods, structure, negotiations, etc. The CPT is not a judicial body; nevertheless it is fair to conclude the CPT has developed a rich array of standards to guide and/or to inform governments and other actors on what the Committee considers as good practices and minimum conditions in order to prevent torture and inhuman or degrading treatment or punishment for persons deprived of their liberty. In recent years, an increasing amount of references are being made to CPT reports in Court proceedings and judgements. Furthermore, the CPT is regularly consulted by other CoE bodies for the elaboration of new CoE standards. This was also the case during the drafting process of the European Prison Rules (Chetwynd, 2010). The CPT standards are dynamic and can evolve over time. Furthermore, the unique visiting powers of the Committee enables the public to gain exceptional insights in a normally closed environment and to allow it for public scrutiny (Chetwynd, 2010; van Zyl Smit & Snacken, 2009).

In this dissertation, the focus is on the CPT standards regarding immigration detention. These standards are the minimum standards which should also be applicable for asylum seekers. From its early conception onwards, the CPT included the particular population of immigration detainees in its analysis. In the CPT 7th General Report, a section is dedicated to foreign nationals detained under aliens legislation (CPT, 1997). This population became more and more

⁶⁸ These statistics can be found on the CPT’s website: <https://www.coe.int/en/web/cpt>

⁶⁹ Article 10, para 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁷⁰ This is illustrated in the case of Greece where, in 2011, the CPT issued a public statement concerning the lack of action by the Greek authorities to the repeated recommendations concerning the detention of irregular migrants. Already in the report of 1997, the Committee expressed concerns about the approach of the Greek authorities towards detaining irregular migrants. The subsequent visits showed no progress regarding this issue (CPT, 2011). After the public statement, the 2013 visit indicates that the situation has not improved and irregular migrants were still held in totally unacceptable conditions (CPT, 2014).

prominent in recent years and especially in the ad hoc visits targeting immigration detention centres.⁷¹ CPT standards stipulate that when it is deemed necessary to detain asylum seekers for an extended period of time, they should be held in specifically designed centres in conditions and a regime tailored to their legal status and that caters to their particular needs. Such centres should avoid, as far as possible, the impression of a carceral environment, provide accommodation which is adequately furnished, clean, and offer sufficient living space. Furthermore, there should be access to outdoor space, recreational facilities (e.g. radio, television, newspapers), and activities (CPT, 1997). However, the CPT argues that the policy of detaining immigration detainees in prisons is fundamentally flawed even when the conditions in prison accommodation are adequate, which has not always been the case as witnessed during CPT's visits. Detaining immigration detainees in prisons should be an exceptional measure, according to CPT standards. A prison is, by definition, not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence (CPT, 2015b). When immigration detainees are held in prison accommodation, they should be held separately from remand or sentenced prisoners (CPT, 2005a). The visits to various forms of immigration detention centres reinforced the Committee's view that immigration detainees are particularly vulnerable to various forms of ill-treatment, whether at the moment of apprehension, during the period of custody, or while being deported (CPT, 2009). In the CPT's 19th General Report covering the period of 2008-2009, the CPT stipulated that "*there are still far too many instances where the CPT comes across places of deprivation of liberty for irregular migrants, and on occasion asylum seekers, which are totally unsuitable*" (CPT, 2009, p. 38).

4.3.3 The Parliamentary Assembly Committee on Migration, Refugees and Displaced Persons

This Committee is one of the nine general committees in the framework of the PACE and considers all relevant matters in the area of migration, asylum, and displacement. The Committee has 81 seats and its members are appointed by the national delegations. The focus of this Committee is on issues linked to the asylum process in Europe and the rights of asylum seekers and refugees. The Committee currently has three sub-committees:

⁷¹ See, for example, the visits to Spain (2012, 2014), Turkey (2009), Cyprus (2013), Austria (2009, 2014), Czech Republic (2014), France (2010), Germany (2010), Hungary (2009), Italy (2012), United Kingdom (2012).

- Sub-Committee on Integration;
- Sub-Committee on Population;
- Sub-Committee on Co-operation with Non-European Countries of Origin and Transit.

This Committee prepares and adopts reports, resolutions, and recommendations in the area of migration and asylum. This Committee was especially active in setting standards on national removal procedures and, consequently, also the detention of asylum seekers in extradition or expulsion cases.⁷²

4.3.4 The Special Representative of the Secretary General on Migration and Refugees

“The Council of Europe does not really deal with migration management as such. This is not our field of expertise. What the Council of Europe does offer is an impressive corpus of standards on the human rights protection of migrants, asylum-seekers and refugees. These standards should lie at the heart of migration management, whatever the border system in place” (Boček, 2016a).

It is not only the “*typical*” organisational structures of the CoE such as the CM, the PACE, and the CPT create detention norms and standards for irregular migrants and asylum seekers. Other specific functions, such as the Commissioner for Human Rights and the Special Representative (SR) of the Secretary General on Migration and Refugees, are indirectly involved in the European standard setting process. Both functions regularly visit places of immigration detention and increase fact-finding capacities. The SR function is a reflection of the political importance that is given to the topic of migration and asylum.⁷³ The CoE Secretary General Thorbjørn Jagland announced the position of SR on Migration and Refugees in December 2016,

⁷² For example, Resolution 1788 (2011) Preventing harm to refugees and migrants in extradition and expulsion cases; Resolution 1742 (2010) Voluntary return programmes: an effective humane and cost-effective mechanism for returning irregular migrants; Resolution 1741 (2010) Readmission agreements: a mechanism for returning irregular migrants; Resolution 1707 (2010) On the detention of asylum seekers and irregular migrants in Europe; Recommendation 1645 (2004) On access to assistance and protection for asylum seekers at European seaports and coastal area; Recommendation 1547 (2002) On expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

⁷³ At the time of writing (March 2018) there are two positions as SR: Special Representative of the Secretary General for Roma Issues - Valeriu Nicolae and Special Representative of the Secretary General on Migration and Refugees - Tomáš Boček.

following reports and allegations of human rights violations against migrants and refugees in Europe (Council of Europe, 2015). The position was created as the CoE's response to the developments related to the high numbers of asylum seekers at the European borders creating unprecedented challenges for Europe. The position of SR was filled by Polish ambassador Tomáš Boček, who started his mandate in February 2016. The mandate consists of gathering information on how fundamental rights of migrants and refugees are protected in the member states through fact-finding missions,⁷⁴ and to improve the situation of the high numbers of refugees and migrant children in Europe. This is with the aim of developing proposals at both the national and European levels in order to improve the situation, to assist member states, to coordinate CoE support, and to identify opportunities for targeted action. The position is also a liaison and coordination function within the CoE and with other relevant international partners, such as the United Nations High Commissioner for Refugees, the International Organisation for Migration, UNICEF, the EU, and FRONTEX (Council of Europe, 2016b, 2016c). In relation to the EU, the SR acknowledged the influence of the EU in the work and standards of the CoE (Boček, 2016b). The SR also calls for a better understanding of the need for diversity and to educate the generation of tomorrow in tolerance and respect (Boček, 2016c). Specific functions such as the Human Rights Commissioner and the SR for Migration and Refugees can create increased political visibility and monitoring capacity. However, a duplication of activities can occur with the Commissioner for Human Rights, which has, thematically, a broader mandate. This function is the focus of the next section.

4.3.5 The Commissioner for Human Rights

The Commissioner for Human Rights is a function linked to broader human rights questions and also deals with the issue of detention. The mandate of the Commissioner was established by the CoE member states in 1999 as an independent, impartial, and non-judicial institution to “*promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe*”.⁷⁵ The Commissioner can directly contact governments of the CoE member states and can issue recommendations, opinions, and reports (Council of Europe, 1999). The Commissioner cannot act upon individual complaints because

⁷⁴ For example to Italy (16-21 October 2016), France (Calais, 12-13 September 2016), Turkey (30 May-4 June 2016), Greece and the former Yugoslav Republic of Macedonia (7-11 March 2016).

⁷⁵ Art. 1 of Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (Council of Europe, 1999).

it is not a judicial body. One of the thematic areas on which the Commissioner focuses is the protection of human rights for immigrants, refugees, and asylum seekers. The Commissioner visits CoE member states in order to monitor and to evaluate the human rights situation. The Commissioner also visits immigration detention centres. During these visits, the Commissioner meets government representatives, national parliaments, the judiciary, civil society, etc. Following the visits, a report or letter can be addressed to the authorities of the visited country with the assessment of the human rights situation, including recommendations. The Commissioner also has the right to intervene as a third party in the proceedings of the ECtHR and can release opinions, issue papers, and reports on thematic issues (Council of Europe, 2016a). In 2010 the Commissioner published an issue paper concerning the criminalisation of migrants in which the detention of irregular migrants and asylum seekers is being addressed (Commissioner for Human Rights, 2010a). Grounded on the standards set by the PACE, the CPT, case law by the ECtHR, plus the Commissioner's own experiences in visiting detention centres across the CoE, the Commissioner makes recommendations regarding the detention of migrants and asylum seekers. According to the Commissioner, the lengthy detention of migrants and the use of detention as a pre-expulsion mechanism have increased substantially across Europe over the past ten years. The Commissioner stipulates that states are not prohibited from detaining irregular migrants in order to prevent unauthorised entry, or with a view to deportation or removal. However, a state's power to detain is curtailed and those detained should be protected by Article 3 and 5 of the ECHR and should be held in appropriate conditions. According to the Commissioner, *"no one should be subject to detention of any kind on the sole basis that he or she is not a national. As a matter of principle, no person seeking international protection should be subject to detention"* (Commissioner for Human Rights, 2010b).

In addition to the standards that detention should be used as a last resort, judicially authorised, and held to a strict minimum, detention facilities should fulfil conditions which meet the needs of the individuals and realise the standards set out by the CoE.⁷⁶ These standards imply sufficient access and provisions, including hygiene, sanitary facilities, sleeping arrangements, an adequate state of the building and the environment (light, size of holding cells,

⁷⁶ Parliamentary Assembly Resolution 1509 (2006) on the human rights of irregular migrants stipulate that: "Where necessary, irregular migrants should be held in special detention facilities and not with convicted prisoners. Suitable accommodation should be available to lodge families together but otherwise men and women should be housed separately." The focus in this dissertation is on the detention of asylum seekers, this standard is applicable for immigration detention and also on asylum seekers which deserve a higher level of protection.

overcrowding), ventilation, outdoor access, recreation possibilities, and access to health care. The Commissioner further argues that immigration detainees should not be mixed with detainees who have been arrested or convicted for a criminal offence (Commissioner for Human Rights, 2010b). One of the priorities of the Commissioner is the abolition of migrant detention and the promotion of alternatives. This is necessary because the practice of detaining migrants, including asylum seekers, upon arrival or under removal procedures in the CoE member states has increased substantially in recent years. Furthermore, the conditions of detention are a major concern and in most European countries there are no alternatives to detention. As a result, the deprivation of liberty is the first response in the reception of illegal migrants and asylum seekers (Commissioner for Human Rights, 2012, 2017). The Commissioner issued his concern in a human rights comment that addressed the repetitive detention of migrants, including asylum seekers, who are often held in grim conditions in prisons together with criminal law detainees (Commissioner for Human Rights, 2016b).

The Commissioner also highlights the prolonged non-implementation by CoE member states of ECtHR judgements. This practice poses challenges to the Court's authority and to the Convention system as a whole (Commissioner for Human Rights, 2016a). Prolonged non-implementation of ECtHR case law is problematic because CoE member states have accepted the creation of a judicial mechanism, including the competence to examine and to decide on the way CoE member states ensure the rights, as stipulated in the ECHR, in their jurisdictions (Commissioner for Human Rights, 2016a). The PACE Committee on Legal Affairs and Human Rights highlighted this problem in its 8th General Report concerning the implementation of ECtHR judgements. The Committee identified major problems in nine CoE member states with the highest number of unenforced Court judgements.⁷⁷ Poor conditions in detention facilities were, amongst others, one of the identified problems. Furthermore, a rising number of judgements imply complex or structural problems, so-called "*leading*" cases, which have not been implemented for more than ten years⁷⁸ (Parliamentary Assembly, 2015). The 9th annual report of the CM highlighted the management of sensitive and complex problems. According to the CM, it is increasingly confronted with situations related to "*pockets of resistance*" which

⁷⁷ These member states are Italy, Turkey, the Russian Federation, Ukraine, Romania, Greece, Poland, Hungary and Bulgaria (Parliamentary Assembly, 2015).

⁷⁸ Especially the Russian Federation, Ukraine, Turkey, Bulgaria, Italy, the Republic of Moldova, Romania, Greece, Azerbaijan, Serbia, and Poland score higher in not implementing cases which reveal structural problems (Parliamentary Assembly, 2015).

are linked to deeply-rooted prejudices of a social nature, political considerations, and national/regional security issues (Committee of Ministers, 2015b).

4.4 Different actors in setting standards for detention conditions in the EU

The policy-making process in the EU entails three main institutional players: the Commission, which has the power of initiative; the Council representing the member states; and the EP acting as co-legislator with directly elected members. After describing the three main institutional players in the EU policy-making process, trilogues will be discussed as an essential aspect that pushes the policy-making process forward. This is followed by a description of the EU policy outcomes in the area of detention.

4.4.1 The Commission

The Commission is responsible for, inter alia, the introduction of new legislation, the monitoring of policy implementation, the management of European programmes, and the mediation between the Council and the EP. Similar to national governments, the Commission is composed of an executive (the Commissioners and their cabinets) and an administrative branch (the departments and units). As a result, the Commission has both a political and an administrative dimension. The political level is presented by the College of Commissioners composed of all Commissioners, one per member state, and the President of the Commission. When certain issues are not resolved at the unit or department level, they move up the ladder to discuss the dossier in the College that meets on a weekly basis. This formal political level operates on the basis of collegiality so the aim is to reach consensus. The Commissioners⁷⁹ have a specific portfolio that consists of certain policy areas and involves oversight of one or more departments (known as Directorate-Generals or DG's). The President of the Commission decides on the allocation of the portfolios. The personal cabinet of the Commissioner helps to push the Commissioners' ideas to the departments (top-down approach) and filters policy proposals coming from the departments (bottom-up approach). Next to this coordinating role, the cabinets are a vital source of information (internally within the Commission but also for the

⁷⁹ The Commissioners are appointed for a five-year term by the member states, although they are supposed not to take instructions from outside the Commission and do not represent national governments in any formal way (Egeberg, 2013).

EP, Council, and national governments) and are also a point of access for governments and other stakeholders seeking influence (Egeberg, 2013).

The administrative wing of the Commission are the DG's, headed by a Director General and consisting of several directorates which are further divided into units. Due to the capacity of the Commission to initiate new legislative proposals, it has an important agenda-setting role. After an internal agreement is reached within the Commission, the officials who drafted the proposal may also attend meetings of the relevant meetings at Council level (working parties, Coreper, JHA Council meetings) and in the relevant EP Committee. This in order to defend the Commission proposal or to mediate between the Council and the EP (Egeberg, 2013). A large body of expert committees assists the Commission in its preparatory work. The practical work on a policy proposal usually starts in such an expert committee, which is composed of national officials and (academic) experts. These committees provide additional expertise on a specific topic and complement the work of the Commission's permanent staff. As a result, the Commission relies on a network of external experts to prepare policy initiatives or to launch policy ideas. In the EU policy-making process, this is also the phase in which contacts with external experts and civil society is the highest. This is important because the Commission needs to know what is going on at the ground in order to make substantiated policy proposals. The Commission also funds numerous grants for research purposes and several NGOs are financially dependent on EU funding. In turn, these NGOs may serve as coalition partners in policy-making preparations (Egeberg, 2013; Elgström & Jönsson, 2005; Warleigh-Lack & Drachenberg, 2013).

4.4.2 The Council of the European Union

The Council is the institution of the EU where the member states are represented and is the institutional heart of decision-making in the EU. The legislative proposals by the Commission must be approved by the Council and the EP before becoming EU law. As a result, the Council is the stage of intense negotiations, compromise building, and also disagreement amongst the member states (Lewis, 2013). Within the Council, three distinct levels can be identified: the working groups, the Committee of Permanent Representatives (Coreper), and the Council meetings at ministerial level. The Council working groups discuss, in the early stages of negotiations, the legislative proposals by the Commission and explore compromise options.

These working groups can be of a permanent nature or ad hoc for a specific issue. For matters related to asylum, the Asylum Working Party (AWP) is the Council's working party. In the area of judicial cooperation in criminal matters this is the Working Party on Cooperation in Criminal Matters (COPEN). In such working parties, member states are represented by national civil servants with expertise in that specific policy area. These experts travel from the capitals or from the Brussels-based permanent representations to the relevant working group meetings.

During the readings in the working groups, the legislative proposals are examined in detail. The national experts who may have received instructions from their ministries can ask for clarifications and express their reservations. These meetings aim to build a common understanding of the dossier amongst the member states and to iron out technical and substantive difficulties. The working groups also identify the main points of disagreement, political issues, or provisions that can be controversial for certain member states and which need to be addressed at Coreper or ministerial level. These working groups are also convenient for storing a certain policy initiative until the political climate is more favourable for reaching an agreement. Another important actor in the policy-making process is the role of the Presidency, which rotates every six months amongst the member states. In its work, the Presidency is supported by the General Secretariat of the Council. Jointly they are responsible for certain administrative tasks, such as the planning and scheduling the Council meetings, Coreper, and the working groups, plus distributing relevant documents, draft compromise proposals, and draft texts. The function of Presidency gives opportunities to member states to privilege specific topics of national interest and priority. Furthermore, the Presidency decides on the number of readings at the working group level and can table, together with the Commission or other member states, compromise proposals to reduce the number of reservations in a certain legislative proposal. This last activity is closely related to the mediator function of the Presidency (Lewis, 2013; Nilsson & Siegl, 2010; Thomson, 2008). In the literature, the political influence the Presidency has on the policy process is contested. Some scholars label the Presidency as a function including responsibility but no power, while other research emphasises the administrative and managerial side of the function. The potential the Presidency has to advance its own interests is severely curtailed by the short duration of the office. Presidencies should, in theory, abide by the normative principle that they should act as "*neutral brokers*" and abstain from using their privileged position to push their own interests. However, some researchers stress the privileged position of the Presidency as the Chair of

Council meetings at different levels (working group, political, and strategic level) (Thomson, 2008).

When a certain issue needs more advice on strategic matters, questions can be raised before the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) or the Coordinating Committee in the Area of Police and Judicial Cooperation in Criminal Matters (CATS). These strategic committees gather senior officials from national ministries at the level of Directors or Director Generals. They usually meet once a month. The strategic committees need to provide strategic guidance and to ensure a horizontal coordination of policy-making in a certain policy area. This “*intermediate strategic level*” is often confronted with the task of problem-solving. However, in practice, these committees neither have the technical expertise which is present in the working groups, nor the political position of the Coreper level to resolve problematic issues (Nilsson & Siegl, 2010). Only when the Presidency and the working party is of the opinion that sufficient groundwork has been done, and all the issues that could be resolved at their level have been cleared, does the dossier move up to the Coreper and potentially eventually become an item for a forthcoming Council meeting (General Secretariat of the Council of the European Union, 2011). The Coreper level is the most senior preparatory body in the Council that is staffed by the EU permanent representatives of the member states (ambassadors or their deputy).⁸⁰ This body has a unique position because it is placed vertically between the experts and the ministers. The Coreper meets on a weekly, in a very formal way and negotiates cross-sectoral issues. Literature also highlights that a lot of informal decision-making takes place in the Coreper and in the working groups (Lewis, 2013). Two Coreper meetings are in place: Coreper I (staffed by the deputy permanent representatives) & Coreper II (staffed by the ambassadors). Coreper II discusses the more politically sensitive issues, such as the topics covered by the Justice & Home Affairs (JHA) Council. Essentially, Coreper is responsible for preparing the forthcoming Council meetings. These formal meetings include intense discussions in order to pave the way for agreement at ministerial level. It further functions under a heavy cover of confidentiality and non-transparency. Due to the intensity of the negotiations and the long periods Coreper members hold their positions, Coreper officials develop close personal relationships that are based on mutual trust. Also, a willingness to move forward and to reach compromise or a deal on a certain file is an important incentive (Lewis, 2013; Puetter, 2014).

⁸⁰ Each member state has a permanent representation based in Brussels that is run by an ambassador, a deputy, and policy specialists from different national ministries (Lewis, 2013).

Other important actors in the policy-making process are the JHA Counsellors. The JHA Counsellors have an informal status because neither the precise function of this group, nor its position in the Council's working structure is explicitly defined. In general, it is an informal group of member state representatives who meet with each other frequently (often several times a week) to negotiate agreement on a certain file or issue. These Counsellors, who are based in Brussels, have close links to their national ministry and often meet their national colleagues while attending the meetings of the strategic committees or the working groups. These Counsellors have a comprehensive overview of policy negotiations plus technical and political expertise because they follow negotiations at different levels (working group, strategic committees, Coreper). The JHA Counsellors are part of the member state he/she belongs to permanent representation to the EU. Due to the distance between the Counsellors and their capital, the JHA Counsellors can have more room to manoeuvre, which may help them to reach a consensus. Because the Counsellors are permanently based in Brussels, together with the high number of meetings at different levels this influences the socialisation and personal network of the JHA Counsellors. Because the JHA Counsellors often meet amongst themselves, this can increase the level of trust between the JHA Counsellors and make their meetings generally more informal. This club atmosphere and high levels of trust amongst JHA Counsellors have a positive influence for solving problems or resolving deadlocks in certain files. Consequently, Coreper II and also the working parties often refer files, including unresolved issues, to the JHA Counsellors in order to reach a compromise and/or to finalise drafts. The JHA Counsellors also examine the position of the EP on a specific file and prepare the Council's position in co-decision procedures (Nilsson & Siegl, 2010).

The highest level within the Council configuration is the Council meetings in which a presence is required from the member states at ministerial level.⁸¹ There are numerous ministerial Council formations organised according to policy topic which have their own organisational culture, including a set of informal and distinctive working habits (Lewis, 2013). For this dissertation, the Justice and Home Affairs (JHA) Council is especially relevant. The JHA Council has two configurations: one where the ministers of interior meet and one where the ministers of justice meet, usually six times a year. Each minister is accompanied by a delegation consisting of the permanent representative (ambassador level) plus advisers. Council meetings

⁸¹ The heads of state meet formally in the European Council twice a year, but can also convene on an emergency basis and at least twice a year as an "informal" gathering around a specific topic (Lewis, 2013).

are chaired by the Presidency. The Commission and the Council's General Secretariat are also represented (Nilsson & Siegl, 2010). The Council can adopt points in two ways; the so-called "A" items are proposals where an agreement was reached in the Coreper and "B" items are issues where substantive differences remain and the issue needs further discussion at Council level in order to be resolved (General Secretariat of the Council of the European Union, 2011). The Council can either decide to adopt the text, to refer it back to Coreper for further study, or refer it to the relevant working party to sort out technical difficulties (General Secretariat of the Council of the European Union, 2011).

The Coreper, and especially the working groups of the Council, are the fora in which the vast majority of political and technical decisions are being made (Börzel & Panke, 2013). These decisions are usually based on the exchange of arguments and mutual accepted norms. As a result, smaller member states can also be influential and can "punch above their weight" (Panke, 2012a, 2012b). In the decision-making process in the AFSJ, negotiations on controversial points are often referred to the more senior coordination committees (e.g. Coreper, JHA Counsellors) (Nilsson & Siegl, 2010). At this level, contacts with external actors are kept to a minimum (Elgström & Jönsson, 2005; Howard Gron & Houlberg Salomonsen, 2015). According to Lewis, (2013) the Council is also the least documented institution of all EU institutions. The image of the Council is one of a "*stronghold of individualistically oriented national actors who focus more or less exclusively on their own self-interest rather than on the welfare of others or the group as a whole*" (Lewis, 2013, p. 145). However, national actors act collectively, and many develop some type of shared sense of responsibility in which the work of the Council should move forward and the legislative output should be successful. Furthermore, these national actors often develop trust relations and mutual understandings which may result in them becoming more socialised into a collective decision-making system. The Council is typically portrayed as hierarchical with different competence levels and importance with significant variations by issue area. In reality, a more nuanced system is present in which the activities of the Council represent a network of inter-organisational relations rather than a strict corporate hierarchy (Lewis, 2013).

4.4.3 The European Parliament

The third institutional actor, besides the Commission and the Council, in the EU framework is the European Parliament (EP). The EP is the only directly elected EU institution and has seen its powers dramatically increase in recent periods. In the context of EU legislation, the EP has the right to amend and to reject Commission proposals. Furthermore, the ordinary legislative procedure makes the EP a co-legislator with the Council. Consequently, both institutions must agree on a proposal in order for legislation to be adopted (Lewis, 2013). The EP is assisted by committees to prepare its work. The Civil Liberties, Justice and Home Affairs Committee (LIBE) discusses all matters related to judicial cooperation in criminal matters and asylum. The members of the LIBE Committee are members of the EP (MEPs) and are assisted by legal and/or policy advisers employed by each political group.⁸² These political groups are composed of members from different member states who share broad ideological convictions. These groups control the appointment of responsible positions (President, Vice-Presidents, Chairs of the committees) and set the EP's agenda and calendar. Within the EP, a key position is the Chair of the committee who organises the calendar and agenda of the meetings, chairs the meetings, and participates in inter-institutional discussions. Another key position is the function of Rapporteur of a specific legislative proposal. These are selected after a bidding process between the political groups. Once a political group has won the right to choose a Rapporteur, it is the coordinator of that political group in that specific committee who decides which MEP of the political group will function as a Rapporteur on that specific file. Academic research concludes that the selection of MEP's for the function of Rapporteur is based on strategic considerations (Costello & Thomson, 2010, 2011; Yoshinaka, Mcelroy, & Bowler, 2010). Furthermore, the importance of the Rapporteur is demonstrated in Costello & Thomson (2011), who conclude that the characteristics of the Rapporteur affect the EP's bargaining success in the legislative arena. When the Rapporteur is appointed, the first main task is to assist in the formation of a joined EP's position on the specific legislative proposal. The Rapporteur is supported by shadow Rapporteurs from the other political groups and may complement the reports with alternative political perspectives to achieve a certain balance. Following discussions within the relevant committee, the Rapporteur produces a text that usually includes a number of proposed amendments on the Commission proposal. The report adopted in the EP's plenary is the EP's opinion, which is transmitted to the Council. The Rapporteur also plays a key role in

⁸² The membership of the committees roughly reflects the ideological balance of the whole EP (Lewis, 2013).

representing the EP during inter-institutional negotiations between the Council and the EP. It is important to note that within the EP, MEPs vote ideologically according to their political group and not with their fellow nationals (Costello & Thomson, 2010, 2011; Lewis, 2013).

4.4.4 Trilogues

An interesting notion is the organisation of the so-called trilogues. This type of policy-making does not have legal reference in the Lisbon Treaty or any earlier treaty. However, certain commitments and claims have been made in the Lisbon Treaty about the transparency of EU decision-making.⁸³ Trilogues are informal tripartite meetings on legislative proposals between representatives of the Council, the Commission, and the Parliament. The purpose of trilogues is to reach a provisional agreement on a text that is acceptable to both the Council and the Parliament. The Commission functions in these meetings as a mediator aiming to facilitate agreement. Participation in these trilogues is based on negotiating mandates granted by the Council and the EP. In general, the Council is represented by the Presidency and the Council Secretariat. The EP is represented by the Rapporteur of the file supported by the shadow Rapporteurs. The Commission is represented by the responsible Head of the Unit or Director, and in exceptional cases by the Director General or Commissioner. The level of representation differs according to the stage of the procedure and the importance of the file under negotiation (European Parliament, 2014a). Trilogues are political negotiations based on the joined positions of the Council and the EP. According to Roederer-Rynning and Greenwood (2015), trilogues play a pivotal role in almost 90 percent of EU legislation and are underpinned by accepted binding norms, standard operating procedures, and practices linking formal and informal institutions. Also Costello and Thomson (2011) conclude that under the co-decision procedure, conflicts between the Council and the EP are resolved during informal negotiations such as trilogues and between a small number of key individuals. A study for the European Economic and Social Committee concludes that the rules and practices of trilogues have become more institutionalised over time. As a result, trilogues did not only become part of the normal operating procedure, but are one of the most important instruments for decision-making in the EU (Kluger Dionigi & Koop, 2017).

⁸³ E.g. Article 15 TFEU stipulates certain provisions regarding openness, access, and transparency of the Union's institutions.

4.4.5 EU policy outcomes in the area of detention

In this dissertation, the focus is on two EU policy outcomes which each are linked to standard setting in the area of detention conditions: the Green paper on detention for criminal detention and the recast Reception Conditions Directive for the administrative detention of asylum seekers. In the specific area of conditions for criminal detention, the Commission issued a Green paper on detention. The results of this consultation process did not trigger any further legislative initiatives. However, this outcome is important because the Green paper on detention encouraged the debate between the principle of mutual recognition and the issue of detention conditions. Since the 2015 asylum crisis, asylum has been a political priority for the EU. At the 1999 Tampere European Council, the decision was adopted to create a Common European Asylum System (CEAS) that is based on mutual trust in order to harmonise common minimum standards for, inter alia, the reception of asylum seekers in the different member states. This was reflected in the Reception Conditions Directive and its recast establishing standards related to the grounds and conditions of depriving asylum seekers from their liberty in EU member states.

4.4.5.1 The Green paper on detention

The Presidency conclusions of the 1999 Tampere Council stipulate that mutual recognition (MR) should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union (European Council, 1999). From that moment onwards, the EU developed an expanding policy based on MR in criminal matters to enhance the facilitation of criminal investigations, prosecutions, and sentences across borders between EU judicial authorities (Morgan, 2010; Peers, 2004). The MR principle is based on notions of equivalence and trust between the member states, whereby every member state is perceived as equally *good* because it ratified the European Convention on Human Rights (ECHR) under the assumption that fundamental rights are respected across the Union (Mitsilegas, 2015). In order to facilitate judicial cooperation in criminal matters, this principle is designed in order that a decision of a judicial authority in one member state can be enforced beyond its territorial legal borders with a minimum of formalities. Ideally, the member states will not question the outcomes of other member states' judicial processes as long as EU law and fundamental rights have been respected (Ferraro, 2013). These instruments create a common framework with the aim of speeding up

judicial cooperation by implying a certain level of automaticity (Mitsilegas, 2009, 2012). All the EU member states may be signatories to the ECHR, although the foundations of this mutual trust are rather weak. In the area of prisoners, no binding standards have yet been developed at the EU level, although each member state ratified the ECHR, assuming fundamental rights are respected across the Union. In practice EU member states do not respect all fundamental rights to the same degree (Heard & Mansell, 2011). The decision to make MR the engine for developing judicial cooperation in criminal matters was, according to Vernimmen-Van Tiggelen and Surano (2008), not a natural outcome of a process of evolution or the logical consequence of a high level of mutual trust. It was simply assumed to be there. In reality, this trust did not occur spontaneously and is by no means always evident in practice. Mutual trust is a learning process, which has to evolve and grow.

The Commission issued a Green paper on detention in 2011 (European Commission, 2011b). Green papers are documents published by the Commission to stimulate discussions on certain topics at European level. The goal of such a Green paper is to invite all relevant stakeholders to participate in a consultation process and to debate the proposals the Commission puts forward. The origins of the Green paper on detention can be found in the roadmap on procedural rights. The initial proposal by the Commission of this roadmap dates back from 2004⁸⁴ and covers five basic rights⁸⁵ (Commission of the European Communities, 2004). After three years of negotiations, no consensus was reached in the Council concerning the procedural rights proposal. Based on a study by the Université Libre de Bruxelles (Vernimmen-Van Tiggelen and Surano 2008), the Commission proposed a new approach by tackling the five rights in individual measures and not in one all-encompassing instrument (Vermeulen et al., 2012). Consequently, the Swedish Presidency (July-December 2009) presented a roadmap on procedural rights. This roadmap was adopted by the European Council on 10-11 December 2009 and is an explicit part of the Stockholm Programme which contains the guidelines for a future common policy in the field of justice and home affairs (Council of the European Union, 2010d). The proposal reiterates that the ECHR, as interpreted by the ECtHR, is a very important common basis for member states to have trust in each other's criminal justice systems. However, the document acknowledges the space for further action in order to enhance mutual

⁸⁴ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final.

⁸⁵ Access to a lawyer and to consular authorities, interpretation and translation, the right to communicate the fact of being in detention and to information about rights, and special protection for vulnerable suspects such as children (Commission of the European Communities, 2004). For more information see Morgan (2012).

trust between EU countries. Consequently, use of the EU standards for the protection of procedural rights was the preferred way forward by EU policy-makers to create this mutual trust (Council of the European Union, 2009b), which was initially just assumed to be there. While the emphasis was clearly on procedural measures, the EP stressed in the LIBE Committee the importance of combining this with “*measures to fix minimum standards for prison and detention conditions and a common set of prisoners’ rights in the EU*” (European Parliament, 2009b, p. 9).

The Green paper on detention stipulates that detention conditions can have a direct impact on the smooth functioning of the MR principle (European Commission, 2011b). This principle is the foundation for all of the developed instruments to enhance judicial cooperation in criminal matters between EU member states. The flagship initiative to facilitate judicial cooperation is the EAW, which replaced and accelerated traditional extradition proceedings between EU member states (Plachta & van Ballegooij, 2005). Based on the MR principle, the aim of the EAW is to abolish formalities associated with old extradition procedures between the member states with respect to two categories of persons: those who are sought for criminal prosecution and those who have been finally sentenced in a criminal prosecution, but who are present in another member state. The EAW system facilitates the surrender of sentenced or suspected persons to either execute criminal sentences or to prosecute criminal charges (Carrera et al., 2013). A Commission report on the implementation of the EAW in 2011 recognised the varying standards across the EU in protecting fundamental rights. Even though individuals can claim a violation of their Convention rights before the ECtHR, this has not proved to be an effective way of ensuring that signatories comply with Convention’s standards (European Commission, 2011c). The EAW has been perceived as positive, although it is far from being perfect. Despite the shortcomings of the instrument and initiatives by the EP (European Parliament, 2014b), the Commission finds it premature to re-open discussions to amend the EAW (European Commission, 2015b). Also, for prisoners, interstate cooperation was facilitated by a Framework Decision (Council of the European Union, 2008a). In essence, this instrument creates a mechanism through which a prisoner sentenced to imprisonment in another EU country other than his/her home country can be transferred back to his/her home country to serve his/her sentence. Thus, prisoners can be transferred to their country of nationality or residence, without their consent, based on the presumption that social rehabilitation and reintegration can be more easily achieved there. This Framework Decision has been criticised, because it does not tackle the issue of prisoners ending up in a stricter prison regime as a result of the transfer or prisoners

being transferred to a facility which does not provide the same material detention conditions. Moreover, this Framework Decision has been criticised because it takes a distinctly authoritarian perspective or serves a member state's interest in which the catalyst behind this mechanism is to see criminal law more effectively enforced (van Zyl Smit & Spencer, 2010).

4.4.5.2 The Recast Reception Conditions Directive

All EU member states are signatories to the 1951 Geneva Convention (United Nations General Assembly, 1951) and the ECHR, which oblige member states to comply with fundamental obligations for the treatment of asylum seekers. As a result of these legal obligations, mutual trust is justified and is presumed to exist (Battjes, Brouwer, Paulien, & Ouwerkerk, 2011; Guild & Carrera, 2010). Because all EU member states are perceived as *equally good*, the instruments to develop a CEAS are all based on the presumption of mutual trust: the assumption that each member state will treat asylum seekers and examine their claims according to national, European, and international law. When an asylum seeker is transferred under the Dublin Regulation, this transfer may impact the living conditions of the person involved due to varying reception conditions and detention facilities for asylum seekers in different member states. For this dissertation, the recast Reception Conditions Directives is considered to be a key policy outcome of setting standards related to detention conditions for those in need of international protection. Seeking asylum is not an unlawful act, although asylum seekers are often detained and deprived of their liberty whether or not in specialist institutions, which may impact their general well-being.

After the entry into force of the Treaty of Amsterdam (May 1999), the creation of a Common European Asylum System (CEAS) was envisioned based on the guidance given by the Tampere European Council (1999). In the so-called "*first phase*" of the CEAS, ranging from the period 1999-2005, the aim was to harmonise the legal frameworks of the member states based on common minimum standards (Commission of the European Communities, 2008a). One of the main aims of the Reception Conditions Directive and its successor, the recast Reception Conditions Directive (hereafter "*the recast*") (European Union, 2013), is to provide a dignified standard of living across the member states for those in need of international protection and to lay down the minimum standards concerning the material conditions for the reception of asylum

seekers⁸⁶ (Court of Justice of the European Union, 2012; European Council on Refugees and Exiles, 2015). Under the CEAS, regardless of the member state in which the asylum seeker applied for protection, every member state should offer an equivalent level of reception conditions. As a result, in 2003 the Council adopted the Reception Conditions Directive. This Directive was renegotiated and the recast was adopted in 2013 (European Union, 2003, 2013). This Directive leaves a considerable amount of discretion for defining what constitutes a dignified standard of living for persons seeking international protection. Furthermore, reception systems and centres differ greatly in setup, modalities, and conditions across EU member states, causing differences in treatment (European Asylum Support Office, 2016). Also, a study of the European Migration Network highlights that the organisation of reception facilities differs greatly amongst and within the EU member states. This results in unequal treatment and, in certain cases, substandard reception conditions (European Migration Network, 2014a). In essence, the very introduction of this instrument reflects an awareness of substandard reception conditions for asylum seekers in the different EU member states. As such, it is argued that the very necessity of the recast Reception Conditions Directive is a reflection that reception and detention conditions were not equal between the member states and the assumed mutual trust in each other's systems was premature. Furthermore, this instrument is based on a certain level of distrust in the member states' reception conditions, in that it was eventually deemed necessary to install an instrument to guarantee adequate reception conditions for asylum seekers (Deruiter & Vermeulen, 2016).

European Union law, through the recast Reception Conditions Directive, does not prohibit the deprivation of liberty of asylum seekers but it defines the grounds for when a member state may detain an applicant, for example to verify his or her identity (art. 8 para 3a), when there is risk of absconding (art. 8 para 3b), to prepare a return (art. 8 para 3d), or when it is required for the protection of national security or public order (art. 8 para 3e). Furthermore, the recast tries to individualise the process and to stimulate the application of less coercive alternative measures (art. 8 para 2). The instrument also provides certain guarantees to the detained asylum seeker: the detention period should be as short as possible (art. 9 para 1), subjected to judicial review (art. 9 para 3 and 5), and offer free legal assistance (art. 9 para 7). As a rule, asylum seekers should be detained in specialised detention facilities, but this is not an absolute rule. A member

⁸⁶ The revision process of the Reception Conditions Directive was difficult and troublesome. As a result, the safeguards for asylum seekers regarding reception conditions in the initial 2008 Commission proposal were lowered in comparison with the eventual adopted recast (Velluti, 2014).

state can also detain asylum seekers in prison accommodation as long as they are kept separate from ordinary prisoners (art. 10 para 1). The Directive further stipulates that asylum seekers should have access to open air spaces (art. 10 para 2), contact with UNHCR, family members, legal advisers, etc. (art. 10 para 3 and 4). Information about the rules in the facility plus their rights and obligations should be provided in a systematic matter in a language which the asylum seeker understands or is reasonably supposed to understand (art. 10 para 5). Recital 18 of the recast Reception Conditions Directive further states that the applicant in detention “*should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs ...*” (European Union, 2013). Despite these legal standards, detention grounds are phrased very broadly and the problem of the non-implementation of these legal safeguards persists (De Bruycker & Tsourdi, 2016).

4.5 Conclusion

This chapter outlined the early developments in the area of detention conditions for prisoners and asylum seekers. Europe has evolved immensely through the last decades when it comes to norm and standard setting in the area of detention conditions. This chapter highlights the whole range of different actors involved in setting detention norms and standards for prisoners and asylum seekers in the CoE and the EU. The normative power of the European framework was discussed together with the complex structures of working groups, committees, and expert bodies. All these structures have their own specific composition, responsibilities, and expertise. For the CoE, the main active actors in this area are the PC-CP with the European Prison Rules and the CPT with their visits, reports, and recommendations. Also, more political bodies such as the SR on Migration and Refugees and the Commissioner on Human Rights can increase political awareness and monitoring capacity towards immigration detention and the detention of asylum seekers.

For the EU, the classic institutional bodies, the Commission, Council, and EP, are each indispensable elements in the policy-making process. Furthermore, trilogues are more and more in common practice in the EU in order to push the policy-making process forward and to reach an agreement between the Council and the EP. While the Green paper on detention did not trigger any legislative initiatives in the area of detention conditions for prisoners, it influenced the debate within the EU regarding the varying nature of detention conditions between different EU member states. Furthermore, the Green paper on detention stimulated discussions

concerning the link between the principle of mutual recognition and the issue of detention conditions. In the area of asylum, the recast Reception Conditions Directive created binding rules regarding the grounds to detain asylum seekers and stipulated certain conditions of detention. The involvement of the CoE and the EU in this matter varies due to the varying legal nature of the policy outcomes and the political sensitivity of the issue. While the CoE can focus on its core business of protecting human rights, the EU, in addition, needs to create mutual trust in the member states' judicial and asylum systems in order for the judicial cooperation in criminal matters and the CEAS to function. As a result, both the CoE and the EU are setting standards on what is acceptable across Europe regarding the sensitive issue of detention conditions. However, these standards have very different legal implications and level of detail. Literature on policy-making processes in the EU indicates that informal processes can have a considerable influence. A possible explanation can be the development of personal relationships, a feeling of a "*club atmosphere*" within (e.g. JHA Counsellors) and amongst these networks of policy experts and elites, which comprise a small circle of professionals who work very intensely with each other and who may share the same norms and values. This will be further analyzed in the empirical part of this dissertation.

PART 2: RESULTS OF THE EMPIRICAL STUDY

In this part, the empirical results of both the document analysis and the semi-structured interviews with key policy-makers will be discussed in order to analyse the norm and standard setting process in the area of detention conditions for prisoners and asylum seekers in Europe. The analysis of the results in the subsequent chapters follows a thematic structure. The first chapter (chapter 5) focuses on detention norms and standards for prisoners in which the following policy documents and initiatives are analysed:

For the CoE:

- The European Prison Rules (EPR)

For the EU:

- The Green paper on detention

The second chapter (chapter 6) focuses on detention norms and standard for asylum seekers in which the following bodies and policy documents are analysed:

For the CoE:

- The CPT standards regarding immigration detention centres

For the EU:

- The recast Reception Conditions Directive

Chapter 7 focuses on the cooperation and relations between the CoE and the EU regarding the issue of detention. The last chapter of this part (chapter 8) discusses the uniting principles which guide policy-makers and experts in the norm and standard setting processes regarding the issue of detention in Europe.

5 DETENTION CONDITIONS FOR PRISONERS IN EUROPE

5.1 The Council of Europe PC-CP and the road towards the European Prison Rules

5.1.1 Soft versus hard standards?

In 2002, the PC-CP received a mandate by the CM (Council for Penological Co-operation, 2002) to revise the EPR dating from 1987 (Committee of Ministers, 2002). Alongside updating the EPR, other options to secure additional rights for persons deprived of their liberty were discussed in the CoE. One option was to consider an additional protocol to the ECHR. This option was introduced by the Italian Chair of the CM at the 720th Meeting of the Ministers' Deputies (September 2000). The Italian Chairmanship aimed to secure additional rights for persons deprived of their liberty and stipulated that the additional protocol is not a new initiative. This protocol could be based on the text and explanatory report already prepared by the Committee of Experts for the Development of Human Rights in 1994 (Committee of Ministers, 2000). In the mid-1990s, the political climate did not allow for the drafting of a binding text on this matter. However, at the beginning of the new millennium, the Italian Chair of the CM found the time ripe to breathe new life into this initiative because penal matters had received considerable attention from the international community. According to the Italian Chair, a binding text would complete and strengthen the work already accomplished in this area, plus it would raise the CoE's profile on this matter and its relationships with civil society⁸⁷ (Steering Committee for Human Rights, 2001a).

The Steering Committee for Human Rights (CDDH) was assigned to study the feasibility of an additional protocol and, if appropriate, to draft the actual text (Committee of Ministers, 2000). The CDDH held a first exchange of views on this matter during its 51st meeting (28 February–2 March 2001) (Steering Committee for Human Rights, 2001c). The CDDH requested the Secretariat to collect information from other organs which are particularly concerned with this issue such as the CPT, the ECtHR, the PACE, NGOs, etc. (Steering Committee for Human Rights, 2000). The CDDH Bureau considered the advisability of drafting such an additional protocol to the ECHR in 2002 and highlighted the risk of ending the evolving nature of the

⁸⁷ It is noteworthy that Amnesty International ceased to participate in the activities of the CoE when the work on the Protocol in question was suspended (Committee of Ministers, 2000).

ECtHR case law and thereby paradoxically limiting the protection provided by the ECHR. Already in 2001 the CDDH Bureau considered the intention of revising the EPR. Consequently, the Bureau argued that this update may provide an answer to some of the concerns raised by experts who favoured the idea of drafting an additional protocol to the ECHR (Steering Committee for Human Rights, 2001b). Several experts questioned whether the protocol would risk making the case law of the Strasbourg Court a static or fixed instrument. Other experts questioned the scope of such an additional protocol because the Italian proposal was very detailed. As a result, several experts argued that updating the EPR is a better format for ensuring additional rights for people deprived of their liberty. Consequently, the CDDH agreed not to proceed with the initiative at this stage and decided to closely follow the EPR update. The CDDH also agreed to reconsider the advisability of such a protocol, containing additional rights for persons deprived of their liberty, in three-four years' time (Steering Committee for Human Rights, 2001b, 2001c). In 2004, the PACE proposed to draft a European Prisons Charter to ensure more binding rules for people deprived of their liberty⁸⁸ (Parliamentary Assembly, 2004b). Also, the EP declared in a recommendation⁸⁹ that if this Charter should “*not be completed in the near future, or should the outcome prove unsatisfactory, the EU will draw up a Charter for the rights of persons deprived of their liberty which is binding on the member states and which can be invoked before the Court of Justice*” (European Parliament, 2004). The CM agreed to draft such a European Prison Charter. The CM also encouraged the EU to become actively involved in the work related to the EPR in order to reach common standards in this area (European Parliament, 2004).

5.1.2 New actors influencing the standard setting process

Despite initiatives for binding rules regarding the area of detention, the preferred option for ensuring additional safeguards for people deprived of their liberty was to update the EPR. These initial Rules, adopted in 1987, date from a period in which the CoE only had 21 members. In the meantime, East and Central European states also joined the CoE with their different understandings and practices concerning the essential components of imprisonment. This was also highlighted by the respondents: “*There were several developments. One was the*

⁸⁸ Recommendation 1656 (2004) of the Parliamentary Assembly recommending the revision of the EPR and the drawing up, in conjunction with the European Union, of a European Prisons Charter.

⁸⁹ Report with a proposal for a European Parliament recommendation to the Council on the rights of prisoners in the European Union (2003/2188(INI)).

recognition of a need to review the EPR because they [the 1987 Rules]⁹⁰ were all written from a Western perspective and could not be applied in ex-Soviet countries” (Respondent CoE 12). Furthermore, the 1987 version of the EPR was “too Western oriented”⁹¹ (Respondent CoE 9). “For the credibility of the EPR you needed a much more pan-European approach” (Respondent CoE 12). Next to the change in composition of the CoE, all interviewed respondents highlight other contextual features in which the decision to update the 1987 EPR was made: new and improved case law by the ECtHR protecting the rights for detainees, increased CPT visits, and increased activity by the PACE and CM regarding the issue of detention. Since the 1990s, the CPT started to carry out a significant number of visits and thereafter issued country and general reports in which the visiting delegation describe their observations and make recommendations on substantive issues concerning the deprivation of liberty. Also during that period, the ECtHR issued a number of decisive judgements related to the treatment of prisoners and detention conditions (Coyle, 2004, 2005). Influenced by these new realities, the time was considered appropriate for renewing the EPR. After receiving the mandate from the CM in 2002, the CDPC instructed the PC-CP to revise the EPR and to complete the work by the end of 2005 (Coyle, 2004). Throughout the drafting process, the aim was to include member states’ experiences, recent case law by the ECtHR, CPT reports, recommendations by the CM, and new priorities faced by prison administrations (Council for Penological Co-operation, 2003b; Coyle, 2004). This is also visible during the drafting process in which all these different actors were consulted and actively involved. Due to the fact that different stakeholders had input in the drafting process, the eventual end product was widely supported by the different stakeholders.

5.1.3 The role of outsiders in the standard setting process: Academic experts holding the pen

Already from an early stage in the policy-making process, the decision was made to include scientific experts to draft the revision of the Rules in addition with the input received by member states and NGOs.⁹² As a result, the PC-CP was very receptive to receive input from external

⁹⁰ In the quotes, certain passages are put into [...] this is extra information added by the researcher to either improve the readability of the quote and/or to guarantee the respondent anonymity.

⁹¹ Translated by the researcher from Dutch.

⁹² The following NGOs were consulted: the International Corrections and Prisons Association, the International Centre for Prison Studies, the Association for the Prevention of Torture, Amnesty International, Prison Reform

experts in the shape of academics, practitioners, and civil society. Furthermore, the actual drafting of the EPR was highly influenced by external experts: academics who, due to their expertise in the area of penology and criminal law, were chosen and appointed with the task of updating and drafting the EPR. This is related to the feature of individual resources in which the individual knowledge and information influenced the decision to select these academics. Consequently, three academics were selected who profoundly influenced the debate and outcome: Gerard de Jonge, Dirk van Zyl Smit, and Andrew Coyle. The interviews indicate that the combination of an academic profile with “*a strong practical background*” (Respondent CoE 12) were essential features for functioning as an expert in the PC-CP and to draft the EPR. Furthermore, “*you [an expert] need to have comparative knowledge and drafting skills. This is usually the expertise of academics. They should be able to give a synthesis of what you hear, what you know, and what the practitioners tell you. You [an expert] need to have this capacity of synthesising the information you get which is not always the positive and best side of practitioners who may be very good in their field of competence but do not necessarily know what is happening in other countries and the systems in Europe differ quite a lot*” (Respondent CoE 1).

The individual resources (information and knowledge) proved to be only one feature for explaining why these experts were chosen. Informal relations and previous cooperation within the CoE were also influential. According to one respondent, the decision to specifically appoint these three experts came from the members of the PC-CP (Respondent CoE 1). Another respondent indicates that it was the personal preferences of the members and the Chair of the PC-CP that were important for choosing these specific experts (Respondent CoE 6). It appears that the choice for the three academic experts was a natural consequence of the combination of their backgrounds (combination of practical and academic experience) plus previous involvement with the CoE or CPT as an expert. During that time in particular, at the beginning of the new millennium, there were, and arguably still are, “*quite a small group of people active in this area and a small sphere of interest*” (Respondent CoE 12). A relatively small group of people was working on detention issues. As a result, the three experts knew each other before they were officially appointed to draft a new version of the EPR. The mix of competences between the three experts was especially important: “*they [the PC-CP] appointed three people who actually contributed different skills*” (CoE Respondent 12). Dirk van Zyl Smit had a legal

International, Human Rights Watch, International Helsinki Federation for Human Rights, Observatoire International des Prisons (Council for Penological Co-operation, 2003a).

background and had also drafted penal legislation in South Africa. Andrew Coyle combines an academic profile with practical experiences as a former prison governor. Gerard de Jonge is an academic who wrote, inter alia, a practical handbook for detainees.⁹³ Due to this mix of competences, the experts were “*able to argue their case to whomever*”. Also, the experts “*did not do anything that [the experts] could not justify. Everything that [the experts] proposed went through. It may not have gone through in the wording that [the experts] preferred but I do not think they [the PC-CP and the CDPC] refused any specific rule. [The experts] were quite happy with the outcome. There were a number of rules that even the experts liked to see them stronger or weaker or phrased slightly different but that is the result of negotiating with 47 countries*” (CoE Respondent 12).

5.1.4 The formal rules of the game in drafting the EPR

The basic pattern of work for drafting the EPR was the following: “*a group of three experts who met both separately and together with the PC-CP. The PC-CP would go through the rules numerous times and then they would report to the CDPC*” (Respondent CoE 8). The experts drafted the actual text which then had to be adopted by both the PC-CP and the CDPC. It was not only the experts, but also the composition of the PC-CP that influenced the negotiations (see coding scheme feature “*composition*”). The composition of the PC-CP changed during the drafting process: “*when we began, most PC-CP members were from what you may call EU countries or Western Europe. Gradually, Central Europeans, then the Eastern Europeans and Russians came on board*” (Respondent CoE 12). This was important in order to incorporate non-Western European views. Furthermore, “*the PC-CP members need to be elected by the CDPC and need to represent the different regions of the CoE (Scandinavia, East, West, South, and Central Europe). Because the different regions are represented in the PC-CP, you [the PC-CP] already incorporate in your discussions different traditions and cultures. If you can reach a consensus despite all these differences at PC-CP level it will be easier to defend our position at the CDPC*”⁹⁴ (Respondent CoE 9). During the period the EPR was being redrafted, the PC-CP was composed of seven members with a mixture of academics and professionals. After the adoption of the EPR, the PC-CP members increased from seven to nine. The member states may suggest candidate members for the PC-CP but “*that is only one member state; you need*

⁹³ So called “*Bajesboek*”.

⁹⁴ Translated by the researcher from Dutch.

*more member states behind you to get appointed*⁹⁵ (Respondent CoE 9). The CDPC is composed of member state representatives and come from the ministries of justice. During negotiations at this level, political elements and considerations come into play. At the CDPC *“you will not only find practitioners’ knowledge but also the political drive behind accepting a certain sentence or a word in the text”* (Respondent CoE 1).

During the 45th meeting of the PC-CP (February 2003), organisational guidelines and a possible structure of the draft EPR were discussed. The PC-CP decided to maintain three broad categories: management issues, regime related issues plus special categories of prisoners, along with issues related to complaints and inspection. The PC-CP also suggested assigning one scientific expert for each specific issue (Council for Penological Co-operation, 2003a). At this meeting, the experts further defined the scope of the draft and explained the issues which needed to be covered under each identified category. During this meeting, the ECtHR was also involved and Judge Tulkens⁹⁶ gave a presentation on prisoners’ rights under the ECHR. Next to the Strasbourg Court, the member states were also invited to make general comments concerning the process (Council for Penological Co-operation, 2003a). At the October 2003 PC-CP meeting, the experts presented a draft structure of the Rules. The discussions concentrated on the scope and application of the draft together with an analysis of the results of the first consultation round with member states and NGOs. Based on this input, the experts aimed to prepare a first draft of the EPR by mid-2004 (Council for Penological Co-operation, 2003b). One respondent indicates that *“the one thing that [the experts] can claim credit for is, initially, the Committee wanted to amend the old rules. [The experts] persuaded them [the PC-CP] not to do that and to go for a complete new set of rules. [The experts] spent an enormous amount of time on structuring the rules. There was “this very strong idea that it should move from general principles to specific rules and that it should be simplified”* (Respondent CoE 8). A lot of effort was made to *“make sure that each rule was short and punchy. In my recollection just the first part, the principles, took about a year to write. It took a very long time. Also one of the things [the experts] found the most difficult thing to do was to define the scope. That took weeks of talking and thinking. Once [the experts] had written the first seven or eight principles the rest kind of followed logically”* (Respondent CoE 8).

⁹⁵ Translated by the researcher from Dutch.

⁹⁶ Judge Tulkens was the Belgian judge at the ECtHR from 1998-2012.

During the October 2004 PC-CP meeting, the draft EPR was further discussed and they decided to include general principles at the beginning of the text. Proposals to include a specific minimal cell size were not approved and the issue of whether a doctor or a fully qualified nurse could examine prisoners proved to be very sensitive for the PC-CP members. Regarding the discussions on the minimal cell size, one respondent indicates that *“you try to be general for the sustainability of the rules but they need to be specific enough. Looking back on it, you think on certain aspects we had to be stricter or to push for it harder for example the minimal cell size”*.⁹⁷ (Respondent CoE 6) Furthermore, *“because we need to incorporate the differences and agree on something that is acceptable and feasible for the 47 member states, we have to remain general but still not forgetting our own standards and principles”* (Respondent CoE 1). Next to discussions on the minimal cell size, the draft rules on disciplinary punishment also had to be re-redrafted together with the rules on prison inspection, which were considered too detailed by the PC-CP members. In this draft, specific references to prison regimes were still absent, as were rules related to medical confidentiality, welfare, long-term visits, allocation, and re-allocation. Taking into account all comments by the PC-CP, the scientific experts revised the text, which was translated into French in order to be discussed at the CDPC Bureau meeting of 15-16 November 2004. The draft was also sent to the directors of prison administrations of the CoE member states in order for them to be informed, consulted, and to express their opinions (European Committee on Crime Problems, 2005a). The national administrations were invited to send written comments or to present them orally at the ad hoc Conference of Directors of Prison Administration in November 2004, which was held in Rome (Council for Penological Co-operation, 2004). At this ad hoc Conference, the three appointed experts presented the draft EPR together with the explanatory memorandum. The experts highlighted the main differences and significant changes with the old rules. Also the preferred structure in which the draft will first set out rules applying for all prisoners, followed by different rules applicable to pre-trial and sentenced prisoners was presented. At this conference, the President of the CPT welcomed the revision of the EPR because *“it reflects the growing consensus about the need to take forward shared values and general principles concerning the human rights of prisoners”* (Coyle, 2004, p. 6). The CPT President emphasised that there is a high degree of congruence between the EPR and the recommendations stipulated in the CPT reports. As a result, the strengthening of these basic principles is an important advancement in the context of prison overcrowding in several European states (CPT, 2005a). As a result, the feature *“cooperation*

⁹⁷ Translated by the researcher from Dutch.

with other actors” across and within the CoE is influential for determining the negotiations and eventual outcome of the EPR.

5.1.5 Incorporating the political dimension in the EPR

The draft recommendation containing the EPR was further revised within the PC-CP in light of the expressed opinions and received comments. Consequently, the text went from the PC-CP which is a technical body, to the CDPC, which is, in essence, a more political body. *“Twice it went to the CDPC and came back for revision. There were written comments two rounds so it was really quite a big thing”* (Respondent CoE 1). This revised text was presented at the 2005 CDPC plenary (March) by the PC-CP Chair, Mr. Bertel Österdahl, who was at that time the head of the Swedish prison administration (European Committee on Crime Problems, 2005a). The CDPC considered finalising and approving the draft text plus commentary during this meeting. However, throughout the discussions the necessity of a wide consultation was stressed by the member states representatives. The draft text was approved by the PC-CP, but this body consisted of only nine members and therefore, it could not represent the CoE member states. According to the CDPC plenary, the draft text should be subject to further consultation procedures that are open to all member states in order to take into account the specialised and political nature of the text. Moreover, a number of member states needed full consultations with their national, and sometimes regional, authorities. As a result, the proposed accelerated procedure did not allow for sufficient consultation time in order to consider the draft text. The CDPC concluded that the revision could not be finalised and invited all delegations to send their written comments. Taking into account all the feedback and opinions, the draft text was again discussed and revised in the PC-CP (Council of Europe, 2006a).

The respondents indicated that, after drafting the concept paper at the PC-CP, and going to the CDPC *“some of the countries which felt most threatened were actually the original Western European member states”* (Respondent CoE 12). The level of interest and priorities were also much more diverse in the CDPC as compared with the priorities from the PC-CP: *“at the CDPC level the different countries had a different focus, level of competence, and interest”* (Respondent CoE 8). Certain representatives were very active and knowledgeable but *“other countries did not seem to care or did not always send a representative. It depends how you view these Rules and how seriously you take them”* (Respondent CoE 8). One respondent indicated

that the received comments from the 47 member states on the draft were sometimes completely contradictory. However, *“the meetings in Strasbourg with the CDPC were really important moments to discuss with all the member states and try to maintain the coherence of the text”*⁹⁸ (Respondent CoE 9). When the draft EPR was presented to the CDPC, certain countries were shocked and found the text on certain points too liberal. Other countries found that the draft did not go far enough. The PC-CP Chair Mr. Bertel Österdahl had, according to the respondents, an important role in persuading member state representatives of the content of the draft text. He was able to do that because *“he had a practical background, and him supporting this proved it was not some product of certain academics writing from their ivory tower”* (Respondent CoE 9). As a result, the person holding the Chair position does have an influence on the negotiated outcome. This is closely related to the feature of *“key positions”* in a negotiation process. A Chair who is deemed knowledgeable, experienced, and well informed by the member states will enjoy more persuading possibilities than a Chair who is considered not to have the most adequate professional and practical qualifications or experiences.

Despite the initiative to draft a European Prison Charter, the main focus of the CDPC was still on the finalisation of the EPR. The CDPC prepared a progress report on the EPR drafting process for the forthcoming 26th Conference of European Ministers of Justice (April 2005) (European Committee on Crime Problems, 2005a). This conference is a specialised CoE conference at the ministerial level, which discusses matters and challenges related to justice and the rule of law. At the 2005 Conference of European Ministers of Justice, the CoE Deputy Secretary General (SG), Maud de Boer-Buquicchio, together with the adopted resolution concerning the revision of the EPR, called on every member state to adopt the revised Rules as soon as possible. Once the Rules were adopted, the Deputy SG stated that the CoE can examine in detail the question of a European Prison Charter as proposed by the PACE and the EP. Already at this Conference, ministers raised questions regarding the feasibility and added value of such a Charter but supported the CDPC’s move to examine this (Council of Europe, 2005a; de Boer-Buquicchio, 2005). One respondent highlighted that also within the PC-CP, progressive voices were worried about developing such a binding Charter because it could decrease the level of protection of the standards developed in the EPR (Respondent CoE 9).

⁹⁸ Translated by the researcher from Dutch.

The enlarged CDPC Bureau,⁹⁹ together with the Chair of the PC-CP and one of the experts (Dirk van Zyl Smit), met in June 2005 to revise the text of the EPR and its commentary (European Committee on Crime Problems, 2005a). The revised version was sent to all CDPC delegations with a request to send all comments to the CDPC Secretariat by 15 September 2005 (European Committee on Crime Problems, 2005c). On the basis of the received comments, the Bureau aimed to finalise the text at its October meeting and forward it to the CM for adoption (European Committee on Crime Problems, 2005c). A synthesis of the received comments was presented by the CDPC Secretariat before the Bureau meeting of October 2005. These were considered, together with comments made by the CPT. The draft text and its commentary were approved by the CDPC. The draft text in the form of a recommendation was submitted to the CM for adoption (Council of Europe, 2006a; European Committee on Crime Problems, 2005b). The CM then adopted the updated EPR¹⁰⁰ on 11th January 2006 (Committee of Ministers, 2006). The adopted 2006 EPR differs in style and substance from the previous version. At the beginning of the Rules, certain basic principles are spelled out.¹⁰¹ The EPR also defines its scope and application (Rules 10 to 13) together with different sections of varying aspects of life in prison: conditions of imprisonment (e.g. admission, allocation and accommodation, hygiene, nutrition, legal advice, contacts with outside world, prison regime, work, education, exercise, and recreation), health (e.g. mental health care, medical and health care personnel) good order (e.g. security, safety, special high security or safety measures, use of force, and weapons), management and staff (e.g. selection and training of prison staff, prison management), inspection and monitoring, untried and sentenced prisoners (Committee of Ministers, 2006). The last Rule of the EPR is that these Rules shall be updated regularly (Rule 108). It is further explained that these updates should be based on scientific research and carefully consider the

⁹⁹ Members of the Bureau and other CDPC delegations attended at their own expense.

¹⁰⁰ Contained in Council of Europe Committee of Ministers recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

¹⁰¹ For example Rule 1-9 of the EPR: All persons deprived of their liberty shall be treated with respect for their human rights; Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody; Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed; Prison conditions that infringe prisoners' human rights are not justified by lack of resources; Life in prison shall approximate as closely as possible the positive aspects of life in the community; All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty; Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged; Prison staff carry out an important public service and their recruitment, training, and conditions of work shall enable them to maintain high standards in their care of prisoners; All prisons shall be subject to regular government inspection and independent monitoring (Committee of Ministers, 2006).

relationship between the Rules and other instruments, standards, and recommendations in the penal sphere.

5.1.6 The formation of an epistemic community

For the EPR the PC-CP, and by extension the CoE, relied heavily on outsider experts. It is argued that this network of experts took the form of an epistemic community. Policy ideas from this type of community generally evolve independently rather than under the immediate influence of government authorities (Adler & Haas, 1992). The impact of epistemic communities is institutionalised through the active involvement of their members in the policy-making process, through their ability to acquire regulatory and policy-making responsibility, and to persuade others of the accuracy of their approach (Adler & Haas, 1992). For this epistemic community, certain analysed features are important: resources (knowledge and information), belief system (e.g. practical and academic background, legal principles) and their individual norms, priorities, and ideas. Due to their competences in the penological field (practical and academic) and previous working experience in the CoE, the experts and the PC-CP Chair held a lot of policy-relevant knowledge. The role of the experts was institutionalised and their knowledge changed into power to draft norms and standards in the area of detention conditions for prisoners. The experts had an independent role, which was never questioned, and they could do their work in total autonomy (Respondent CoE 6). This was also highlighted by another respondent who was active in the PC-CP: *“we had the freedom to think about what is a correct recommendation in this area and what should be in it. This is different with the CDPC; these people are there with a task from the ministry of justice. Sometimes you receive cooperation but also opposition from unexpected sources”*¹⁰² (Respondent CoE 9).

During the drafting process, the respondents highlight there were *“no dividing lines on major issues, but there were a number of lively debates about specific issues. It took three years of [the experts] going three-four times a year to Strasbourg and [the experts] did all of this work pro bono. It was a big chunk out of [the experts] lives”* (Respondent CoE 12). Respondents indicated that the work of drafting the EPR was rather well-organised and took about three years before it was approved by the CM. The basic drafting of the text was done by the appointed experts in which they had to *“bring [their] professional expertise but at the same*

¹⁰² Translated by the researcher from Dutch.

time being politically aware of what will be accepted and what not. You had to be quite diplomatic in finding the right words” (Respondent CoE 12). The experts “*were drafting in a way that would meet the approval of the member states and the CM ultimately*” (Respondent CoE 12). Once the text went from the PC-CP to the CDPC and the members of the CDPC began to see the drafts “*no one was against the review in principle. What [the experts] needed to accommodate was some individual countries with individual issues. For example, every prisoner will have one hour of exercise a day into fresh air. That was then changed to a reasonable amount of time and the one hour disappeared. Reasonable is in the eye of the beholder*” (Respondent CoE 12). The respondents indicated that the process of drafting the rules involved cooperation with “*surprisingly few other actors. It was mostly the experts and the PC-CP*” (Respondent CoE 8). “*I do not think the member states had that degree of interest in the details, they did not give it a high priority*” (Respondent CoE 12). The entire process was primarily expert driven (Respondent CoE 8), but opportunities were created to provide input and comments. The experts and the PC-CP received input and comments from a number of actors (for example the European Commission, Penal Reform International, Association for the Prevention of Torture, International Center for Prison Studies, etc.) but most importantly from the CPT and the ECtHR (Respondent CoE 1, CoE 6).

5.1.7 Changing the formal structured context after the adoption of the EPR

It is a notable achievement that such an instrument like the EPR was developed: “*the simple truth is that usually the rights of detainees are not amongst the priorities in the countries*” (Respondent CoE 1). Respondents highlighted that the adopted text was a good compromise solution for all the different views in Europe regarding the issue of detention. “*This process is also extremely interesting because you need to come to a consensus between people with a totally different background*”¹⁰³ (Respondent CoE 9). One respondent further stated that “*I think that about 90% of what the PC-CP proposed went through or even more than that 95%*” (Respondent CoE 8). Another respondent highlighted that “*I think I can safely say that everything that we proposed went through. It may not have gone through in the wording that we had preferred but I do not think they refused any specific rule*” (Respondent CoE 12). Also, because the draft version had “*many rounds of negotiations, it was finally a product in which everybody was feeling involved and everybody found his or her contribution. It was not only*

¹⁰³ Translated by the researcher from Dutch.

the academics that produced the first draft but it had so many revisions that the final product was something everybody felt attached to” (Respondent CoE 1). What is remarkable about the whole process of updating the EPR is that the working methods and composition of the PC-CP changed because of the way this standard setting process occurred. *“The PC-CP now has plenary meetings once a year in which all the member states participate as a result that such an important text like the EPR should be negotiated, before it goes to the CDPC, at a larger scale. Now we are also having plenary meetings in the PC-CP”* (Respondent CoE 1). Currently, once a year the PC-CP has a plenary meeting in which the 47 CoE member states are invited. As a result, *“you already have a discussion with the member states before it goes to the CDPC”*¹⁰⁴ (Respondent CoE 9). The EPR was the last recommendation that was written entirely within the PC-CP. The CDPC was confronted with an entire draft and could only comment on it at a late stage in the process. *“Some member states highlighted that they do not want to be confronted with an end product anymore. They want to have more input in the actual realisation of the text.”* From that point onwards, the Chair of the PC-CP needed to participate in the CDPC Bureau or the CDPC plenary meeting to give more information concerning the progress of different recommendations and drafts¹⁰⁵ (Respondent CoE 9).

5.1.8 The informal aspects of the EPR standard setting process

Respondents indicate that the role of the Chair of the PC-CP and the CDPC was a key position during the negotiations, especially for seeking compromise and consensus (Respondent 8, 9, 12). *“The Chair of the PC-CP is a very important position firstly because the person can facilitate the debate. Secondly, the Chair of the PC-CP presents its findings to the CDPC which is very important”* (Respondent CoE 8). While these negotiations occur in the formal structures there is also an informal component to this standard setting process. Because there was a relatively small group of people working on the issue of detention at the CoE level, the experts knew each other before they were formally appointed by the CoE to draft the EPR. The experts state that *“it clearly helped that [the experts] knew each other well enough and debated everything through and [the experts] worked well together. That was important but it was a benefit, it was not essential”* (Respondent CoE 12). Furthermore, their ambition or motivation to write these rules was equal: *“it was about being clear what human and decent conditions*

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

are. *[The experts] were not outliers but mainstream thinkers*” (Respondent CoE 12). The three experts met on their own, outside of the formal framework of the PC-CP. During negotiations, especially at the CDPC, coffee breaks were frequently used to iron out differences and to seek a compromise. According to one respondent *“quite a bit of lobbying went on because a number of people in the CDPC, the people appointed by the member states, were very often people with some interest in this”* (Respondent CoE 12). This was different in the PC-CP in which one respondent indicated that there was no lobbying done outside the meeting rooms because *“people are free to speak and sometimes, or even often, if the suggestions are good they are taken on board even though they come from an observer. There is no difference in status of opinion between the observers or the PC-CP members. If you consider something important everybody can take the floor”* (Respondent CoE 1). In order to participate in the PC-CP meetings, organisations such as NGOs need to have observer status with the CoE.

5.1.9 Evolving soft rules versus hard law

The option for a European Prison Charter was on the agenda of the 47th meeting of the PC-CP (October 2004) (Council for Penological Co-operation, 2004). Already then, the representative from the EU Commission clarified that despite the EU having discussed, on several occasions, standard setting in the area of people deprived of their liberty, that this question should be set aside for the time being. At the 2004 PC-CP meeting, some members argued that it would be impossible to take a decision on the feasibility of a Prison Charter without having a draft text to have an idea of which principles could be acceptable. Consequently, Dirk van Zyl Smit proposed to prepare such a draft text based on the UN basic principles for the treatment of prisoners (Council for Penological Co-operation, 2004). The PC-CP was largely in favour of a draft Charter text, but stated that in order for them to take the exercise of the European Prison Charter further, they would need a clear mandate by the CDPC. The issue of the feasibility of such a Charter was also discussed at the CPT Bureau and concluded that: *“if such a charter were to have the status of a Convention and thus be binding upon state parties, it would in principle have some added value. While the EPR have strong normative force, states are not legally obliged to implement them”* (European Committee on Crime Problems, 2005b). The CDPC Secretariat prepared a memorandum on this topic in which several options were presented, together with their pros and cons. This analysis was discussed during the CDPC plenary meeting in April 2006. The CDPC concluded that a binding European Prison Charter

was not a feasible proposition. One of the main reasons, according to the CDPC, was that “*it would be difficult for the states to reach a consensus on more than a very limited number of binding legal rules which could have the result of impoverishing and stigmatising existing standards and could moreover lead to weakening the importance and the impact of the EPR on the work of the prison administrations in the member states and at the European level in general*” (European Committee on Crime Problems, 2006, p. 20). The CDPC considered that it would be more appropriate and necessary to work on the existing standards and to further strengthen them by, inter alia, elaborating a Compendium of the CoE recommendations in the penitentiary field (Council of Europe, 2006a; European Committee on Crime Problems, 2006).

One respondent highlighted that such a Prison Charter could open discussions in a whole range of areas to have binding legal instruments: “*I think Europe was not ready for such a Prison Charter and it was not seen as a priority. If you would have a charter on prisoners then you need a charter for victims and it is opening a whole area*” (Respondent CoE 12). The assessment of a European Prison Charter revealed several difficulties. For example, a binding instrument with detailed provisions could cause difficulties in collecting a sufficient number of signatures and ratifications. However, prison administrations attached great importance to the EPR, and this may have highlighted the need to go one step further and agree on a set of guiding principles of a general nature. During the 2004 PC-CP meeting it was also noted that, if the CoE did not take the initiative of drafting this Charter, there was a possibility that the EU would develop such a Charter. This could risk creating different standards of protection for prisoners across Europe (Council for Penological Co-operation, 2004). This problem ended up not being an issue after all because the EU has, at the time of writing,¹⁰⁶ not shown any initiative to draft binding rules for people deprived of their liberty.

Since the adoption of the EPR, the ECtHR has made more and more reference to the EPR in its case law regarding detention issues. The reason why the ECtHR makes so much reference to the EPR is, according to one respondent, because the EPR represents “*a political consensus adopted by 47 member states about what should happen in Europe*”¹⁰⁷ regarding the issue of detention (Respondent CoE 9). In the CoE, there is a certain synergy between the different outcomes of the ECtHR, the CPT, and the recommendations by the CM (such as the EPR) representing the judicial, monitoring, and political levels. Because they are in constant

¹⁰⁶ March 2018.

¹⁰⁷ Translated by the researcher from Dutch.

interaction, they empower and mutually reinforce each other (Respondent CoE 8, CoE 9). A side effect of the increased use and reference by the ECtHR of the EPR is that the dynamic of the EPR as a soft standard is evolving. The evolution in status of existing soft CoE standards regarding detention conditions was explicitly acknowledged by Judge Pinto De Albuquerque in the *Mursic v. Croatia* judgement.¹⁰⁸ The Judge describes the EPR as the prototype of hardened soft law in the CoE's normative system. Furthermore, the Judge states that: "*Cosmopolitanism links the CoE legal order with the world, as much as the dialogue with the European domestic legal orders, and notably with their apex domestic courts, links it with the values of European society*".¹⁰⁹ This hardened soft law is essential in order to continue to protect the rights of detainees because a binding Prison Charter has been proposed several times with no result. As a result of this effect, questions can be raised about the extent to which binding rules are necessary when the dynamics of purely soft standards are evolving to a more "hardening" approach? This was also highlighted during the interviews. The absolute necessity for binding "hard" rules is possibly not the best way forward. "*I do not think any government envisaged that the European Court would rely as extensively as they do on the EPR. I am absolutely thrilled that they are doing that. I do not think I expected that either*" (CoE Respondent 8). According to the respondents, the main problem remains the implementation of the EPR. As a result, the respondents are not convinced that a binding Prison Charter is necessary. "*We don't need new rules, we need to implement*" (Respondent CoE 12).

5.1.10 The EPR as a living instrument?

Andrew Coyle, one of the scientific experts, highlights that the EPR are founded on long standing human rights principles which are unlikely to change but the detail in the individual rules is subject to continuous development. As a result, the "*rules should not be regarded as tablets of stone but rather as dynamic and living*" (Coyle, 2005, p. 21). The need to regularly update these rules was also stressed at the CoE ministerial level. For example at the 28th (2008) Conference of European Ministers of Justice, it was highlighted that in order to ensure the continued adequacy of the norms contained in the EPR, the PC-CP is entrusted with the task to "*re-examine on a regular basis the EPR and to propose to the CDPC their updating if necessary*" (Council of Europe, 2007, p. 22). At the 30th CoE Conference of Ministers of

¹⁰⁸ Case of *Mursic v. Croatia* (Application no. 7334/13, 20 October 2016).

¹⁰⁹ Case of *Mursic v. Croatia* (Application no. 7334/13, 20 October 2016), p. 86.

Justice, a resolution was adopted in which the CDPC was invited in cooperation with the CDDH (Steering Committee for Human Rights) and the CPT to:

- Evaluate the measures taken by member states to follow, inter alia, the EPR;
- Take stock of problems faced by prison administrations, more particularly prison overcrowding, remand in custody, treatment of foreign nationals in prison, as well as other topics which may require additional guidance through standard setting;
- Consider, in the light of the outcome of such an assessment and stock-taking, the necessity of reinforcing the legal framework in that field, including the feasibility and advisability of a legal binding instrument regulating certain aspects of detention conditions, prison management, and the treatment of prisoners, or undertaking other measures to achieve this aim, including the identification and dissemination of best practices (Council of Europe, 2010).

At the 13th meeting of the PC-CP working group (September 2016), it was decided that one of the priority tasks for 2017 will be, inter alia, the revision and updating of the commentary to the EPR. Professor Dirk van Zyl Smit was again prepared to undertake this revision task as of May 2017 (Council for Penological Co-operation, 2016), which was later postponed to September 2017 (Council for Penological Co-operation, 2017). The revision of the commentary should reflect the latest relevant ECtHR pilot judgements plus the UN Nelson Mandela Standard Minimum Rules for the treatment of prisoners. Professor van Zyl Smit, by analysing the Rules and taking into account the latest developments, will put forward for discussions in the PC-CP any proposals for updating, complementing, or improving some of the rules, if necessary (Council for Penological Co-operation, 2016). The PC-CP working group, and one of its members Nikolas Koulouris, drafted a report analysing the developments in the penal sphere since the adoption of the EPR in 2006 (European Committee on Crime problems, 2017). At the 14th meeting of the PC-CP working group (January-February 2017) it was highlighted that any updating or amendments to the commentary should be well targeted and relate to specific parts. In case there is a need to further develop some of the Rules, this should be put forward for approval before the CDPC and should only concern a few Rules. Participants were invited to send their amendments and proposals to update the commentary to the PC-CP Secretariat (Council for Penological Co-operation, 2017).

Only the updating of the commentary of the EPR is a conscious decision. One respondent states that if the EPR were to be redrafted and come again before the CM now, *“I am not sure they*

would approve some of these things” (Respondent CoE 8). Respondents indicate that prisons have become much more politically sensitive. *“They [prisons] have a much higher political profile than they did 15 years ago. That is largely driven by the movement of people, immigration, and asylum, the so-called war on terror and high security. I could imagine that the people involved said let’s not open up the Rules again because you can end up with less and for now we only redraft the commentary to the EPR”* (Respondent CoE 12). Another respondent indicates that it is precisely because of the increased EPR reference by the ECtHR in its case law that the political pressure increased on this topic. *“The EPR together with the CPT standards are referred to as legal instruments and the Court refers to them as a European consensus how the situations regarding detention should be. The soft law is evolving and this development is perceived by certain countries as a threat”*¹¹⁰ (Respondent CoE 9).

5.2 The European Union and the road towards the Green paper on detention

The EU has shown some interest in the area of detention conditions for prisoners. This interest is linked to the smooth functioning of the mutual recognition instruments that facilitate judicial cooperation in criminal matters. This process has been accelerated due to the influence of 9/11 and the adoption of the EAW. *“The influence of 9/11 was crucial for the adoption of the EAW. The problem of different prison conditions between the member states was only raised afterwards. Before the adoption, this was never discussed. Also, it was assumed that the EAW was not going to be used so frequently but the EAW forced us to think about other things”* (Respondent Commission 2). In 2011 the Commission issued a Green paper on detention (European Commission, 2011b). The origins of this Green paper can be found in the roadmap on procedural rights. The initial proposal by the Commission of this roadmap dates back to 2004¹¹¹ (Commission of the European Communities, 2004). The roadmap includes the request, under measure F, for a Green paper on pre-trial detention¹¹² (Council of the European Union, 2009b, 2009i). The actual Green paper, issued by the Commission, rightly shifts the attention to detention conditions in general by not only focusing on pre-trial detention but also linking

¹¹⁰ Translated by the researcher from Dutch.

¹¹¹ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final.

¹¹² The short explanation is that *“the time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.”*

the issue of detention conditions to the effective functioning of the Framework Decision on the transfer of prisoners¹¹³ (Vermeulen, 2012). Before the consultation process for the Green paper on detention was initiated, a number of academic projects were financed by the Commission and published online as reference documents.¹¹⁴ Two of these studies were completed by the Institute for International Research on Criminal Policy (IRCP) from Ghent University (Vermeulen et al., 2011a, 2011b). The study concerning the mutual recognition instruments and the cross-border execution of judgements concludes that the often subordinate material detention conditions in most member states could potentially infringe upon prisoners' fundamental rights under the ECHR. Furthermore, the study highlights the alarming fact that a vast number of inferior standards derive from binding European and international norms and/or ECtHR jurisprudence (Vermeulen et al., 2011a). The second IRCP study, focusing on material detention conditions and the execution of custodial sentences and prisoner transfers in the EU member states, identifies the problematic issue of prison overcrowding across the EU. One of the observations of the study is that *"prison overcrowding is in fact the mother of many other problems relating to prison conditions, such as inter-prisoner violence, insufficient cell space per prisoner, staff shortage, inadequate programs of activities, poor health conditions, etc"*. (Vermeulen et al., 2011b, p. 37). Other identified issues of concern were old prison accommodations, sanitary facilities, and health care. Despite an array of legally binding and non-binding European standards, this does not tell anything about the actual situation, which is not always according to the prescribed commitments (Vermeulen et al., 2011b). Another background document in preparation for the Green paper on detention was executed by the universities of Tilburg and Greifswald focusing on the issue of pre-trial detention. The study concludes that across the analysed 27 member states, certain problems always re-occur: the length of pre-trial detention and the conditions under which this is enforced. These identified problems were again linked to overcrowding and/or the lack of meaningful activities for remand prisoners (Van Kalmthout et al., 2009). The aforementioned academic studies each highlight the issue of material detention conditions. Subsequently, substandard prison conditions may lead to serious challenges to the mutual recognition instruments developed to facilitate judicial cooperation in criminal matters.¹¹⁵

¹¹³ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

¹¹⁴ For the reference studies see http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm, last consulted on 07/02/2017.

¹¹⁵ Source: <http://ec.europa.eu/green-papers/>, last consulted on 07/07/2016.

5.2.1 *The role of the Commission and other stakeholders*

The Green paper on detention was developed by the Commission, Directorate-General Justice, as requested by the Council. This was followed by a public consultation with the aim of reaching “*a wide audience and stimulating interest in many quarters. The Commission is interested in receiving feedback, comments and replies from practitioners, such as judges, prosecutors and lawyers and other legal practitioners, directors of prison administrations, people working in the social and probation services, pre-trial detention centres and prisons, academic circles, relevant NGOs and government bodies*” (European Commission, 2011b, p. 12). During this consultation process, the Commission received a total of 81 replies from national governments, practitioners, international organisations, NGOs, and academics (European Commission, n.d.). After analysing the replies, the Commission acknowledges that detention conditions can have a direct impact on the smooth functioning of the MR principle.¹¹⁶ The document further indicates an alarming picture in the diversity of detention conditions across member states. From the replies of the member states, the Commission could see that “*most member states were not in favour of legislative action regarding detention conditions at that stage. The Commission has to work with, and has to be backed up by, the member states. Poor detention conditions and issues such as overcrowding are a problematic issue for some member states, who have asked for increased EU coordination on this matter as they might have difficulties to put detention issues on the agenda in the national political context*” (Respondent Commission 1).

Next to the collected input for the Green paper on detention, the Commission received a substantive number of Parliamentary questions¹¹⁷ regarding the issue. These Parliamentary questions highlighted the diverse situation in member states prisons such as overcrowding, high numbers of pre-trial detainees, and detention conditions. The questions inquire about specific actions by the Commission and the Council to ensure that fundamental rights of persons detained in prisons are respected and that detention conditions are improved in the member

¹¹⁶ This principle is the foundation for all instruments that were developed to facilitate judicial cooperation in criminal matters across the EU. For more information concerning the principle of mutual recognition and the different instruments see Deruiter and Vermeulen (2016).

¹¹⁷ All Parliamentary questions are accessible at: <http://www.europarl.europa.eu/plenary/en/parliamentary-questions.html?tabActif=tabLastSecond&tabType=wq>, last consulted on 20/01/2017.

states. Questions were raised as to what the Council will do to follow up the Green paper and to promote minimum standards for prisons, detention conditions, and a common set of prisoners' rights in the EU. Furthermore, the question was raised about whether the Commission is willing to propose EU legislation which incorporates the European Prison Rules and, if the time is right, a binding legislative instrument. Also, in the framework of the EAW, questions were raised about whether when prison conditions in the EU are not improved, do courts have a de facto refusal ground to block the execution of an EAW in order to protect a person's fundamental rights. The answers by the Commission and Commissioner Viviane Reding¹¹⁸ confirm that detention conditions fall under the competence of the member states who are bound by existing international and CoE standards. The Commission focus lays with the implementation of existing EU legislation¹¹⁹ and considers that the correct implementation will have a positive effect on prison overcrowding and pre-trial detention (Patriciello, 2012). As a result, at that time the Commissioner did not find new initiatives in this area necessary because the scope for the EU to act on this is contested. As a result, the focus was on the implementation of the existing instruments for facilitating judicial cooperation in criminal matters.

In the aftermath of the consultation process for the Green paper, several workshops were organised by the Commission as a follow-up for the Green paper and to facilitate the implementation of the framework decisions on the transfer of prisoners (2008/909/JHA), probation, and alternative sanctions (2008/947/JHA) and the European supervision order (2009/829/JHA). During such expert meetings, the academic studies, serving as background documents for the Green paper, were presented.¹²⁰ Also, Andrew Coyle, one of the three scientific experts drafting the EPR, participated in such an expert meeting to link the framework decisions with the context of the CoE standards and the EPR (European Commission, 2012). Problems with the implementation of existing standards related to detention conditions was also the topic of the expert meeting organised by the Commission in November 2012. During this meeting, the Commission reiterated that most member states are not in favour of new legislation at the EU level in this area (Statewatch, 2012). The EP contributed to the Green paper with the

¹¹⁸ Mrs. Viviane Redding: Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship (2010-2014).

¹¹⁹ E.g. The European Arrest Warrant, transfer of prisoners (Framework Decision 2008/909/JHA), probation decisions and alternative sanctions (Framework Decision 2008/947/JHA), alternative to pre-trial detention (Framework Decision 2009/829/JHA).

¹²⁰ On 20 March 2012, the IRCP studies regarding material detention conditions were presented by prof. dr. Gert Vermeulen.

adoption of a resolution. This resolution, inter alia, called the Commission to come forward with a legislative proposal on the rights of persons deprived of their liberty plus to develop and implement minimum standards for prisons and detention conditions.¹²¹ One respondent indicated that this resolution was not negotiated with the MEPs but with the policy advisers. *“In this case I remember that we had a relatively light procedure in which the policy advisers negotiated the resolution”* (Respondent EP 1). Arguably, when the policy advisers are negotiating the file, this can reflect the lack of attention by the MEPs towards the topic, the non-legislative nature of the resolution or the general agreement within the LIBE Committee towards the topic. For this specific resolution *“there was a consensus on the content”* (Respondent EP 1) between the political groups. Furthermore, in February 2014 a resolution from the EP on the review of the EAW called the Commission to investigate the legal and financial possibilities to expand standards on detention conditions.¹²² Despite the acknowledgement and awareness of the issue, the grounds for the EU to act on any initiatives considering norms and standards for prisoners remain highly contested.

The input from NGOs in the Green paper consultation process was largely similar. However, the message they had *“was not directly linked to the principle of mutual recognition. This linkage is important because in order for the EU to act on it, it has to impact the principle of mutual recognition”* (Respondent Commission 1). As a result, the linkage between mutual recognition and detention conditions was, according to the Commission, underdeveloped. Not only does this link make any initiative in the area of detention very sensitive, but there is also *“the contested legal basis for the EU to act on it. Economic reasons and the fact that certain countries are not very open to protect prisoners’ rights play a role. The main problem is money and the fact that there are no economic means to improve the situation”* (Respondent Commission 1). Due to the fact that the Commission is not supported by the member states to develop new proposals in this area, the Commission puts all its focus on implementation of existing instruments facilitating judicial cooperation in criminal matters. *“When member states are reluctant to act on this the Commission is also reluctant. It is a very sensitive topic and the focus is now more on ongoing legislation. Even in the LIBE Committee there is no consensus. Detention is a priority for some groups and not for others. It is this political balance you have to take in mind and you cannot push too hard”* (Respondent EP 5). Furthermore, in an area that

¹²¹ European Parliament resolution of 15 December 2011 on detention conditions in the EU.

¹²² European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant.

always belonged to the heart of member states' sovereignty, it is perhaps not surprising that this encounters resistance. *"I guess it makes sense from a policy and EU perspective where you do not want to run away from the member states. In general member states are fed up with the EU just bringing new initiatives and they [the member states] are barely keeping up with the names of them. If they [the member states] are supposed to implement them as well it is not so easy. The investment is not only money but also politically it is difficult to sell"* (Respondent EU Agency 2).

5.2.2 The receptivity for outsiders

Contacts with stakeholders are important for the Commission: *"the detention file involves a lot of contacts with stakeholders. These stakeholders are a mix of academics, NGOs, and practitioners (prison and probation personnel, prosecutors, ministries, lawyers, etc.)"* (Respondent Commission 1). The decision of who the Commission works is *"based on the assessment by the policy officer or the qualifications of the stakeholders. As a result, it is very important to invest in networks because you need their information and input to know what is going on in practice. I allow everybody to give input; I do not exclude anyone because we need this information"* (Respondent Commission 1). As a result, it is up to the personal preference and judgement of the person handling the file who he/she works with. Also, as a civil society organisation, the timing of when to intervene is crucial. *"You need to know the technicalities and you need to know when to intervene. A resolution is negotiated ahead of a plenary session. If you start to lobby around the plenary session you are too late. You need to lobby them far before because, first of all, you need to be able to get it at the plenary agenda which is one or two months in advance. Then, you need to be able to influence the negotiations which is two weeks in advance and then you need to be able to make your points into the text"* (Respondent EP 1).

Other organisations such as the CEP (Confederation of European Probation), Europris (The European Organisation of Prison and Correctional Services) or the EJM (European Judicial Network) regularly organise expert meetings to share best practices and discuss implementation difficulties.¹²³ At the CEP meeting of August 2015 the official of the Commission informed the

¹²³ For Example the CEP Expert Meeting entitled: "Enhancing the Implementation of Framework Decisions 2008/JHA/947 and 2009/JHA/829". 26-27 August 2015; On 29-30 June 2015 the 44th plenary meeting of the European Judicial Network (EJM) took place in Riga, Latvia. The main topic of the meeting was "Custodial

participants that the Commission had appointed three different researchers to write handbooks on the practical implementation of the following Framework Decisions: transfer of prisoners (2008/909/JHA), probation and alternative sanctions (2008/947/JHA), and the European supervision order (2009/829/JHA). Furthermore, Mrs. Beneder (legal officer Commission) reiterated the scepticism from EU member states for legislative proposals on the aforementioned framework decisions (Confederation of European Probation, 2015). The publication of the handbooks was scheduled in 2016. At the time of writing,¹²⁴ the handbooks were still not published or made publicly available by the Commission. The Academy of European Law (ERA) also organises regular conferences sponsored by the Commission on how to improve detention conditions at EU level. These conferences gather EU and CoE officials, practitioners (e.g. lawyers, judges, prosecutors, prison governors), civil society, and academics.¹²⁵ These conferences are also a platform for more informal encounters and discussions between relevant stakeholders. These information relations are not only important between the Commission and relevant stakeholders; also at the EP, and within the LIBE Committee, there appears to be a lot of informal negotiations: “*Informal relations can be huge because the LIBE Committee is very overwhelmed and is a very busy Committee. Even on legislation there is a very strong and heavy burden. Things that are more policy-oriented and non-legislative usually end up in the hands of policy advisers first. Only if they cannot agree then it goes up. In any event if it is more politically sensitive there will be a meeting at MEP level anyway*” (Respondent EP 1).

5.2.3 How to proceed forward?

In the area of detention, due to the terrorist attacks in Brussels and Paris, “*the current discussion is shifting towards radicalisation. The Commission is looking at possibilities under existing European funds to improve detention facilities. The Commission already funds a lot of projects in the area of detention (e.g. action grants on pre-trial detention, alternatives to detention, and yearly operating grants to Europris and the European Confederation of Probation (CEP), etc.) but never directly invests in prison accommodation and facilities. Funding new prisons is also*

sentences and measures involving deprivation of liberty” in which the EAW and the FD on the transfer of prisoners was extensively discussed.

¹²⁴ March 2018.

¹²⁵ These conferences are financially supported by the European Commission’s Justice Program. For more information see: www.era.int.

an ethical issue” (Respondent Commission 1). Defending human rights and combating torture and other ill-treatment is an explicit priority mentioned in the EU Action Plan on Human Rights and Democracy 2015-2019 (objective 13).¹²⁶ However, being a strategic focus of the EU, the identified actions are formulated very vaguely and do not specifically address the issue of substandard detention conditions in the member states.¹²⁷ The 18th session of the EU-NGO Forum on Human Rights took place in December 2016 under the title “*United against all forms of Torture: Applying a cross-cutting perspective to prevent, prohibit, and redress torture globally*”.¹²⁸ This Forum facilitates an open dialogue and brings together representatives of European institutions, member states, international organisations, civil society, academics, and practitioners. The expected outcome would be action-oriented suggestions and recommendations on the way forward and “*emphasising practical ways for the EU and member states to reinforce current practices and effectively step up engagement against torture and ill-treatment*” (European Union External Action Service, 2016). While combating torture is a strategic priority for the EU, the Commission appears to be very hesitant to give a follow-up on the Green paper on detention due to the lack of support by the member states. All respondents agree on the fact that the political will for legal initiatives in the area of detention conditions is absent, which is partly because of financial reasons but also due to the contested competence of the EU to act in this area. “*The discussion is mainly about EU competence. The legal service has the opinion the EU has this competence. The member states think the EU does not have this competence*” (Respondent Commission 2). For the member states, detention conditions remain a competence of the nation-state: “*member states want to arrange this at national level. On the other hand, they [the member states] agreed to the framework decision 909 on the transfer of prisoners*” (Respondent Commission 2).

¹²⁶ Council of the European Union, outcome of proceedings, from General Secretariat of the Council on: 20 July 2015, Subject: Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, Brussels, 20 July 2015, 10897/15.

¹²⁷ Action a: Address torture and ill-treatment (prevention, accountability and rehabilitation), and the death penalty (abolition, moratorium and minimum standards) in a comprehensive manner through political and human rights dialogues and support to partner countries, independent national prevention mechanisms and civil society; mainstream safeguards against death penalty, torture and ill-treatment in EU activities, including in counter-terrorism and in crisis management. Action b: Elaborate a coherent approach addressing the links between death penalty, torture and cruel, inhuman or degrading treatment or punishment, extra judicial summary or arbitrary executions, enforced disappearances and arbitrary arrest and detention. Action c: Undertake joint actions to promote the absolute prohibition of torture working in close cooperation with the UN, regional organizations and civil society, including supporting the 10 year global initiative (Convention against torture Initiative), to achieve global ratification and implementation of the UN Convention against Torture (CAT) by 2024; promote the ratification and implementation of its Optional Protocol (OPCAT), and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Council of the European Union, 2015a).

¹²⁸ The conference took place in Brussels. Source: https://eeas.europa.eu/headquarters/headquarters-homepage/16240/eu-ngo-forum-human-rights_en, last accessed on 21/03/2018.

The focus of the Commission is on the implementation of existing framework decisions and to prioritise procedural safeguards in order to enhance mutual trust and mutual recognition. The question remains how procedural safeguards will help to build trust in each other's judicial systems when the very basis of this trust, the often substandard way prisoners are deprived of their liberty, is so divergent. This divergence in itself is not problematic but only becomes so when detention conditions are substandard, and may cause Treaty or Convention violations. Despite the lack of initiatives by the Commission, the EP keeps putting the issue of prison systems and detention conditions on the European agenda. This is reflected in the public hearing the LIBE Committee organised on "*Prisons' Systems and Conditions in the EU*"¹²⁹. The PC-CP of the CoE was present at this hearing to explain their work in the area of detention conditions. Mr. Vivian Geiran, the then Chair of the PC-CP, raised the question of whether it was again time to push for a binding Prison Charter. Neither the MEPs present at the hearing, nor the Chair or the Rapporteur followed up on Mr. Geiran's question. However, in March 2017, a draft report by the LIBE Committee was issued on prison systems and conditions expressing concerns about prison conditions in certain member states. The motion for a draft resolution calls (again) on member states to adopt a Prison Charter in accordance with CoE Recommendation on the situation of European prisons and pre-trial detention centres¹³⁰ (European Parliament, 2017a).

In July 2017, the EP adopted the final report on prison systems and conditions (European Parliament, 2017c). In the adopted report, the EP again calls upon the member states for a binding Prison Charter. The option for a binding Prison Charter also entails a danger that some member states will lower their standards. "*There is a dilemma in asking for high standards but the risk that member states will lower their standards and we go to a minimum harmonised level. Concerning detention conditions, the EP is not unaware about the issue and wants to stretch the legal basis to act on it because if you ignore detention conditions you undermine mutual trust. It is internally a difficult matter and a political issue. In practice, it is a constant battle between member states and the EP*" (Respondent EP 5). The EP report on prison systems and conditions also calls upon the Commission to establish a European Forum on prison

¹²⁹ Hearing on "Prisons' Systems and Conditions in the EU", Thursday February 9 2017, European Parliament, Brussels. Draft Program: LIBE(2017)0209_1.

¹³⁰ Recommendation 1656 (2004) Situation of European prisons and pre-trial detention centers. Text adopted by the Assembly on 27 April 2004 (11th Sitting).

conditions to exchange best practices between experts and practitioners across all member states. This could be a valuable option because respondents highlight that opportunities for the exchange of information and best practices between member states are important in the area of judicial cooperation. A platform specifically designed towards detention conditions can be a softer approach to exchange best practices, views and ideas (European Parliament, 2017c).

Despite the frequent calls by the EP for a Prison Charter, perhaps more legislation at EU level is not necessary: *“more legislation will not change the minds because the problem is often the application of existing legislation in practice. Therefore, the focus cannot only be on legislation. It has to be a package of measures to improve detention conditions and we need to work closely with the CoE”* (Respondent Commission 1). The financial implications are a crucial concern for the member states: *“there is a tendency noticeable with the member states if we suggest measures to improve conditions and it costs the member states money, the member states are very reluctant to act on this. This is a tendency that is noticeable across policies. It is not that the member states are against the principle of improving conditions but it is the financial impact which leaves them hesitant”* (Respondent EP 5). However, one respondent states that good detention conditions will always be a problem: *“We are in a time of austerity, in times of pressure, in times of populist arising of extreme right wing movements. We know that the political forces are now at the side that do not care about conditions of detention. Nobody cares about it a part from those who actually have gone through detention or NGOs who work on human rights or civil society. There is no major interest of the normal population to make sure that someone is living in good detention conditions. It is always a matter of the good will of the member states and the pressure that it gets from civil society”* (Respondent EP 7).

One respondent highlighted that *“there is still a strong third pillar mentality in the Council and to a certain extent also in the Commission. The Commission also looks at the Council in order to determine what are we allowed to do in this area”*¹³¹ (Respondent EP 1). Also, the difference in style between the current Commissioner (Věra Jourová¹³²) and the previous Commissioner (Viviane Reding¹³³) influences the initiatives that are taken in the Commission. *“Commissioner Reding was very different than the Commissioner now. Mrs. Reding was a federalist who really*

¹³¹ Translated by the researcher from Dutch.

¹³² Responsible for Justice, Consumers and Gender Equality

¹³³ Commissioner for European Commissioner for Education, Culture, Youth, Media and Sport during 1999–2004, European Commissioner for Information Society and Media during 2004–2010, Vice-President and Commissioner responsible for Justice, Fundamental Rights and Citizenship during 2010–2014.

*dared to come with bold proposals. Commissioner Jourová is a weak Commissioner with a very diverse portfolio where criminal law is not a priority”.*¹³⁴ (Respondent EP 1) *“Reding had a very strong fundamental rights mandate. The present Commissioner has a fundamental rights and consumer protection mandate which overlaps. Fundamental rights are also split with Timmermans. In that way Reding had a higher status, she was a Vice-President and Timmermans is now the first Vice-President. On detention which then would fall with Jourová, she has a lower status in the Commission and a wider portfolio. Objectively, you could argue there is a bit less attention to the fundamental rights and criminal reform in this Commission but also in the very nature what the member states want from the EU. The Commission is committed to legislate less and to implement more”* (Respondent EU Agency 2). Also the composition of the EP is different to the previous one. According to one respondent, the different composition of the EP especially shows in the type of amendments that are being submitted, which directly represent the interests of the member states (Respondent EP 1). Within the EP, the specific topic of judicial cooperation or criminal justice *“is still seen as a specialist area. I also feel that, even in the current Parliament, there is a select group of MEPs that knows about it and are engaged in it. An asylum issue will be broadly shared quite immediately. It blends itself easier for political discussion”* (Respondent EP 1). As a result, there is still a lack of attention towards the issue of detention conditions in the context of judicial cooperation in criminal matters in the EU. According to the FRA, the EU, in cooperation with the member states, should consider investing in making information on detention conditions in all EU member states much more easily available. This practical information system could be a practical tool for prosecutors and judges in order to assess whether an execution of an EAW or a transfer under FD 909 entails possible fundamental rights violations. Furthermore, FRA recommends that EU funds could be linked to recommendations by for example the CPT in order to create incentives, and realistic opportunities, for addressing identified shortcomings in a member states detention conditions (European Union Agency for Fundamental Rights, 2016).

5.3 The role of the European Courts

The European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU) are crucial for interpreting Convention rights as well as to assess the protection and implementation of these rights in the member states. Furthermore, member states gave the power to these

¹³⁴ Translated by the researcher from Dutch.

European Courts and acknowledged the authority of these judicial bodies to examine state practices and to condemn the state under scrutiny when violations of convention rights occurred. The next section examines firstly the two courts itself, followed by their role and influence in the specific area of detention conditions for prisoners.

5.3.1 The European Court of Human Rights (ECtHR)

The jurisprudence developed by the ECtHR has undeniably influenced the application of the broader human rights standards in Europe, especially in the area of detention conditions. In order to become a member of the CoE, governments need to subscribe to the European Convention of Human Rights (ECHR), which guarantees fundamental human rights. With this, the state parties also recognise the authority of the ECtHR to enforce them. The ECHR, signed in Rome on 4 November 1950, initiated the revolutionary concept of a legally binding European instrument guaranteeing the protection of human rights with a European Court to dispense judgements in cases brought by one state against another, or even by citizens against their own state (Bond, 2012). Since 1953, individuals (after exhausting domestic remedies) and state parties could bring alleged human rights infringements, as established in the ECHR before a legal institution (van Zyl Smit & Snacken, 2009). It took until January 1959 for the first judges of the ECtHR to be actually put in place. Ten years after the formation of the CoE, the Court held its first session. Due to a disagreement in granting the right of individual petition, two bodies were created: the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR). The direct access of individuals to an international jurisdiction was, at that time, considered to be too radical. Consequently, the Commission functioned as a filter and a preliminary examiner in making decisions on admissibility (Bond, 2012; Kleinsorge, 2010a). The ECtHR is located in Strasbourg and is composed of one judge per member state. These judges are elected by the PACE. A “*standard*” ECtHR judgement is decided by seven judges. When there are dissenting opinions about a case, a referral can be made to the Grand Chamber, where the case is assessed by 17 judges.

Until the mid-1980s, the work of the ECtHR with respect to the protection of Europe’s prisoners, or in the area of detention conditions, was severely underdeveloped and did not provide sufficient protection or a solid legal basis for the protection against abuses (van Zyl Smit & Snacken, 2009). At the end of the previous century, due to the exponential growth of

cases, the procedures of the ECtHR changed remarkably. Since 1998, all new matters concerning the interpretation and application of the ECHR have been directly referred to the Court: a single permanent Court that decides both on admissibility and merits, and has the jurisdiction on all matters concerning the interpretation and application of the ECHR. The ECtHR can also produce advisory opinions on questions related to interpretations when requested by the CM (Bond, 2012). The CM has to monitor whether the decisions of the ECtHR are enforced. The ECHR does not provide any special safeguards specifically related to prisoners or asylum seekers, but it does protect some of their fundamental rights, which are inherent to all human beings. In the case law of the Strasbourg Court, human rights principles always take the centre stage. Also, the jurisprudence of the ECtHR is not a static notion, the case law continuously evolves by determining new obligations and acceptable minimum standards regarding the treatment of persons deprived of their liberty. From an early stage, the ECtHR has been vigilant in the protection of individuals when there is a substantial risk that an individual would suffer torture, inhuman, or degrading treatment when sent to another country (Guild & Carrera, 2010). When people are incarcerated, they do not lose the protection of their rights guaranteed by the ECHR. On the contrary, persons in custody are in a vulnerable position, and the authorities are under a duty to protect them.¹³⁵ When people are deprived of their liberty, the ECtHR accepts that this inevitably leads to a restriction of certain rights. However, certain imprisonment conditions, and especially the cumulative effect of these conditions, can be so severe that they may result in a violation of Convention rights.

Despite early reluctance, the ECtHR has increasingly relied upon country reports by the CPT. As a result, The CPT reports are frequently used to assess whether or not detention conditions in a specific case reach the minimum level of severity required to fall within the scope of article 3 ECHR, despite the absence of an intent on behalf of member state to humiliate a detainee¹³⁶ (Rodley & Pollard, 2009; Snacken & van Zyl Smit, 2013; Vermeulen et al., 2011a). Due to its country visits, the CPT has developed a whole array of practical standards, for example. minimum cell size for prison and police cells, material detention conditions such as sanitary facilities, access to natural light, etc. These standards influence the Strasbourg Court in its

¹³⁵ See par. 120 of *Orchowski v. Poland* (application no. 17885/04, date 22/01/2010).

¹³⁶ For example *Dougoz v. Greece* (application no. 40907/98, date 06/06/2001), *Kehayov v. Bulgaria* (application no. 41035/98, date 18/04/2005).

rulings.¹³⁷ Also, the reverse reasoning by the Court is possible in which the findings of the CPT are used to reject the claim(s) of the applicant.¹³⁸ As a result, initially labelled as “*soft law*”, the CPT’s reports and visits became increasingly influential in the judgements by the ECtHR. In this way the CPT reports are used as a type of “*fact finding*” instrument or body. However, the ECtHR can also initiate its own fact finding missions. An important question can be raised if the increased use by the ECtHR of CPT reports influences the trust and cooperation relationship between the CPT and the state under visitation? The ECtHR also makes reference to the EPR as relevant international standards and cites these provisions in its judgements despite their non-binding nature¹³⁹ (Rodley & Pollard, 2009). As a result, soft standards are an essential part of the ECtHR jurisprudence in the area of detention conditions.

The Strasbourg Court has highlighted, on frequent occasions, that material detention conditions in EU member states have violated article 3 ECHR (Rodley & Pollard, 2009). In 2000, in the Kudla case, the ECtHR explained what article 3 ECHR requires of the state.¹⁴⁰ In certain cases, practices of overcrowding appear to be a very dominant factor in the reasoning by the ECtHR for the result of an article 3 ECHR violation.¹⁴¹ More often, the combination and the cumulative effects of conditions, for example cell size, overcrowding, sanitary conditions, lack of access to natural light, poor ventilation, lack of exercise, or recreation possibilities, and lack of access to and knowledge about the outside world (media, newspapers, books, television, radio) have been found, in different combinations of occurrence, to amount to inhuman or degrading

¹³⁷ For example Kalashnikov v. Russia (application no. 47095/99, date 15/10/2002), Shchebet v. Russia (application no. 16074/07, date 12/09/2008), Bragadireanu v. Romania (application no. 22088/04, date 06/06/2008).

¹³⁸ For example Yakovenko v. Ukraine (application no. 5425/11, date 04/09/2015).

¹³⁹ For example Dybeku v. Albania (application no. 41153/06, date 02/06/2008), Slawomir Musial v. Poland (application no. 28300/06, date 05/06/2009), Nevmerzhitsky v. Ukraine (application no. 54825/00, date 12/10/2005), Rivière v. France (application no. 33834/03, date 11/10/2006), Ramirez Sanchez v. France (application no. 59450/00, date 04/07/2006), Dickson v. the United Kingdom (application no. 44362/04, date 04/12/2007), Gulmez v. Turkey (application no. 16330/02, date 29/09/2008).

¹⁴⁰ The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance. Para 94, Kudla v. Poland (application no. 30210/96, date 26/10/2000).

¹⁴¹ For example Labzov v. Russia (application no. 62208/00, date 16/09/2005), Andrey Frolov v. Russia (Application no. 205/02, date 24/09/2007), Kantyrev v. Russia (Application no. 37213/02, date: 30/01/2008), Lind v. Russia (application no. 25664/05, date 02/06/2008), Orchowski v. Poland (application no. 17885/04, date 22/01/2010), Mandic and Jovic v. Slovenia (applications nos. 5774/10 and 5985/10, date 20/01/2012), Štrucl and Others v. Slovenia (applications nos. 5903/10, 6003/10 and 6544/10, date 20/01/2012), Torreggiani and Others v. Italy (pilot judgment, application nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, date 27/05/2013), Varga and Others v. Hungary (pilot judgment, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, date 10/06/2015).

treatment violating article 3 ECHR.¹⁴² The ECtHR has, in the form of pilot judgements, another interesting instrument at its disposal for repetitive cases deriving from a common dysfunction. By using this technique, the Strasbourg Court can identify the underlying structural problems of repetitive cases against a country and impose an obligation on the state under scrutiny to address the identified problems. When human rights conditions are structurally substandard, this judicial mechanism can limit the diversity in the member states and oblige the member state to address this issue. Several of these judgements took place in the area of detention conditions stressing the inadequate conditions of detention in different countries.¹⁴³ One example of the pilot judgement procedure is the *Torreggiani and others v. Italy* case.¹⁴⁴ The structural and systemic problem of overcrowding, specifically the cramped personal space in prison cells, coupled with the length of imprisonment, subjected the applicants to hardship and suffering, which amounted to a violation of article 3 ECHR.

In the Grand Chamber judgement of the *Mursic v. Croatia*¹⁴⁵ case, the judges found a violation of article 3 ECHR for the consecutive period of 27 days in which the applicant had been confined in a cell with less than 3 m² of personal space. The other non-consecutive periods in which the applicant was held in less than 3 m² of personal space, the Grand Chamber ruled there was no violation of Convention rights. Therefore, the Court argued that these non-consecutive periods were short, they consisted of only a minor reduction of personal space, and the detainee had sufficient freedom of movement and activities outside the cell. In the preceding Chamber judgement, delivered on 12 March 2015, the ECtHR ruled there was no violation of article 3 ECHR because the conditions of detention in which the applicant had been held did not reach the threshold of severity to be regarded as inhuman or degrading. More interesting about this

¹⁴² For example *Peers v. Greece* (application no. 28524/95, date 19/04/2001), *Kalashnikov v. Russia* (application no. 47095/99, date 15/10/2002), *Modârca v. Moldova* (application no. 14437/05, date 10/05/2007), *Slawomir Musial v. Poland* (2009), *Florea v. Romania* (application no 37186/03, date 14/12/2010), *Orchowski v. Poland* (application no. 17885/04, date 22/01/2010), *Florea v. Romania*, (application no. 37186/03, date 14/09/2010), *Ananyev and Others v. Russia* (pilot judgment, applications nos. 42525/07 and 60800/08, date 10/04/2012), *Canali v. France* (application no 40119/09, date 25/07/2013), *Vasilescu v. Belgium* (application no 64682/12, date 20/04/2015), *Radulescu v. Romania* (application no. 17295/10, date 19/08/2015), *Adrian Radu v. Romania* (application no. 26089/13, date 07/07/2015); *Szafrański v. Poland* (application no. 17249/12, date 15/03/2016).

¹⁴³ E.g. *Ananyev and Others v. Russia* (application nos. 42525/07 and 60800/08, date 10/01/2012), *Torreggiani and Others v. Italy* (application no. 43517/09, date 08/01/2013), *Neshkov and Others v. Bulgaria* (applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, date 27/01/2015, *Varga and Others v. Hungary*, (application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, date 10/03/2015, *W.D. v. Belgium*, application no. 73548/13, date 6/09/2016), *Rezmiveş and Others v. Romania* (applications nos. 61467/12, 39516/13, 48213/13 and 68191/13, date 25/04/2017).

¹⁴⁴ Application no. 43517/09, date 08/01/2013.

¹⁴⁵ *Mursic v. Croatia* (application no. 7334/13, date 20 October 2016).

case are the dissenting opinions by certain judges. The first partly dissenting opinion¹⁴⁶ stipulates that the majority judgement does not provide sufficiently convincing arguments to depart from the standard of 4 m² of minimum personal space set by the CPT. These judges specifically state that the ECtHR is overruling the specialised agency within the CoE by applying a 3 m² standard and disregard the need for a coordinated, synchronised approach at the international level. While acknowledging that the Court and the CPT have different functions, the partly diverging opinion states it is highly necessary for the two institutions to use the same standards (in this case 4 m² of minimum personal space). Furthermore, according to these judges, the space available outside the applicant's cell, which was less than 3 m², was not sufficient to counterbalance the size of the cell. The dissenting opinion of Judge Pinto De Albuquerque takes a more holistic approach, arguing that there has been a "*pan-European and worldwide trend towards hardening prison soft law in view of the phenomenon of prison overcrowding*".¹⁴⁷ This hardening of prison soft law is according to the judge particularly visible in Europe. The EPR is therefore the prototype of hardened soft law in the CoE's normative system. Soft law is, according to Judge Pinto De Albuquerque, not entirely free to not be followed due to the negative consequences which are not only moral, political, or reputational in nature. Soft law provides "*the most important source of crystallisation of the European consensus and the common heritage of values*". Furthermore, "*the legal order of the CoE, state consent is framed within the context of a cosmopolitan perspective: the universality of human rights and a dialogic understanding of the common heritage of values of European societies*".¹⁴⁸ Ultimately it is up to the Court to decide how much weight it attributes to these hardening soft laws and there are certain factors (e.g. wide publicity, deliberative procedure, linguistic accuracy) that hardens its normative claim. The resolutions and recommendations by the CM, the CPT standards, and general reports are, according to Judge Pinto De Albuquerque, remarkable sources of CoE soft law in the penitentiary field. Also, the Court has stated that, despite the non-binding nature of these instruments, it attaches considerable importance to these normative instruments, which are also taken into account in the analyses of cases concerning ill-treatment. In its dissenting opinion the judge is particularly clear that the majority, by ignoring EPR standards (in this case 4 m² of personal space) are setting aside the penological work performed by the PC-CP and the CDPC. This is done without providing any scientific

¹⁴⁶ Joint partly dissenting opinion of judges Lazarova Trajkovska, De Gaetano, and Grozev in case of Mursic v. Croatia (application no. 7334/13, date 20 October 2016).

¹⁴⁷ Partly dissenting opinion of judge Pinto De Albuquerque, Mursic v. Croatia (application no. 7334/13, date 20 October 2016), p.74.

¹⁴⁸ Ibid, p. 80, 86.

background to contradict the PC-CP experts' opinions. This case, and the reasoning by the Court, shows a lack of coherence by not following soft standards stipulated by the CPT and the EPR, which are standards that have been agreed upon by CM, which consists of the 47 CoE member states. Arguably, this judgement may potentially weaken the human rights protection from within the CoE.

The CoE Commissioner for Human Rights raised his concern about the increasing number of “*leading*” cases before the ECtHR that have not been implemented for more than ten years and which reveal complex or structural problems (Commissioner for Human Rights, 2016a). State parties to the ECHR gave the power to a judicial mechanism, in this case the ECtHR, to examine how the states ensure these rights in their jurisdictions. Complex and technical issues may take time to resolve, but prolonged non-implementation by the CoE member states is problematic. This indicates that common human rights norms in the area of detention are not easily accepted or put into practice across Europe or in certain CoE member states. When placing this development in the cosmopolitan framework, this poses challenges for the European framework, which should be grounded on commonly accepted human rights norms. Following the concept of cosmopolitanism, case law indicating substandard conditions challenges the commonly accepted norms as reflected in the human rights regime and, inter alia, the ECHR. Furthermore, the lack or non-implementation of ECtHR judgements are indicative that this “*unity in diversity*” is not as unified as it should be in Europe. It may also be an indication that certain member states in Europe are working or functioning in the human rights areas at different “*speeds*”.

5.3.2 The European Court of Justice (CJEU)

While the executive and legislative functions of the EU have mixed responsibilities with a horizontal (Commission, Council and EP) and vertical separation of powers (local and regional governments), there is clearly a separate judiciary (Warleigh-Lack & Drachenberg, 2013). The Treaty on the EU (TEU)¹⁴⁹ and the Treaty on the functioning of the EU (TFEU)¹⁵⁰ stipulate that the judicial branch of the EU comprises, inter alia, the European Court of Justice (CJEU). Over time the CJEU gained increasing powers and its jurisdiction expanded. Next to the judicial

¹⁴⁹ Art. 19 TEU: The Court of Justice of the European Union shall include the Court of Justice, the General Court, and specialised courts. It shall ensure that in the interpretation and application of the Treaties, the law is observed.

¹⁵⁰ Section 5 TFEU.

power, the CJEU can convey political messages in its case law about sensitive issues (Kapsis, 2013). The CJEU is based in Luxembourg with a composition of one judge per member state, plus 11 Advocates General (AG) which give non-binding, impartial, and independent opinions prior to the final decision by the CJEU (Kapsis, 2013). The CJEU serves different functions: interpreting EU law (preliminary rulings by member states who are in doubt of the correct interpretation or validity of EU law or whether national law is compatible with EU law), enforcing the law (infringement proceedings when national governments fail to comply with EU law), annulling EU legal acts (when an EU act is believed to violate EU treaties or fundamental right(s)), and ensuring the EU takes action, plus sanctioning EU institutions (European Union, 2016). Especially the preliminary rulings have played a key role in shaping the legal order of the EU and its relationships with the member states. The CJEU has used this instrument to issue certain decisions with great political impact (Kapsis, 2013). As a result, the CJEU has an important role to play in interpreting EU law, as well as to trigger policy initiatives and change. Especially in the area of asylum, the influence by the CJEU is the most present which will be elaborated in the next chapter.

In the EU framework, the protection of fundamental rights, and by extension, the rights for prisoners and their detention conditions, is an essential issue in order to ensure the smooth functioning of some of the instruments facilitating judicial cooperation in criminal matters, for example the EAW¹⁵¹ and the Transfer of Prisoners.¹⁵² In the area of asylum, the CJEU judged in the joined cases of N.S. and M.E.¹⁵³ that an asylum seeker cannot be transferred to the responsible member state if there is a real risk that he/she will suffer inhuman or degrading treatment. In the aftermath of this judgement, the question was raised whether the mutual trust limitations in the field of asylum can also be applied to criminal matters, in which fundamental rights violations may set a limit on the principle of mutual recognition. In the Radu case,¹⁵⁴ expectations were high whether the CJEU would draw inspiration from asylum case law. The CJEU was asked if a national court is entitled to not execute an EAW when there is a breach of fundamental rights: the right to be heard (this ground for non-execution is not provided in the

¹⁵¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.

¹⁵² Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

¹⁵³ Joined Cases C-411/10 and C-493/10, date 21/12/2011.

¹⁵⁴ Case C-396/11, date 29/01/2013.

EAW). In the Radu case, the CJEU reiterated the purpose of the EAW: facilitating and accelerating judicial cooperation. As result, the CJEU ruled there was no violation of Charter rights. The different outcome between the Radu and the N.S. and M.E. cases can be explained because in the latter case, a moderation of the mutual trust principle was necessary to avoid a breach of article 4 of the Charter. In the Radu case, there was no breach of the Charter,¹⁵⁵ and thus, no need to moderate the MR principle (Janssens, 2013). In the Melloni case¹⁵⁶, the CJEU ruled that the Charter (article 53) does not give member states the power to apply higher fundamental rights standards when a situation falls within the scope of EU law and can compromise the “*primacy, unity and effectiveness of EU law*”.¹⁵⁷ According to Advocate General Bot, the level of protection in the EU reflects a balance between the need to ensure the effectiveness of EU action and the need to provide adequate fundamental rights protection. In a situation where a member state invokes a higher level of protection, this would upset the balance and therefore jeopardise the application of EU law.¹⁵⁸ From a cosmopolitan perspective, the CJEU, by highlighting the primacy of the EU Charter, set boundaries for the member states’ diversity, although this diversity may result in higher fundamental rights protection. As a result, the *otherness* of the member states is accepted to the extent that it does not compromise the unity and effectiveness of EU law (Bot, 2012). The CJEU ruled in favour of a unity, but a *unity in diversity* with limitations and boundaries.

The CJEU, on frequent occasions, has affirmed that, in the context of the EAW, mutual recognition does not imply an absolute obligation to execute a warrant.¹⁵⁹ The preliminary ruling in the case of Aranyosi and Căldăraru¹⁶⁰ provided further clarity for the member states as to whether a surrender procedure, for example under the EAW or the Framework Decision on the transfer of prisoners, should be executed when there is doubt concerning the detention conditions in the issuing member state. The CJEU rules that, after a two-stage assessment, the executing judicial authority finds there is a real risk of an Article 4 Charter violation for the requested person once surrendered, the execution of the EAW arrest warrant must be postponed.

¹⁵⁵ See for example par. 39: “*The observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued.*” (Radu case, C-396/11, date 29/01/2013).

¹⁵⁶ Case C-399/11, date 26/02/2013.

¹⁵⁷ See par. 60 of the Melloni case (C-399/11, date 26/02/2013).

¹⁵⁸ See par. 125 of the opinion of Advocate General Bot delivered in Melloni case (C-399/11, date 26/02/2013) (Bot, 2012).

¹⁵⁹ See for example par. 50 of I.B. (C-306/09, date 21/10/2010), par. 64 of Melvin West (C-192/12, date 28/06/2012), par. 36 of Jeremy F. (C-168/13PPU, date 30/05/2013).

¹⁶⁰ Case C-404/15 and C-659/15 PPU, date 05/04/2016.

This postponement lasts until the executing judicial authority obtains supplementary information that allows for the elimination of the risk of inhuman or degrading treatment. If the existence of that risk cannot be excluded within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end. As a result, this shakes the system of mutual trust upon which the principle of mutual recognition is built (Bovend'Eerd, 2016). As a result, the automaticity and the smooth surrender of suspects, offenders, and prisoners in the EU are curtailed by human rights concerns. Consequently, human rights considerations have a higher status than the principle of mutual recognition. For example, the Netherlands refused the transfer of suspects to Belgium in June 2016 and August 2017. Both times there were doubts as to whether the human rights of the suspects would be respected in the Belgian penitentiary system. This refusal was based upon the CPT visit to Belgium in May 2016 (CPT, 2016a) and the CPT public statement due to the ongoing failure of the Belgian authorities to put in place a minimum level of service to guarantee the rights of detainees during periods of industrial action by prison staff (CPT, 2017c). In both cases, after guarantees were made that the suspects would be detained in facilities that comply with international standards and guidelines, the Netherlands allowed the transfer of suspects to Belgium (De Rechtspraak, 2016, 2017). However, the Dutch judicial authority stipulated that this is not a general guarantee for all suspects for whom a transfer to Belgium is requested (De Rechtspraak, 2017).

The Aranyosi and Căldăraru case reflects the importance of detention conditions for the functioning of judicial cooperation in criminal matters between EU member states. But not all opinions within the CJEU are unified regarding this position. In the month before the final judgement, Advocate General Bot argued that there are no grounds for the non-execution of an EAW even if there is a risk of inhuman or degrading treatment for the requested person.¹⁶¹ This opinion, in which mutual recognition undermines fundamental rights, raised eyebrows across Europe. For that reason, Fair Trials, together with other organisations from the Legal Experts Advisory Panel, wrote a letter to Věra Jourová, the Commissioner for Justice, Consumers and Gender Equality to express their concerns (Fair Trials International, 2016).

¹⁶¹ Opinion of Advocate General Bot delivered on 3 March 2016. Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen.

5.4 Conclusion

In the CoE, preference was given to first develop soft non-binding standards in the area of detention conditions, which resulted in the EPR. In the writing process of these Rules, academics were holding the pen and were in charge to set European norms and standards in this area. These scientific experts, who essentially wrote the Rules, were chosen due to personal preferences of PC-CP members, previous work within the CoE, availability, and expertise. Because the authoritative claim the experts had to policy-relevant knowledge they took the form of an epistemic community. Certain analysed features are therefore important: their individual norms, priorities and ideas, individual resources (knowledge and information), and the cooperation with other actors. As a result of this combination, the experts could push this standard setting process forward and into a certain direction. Furthermore, because the stakeholders involved in this standard setting process (members of the PC-CP and the CDPC) acknowledged the role and the capacities of the three experts, plus the Chair of the PC-CP, this helped to push for certain ideas. As a result, the mix of an academic and a practical background proved to be essential features not only to be able to draft the EPR but also to mediate and to persuade member states in the framework of the CDPC of their ideas. Furthermore, the experts were united in the norms, priorities, and ideas they wanted to carry out with the EPR. Also, the formal, structured context changed because of the way the EPR was negotiated. When the member states in the CDPC saw the first draft of the EPR, it was already an extensive document. Currently, because the member states wanted to be involved earlier in the standard setting process, the PC-CP has plenary meetings in which the CDPC members are invited. As a result, the CDPC is now consulted a lot earlier in the standard setting process. Because of the appointment of the three experts and the frequent consultations with relevant stakeholders, the role for outsiders in the creation of the EPR was high.

CPT reports and case law by the European Courts proved that the detention conditions in the EU member states can be substandard. This jeopardises the smooth functioning of the instruments that facilitate judicial cooperation in criminal matters, which is based on the principle of mutual recognition. A first attempt to give this issue more attention was reflected in the Green paper on detention. While this was merely an initiative and consultation process to stimulate discussion between relevant stakeholders, the impact of the Green paper on detention should not be underestimated. It initiated and stimulated the debate regarding the presence of substandard prison conditions in the EU member states. Furthermore, the link

between (substandard) detention conditions and the principle of MR was extensively discussed, which can impact the smooth functioning of the instruments facilitating judicial cooperation in criminal matters in the EU. No further legal initiatives emerged from the Green paper, due to political priorities (emphasis on implementation and procedural rights), competence issues, financial constraints by member states, etc. The essential feature in the EU context is the mandate or scope for the EU to act on this matter. The overall EU approach in the area of judicial cooperation in criminal matters is to push for the implementation of procedural rights and existing instruments. This is in sharp contrast with the norms, priorities, and ideas from the EP and the LIBE Committee, which try to push for higher standards and keep placing the topic of detention conditions, and even the possibility of a Prison Charter, on the political agenda. Due to the fact that the Commission is not supported by the member states for any further legislative initiatives in this matter, a lot of softer approaches have been taken, particularly in the form of cooperation with other actors in organising expert meetings and practical tools.

The CoE has been an active actor in setting norms and standards in the area of detention conditions at an earlier stage than the EU. This is partly explained due to the nature of the CoE and the EU, which are, in essence, very different. While the CoE can focus on upholding fundamental rights and freedoms such as democracy, the rule of law, and human rights, the EU, in addition, has to ensure that mutual trust is developed in the judicial systems between the member states. As such, the EU embraces the soft CoE standards, but political, financial and legal motives and incentives also play more at the EU level because the EU develops legally binding instruments which need to be followed and implemented by EU member states. Arguably, the standards set by the EU go further than those by the CoE because these are hard standards. As a result, this is also reflected in the initiatives, or the lack thereof, that have been taken in the area of detention conditions in the CoE and the EU. The ECtHR changed the meaning and significance of the soft standards stipulated in the EPR and by the CPT. However, the Mursic case also revealed this in the CoE system, which is not waterproof for a unified approach within the CoE. The Mursic case also highlights the difficulty of applying standards to specific situations. Whether fundamental rights non-compliance by the member states can constitute a limit on the mutual recognition principle in criminal matters was (partly) answered with the Aranyosi and Căldăraru judgement in which a member state must postpone the surrender of the individual concerned until it obtains the supplementary information that allows elimination of the risk of inhuman or degrading treatment. Again, the CJEU set boundaries on the diversity of the member states. When detention conditions are substandard and there is a

reasonable risk for degrading of inhumane treatment, this is the limit of the *otherness* of the member states. From a cosmopolitan perspective this is crucial, because the European Courts set clear rules on what is acceptable in the diversity of the member states.

Whether a binding Prison Charter may be an answer to increasing the overall level of detention conditions for prisoners in Europe, and by extension also to increase mutual trust and mutual recognition, is highly uncertain. Perhaps this is not necessary because the standards are present (EPR, CPT), but implementation is still lacking in certain countries. The decision to update the commentary of the EPR may provide a new stimulus to highlight these Rules and the importance of soft standardisation. Also, the dynamics of hardening soft law, in which the ECtHR plays a crucial role, may result in that binding standards are not necessary after all.

6 DETENTION CONDITIONS FOR ASYLUM SEEKERS IN EUROPE

This chapter will analyse detention norms and standards for asylum seekers and will predominantly focus on the following bodies and policy documents:

For the CoE:

- The CPT standards regarding immigration detention centres

For the EU:

- The recast Reception Conditions Directive

Also other bodies in the CoE framework will be discussed briefly, such as the recommendations by the PACE, the expert Committee on administrative detention of migrants, the function of the Commissioner of Human Rights, plus the Special Representative of the Secretary General on Migration and Refugees.

6.1 The Council of Europe as an early standard setter for asylum seekers in detention

Already in 1997, the CoE stipulated in a recommendation the lack of a wide harmonisation concerning asylum policies in the CoE member states resulting in an unequal “*burden-sharing*”.¹⁶² Furthermore, the absence of clear rules regarding the detention and deportation of asylum seekers can result in violations of their human rights. Therefore, the PACE urges member states “*to review, and, where necessary, to improve conditions of detention, and in particular not to detain asylum-seekers with common-law prisoners*” (Parliamentary Assembly, 1997, p. 2). This recommendation was adopted in 1997, the same year the CPT included in its annual report a specific section on foreign nationals detained under aliens legislation (CPT, 1997). This reflects a general consensus within the CoE that asylum seekers should, as a rule, not be detained in prison facilities. The issue of depriving asylum seekers of their liberty was specifically addressed in a recommendation by the CM that was adopted in 2003 (Council of Europe, 2003). This recommendation stipulates the non-punitive aim of

¹⁶² Recommendation 1327 on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe.

detaining asylum seekers plus the exceptional nature of the practice.¹⁶³ When special detention facilities are not available, asylum seekers should at least be separated from convicted detainees and prisoners on remand. As a result, from early inception, onwards the CPT and the CM reinforced the very fundamental standards when detaining asylum seekers: the non-punitive aim, the exceptional character of the measure, plus separating the association between immigration detention and detainees convicted or suspected for criminal offences.

The CoE is also active in standard setting in the area of expulsion procedures and forced returns of persons whose asylum claims have been rejected. At the beginning of the new millennium during many of the CPT's visits, particular attention was given to the treatment of immigration detainees (CPT, 2001, 2002, 2004, 2005a). The focus of these visits was not only on the conditions of detention but also on the practices and procedures applied in the context of forcible removals by air¹⁶⁴ and detainees under terrorist acts¹⁶⁵ (CPT, 2004). In 2002 the PACE tackled the topic of expulsion in a recommendation which sets out standards related to the use of detention prior to expulsion. The recommendation is especially straightforward in setting time limits for the length of detention under expulsion procedures (Parliamentary Assembly, 2002). In 2005, the CoE adopted Twenty Guidelines on Forced Return when detention is ordered for removal purposes (Council of Europe, 2005b). The CPT was involved in the preparation of these guidelines and these reflect many of the CPT standards, for example the centres should avoid, as far as possible, any impression of a carceral environment plus material detention conditions, and regime, should be appropriate to the legal situation of the persons detained pending removal.¹⁶⁶ Also these guidelines stipulate that "*persons detained pending their removal from the territory should not normally be held together with ordinary prisoners*". This phrasing still allows a margin of interpretation for the member states. The CPT argues that immigration detainees waiting for expulsion should always be separated from ordinary prisoners (CPT, 2005a). As a result, the same core standards apply for asylum seekers who are at the beginning of their process in claiming asylum and those at the very end of the process, when asylum claims have been rejected.

¹⁶³ When an identity and/or nationality needs to be verified or when the protection of national security and/or public order so requires.

¹⁶⁴ E.g. during the ad hoc visit to Switzerland in October 2003.

¹⁶⁵ E.g. the ad hoc visit to the United Kingdom in March 2004.

¹⁶⁶ See Guideline 10. Conditions of detention pending removal (Council of Europe, 2005b).

Within the PACE it is the Committee on Migration, Refugees and Displaced Persons which deals with the asylum files. Every member of the Committee can hand in a motion for a certain topic after getting a certain number of signatories from the other members. The Bureau examines the admissibility of the request. When admissible, the responsible Committee appoints a Rapporteur. Remarkable in this process is that the reports are written by the Committee's secretariat and not by the appointed Rapporteur. The Rapporteur can give feedback or adjustments. *"The people in the secretariat are mostly progressive people. This also makes sense because you do not work for a human rights organisations if you have any doubts concerning human rights"*¹⁶⁷ (Respondent CoE 11). The CoE's decisions do not have binding legislative power like the EU. Furthermore, the PACE does not have the same function as co-legislator like the EP. This is also reflected in the civil society organisations that are active in the CoE framework. According to one respondent: *"this is the assembly where there is a lot of lobbying and it is also very clear if you walk around there. Mostly it is rather smaller organisations and organisations from non-EU members because this is their only platform. The bigger civil society organisations target their activities towards the EU, not the CoE"*¹⁶⁸ (Respondent CoE 11).

The PACE Committee on Migration, Refugees and Displaced Persons specifically addressed the rise and excessive use of the practice to detain asylum seekers by CoE member states in a recommendation followed by a resolution in 2010 (Parliamentary Assembly, 2010a). The resolution highlights the substantive growth in the detention of asylum seekers across CoE member states together with the issue of overcrowding and the policy of using detention as a deterrent for migration and seeking asylum. The resolution also stipulates that the conditions and safeguards for asylum seekers are often worse than those provided for criminal detainees (Parliamentary Assembly, 2010b). The resolution lays down guiding principles in which the detention of asylum seekers and irregular migrants may be legally permissible. These principles aim to ensure that the detention of asylum seekers and irregular migrants is:

- Exceptional after reviewing alternatives, necessary, proportionate, not arbitrary, non-punitive, and for the shortest time possible;
- Carried out by procedures prescribed by law and subjected to judicial review;

¹⁶⁷ Translated by the researcher from Dutch.

¹⁶⁸ Ibid.

- Ordered only for the purpose of preventing unauthorised entry into a state's territory or with a view to deportation or extradition;
- Held in a place where the conditions and regime of detention are appropriate;
- Aware that vulnerable people should not be placed in detention, especially unaccompanied minors.

The resolution further stipulates 15 minimum standard conditions of detention for migrants and asylum seekers, such as material detention conditions and regimes appropriate to the individual's legal and factual situation. However, getting the issue on the CoE and the PACE agenda was not easy. *“It was very difficult to get them involved in the issue of migration. When I wanted to do something there was no budget for it and the EU is working around that topic. I think this is very weird because the CoE involves more European countries and we have that human rights perspective which is totally different than the legislative function of the EU”*¹⁶⁹ (Respondent CoE 15).

6.2 The CPT and immigration detention

The CPT mandate allows delegations to visit all places in the CoE member states where people are deprived of their liberty. From the very beginning, the CPT had a dominant focus on prisons and police stations. Gradually the CPT extended its activities to, inter alia, mental institutions and detention centres for foreigners (CPT, 1992). This shift is also highlighted by one respondent: *“migration centres are not the very first priority of the CPT, taking into account that the capacity of the CPT is limited. Sometimes it is better to do less but to do it good. Prisons and police are the main priorities. While immigration detention is not the core business of the CPT, it does not mean it is under the radar. It is still something that we are doing by tradition”* (Coe Respondent 10). Especially in the last decade, immigration detention gained increased attention of the CPT. An example of this is the increased ad hoc visits to the hotspots in Greece and Italy and the publication of the factsheet on immigration detention¹⁷⁰ (CPT, 2017b). The factsheet stipulates that immigration detention is a primary focus of the CPT activities. In

¹⁶⁹ Translated by the researcher from Dutch.

¹⁷⁰ The factsheet, published in March 2017, gives a detailed overview on the safeguards for immigration detention, suitable premises, material conditions, type of regime, staff, discipline, segregation, and means of restraint, monitoring and complaint mechanisms, health care, vulnerable persons (CPT, 2017b).

essence, immigration detention is, in most CoE countries, a form of administrative detention and should not be punitive in nature. The factsheet further highlights that the detention conditions and safeguards for asylum seekers should go further than those applicable to immigration detainees due to their legal status and vulnerability. As a result, the standards for immigration detainees are the minimum standards which are also applicable for asylum seekers.

Due to the extensive number of CPT visits, an increasing number of standards have developed in various areas where people are deprived of their liberty and, inter alia, also in the area of immigration detention. CPT delegations frequently encounter foreign nationals deprived of their liberty under aliens legislation, the so-called “*immigration detainees*”: persons refused entry to the country concerned; persons who have entered the country illegally and/or persons whose authorisation to stay in the country has expired; asylum seekers whose detention is considered necessary by the authorities for identification purposes. The custodial settings in which immigration detainees are deprived of their liberty range from holding facilities at entry points (e.g. airports, borders, harbours) to police stations, prisons, and specialised detention facilities. In the 7th General Report, published in 1997, the CPT explains its position in relation to safeguards and conditions for foreign nationals deprived of their liberty under aliens legislation. The CPT considers the detention of immigration detainees in prison facilities as fundamentally flawed: “*A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence*” (CPT, 1997, p. 12). The deprivation of liberty of asylum seekers, whether or not in prison facilities, can only be used for identification purposes, to determine the elements of the asylum claim, and for reasons of national security or public order. Furthermore, the ground rules for immigration detention are that it cannot be arbitrary, plus it is an exceptional measure of last resort after a careful examination of each individual case. According to the CPT, when immigration detainees are deprived of their liberty for an extended period under aliens legislation, accommodations should be specifically designed for that purpose, including appropriate material conditions, prison regime,¹⁷¹ and suitable qualified personnel. When certain exceptional circumstances are applicable, such as the known risk of violence or the need for in-patient treatment, it might be rightful to hold an immigration detainee in a prison facility. When this is the case, the core CPT standard applies that immigration detainees should be held separately from regular prisoners.

¹⁷¹ Regime activities should include outdoor exercise, access to a day room with radio, television, newspapers, magazines, and other appropriate means of recreation (e.g. board games) (CPT, 1997).

When immigration detainees are deprived of their liberty, this should be subjected to periodic judicial reviews (CPT, 1997, 2005b, 2011, 2017b).

In the 19th General Report, the CPT indicates there are still far too many instances where CPT delegations come across places for the deprivation of liberty of irregular migrants, and on occasion, asylum seekers, which are totally unsuitable. An example of such a place would be a disused warehouse, with limited or no sanitation, crammed with beds or mattresses on the floor, accommodating nearly a hundred persons locked in together for weeks or even months, with no activities, no access to outdoor exercise, and poor hygiene. According to the CPT, asylum seekers are particularly vulnerable to various forms of ill-treatment and should be afforded a wide range of safeguards in line with their legal status. The detention standards and safeguards for asylum seekers should go further than those applicable to, for example, irregular migrants (CPT, 2009). As a result, CPT standards for irregular migrants are the very basis which should be provided for persons seeking international protection. Furthermore, the conditions in which asylum seekers are held should reflect their legal status. The CPT also recommends that immigration detention centres should provide accommodation which is adequately furnished, clean, in a good state of repair, and with sufficient living space. Furthermore, the design and lay-out of the immigration detention centres should avoid, as far as possible, the impression of a carceral environment (CPT, 1997, 2011, 2014, 2016b, 2017b).

6.2.1 The formal rules of the game: composition, key positions and working methods

The standards developed by the CPT derive from a practical approach and the numerous visits the CPT delegations conduct. The CPT visits, priorities, and standards are not created in a vacuum, but in discussion with different actors within the CPT: the secretariat, the Bureau, and the members. The standard setting process by the CPT is unique because the CPT engages actively with the field: *“It is not that unusual now, but in the context of the CoE it was the very first body that actually did on-site monitoring. This is where a lot of its standards come from”* (Respondent CoE 10). The CPT standards *“come from what is found on the ground and from there standards are developed. They are not intellectual, they result from fact finding”* (Respondent CoE 13).

Within the CPT, three key actors can be identified: the secretariat, the Bureau, and the CPT members. The CPT secretariat is a permanent body. The secretariat is divided into three regional divisions. The CPT secretariat prepares the visits and maintains the contacts with relevant civil society organisations, proposes the composition of the delegations to the Bureau, etc. Each unit within the secretariat is responsible for a certain number of countries. However, the working methods between the units are the same *“we use the same methodology and there is a cross-fertilisation between them”* (Respondent CoE 5). Within the CPT secretariat there is, for each country, a desk officer plus one back-up desk officer. The desk officer will normally join the delegation for the country for which he/she is responsible (Respondent CoE 5). The head of the secretariat is the executive secretary and has an advisory role to the Bureau. From 1987 to 2013 the executive secretary was Trevor Stevens (Respondent CoE 3). Due to the extensive period Mr. Stevens was active in the CPT secretariat, he had a big impact: *“He was the father of the CPT and he shaped the whole thing. He introduced all the working methods and was the most influential figure of the CPT”* (Respondent CoE 4). Currently, the heads of the divisions are very experienced staff. *“These people have 15–20 years of experience. It is normal that they carry on a weight. Not so much during Committee meetings or in Strasbourg; that is the Bureau and the executive secretary. When you are out on a visit or drawing up a report these people [heads of a unit] carry a lot of authority”* (Respondent CoE 13). According to the respondents, the Bureau is an important entity within the CPT. The Bureau consists of the President and the Vice-Presidents (CPT, 2008). The President is the face of the CPT to the outside world. The President also attends the CM hearing once a year (Respondent CoE 13). The Bureau is elected by the CPT plenary by secret vote for a two-year term. According to one respondent, *“for the Bureau it is important to give leadership and direction. The way of doing this depends a lot on the personalities of the President and the Bureau members”* (Respondent CoE 14). One respondent indicated that *“if you want to see a power block, it is the Bureau together with the executive secretary. They are the people who are guiding and directing the direction of the Committee”* (Respondent CoE 13). The Bureau proposes the periodic visits to the plenary. The ad hoc visits are, in most cases, decided by the Bureau. The Bureau has to report to the plenary afterwards. Sometimes the ad hoc visits can also be decided during the plenaries (Respondent CoE 13). In recent years, the CPT strategy concerning the visits has changed. *“Initially there were quite few ad hoc visits. Over time the number of ad hoc visits increased quite substantially. We do more targeted visits and some in reaction of certain events. It is clearly a policy matter now to give more priorities to ad hoc visits and to be more flexible”* (Respondent CoE 14). As

a result, the working methods are changing due to changing priorities and the increasing importance of ad hoc visits.

Although they have a large Committee of 47 members, the capacity of the secretariat and the number of visits the CPT can do is limited. *“Because of financial and capacity reasons there is a limit on the number of visits the Committee can do. The Committee has always said we should be doing at least 200 days of visits a year but they never do 200. They do 150–160. So a limited number of visits, a rather small number compared to the people who want to do the visits.”* Furthermore, the CPT secretariat needs to have the capacity to produce the reports (Respondent CoE 13). The composition of the delegation is important because the delegation is more or less autonomous and decides the programme of the visit (Respondent CoE 5, CoE 14). The composition of the delegations is decided by the Bureau and proposed by the secretariat. A delegation is generally composed of five or six members (CPT members and secretariat) plus one or two experts and interpreters. The CPT members in the delegation are chosen based upon specific knowledge, background, language skills, and experience in a certain country. For the ad hoc visits, which need to be decided more quickly, sometimes CPT members are chosen based purely on availability (Respondent CoE 4, CoE 5). Often, the delegation is split up to visit different places where people are deprived of their liberty (Respondent CoE 3). The decision to take additional experts in the delegation is autonomously decided by the delegation. The delegations are also free to decide the programme and priorities of the visit. The network of experts the CPT relies on is an *“informal network that somehow has been established by practice. Experts are invited by the delegation based on their professional capacities”* (Respondent CoE 10). *“The experts are handpicked by the delegation”* (Respondent CoE 13). Especially in the medical field there are not that many experts available with the necessary qualifications. *“There are very few, a handful of people who have the right skills and who are willing to go out there. These people do not grow on trees, especially in the medical and forensic field”* (Respondent CoE 13).

Every delegation appoints a head of delegation who leads the official dialogue with the government. The head of delegation is mostly chosen based on seniority and willingness to fulfil this function. The head of a delegation *“has to take quite some decisions and sometimes on the spot we have to change the plan or change the programme. The head of delegation does the talking and delivers whatever the delegation thinks”* (Respondent CoE 4). *“The head of the delegation is the one who negotiates with the country if the situation is not very problematic. If*

it becomes problematic then it is the Bureau or even the CPT's President” (Respondent CoE 3). Regarding the composition of the delegation, *“the idea in any kind of delegation is to have a mix of depending what it is that you are going to look at but every delegation will always have a doctor in it. Additionally, there will always be a lawyer and a human rights specialist in prisons or police”* (Respondent CoE 5). The delegation is responsible for the visit itself, the programme, the way in which the visit takes place, the findings, and afterwards, the communications to the government and the drafting of the report (Respondent CoE 5). The secretariat will finalise the draft report of the visit and send it first to the delegation and then to all CPT members in order to discuss it in the plenary (Respondent CoE 7). The CPT has three plenary sessions a year, each for a whole week. *“During the plenary session, every report is reviewed by the whole Committee. After every plenary our standards are slightly reviewed or improved. In this way it is also internally codified”* (Respondent CoE 10). Because the whole Committee can comment on the draft report by the delegation, this working method allows for internal scrutiny and an internal system of checks and balances (Respondent CoE 10). The norms and standards are further followed by two CPT working groups: the health (previously called the medical group) and the jurisprudence group. *“The medical group consists of at least one-third of the CPT members and are medical people. They will normally meet before the plenary and sometimes they meet between meetings. The Chair of the medical group carries a lot of weight. That is the person who the Bureau will consult before taking a position on a medical issue”* (Respondent CoE 13). The jurisprudence group will look at all the reports and will alert the Committee if there is a divergence or an evolution of the normal standards (Respondent CoE 13, CoE 14). The jurisprudence group looks at *“consistency, coherence, developments, and can also propose changes”* (Respondent CoE 14).

The CPT contacts with civil society are limited, mainly focusing on information gathering. Respondents indicated the CPT is *“not necessarily the best partner for NGOs. We tend to be people who take information but we do not give much back”* (Respondent CoE 5). The CPT meets with civil society organisations, which they select and invite, at the beginning of a visit. Afterwards, *“we do not really have any contact with them until our report comes out or when we want them to sort of push it. It is a little bit of a one way street to a degree. They give us lots of information but we cannot really give them much back at least until the reports are made public”* (Respondent CoE 5). Also, when the CPT consults with civil society, the relevant organisations are handpicked: *“we are quite selective. It would not be a broad consultation of*

all civil society organisations in that country but certain specific organisation that we think we can trust. We have quite a good understanding of who works in the field” (Respondent CoE 4).

6.2.2 Tackling diversity and unequal challenges in Europe

During the interviews, the diversity of the practice of immigration detention and the detention conditions for asylum seekers in Europe was highlighted. The lack of a comprehensive approach or an instrument covering the whole of the European continent which stipulates minimum standards in the area of detention conditions and safeguards for irregular migrants and asylum seekers deprived of their liberty, and which takes into account their specific needs and vulnerabilities, is also stressed in the CPT’s 19th General Report (CPT, 2009). The CPT is not only critical towards substandard material conditions, structural deficiencies, situations of overcrowding, and problems of ill-treatment, but also towards the general approach a country takes in the treatment of irregular migrants and asylum seekers. A security approach in immigration detention centres in which immigration detainees are treated in various aspects as criminal suspects or prisoners is always criticised by the Committee.¹⁷² The CPT is also very clear regarding the “*deterrent*” argument of a country’s detention policy towards irregular migrants and asylum seekers. Detaining asylum seekers for deterrence purposes is prohibited by international standards and contradicts refugee law. The deprivation of liberty is certainly not justified when it is imposed with the aim of discouraging further arrivals¹⁷³ (CPT, 2005b). In discussing CPT findings and standards with the country under scrutiny, the CPT norms and standards are “*formally accepted*”. However, “*the gap between what is accepted on paper and what is accepted in practice is huge. In particular in some countries. There are some countries where it is very difficult*” (Respondent CoE 3). Respondents highlighted that most of the time, the CPT standards are accepted, but countries will contest the facts or if certain events took place the way the CPT describes it (Respondent CoE 5). In Europe, a wide divergence exists on how immigration detainees and asylum seekers are deprived of their liberty: “*in many countries they [immigration detainees and asylum seekers] are held in a carceral environment. In some countries they are actually put into a prison. In some countries the immigration detention centres are former prisons. In some countries it are very open centres and they are specifically designed to be like that*” (Respondent CoE 14). Furthermore, regarding conditions

¹⁷² See for example the 24th General Report and its visit to Greece in April 2013 (CPT, 2015a).

¹⁷³ See for example paragraph 32 of the UNHCR Detention Guidelines (United Nations High Commissioner for Refugees, 2012).

of detention, nothing changes overnight. *“It starts with the design and architecture. In some countries, we saw that the authorities took former prison facilities and they converted them into a centre for immigration detainees. It should not be prison or police like and it should be adjusted to the situation with as much freedom as possible within the centre”* (Respondent CoE 14).

Respondents indicated that in the long run, the CPT has made big steps in the acceptance of certain standards related to immigration detention. For example, the CPT advised that immigration detainees should be allowed to keep their mobile phones. *“At first this was revolutionary, now it is a common practice in many centres we visit. But still in some areas, even in countries that are well advanced, there is resistance. Healthcare or the degree of provided support is difficult to discuss with governments. I think there is the issue of money behind it. What we ask costs money and countries say should we invest that much money in times of crisis?”* (Respondent CoE 14). However, the decision to implement certain standards is not only because of financial constraints: *“It is not the most popular political move you can do to spend all your money on immigration detainees or prisoners. We [the CPT] can only recommend these standards again and again and try to persuade a country in doing something this way and not the other”* (Respondent CoE 4). Another respondent indicated that no state accepts all of the CPT standards but this does not have to be problematic: *“this is the whole point of the CPT to enter into a constructive dialogue. Sometimes the reasons given by a country why they do not want to implement our standards are perfectly reasonable and we might rethink our own standard”* (Respondent CoE 4).

Taking into account the diverse practices regarding immigration detention, the CPT also recognises the unequal challenges certain countries face in receiving asylum seekers. *“We have the core CPT standards or the core principles but we try to develop higher standards. We first start with the basics. When this is more or less implemented then we go a bit higher. Then we try to differentiate the approach, we are not asking the same from the Greek authorities than from the Swedish authorities. The CPT does not necessarily have the same demands for different countries”* (Respondent CoE 14). Furthermore, *“When we talk to governments they appreciate it that we [the CPT] take into account their realities. This is probably where we have the most discussions: how do we take into account, or to which extent do we take into account, a specific situation on the ground but without missing the objective of our ideas and values?”* (Respondent CoE 14). Besides financial constraints and cultural differences, it also depends on

the political will and the responsible person(s) in that country for that particular field if something changes or not. *“You can come to a country and speak with a government year after year and things do not change. Suddenly, there is a new minister or another key person who is really an agent of change and things start to move”* (Respondent CoE 10). *“The biggest thing that we are trying to do is effectively changing people’s mind-set and changing cultures so that the systems in place treat persons in detention in a humane way. That means changing the cultural approach. That takes a long time”* (Respondent CoE 14).

The diversity in Europe in the area of immigration detention is closely linked to the approach countries take towards this specific category of people. One respondent indicated that the biggest obstacle regarding changes in immigration detention is a conceptual one and the approach countries choose. If you treat immigration detainees more or less as criminals then you will have a very confrontational approach. *“Too many countries superficially look at what the CPT has said but have not actually changed their whole approach. In other countries the policy of how long you keep people or who you detain has not changed. Although, there has been some changes in the conditions in which people are kept. I have to be honest that is not only due to the CPT, it is also where you have strong civil society and strong local monitoring bodies that are pushing the same messages. So you have a reinforcement of the messages that are being made by the CPT”* (Respondent CoE 5). Another respondent highlights the hardening towards immigration detention in Europe: *“there is a hardening by governments to basically have a much tougher approach. For some countries it is really about control. For a number of countries it is also the security aspect which is more alive than in the past”* (Respondent CoE 14).

6.2.3 Tackling diversity and unequal challenges within the CPT

Next to the issue of diversity within Europe concerning the implementation of CPT standards, the CPT is also internally dealing with diversities. The Committee is very large, with 47 members. Within the CPT, there are very few political discussions, *“we are very a-political in our CPT work. You have differences but it is human. You have different people from different countries with different backgrounds and professions and it shows in the discussions”* (Respondent CoE 4). Despite the fact that the CPT is a large Committee, respondents indicated that, although there can be different views on certain topics, every CPT member has the same

understanding on the set of norms and standards the CPT applies. *“There are core standards which exist for 20–30 years now and there is no debate about it. In the CPT, not only for immigration detention but also for prisons, it is about finding a compromise between our ideals and the reality”* (Respondent CoE 13). Development of the standards is done during the CPT plenary meetings. *“If we want to change the standards we have to do that in the full Committee and not during a delegation or during a trip to whatever country. During a visit we are providing first impressions but we do not base our final report on these first impressions”* (Respondent CoE 4). Furthermore, *“everybody is basically going into the same direction. What it is exactly they [CPT members] are contributing it varies tremendously from member to member. But there has always been a solid block of people who are very active, very articulate and very experienced which drives the Committee forward”* (Respondent CoE 13).

The CPT aims to be a professional Committee, not a political Committee. As a result, the election procedure for the CPT members is a crucial aspect. Article 5 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stipulates the formal election process of CPT members. The members are elected by the CM by absolute majority vote based on a list of names which is drawn up by the PACE Bureau. Each national delegation in the PACE has to put forward three candidates. Respondents indicated that there have been some problems in the past with the election process. The PACE has been pushing to have a similar selection procedure for the CPT as for the ECtHR. The ECtHR judges need to go through an interview and the PACE elects the judges (Respondent CoE 5). Respondents highlighted that, although the CM respects the fact the CPT is not a political body, there have been cases when a political influence was noticed. For some respondents this has always been present with the appointment of CPT members by the CM because *“ultimately it is the ambassador who decides”* (Respondent CoE 5). According to one respondent, this perceived political influence is *“linked to keep an eye on what we are doing. It is politicised and it is used to bring people in who might be brought in by their prime minister and offered them a job or something. If a person [CPT member] is really good and we want to keep him or her for a second term, but if the political pressure from their representation or their ministry is too big, then you get somebody with half the potential. We are used to that and it has happened for different reasons”* (Respondent CoE 4). The CM and the ambassadors receive advice on the preferred candidates from the PACE and the CPT. *“Generally they do take into account what the CPT needs. But if a country is pushing for a particular person, there is nothing we can*

really do. We have made it quite complaint to them [CM] that we expect they will choose the most competent person and we hope they are not trying to politicise it” (Respondent CoE 5).

A PACE report on the 25 years existence of the CPT highlights that: *“the success of the CPT undoubtedly depends on the professional skills, experience, and independence of its members”* (Parliamentary Assembly, 2017). The PACE reiterates, on frequent occasions, the need to improve the quality of the CPT members (especially regarding professional background, gender, age, and availability of minimum 40 days a year), as well as the national selection procedures to shortlist potential CPT members.¹⁷⁴ *“The expertise is one thing, but you also have the personality which is an important element. That is why, when we speak about membership, we speak about expertise but also about human qualities and personalities”* (Respondent CoE 14). Because the quality of the CPT members is crucial for the functioning of the CPT, the PACE puts more emphasis on the national selection procedure for CPT candidates. Furthermore, the PACE examines how the national delegation came up with the three names (Respondent CoE 13). *“The national selection procedures were not as rigorous as they are now. What is positive is that now countries in general tend to invest more in the national selection procedures”* (Respondent CoE 14).

The majority of the respondents indicated that not all CPT members have the same resources and capacities. This may not be surprising, because CPT members are essentially experts acting as volunteers. *“I would like to say that we all have different strengths but the truth of the matter is that some people are more committed than others”* (Respondent CoE 4). The Committee is very demanding because there are at least three plenary sessions (three weeks in total) plus a country visit, which can take up to two weeks per visit plus preparations. As a result, availability is a very important issue. That is also why certain experts prefer to stay experts and do not want to become members. *“When you are a member you have additional requirements, such as coming for plenaries and discussions within the Committee. When you are an expert you just discuss the issues of one country in a delegation. It is less requiring in terms of availability”* (Respondent CoE 14). Respondents highlighted that amongst the CPT members there are stronger and weaker members or strong and not so strong members. This is based on how active

¹⁷⁴ Recommendation 1323 (1997)1 Strengthening the machinery of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Resolution 1248 (2001) European Committee for the Prevention of Torture (CPT): composition of the Committee, Resolution 1540 (2007) Improving selection procedures for CPT members, Resolution 1808 (2011) Strengthening torture prevention mechanisms in Europe.

CPT members are, how much interest they have and show in the matter, plus how competent they are during the visits (Respondent CoE 5). *“Some members are rather weak, so you send them to an easy country. In some cases you know this member has a good knowledge of that country. It depends on the ability to intervene and to have an institutional approach to the problems because you are not an activist”* (Respondent CoE 3). The composition of a CPT delegation needs to be balanced. As a result, *“you will not have very weak members or very inexperienced members in one group and all experienced members in others”* (Respondent CoE 5). Also, the level of activity between the CPT members is very different. *“In each body you have one-third of very efficient people and one third of people who sleep during the plenary”* (Respondent CoE 3). Regarding the different capacities of the CPT members, the question can be raised as to whether this is an unavoidable issue in this type of Committee? Furthermore, is this problematic? One respondent highlighted that *“if you would have 47 active members this would also be problematic and very difficult to come to conclusions. I think it is kind of normal that you have 15 to 20 active people and then you have a number of persons that are maybe not active in plenary sessions, but who are very competent in carrying out their job on the visit and that is fine. Then you have a group of persons who are relatively disengaged from it. They turn up for the meetings, sit there quietly and do not really contribute much. They go on the visits and do not contribute much. That is the nature of these sorts of organisations. You would expect there are 47 very competent people in their fields but that is not the case”* (Respondent CoE 5). Next to availability, experiences, and knowledge, various respondents indicated that the language skills of the CPT members can be problematic. *“It is a basic requirement but there is no interview process by the PACE or by anybody. Nobody knows until they [CPT members] show up how good their language skills actually are”* (Respondent CoE 5). Having adequate language skills is highlighted by almost all respondents as a problem. However, it is only a small minority of CPT members who have difficulties functioning in the CoE official languages (English and French) (Respondent CoE 13).

Next to the formal structure of the CPT’s work and meetings, more informal relations also appear in which the feature of individual characteristics (personality, knowledge, language capacities, personal network) is important for reaching an agreement and the eventual outcome. *“You have members who are getting along more with each other than others. It has been a factor for some time that the French speaking members were closer to each other because they are a minority compared to the English speaking members. What is quite nice now is that you have more French speaking members speaking English or at least having a passive knowledge*

of English. So they can communicate with each other more easily. It is an impression of me that you have less informal groups than in the past in terms of linguistics because you have more communication between the members” (Respondent CoE 14). Informal relations are also a normal element during the country visits due to the very nature of the visits. A CPT visit is a demanding experience in which you work and share experiences in a small group. One respondent indicated that strong emotions need to be mastered in difficult situations during a visit. This generates and creates strong relations. However, also the contrary can happen: *“tensions can arise within a delegation when people are in disagreement. In this climate, very strong bonds but also very strong dislikes can be developed”* (Respondent CoE 10). Despite the fact that very strong bonds and/or dislikes can develop, the CPT standard setting process happens in the formal structure of the CPT plenary meetings and is not a matter of informality. *“I believe that people who are happy to work together on missions do not hesitate to have discussions and arguments with each other in plenary meetings when they do not share the same views. People are very well aware and are professional enough to understand it is a professional discussion and it has nothing to do if you are a friend”* (Respondent CoE 10). Next to the selection process and informal relations, staffing resources are another crucial internal component in the functioning of the CPT. Respondents indicated that the staffing situation in the CPT secretariat has been unstable over the last few years. Experienced staff members retired (e.g. the executive secretary) or left the secretariat for an extensive time and were not replaced (e.g. switched to other CoE departments). *“We have been understaffed. Hopefully by the end of this year [2017] we will be back to the normal staffing and then we can increase the number of visits. What we want to be able to do is at least 20 visits every year. We have been doing more like 17 up till now. We are trying to ensure that we do the basics. The bigger question is the more strategic thinking for the future and adapting the way we work. You can carry on visiting all the time but you also need to look at the effectiveness of the visits and how the recommendations are being implemented. How do we ensure that we remain relevant?”* (Respondent CoE 5).

When digging deeper into the structures of the CPT, a lot of internal diversity appears. However, this is structured around a solid block of shared norms and standards that this Committee protects and disseminates internally and externally. The CPT applies certain core standards, although in practice the CPT differentiates between the CoE member states in what it expects to find in different countries. As a result, diversity in Europe is not problematic in the area of immigration detention as long as certain core standards are protected.

6.2.4 *The CPT mandate and the hotspot approach*

The disproportionate influx of asylum seekers especially affected the European countries at the periphery, such as Greece, Italy, Malta, and Cyprus. One of the actions the EU took to tackle the high volumes of arrivals at EU borders was the so-called “hotspot approach” (Reception and Identification Centres). The principle aim was to provide operational support especially to Greece¹⁷⁵ and Italy¹⁷⁶ with the goal to “swiftly identify, register and fingerprint incoming migrants” and to support the implementation of relocation and returns (European Commission, 2015a; European Council for Refugees and Exiles, 2016). An ECRE report highlights that detention in the Italian hotspots tends to last longer than 48 hours, and is unregulated and arbitrary. In Greece, one of the main concerns in the hotspots is the prolonged stay in detention and the excessive delays due to the lack of capacity to process asylum applications. Furthermore, there is a lack of available accommodation in open reception centres. In Greece, the practice of mandatory detention was applied, which is against the EU acquis (European Council for Refugees and Exiles, 2016). The UNHCR suspended certain activities at the closed centres on the Greek islands where the hotspots are located because, under the new provisions of the EU-Turkey statement, these sites became closed detention facilities (UNHCR, 2016). All individuals arriving after 20 March 2016¹⁷⁷ were automatically detained (Greek Council for Refugees, n.d.). The shift from open to closed detention facilities is crucial for the CPT which, according to their mandate, can only visit closed detention centres. As a result, the CPT visited the hotspots in Greece (April and July 2016) and Italy (June 2017). One respondent stated that: “very quickly overnight these centres all of the sudden became detention camps. We went there in April and it was extremely problematic. People were held in arbitrary detention because there was no legal basis for it” (Respondent CoE 4).

Respondents active in the CPT are very aware and cautious about the mandate of the CPT. This is reflected while carrying out their function and in what they can and cannot do: “*I think the*

¹⁷⁵ In Greece, five hotspots are operational: Moria hotspot on the island of Lesbos, VIAL hotspot on the island of Chios, Vathi hotspot on the island of Samos, Lepida hotspot on the island of Leros, and Pyli hotspot on the island of Kos (CPT, 2017d).

¹⁷⁶ In Italy, six hotspots were planned (Lampedusa, Pozzallo, Porto Empedocle, Augusta, Taranto, Trapani) but only four are operational (Lampedusa, Pozzallo, Taranto, Trapani) (Neville, Sy, & Rigon, 2016).

¹⁷⁷ From that day, all new irregular migrants crossing from Turkey into Greek islands from 20 March 2016 will be returned to Turkey (European Council, 2016).

CPT's mandate is quite unique. Nobody else has such a mandate" (Respondent CoE 10). The mandate is closely connected to what places the CPT can visit and what eventually appears in the public domain. However, the interpretation of the mandate is not always straightforward: *"Sometimes we have discussions if this particular issue is still under our mandate. There are some issues that deserve attention but they might not be under the CPT's mandate. If you want to visit a certain place but it is not under our mandate, you have to think twice before you act and how you put it into the report"* (Respondent CoE 10). One respondent indicated that *"at the outset there was tremendous debate"* (Respondent CoE 13) regarding the CPT's mandate and the issue of immigration detention. For example, the issue of whether the CPT could visit transit zones at airports was eventually settled by a decision from the ECtHR¹⁷⁸. The interpretation of the CPT's mandate has further evolved over the years. According to one respondent: *"At the outset of this committee's work, the emphasis was very much on what we call the hard end of the mandate: torture. At that time there was no information available that people held under alien legislation were at a particular risk of being tortured. Maybe that was why there was no emphasis on them. Gradually things developed. It was not a conscious decision where we said we are not interested in immigration detention"* (Respondent CoE 13). The evolving nature of the CPT's mandate is closely related to the evolving case law from the ECtHR and the interpretation by the CPT. *"The CPT more and more adopted this concept of de facto deprivation of liberty even if the jure it is not"* (Respondent CoE 3). One respondent further highlighted that *"we follow what the ECtHR says about article 5 and the deprivation of liberty. It is basically are they [immigration detainees] free to leave? But are they free to leave is also a matter of discussion and what is the threshold? We [the CPT] judge by ourselves whether it is deprivation of liberty or not, or at least we give a description of all the types of restrictions we see. This is exactly what happened with Hungary and the transit zones. We went there without entirely being sure if it was within our mandate and whether it was deprivation of liberty. We have some flexibility about our mandate. When we have hesitations we go and check. When it is clear for us that it is not deprivation of liberty then we do not go"* (Respondent CoE 14). As a result, due to the increased external pressure on countries' migration systems the CPT adapted their working methods in doing more ad hoc visits. However, working within the boundaries of the CPT mandate remains a delicate balancing exercise.

¹⁷⁸ Amuur v. France - 19776/92, Judgment 25/6/1996.

6.3 The Council of Europe's expert Committee on administrative detention of migrants

In January 2010, the PACE adopted a recommendation in which it recommends the CM to “*instruct the relevant expert Committee within the CoE to prepare European rules on minimum standards of conditions of detention of irregular migrants and asylum seekers*”. According to the recommendation, the aim would be to “*provide, in the context of immigration detention, a parallel framework to the European Prison Rules. The minimum standards should draw inspiration from the European Prison Rules, but recognise that they are applicable to persons not detained on the basis of having committed any criminal offence*”¹⁷⁹ (Parliamentary Assembly, 2010a). According to one respondent, the 2010 PACE recommendation was crucial in building momentum to develop this type of standard within the CM. “*We [the PACE] already asked a long time for these standards. The 2010 recommendation was an initial important step in this process. The CM replied first that it would wait to develop this. A few years ago we [the PACE] reminded them with the support of the NPMs which also issued a declaration for the need of these standards. Then the CM decided to develop these guidelines*”¹⁸⁰ (Respondent CoE 15).

The PACE Committee on Migration, Refugees and Population (the current Committee on Migration, Refugees and Displaced Persons) stressed that in order to strengthen mutual trust, the level of protection for offenders and prisoners should also be applied to those held in detention as asylum seekers (Parliamentary Assembly, 2011). In 2011, the CoE Secretary General (SG) presented a framework on migration issues for the period of 2011–2013, which formulates proposals on how migration activities within the CoE can be reorganised. This is with the aim of improving effectiveness and coherence, and having a better impact. The SG suggests developing new standards to promote more efficiently the rich body of existing standards and instruments, such as conventions, recommendations, resolutions, and guidelines. According to the SG, one of the identified areas where the CoE can offer a unique and useful contribution is the human rights dimension. Appendix II of this proposal gives particular attention to the detention of asylum seekers and suggests in paragraph 29: “*At a later stage (possibly in the second half of 2013), the CM might consider a possibility of developing specific*

¹⁷⁹ This call for minimum detention standards for asylum seekers was reiterated in other recommendations, such as recommendation 1917 (2010) Migrants and refugees: a continuing challenge for the Council of Europe.

¹⁸⁰ Translated by the researcher from Dutch.

standards on the detention of irregular migrants and asylum-seekers, which should facilitate the tasks of member states as well as mutual trust and co-operation in matters of irregular migration and return” (Council of Europe, 2011). Based on this framework, academics¹⁸¹ were mandated to conduct a feasibility study on the European Immigration Detention Rules. This study showed the necessity of establishing these Rules in the framework of the CoE (Achermann, Küntzli, & von Rütte, 2013). The feasibility study further concludes that the existing standards are scattered amongst various instruments with diverging legal consequences and relevance. In the specific area of detention conditions, the study highlights that in the existing standards related to immigration detention, a large gap exists regarding the design of immigration detention facilities. If it is not to resemble a prison, there is no actual guidance how an actual immigration detention centre should look (Achermann et al., 2013). In principle, persons detained in an immigration or asylum context fall under the scope of the EPR if they are detained in a prison facility. However, even in situations where asylum seekers are held in prison settings, the EPR can only partly provide a solution because of the specific needs and vulnerabilities of this category of people. As a result, the EPR is neither applicable nor adequate for the situation of immigration detainees.

The Committee of Experts on the Administrative Detention of Migrants (CJ-DAM) was created under the umbrella of the European Committee on Legal Cooperation (CDCJ), for the development and implementation of common standards and policies regarding the administrative detention of migrants. Subsequently, the CDCJ is carrying out a “*a codifying exercise on existing international standards relating to the conditions in which migrants are held in closed administrative centres and, as appropriate, in other places or situations of detention*”¹⁸² (Council of Europe, 2016e). The codification of European Immigration Detention Rules is specifically emphasised in the first report of the CoE SG on the state of democracy, human rights, and the rule of law in Europe (Council of Europe Secretary General, 2014). The codifying exercise began in May 2016 and was expected to be completed by the end of 2017. At the time of writing (March 2018), the exercise was not yet completed. One respondent highlighted that: “*the process will be very interesting because this is where governments are going to try to be very vague, to have a very minimalistic approach and not to have clear*

¹⁸¹ Prof. Dr. Alberto Achermann, Center for Migration Law, University of Bern; Prof. Dr. Jörg Küntzli, Institute for Public Law, University of Bern; Barbara von Rütte, MLaw, University of Bern.

¹⁸² The specific website for the developments regarding this exercise: http://www.coe.int/t/dghl/standardsetting/cdcj/Administrative%20detention%20of%20migrants/administration_detention_migrants_en.asp, last consulted on 16/01/2017.

guidelines for immigration detention” (Respondent CoE 5). In March 2017, the CPT issued a factsheet on immigration detention (CPT, 2017b). It is not a coincidence the CPT published this factsheet with their standards at that specific time. The CPT is involved and consulted in this codifying exercise. The factsheet is an additional way in which the CPT aims to steer the debate in the CJ-DAM in a certain direction based on its expertise. In this codifying process, the EU, UNHCR, and the SR on Migration and Refugees are also actively consulted. The CPT acts as an observer in the CJ-DAM: “*we [the CPT] try to advise and to tell what we think. But it is not our decision. It is still an intergovernmental body so it is for the government officials to decide. Sometimes we are heard and sometimes we are not*” (Respondent CoE 14). The dominant national input in the debate was also confirmed by another respondent: “*the input in the debate comes very much from a national context. They are not there to give priority to human rights but to serve the national context and to detain people*”¹⁸³ (Respondent CoE 15).

The CDCJ conducted a written consultation¹⁸⁴ of key actors and civil society organisations on the basis of a first draft of the codifying exercise (European Committee on Legal Co-operation, 2017). In parallel with the written consultation, a hearing with key stakeholders was held in Strasbourg on 22–23 June 2017. The CDCJ received a total of 45 written observations on the draft codifying exercise.¹⁸⁵ While all contributors welcomed the initiative, serious concerns were raised regarding the basic approach and the scope of application. The draft document takes the EPR not only as a model for the structure of the document, but also for substantive provisions. It appears as if that the drafters took the EPR as a blueprint and analysed which rules can be applicable for administrative detention. This working method was widely criticised because the draft does not distinguish sufficiently between criminal and administrative detention. “*The CPT had an issue with the draft from the very beginning. I think there were some misunderstanding from the mandate of the CJ-DAM to take as a model the EPR. It [The mandate] did not mean to take the EPR as such and see what is appropriate or not for immigration detention. It was more about the process and about the product, not about the*

¹⁸³ Translated by the researcher from Dutch.

¹⁸⁴ A written consultation opened on 18 May 2017 until 15 July 2017 (European Committee on Legal Co-operation, 2017).

¹⁸⁵ 39 observations were submitted by individual actors or organizations. Two observations were joint statements. Four observations were submitted by Council of Europe bodies and services. From the 39 observations, 12 written comments came from national institutions, including independent authorities such as Ombudspersons or NPMs, eight by international organizations and 14 by non-governmental organizations. Four academics made a written observation. Five observations were submitted by actors who had the status of observers within the European Committee on Legal Co-operation Committee of Experts on Administrative Detention of Migrants (CJ-DAM) meetings (Achermann, Künzli, & von Rütte, 2017).

content. You cannot have rules applying to prisons being applied to administrative detention. We should have a completely different thinking about immigration detention” (Respondent CoE 14). This issue was also highlighted by another respondent: *“you will see that the CPT standards have been taken on board to a large extent. What I do not like in that context is taking the EPR as a model. That is unfortunate”* (Respondent CoE 13). Another respondent highlighted that these rules should eventually have the same status of the EPR, but that it needs to be disconnected from the content (Respondent CoE 15).

A large majority of the written contributions call for a stronger human rights approach for the use of administrative detention based on the right to liberty, free movement, and human dignity (Achermann et al., 2017). Next to the written consultations, a hearing was organised in June 2017 with key stakeholders and civil society organisations. The oral hearing brought together 50 representatives from civil society, CoE bodies, and members of the CJ-DAM. Again, the reference to the EPR as a model for the draft was a major point of criticism. The participants considered this inappropriate and would unjustifiably criminalise migrants from the outset (Henrichs, 2017).

6.4 EU standards related to detention conditions for asylum seekers

In addition to the CoE, the EU developed binding standards regarding detention conditions applicable to asylum seekers. In general, detention is an exception to the general rule of free movement within the EU. Detaining asylum seekers can only be used when *“it proves necessary”*. Furthermore, the automatic detention of asylum seekers without any evaluation of the specific circumstances of the person in question contradicts EU legislation. Specific provisions related to detention conditions are developed in the wider framework of the CEAS and especially in the recast Reception Conditions Directive, which was adopted in 2013 (European Union, 2013). Its predecessor, which was adopted in 2003 (European Union, 2003), defined the meaning of detention. Specific detention grounds or provisions related to detention conditions were still absent. At the time of writing¹⁸⁶ a third package of the CEAS, including the recast Reception Conditions Directive, is being renegotiated.

¹⁸⁶ March 2018.

6.4.1 *The formal structures in the early policy-making stages of the recast Reception Conditions Directive*

The process of modifying the 2003 Reception Conditions Directive was difficult and troublesome (Velluti, 2014). The area of asylum “*has not been Europeanised for long, only in 1999. When you move from the traditional third to the first pillar, member states had some resistance because they need to change certain practices they had for a long time. The reception conditions is the most contentious part of the CEAS acquis after Dublin. Various aspects could not be agreed easily by member states because of the different situations in the different member states*” (Respondent EU Agency 1). In December 2008, the Commission tabled a proposal (Commission of the European Communities, 2008c) amending the 2003 Directive. Formally, all positions by the Commission need to be adopted by the College¹⁸⁷. “*It is the heads of cabinets who prepare College meetings. When the College agrees on a point, that is a political decision and that is the view of the Commission. When this needs to change, the matter has to go back to the College*” (Respondent Commission 3). The Commission proposal was preceded with an extensive reflection and consultation process with relevant stakeholders concerning the future of the CEAS (Commission of the European Communities, 2008a). An evaluation report by the Commission on the application of the Reception Conditions Directive in the member states was prepared on the basis of a study by the European Migration Network. The report concluded that the deprivation of liberty of asylum seekers is foreseen by all member states on numerous grounds, ranging from exceptional circumstances to a general practice. Also the length of detention varies considerably between member states, ranging from seven days, to twelve months, to an undefined period of time (Commission of the European Communities, 2007b; European Migration Network, 2006).

In order to find adequate responses to the identified issues in the evaluation report and to acknowledge the necessity of a wide political reflection on the level of ambition for the CEAS, a Green paper on the future of EU asylum policy was presented by the Commission in 2007 (Commission of the European Communities, 2007a). The Green paper aimed to identify possible options for the second-phase of policy-making in the CEAS (Commission of the European Communities, 2008c). The public consultation process resulted in 89 contributions from member states, third-country governments, civil society, NGOs, and academics. The

¹⁸⁷ The College of the Commission is composed of the 28 Commissioners, one Commissioner from each EU member state, and is led by the Commission President.

outcome of this consultation process was the basis for the 2008 Policy Plan on asylum, which functions as a roadmap for future legislative initiatives. This Policy Plan announces the intention of the Commission to propose amendments to the existing Reception Conditions Directive in the course of 2008 (Commission of the European Communities, 2008b). During this initial policy-making phase, the Commission allows and gives a platform for external experts to share their views and opinions. In preparation of the Commission proposal, expert meetings were organised by the Commission between December 2007 and March 2008 with member states, academic experts, NGOs, UNHCR and MEPs to seek their views and opinions on how to further enhance reception conditions across the EU (Commission of the European Communities, 2008c; Council of the European Union, 2008b). The impact assessment of the proposal by the Commission stipulated that detained asylum seekers often live in difficult conditions which are below the intended standards set out by the Directive. This reality can eventually amount to an infringement of article 3 ECHR¹⁸⁸ (Council of the European Union, 2008b). Policy-makers were then already notified that substandard detention conditions can have an impact on the smooth functioning of the instruments that facilitate the CEAS. Based on this wide reflection process, the Commission tabled its proposal amending the Reception Conditions Directive (Commission of the European Communities, 2008c). In this proposal, the detention of asylum seekers was allowed on exceptional grounds, based on the standards developed by the CoE and the UNHCR. Detention should be in line with necessity and proportionality principles, subjected to individual assessment, and asylum seekers shall be kept in specialised detention facilities (Commission of the European Communities, 2008b).

Especially in the early stages of the policy-making process, external organisations and experts had an important role to play. *“It is more in the pre-legislative phase and then afterwards you will see that those organisations try to look for contacts with the Commission and try to continue to issue papers on the evolution of negotiations in order to try to influence them”* (Respondent Council 2). These external experts and civil society organisations are especially important in *“providing data, field research, and legal analysis. Testimonies from detained asylum seekers was also a particularly influential action”* (Respondent external expert 2). In this way the Commission provides a platform for interaction, to receive information and that the external experts are being heard. This results in *“a mutually sustaining relationship”* (Respondent external expert 3). *“The Commission can take into consideration all comments or opinion*

¹⁸⁸ For example in the *Dougoz v. Greece* case.

papers from civil society and we [the Commission] do get a lot of these papers sent to us or we find them online. In the consultation meetings, there are no restrictions which organisations can participate” (Respondent Commission 3). The interviews with civil society and international organisations indicated that, in general, they mainly lobby the Commission and the EP. The access to the Commission and the EP is easier than, for example, to the Council. *“Commission and EP have proved to be open for input by civil society actors, whereas Council has never been really receptive”* (Respondent external expert 1). All respondents indicated the Council as the least accessible or open towards NGOs. *“When it comes to the Council and the member states, there is always a bit of remoteness towards NGOs”* (Respondent external expert 3). In order to get access to or to influence the Council: *“effective lobbying strategies require a dedicated presence in the capitals. Still, member states kept themselves insulated from civil society advocacy”* (Respondent external expert 2). This is also confirmed by a respondent in the Council: *“lobby groups have the most success in trying to influence member states in the capitals, not in Brussels”* (Respondent Council 2). As an external expert or organisation, you only get a partial impression of the negotiations. *“It would be exceptional not only to be invited to those meetings but even to get a proper agenda or a proper outcome document which is another very funny thing. If you see the formal outcome of proceedings in the Council, they are very different from the internal reports”* (Respondent external expert 3). Also, the type of input an organisation can make in order to be taken into consideration is important. One respondent indicated it is important to make positive contributions or input which is perceived as being neutral (Respondent external expert 2). This *“neutral”* information can also be an explanation for why the UNHCR is a frequent partner in providing knowledge, expertise, and legal analysis for the Commission, the Council, and the EP. They can be perceived as a *“neutral actor”* and are always involved in negotiations regarding the issue of asylum in the EU. *“They [the Commission, the Council, and the EP] see the UNHCR as experts in this area. The UNHCR norms, standards, and positions are based and grounded on international law and jurisprudence. The UNHCR also feels respected in its opinion and feel they have influence”*¹⁸⁹ (Respondent external expert 4). When questioning the impact civil society and international organisations have, one respondent from the Council stated that: *“they talk at high level with Commission and Parliament. It is difficult to disregard them. The Council is also lobbied but the more effective lobbying is towards the Commission and the Parliament”* (Respondent Council 1).

¹⁸⁹ Translated by the researcher from Dutch.

6.4.2 Towards the recast Reception Condition Directive: Key actors and working methods in the Council and the European parliament

6.4.2.1 The Asylum Working Party (AWP)

When the Commission puts forward a proposal to the Council and the EP regarding the CEAS, the discussions for the Council start in the Asylum Working Party (AWP). The AWP is one element in the formal negotiation process within the Council. It is “*a working group where experts from the capitals come to Brussels every month to discuss the technical and legal issues or details about proposals. Each of them of course with a background of their own systems*” (Respondent Council 2). “*The AWP is a very formal way of working. It is with a full translation regime so everyone speaks his or her own language, which makes it much more difficult*” (Respondent Council 2). In the AWP, article by article is discussed, which makes it, according to one respondent “*quite cumbersome. There are many technical comments, everyone will have comments from their own experience and their own administrative structure, organisation, and legal situation. It is quite intense and it takes a lot of time*” (Respondent Council 2). The purpose of this type of working group is that “*you end with a text that is, for most member states, on a technical level, acceptable because they see their own system reflected and they have the necessary guarantees that they will not have to change too much. Then the text goes to the JHA Counsellors where often there are still quite some, certainly in the beginning, technical issues that were not able to be solved in the working group*” (Respondent Council 2).

6.4.2.2 The Justice and Home Affairs Counsellors

The JHA Counsellors are permanently based in Brussels and are a part of the permanent representations of the EU member states. The JHA Counsellor setting is part of the formal institutional structure of the Council, but their meetings are organised and executed in a more informal way. The JHA Counsellors can be labelled as mediators because they follow the negotiations at different levels: working groups, Coreper, and SCIFA. According to one respondent, the focus of the Counsellors is to “*try to grasp information everywhere you can. Basically you try to advance negotiations and the positions of your country*” (Respondent Council 5). One of the crucial aspects in the function of a JHA Counsellor is to gather

information in order to find common positions between member states, along with anticipating the next steps in the negotiation process, together with their number one task of assisting their ambassador (Respondent Council 3, Council 5). The JHA Counsellors are, in comparison to the formal structures of the Council, such as the AWP, SCIFA or Coreper, “*more easy to gather. You do not need any language regime and you can call them and they are there the next day or even the same day. Moreover, if you want to have the final deal or a compromise on three or four issues in the Coreper, then it is good to have the JHA Counsellors involved first because they are the ones advising the ambassadors. If they agree themselves at their level then they are able to sell that to their ambassador*” (Respondent Council 3). The frequency of JHA Counsellors meetings is decided by the Presidency. Different factors play a role in this frequency: political pressure, preferences, and priorities by the Presidency, as well as the political climate and the priorities of the bigger member states which shape the direction of a certain policy file (Respondent Council 6).

The more informal nature of the JHA Counsellors is indicated by all respondents active in this setting. “*We are kind of a group of friends because all these people work in Brussels and know each other very well. This helps in the discussions and also the fact that they are supposed to be closer to their governments and ambassadors*” (Respondent Council 2). Personalities and experiences also play a role how colleagues are perceived: “*we have some very experienced colleagues and some people, if they take the microphone, you listen and they are generally right*” (Respondent Council 3). According to the respondents, this more informal way of negotiating between the JHA Counsellors does not cause significant problems. “*I think it is easier because you know each other. Obviously people change but you generally know your colleagues so you can have a bit more frank talks with them. You still have to act on your instructions of your capital of course, but you can have a more honest exchange. I do not think it causes any issues*” (Respondent Council 3). Not having a full language regime in this more informal context creates opportunities but also challenges: “*you do not have translation or interpretation in the Counsellors meetings as you do have in the working party. Sometimes there can be an issue with language*” (Respondent Council 3). The JHA Counsellors also meet each other on a bilateral basis (Respondent Council 2, Council 3). “*At Counsellors level we are often communicating with like-minded member states so we can reach a common position and we can agree who raises the issue and who is going to support it. Many issues like that can be done in advance so there is a strong impact*” (Respondent Council 5). Because the JHA Counsellors follow negotiations on different levels, the Counsellors have a key position in the

negotiation process. The Counsellors ought to have an overview of the more technical negotiations or difficulties plus the more political components which is reflected in the Coreper or the SCIFA meetings. The basis for the negotiations with the JHA Counsellors is the technical discussions in the AWP. Eventually, *“only the more political issues remain. We try to solve as much as we can in our working groups. Finally we go with two or three remaining big questions to Coreper”* (Respondent Council 2). Furthermore, because of the closeness of the Counsellors to other EU institutions, national experts and ambassadors, the Counsellors have a unique position. *“We [the Counsellors] are all in Brussels, we are close to the Commission, we are close to the Presidency and to our colleagues. We are able to talk with each other outside the meetings and try to convince or try to find solutions amongst like-minded member states on a certain issue”* (Respondent Council 2). The difference with the national experts who are active in the AWP, is that the JHA Counsellors negotiate more with other stakeholders. *“The experts are mostly going to the meetings, have a formal stance on several issues, make their point and go back home and then its finished”* (Respondent Council 2). The JHA Counsellors are supposed to *“negotiate with the Presidency, the Commission, with each other to see where we can find solutions. One of the purposes of why we are here is to make the life easier of our ambassador”* (Respondent Council 2). The JHA Counsellors’ network combines loose memberships or coalitions around a certain issue or problem. In order to fulfil their role as mediators, the JHA Counsellors try to find other like-minded partners in order to form some sort of alliance to push policy further and to disentangle sensitive topics. The JHA Counsellors are aware of the political components and importance of certain files. The JHA Counsellors are also trained to deal with these sensitivities because they often have a diplomatic background or career. As a result, these JHA Counsellors are part of a political elite who operate in the background of the political decision-making process but also has a crucial position in driving the policy process forward.

6.4.2.3 Coreper and SCIFA

Ambassadors of the member states’ permanent representation to the EU come together in the Coreper meetings which have a very formal setting with a full language regime. The Coreper is *“completely political”* (Respondent Council 3). *“These people know each other very well and they are more or less politicians. They know how to make political points. What is being said there is very important because this sets out the real political red lines for member states. If the*

Presidency is not able to solve something in one Coreper, or if things do not get resolved in Coreper, you can go back to the JHA Counsellors meetings and try to find a solution” (Respondent Council 2). While the JHA Counsellors are easy to gather, Coreper meets once a week. The SCIFA meetings need to be decided long beforehand. *“They are not flexible and that is quite problematic”* (Respondent Council 5). SCIFA needs to give input on the strategic direction of the negotiations. Due to the fact that the SCIFA meetings are planned long beforehand, you may need a SCIFA meeting at a certain point during the negotiations, but this is not possible because it is not scheduled (Respondent Council 5).

6.4.2.4 Presidency

Presidencies in the Council rotate every six months, but not every respondent is convinced about the influence the Presidency has on the negotiation process. *“The Presidency is important because practically they set the agenda and drive the policy-making process at the Council. Every six months there are changes with new people being in charge but that does not pose any problems”* (Respondent Commission 3). The Presidency has *“to find European solutions but in the end it is a machine. The machine keeps on rolling and it does not matter what kind of Presidency you have”* (Respondent Council 1). The Presidencies are supported in their activities by the Council’s secretariat. *“There are presidencies who rely much more on the secretariat and others are much more independent”* (Respondent Council 4). The Council’s secretariat provides logistical support but also has a historical memory of previous negotiations and can help with the redrafting (Respondent Council 3, Council 5). The secretariat *“needs to make sure that whatever the Presidency does somehow represents the position by the JHA Council. It is our role that negotiations evolve correspondingly with whatever was decided on a political level. It is up to us to remind the Presidency sometimes, or even the delegations, that we need to stick to the Council guidelines. Sometimes, there are three or four different positions on a certain topic and it is our role to try to bridge those differences and to come up with a compromise that may facilitate an agreement. This is something in which we can help the Presidency much more than for instance the Commission”* (Respondent Council 4). Furthermore, the Council secretariat oversees continuity because *“the adoption or negotiations of a file takes much more time than the term of one Presidency”* (Respondent Council 4).

Between the different Presidencies there are not only differences in resources and priorities, but the eventual outcome also depends on the composition of the Presidency and the corresponding working methods. This is further determined by the personal characteristics of the person who is handling the file. *“Sometimes you have some drawbacks because there are personal animosities and people not working so well together. In general the machine keeps on going”* (Respondent Council 1). The influence of personalities within the Presidency is highlighted by all respondents. *“Personalities are important. Not everyone has the same interaction or compromise capacities or the ability to show sympathy to positions that are not necessarily very popular”* (Respondent Council 4). *“It is not that much the country but more how the Presidency acts, the persons as Chairs and the working methods they use”* (Respondent Council 5). As a result, what is important for a Presidency are the resources and working methods of the people handling the file and who are able to explain their position(s) and compromises: *“what I think is the merit of the Presidency is when they make a change in the compromise proposal, or in the Commission proposal, they are able to explain what they are looking for”* (Respondent Council 5). Next to the person handling the file, timing is also important for the Presidency. *“In the end everybody tries to find compromises and everybody puts back a bit its national interests when they are in the Chair”* (Respondent Council 1). Furthermore, a file *“has to be ripe”* in order for all parties to move forward with the negotiations (Respondent Council 1). Presidencies also inherit what has been discussed during previous Presidencies. This can influence the approach and working methods of the next Presidency.

6.4.2.5 Rapporteur

Within the EP, the LIBE Committee is responsible for negotiating the asylum files. The key positions for the EP in the negotiation process are the Rapporteur and the team of shadow Rapporteurs. The Rapporteur for a specific file is appointed by a point system within the LIBE Committee. The shadow Rapporteurs are decided internally in each political group. The political group receiving the position of Rapporteur is essential because it sets the blueprint for negotiations within the EP and later with the Council. As a result, the composition of the team of the Rapporteur and shadow Rapporteurs is important: *“if you are big political group it is always easier to find compromises, alliances and to be able to advance. If you are a smaller group it depends to what extent you want to compromise your positions”* (Respondent EP 7). This composition feature is also closely related to the analysed features of resources, working

methods, and (individual) cooperation with other actors. The policy outcome “*also depends on the personal relations of the Rapporteur. You might have good relations with the shadows or you might be a strong member yourself for various reasons. There are different factors to say how effective a Rapporteur can be but also small groups have big positions in the EP. Also what languages you speak, things like that are important*” (Respondent EP 7). Language skills are not only important for a Rapporteur, but also for other MEP’s; adequate language skills are an important factor in order to effectively comment on proposals and positions. “*There are some members that are still not very fluent. You can see that impairs to some extent the commentary work. Also with stakeholders it is more difficult to communicate. This should not be the case*” (Respondent EP 7). If the Rapporteur is not perceived as a “*strong figure*”, the political advisers can also play a role to draft reports or to negotiate positions (Respondent EP 7). The Rapporteur, shadow Rapporteurs, and advisers can determine the atmosphere surrounding a specific file, especially when this team is composed of different personalities with different working methods. “*Depending on the personalities of the Rapporteur and shadow Rapporteurs, they work in a team. You also have Rapporteurs who prefer to work solo. Most of the time, if you have a good team of Rapporteurs, you have a strong basis and position to determine the joint EP’s position*”¹⁹⁰ (Respondent EP 2). The role of the Rapporteur and team of shadow Rapporteurs is crucial for drafting the EP’s report as well as in the negotiations with the Council. “*The Rapporteur has a lot of input in setting the discussion, choosing the main political priorities and the red lines for the Parliament*” (Respondent external expert 3). Just like the Council’s secretariat, the LIBE Committee also has a secretariat which functions as a type of “*control tower*” (Respondent EP 7). The LIBE secretariat has an overview of the global political process, tries to ensure coherence and talks with the political advisers in order to determine the margin within which to manoeuvre on different positions (Respondent EP 7).

6.4.3 Towards the recast Reception Condition Directive: The first formal round of negotiations

On the 3rd of January 2009, the AWP started with the first reading of the Commission proposal (Council of the European Union, 2009c). Also, the EP, more specifically the LIBE Committee, discussed the Commission proposal, resulting in a vote to adopt the proposal with 31 amendments (Council of the European Union, 2009a; European Parliament, 2009a). The

¹⁹⁰ Translated by the researcher from Dutch.

Rapporteur of the LIBE Committee for this specific policy document was Antonio Masip Hidalgo¹⁹¹ and shadow Rapporteurs Georgios Papanikolaou¹⁹² and Jean Lambert.¹⁹³ When analysing more closely the report of the LIBE Committee, and specifically the amendments made to the detention provisions,¹⁹⁴ the EP's position was essentially in line with the position of the Commission. Article 8 on the reasons for detention was not amended. Article 9 (guarantees for detained asylum seekers) was slightly amended so that administrative procedures which are delayed cannot be attributed to the asylum seeker and shall not justify the continuation of the detention. Furthermore, asylum seekers should have real access to legal assistance and/or representation. Article 10 (conditions of detention) was amended in order to ensure that detained asylum seekers have access to not only UNHCR but also to social workers, religious visitors, appropriate medical treatment, and psychological counselling where appropriate. Furthermore, asylum seekers should be provided with information in a language they understand or may reasonably be presumed to understand (European Parliament, 2009a).

At the Council level, the AWP completed its first reading of the file in April 2009. In May 2009, the proposal moved up the ladder to the SCIFA in order to get clarification on the issues of detention and access to the labour market, and to determine the further direction of the negotiations (Council of the European Union, 2009h). At the September 2009 JHA Council meeting, it was decided that the recast Reception Conditions Directive¹⁹⁵ should be completed by 2012 at the latest (Council of the European Union, 2009f). Based upon the discussions in the SCIFA, the Czech and Swedish Presidencies drafted several compromise options which included the addition of the "*risk of absconding*" to the list of grounds to detain asylum seekers.¹⁹⁶ Some member state delegations welcomed this suggestion as progress. However, a

¹⁹¹ From 14/07/2009 until 30/06/2014 member of the group of the Progressive Alliance of Socialists and Democrats. Source: http://www.europarl.europa.eu/meps/en/28338/ANTONIO_MASIP+HIDALGO_home.html, last consulted on 20/12/2016.

¹⁹² From 14/07/2009 until 30/06/2014, a member of the group of the European People's Party (Christian Democrats). Source: http://www.europarl.europa.eu/meps/en/96900/GEORGIOS_PAPANIKOLAOU_home.html, last consulted on 20/12/2016.

¹⁹³ Since 1999, a member of the Greens/European Free Alliance political group in the European Parliament. Source: <http://www.jeanlambertmep.org.uk/meet-jean/jean-in-the-european-parliament/>, last consulted on 20/12/2016.

¹⁹⁴ Article 8: Detention, article 9: Guarantees for detained asylum seekers, and article 10: Conditions of detention.

¹⁹⁵ Also, other proposals regarding the CEAS were negotiated at the same time. The other outstanding proposals under negotiation in the area of asylum were the EU resettlement Program, the Dublin Regulation, the EURODAC regulation, the European Asylum Support Office and the amendment of the European Refugee Fund (Council of the European Union, 2009f).

¹⁹⁶ The initial Directive does not stipulate on which grounds member states may decide to detain an asylum seeker, because this was regulated in national legislation and subjected to international obligations and standards.

substantial number of member states maintained their reservations. Member states argued that the grounds for detention should be legislated at the national level or, on the contrary, more grounds for detention should be included in the Directive. The Commission was very critical towards the addition of the risk of absconding as a ground to detain asylum seekers. The Commission criticised the vague wording and feared the systematic practice of detaining asylum seekers based on this provision (Council of the European Union, 2010a). The progress report on the negotiations stipulated the divergent positions by the EP and the Council regarding the provisions on detention for which further discussion was needed (Council of the European Union, 2009g). The AWP examined the EP's position and compromise options from the Presidency in June 2009 (Council of the European Union, 2009d). The process of moving away from the provision to detain asylum seekers only in specialised detention centres was initiated by the wording: *“in duly justified cases and for a reasonable period which shall be as short as possible, member states may derogate when accommodation in specialised detention facilities is temporarily exhausted and, as a consequence, member states are obliged to resort to prison accommodation, provided that asylum seekers in detention are kept separated from ordinary prisoners”* (Council of the European Union, 2009e). By the end of 2009, the Council was still far from having a common position which was sufficient to start negotiations with the EP (Council of the European Union, 2009j). Negotiations continued under the Belgian Presidency (July–December 2010), which organised a conference entitled *“Quality and Efficiency in the Asylum Process”* (13–14 September 2010). This conference gave the opportunity for member states, UNHCR, and civil society to further discuss the issues concerning reception conditions for asylum seekers across Europe. There was a general consensus that further reflection on the recast Reception Conditions Directive was needed. The aim was reiterated to have an agreement by 2012 (Belgian Presidency, 2010).

6.4.4 A deadlock in the negotiations and a new Commission proposal

The CEAS legislative package, including the Reception Conditions Directive, was further discussed at the ministerial level at the JHA Council of October and November 2010 (Council of the European Union, 2010c). While the proposal for the recast was already tabled in 2008, negotiations at both the AWP and the SCIFA made it clear that several delegations had serious concerns on different issues. These difficulties were based on the possible financial impact of some of the provisions, the creation of potential pull factors, and a concern of over-burdening

the national reception systems. One respondent indicated the “*Commission proposal did not take into account sufficiently the budgetary implications. Moreover, this proposal left no sufficient flexibility to organise national asylum systems*” (Respondent Council 1). Regarding the provisions of detention in the first Commission proposal, one respondent indicated that “*detention was a big issue and especially how to frame detention. When can you detain people? What are the rules for detention? In what conditions can you detain people?*” (Respondent Council 1). The harmonisation goal pursued by the Commission went too far for the member states. As a result, within the Council, and between the Council and the Commission, there was a substantive contrast in the norms, priorities, and ideas regarding this topic. Because negotiations reached a deadlock, the Commission, at the JHA Council of 8–9 November 2010, announced it will table an amended proposal by early 2011 which takes into account the views of the Council and the EP (Council of the European Union, 2010b). This commitment was reiterated at the JHA Council of April 2011 and the Commission tabled a revised proposal in time for a first discussion at the JHA Council of June 2011 (Council of the European Union, 2011i). In parallel with the previous proposal, the Commission undertook a series of bilateral technical consultation meetings with relevant stakeholders, external experts, and national administrations in the period of January–April 2010. One of the aims of the amended proposal is to establish clear and strict rules on the use of detention in order to guarantee that detention is not arbitrary and fundamental rights are respected. The Commission maintained the position that the detention of asylum seekers shall only take place in specialised detention facilities (article 10). Detention may only occur under predefined grounds when it is in line with the principles of necessity and proportionality, after an individual assessment of each case. Furthermore, reception conditions in detention should “*respect human dignity*” (European Commission, 2011a). What human dignity precisely implies is not defined in the proposal and is left open for interpretation by the member states.

The AWP started its first reading of the amended proposal in July 2011 (Council of the European Union, 2011g, 2011h). The Presidency analysed the provisions related to the grounds of detention as “*proven to be of key political significance. Further political consideration of these questions will be necessary*” (Council of the European Union, 2011d, p. 2). Due to the contrasting ideas regarding this issue, it was further discussed at strategic level in the SCIFA and Coreper in order to progress with the negotiations. Due to the politically sensitive nature of the detention provisions, the Polish Presidency made this the key focus of an informal SCIFA meeting in September 2011 (Council of the European Union, 2011f). In the meantime, the AWP

continued with the technical examination of the proposal. The Presidency highlighted that although negotiations are progressing constructively, certain key political issues, inter alia the issue of detention, still need further negotiation (Council of the European Union, 2011e). In the amendments by the German and Austrian delegation, it is clear that the financial aspect or budgetary implications are an essential factor. The German delegation declared that the proposal is to achieve an appropriate balance between a separate accommodation to detain asylum seekers and the costs for the member states. Taking into account this financial equilibrium, the provision, including the temporary and justified derogation to detain asylum seekers only in specialised detention facilities, was moderated. Consequently, asylum seekers only need to be separated from ordinary prisoners (Council of the European Union, 2011a, 2011b). This reasoning was also followed in the compromise proposal by the Presidency, which was discussed in the AWP in November 2011 (Council of the European Union, 2011c). Until the end of 2011, no common position was reached within the Council because the grounds for detention remained such a politically sensitive issue.

From the beginning of 2012, negotiations took place at the political level of the Coreper and between the JHA Counsellors. The specific grounds for detention (article 8 in the adopted Directive) remained politically contentious for many member states and very difficult to negotiate (Council of the European Union, 2012c). During these negotiations, the Commission consistently targeted higher standards than the Council proposals. The reasoning by the Commission was based on the evolving case law of the European Courts in which the deprivation of liberty may only be applied as a measure of last resort, proportionate, and may only occur under clear legally defined and objective grounds (Council of the European Union, 2012h). At the Coreper meeting of 21 March 2012, the delegations endorsed the compromise text from the Presidency as a mandate for the Presidency to start trilogue discussions with the EP (Council of the European Union, 2012g). The first reading of the EP dates from May 2009 and was based on the first Commission proposal. This first reading position by the EP was also the basis for the EP to start negotiations with the Council.

6.4.5 Trilogues as a way to push negotiations forward

“Typically the more sensitive issues go to trilogue meetings in which they continue until there is an agreement. The Commission does not take part in these negotiations but functions as a

facilitator and explains its position. We try to come up with solutions and compromise options” (Respondent Commission 3). For the recast Reception Conditions Directive, the negotiations between the Council and the EP started when both institutions have received a mandate from either the Coreper or the LIBE Committee, respectively. For the recast Reception Conditions Directive, initially four trilogue meetings were scheduled. These trilogues consist of the Presidency (representing the Council), the Rapporteur (representing the EP), and the Director General of the relevant DG (representing the Commission)¹⁹⁷ (Council of the European Union, 2012e). During May and June 2012, three trilogue meetings took place under the Danish Presidency, which gave feedback to the delegations and discussed compromise options. Before the first informal trilogue, a note from the Presidency to the JHA Counsellors indicated that article 9 (guarantees for detained asylum seekers) and article 10 (conditions of detention) of the Commission proposal *“need to be further discussed”* (Council of the European Union, 2012b). Despite the Presidency stipulating the achieved progress during these meetings, no consensus was reached regarding these provisions because the position of the Council and the EP on this matter opposed each other.

After three trilogue meetings, no consensus was reached. The Presidency suggested discussing these issues back at the Coreper level in preparation for the fourth trilogue meeting (Council of the European Union, 2012d). Until the fourth trilogue meeting, the EP maintained the position that *“member states shall not detain asylum seekers in prison accommodation. Detention shall only take place in specialised detention facilities”*.¹⁹⁸ A compromise option was found by adding the wording *“as a rule”*. Consequently, the EP agreed that the detention of applicants for international protection shall *“take place, as a rule, in specialised detention facilities. Where a member state cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply”*.¹⁹⁹ Eventually, a fifth and final trilogue meeting (27 June 2012) was necessary to reach a consensus between the Council and the EP. This meeting was prepared by the JHA Counsellors based on

¹⁹⁷ The Commission does not take part in the formal negotiation process but participates at these trilogue meetings as a facilitator for the negotiations and to give more information on certain technical aspects.

¹⁹⁸ This was in line with the Commission proposal which stated: *“Detention shall only take place in specialized detention facilities”* (European Commission, 2011a).

¹⁹⁹ Art. 10(1) of the recast Reception Conditions Directive (European Union, 2013). This provision is far apart from the original wording by the Commission: *“Member states shall not detain asylum seekers in prison accommodation. Detention shall only be carried out in specialized detention facilities”* (Commission of the European Communities, 2008c).

the suggestions by the Danish Presidency (Council of the European Union, 2012i). This approved common position resulted in a political agreement between the Council and the EP in September 2012. The political agreement on the text was confirmed by the Coreper of October 2012 and at the JHA Council of 25–26 October 2012 without discussion (A-item) (Council of the European Union, 2012a, 2012f). The position of the Council's first reading was adopted by the JHA Council in June 2013 (Council of the European Union, 2013b) followed by the adoption of the text with no amendments by the EP (Council of the European Union, 2013a). The policy cycle was completed on 26 June 2013 with the formal adoption of the recast Reception Conditions Directive (European Union, 2013).

The trilogue method is the preferred option for pushing negotiations process forward. However, according to a majority of the respondents, this is not an ideal way of policy-making for a number of reasons. One respondent described the process of trilogues “*as theatre. At the end of the day if Council does not want to make things happen, Council does not*” (Respondent EP 6). Also the level of secrecy and confidentiality involved in these meetings makes it extremely difficult for external experts and organisations to follow negotiations in trilogues. Sometimes this is also the case for officials working within EU structures. One respondent active in the EP indicated that the strong role given to the Rapporteur, who leads the negotiations for the EP, is worrisome. According to the respondent, especially when the Rapporteur is from a bigger political group, at a certain point the Rapporteur runs away with the process due to the lack of reporting. As a result, “*it is not necessarily clear who is proposing what on whose behalf. Things go with enormous speed and you do not know where the text is at a certain point. You cannot publicly share it with NGOs or other stakeholders. It depends on the transparency of the Rapporteur and his or her staff to which extent another political group can follow the process properly. You also do not know to what extent parallel negotiations are taking place with the Rapporteur's office and the Council*” (Respondent EP 1). Also, internally this poses challenges in disseminating information and different opinions by the parties involved. “*At the one hand, the Rapporteur has to provide information which is enough for you to understand what is being discussed. On the other hand, they [the Rapporteur] cannot discuss the various positions of the three parties because then they violate the secrecy of the negotiations. It depends on the insistence of the other MEPs whether or not they get the minutes of the trilogues*” (Respondent EP 1). Consequently, this shows the Rapporteur as a key position for the EP and in the negotiating process with the Council in the trilogues. The shadow Rapporteurs from the other political groups can be present at the trilogues, but they cannot intervene or take the floor. While

this method is not ideal, the question can be raised as to what extent this level of secrecy and confidentiality is avoidable in a policy-making process?

In the specific case of the recast Reception Conditions Directive negotiations, the role of the Rapporteur influenced the negotiations and the eventual outcome. From the outset, building a general consensus in the EP regarding this file was challenging. *“It was really quite difficult to find a progressive majority. When you got a Rapporteur from the S&D who is making the case and not doing the pushing you are at a disadvantage in the negotiations. It is only fair to say this because it also shows that quite a lot of this is the combination of people that you have which will enable you to get something”* (Respondent EP 6). The Rapporteur for the recast Reception Conditions Directive was *“less involved, new in the file, and did not take a lot of initiative”*²⁰⁰ (Respondent external expert 4). *“We [the EP] did not have the most forceful Rapporteur on this. Some of the things we did manage to get, almost last minute, were largely because we had the Chair of the LIBE Committee present for at least the final rounds of negotiations. It was a different energy in the room”* (Respondent EP 6). This was not only because the Rapporteur was not the most forceful but also because personal and private aspects played a role: *“we had somebody who was a really nice bloke but was not on top of the details and then also suffered a stroke partway through. When he came back he tired easily so it was that sort of personal side to it as well”* (Respondent EP 6).

Specifically regarding the provisions related to the grounds for detention, the adopted proposal contained more grounds to detain asylum seekers than the Commission proposed. *“One of the big problems is that we ended up with even more grounds for detention at the end than the Commission had given. We ended up with five and the Commission originally had only given us four”* (Respondent EP 6). This is arguably due to the weaker negotiation position of the EP vis-à-vis the Council. As a result, for the EP it is very important which Rapporteur you have (political group, experience, personality) in order to determine the negotiating position of the EP and the eventual outcome. On the other hand, as indicated before, respondents active in the EP highlighted that if the Council does not want to move its position on certain aspects, Council does not. The analysed feature “resources” can further explain why the EP perceives itself to have a disadvantaged position vis-à-vis the Council. The differences in available resources between the EP and the Council can help to clarify why the EP is more receptive to external

²⁰⁰ Translated by the researcher from Dutch.

expertise and knowledge than the Council. “As EP we do not have much direct access to field expertise” (Respondent EP 7). Behind the Presidency are national administrations from every member state, each with their own experts who can provide input and analysis. “In a national administration you have tens or more experts working on the same kind of thing. The EP has the secretariat, one policy collaborator which has to deal with all the files so it is impossible. For an MEP it’s much more difficult unless he/she has still good contacts with his/her own home member state and administration. This is certainly not always the case and then they count on international organisations, NGOs, and so on to provide them with information” (Respondent Council 2). “In many cases it does lead to Parliament giving in things. I would say generally in trilogue negotiations they [Council] are stronger than us. Technically speaking they are always stronger than us and they are able to better screen the documents. From our side it depends who is the Rapporteur and how much he or she wants to go into the details and fight for the different points” (Respondent EP 7). This is also the case for the Commission, which is similarly limited in capacity. If they do not possess the expertise, the Commission has to rely on external experts. The fact that there is a whole array of national experts behind the Council can also complicate the process because so many actors are involved. However, it also allows for the exchange of expertise between different persons and an increased capacity to prepare positions, legal analysis, etc. The following part will analyse the feature of “external influence”, which is crucial to understand the third wave of EU asylum legislation.

6.4.6 The 2015 “refugee crisis”: A third wave of asylum legislation

In the years after the adoption of the recast Reception Conditions Directive, extraordinary events took place at the EU external borders when hundreds of thousands of migrants strived to enter the territory of the EU (Trauner, 2016). Especially in 2015, the asylum or refugee crisis, placed heavy burdens on the functioning of the CEAS. Member states located at the periphery (e.g. Greece, Italy, Malta, Cyprus) did not have the capacity or the reception centres to deal with this amount of people. The migration crisis exposed the need for ensuring a better consistency in reception conditions across the EU. Varying conditions concerning the reception of asylum seekers within member states persist and are raising problems with ensuring a dignified treatment of applicants. Furthermore, when certain member states are being “more generous” than others, this may contribute to secondary movements. Therefore, with the proposal on the recast Reception Conditions Directive, the Commission aims to further

harmonise reception conditions, to reduce incentives for secondary movements, and to increase the applicants' self-reliance and possible integration prospects (European Commission, 2016b).

The whole EU asylum policy and the CEAS came under enormous pressure with these events. Subsequently, the assumption of comparable standards, rules, and procedures was not only challenged in practice, but also in the case law from national and European Courts. Due to this increased pressure, the political will at the national and European levels grew to act on this crisis. The Commission announced two packages of legislative reform in its proposal:

1st package (11 May 2016):

- A recast of the Dublin Regulation establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection;
- A Regulation on the European Union Agency for Asylum, replacing the EASO Regulation;
- A recast of the Regulation on the establishment of "Eurodac".

2nd package (18 July 2016):

- A Regulation establishing a common procedure for international protection in the EU (replacing the Asylum Procedures Directive);
- A Regulation on qualification of third-country nationals or stateless persons as beneficiaries of international protection (replacing the Qualification Directive);
- A recast of the Directive for the reception conditions of applicants for international protection;
- A Regulation establishing a Union Resettlement Framework (European Commission, 2016a).

Certain Directives changed nature and were transformed from a Directive into a Regulation.²⁰¹ This increases harmonisation purposes because regulations are directly applicable in all member states. The recast Reception Conditions Directive remains a Directive. One respondent

²⁰¹ For example the Asylum Procedures Directive (proposal COM(2016) 467 final) and the Qualification Directive (COM(2016) 466 final).

highlighted that this Directive did not change in nature because the possibility has to be kept for member states to keep their flexibility and diversity (Respondent Council 4). Furthermore, the recast Reception Conditions Directive also includes provisions related to social assistance and social security “*which are really complicated and goes much into the national systems of the member states. It is probably not possible to try to harmonise that because of the differences between the member states. In general there is an understanding there is no possibility to go further*” (Respondent Council 5). The Commission stipulated in the explanatory memorandum of the proposal that reception conditions continue to vary considerably across member states.

6.4.6.1 Policy-making in a different context

The 2015 asylum crisis changed the context in which the EU operates and the internal dynamics of the policy-making process. “*There is a political will for change. This political will comes from everywhere: member states, EP, and civil society. There is an overall uniform support or a consensus about the necessity to reform the CEAS, including the Reception Conditions Directive. The experiences of the crisis is the main driver of this increased political will, particularly for the member states*” (Respondent Commission 3). The transformation of the CEAS is since 2015 a top priority. The CEAS package includes “*all very important, sensitive, priority files*” (Respondent EP 7). “*There is so much political pressure on the whole refugee and migration topic in the EU*” (Respondent external expert 3). In the Council there is a division between what is being proclaimed at the political level and how progress can be reached at a technical level. “*Politicians have quite ambitious roles. They want to achieve the CEAS very quickly. If you hear the working group discussions, you do not see this pressure to achieve something very fast. When you see the discussions and how difficult they are, you try to understand the differences between the member states. Then you realise that it is not simply something you can do in a couple of months*” (Respondent Council 5). Respondents highlight that the policy-making of the third CEAS package is an example of a top-down approach. “*The political direction and mandate comes from high up and is centrally managed. This means that for DG Home [Commission] to be able to define its own boundaries and its own position is very difficult. DG Home obviously has the technical expertise to draft a proposal and assess the issues, but very often the political objective is not in their hands. They just need to implement*” (Respondent external expert 3). “*You have a strong vice-president in Timmermans who is very active in immigration issues. Also, President Juncker takes a personal interest in the matter*”

(Respondent EP 5). As a result, *“it is more difficult now to influence the Commission from the grassroots level”* (Respondent Council 6). According to one respondent, this top-down approach is also the reason why there is so much resistance from the member states towards the CEAS: *“not enough grassroots work why diversity is not a threat”* (Respondent EP 6).

The context in which negotiations take place is crucial. In the area of asylum there appears to be a general context in which member states are not keen to make many changes to their national system. *“Everyone says that the political goal should be harmonisation. Between the statements and practice you see that some member states are very keen to keep their systems and are not willing to change a lot because Europe says it. They [member states] might be convinced about the fact that we need European solutions or they might see their system as the model for a future European solution”* (Respondent Council 2). Due to the increased political pressure on the issue of asylum, the pace of the CEAS reforms is very fast. For example, for the recast Reception Conditions Directive, the deadline for member states to transpose the Directive into national law was July 2015. In July 2016 the Commission launched a new proposal to re-negotiate certain aspects of this file. When we take this into account, one can wonder whether there is any sense of *“legislation fatigue”* present with the different stakeholders in the negotiation process. Certain respondents highlighted that this is the case, especially in the Council where member states sometimes struggle with the implementation of all the legislative files in the area of asylum. On the other hand, the member states gave a clear political message that the CEAS had to be reformed to better deal with the crisis. Because of the crisis atmosphere *“you see member states going back to national solutions as a consequence of this situation”* (Respondent Council 2). This is also reflected within the Council and the EP. *“If the Council was already kind of a heterogeneous house a couple of years ago, now it is definitely very difficult to bridge all those positions. I think it will take a lot of time for them to even agree on something and it will look as a product of a very difficult compromise and we all know how that looks”* (Respondent external expert 3). Also, the composition of the EP is more heterogeneous than the previous one. *“You are no longer able to see the traditional divide that we all had in our minds: a very strict Council versus a proactive and very liberal Parliament. I think those days are gone, which means that the Parliament has to make very difficult compromises within before it can start talking to the Council”* (Respondent external expert 3).

For the Juncker Commission, it is an absolute priority to provide better regulation.²⁰² For the proposal on the recast Reception Conditions Directive, no formal impact assessment was carried out. Consultative meetings with stakeholders (member states, EP, ECRE, UNHCR, FRA) took place, but there was no evaluation process to ensure EU laws are fit for its purpose. Apparently, the need for better regulation and ensuring quality and coherence in EU legislation is overshadowed by political considerations and the political will to show that “*something*” is being done. “*The intention for better regulation is still there but this has to be weighed against the political pressure to deliver. I am not saying this is the right approach. It is this idea that you always need to put new things on the table to show that you are doing something but you are not giving enough time to implement what was decided. This is true for asylum but also for some of the other areas*” (Respondent Commission 3). One respondent from a civil society organisation perceives this as a systematic problem within the Commission: “*You see a very systematic pattern of the Commission very often responding in a bit of a panic approach, quick fixes and a less visionary and long term approach*” (Respondent external expert 3). However, the reform is more linked to the political message the EU wants to spread. “*Technically the reform was perhaps not necessary but politically it was. The reform is a strong political signal which was absolutely necessary*”²⁰³ (Respondent EP 2). “*It is about showing that we [the EU] are in control because the public thought we were not. Not to be seen as in control is politically a very dangerous place to be for national governments, Commission or whoever*” (Respondent EP 6). The increased political pressure has also an important side effect concerning the access from civil society to the Commission. “*Especially the Commission has been slightly more restrictive when it comes to discuss plans with NGOs and being open to reconsider positions. We had one consultation with them before the adoption of the CEAS proposal. There again they clarified that the political constraints are very strong*” (Respondent external expert 3).

The majority of the respondents indicate that the lack of an impact assessment and the crisis atmosphere of policy-making are problematic. “*You are devising new policy that are meant to last for the next 10–15 years on the basis of this crisis scenario whereas you should not be in crisis mode*” (Respondent EP 5). For some respondents, the absolute need and basis for a reform was also not clear: “*when it comes to the actual instruments, we do not have a basis for solidly concluding that we needed a reform. There were a lot of flaws in the different instruments that*

²⁰² See for example the Communication from the Commission to the European Parliament, the European Council and the Council on better regulation: delivering better results for a stronger Union. COM(2016) 615 final.

²⁰³ Translated by the researcher from Dutch.

is for sure. But without a proper monitoring and understanding of how these are even implemented given that the transposition deadline had just lapsed. Some member states have not even transposed them yet (Respondent external expert 3). “If you do an impact assessment, normally you kind of understand where everything, or most things, come from, including the choice to actually present a proposal. In some cases, we [the EP] do not understand where these amendments that the Commission proposes are coming from” (Respondent EP 7). While the basis for these new proposals was not clear, the respondents were unanimous about the message or the rationale from the Commission. “This, I think, is closely linked to political messaging and how the Commission needs to or perceives itself as acting and as an actor promoting change and fixing problems” (Respondent external expert 3). “In some cases it seems that they [the Commission] were responding to some political pressure. It is obvious that the European Council was asking for reforms. They [the Commission] felt that under the refugee crisis they had to do something, which is the presentation of new proposals. That was actually even coming, in some cases, before the evaluation of the last transposed legislation or not even transposed legislation” (Respondent EP 7).

6.4.6.2 Different objectives and working methods

Due to the crisis atmosphere, the objective of the Commission proposal changed compared to the proposals concerning the second CEAS package. According to one respondent, the previous negotiations had a “clear harmonisation towards protection rationale and aimed to raise standards. This is a completely different game. The starting point of the Commission is to respond to an extensive political reality and political constraints and not to raise standards but to lower them. We are having a completely different discussion from the one we had last time around” (Respondent external expert 3). According to a respondent in the EP, “the current Commission is much more punitive. Member states’ systems are under pressure, whereas in fact we know that only certain countries’ systems are under pressure because others are not doing anything. A certain number of member states decided not to develop their asylum systems because they are not taking any asylum seekers. Also, the Commission is more politicised and political conservative than before. The previous Commissions tried not to be a-political but recognised there were different forces and tried to balance that” (Respondent EP 6). If the Commission is perceived as more restrictive or more bounded by political directions and pressure, this trickles down to the legislative proposals, which set the blueprint to start

negotiations with the Council and the EP. While the composition of the Commission is different, the other approach of the Commission is also explained by the European context and the fact they are responding to extraordinary events and increased political pressure.

Due to the increased political pressure, the working methods also changed. More has been negotiated immediately at JHA Counsellor and Coreper level (Respondent Council 2). The increased political pressure on the asylum files influenced the Presidencies. Since the crisis, the different Presidencies had to put all their emphasis on asylum and migration. The increased political pressure on the files also influenced the working methods and the leeway of the JHA Counsellors because “*more and more is done at the capitals*”. This is done in order to ensure that the views in Brussels do not go beyond what should be told and so they stay in clearly defined lines (Respondent Council 6). “*If I was here ten years ago life would have been much more easier because then you could act more freely. Nowadays, I feel that the margin of manoeuvre is much more limited because it is such a political issue and there are very strong views. Many based in Brussels feel it because of the political type of discussion. It makes you to respect your instructions much more because it is so sensitive and there are very strong views*” (Respondent Council 5). Also the Maltese Presidency (January–July 2017) applied a new working method regarding the negotiations of the third CEAS package. In order to progress negotiations within the Council, the Maltese Presidency adopted a thematic approach: “*trying to adopt positions across all the CEAS files, for example children or vulnerable groups*”²⁰⁴ (Respondent external expert 4). Eventually, this new approach did not prove to speed up negotiations like the Presidency had hoped (Respondent external expert 4). This is partly explained because all the files are intertwined with each other and are also negotiated as a package deal.

As a result of this external influence, not only the working methods, but the rules of the game in the policy-making process, changed. The priorities and directions are now coming from a higher political level. Consequently, the leeway for policy-makers at a working party or unit level to act decreases and they have to stay in clearly defined lines. This is enforced by the fact that policy proposals were immediately discussed at a higher political level. Also, certain principles to make better regulation (e.g. conducting an impact assessment) are set aside in order to show that the responsible policy-makers are in control of the situation. Due to the

²⁰⁴ Translated by the researcher from Dutch.

increased political pressure, priorities increasingly come from a top-down approach. This in combination with a sense of urgency and crisis atmosphere; it is more difficult for external organisations to influence policy-makers.

6.4.7 A recast on the recast Reception Conditions Directive

In preparation for the Commission proposal on the recast Reception Conditions Directive, the European Asylum Support Office (EASO) developed operational standards and indicators on reception conditions. The guide covers certain aspects that fall within the scope of the Directive, such as housing, food, clothing, allowances, health care, etc. The issue of detention is not covered by the report (European Asylum Support Office, 2016). A second source of inspiration for the Commission proposal came from Contact Committees. Since the adoption of the Reception Conditions Directive in 2013, so-called Contact Committees have been organised by the Commission to discuss with relevant stakeholders the challenges regarding the transposition and implementation of the Directive (European Commission, 2016b). A new element in the third CEAS package is that *“the sanctioning paradigm is very important”* (Respondent Council 6). The overall tone of the Commission proposal *“has become much more stricter”* (Respondent Council 5). It is also *“more punitive. That is the intention and that was a clear political message from the Council which was already given in 2015. In general I think we can talk of a certain consensus about needing more punitive measures”* (Respondent Council 4). *“The problem is that the whole debate has shifted a step to the right. If you see the climate in Europe, it has shifted to the right compared to a few years ago. The Council also has shifted”* (Respondent EP 7).

In the specific area of detention, the proposal adds one additional detention ground in order to tackle secondary movements: *“In case an applicant has been assigned a specific place of residence but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, the applicant may be detained in order to ensure the fulfilment of the obligation to reside in a specific place”* (Article 8(3)(c)) (European Commission, 2016b). This ground is very restrictive in holding people seeking international protection in one assigned place and country, otherwise they can be legally detained. Also, member states can still detain asylum seekers in prison accommodation if they are kept separately from ordinary prisoners. Apparently, the Commission feels no political support to go back to their position of

the first proposal of the 2013 recast in which applicants for international protection should always be detained in specialised facilities. Apparently there was no appetite within the Commission to re-open the debate regarding the grounds and conditions of detention in the recast. *“Inside the unit there was a lot of discussions also at cabinet level. On the issue of detention it was clear that we did not want to touch the provisions on detention too much because it was fought hard for during the previous negotiations. It is still sensitive for the member states and the position of the Council and the EP is so different. There is no appetite to do this again”* (Respondent Commission 3). Within the Council, the issue of detention is *“not controversial and everyone is on the same line”* (Respondent Council 6). The provisions related to detention are not *“so contentious amongst member states. Of course when you go to the EP then it is different”* (Respondent Council 4). However, the debate regarding the deprivation of liberty of asylum seekers is necessary because there is a *“very wobbly and often inappropriate cross-fertilisation between immigration and criminal detention. There you have two worlds that are so closely interacted, even though their fundamental basis is so different”* (Respondent external expert 3).

The Commission presented its proposal concerning the new legislative options in the LIBE Committee on 20 April 2016. The Rapporteur for the LIBE Committee on this dossier is Sophia in’ t Veld²⁰⁵ who is very active and has a solid track record as an MEP in different policy areas. The reform of the CEAS was one of the four priorities of the Slovak Presidency (July–December 2016).²⁰⁶ This was reflected in an increase in the scheduled meeting-days of the AWP. In the AWP of 28–29 September 2016, a first exchange of views and a presentation by the Commission took place specifically on the proposal of the recast Reception Conditions Directive (Council of the European Union, 2016a). Regarding the initial examinations of the *“July package”*, including the Reception Conditions Directive, the delegations mainly raised concerns about possible financial and administrative burdens. The proposal was further discussed at the Coreper meetings of October (Council of the European Union, 2016f) and December 2016 (Council of the European Union, 2016d) in preparation for the JHA Council

²⁰⁵ MEP since 2004 for the ALDE group and since 14/07/2014 Vice-chair of the ALDE group. The shadow Rapporteurs are Salvatore Domenico Pogliese (EPP), Iliana Lotova (S&D), Cornelia Ernst (GUE/NGL), Bodil Valero (Greens, EFA), Gilles Lebreton (ENF).

²⁰⁶ *“Sustainable migration and asylum policies: The current migration crisis is putting enormous pressure on the EU’s external borders and on the asylum systems of the Member States. The Slovak Presidency therefore seeks to encourage the Union to develop more sustainable migration and asylum policies.”* Source: <http://www.eu2016.sk/en/programme-and-priorities/priorities-of-the-slovak-presidency>, last consulted on 20/12/2016.

meetings in the same months (Council of the European Union, 2016b, 2016e). By the end of November 2016, the AWP completed the first round of examinations of the Dublin Regulation, the Qualification Regulation, and the recast Reception Conditions Directive (Council of the European Union, 2016c).

The LIBE Committee and Rapporteur Sophia in 't Veld presented the EP draft report on 18 January 2017. Specifically regarding the issue of detention, the Rapporteur stressed that detention can only be based on a judicial decision and not on a decision by an administrative authority (position from the Commission). The Rapporteur also stressed the need for alternatives to detention by including a provision that the detention order needs to contain a reference to the consideration of available alternatives and the reasons for why this could not be applied effectively (European Parliament, 2017b). The EP does not go back to its position regarding the detention of asylum seekers by insisting that applicants for international protection should only be detained in specialised detention facilities. One respondent indicated that “*while drafting the EP report, the choice was made not to take up this battle regarding the provisions of detention due to the lack of a broad political support*”²⁰⁷ (Respondent EP 2). Even in the EP there is no will to go too far in the area of detention.

6.4.8 The informal context in the policy-making process within and across the EU

Informal relations and contacts appear to be an intrinsic part of the policy-making process within and across different EU institutions. “*Like all associations, a lot happens in the margins. I do not think this is bad, but that is how things move forward, especially in the area of asylum where you can have frank discussions and member states sharing their views. In preparation for the acquis that is now being discussed, there were many informal settings where member states, in different configurations and groups, came together to discuss the issues. Not only amongst member states but also between the institutions there are many informal contacts taking place*” (Respondent EU Agency 1). In frequent cases, these informal encounters are related to understand the diverging position(s) of the other party. “*It is very important to talk with people through informal contacts in order to be able to understand their position*”²⁰⁸ (Respondent EP 2). As indicated before, the Commission gives a platform to civil society

²⁰⁷ Translated by the researcher from Dutch.

²⁰⁸ Ibid.

organisations to provide input. Next to the formal consultation processes and stakeholder meetings, the majority of these contacts happen in a very unstructured informal way. Respondents active in the Commission and civil society organisations all indicate that the most important way of getting access is “*through personal contacts with individual policy-makers, and by demonstrating the organisation’s value to policy-makers. Personal relationships were key in getting success and being heard*” (Respondent external expert 1). Furthermore, respondents stated that these informal contacts are “*absolutely crucial. Negotiations happen in the hallways, in meetings, events, and in phone calls just as much as in formal sessions. Personal contacts proved invaluable*” (Respondent external expert 2). In order to have this access through informal contacts and relations, it requires a lot of pro-activity. “*A lot of the negotiations are formal. You can find when an AWP occurs but what they precisely discuss is not always clear so you got to have your sources*”²⁰⁹ (Respondent international organisation 1). One respondent highlighted that “*from a practical perspective it tends to be even more effective than any formal process. In any possible context where people need advice or need to discuss things it is easier to do this in a protected small format. Sometimes this makes sure that you can communicate easily*” (Respondent external expert 3). Informal relations do not only take place with the Commission. Respondents also highlight that occasionally “*through contacts with the Presidencies, at times we managed to get some sense of what the main sticking points could be. Very rarely a Council member is open to discuss which member state has said*” (Respondent external expert 3).

These informal meetings not only take place with external stakeholders but also internally between, for example, the Presidency and the member states. “*For the Presidency it is necessary to push member states to reach a compromise. Sometimes the Presidency has meetings with those member states who have problems with a certain issue. Sometimes the Commission is invited to these meetings to give technical guidance*” (Respondent Commission 3). Also, a lot of informal relations and meetings happen between the experts and the JHA Counsellors. “*We have these informal processes amongst the experts. We always had them amongst the Counsellors but also the experts in the working parties often have these informal meetings before or in the margins of the working party meetings. It helps to have personal contacts with the others. It raises and increases understanding towards the views of the others*” (Respondent Council 5). It is especially in situations when there is uncertainty about the

²⁰⁹ Translated by the researcher from Dutch.

position of the other or when there are differences of opinion that informal meetings with the involved parties are “organised”.²¹⁰ “Sometimes you need to have a chat with them afterwards or maybe before if you know that they are particularly passionate about an item. You try to understand where they are coming from because they are not always able to tell you what is motivating their intervention” (Respondent Council 3). In essence, it is easier in an informal way to “understand where everyone is coming from so that you can work out if you have common ground or not” (Respondent Council 3). According to one respondent, informal talks are important because this is also related to the fact that positions are not easily given up in the formal configurations such as the AWP, Coreper, and JHA Council. “There is always this dynamic in negotiations. In the beginning there are lots of comments. Then some things are not that important for some member states so they just drop them. There is always a core of issues that are more complicated and member states are insisting on keeping them. You say formally that you reach a compromise but many times it is not in the room with the 28 member states that you will state I give up on whatever I was opposing. They [member states] do it backstage to also save their face of whoever was defending their position for months” (Respondent Council 4).

Informal relations also occur within the Council and between the Council and the EP. “Another important role of the Presidency is to talk with the Parliament, not only in formal and informal trilogues, but also in informal contacts with people of the Parliament. Try to explain them what happened before in the Council. You have to be careful because as long as you do not have a mandate from the Council it can be used against you” (Respondent Council 2). “Formally the Council does not look at the EP position or it does not have an influence on the negotiations within Council. There is a bulk of informal relations within the Council and with the Council and the EP. It is also a normal part of the policy-making process. The permanent representations and the shadow Rapporteur who may be from the same nationality is a frequent informal link or relation. This informal network is very important. This informality depends a lot on the Rapporteur and the room to manoeuvre they have to take into account the information by the capitals, which is provided through the permanent representations” (Respondent Council 6). Nationality appears to be a connecting factor in order to establish informal relations: “many member states, big member states, call directly their members of the EP to ensure that national positions are safeguarded. The vice versa, a member calling their national government

²¹⁰ Organised is placed in quotes because of the often unstructured nature of these encounters.

to give them a line, never happens. National interest is only going in that way” (Respondent EP 7). For NGOs, the access to negotiations in the Council is also difficult in informal settings. *“The Council is such a heterogeneous institution in itself that even if you have a close contact with the Presidency, that does not necessarily mean that you understand or you get the opportunity to discuss it”* (Respondent external expert 3).

Also for the EP, informal contacts are important. Informal relations can make work and the distribution of knowledge a lot easier. *“You know people who you can work with, you know which staff you can get along with. You know the people in the Commission you can talk to about certain things. So that very closed mixed circle is important. If you got particular people or organisations from outside that you trust for their expertise, that is also really important. You can do more technical meetings with them but you also know that they will be trying to spread the word elsewhere”* (Respondent EP 6). While there are many informal links between the Council and the EP, informal relations with the Commission appear to be more difficult. *“Informal contact between the Council and the Commission is more difficult because the Commission is deemed to be impartial and neutral”* (Respondent Council 6). For most respondents, informal relations and meetings did not cause any substantial difficulties in the policy-making process. *“In my view it is not counterproductive, actually it is helpful that there are a small group of people who work closely”* (Respondent EU Agency 1). However, it gives the relevant actors the opportunity to consciously exclude or to involve certain actors. *“I might not even know how many different like-minded groups there are. As long as you do not know this, you do not know where you are included and where not. It can create a feeling of why am I not there? Usually the groups are quite flexible and they are not very stable so there can be member states included at a further stage”* (Respondent Council 5).

6.5 The role of the European Courts

This section examines both the ECtHR and the CJEU in their role and influence in the specific area of detention conditions for asylum seekers.

6.5.1 The European Court of Human Rights (ECtHR)

When asylum seekers are detained, the ECtHR has found, in numerous cases, that certain detention practices and reception facilities amount to inhuman or degrading treatment, triggering a breach of article 3 ECHR.²¹¹ The ECtHR does not condemn the practice of detention as such but substandard detention conditions can trigger a breach of art. 3 ECHR. An interesting case is the detention of minor asylum seekers or unaccompanied minors. The ECHR does not contain specific provisions regarding the detention of children. However, the ECtHR highlighted on many occasions, through its case law, the extreme vulnerability of a child which is a paramount consideration and takes precedence over their immigration status. States also have an obligation to give primary consideration to the best interest of the child and to provide appropriate care, including alternatives to detention. While the ECtHR is not against the policy of detaining children, the PACE, the Commissioner for Human Rights and the Special Representative of the Secretary General on Migration and Refugees are clearly against the detention of children.²¹²

The ECtHR has been called to decide on a number of cases involving the Dublin system, which allocates to the state the responsibility for examining asylum applications. The initial response of the ECtHR has been that, in the context of the Dublin system, there is a presumption that each EU member state complies with the provisions in the ECHR in order to guarantee fundamental rights and minimum reception conditions for asylum seekers²¹³ (Velluti, 2014). This initial position changed in the well-debated *M.S.S. v. Belgium and Greece* case.²¹⁴ In this case, the ECtHR ruled that, although the countries may be in compliance with the Dublin Regulation, unacceptable detention conditions can amount to a violation of article 3 ECHR.

²¹¹ *Dougoz v. Greece* (application no. 40907/98, date 06/06/2001) *Riad and Idiab v. Belgium* (application nos 29787/03 and 29810/03, date 24/01/2008), *S.D. v. Greece* (application no. 53541/07, date 11/09/ 2009), *A.A. v. Greece* (application no. 12186/08, date 22/10/2010), *Muskhadzhiyeva and Others v. Belgium* (application no. 41442/07, date 19/01/2010), *M.S.S. v. Belgium and Greece* (application no. 30696/09, date 21/01/2011), *R.U. v. Greece* (application no. 2237/08, date 07/09/2011), *Kanagaratnam and Others v. Belgium* (application no. 15297/09, date 13/12/2011), *Bygylashvili v. Greece* (application No. 58164/10, date 25/09/2012), *Popov v. France* (application nos. 39472/07 and 39474/07/2012, date 19/01/2012), *A.F. v. Greece* (application no. 53709/11/2013, date 07/10/2013), *Horshill v. Greece* (application no. 70427/11, date 01/11/2013), *Tabesh v. Greece* (application no. 8256/07, date 26/11/2009), *C.D. and Others v. Greece* (application nos. 33441/10, 33468/10 and 33476/10, date 19/12/2013), *B.M. v. Greece* (application no. 53608/11, date 19/12/2013), *Ahmed v. Malta* (application no. 55352/12, date 9/12/ 2013), *F.H. v. Greece* (application no. 78456/11, date 13/07/2014), *Tatishvili v. Greece* (application no. 26452/11, date 31/07/2014).

²¹² See for example PACE Resolution 2020 (2014), the alternatives to immigration detention of children. (Parliamentary Assembly, 2014). Keynote speech by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Immigration detention of Children: Coming to a Close? (Muižnieks, 2017).

²¹³ For example in *K.R.S. v. United Kingdom* (application no. 32733/08, date 02/12/2008) the removal of the asylum applicant from the U.K. to Greece would not constitute a violation of art. 3 because Greece, as a Contracting State has undertaken to abide by its Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by art. 3 ECHR.

²¹⁴ Application no. 30696/09, date 21/01/2011.

The mutual trust presumption upon which the CEAS is based was considered rebutted for the first time. In the *Sharifi and Others v. Italy and Greece* case,²¹⁵ in line with the M.S.S. ruling, the ECtHR stressed member states' obligation to assess the risk of Convention violations when applying the Dublin Regulation. The state carrying out the transfer is obliged to ensure that the destination country offers adequate guarantees to respect the human dignity of the person involved and the rights under the ECHR and the Charter (The AIRE Centre, 2014). In the *Khlaifia v. Italy* case, the Chamber ruled that the detention of Tunisian migrants in degrading conditions in Lampedusa breached article 3 ECHR. This judgement remains highly protective of the rights of migrants, refugees, and asylum seekers under the ECHR against the background of the crisis. However, the Grand Chamber altered the judgement by highlighting the necessity to take into consideration the emergency situation of certain countries (e.g. Tunisia, Libya) followed by an exceptional increased influx of asylum seekers in Europe. As a result, the Grand Chamber did not find a violation of article 3 ECHR because the state "*had not deliberately violated the prohibition against inhuman and degrading treatment, but rather found itself faced with the objective inability to provide better immigration reception conditions.*"²¹⁶ The case did not involve asylum seekers and did not take into account the specific vulnerability criteria inherent to the asylum status. There appears to be some grey area in the absolute character of article 3 ECHR in combination with the margins to manoeuvre for the member states when they encounter exceptional situations.²¹⁷

6.5.2 The European Court of Justice (CJEU)

The CJEU, in the joint cases of *N.S. and M.E.*,²¹⁸ adopted an identical reasoning as the ECtHR *M.S.S. v. Belgium and Greece* case:²¹⁹ an asylum seeker cannot be transferred to the responsible member state if there is a real risk that he/she will suffer inhuman or degrading treatment. This judgement was the first time the CJEU explicitly acknowledged in the AFSJ the need to limit mutual trust on fundamental human rights grounds (Janssens, 2013). Consequently, there cannot be a blind presumption that all of the member states adhere to the same standards for receiving, and when deemed necessary, detaining, asylum seekers. It is important to consider

²¹⁵ Application No. 16643/09, date 21/10/2014.

²¹⁶ *Khlaifia and Others v. Italy* (no. 16483/12, Chamber judgment on 1 September 2015, Grand Chamber judgment on 15 December 2016).

²¹⁷ See para. 183-186 of the *Khlaifia and Others v. Italy* case.

²¹⁸ Joined Cases C-411/10 and C-493/10, date 21/12/2011.

²¹⁹ Application no. 30696/09, date 21/01/2011.

the high threshold the CJEU applied for incompatibility with fundamental rights in the N.S. and M.E. cases: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are “*substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the responsible member state, resulting in inhuman or degrading treatment, within the meaning of article 4 Charter*”.²²⁰ According to the CJEU, at issue here is the *raison d’être* of the EU and the creation of an AFSJ, and more particularly, the CEAS, based on mutual trust and the presumption of the compliance of all member states with EU law, and in particular, fundamental rights.²²¹ Accordingly, the applied threshold is justified on the assumption that all member states respect fundamental rights and by the alleged existence of mutual trust between the member states. As a result, the CJEU argued that considering the slightest infringements of CEAS measures as sufficient to prevent the transfer of an asylum seeker to the responsible member state under the Dublin Regulation would be incompatible with the aims of the Dublin Regulation.²²² The Court further reiterated the objective of the Dublin Regulation in designating, quickly and in a clear and effective way, the responsible member state to examine the asylum claim²²³ (Mitsilegas, 2015). In the Abdullahi judgement, the CJEU reiterated the principle objective of the Dublin Regulation: the establishment of a clear and workable method to rapidly determine the responsible member state for the processing of an asylum application.²²⁴ As a result, the efficiency thinking was reaffirmed by the Luxembourg Court, and as such, only “*systemic deficiencies*” in the responsible member state’s asylum system are justified to challenge a Dublin transfer.²²⁵

The CJEU is not a human rights court. Its purpose is to ensure that enacted EU law is respected, correctly interpreted, and applied in the member states. The ECtHR, on the other hand, has a more distinct human rights objective, but also applies a high threshold when assessing potential article 3 ECHR violations resulting in inhuman or degrading treatment. The Strasbourg Court, in its rulings, does not emphasise efficiency objectives, but rather, the cumulative nature of conditions that may amount to a breach of article 3 ECHR. For example, in the Tarakhel case,²²⁶ the argumentation was based on the applicants’ inherent vulnerability, combined with the

²²⁰ See par. 86 of the joined cases N.S. and M.E. (Joined Cases C-411/10 and C-493/10, date 21/12/2011).

²²¹ Ibid., par. 83.

²²² Ibid., par. 84.

²²³ Ibid., par. 84-85.

²²⁴ See par. 59 of *Shamso Abdullahi v. Bundesasylamt* (C-394/12, date 10/12/2013).

²²⁵ Ibid., par. 60.

²²⁶ *Tarakhel v. Switzerland* (application no. 29217/12, date 04/11/2014).

inadequate living conditions in Italian detention centres, which resulted in a violation of article 3 ECHR (European Council on Refugees and Exiles, 2015). These cases disrupted the unchecked presumption of automaticity constructed on the member states' full compliance with fundamental rights. The member states cannot transfer an asylum seeker to the responsible member state when they cannot be unaware that there are systemic deficiencies in the asylum procedure or in the reception conditions in that member state which may amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. Consequently, the European Courts introduced a duty on the member states to examine the impact of the transfer on the involved person's fundamental rights on a case-by-case basis (Mitsilegas, 2015; Mitsilegas, Carrera, & Eisele, 2014). This rationale was also followed by the EU legislature and adopted in the Dublin III Regulation, where article 3(2) states: "*it is impossible to transfer an applicant to the member state primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member state, resulting in a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights of the European Union*" (European Parliament and Council of the European Union, 2013). By explicitly introducing a mandatory human rights refusal ground in asylum law, which is based on a ground of distrust in another member state, both the EU and the member states recognised this problem as a common concern in need of being dealt with at a European level. As a result, the equal goodness of the member states and the accepted diversity incorporated in the *unity in diversity* rhetoric reached its limits. From a cosmopolitan perspective, the CJEU defined in its case law the commonly accepted norms and standards which need to be respected.

6.6 Conclusion

The CoE was, from early inception, onwards, actively involved in standard setting in the area of detention conditions for asylum seekers. The different norms and standards developed in the CoE framework related to detention conditions of asylum seekers mutually reinforce each other. Next to the "classic bodies" such as the PACE and the CM, more specific functions, such as the Commissioner for Human Rights and the Special Representative on Migration and Refugees, reflect the political attention that is given to the area of migration and asylum. The decision by the CM to establish an expert Committee on the administrative detention of migrants with the aim of creating Immigration Detention Rules further shows the political importance that is

given to this topic. This can also be a first attempt for a coherent view regarding immigration detention across Europe. The CPT, by elaborating its activities from prisons and police stations to immigration detention facilities, developed a rich array of practical standards. Within the CPT there are certain key positions: the secretariat (with the executive secretary and the heads of units), the Bureau, and the CPT members. For years, Trevor Stevens was the CPT executive secretary, leaving his mark on the development of the CPT (e.g. structure and working methods). The resources of the CPT members are not equally divided; there are different levels of activity, knowledge, information, language skills, availability, etc. The question remains if this is unavoidable, taking into consideration that CPT members are basically volunteers. Also, the appointment of the CPT members is a political process which may favour certain candidates.

While there is diversity between the CPT members, they are all assembled around a solid block of shared norms and standards that the CPT protects and disseminates internally and externally. The CPT applies certain core standards; although in practice, the CPT differentiates between the CoE member states on what it expects to find in different countries. As a result, diversity in Europe is not problematic in the area of immigration detention, as long as certain core standards are protected. Due to the increased pressure on countries' reception and migration detention centres, the CPT altered its working methods by doing more ad hoc visits. Furthermore, working within the boundaries of the CPT mandate remains a delicate balancing exercise to determine when a location constitutes the deprivation of liberty.

The process of reaching a common position in the EU regarding the recast Reception Conditions Directive took a substantial amount of time because the grounds and conditions of detention were, and still are, politically sensitive issues. Within the Council, the AWP gives specialised and technical input in the debate. The rotating Presidency facilitates the negotiations by proposing compromise suggestions to the AWP after each round of negotiations. The Presidency acts as a negotiation facilitator and an agenda setter. The rotating Presidencies have fluctuating capacities in staff and experiences. However, the "*policy-making machine*" continues, and even under Presidencies with fewer resources, crucial compromises were reached. This is partly explained by the role of the General Secretariat of the Council, which is a permanent body with experienced civil servants that support the Presidency in its role. When further political guidance was deemed necessary, and in order to determine the strategic direction of the negotiations, the proposal shifted to the SCIFA or the Coreper. Important actors in the negotiation process are the JHA Counsellors, who perform a mediator function. The JHA

Counsellors are positioned between different levels and aim to build bridges between certain positions and opinions in order to reach a consensus. These Counsellors discuss compromise options amongst each other and lift the debate from a technical towards a political level. These JHA Counsellors are diplomats and prepare the work for the ambassadors. These counsellors are a political elite because they have a key position in the negotiations and link technical discussions with the overall political direction or the priorities of their member state. As a result, the more hidden functions, such as that of the JHA Counsellors in the Council, are very influential in order to broker agreements. This can be explained due to their more informal working methods and closeness to various actors at different policy levels, such as the ambassadors, national administrations, working party level, Council secretariat, and Commission.

Within the EP, the Rapporteur is a key position in the policy-making process. The function of the Rapporteur is crucial in order to set the blueprint for the negotiations within the EP, to mediate between the different political groups and, at a later stage, represent the EP in the negotiations with the Council. The different working methods, resources (personal characteristics, experiences, language skills), norms, priorities, and ideas (political group), plus the relations with other actors are essential features in order to determine the position of the Rapporteur. When a common position is reached in both the Council and the EP, policy proposals shift to a trilogue which is, due to its composition, a very restrictive and concealed way of policy-making. The composition of and participation in a trilogue is restricted and insights into the position of the different parties are dependent on the Presidency or the Rapporteur to provide feedback. From an academic perspective, the lack of transparency complicates efforts to systematically study this phenomenon. As an outsider it is impossible to get any insights into trilogue processes and the different positions and/or composition based on the analysis of official documentation. When such informal negotiations are an essential feature in the policy-making process, this has serious consequences for the transparency of the negotiations. Furthermore, it increases the image of policy-making as a “*hidden process*”.

In accordance with existing literature, as well as in the analysed cases, it appears that when the policy-making process continues, the platform given to external experts decreases. The influence of external experts is especially high in the preparatory stages of legislative proposals by the Commission. This completely disappears when negotiations start between the Council and the EP in the form of trilogues. The influence of personal characteristics in certain functions

and personal competences of policy-makers is a recurring essential element in the norm and policy-making process at both the CoE and EU level. These characteristics, such as experiences, knowledge about the topic, language skills, etc. influence the policy and standard setting negotiations and the adopted outcome. Also, informal relations and ties are crucial in both the CoE and the EU. The respondents do not perceive this as a negative issue. These informal networks are used to increase understanding and to share information, but also to find like-minded positions with other stakeholders. The context in which the asylum files are negotiated, both at the CoE and EU level, is crucial in order to stimulate new initiatives as well as set the overall atmosphere of the negotiations. The political pressure of the 2015 asylum crisis triggered new initiatives at both the CoE and the EU; in the CoE, this was in the form of the CJ-DAM and in the EU as a “third wave of policy proposals” for the CEAS. This third wave of policy proposals followed only a couple years later, after the formal adoption of the second wave of CEAS legislation. A certain “policy-making fatigue” could be witnessed with the respondents. However, EU policy-makers need to show that they are doing something and try to react quickly. Subsequently, this means that political realities come into play, which lead to a more top-down approach of policy-making and standard setting. Whether this is beneficial to the “*better regulation for better results*”²²⁷ priority of the Juncker Commission will be answered in the years to come. The issue of detention conditions for asylum seekers is also, in the new proposal of the recast, not tackled in a precise way, leaving it open for member states to interpret how and in what conditions asylum seekers are being detained. The interpretation of what substandard detention conditions are is again left open for the European Courts to decide. The question is, by adding a new layer of policy instruments how will this enhance mutual trust and solidarity between the member states if the root causes of the lack of solidarity are not tackled?²²⁸ External influences changed for the EU the rules of the game. Under influence of the increased political pressure due to the asylum crisis, a more top-down approach can be witnessed in the policy-making process of the legislative initiatives of the third wave of the CEAS.

In the area of asylum, the European Courts, especially the CJEU, were very influential in initiating a mandatory refusal ground based on human rights concerns. The case law of the

²²⁷ See for example the Communication from the Commission to the European Parliament, the European Council and the Council on better regulation: delivering better results for a stronger Union. COM(2016) 615 final.

²²⁸ For example financial implications, political support in the member states, strategic considerations to externalize the problem of migration (EU-Turkey deal), infringement procedures that are not carried out, etc.

ECtHR and the CJEU reveal that the minimum fundamental rights harmonisation in the member states does not prevent essential shortcomings in the member states' detention facilities. The European Courts play a key role in challenging the apparent unproblematic nature of the *equal goodness of otherness* in the EU member states in protecting commonly accepted norms and in stimulating policy change. In doing so, the Courts highlight what is commonly accepted and the boundaries of mutual trust underpinning the AFSJ. When the member states' diversity and *otherness* is too substantial, meaning that it may result in systemic human rights deficiencies, the acceptable level of *otherness* reaches its boundaries. As a result, the systemic nature of deficiencies is the boundary up to which *otherness* is accepted and constitutes the common norm that needs to be protected in order for the EU to deal with the *otherness* of the member states. The CEAS is the principal domain in the AFSJ in which the CJEU has set unambiguous limits to mutual trust. Material detention conditions play a crucial role in setting these boundaries on the member states' diversity in how they treat and receive asylum seekers. In the previously discussed N.S. and M.E. judgements,²²⁹ inspired by the M.S.S. v. Belgium and Greece case,²³⁰ the CJEU found that the member states have a duty to not transfer asylum seekers when there is a substantial ground for believing that, due to systemic flaws in the asylum procedure, the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 Charter (Janssens, 2013). This mandatory refusal ground is certainly beneficial for the individual in question, but essentially initiates grounds of distrust in EU asylum legislation. The emphasis of both Courts that only systemic deficiencies can amount to a violation of article 3 ECHR or article 4 Charter highlights the fact that differences between the member states' material detention conditions are accepted, but only to a certain extent. Minor or trivial breaches which are not systemic in nature cannot amount to degrading or inhuman treatment, even if these breaches negatively impact the living conditions of the person involved. By using the cosmopolitan perspective, it is argued that this is the diversity between the member states which is tolerated in order for them to be united in diversity.

A cosmopolitan Europe or a true "*unity in diversity*" needs to be grounded in common norms in order to deal with "*otherness*". The systemic nature of the threshold which needs to be fulfilled in order to challenge the transfer of asylum seekers under the Dublin Regulation can be labelled as this common norm limiting member states' "*otherness*". With the

²²⁹ Joined Cases C-411/10 and C-493/10, date 21/12/2011.

²³⁰ Application no. 30696/09, date 21/01/2011.

implementation of this mandatory human rights refusal ground in asylum law, the “*equal goodness*” of the member states’ asylum systems is accepted, as long as they do not trespass this boundary. The fact that the EU legislature has also incorporated the rationale of the European Courts into asylum law reflects the increasingly cosmopolitan orientation of the EU in this area: a unity in diversity, grounded in commonly agreed norms.

7 COOPERATION AND RELATIONS BETWEEN THE COE AND THE EU REGARDING THE ISSUE OF DETENTION

7.1 On an ad hoc basis

Both the CoE and the EU are considered, in this dissertation, as the main European institutions regarding norm and standard setting in the area of detention conditions. Between the two institutions there is a very limited structural cooperation. When there are interactions, these are very ad hoc or through personal informal contacts. One explanation for the lack of structural cooperation is the different mandate of the two institutions. *“The CoE and especially those particular institutions within, like the Commissioner for Human Rights or the CPT, have much more narrowly defined responsibilities with a very strong human rights protection vision. That makes it easier not only to discuss with like-minded organisations, but also to have a specific focus. An EU institution may have a completely different agenda”* (Respondent external expert 3). Despite the different mandates, it is, in practice, not easy to bring the two institutions together: *“Technically it is very difficult and there is no operational cooperation. We [the EP] do invite them to our meetings and meet each other formally with hearings in the EP for example. If we meet in Strasbourg, the CoE does not meet there because it does not run parallel. Technically you have very few opportunities to meet each other, especially informally, it is tricky”*²³¹ (Respondent EP 4). The EU has observer status with the CoE. When there are specific standards being negotiated in the CoE the EU, more specifically the Commission, is invited to these meetings. For example, in the area of detention and during the negotiations of the EPR, the Commission was present and actively involved in the meetings of the PC-CP. Also, in the CoE, in the area of asylum, one member of the Commission participates in the meeting of the CJ-DAM (Respondent Commission 3). The CoE also provided input for the consultation process, which resulted in the Green paper on detention.

The cooperation between the EP and the CoE is very limited. The LIBE Committee or MEPs have contact on an ad hoc basis with the CoE. For example, the LIBE Committee invites the PC-CP or the CPT to hearings in the EP. *“We [the EP] invite them, but if that cooperation exists, I think it is not appreciated by the member states. The member states think you should*

²³¹ Translated by the researcher from Dutch.

*involve the Fundamental Rights Agency (FRA) instead. But the FRA is kept very small on this area. The EP can always ask the FRA for advice but they [the FRA] do not always have the expertise to give such an advice. You can see the dilemma here: the CoE wants to but it is not appreciated*²³² (Respondent EP 1). The FRA has the obligation of a structural cooperation with the CoE stipulated in its founding regulation: *“The Agency should collaborate closely with the Council of Europe. Such cooperation should guarantee that any overlap between the activities of the Agency and those of the Council of Europe are avoided”*. The CoE is also represented in the management structure of the FRA (Council of the European Union, 2007). The nature of cooperation is *“the exchange of information, contribution to conferences and joint projects. On some topics we also cooperate directly with entities of the CoE to share costs and work. It is an intense cooperation which is obligated but also needed and very easy, natural and friendly”* (Respondent EU Agency 2). However, one respondent highlighted that the FRA is a duplication. *“The FRA is created within the EU, while the CoE already had a Human Rights Commissioner. The FRA is loaded with money while our Commissioner is seriously underfunded. It is really perceived as a duplication and also a certain fear that it undermines the CoE. Initially, this was not an issue because the EU was about economic cooperation and the CoE about human rights. Now this is shifting and it is perceived as a threat especially because of the financial component”*²³³ (Respondent CoE 15). Respondents from the Council indicated that there are almost no contacts or any type of working relationship with the CoE. The only form of contact is that the Council receives information: *“we are not in frequent contact with them in terms how we are discussing things. It is more for receiving reports”* (Respondent Council 4). As a result, the nature of cooperation is more on an ad hoc basis based on specific initiatives.

7.2 The influence of the European Courts

All interviewed respondents agree that the influence of both the ECtHR and the CJEU is crucial in both areas of judicial cooperation in criminal matters and asylum and, by extension, also for detention conditions. *“They [the European Courts] have a strong role and we look closely what the Courts say because it has a direct impact on our work”* (Respondent EU Agency 1). Due to

²³² Translated by the researcher from Dutch.

²³³ Ibid.

the fact that only respondents active in the ECtHR were interviewed, this section will mainly focus on the ECtHR.

Both the ECtHR and the CJEU are composed of judges with different backgrounds. According to one respondent *“this is the beauty of the system and this whole discussion brings a product which is the result of compromise of all these different fractions”* (Respondent ECtHR 1). *“There is a huge influence of the backgrounds of the judges, and this affects the positions of the judges. That is normal because your education and professional background influence you in your thinking”* (Respondent ECtHR 2). More specifically for the ECtHR, *“when you sit in a chamber you can see a former prosecutor who is very protective of the state and has huge concerns that we already went too far in some cases and wants to go a little bit back. You have former judges at domestic level who will always like to keep a status quo. Then you have former lawyers, or who were in NGOs, who always want to push things further and always have a feeling that this Court is not doing sufficiently as it should. Then you have professors who like to complicate everything”* (Respondent ECtHR 1). Also, for the ECtHR, the judges do not all have the same priorities in executing their function. *“Sometimes their country’s agenda influences their position in the decision-making process”* (Respondent ECtHR 4).

The ECtHR case law regarding the issue of detention conditions for prisoners has been more developed in comparison with the detention of asylum seekers. In the area of criminal detention, the ECtHR developed its case law from very general principles. Afterwards, *“these cases started to develop very specifically, elaborate and complex. From these very general principles you have a very specific developed case law with nuances on particular issues”* (Respondent ECtHR 1). While one respondent indicated the ECtHR developed a very rich and detailed case law regarding the issue of detention. Another respondent highlighted the lack of a progressive attitude by the ECtHR: *“the Court can be very progressive and bold but not in some aspects such as the issue of detention. Prison issues are not fashionable and there is nothing to gain to be very proactive on this issue on a political level”* (Respondent ECtHR 2). In the area of asylum, and more specifically in the area of detention conditions, the case law of the ECtHR is relatively recent. *“I think the case law is still developing there. My concern is that I am not completely sure that you can copy/paste all the principles and the issues that arise in the prison context to the asylum context. I am afraid this is what is happening in the case law regarding conditions in asylum detention. I can assume that in some future there will need to be some sort of clarification of these principles and a certain harmonisation”* (Respondent ECtHR 1). *“We*

have to be aware that there are governments' agendas in this field. Very strong government agendas but at the end of the day, we always come to the argument of money and there is a lot of money and financial issues involved in this context. Of course in addition to some political issues” (Respondent ECtHR 1). “It is political in that sense it is not the first priority of politicians to resolve these issues. As far as foreigners are concerned, they do not vote and the national detainees are not a pressure group. They do not have someone to defend them, unless they address the judges, national or European. Politically this is unfortunately not a priority issue” (Respondent ECtHR 3).

7.2.1 The European Courts as a policy trigger

The principle of mutual trust is the cornerstone of judicial cooperation in criminal matters and the CEAS. Also, the European Courts highlighted this principle as problematic. *“There is a new development in which there is an increased impact on mutual recognition. Consequently you need to work on the issue of detention conditions. At the same time, the EU needs to prove that detention conditions have an impact on mutual recognition. Court rulings can provide evidence that EU mutual recognition instruments are hampered because of the lack of mutual trust”* (Respondent Commission 1). In the area of detention, the Aranyosi and Căldăraru case before the CJEU was very influential. However, this case did not introduce new legislative proposals in the EU. This is clearly different in the asylum area, where different cases before the CJEU and ECtHR have triggered new policy initiatives.²³⁴ Due to the lack of appetite by the member states for new legislative proposals or amendments on existing instruments that facilitate judicial cooperation in criminal matters, the Aranyosi and Căldăraru case did trigger the development of more practical tools and soft approaches. For example the Fundamental Rights Agency (FRA) is developing practical online tools to easily access information and resources regarding international standards and national practices regarding detention. FRA does this in relation to and cooperation with other actors: the National Preventive Mechanisms (NPM's), EJM, Eurojust, and DG Justice. In the area of asylum, the case law of the CJEU had a direct impact on the policy-making process. *“Quite a lot of changes in the Reception Conditions Directive have to deal with legislation that is interpreted by the CJEU. We [the Council] had to include these interpretations into legislation, which is strange because normally legislators*

²³⁴ For example, before the CJEU, the joined Cases N. S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10), date 21/12/2011. Before the ECtHR, there was the Tarakhel v. Switzerland judgment (application no. 29217/12, date 04/11/2014).

have to legislate and then the Courts need to interpret. Now the interpretations by the Courts were quite leading for the legislators. That is quite remarkable” (Respondent Council 1). Also more in the background, many activities are going on whenever there is an influential judgement. “Sometimes we also have discussions on Court decisions especially from the European Courts in our networks to see how the implementation could take place and how it could be harmonised. For example, with the famous Tarakhel judgement we organised meetings jointly with the Commission to see how member states are going to take into consideration the judgement” (Respondent EU Agency 1).

Both European Courts trigger policy change. The question can be raised as to whether it is the role of the Courts to solve sensitive issues that are left open by the policy-makers, or is it an inherent function of the Courts? *“I think there is a lack of uniform agreed concept of where we need to go together in the area of criminal justice and asylum. We are intervening in different parts in different ways almost at random. For instance on detention, the Court puts a barrier and then we [the EU] need to quick fix. That method of policy-making, which is, of course, adopted directly from the single market, is quite reckless when you apply it to a criminal justice system. First we throw a measure in, if it leads to a fundamental rights violation then we will repair it” (Respondent EP 1). Also, for civil society the Courts are perceived as extremely important to push for policy change and to force member states to comply with international standards and regulations. One respondent from a civil society organisation indicated that the Courts are perceived as allies: “often it is these Courts that actually force member states to comply with laws. When I was with [X], I viewed the Courts as big allies. They could change the debate with just one ruling” (Respondent external expert 2). “Definitely the Courts have a very strong role in this. I think especially when it comes to asylum and the link with human rights. Whenever there is a powerful judgement from either Court, member states need to stop and think. In most cases you see that the reform process tries to get around judgements which are difficult for member states. At least this is something that requires countries to rethink, to reform but definitely to engage with the judgement. There has not been a strong judgement from the Court that has just been ignored. This is a very important thing to bear in mind” (Respondent external expert 2).*

7.2.2 *The relation between the CPT and the ECtHR*

The link and cooperation between the ECtHR and the CPT is very important in both ways. When the CPT reports are used by the ECtHR, it is a way for the CPT to legally “harden” their standards. For the ECtHR, it is crucial to have practical information from the ground. “*When we have pertinent information concerning a specific prison, in a specific time which is more or less similar to the period during which our applicant was being detained in the same prison we rely very heavily on the findings of the CPT*” (Respondent ECtHR 3). For the ECtHR, it is a lot more difficult to use reports or findings by, for example, the Commissioner for Human Rights. “*CPT members have a global approach to the situation and are very experienced. Many of them are not only lawyers but have different backgrounds and are very knowledgeable about prisons and prison conditions. We consider this body to be extremely reliable and its style is much closer to what we need. The CPT is much more factual and it is easier to quote the CPT than the Commissioner. The style is different. It is difficult to quote in a judicial decision a political statement unless it contains very concrete information that we cannot have from other sources. We prefer quoting the CPT because it is much more factual*” (Respondent ECtHR 3). The importance of the CPT reports is stressed by all respondents from the ECtHR.

On the broader function of soft law for the ECtHR, the respondents indicated that “*the Court should always be aware of soft law. Soft law demonstrates the progress and development of the human rights agenda. On the other hand, I think that the Court should be very aware and careful not to implement certain principles coming from soft law in its judgement directly. Governments, for a deliberate reason, want to keep something to be soft law and not to be bound as hard law in terms of a convention. If the Court would come and transpose this as a binding issue in a Courts judgement then it is kind of surpassing certain idea for which this soft law remains soft law*” (Respondent ECtHR 1). A dissenting opinion in the Mursic case used the reasoning of the increasing importance of “*hardening soft law*” in the context of detention conditions for prisoners and the EPR. In the Mursic case, the difference in standards between the CPT and the Court was a point of debate. Consequently, within the ECtHR, the position and function of soft law is not that united. However, according to the respondents, this is explained by the different function and approach of both institutions. The CPT is a preventive body, the Court is reactive. “*The CPT is about prevention and the Court is about sanction. If you have a different role and duty then your standards are different. You cannot sanction a country unless it has violated the bare minimum which is acceptable. We acknowledge that we are less*

demanding for states. On the other hand, the CPT is making recommendation and we are inflicting a sanction” (Respondent ECtHR 3).

Also, in the area of asylum, the ECtHR makes reference to CPT reports.²³⁵ It will be interesting to see whether the ECtHR will take into account the Immigration Detention Rules, which are currently under negotiation, as it does with the EPR to substantiate their rulings. The ECtHR also takes into account other soft law instruments, recommendations, and resolutions in its case law. *“We look especially to CoE instruments like recommendations or resolutions by the PACE. We look at the guidance given by the CoE, UN, or EU agencies. Sometimes it does influence the Court. In a particular issue, when the Court is not an expert, you need to rely on that or you need to give powerful reasons to decide otherwise”* (Respondent ECtHR 4). Between the ECtHR and the CPT, there are regular formal exchanges of views once a year in the CPT plenary session (Respondent CoE 13). Furthermore, *“there is definitely an informal cooperation between the CPT and the ECtHR in the sense that we know each other and the people who work on these issues in the CPT. You can just send an e-mail and ask do you have something on this. There is more this form of cooperation”* (Respondent ECtHR 1). The ECtHR also gives guidance to other CoE bodies. *“I think that the Court and the registry staff in all the CoE institution enjoys a certain prestige or respect so we are always taken very seriously and our input is never ignored. I think it is a very valuable thing”* (Respondent ECtHR 1).

7.2.3 Need for a binding instrument?

The need for binding rules on detention conditions have been put forward on several occasions by the EP in the EU. One can wonder if this option is feasible and needed. This is closely related to the theory of cosmopolitanism and the question of whether Europe already has a sufficient number of norms and standards which are commonly shared in order to deal with member states diversities in this area.

Soft law is, according to one respondent, the first step for a progressive ECtHR. *“These soft standards come from the roots and are made bottom-up so it is crucial for the Court to take them into account. They could be binding, but that is a political question”* (Respondent ECtHR

²³⁵ Horshill v. Greece (no. 70427/11), A.F. v. Greece (no. 53709/11), M.S.S. v. Belgium and Greece (no. 30696/09), etc.

2). For all the ECtHR, a binding Prison Charter is not feasible. *“I have a feeling that such a Charter could never be really adopted at a European level on the basis of a certain consensus. Whenever we talk about detention conditions, it is something that is very much dependent on domestic some sort of cultural, historical, and social background. To adopt a Charter which would be binding for the states, and to have all the states at the same level at the CoE, I hardly doubt it. Even if they would start with such an initiative, it would always have very fluid and broad terms like you have in the EPR which should allow for everything”* (Respondent ECtHR 1). The position that a binding Charter would lower existing standards is also acknowledged by another respondent: *“If you go for a binding text, it is almost sure that you are going to lower your standards which are accepted today”* (Respondent ECtHR 3). As a result, what is really necessary is the implementation of existing standards: *“I think that we do not need new standards, we have enough. What we need is implementation”* (Respondent ECtHR 3). The non-implementation by the member states in the area of detention conditions undermines, according to one respondent, the convention machinery. *“It has become a repetitive subject. We delivered quite a number of standard setting judgements but it all boils down to the execution of leading and pilot judgements which the Court has delivered. It is about implementation and the reforms to be carried out by the respondent states. It is threatening the effectiveness of the Court. Everything is there and all the governments have to do is to carry out the reforms”* (Respondent ECtHR 4).

7.3 Conclusion

When analysing the relations between the CoE and the EU, there are no structural formal links to ensure the cooperation between the two actors in the area of detention conditions. When the CoE and EU do work together it is on a very ad hoc basis, on certain topics, and with a focus on exchanging information. Informally, respondents indicated there are linkages between the CoE and the EU, but not on a frequent basis. The European Courts fulfil a very influential and important function in triggering policy initiatives. With one judgement, both the ECtHR and the CJEU can change the direction of a certain policy area and trigger policy change. This was the case in the asylum area, where a mandatory refusal ground was incorporated into the instruments facilitating the CEAS. In the area of judicial cooperation in criminal matters, case law by the CJEU did not re-open negotiations on the instruments facilitating judicial cooperation in criminal matters. However, the case law by both the ECtHR and the CJEU is, overall, accepted by the member states. As a result, the judgements create, de facto, refusal

grounds, even if they are not incorporated into the instruments facilitating judicial cooperation in criminal matters.

The cooperation within the CoE between the CPT and the ECtHR is mutually important. There is an exchange of views and information through formal and informal channels. The CPT reports and recommendations are a very important source of soft law, which is heavily relied on by the ECtHR. However, the ECtHR judges are not always united in their norms, priorities, and ideas. The different resources these judges have (e.g. professional and academic background, country of origin), influences them in their reasoning. This diversity is not problematic because the overall framework and the commonly accepted norms, are undeniably under protected by the ECHR. The need for a binding instrument regarding detention conditions is not shared by the respondents who are active in the ECtHR. In Europe, there already exist enough standards which are commonly shared. The key issues remain the implementation by the member states regarding these standards and the case law involving the issue of detention conditions.

8 THE UNITING PRINCIPLES BEHIND THE STANDARD SETTING AND POLICY-MAKING PROCESSES AT EUROPEAN LEVEL

In this section, an analysis is given of the features of the individual belief system and the individual norms, priorities, and ideas of the interviewed policy-makers. This is important, because for cosmopolitanism to work, there needs to be a unity in diversity that is grounded in commonly accepted norms. As a result, analysing the underlying principles which guide policy-makers in their professional activities gives increased insights into what influences the development of these commonly accepted norms. Also, the principles policy-makers aim to carry out influence the norm and standard setting process. A substantive number of respondents indicated that the protection of human rights as increasingly being threatened by nationalistic populism and the dominance of national interests in transnational issues, such as judicial cooperation in criminal matters and asylum. First Vice-President Timmermans of the Commission and CoE Secretary General Jagland stated in a joint statement on the 2017 Human Rights Day: *“Recent trends in Europe show that the overall commitment to human rights is not what it once was. European countries have long been the staunchest defenders of human rights but we now see a real risk that we are going backwards. All our European states must recommit to a culture of human rights, abide by the commitments that they have made and implement the rule of law on that basis”* (European Commission, 2017a).

In the area of asylum, the crisis atmosphere is challenging the European norms and values, such as human rights and solidarity, between European countries. This is also reflected in the current negotiations in the EU: *“we are negotiating under pressure, but values should continue to be there. First and foremost, it is up to the Commission to ensure these values are reflected in the proposals they put on the table. Right now the political moment in Europe is not one of a consensus about what the priorities should be or what values stand above other values”* (Respondent Council 4). *“There clearly are shared values, but you got 28 member states and lots of differences in culture, language, history. People’s perspectives do differ a lot. I think if you get a big crisis like the migration crisis, that is when the more extreme elements come out. Generally there are shared values there in terms of being civilized. If there is one thing that is quite testing for the EU values it is the migration debate. Mostly there is still a central block of*

values” (Respondent Council 3). *“We are there to ensure that whatever is put on the table is in line with the values. Of course the migration crisis raises a number of questions and even conflicting values between solidarity and responsibility. How do you ensure that laws are respected, there is border control, at the same time you respect your Charter and international obligations and whether this still applies in a situation of crisis or with a massive influx”* (Respondent Council 4). The asylum crisis had its impact on the EU framework and by extension, also what both the CoE and the EU try to protect. *“Asylum is about European values, human rights, and fundamental freedoms. You cannot really discuss asylum without them. When you go more in detail it becomes very difficult”* (Respondent Council 5).

While the overall European feeling is perceived by the respondents as increasingly nationalistic, a majority of the respondents have a strong individual sense of being European and the existence of certain shared norms and values. However, some respondents also question the European framework and are increasingly sceptical about *“the direction of the whole EU project and whether it is the right approach that is currently followed”* (Respondent external expert 3). Furthermore, concerning the debate in the area of criminal justice and the issue of detention conditions, one respondent highlighted that *“in the criminal justice debate we can still see it is more euro-sceptic versus pro-European. Of course there are political differences, but the scale of where the dividing lines lay is not so clear politically. In fact, it is more divided amongst national lines instead of political lines. So you will find euro-sceptic Greens from Sweden and you will find pro-Europeans from EPP sometimes. It is not so clear”* (Respondent EP 1). The individual belonging or closeness towards Europe is not surprising because the professional lives of the respondents are intertwined with the European level. However, many different interpretations are given to these uniting European norms and values. The protection of human rights, human dignity, the rule of law and ensuring consistency in policies are recurring features that are deemed crucial in the policy-making and standard setting process at the European level. While most of the respondents have strong beliefs in these principles, for other respondents their individual belief system is completely irrelevant in their professional environment. *“I follow instructions and leave my personal beliefs behind because they are not appreciated and you need to have an objective assessment”* (Respondent Commission 3). *“I believe in nothing. I am there to assist the Council in decision-making and especially to assist the Presidency. This is kind of mechanistic work. I am more interested in efficient decision-making and that we can make a deal than in what kind of deal it is. I have no views and if I have views they will not be reflected in the work I do”* (Respondent Council 1).

Some respondents highlighted the fact that in such a sensitive area as detention conditions for prisoners and asylum seekers, there are still commonly accepted norms being developed. Respondents explicitly acknowledged this achievement as peculiarly European. One respondent highlighted that there is a certain *“body of European knowledge about prisoner standards, prisoner rights, and law which transcends the national and I think that is very important. I think that is a significant European cultural achievement”* (Reference CoE 8). *“To be honest, I am very much proud of European values. In terms of human rights protection, the rule of law, and so on we are definitely the most advanced region in the world. We should be proud of it. Now all these populist governments are bringing this into question”* (Respondent ECtHR 1). *“I am always saying that the ECHR and the European system of human rights is the jewel of the European civilisation. That is something which is extremely important for Europe”* (Respondent ECtHR 3). It is undeniable that Europe, in the area of detention conditions, has a rich framework of soft and hard standards which represent certain key values. However, it is important to keep in mind that these values are not exclusively European, but are global values. One respondent identified these values as human values and *“does not want to argue they are specific European norms. If they are, you would quickly get into a comparative discussion and our norms and values are better than African, or the US is better than Europe”* (Respondent CoE 12).

PART 3: CONCLUSIONS AND RECOMMENDATIONS

9 FINAL CONCLUSIONS AND RECOMMENDATIONS

This dissertation analyses, from a cosmopolitan perspective, the norm and standard setting processes in the area of detention conditions for prisoners and asylum seekers in the CoE and the EU. The conclusions of this dissertation derive from a literature review, a document analysis, and interviews with key policy-makers at the CoE, the EU, and external experts. A policy and social network approach was applied in order to get increased insights into the actors and the relations between them in the standard setting and policy-making process regarding detention conditions. The policy and social network approach was further operationalised by using a set of features that also functioned as codes for the analysis of the official documentation and the interviews. By applying this research design, it was possible to disentangle key actors in the standard setting and policy-making process in the area of detention conditions plus their working methods, composition, norms, priorities and ideas, resources, belief systems, plus formal and informal relations between the different actors. In this final part, the contribution of this dissertation to the emerging research area of European criminology is highlighted. Furthermore, the answers to the research questions will be summarised, followed by recommendations for further academic research.

9.1 Contributions to European criminology

This dissertation contributes to the emerging research area of European criminology in a number of ways. It does this by, first and foremost, focusing exclusively on the European institutions of the CoE and the EU as key standard setters and policy-makers in the area of detention conditions for prisoners and asylum seekers. When criminologists take into account the European institutions in their analysis, these institutions are predominantly analysed from a legal or normative perspective. While this is certainly valuable, this dissertation applies a broader perspective by using a theoretical framework and research design from other disciplines in social sciences. As a result, this dissertation incorporates elements from criminology, law, political sciences, and international relations. Furthermore, this dissertation contributes to the area of European criminology in a more empirical way by conducting a literature review, a document analysis, and interviews with policy-makers the CoE, the EU, and external experts.

When placing the results of the dissertation in the convergence²³⁶ (Garland, 2001; Pratt, 2002; Wacquant, 2009) versus divergence²³⁷ (Cavadino & Dignan, 2006b; Lacey, 2008; Melossi, 2004; Whitman, 2003) debate in international penological research, the European institutions are still strongly influenced by national considerations. When digging deeper into the standard setting and policy-making processes regarding detention conditions, national priorities such as political and financial contexts influence the debate in both the CoE and the EU. However, this is not problematic due to the presence of commonly accepted European norms and case law by the European Courts, which allows for diversity within the CoE and EU member states, although only to a certain extent. This diversity only becomes problematic when detention conditions lead to substandard situations. As a result, these commonly accepted standards, plus case law by the European Courts, give meaning to what is acceptable or considered substandard within Europe. In the area of asylum and migration, scholars have documented an increased penal severity across Europe (Balibar, 2010; Bosworth, 2008; Bosworth & Guild, 2008; Franko Aas, 2007, 2011; Huysmans, 2006; Wacquant, 1999; Zedner, 2010). As we discussed in chapter 6, and more specifically in section 6.4.6.2, due to the increased political pressure created by the 2015 asylum crisis, negotiations in the EU regarding the third wave of the CEAS occurred in a different context. This was reflected in different objectives, working methods, and a top-down approach in the policy-making process. The EU had to show that it was in control of the situation by responding quickly. The overall objective by the Commission is perceived as being more restrictive, which trickles down to the legislative proposals and becomes the blueprint for the negotiations. As discussed in section 6.4.7, an additional detention ground is added into the Commission proposal for the recast Reception Conditions Directive. This with the aim of tackling secondary movements and to hold people seeking international protection in one assigned place and country otherwise they can be legally detained.

While this dissertation contributes to the emerging research area of European criminology, the empirical analysis also demonstrates the limits of the applied methodology. From the document analysis there appears to be a “*black box*” of policy-relevant information where only insiders are allowed access to. This “*black box*” of information, and the limited access to it, is an important obstacle to gaining a full oversight of the policy-making and standard setting processes at both the CoE and the EU. For example, the majority of official documentation does not stipulate which persons are dealing with the topic under negotiation. Also, written reports

²³⁶ Focus on similarities.

²³⁷ Continuing strong influence of national political institutions, cultures, and historical traditions.

or outcome documents are often very concise in revealing the content of the debate and/or the different positions of varying actors. As a result, the document analysis revealed there are clear limits to what can be analysed by only using official documentation. This was partially countered by conducting interviews with key policy-makers and external experts, however, respondents also have limits in what they are willing to share.

9.2 Research questions

The following section will summarise the answers to each of the research questions based on the literature review, the document analysis, and the interviews.

- 1. What is cosmopolitanism and what is its relevance for standard setting in the area of detention conditions in Europe?*

As we have discussed in chapter 3, cosmopolitanism helps to explain why there is a greater unity in diversity in Europe in the area of detention conditions, which is reflected in the analysed policy moments and outcomes. What lies at the very core of cosmopolitanism is the acknowledgement of *otherness*, where difference is accepted as such, actively tolerated, and treated equally. Consequently, differences should not be replaced by common norms, values, and standards or arranged hierarchically, but accepted as such. For cosmopolitanism to work, it has to be grounded in a certain number of commonly shared norms which enable it to regulate its dealings with otherness. In short, it combines the tolerance of otherness with indispensable norms or a unity in diversity. As a result, for cosmopolitanism to function, a unity in diversity needs to be created that is based on commonly accepted norms. The protection of human rights in Europe is one reflection of this commonly accepted approach. The theory of cosmopolitanism reflects new realities in practice, as well as in research, where certain issues need to be tackled at a more transnational level. Consequently, the frame of reference is no longer exclusively the nation-state. Furthermore, the theory positively incorporates the diversities which are present in Europe. While these diversities are not problematic, certain uniting norms and values need to be accepted in order to have a shared common ground for dealing with diversity.

When taking a cosmopolitan approach, it implies that policy-making and standard setting transcend national interests, priorities, and ideas. Cosmopolitanism entails that common norms and standards are shared not only by certain states but, in this case, the European framework.

Judicial cooperation in criminal matters and asylum are two areas where the shift, to some extent, was made from the national to the European level. By extension, in the EU the issue of detention conditions was an “*unforeseen side effect*” that, due to member states’ varying, and often substandard, detention conditions, plus case law substantiating this, came into the spotlight. The area of detention conditions is a sensitive area for numerous reasons. Notwithstanding this observation, a substantive number of standards are developed at both the CoE and the EU. This is mainly reflected for the CoE in the EPR and the CPT country visits and recommendations. For the EU, this is mainly reflected in the Green paper on detention and the provisions related to detention in the recast Reception Conditions Directive. While these norms and standards protect the underlying principles of human rights for detainees and asylum seekers in Europe, most of these standards are first and foremost soft standards, with the exception of the recast Reception Conditions Directive. However, the purely soft nature of the EPR and the CPT reports and recommendations is changing under the influence of the extensive use of these standards by the ECtHR to substantiate their rulings. These commonly accepted norms and standards, together with the case law of the European Courts, give meaning to what is acceptable and what is considered substandard in the area of detention conditions, notwithstanding the presence of diversity in Europe. This was also highlighted in the dissenting opinion of Judge Pinto De Albuquerque in the Mursic case before the ECtHR: “*In the CoE legal order State consent is framed within the context of a cosmopolitan perspective of the universality of human rights and a dialogic understanding of the common heritage of values of European societies*”.²³⁸

A cosmopolitan Europe, and the protection of common norms such as human rights, is closely linked to the broader context of the existence of Europe as a normative power. Normative power relies on persuasion, argumentation, discussion, and shaming. Despite the underlying and commonly accepted principles for the protection of human rights, the rule of law, solidarity, and mutual trust in the European framework, political realities, and priorities do not always correspond with these underlying principles. As discussed in chapter 8, respondents indicated that there is a solid block of common norms and values, such as the rule of law and protection of human rights, which they individually want to carry out in their function as policy-makers or experts. When digging deeper into the negotiations, it is the same member states who are guided by national incentives (e.g. financial, cultural, political) in order to not go too far in

²³⁸ Case of Mursic v. Croatia (application no. 7334/13, date 20 October 2016).

setting binding rules in the area of detention conditions. The inability of the EU to politically come with binding rules is softened by the case law of the European Courts. These Courts are an indispensable part of this normative power Europe in highlighting what is considered acceptable and substandard. Due to the changing nature of purely soft standards and the normative power of the European Courts, it could be argued that binding rules in the area of detention conditions for prisoners are not necessary after all. Both European Courts have a crucial moral authority over European policies, standards, and practices. Certain Court decisions had a direct impact on European policies such the M.S.S. case and Aranyosi case. These judgements created human rights refusal grounds in the areas of judicial cooperation in criminal matters and asylum. Member states needed to transpose the reasoning by the Courts into practice. Notwithstanding this observation, the ECtHR has been dealing with prolonged non-implementation of a number of judgements and secondly, direct attacks on the Court's authority²³⁹ (Commissioner for Human Rights, 2016a; Daems, 2017; Jagland, 2016). The Mursic case revealed different approaches between the Judges at the ECtHR, which was reflected in dissenting opinions on the issue how to deal with European standards from different European bodies (in this case the CPT standard regarding minimal cell size). Not only is the ECtHR struggling with non-implementation, but the CPT remarked on the inadequate follow-up by member states on CPT's recommendations (Daems, 2017). In the EU, after the asylum crisis, the Court also had to intervene on the legality of the Council decision regarding the mandatory relocation mechanism. Furthermore, the Commission launched infringement procedures against the Czech Republic, Hungary, and Poland due to their non-compliance with their legal obligations on relocation (European Commission, 2017b). While European standards in the area of detention conditions go beyond the national level, the above-mentioned incidences raise crucial questions concerning the necessity of rethinking the European project. Arguments can be raised that there should either be less Europe, or that the current Europeanisation process is not going far enough.

2. *Which unity in diversity norms and standards have been created by the CoE and the EU in the area of detention conditions for prisoners and asylum seekers?*

The norms and standards developed in Europe related to the issue of detention conditions reflect a united approach toward how people deprived of their liberty ought to be treated in Europe.

²³⁹ See the report by the Steering Committee for Human Rights (CDDH) on the longer-term future of the Convention system (Steering Committee for Human Rights, 2015).

However, these norms vary in legal nature. The CoE was, from its early inception onwards, actively involved in standard setting in the area of detention conditions for prisoners and asylum seekers. The most known and most elaborate standards in the area of detention conditions for prisoners are the EPR (discussed in section 5.2). For asylum seekers, the CPT visits to immigration detention centres, which became increasingly important in recent years, developed a rich array of practical standards (discussed in section 6.2). As we have seen in section 5.3.1 concerning the role of the ECtHR, the dynamic of purely soft standards is evolving due to the fact that soft standards are increasingly used by the ECtHR. This evolution is also emphasised by Judge Pinto De Albuquerque who argues that the EPR is the prototype of hardened soft law.²⁴⁰ The EPR is also influential by inspiring other standard setting initiatives in the area of immigration detention. As discussed in section 6.3, the CoE created an expert Committee to develop Immigration Detention Rules, which takes the process and outcome of the EPR as an example. This decision reflects the political importance given to the topic of immigration detention and the need for a more comprehensive European approach to common standards in this area.

Also, the EU became increasingly active in this area during the last two decades, although with varying legal implications. While the CoE was involved earlier in setting standards in the area of detention conditions than the EU, the mandate and focus of the two institutions is completely different. The CoE develops soft standards, and the case law by the ECtHR has an origin and mandate that focuses, inter alia, on the protection of human rights. The EU embraces the CoE standards and, in addition, creates binding standards that the member states need to implement. As we have discussed in section 5.2.3, the scope for the EU to develop binding standards in the area of detention conditions for prisoners is highly contested. To date, the EU has not developed any specific standards related to detention conditions for prisoners. However, it was acknowledged in the Green paper on detention that substandard detention conditions may undermine the smooth functioning of the mutual recognition instruments facilitating judicial cooperation in criminal matters. In the area of criminal detention, the Green paper on detention did not trigger any further policy initiatives. In the follow-up of this Green paper, initiatives have been taken with a more soft approach, such as expert meetings on the different instruments that facilitate judicial cooperation in criminal matters. In the area of detention conditions for asylum seekers, the EU has developed binding legal provisions in the recast Reception

²⁴⁰ Case of Mursic v. Croatia (Application no. 7334/13, 20 October 2016).

Conditions Directive. Also in this area, the analysis in section 6.4 showed that the grounds for detention and detention conditions became a sensitive issue during the negotiations. The analysis of the trilogues in section 6.4.5 presented the diverging, and even opposite, positions between the Council and the EP regarding the issue of detention. The eventual adopted provisions related to detention conditions in the recast Reception Conditions Directive leave a substantial margin of discretion for the member states. As a result, at the European level, there is no comprehensive approach for how a specialised detention centre for illegal migrants or asylum seekers should look. Due to this vagueness, it is often up to the European Courts to further elaborate and to give meaning to what is considered acceptable within Europe, thereby reflecting European norms, standards, and values.

3. *Which policy and social networks can be identified in the process of establishing European detention norms for prisoners and asylum seekers?*

i. *Which actors are present in this process?*

This dissertation identified certain key position in the formal standard setting and policy-making processes in the area of detention conditions at the CoE and the EU. Due to the applied methodology and the sample of respondents, which at EU level do not include senior officials or members of cabinet levels, it is possible that other, higher-ranked officials had an impact on the standard setting and policy-making processes (e.g. (Vice-)President of the Commission, European Council, or the EP). However, these higher-ranked actors were not mentioned by the respondents during the interviews. This does not mean these actors do not have influence at all. Probably the interviewed respondents do not have contact with these higher-ranked officials. The influence of the higher-ranked officials is situated in setting the overall political context and direction of the negotiations, and have less direct impact at technical levels. From the document analysis and the interviews, it can be concluded that the topic of criminal or administrative detention, at both the CoE and the EU, is considered a very specialised area, that has only a limited number of persons active in it. This is especially the case in the area of detention conditions for prisoners, because asylum and immigration detention received more attention in recent years due to the asylum crisis. As discussed in section 5.1.3, the experts who drafted the EPR indicated that at the beginning of the new millennium it was, and arguably still is, “*quite a small group of people active in this area and a small sphere of interest*” (Respondent

CoE 12). Also, in the EU and in the area of judicial cooperation in criminal matters, there is only one legal officer responsible for the area of detention.

Certain actors help to explain why certain norms and standards are adopted in the area of detention conditions. The identified key actors in this dissertation can be labelled as having mediator functions because they need to build bridges between certain positions and opinions in order to reach a consensus. These mediators actively seek compromise by building alliances with like-minded actors, actively seeking and proposing compromise options, etc. At the same time, these mediators take into account and have an overview of different positions at different levels of the policy-making and standard setting process. As discussed in section 5.1, during the drafting process of the EPR, three scientific experts were holding the pen. These experts, together with the Chair of the PC-CP, actively pursued a consensus by mediating first within the PC-CP and at a later stage with the CoE member states in the CDPC. Respondents active in writing these Rules indicated that they drafted the Rules guided by their own professional and academic expertise, but also with the idea the proposal had to be accepted by the CoE member states. Consequently, in order to come to a consensus, the experts anticipated member states having diverging positions. Within the CoE, the CPT is a key actor in developing practical standards and recommendations regarding immigration detention based on on-site monitoring. The CPT takes into account member states, diversity in its visits and reports by differentiating between the countries and adapting their expectations and recommendations to the situation of the specific country without jeopardising the core CPT standards. Internally, the composition of the CPT members is very diverse, with each member having different resources which are not equally divided (e.g. level of activity, availability, competences, knowledge, experiences, language skills). However, they are all united around a solid block of standards that the CPT aims to protect in the area of the deprivation of liberty. Respondents indicated that the CPT Bureau is an internal “*power block*”. The CPT Bureau is especially important for making decisions between the CPT plenary meetings (e.g. decision for ad hoc visits). Also, the former executive secretary, Trevor Stevens, was highlighted as a highly influential feature in the CPT because Mr. Stevens held this position for an extensive period.

Also, in the EU, there are certain key mediator actors in the policy-making process. It is important to note that only in the area of asylum are binding legal standards in the area of detention conditions adopted. This dissertation identified two important mediator functions as highly influential in the policy-making process of the recast Reception Conditions Directive,

and arguably for the wider EU legislative process: for the Council, the JHA Counsellors, and for the EP, the Rapporteur. The JHA Counsellors meet on a regular basis and fulfil their mediating role by following negotiations at different levels of the policy-making process. This gives them a unique position in which they can take into account technical difficulties and political sensitivities in trying to reach a consensus on a certain topic. Furthermore, JHA Counsellors try to find like-minded partners in order to push the policy-making process further and to disentangle sensitive topics. When the Counsellors meet amongst themselves, they also consciously include and exclude colleagues in order to find coalitions and common ground. The JHA Counsellors are also trained to deal with politically sensitive issues because they often have a diplomatic background or career. As a result, the JHA Counsellors are part of a political elite, operating in the background of the political decision-making process but having a crucial position in driving the policy process forward. As discussed in section 6.4.2.4, the influence of the rotating Presidency in the standard setting and policy-making process is open for discussion. Literature on EU Presidencies labels the function as a mediator; a position with responsibility but no power. This means that the majority of the tasks by the Presidency are predominantly of an administrative and/or managerial nature (Lewis, 2013; Nilsson & Siegl, 2010; Thomson, 2008). From this dissertation, we can conclude that Presidencies have a lot of administrative responsibilities in agenda setting and to determine the frequency of different meetings. But Presidencies can have a certain impact on the negotiation process, especially in the working methods they apply, the suggested compromise proposals, and the prioritisation of certain files. Furthermore, new people (with different resources, backgrounds, experiences, and language skills) and new approaches can also provide a fresh stimulus to the debate. However, the influence of Presidencies should not be overestimated, taking into account the long time required for negotiating legislative documents at the EU. As a result, the period of six months is relatively short for achieving substantive progress. Furthermore, even if there is a Presidency with less capacities and resources, the policy-making machine continues, due to the role of the Council's secretariat. The Council's secretariat supports the Presidency, but also keeps an eye to whether the Presidency acts within the overall accepted political direction of a certain area.

As we have discussed in section 6.4.2.5, the function of Rapporteur can be considered as a key actor for the EP in the policy-making process. Rapporteurs set the blueprint for negotiations within the EP and represent the EP in the negotiations with the Council. Academic literature points out that the selection of MEPs for the function of Rapporteur is strategic (Costello & Thomson, 2010, 2011; Yoshinaka et al., 2010), along with the high importance of this role for

the bargaining success of the EP in the legislative arena (Costello & Thomson, 2011). These observations are also confirmed in this dissertation. The Rapporteur for the recast Reception Conditions Directive had an important influence in the negotiations with the Council and the eventual outcome. More specifically, because there was a less resourceful Rapporteur due to, inter alia, personal characteristics and experiences, the position of the EP in the negotiations with the Council was weakened. This resulted in the fact that more grounds for detention were eventually adopted, in accordance with the position of the Council, than initially given in the Commission proposal. As a result, not only is the function itself, but also the personal characteristics and capacities of the individuals holding these functions, crucial in the standard setting and policy-making process.

The European Courts fulfil a very influential and important function in triggering policy initiatives. As we have seen in section 6.5, with one judgement, both the ECtHR and the CJEU, can change the direction of a certain policy area and stimulate policy change. This was the case in the asylum area, where a mandatory refusal ground was incorporated into the instruments that facilitated the CEAS. In the area of judicial cooperation in criminal matters, case law by the CJEU did not re-open negotiations on the instruments that facilitate judicial cooperation in criminal matters. Even if these instruments do not incorporate this refusal ground, due to the fact that the CJEU's case law established a mandatory human rights refusal ground, member states take this into account in practice. As discussed in section 7.2, the interviews and the analysed case law indicated that the ECtHR judges are not always united in their reasoning, priorities, and ideas. Both the ECtHR and the CJEU are composed of judges from different countries, professional (former prosecutors, domestic judges, lawyers, background in civil society, academia), and academic backgrounds, which have an impact on their positions. One respondent indicated that this diversity is *“the beauty of the system and this whole discussion brings a product which is the result of compromise of all these different fractions”* (Respondent ECtHR 1). As indicated earlier, in the specific Mursic case, the diversity between the Judges at the ECtHR resulted in dissenting opinions and contrasting ideas on which European standard (in this case minimal cell size) was applicable. From a cosmopolitan perspective, these dissenting opinions are not problematic because the unity is protected by respecting a certain core of commonly accepted norms. It does show that it remains extremely difficult to apply commonly accepted standards, developed within the CoE, to specific situations. The diversity between the ECtHR judges also reflects that the leap towards higher standards in the area of detention conditions is handled with great care and consideration by the ECtHR.

ii. What are the relational ties between the CoE and the EU?

While the CoE and the EU fund numerous projects together, respondents indicated in section 7.1 that they are not aware of any formal structural relational ties in the area of detention conditions to ensure the structural cooperation between the two institutions. Respondents specified that if the CoE and the EU work together, it is on a very ad hoc basis on certain topics with a focus on the exchange of information. As a result, there are contacts and a dialogue between the CoE and the EU but a formal structural cooperation is not institutionalised. When the EPR was drafted, a representative from the Commission was actively involved in the PC-CP. Furthermore, also with the developments of the Immigration Detention Rules, this is actively followed by the asylum unit from the Commission. One example of the exchange of information between the CoE and the EU are the hearings organised by the EP. On frequent occasions, and with the aim of putting the issue of prisons and detention conditions on the political agenda, the EP organises public hearings in which the CoE is invited to discuss their activities in this area. As discussed in section 5.2.3, the EP and the PC-CP are partners in this area because they both aim for higher standards in the area of detention conditions and push for a binding Prison Charter.

As discussed in section 7.1, the EU's Fundamental Rights Agency (FRA) has an intense cooperation with the CoE in the form of exchanging information and working on joined projects. This cooperation is stipulated in the founding regulation of the FRA. The goal of this intense cooperation is to avoid overlap between the activities of the CoE and the EU. However, one respondent highlighted the financial imbalance between the FRA and the underfunded position of the CoE Human Rights Commissioner. This is even perceived as a threat and may undermine the position of the CoE.

iii. To what extent is the formal structured context of both the CoE and the EU shaped by certain rules of the game?

The identification of the rules of the game can help to explain why a certain unity is achieved in the area of detention conditions at the CoE and the EU. This unity is expressed in the policy moments and outcomes that have been the main focus of this dissertation. In order to achieve this unity in diversity, certain rules of the game are present, which include the recognised and

accepted boundaries, or the playing field, in which the standard setting and policy-making process occurs.

The first identified rule of the game is the role of the Commission. The Commission needs to promote the EU's general interest, and by extension, also the unity within the EU, despite the often diverging position between the Council and the EP. The Commission does this by, *inter alia*, taking into account, especially in the preparatory stages of legislative proposals, the views, thoughts, and opinions of international organisations, civil society, and external experts. In this way, different views and approaches can be included in the initiatives and proposals by the Commission. Also, the working methods of the Commission add to the protection of the unity within the EU. The Commission is less likely to initiate legislative proposals when it does not feel support from the Council and the member states. As discussed in section 6.4.4, during the policy-making process of the recast Reception Conditions Directive, the Commission changed its proposal because the Council could not agree on the basis of the text. In the area of detention conditions for prisoners, the Commission did not make any legislative proposals regarding binding rules for prisoners because this idea is not supported by the Council. This is in sharp contrast with the EP. As we have learned from section 5.2.3, the EP frequently calls the Commission for further initiatives regarding binding rules in the area of detention conditions. The 2015 asylum crisis triggered an overall crisis atmosphere within the EU. When political pressure on a certain area increases and the unity within the EU how to deal with this issue is threatened, the Commission acts as the protector of certain core norms and standards. In this way, the Commission fulfils an important role by smoothing diversities between member states. This is also linked to the fact that, depending on the level of the political crisis, policy-making occurs on a different political level. As analysed in section 6.4.6, under the influence of the 2015 asylum crisis and the increased political pressure on the EU, priorities and political directions came from a higher political level. This resulted in that the policy-making process regarding the legislative initiatives of the third wave of the CEAS occurred in a more top-down approach. Consequently, the leeway for policy-makers at working party or unit level decreases and policy-makers have to stay within clearly defined lines. This is enforced by the fact that policy proposals were immediately discussed at a higher political level (e.g. with the JHA Counsellors or Coreper). As a result, with the asylum crisis and the increased political pressure, the unity within the EU is protected by applying a more top-down approach with less room to manoeuvre at lower technical levels. Due to this top-down approach, in combination with a

sense of urgency and crisis atmosphere, it also became more difficult for external organisations to influence policy-makers.

A second identified rule of the game is the commonly accepted norms which are present in the policy-making process at both the CoE and the EU. As discussed in chapter 8, the shared uniting principles behind the standard setting and policy-making processes at the European level are important because for cosmopolitanism to work, there must be a unity in diversity that is grounded in commonly accepted norms. As a result, analysing the underlying principles that guide policy-makers in their professional activities provides increased insights in what influences the development of commonly accepted standards in the area of detention conditions. A dominant number of the respondents highlighted that the protection of human rights as increasingly being threatened by nationalistic populism and the dominance of national interests in transnational issues, such as judicial cooperation in criminal matters and asylum. While the overall European feeling is perceived by the respondents as increasingly nationalistic, all respondents have a strong individual sense of being European and the existence of certain shared norms and values. The existence of these common norms and values is a rule of the game because it creates a certain normative framework in which standard setting and policy-making in Europe occur. However, some respondents question the European framework and are increasingly sceptical about the direction of the EU project. While an individual belonging to Europe is not surprising for these respondents, many different interpretations are given to these uniting European norms and values. The protection of human rights, human dignity, the rule of law, and ensuring consistency in policies are recurring features that are deemed crucial in the policy-making and standard setting process at European level. While most of the respondents have strong beliefs in these principles, for other respondents, their individual belief system is completely irrelevant in their professional environment. Respondents indicated the sensitive nature of the area of detention conditions but noted the fact that common standards being developed is acknowledged as an exceptional European achievement.

A third identified rule of the game is that at the end of a standard setting or policy-making process, all stakeholders are interested in or benefitted with making a deal. In order to come to accepted norms and standards, respondents indicated that national interests are scaled back or put aside. As a result, we can conclude that the unity in diversity in Europe is protected because there is a general understanding, or a rule of the game, that policy-making includes superseding, to a certain extent, national interests, which is eventually beneficial for all stakeholders.

Consequently, this results in the development of commonly accepted norms at the European level even for sensitive issues, such as detention conditions.

- iv. Is the formal, structured context of both the CoE and the EU complemented by informal and less visible structures and relations? If so, what is the role of these informal structures in the standard setting process?*

The research findings indicate that having informal structures and relations is a recurring important feature, influencing the standard setting and policy-making process at both the CoE and the EU. These informal structures and relations take the form of encounters between meetings, telephone conversations, bilateral meetings, discussions in the margins of a formal meeting, etc. These informal structures and relations are not perceived as problematic by the respondents because they allow for a certain flexibility. Informal relations complement and aim to circumvent the formal structural context. Informal relations make “*work easier*”, allow for a more efficient exchange of information, increase understanding of different positions and leave room for more frank discussions. Informal relations and ties are also used to appoint external experts for certain positions. The scientific experts who wrote the EPR, were chosen due to personal preferences of PC-CP members, their previous work within the CoE, as well as their availability and expertise. As we have seen in section 5.1.3, the informal contacts between the three experts were facilitated by the fact that the experts knew each other before working together on the EPR. Respondents indicated that within the PC-CP and the CDPC, everyone was allowed to take the floor. Consequently, informal contacts were held to a minimum during these meetings. Within the CPT, the experts who join the delegations are chosen for reasons based upon personal relations and informal contacts. The empirical analysis also showed strong formal and informal linkages between the CPT and the ECtHR. The judges of the ECtHR are invited once a year to a CPT plenary meeting to exchange views and to discuss case law and CPT standards. Furthermore, informal relations exist between the Registry staff of the ECtHR and the CPT secretariat. Within the CPT, respondents indicated that the standard setting process is not extensively influenced by informal contacts or relations. All the recommendations, standards, and reports are discussed in the CPT plenary meetings.

As we discussed previously in section 6.4.8, informal relations and contacts are an intrinsic part of the policy-making process in the EU. In most cases, informal encounters are related to

understand the diverging position(s) of the other party. The Commission gives a platform to external experts to provide input in the preparatory stages of policy initiatives. Besides formal encounters in, inter alia, expert meetings, the majority of contacts with external experts happen in a very unstructured informal way. From an outsider's perspective, the easiest way of getting access to the Commission, or any EU institution, is through personal contacts. In the context of the Council, for the Presidency, informal contacts with member states are crucial in order to fulfil its mediating role by searching for common positions and to reach compromise. Also, certain positions are more easily given up in a small protected environment than in the formal structure of a working group or committee. During the policy-making process, the cooperation within the EU, between the different institutional players, is the most intense in the trilogue phase. As we have learned from section 4.4.4, trilogues are informal tripartite meetings with the purpose of reaching a provisional agreement on a text that is acceptable for both the Council and the EP. While trilogues do not have legal reference in the Lisbon Treaty, or any earlier treaty, this policy-making instrument is highly institutionalised in the EU policy-making process (Kluger Dionigi & Koop, 2017). As a result, trilogues are not purely informal meetings because they are so highly institutionalised. Also in the policy-making process regarding the recast Reception Conditions Directive, trilogues were used to push the policy-making process forward. Trilogues happen in a protected environment in which a limited number of actors participate and the secrecy of the negotiations is protected. The interviews further revealed that informal linkages between the EP and the Council are often based upon nationalities. Informal contacts with the Commission and the Council or the EP are more problematic because the Commission needs to be impartial. Furthermore, within the Council, the JHA Counsellors meet on a frequent basis informally with each other in order to find like-minded positions. As a result, informal relations are used to create opportunities to consciously exclude or include certain actors in a specific debate.

- v. *To what extent are formal structures receptive to outsiders in the shape of, inter alia, experts, epistemic communities, and civil society? If so, what is their role in the standard setting process?*

Next to the official actors of the CoE and the EU, external experts, such as civil society, international organisations, and academics, are, on frequent occasions, although at different stages of the standard setting or policy-making process, involved. The access external experts have to different institutional players varies according to personal relations, informal contacts,

the institutional configuration, and the timing in the standard setting and policy-making process. As we have seen in section 5.1.6, the drafting process of the EPR was driven by academics who, due to their knowledge in the penological field, were appointed and acknowledged in their role as expert. Due to the authoritative claim the experts had to policy-relevant knowledge, and the members of the PC-CP and the CDPC acknowledging these experts in their role, they took the form of an epistemic community. Certain features are important in order to be labelled as an epistemic community: common individual norms or belief system, priorities and ideas, individual resources (knowledge and information), an authoritative claim, and cooperation with other actors. As a result of this combination, the experts could push this standard setting process forward and into a certain direction, based on their expertise. Because the different stakeholders involved in this standard setting process (members of the PC-CP and the CDPC) acknowledged their expert role and capacities of the three experts plus the Chair of the PC-CP, this helped to push for certain ideas. As a result, the mix of an academic and a practical background showed to be essential features, not only to be able to draft the EPR but also to persuade the member states in the framework of the CDPC of the accuracy of their approach and standards. Also within the CoE, a specific strength of the CPT is its multidisciplinary composition and expertise in different areas. The access outsiders or external experts have to this Committee is very limited due to the high level of confidentiality the CPT applies, which is important in its relations with the CoE member states. When the expertise of the CPT members or the secretariat is insufficient, the CPT relies on external experts. These experts are handpicked by the CPT, established by practice, and based on personal preferences and relations.

Literature points out that negotiations in the EU are influenced by external experts especially at the beginning of the policy-making process. Particularly the Commission relies on a network of external experts to prepare policy initiatives or to launch policy ideas (Egeberg, 2013; Elgström & Jönsson, 2005; Warleigh-Lack & Drachenberg, 2013). This is also confirmed in this dissertation, where it is noted that the influence of outsiders is the highest in the preparatory stages of EU legislative proposals and initiatives. As discussed in section 5.2.2 (Green paper on detention) and 6.4.1 (the recast Reception Conditions Directive), relevant stakeholders can make comments in the preparatory phases of the proposal when the text is still with the Commission. When a common position is adopted by the Commission, and the dossier moves to the Council and the EP, the influence of external experts decreases when the negotiation process continues. Respondents highlighted that the Commission and the EP are the most receptive and open to outsiders in comparison to the Council. Furthermore, the input a civil

society organisation, academic, or practitioner wants to make is also important. Information that is perceived “*neutral*” is considered most valuable. The access or platform you may get as an outsider highly depends on the personal preferences of the person handling the specific file. Furthermore, the personal network you have in these circles is crucial in order to know what is going on behind the closed doors of negotiations.

4. *Which actor-related and relational features in the policy and social networks in the CoE and the EU can explain why the selected policy outcomes reflect a greater unity in diversity in Europe?*

From the document analysis and the interviews, certain actor and relational features help to explain why the selected policy outcomes and policy moments reflect a greater unity in diversity in Europe. Due to the applied methodology (a qualitative research design with a literature review, a document analysis and expert interviews) plus the sample of respondents, it remains challenging to give a full explanation of how the unity in diversity is reflected in the analysed policy outcomes and moments. However, certain analysed features help to explain a greater unity in diversity in Europe. Such an example includes the common norms and values the actors share in the standard setting and policy-making process. As analysed in chapter 8, the norms and values shared by the policy-makers and external experts influence the outcome of the standard setting process. Difficulties can arise with the concrete transposition of these common norms of protecting human rights, the rule of law, solidarity in policy, and legislative instruments. Furthermore, carrying out common norms and standards in the actual standard setting and policy-making process can be weakened or strengthened due to the personal characteristics of the involved actors. At both the CoE and the EU, there is a presence of (external) experts and a policy elite who, due to their individual resources (expertise, experiences, belief system, language skills) and network, influence the standard setting or policy-making process. These experts or policy elite can be strengthened in their role when other stakeholders in the standard setting or policy-making process recognise their authoritative claim or their role as experts with a substantive amount of policy-relevant knowledge. When the individual resources of a stakeholder in the standard setting or policy-making process are weak(er), this is reflected in a weakened negotiating position. With the CoE, as described in section 5.1.6, we saw the influence and the formation of an epistemic community with three experts drafting the EPR. Furthermore, members of the PC-CP and the CDPC recognised the experts as having an authoritative claim and carriers of policy-relevant knowledge due to their

academic and practical knowledge and experiences. On the other hand, as described in section 6.4.5, the Rapporteur, during the negotiations of the recast Reception Conditions Directive, weakened the position of the EP. We can conclude that common norms and values, which go further than merely national interests, are crucial to protecting the unity in diversity in Europe. In addition, the protection of these common norms and values in policy outcomes can be strengthened or weakened by the personal characteristics and the individual resources of the relevant actors.

A relational feature that can explain the greater unity in diversity in Europe is related to the standard setting and policy-making process itself. The formal structured context in the CoE and the EU is supplemented by informal relations and ties. The importance of this informal level in the standard setting and policy-making process is a recurrent influential feature at both the CoE and the EU. This level of informality contributes to a greater unity in diversity because in essence, the function of these informal relations and ties is to understand different positions in order to reach mutual understanding and mutual acceptable positions. As a result, the formal structured context is complemented by informal relations and ties to find a unity in a diverse range of ideas, priorities, and positions by different actors in the standard setting and policy-making process. Informal relations and ties are not perceived as problematic by the respondents. Informal relations can also be used to consciously include or exclude certain actors so that coalitions of like-minded people can be made to push a certain idea or proposal forward. Informal relations and ties also allow for more frank discussions in a smaller protected environment.

9.3 Recommendations for further research

This dissertation incorporates an analysis of the policy-making and standard setting processes in the area of detention conditions at the European level. The findings emerging from this dissertation should be considered as a starting point for future research. In particular, it would be interesting to investigate how the issue of detention conditions is dealt with at a global level and to analyse standard setting processes at UN level (e.g. the creation of the Nelson Mandela Rules²⁴¹) and the recommendations by the SPT. From a theoretical point of view, the application of other theories to the European framework in the area of detention can be valuable. In

²⁴¹ The 2015 UN Standard Minimum Rules for the Treatment of Prisoners.

particular, the theory of policy transfer and policy convergence can offer interesting insights and can further contribute to the emerging research area of European criminology. For example, why are certain policies transferred from a national to a European level or from a European to the national level? Is transfer voluntary or is it based on best practices? How much and how is this transferred? Next to another theoretical framework, a policy and social network approach in another area within the AFSJ can provide insights how Europe deals with fundamental rights and guarantees in other policy areas. For example, in the last decade, a whole array of procedural rights has been developed at the EU level, which can be an interesting subject for a policy and social network approach.

The methodology adopted in this dissertation proved valuable in getting more insights into the policy-making and standard setting process, which actors were involved, and the relational ties between these actors. Applying other methods of data gathering may circumvent some of the limitations of this study. The sample of respondents used in this research is a clear limitation because the sample did not include higher level officials or judges from the CJEU. Another limitation of this research, which stems from using interviews, is that people involved in the standard setting and policy-making processes will only reveal information that is socially desirable or what is expected from an expert or policy-maker. Participatory observations in the organisation under study could reveal interesting aspects, especially in the more informal ties and relations between the different actors. For example, how frequent are these informal contacts? How open and transparent are the different actors about these informal contacts and ties? Are informal contacts and ties only based on nationalities and/or personal characteristics, or are other features (e.g. type of academic or professional background) also important? Participatory observations can also allow for a researcher to build more extensive trust relationships with possible respondents. This mutual trust is important in order for the respondent to feel comfortable in what they reveal. Furthermore, a longer period of observation could allow the researcher to expand the sample of respondents to higher political levels.

This research only analysed the policy-making process itself. An interesting aspect could be how member states, especially for the EU in the area of asylum, deal with the increased amount of legislation. This could be interesting because national political rhetoric is often very different than what is decided at European level. Also, analysing enforcement strategies at both the CoE and the EU can be valuable to receive increased insights on implementation difficulties. In essence, policies are made to be implemented, but this is not always the case in practice.

10 APPENDIX

Appendix 1: Data Storage Factsheet

Name/identifier study: Detention conditions in a cosmopolitan Europe

Author: Rebecca Deruiter

Date: September 2014–August 2018

1. Contact details

=====

1a. Main researcher

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2. Information about the datasets to which this sheet applies

=====

* Reference of the publication in which the datasets are reported:
PhD dissertation entitled “Detention Conditions in a Cosmopolitan Europe”

* Which datasets in that publication does this sheet apply to?:

The sheet applies to all the interviews gathered and used in the aforementioned dissertation.

3. Information about the files that have been stored

=====

3a. Raw data

* Have the raw data been stored by the main researcher? YES / NO

If NO, please justify:

* On which platform are the raw data stored?

- researcher PC
- research group file server
- other (specify): ...

* Who has direct access to the raw data (i.e., without intervention of another person)?

- main researcher
- responsible ZAP
- all members of the research group
- all members of UGent
- other (specify): ...

3b. Other files

* Which other files have been stored?

- file(s) describing the transition from raw data to reported results. Specify:

Word documents where each used code is listed with the corresponding quotes/sections of the interview.

A separate password-protected Word file with the coding schedule in which the codes were matched with the names of the respondent.

- file(s) containing processed data. Specify:

All interviews were transcribed and saved as Word files.

Nvivo file in which the interviews are coded.

- file(s) containing analyses. Specify: ...
- files(s) containing information about informed consent
- a file specifying legal and ethical provisions
- file(s) that describe the content of the stored files and how this content should be interpreted. Specify: ...
- other files. Specify: ...

* On which platform are these other files stored?

- individual PC
- research group file server
- other: ...

* Who has direct access to these other files (i.e., without intervention of another person)?

- main researcher
- responsible ZAP
- all members of the research group
- all members of UGent
- other (specify):

4. Reproduction

=====

* Have the results been reproduced independently?: YES / NO

* If yes, by whom (add if multiple):

- name:
- address:
- affiliation:
- e-mail:

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