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Gstrein, Oskar Josef

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Zum 60. Geburtstag von
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**Zum 60. Geburtstag von
Univ.-Prof. Dr. Thomas Giegerich**

Mit Vorwort von

Isabel Zewe

und Beiträgen von

**Christina Backes
Simon Biehl
Aleksandra Chiniaeva
Karoline Dolgowski
Julia Glocke
Oskar J. Gstrein
Julia Jungfleisch
Derya Nur Kayacan
Katharina Koch
Helen Küchler
Tarlan Masmaliyeva
Kristina Müller
Fabio D. Schlee
Desirée C. Schmitt
Dennis Traudt
Corina Vodă
Laura Katharina Woll**

The Council of Europe as an actor in the Digital Age: Past achievements, future perspectives

Dr. Oskar J. Gstrein, M.A., LL.M.

A. Introduction

The Council of Europe was founded after the Second World War in 1949 and has its main establishment in Strasbourg, France.¹ Despite its manifold successes in the areas of human rights, democracy, and the rule of law in the subsequent decades, the ‘ever closer’ integration of the European Union combined with other international developments are challenging the setup and position of this international organization in the 21st century.² In 2018, the future of the Council of Europe was endangered by budgetary constraints which result from growing political tensions between the member states of the European Union and important member states of the organization such as the Russian Federation, Turkey, and others.³ Despite these challenges, the Council of Europe remains an organization with the potential for the development of unique legal frameworks. While the European Union is limited to 28 (soon possibly 27) member states with approximately 500 million inhabitants, the Strasbourg organization has 47 member states with approximately 820 million inhabitants. Hence, despite the fact that the European Union might be capable of supranational legislative acts as enshrined in Art. 288 TFEU, any harmonization of the regulatory framework through the Council of Europe has a wider territorial, personal, and arguably cultural scope.

1 Statute of the Council of Europe, Art. 11; ETS No. 1.

2 *Polakiewicz*, EU und Europarat: Ungleichlauf der Menschenrechte, Frankfurter Allgemeine Zeitung Einspruch, 12.5.2018.

3 *Rankin*, Human rights body faces cash crisis after clash with Russia, The Guardian 2018, <https://www.theguardian.com/law/2018/mar/16/human-rights-body-faces-cash-crisis-after-clash-with-russia> (09/10/2018); *Nicholls*, Russia's foreign minister slams Brexit Britain for using EU to hurt Russia, Euronews 2018, <https://www.euronews.com/2018/10/16/russian-fm-slams-brexit-britain-for-using-eu-to-hurt-russia> (17/10/2018).

This is an increasingly prominent position when it comes to the regulation of the digital sphere. The members of the Strasbourg organization are not necessarily divided along the same political lines as in other international bodies such as the Human Rights Council of the United Nations, the Security Council of the United Nations, or the North Atlantic Treaty Organization. Additionally, the Council of Europe has a rich tradition in regulating the digital sphere. It is home to international treaties such as the European Convention of Human Rights (ECHR),⁴ the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Convention 108'; which is the first international instrument in this space since 1981),⁵ the Council of Europe Convention on Cybercrime ('Budapest Convention'; which was opened for signature in 2001),⁶ and other truly progressive international instruments relating to technological developments.

However, there are not only historical reasons to think of the Council of Europe as one of the key actors in the Digital Age. As it is well known, the digital sphere is – different to nation states which are constituted by the three elements territory, people, and (internal, external) sovereignty⁷ – governed by a 'multi-stakeholder approach'. This type of regulation is much more complex and influenced by seven groups of actors: states/governments, private sector commercial entities, civil society, intergovernmental organizations, other international private sector organizations,⁸ the academic community, and the technical community.⁹ The Council of Europe is not only already part of this mosaic of actors as will be shown in this text, it is also very well connected to many of the other groups. The Council of Europe is well aware of this role and has adopted an Internet Governance Strategy for the years 2016-2019.¹⁰ In order to strengthen its connections further, the Council of Europe signed initial partnership agreements with leading technology firms (incl. Apple, Deutsche Telekom, Facebook, Google, Microsoft, etc.) and Computer & Industry Associations (incl. DIGITALEUROPE, the European Digi-

4 *Council of Europe*, ETS No. 5.

5 *Council of Europe*, ETS No. 108.

6 *Council of Europe*, ETS No. 185.

7 *Jelinek*, *Allgemeine Staatslehre*, 2nd ed. 1905, p. 381-420.

8 Such as the "Global Network Initiative" which is an alliance of Internet and telecommunications companies, human rights and press freedom groups, investors, and academic institutions from around the world. More information can be found via <https://globalnetworkinitiative.org> (25/9/2018).

9 *Hill*, *The internet, it's governance, and the multi-stakeholder model*, info 2 2014, p. 29.

10 *Council of Europe*, *Internet Governance – Council of Europe Strategy 2016-2019*, via <https://rm.coe.int/internet-governance-strategy-2016-2019-updated-version-06-mar-2018/1680790ebe> (9/10/2018).

tal SME Alliance, etc.) on 8 November 8 2017.¹¹ Furthermore, and in contrast to the European Union, the regulatory frameworks of the Council of Europe are typically open for participation of non-member states or ‘third parties’ upon invitation. In a time where the fear of regional and/or national fragmentation has also reached the Internet,¹² this might be a crucial element in the future work of the organization.

This contribution provides an overview of the main existing instruments with which the Council of Europe contributes to developments in the Digital Age, goes on to briefly reflect on the relationship between the European Union and the Strasbourg organisation, and – before presenting the conclusion – deliberates on future perspectives for the Council of Europe in the Digital Age.

B. Existing Instruments

I. European Convention of Human Rights

Opened for signature on 4 November 1950, amended by 17 protocols and with 47 member states (still in absence of the European Union which is obliged to join the Convention according to Art. 6 (2) TEU),¹³ the undisputed relevance of the ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ for the Digital Age proofs its status as ‘living instrument’.¹⁴ Nevertheless, it should not be overlooked that the understanding of data protection or privacy as human rights in the digital sphere is relatively new, and also vague.¹⁵ Still, the rich and broad jurisprudence of the European Court of Human Rights in matters relating to the Digital Age exceeds the scope of this text. Hence, it seems more appropriate to refer to the frequently updated factsheets of the court, which are organized around themes and important judgments, and therefore allow to understand the position of the court and the meaning of the convention in the Digital Age more easily.

11 Ibidem, Leaflet Partnership with Internet companies, via <https://rm.coe.int/leaflet-partnership-with-internet-companies-en/168079ced2> (9/10/2018), p. 2.

12 *Cerf*, The Fragmentation of the Internet, IEEE Internet Computing 2016, Vol. 20 Issue 1, p. 88.

13 *Council of Europe*, ETS No. 005.

14 *Letsas*, The ECHR as a living instrument: its meaning and legitimacy, in: Føllesdal/Peters/Ulfstein (eds.), *Constituting Europe*, 2013, p. 106-141.

15 *van der Sloot*, Do data protection rules protect the individual and should they?, *International Data Privacy Law* 4 2014, p. 323-325; *Wachter and Mittelstadt*, A right to reasonable inferences: Re-Thinking data protection law in the age of Big Data and AI, *Colum. Bus. L. Rev.*, forthcoming 2019, p. 1-4.

Factsheets relating to Art. 10 ECHR on freedom of expression include - but are not limited to - the topics of 'access to internet',¹⁶ and 'hate speech'.¹⁷ Art. 8 ECHR enshrines the right to private and family life. Factsheets regarding 'mass surveillance',¹⁸ 'protection of personal data',¹⁹ 'surveillance at workplace',²⁰ 'legal professional privilege',²¹ and others are available. There is even a dedicated fact-sheet on the topic of 'new technologies'.²² Here it becomes clear that the convention and the court put in practice, what the United Nations demand repeatedly since the revelations of Edward Snowden in June 2013:²³ Human rights must be respected, protected, and promoted online, as much and as effectively as offline.²⁴

However, the activity of the court in Strasbourg is not only important for the system of the convention. The court's judgments frequently establish standards which are important for other human rights protection mechanisms, in Europe and across the world. The court seems to have become one of the key actors in a process of informal dialogue between international institutions shaping the digital sphere and developing more detailed guidance for complex questions. To name one concrete and particularly prominent example, the European Court of Human Rights (ECtHR) in Strasbourg and the European Court of Justice in Luxembourg are currently caught up in a 'dance' – to the seemingly eternal tune of the 'Bosphorus assumption'²⁵ – in which they aim at establishing the limits and possibilities for the access to digitally stored personal data for the use of law enforcement agencies, and/or security and information services. Remarkable steps of this dance include the 2014 judgment of the Luxembourg court in Digital Rights Ireland which lead

16 https://www.echr.coe.int/Documents/FS_Access_Internet_ENG.pdf (9/10/2018).

17 https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (9/10/2018).

18 https://www.echr.coe.int/Documents/FS_Mass_surveillance_ENG.pdf (9/10/2018).

19 https://www.echr.coe.int/Documents/FS_Data_ENG.pdf (9/10/2018).

20 https://www.echr.coe.int/Documents/FS_Workplace_surveillance_ENG.pdf (9/10/2018).

21 https://www.echr.coe.int/Documents/FS_Legal_professional_privilege_ENG.pdf (9/10/2018).

22 https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf (9/10/2018).

23 *MacAskill and Hern*, Edward Snowden: 'The people are still powerless, but now they're aware', *The Guardian* 2018, <https://www.theguardian.com/us-news/2018/jun/04/edward-snowden-people-still-powerless-but-aware> (09/10/2018).

24 UNGA Res 68/167 (2014), p. 2; UNGA Res A/C.3/71/L.39/Rev.1 (2016), p. 3; UNHRC Res A/HRC/RES/28/16 (2015), p. 3; UNHRC Council Res A/HRC/32/L.20 27.06.2016, p. 2; UNHRC Res A/HRC/34/L.7/Rev.1 22.03.2017, p. 4.

25 *Besselink*, Should the European Union ratify the European Convention on Human Rights? in: Føllesdal/Peters/Ulfstein (eds.), *Constituting Europe*, 2013, p. 308-312.

to the annulment of the European Union data retention directive,²⁶ includes the 2015 judgment in *Zakharov v. Russia* of the judges in Strasbourg,²⁷ adds the 2016 *Tele2 Sverige Watson* judgment in Luxembourg,²⁸ goes further to the 2018 Strasbourg judgment in *Big Brother Watch and Others v. United Kingdom*,²⁹ and finds its final expression up to the time of writing in the Luxembourg judgment on the accessibility of personal data stored on a smartphone in the *Ministerio Fiscal* case, which was decided a few days after the aforementioned ECtHR case.³⁰

One could add many smaller moves to this illustration, but what is described seems sufficient to show the basic figure. Furthermore, despite the fact that this example is focused on Europe, many (also non-judicial) organizations involved in the regulation of the digital sphere follow this process closely to draw their own conclusions. Throughout these judgments the courts seem to be in informal dialogue with each other, complementing their views and findings, ultimately delivering an ever more concrete picture of how this activity should be regulated in the light of human rights, democracy, and the rule of law. This clearly underlines the importance of the European Court of Human Rights and the European Convention of Human Rights for developments in the Digital Age. Nevertheless, and despite the perspective that this particular process may finally restore a degree of much needed legal certainty in this area, the overlong duration it takes highlights the fact that there is a general lack of qualitatively useful political leadership in this field.³¹

II. Convention 108

The ‘Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data’ was opened for signature on 28 January 1981, and entered into force on 1 October 1985.³² It is the first binding international legal instrument to address the processing of personal data. An additional protocol con-

26 CJEU, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd*, ECLI:EU:C:2013:845.

27 ECtHR, app. no. 47143/06 *Roman Zakharov v. Russia*.

28 CJEU, case Joined Cases C-203/15 and C-698/15 *Tele2 Sverige Watson*, ECLI:EU:C:2016:970.

29 ECtHR, app. nos. 58170/13, 62322/14 and 24960/15 *Big Brother Watch and Others v. United Kingdom*.

30 CJEU, case C-207/16 *Ministerio Fiscal*, ECLI:EU:C:2018:788.

31 Compare also the call for an international legal instrument to regulate government-led surveillance by the United Nations Special Rapporteur on the right to privacy, Joe Cannataci. *United Nations*, Report of the Special Rapporteur on the right to privacy Cannataci, A/HRC/34/60, 24.2.2017, p. 20-21.

32 *Council of Europe*, ETS No. 108.

taining requirements to establish a data protection authority and guidance on the regulation of international data flows ('adequacy assessments') was added in 2001,³³ and as response to the 1995 directive of the European Union in this field.³⁴ Convention 108 has become an international model law and inspired other legislation. According to Art. 1 (1) of Convention 108 states who ratify the convention must apply it '[...] to automated personal data files and automatic processing of personal data in the public and private sectors.' This very broad scope is not often found in data protection laws, which regularly only address the private, or the public activities using personal data, or only specific sectors in one of the two. The basic principles found in chapter II of Convention 108 include provisions on the quality of data, on special categories of data, and data security. Overall it is fair to state, that the convention contains many essential elements of data protection law and has a strong legacy. Convention 108 is the blueprint of a typical European data protection law, largely technology neutral, using the so-called 'omnibus approach' which aims at regulating the field in a principal manner. Particularly in times of rapid technological change, these might be decisive advantages over other regulatory approaches.

Convention 108 was not only received well in the member states of the Council of Europe which all have ratified it. Furthermore, Cabo Verde, Mauritius, Mexico, Senegal, Tunisia, and Uruguay have become a member of Convention 108 upon invitation, which means that 53 countries in total (or approximately a fourth of the states in the world) use Convention 108 as basis for their data protection legislation at the end of 2018.³⁵ At the time of writing, more states such as Argentina, Burkina Faso, and Morocco showed interest in ratifying the convention.³⁶ This is important, because it seems that the convention has become a building block for a global consensus on data protection, which is impossible for other important legislative efforts such as the European Union's General Data Protection Regulation (GDPR) which became directly applicable in the member states of the Union on 25 May 2018.³⁷ Despite the fact that Art. 3 of GDPR contains a provision that allows for potential extra-territorial effects of the regulation, there is no other

33 *Council of Europe*, ETS No. 181.

34 *Greenleaf*, Renewing data protection convention 108: The CoE's 'GDPR Lite' initiatives, Privacy Laws & Business International Report 142 2016, p. 1.

35 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=BfbIJBUT (10/10/2018).

36 *Council of Europe*, Mexico joins the data protection convention, Press release 29.06.2018 via <https://www.coe.int/en/web/portal/-/mexico-joins-the-data-protection-convention> (10/10/2018).

37 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

opportunity for countries outside of the European Union to formally or informally accept such a regulatory framework as binding standard and create ownership at the same time.³⁸ In that sense, the possibilities of the Council of Europe and its conventions exceed those of the European Union.

From 2010 to 2018 a modernized version of Convention 108 was produced.³⁹ This protocol of amendment has treaty series number 223, and was signed on 10 October 2018 by 21 states including the Russian Federation.⁴⁰ Much of ‘Convention 108+’ has to be understood as an update to take into account the development of technology, and in connection with the process in the European Union during the negotiations on GDPR.⁴¹ While essential elements such as ‘lawfulness’ of collection or processing of personal data, ‘fairness’, ‘transparency’, ‘purpose limitation’, ‘data minimisation’, ‘accuracy’, ‘storage limitation’, ‘integrity and confidentiality’, and ‘accountability’ are present in both texts,⁴² there are also differences. For example, Convention 108+ has a slightly different definition of data processing which in Art. 2 lit. b) also includes ‘logical and/or arithmetical operations’ to reflect developments in the space of artificial intelligence, and big data.⁴³ Furthermore, Convention 108+ does not include a ‘right to be forgotten’, or a right to ‘data portability’.⁴⁴ The modernized convention has also been described as ‘GDPR Lite’,⁴⁵ since it is less detailed, and the enforcement process, as well as potential fines in case of violations, differ significantly. However, given the different task and incentive of this instrument this characterization might be misleading. In fact, Convention 108+ could become an important cornerstone of a more universal understanding of data protection and privacy in the digital age, which is much needed and necessary to provide the foundations for technological progress based on human rights, democracy, and the rule of law. In this spirit, the United Nations Special Rapporteur on the right to privacy, Joe Cannataci, recommended states to

38 *Greenleaf*, (Fn. 34), p. 4-8.

39 *Ukrain*, Data Protection without Frontiers? On the relationship between EU GDPR and Amended CoE Convention 108, European Data Protection Law 2 2018, p. 240.

40 *Council of Europe*, Opening for signature of the Protocol amending the Convention 108: here is Convention 108+, Press Release via [https://www.coe.int/en/web/data-protection/-/opening-for-signature-of-the-protocol-amending-the-convention-108-here-is-convention-108- \(11/10/2018\)](https://www.coe.int/en/web/data-protection/-/opening-for-signature-of-the-protocol-amending-the-convention-108-here-is-convention-108- (11/10/2018)).

41 A comprehensive leaflet can be found via [https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1 \(10/10/2018\)](https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1 (10/10/2018)).

42 *Ukrain*, (Fn. 39), p. 243.

43 A version of the text can be found via [https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf \(10/10/2018\)](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf (10/10/2018)).

44 *Ibid.*, p. 244.

45 *Ibid.*, p. 9.

become a member of Convention 108+ in his 2018 report to the General Assembly.⁴⁶

III. Budapest Convention

The ‘Convention on Cybercrime’ was opened for signature in the Hungarian capital Budapest in 2001, and entered into force on 1 July 2004. At the end of 2018 a total number of 61 states either ratified this convention, or acceded to it. The composition of members is truly interesting. Four states of the Council of Europe (Ireland, Russian Federation, San Marino, Sweden) have not started, or finished the ratification process. However, a total of eighteen non-member states have ratified the convention, among them Canada, Japan, and the United States of America. More states intend to join the convention in the near future.⁴⁷

As the name of the Convention suggests, its aim is to tackle crime committed via the Internet, and other computer networks. It is the first international treaty to cover this area of increasing importance and prominence. Once ratified, states are obliged to develop an appropriate legal framework, as well as appropriate tools, in order to being able to address cybercrime, and increase cybersecurity.⁴⁸ The Convention was setup as a basis to harmonize national laws (including substantive criminal law, relevant procedural law) and policies in the area, as well as to promote international cooperation in the field.⁴⁹ Focus areas are infringements of copyright, computer-related fraud, child pornography, and violations of network security. Furthermore, the Budapest Convention contains a series of powers and procedures, such as the search of computer networks, and interception of information. An ‘Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems’ was setup, and entered into force on 1 March 2006.⁵⁰ The influence of this protocol on the discussion on ‘hate speech’ or ‘disinformation’ in the digital sphere seems to be limited, however.

Since there is continued interest of states to join this instrument, and due to continuing technological developments in the area of cybercrime, the mid-term report on the Council of Europe Strategy on Internet Governance from May 2018 closes

46 *United Nations Special Rapporteur on the right to privacy*, Report of the Special Rapporteur Canataci on the right to privacy, A/73/45712, 17.10.2018, mn. 117 lit. e, p. 20.

47 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=BfbLJBUT (10/10/2018).

48 *Bernik*, Cybercrime and Cyberwarfare, 2014, p. 50-51.

49 *Council of Europe*, Explanatory Report to the Convention on Cybercrime, ETS No. 185, p. 4-5.

50 *Council of Europe*, ETS No. 189.

with the statement that further development of the Budapest Convention is considered.⁵¹ At the time of writing there was vivid discussion to add a second protocol harmonizing the “rules on obtaining subscriber information” across the member states of the Council of Europe.⁵² This would facilitate investigations of Law Enforcement Agencies and Information and Security Services in the Digital Sphere and across borders (e.g. creating production orders to obtain information on usage of static or dynamic Internet Protocol-Addresses to be able to attribute digital actions to a person). On the level of the EU a proposal for a “Regulation concerning the respect for private life and the protection of personal data in electronic communications” (widely called ‘e-Evidence’ regulation) was presented by the European Commission at the beginning of 2017.⁵³ It remains to be seen how these two initiatives develop in the coming months and years. However, it is clear that the Budapest Convention and its existing and potential protocol cover highly relevant areas in a unique international fashion. With the considerable number of states having joined this convention in recent years, it seems that the Council of Europe will continue to be an important forum to discuss cybercrime in the coming years, and decades.

IV. Protection of Children against Sexual Exploitation and Sexual Abuse

The ‘Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse’ or ‘Lanzarote Convention’ was opened for signature on 25 October 2007. It entered into force on 1 July 2010.⁵⁴ At the end of 2018, 44 member states of the Council of Europe have signed or ratified this international agreement, with Armenia, Azerbaijan, and Ireland being the exception.⁵⁵ The three purposes of the Convention are defined in Art. 1 as ‘to prevent and combat sexual exploitation, and sexual abuse of children’ (lit. a), ‘protect the rights of child victims of sexual exploitation and sexual abuse’ (lit. b), and finally to ‘promote national and international co-operation against sexual exploitation and sexual abuse of children’ (lit. c).

51 *Council of Europe*, Council of Europe Strategy on Internet Governance (2016-2019) – Mid-term report of the Secretary General, 17.5.2018, SG/Inf(2018)19, para. 57.

52 *Council of Europe*, Cybercrime Convention Committee (T-CY), Conditions for obtaining subscriber information in relation to dynamic versus static IP addresses: overview of relevant court decisions and developments, T-CY (2018) 26.

53 *European Commission*, Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final, 2017/0003 (COD).

54 *Council of Europe*, ETS No. 201.

55 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?p_auth=BfbLJBUT (10/10/2018).

The focus of this convention is not alone on the digital sphere. Sexual exploitation and sexual abuse of children are serious, complex crimes which require to go beyond technological regulation. However, the fact that the just discussed Convention on Cybercrime is mentioned in the preamble, emphasizes the potential overlap between the two treaties. Yet, the Internet and computer networks also need to be addressed in this convention in several ways. For example, Art. 13 of the Lanzarote Convention mentions Internet helplines as an example for states to fulfil their obligation to ‘encourage and support the setting up of information services’, potentially also being able to offer such services anonymously. More importantly, technology can be involved in the production, provisioning, distribution or transmission, or processing of child pornography as addressed by Art. 20. Also when it comes to ‘simulated representations or realistic images of a non-existent child’ as mentioned in Art. 20 (3) of the Lanzarote Convention, technology will typically play a crucial role. Finally, it should be noted that this important issue is also subject to considerable efforts on the level of the United Nations.⁵⁶

V. Counterfeiting of medical products and similar crimes

The last Convention that will be covered in more detail in this text relates to ‘the counterfeiting of medical products and similar crimes involving threats to public health.’⁵⁷ It was signed in Moscow on 28 October 2011 and entered into force on 1 January 2016. Since the Convention is relatively new, it is not surprising that only 13 states have acceded to it, or finished the ratification process at the time of writing. It also seems likely that some non-member states will join this convention.⁵⁸ The ‘Medicrime Convention’ is the first international instrument to criminalize manufacturing of counterfeit medical products, supplying, or trafficking such goods, falsifying related documents, and the unauthorised manufacturing or supplying of medicinal products or medical devices which do not have required certifications.⁵⁹

After major incidents in this area soon after the turn to the third millennium there was increased demand to have such an instrument. International cooperation is

56 *Malekian*, Nordlöf, Prohibition of Sexual Exploitation of Children Constituting Obligation Erga Omnes, 2013, Chapter 7.

57 *Council of Europe*, ETS No. 211.

58 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/211/signatures?p_auth=BfbLJBUT (10/10/2018).

59 *Council of Europe*, Explanatory Report to the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health, ETS No. 211, p. 1-2.

crucial, since these crimes are often carried out cross-border.⁶⁰ As with the Convention on Sexual Exploitation and Sexual Abuse of children, this is an area which is not directly relating to technology. However, the use of technology can play a key-role in several areas that the Convention addresses, such as the distribution of fake drugs, or fake medical equipment. Hence, the Budapest Convention is also mentioned in the Preamble of this Convention, and Art. 13 mentions the Internet as a space which potentially facilitates, or increases harm.

VI. Other initiatives

Besides the just mentioned creation and administration of the numerous international instruments, the Council of Europe has also created several other initiatives to deliver guidance on the use of new technologies. On 23 January 2017 the ‘Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data’ have been published.⁶¹ The document contains definitions of the relevant terms,⁶² as well as principles and guidelines to use when working with Big Data analytics. Those principles go beyond mere legal compliance, and address the topics of ethical and socially aware use, preventive policies and risk-assessment, purpose limitation and transparency, data protection by design, deliberations on consent to the creation and use of personal data, anonymisation of personal data, human intervention in decisions based on Big Data Analysis, use of Open Data, and education.⁶³

Furthermore, the impact of the increased use of Artificial Intelligence and Machine Learning on human rights, democracy, and the rule of law is being monitored, analysed, and discussed. While this initiative is still in the early stages at the time of writing, it is to be expected that the organization will also develop relevant guidelines relating to the use of the technology in the area of criminal law, biomedicine, and influence of voter behaviour.⁶⁴ A “Committee of experts on Human Rights Dimensions of automated data processing and different forms of artificial intelligence” (MSI-AUT) had its first meeting on 6-7 March 2018.⁶⁵ There were four

60 *Wanko*, Unkelbach, Europäisches Netzwerk der offiziellen Arzneimittelkontrolllaboratorien, Bundesgesundheitsblatt 60 2017, p. 1222.

61 *Council of Europe*, Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data, T-PD(2017)01.

62 *Ibid.*, p. 2.

63 *Ibid.*, p. 3-6.

64 *Council of Europe*, Artificial Intelligence, Leaflet via <https://rm.coe.int/leaflet-artificial-intelligence-en/168089e571> (17/10/2018).

65 *Council of Europe*, 1st meeting report, MSI-AUT(2018)03 via <https://rm.coe.int/msi-aut-first-meeting-report-6-7-march-2018/16807971b5> (09/01/2019).

deliverables available at the time of writing. They included a draft study on “implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework”,⁶⁶ a “Draft Recommendation of the Committee of Ministers to member States on human rights impacts of algorithmic systems”,⁶⁷ a “Draft Declaration of the Committee of Ministers on the manipulative capabilities of algorithmic processes”,⁶⁸ and a “Draft study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states”.⁶⁹

C. Future Perspectives

According to the Council of Europe Internet Governance Strategy 2016-2019, which was already mentioned earlier in this text, the organization will continue to aim for the promotion of human rights, democracy, and the rule of law in the digital world.⁷⁰ This initiative is a follow-up to the 2012-2015 strategy. In the area of building democracy online, the activities are focusing on education of young ‘netizens’, as well as countering hate speech and speech that leads to violence.⁷¹ The 2016-2019 strategy also includes the use of the existing conventions to contribute to online safety and security for all.⁷² In order to respect, protect, and promote the human rights in the digital world the Council plans on expanding its network with other institutions and looks for ways to provide concrete safeguards and remedies. Convention 108 and its modernized version certainly play a key role in this effort.⁷³

66 *Council of Europe*, A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework, MSI-AUT(2018)05 via <https://rm.coe.int/draft-study-of-the-implications-of-advanced-digital-technologies-inclu/16808ef255> (09/01/2019).

67 *Council of Europe*, Draft Recommendation of the Committee of Ministers to member States on human rights impacts of algorithmic systems, MSI-AUT(2018)06 via <https://rm.coe.int/draft-recommendation-on-human-rights-impacts-of-algorithmic-systems/16808ef256> (09/01/2019).

68 *Council of Europe*, Draft Declaration of the Committee of Ministers on the manipulative capabilities of algorithmic processes, MSI-AUT(2018)07 via <https://rm.coe.int/draft-declaration-on-the-manipulative-capabilities-of-algorithmic-proc/16808ef257> (09/01/2019).

69 *Council of Europe*, Draft study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states, MSI-AUT(2018)04 via <https://rm.coe.int/draft-study-on-forms-of-liability-and-jurisdictional-issues-in-the-app/16808ef307> (09/01/2019).

70 *Council of Europe*, (Fn. 10).

71 *Ibid.*, p. 9-10.

72 *Ibid.*, p. 10-11.

73 *Ibid.*, p. 12-14.

When considering new areas of activity, the Council of Europe might also become an interesting forum to discuss a 'Cyberpeace Convention'. This might be useful to consider in times of increased cross-border activities to influence national politics, and national discourse. Such perspective seems particularly interesting for the Strasbourg organisation, since its members include Eastern and Western European states, and the conventions can be made open for signature to other international organizations, and states all across the world. A Cyberpeace Convention might include aspects of state conduct in cyberspace regarding hate speech, 'trolling', political interference, regulation of suspicious and potentially destabilizing activities, as well as industrial espionage, and attacks on critical infrastructure.

Attempts to create regulatory frameworks for this area would not be entirely new. The administration of United States President Barack Obama and the President of the People's Republic of China Xi Jinping already ventured in this area in 2015.⁷⁴ Whether the resulting agreement has actually been a success, is still subject to discussion.⁷⁵ It remains also unclear how this agreement will be handled by present and future US and Chinese administrations. Nevertheless, this initiative shows that there is space in this area, and with Western concerns about Russian and other interference in national and regional elections,⁷⁶ the Council of Europe might just provide the right frame for an elaborate discussion on these subjects.

More concretely however, the Council of Europe will remain busy in the coming years in rolling out its relatively new and updated Conventions as presented in this text. Their topicality and appropriateness, as well as their potential to provide much needed regulatory guidance in the digital sphere will create corresponding interest of states to join, if the political will materializes.

D. Conclusion

The activities of the Council of Europe as an actor in the Digital Age also allows an outlook for the larger setting of the organisation in relationship with the European Union. The two could more effectively align their strategic positioning to provide stability for the smaller, and larger Europe, in order to protect and promote their core values and objectives across the region, and the world. While the

74 *Sanger*, U.S. and China seek arms deal for cyberspace, New York Times 2015, <https://www.nytimes.com/2015/09/20/world/asia/us-and-china-seek-arms-deal-for-cyberspace.html> (22/10/2018).

75 *Brown, Yung*, Evaluating the US-China Cybersecurity Agreement, Part 1: The US Approach to Cyberspace, The Diplomat 2017, <https://thediplomat.com/2017/01/evaluating-the-us-china-cybersecurity-agreement-part-1-the-us-approach-to-cyberspace/> (22/10/2018).

76 *Drozdiak*, Fear of Russian Meddling Hangs Over Next Year's EU Elections, Bloomberg 2018, <https://www.bloomberg.com/news/articles/2018-10-16/fear-of-russian-meddling-hangs-over-next-year-s-eu-elections> (22/10/2018).

European Union has made significant gains in economic strength, and political importance over the last decades, the Council of Europe has a unique setup that allows it to stabilize Europe, the neighbouring regions, and positively influence developments all over the world. In this line it is also expected that the newly signed Convention 108+ could become a stabilizing factor in the process of the United Kingdom leaving the European Union.⁷⁷

However and more generally, the regulation of the digital sphere is a perfect example in this respect. The United Nations Special Rapporteur on the right to privacy recommended to states in his 2018 report to the General Assembly to sign up for Convention 108+, and if possible to align themselves with the European Union's General Data Protection Regulation safeguards and remedies.⁷⁸ This seems currently the only way to create a more universal consensus on privacy regulation in the digital age, which is desirable to ensure the respect, protection, and promotion of the human right. While Convention 108+ has the potential to align the larger Europe with 47 states around modernized binding rules, its territorial outreach might lead to a globally significant harmonization of national laws, which in turn might eventually pave the way for global frameworks. If the promotion of the Internet as a space without physical borders should take place as it did in the last decades, the creation of multilateral consensus on these issues is crucial. Without a consensus it becomes highly questionable whether international data flows enabling cultural, economic, and technological progress across the world can be upheld. At the same time, the European Union could focus on more specific, and detailed rules in this area. These are necessary to provide a basis for the internal market of the European Union, and make progress on European Integration.

All of this will only succeed if the European Union and the Council of Europe truly promote the same core values. The overdue accession of the European Union to the European Convention of Human Rights would be the right signal to address doubts in this area. Finally however, the overlook in this submission shows that the Council of Europe is one of the most important actors in the Digital Age, and that both Europe and the world can significantly profit from its initiatives and activities.

⁷⁷ Baker, What does the newly signed 'Convention 108+' mean for U.K. adequacy?, International Association of Privacy Professionals, <https://iapp.org/news/a/what-does-the-newly-signed-convention-108-mean-for-u-k-adequacy/> (01/11/2018).

⁷⁸ *United Nations Special Rapporteur on the right to privacy*, (Fn. 46), mn. 117 lit. e, f, p. 20.