

A real threat: Compliance with human rights is no longer a value in Europe

*Erzsébet Kardos Kaponyi*¹

Abstract

The internationalization of the human rights standards and the creation of the basic human rights conventions can be regarded as a great success of the international community. Nevertheless, it has also become clear that there is a wide gap between written norms and practice, and the current mechanisms prove insufficient to protect and promote human rights. The author argues that the effort of the international community to compel countries to protect human rights has essentially failed. Even the current European regime, in particular the related mechanism of the European Union, is unsuitable for managing the violation of human rights standards.

Keywords: international human rights, European Union, human rights mechanisms

Introduction

The international human rights regime has gradually developed after World War II. Western countries sought to reinforce all the human rights standards that have been jointly drafted primarily within the framework of the United Nations (UN). In the decades following the World War II, as a result of slow progress, the UN made efforts to codify human rights in a universally recognized regime of treaties, institutions, and norms. Beyond the *UN Charter*² and the *UN Universal Declaration of Human Rights* (hereafter: UDHR) adopted by General Assembly resolution 217(III), numerous conventions have been signed and ratified in the subsequent decades. Since its conception in 1948, the UDHR has become the global reference human rights document, and it has become

¹ Dr. Erzsébet Kaponyi is Professor of European and International Law at Corvinus University of Budapest.

² Art. 1 of the Charter states that one of the aims of the United Nations is to achieve international cooperation in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,” thus enshrining the principle of non-discrimination. URL: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> [17-20-2018].

binding as a part of customary international law. The UDHR has served as the inspiration for the adoption of numerous more specific human rights instruments, such as the two significant *UN International Covenants* on human rights (ICCPR and ICESCR)³ and, at the regional level, the *Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe (European Treaty Series (ETS), no.: 005, 1950) (hereafter: the *European Convention on Human Rights*, ECHR).⁴ The trend to elaborate regional standards continued with the adoption of the *American Convention on Human Rights* in 1967, which was subsequently followed by the *African Charter on Human and Peoples' Rights*, adopted in 1981. The *Vienna Declaration* (at the World Conference on Human Rights, held in 1993 in Vienna) made concrete recommendations for strengthening and harmonizing the monitoring capacity and the enforcement mechanisms of the UN human rights system.⁵ In this regard, it called for the establishment of a High Commissioner for Human Rights and the Office of the High Commissioner for Human Rights by the General Assembly, which subsequently created the post on 20 December 1993.⁶

For the time being, the UN human rights bodies form a complex, but not effective system. There are Charter-based bodies, including the Human Rights Council (hereafter: UNHRC), and also bodies created under the international human rights treaties, made up of independent experts mandated to monitor State parties' compliance with their treaty obligations. Treaty bodies could be considered as quasi-judicial bodies, given the fact that their decisions in response to individual or interstate complaints are not legally binding, but do have persuasive value.⁷ UNHRC monitors the compliance of all 193 UN member States with their international human rights obligations through the Universal Periodic Review (hereafter: UPR). The UPR seeks to assess member States' human rights records and to highlight human rights violations. UNHRC is able to bring urgent crises to the attention of the world community. In the [2018 annual report of the Human Rights Council to the General Assembly](#) (A/73/53/Add.1), it reported a number of cases of serious human

³ International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which refer to the UDHR explicitly in their preambles. Together with UDHR and the protocols of these covenants, these are known as the International Bill of Human Rights.

⁴ See more: Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, (2nd ed), Oxford University Press, Oxford, 2000.

⁵ A/CONF.157/24 (Part I) 13 October 1993, URL: www.unhchr.ch/huridocda/huridoca.nsf [23-09-2018].

⁶ A/49/668). URL: www.ohchr.org/EN/AboutUs/Pages/ViennaWC5.aspx [23-09-2018].

⁷ URL: <http://research.un.org/en/docs/humanrights/treaties> [23-09-2018].

rights violations and abuses of international human rights law and violations of international humanitarian law.⁸ The UNHRC brought to the attention of the General Assembly for its consideration and possible action the situation of human rights of Rohingya Muslims and other minorities in Myanmar, the promotion and protection of human rights in the Bolivarian Republic of Venezuela, and the human rights situation in countries such as the Syrian Arab Republic, Yemen, and Burundi etc. The report reflects alarming developments around the world: systematic, widespread and gross violations and abuses of human rights, which has a serious negative impact in every region. However, despite all these frustrating phenomena, it is unlikely that the decisions of the UNHRC would be directly endorsed by the UN Security Council.

Monitoring and investigation of violations in Europe: The role of the Council of Europe

One of the most developed and elaborated regional human rights systems and regimes is the European one, based on the Council of Europe (CoE),⁹ the European Union (EU)¹⁰ and the Organization for Security and Cooperation (OSCE).¹¹ The European human rights system includes various mechanisms to enforce human rights provisions, but this system is not unified. It consists of separate entities with distinct functions, which essentially weakens the enforcement of the European human rights system.

The Council of Europe, founded after the horrors of World War II and dedicated above all to the protection and the development of pluralist democracy, the rule of law and human rights, wishes to share these values with every European country. In the Preamble of its *Statute*, the Council of Europe emphasises: [...] “*Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples*”

⁸ Twenty-seventh special session (5 December 2017); Thirty-seventh session (26 February–23 March 2018); Twenty-eighth special session (18 May 2018); Thirty-eighth session (18 June–6 July 2018). URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/258/79/PDF/G1825879.pdf> [18-11-2018].

⁹ The Council of Europe (CoE) was created in 1949 with 10 founding members (*Statute of the Council of Europe*), 87 UNTS 103, E.T.S. 1; there are now 47 member states. The CoE has provided the framework for the negotiation and conclusion of more than 100 multilateral agreements among its member states (“European treaties”).

¹⁰ The legitimacy of such transnational institutions born by political integration. The European Union is based on a strong commitment to promoting and protecting human rights; human dignity, freedom, democracy, equality, the rule of law and respect for human rights – these values are embedded in the EU treaties since 1997. The EU Charter of Fundamental Rights (2000) is a clear and strong statement of EU citizens' rights.

¹¹ The scope of this work unfortunately prevents an exploration of the human rights activities of the OSCE. See more: Galbreath, David J.: *The Organization for Security and Co-operation in Europe (OSCE)*. 2007.; Weiss, Thomas G. – Wilkinson, Rorden (ed.): *The Global Institutions Series*. Rutledge.

and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy; “¹² The Statute did not only lay down the conditions for membership, but it also set out sanctions for member States which fail to fulfil their obligations.¹³ Even today, it is important to keep in mind that the founders of the Council of Europe took the position that: [...] “*it [a State party] cannot be a member State of the Council of Europe if it does not respect pluralist democracy, the rule of law and human rights. So a non-democratic State could not participate in the ECHR system: the protection of democracy goes hand in hand with the protection of rights.*”¹⁴ The *European Convention on Human Rights* is a powerful living instrument, which has been playing a pivotal role in the European human rights system.¹⁵ The European Human Rights Court’s (hereafter: ECtHR) is the first human rights court sitting on a full-time basis; it makes remarkable case law. The ECtHR is not a substitute for national courts, dealing only with disputes concerning non-compliance with human rights obligations under ECHR and its Protocols. The final judgements of the ECtHR are legally binding on the State concerned, which is based on the fundamental principle of international law that agreements must be respected. When ratifying the Convention, States parties thus

¹² Statute of the Council of Europe, London, 05/05/1949, ETS No.001. URL:

<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> [21-10-2018]

¹³ „Article 8: Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine. Article 9 The Committee of Ministers may suspend the right of representation on the Committee and on the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled.” ETS 1 – Statute of the Council of Europe, 5.V.1949. URL <https://rm.coe.int/1680306052> [21-10-2018]

¹⁴ “The European system of the protection of human rights with its Court would be inconceivable untied from democracy. In fact we have a bond that is not only regional or geographic: a State cannot be party to the European Convention on Human Rights if it is not a member of the Council of Europe; it cannot be a member State of the Council of Europe if it does not respect pluralist democracy, the rule of law and human rights. So a non-democratic State could not participate in the ECHR system: the protection of democracy goes hand in hand with the protection of rights.” Guido Raimondi: *Immunità parlamentari e dritti umani, Diritto Pubblico Europeo Rassegna online*, gennaio 2016. URL: https://www.academia.edu/22369691/Allocuzione_del_presidente_Raimondi_alla_presentazione_dello_Scudo_in_Ara_Coeli [22-10-2018]

¹⁵ CDL-AD(2002)034-e Opinion on the Implementation of the Judgments of the European Court of Human Rights, adopted by the Venice Commission at its 53rd Plenary Session (Venice, 13-14 December 2002). URL: [https://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)034.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2002)034.aspx) [11-09-2018]. The Department for the Execution of Judgments of the ECtHR advises and assists the Committee of Ministers of the Council of Europe in its function of supervision of the implementation of the Court’s judgements. It also provides support the member States to achieve full, effective and prompt execution of judgments. URL: <https://www.coe.int/en/web/execution/presentation-of-the-department> [11-09-2018]. It should be pointed out that more than 200 other international treaties have been concluded within the Council of Europe.

explicitly undertake to implement, acting in good faith, all judgments of the European Court of Human Rights, in cases in which they are involved.

The jurisprudence of the ECtHR has been strongly influential in the development of human rights norms.¹⁶ One of the most significant ways in which judgements of the ECtHR affect trends at the regional and also at the international level is in the ECHR's revisions of previous judgements and the resulting evolution of case law according to the new precedents. Given the fact that member States of the Council of Europe have incorporated the ECHR into their national law, the judiciary at the national level could consider the ECHR's standards as well.¹⁷ However, some member States are challenging the primacy of the ECHR, seeking to empower national courts to overrule judgments from the Court, and refusing to implement such judgments for political reasons, as the "Report on the State of Democracy, Human Rights and the Rule of Law 2018" of the Secretary General of the Council of Europe stated.¹⁸

Particular attention needs to be given to the activities of the European Commission for Democracy through Law, known as the Venice Commission (1990), which is an advisory body of the *Council of Europe*, composed of independent experts in the field of constitutional law and it has been recognized as an instance of independent reflexion.¹⁹ The activity of the Venice Commission is based on the three ground principles of the European constitutional heritage: democracy, human rights and the rule of law. The Commission concentrates on three key areas of action, namely: democratic institutions, constitutional justice and ordinary justice, and elections, referendums and political parties. The Venice Commission's primary task is to provide states with legal advice in the form of so-called legal opinions on draft legislation or legislation already in force which is submitted to it for examination. It also produces studies and reports on

¹⁶ CDL-AD(2002)034-e Opinion on the Implementation of the Judgments of the European Court of Human Rights, adopted by the Venice Commission at its 53rd Plenary Session (Venice, 13-14 December 2002). URL: [https://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)034.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2002)034.aspx) [11-09-2018]. The Department for the Execution of Judgments of the ECtHR advises and assists the Committee of Ministers of the Council of Europe in its function of supervision of the implementation of the Court's judgements. It also provides support the member States to achieve full, effective and prompt execution of judgments. URL: <https://www.coe.int/en/web/execution/presentation-of-the-department> [11-09-2018].

¹⁷ Eirik Bjorge: National supreme courts and the development of ECHR rights, *International Journal of Constitutional Law*, Volume 9, Issue 1, 1 January 2011, Pages 5–31. URL <https://doi.org/10.1093/icon/mor018> [11-09-2018].

¹⁸ State of Democracy, Human Rights and the Rule of Law; Role of institutions Threats to institutions, Report by the Secretary General of the Council of Europe 2018, Council of Europe Publications F-67075 Strasbourg Cedex www.coe.int, May 2018 Printed at the Council of Europe. URL: <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5> [20-10-2018].

¹⁹ URL <http://www.venice.coe.int/webforms/events/> [10-09-2018].

topical issues. Groups of members assisted by the secretariat prepare the draft opinions and studies, which are then discussed and adopted at the Committee's plenary sessions.²⁰ During the last decades, the Venice Commission has been doing an incredible job, interpreting in its resolutions on the questions of the rule of law, democracy and human rights (in particular, freedom of association, prohibition of discrimination, freedom of assembly, freedom of expression and freedom of conscience and religion.) It may be stated in general that, the States concerned are not really eager to accept – and at times are vocally critical of – resolutions of the Venice Commission.

As an example, in 2013, the Venice Commission collected information on the legislation on NGOs, including on foreign funding, in a number of countries. In 2016, the Secretary General of the Council of Europe requested the Venice Commission to carry out a review of the standards applying to foreign funding of NGOs in Council of Europe member States. As a result of the preliminary non-exhaustive analysis of the information received (relating to 38 countries), it is found that the majority of Venice Commission member States do not have specific provisions regulating or restricting the ability of associations to receive funding from abroad, nor specific provisions imposing specific reporting or disclosure requirements in respect of foreign funding.

In February 2017, the Hungarian government initiated a national consultation, under the title “Let's Stop Brussels”, polling citizens on issues labelled as possible threats to the national independence of the state.²¹ This campaign also targeted NGOs receiving foreign funding and suggested that they operate in Hungary with the aim to interfere in domestic affairs in a non-transparent manner. In June 2017, after a few months of consecutive campaigns against foreign-funded groups – as the **first law of its kind in a European Union member State** – Hungary adopted the legislation on “Transparency of Organisations Receiving Foreign Funds”. This regulation is widely viewed by intergovernmental and civil society organisations (CSOs) as a major obstacle to the work of Hungarian CSOs and their interactions with civil society domestically and

²⁰ URL https://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN [11-09-2018].

²¹ The Prime Minister Viktor Orbán said that the Government is calling the defensive measures being considered in response to these five attacks a “new national policy for protecting the country, Hungary's national interests and the results achieved”. In order for Hungarians to successfully defend themselves, he said, they first need agreement, “the wider and fuller the agreement, the better”. Therefore a national consultation on these issues will be launched. National consultation to be launched on threats faced by Hungary, 21 February 2017. URL: <http://www.kormany.hu/en/the-prime-minister/news/national-consultation-to-be-launched-on-threats-faced-by-hungary> [27-10-2018].

internationally.²² The Venice Commission issued its “Opinion on the Draft Law on the Transparency of Organisations (Hungarian Parliament Bill T/14967)²³ receiving support from abroad” acknowledging that the “*Draft Law is explained as pursuing the legitimate aim of ensuring transparency of civil society organisations in order to prevent undue foreign political influence. The Draft Law may also contribute to the fight against money-laundering and the financing of terrorism. However, these legitimate aims cannot be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work. This effect would go beyond the legitimate aim of transparency which is alleged to be the only aim of the Law under consideration.*” The Venice Commission also raised concern about the label of “organisation receiving support from abroad” as to whether this breaches the prohibition of discrimination, and may thus be contrary to Article 14 ECHR. Moreover, this label risks stigmatising such organisations, adversely affecting their legitimate activities and having a chilling effect on freedom of expression and association.²⁴ Besides the above-mentioned opinion, at the request of the Conference of INGOs of the Council of Europe, the Expert Council on NGO Law considered that [...] “*Sadly, recent years have seen today's Hungarian authorities become increasingly aggressive and regressive towards civil society organizations (CSOs). This has included making verbal assaults and heaping opprobrium on perfectly legitimate CSOs/NGOs solely because they have received funding from governments or philanthropies based in other countries – a practice which is of course itself entirely legitimate.*”²⁵

In a letter dated 22 March 2018, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, informed the Venice Commission that the Committee, at its hearing on “Protecting human rights defenders in Council of Europe members States”, held on 14 March 2018 in Paris, had decided to request an opinion from the Venice Commission on the compatibility with international human rights standards of the Hungarian government’s “Stop Soros” legislative package, which included Bill t/1976 on the licencing of organisations

²² The Law introduces a new status of “organisation supported from abroad” which applies to all Hungarian associations and foundations that receive funding from any foreign sources (e.g., individuals, foundations, government aid agencies, direct EU funding) above 7,2 million HUF (approx. €23,500) in a tax year.

²³ URL: <http://www.parlament.hu/iromanyok-lekerdezese> [27-10-2018]

²⁴ Opinion 889/ 2017 Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad CDL-AD(2017)015-e, Hungary, Opinions for "Hungary." URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e) [18-11-2018]

²⁵ Expert Council on NGO Law Opinion on the Hungarian Draft Act on The Transparency of Organisations supported from abroad Opinion prepared by the Expert Council on NGO Law, EXPERT COUNCIL ON NGO LAW CONF/EXP(2017)124 April 2017. <https://rm.coe.int/168070bfb> [18-11-2018].

supporting migration, Bill t/19775 on the immigration financing duty and Bill t/19774 on the immigration restraint order. On 24-26 May 2018, a joint delegation of the Venice Commission and OSCE/ODIHR visited Budapest and met with the State Secretary from the Prime Minister's Office and representatives of the Foreign Affairs Committee and Committee of Justice of the Hungarian Parliament, including deputies from the ruling and opposition parties, representatives of the Constitutional Court, and a number of civil society organisations.²⁶ As result of the consultation, their Joint Opinion observed that [...]”*In addition, there may be circumstances in which providing “assistance” is a moral imperative or at least a moral right. As such, the provision may result in further arbitrary restrictions to and prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs. Under the draft provision, as it currently stands, persons and/or organisations that carry out informational activities, support individual cases, provide aid on the border of Hungary may be under risk of prosecution even if they acted in good faith, in line with the international law for supporting the asylum seekers or other forms of legal migrants, for instance victims of trafficking.*”

There have been cases where some States considered the statements of the Venice Commission as misplaced, prejudiced, and expressed disagreement with the decisions of the Commission, while urging criticism to be addressed at other states.²⁷ Manifestations of these attitudes certainly do not deduce from the high value of the work of the Venice Commission. Irrespective of the fact that their decisions are not mandatory, they indisputably show the correct direction for every member States of the Council of Europe.

²⁶ European Commission for Democracy through law (Venice Commission); OSCE Office for Democratic Institutions and Human rights (OSCE/ODIHR); Hungary Joint Opinion on the provisions of the so-called “Stop Soros” draft legislative package which directly affect NGOs (In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018). URL:

<https://www.osce.org/odihr/385932?download=true> [18-11-2018].

²⁷ The Venice Commission issued recommendations on the law in December 2017 proposing that Ukraine execute changes to it. Hungarian government would like private schools to be exempt from the law, and that the contested regulations not be implemented for another five years. Until these aims are achieved, the Hungarian government indicated it will continue to block Ukrainian initiatives at international organisations as the UN and NATO. On 18 June 2018 President Gianni Buquicchio met with Hungarian Foreign Minister Peter Szijjártó to discuss the implementation of the Venice Commission's opinion on the amendments to the Ukrainian Law on Secondary Education as well as the upcoming opinion on the new “stop Soros” legislative provisions. In relation to the latter, President Buquicchio called on the Hungarian Parliament not to proceed with the adoption of the law prior to the publication of the Commission's opinion on the coming Friday of 22 June 2018, or at least to take into account the Commission's recommendations as they appear in the draft opinion which has already been sent to the authorities.

URL <https://www.venice.coe.int/webforms/events/?id=2585> [11-09-2018].

Mention should also be made in this regard of the fifth “Report on the State of Democracy, Human Rights and the Rule of Law; Role of institutions; Threats to institutions” by Thorbjørn Jagland, the Secretary General of the Council of Europe 2018 (hereafter: CoE Report). The CoE Report has five chapters which look at the key building blocks of democratic security: efficient, impartial and independent judiciaries; freedom of expression; freedom of assembly and freedom of association; democratic institutions; and inclusive societies. The CoE Report pays special attention to the phenomenon of populism and its disturbing implications, asking how strong Europe’s checks and balances are: *”Our human rights, democracy and the rule of law depend on the institutions that give them form. But for populists, who invoke the proclaimed “will of the people” in order to stifle opposition, these checks and balances on power are often seen as an obstacle that should be subverted.”* This report offers many alarming examples of increased attempts to challenge judicial independence, including through political influence over appointments, the violation of the freedom of expression, and political pressure on human rights non-governmental organisations (NGOs) and human rights defenders, an increasingly aggressive use of technology to influence electoral processes and outcomes, and the growing influence of xenophobic and populist rhetoric in public opinion.²⁸ The Report mentions notably nine member States (Azerbaijan, Bulgaria, Hungary, Poland, Romania, Serbia, Slovak Republic, “the former Yugoslav Republic of Macedonia” and Turkey), where NGOs were stigmatised by “official” rhetoric, often denouncing them as unpatriotic or politically biased. The Conference of INGOs of the Council of Europe also highlighted this trend in its reports and statements in 2017.²⁹ On 3 May 2017, the Commissioner for Human Rights of the CoE (hereafter: Commissioner) published a letter addressed to the Speaker of the National Assembly of Hungary, noting that the Draft Law on the Transparency of Organisations Supported from Abroad carried a clear risk of stigmatising a large number of organisations pursuing lawful activities in the field of human rights, and provoking a dissuasive effect on their activities.³⁰ The Commissioner expressed concern at the apparent absence of meaningful

²⁸ State of Democracy, Human Rights and the Rule of Law; Role of institutions Threats to institutions, Report by the Secretary General of the Council of Europe 2018, Council of Europe Publications F-67075 Strasbourg Cedex www.coe.int, May 2018 Printed at the Council of Europe. URL <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5> [16-11-2018].

²⁹ Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law on non-governmental organisations labelled as foreign agents in Hungary (7 March 2017) (<https://goo.gl/DdGEvx>); CoE Report p. 56.

³⁰ Commissioner for Human Rights, Letter to the Speaker of the National Assembly of Hungary, published on 3 May 2017 (<https://rm.coe.int/168070ce6d>). CoE Report p.58.

public consultation on the draft law, which would create additional administrative burdens on NGOs falling within its scope, obliging them to register and self-label as “foreign-funded”, and introduce sanctions for non-compliance. Moreover, the draft law, based on unambiguous criteria, excluded from its scope other types of NGOs, such as those pursuing sports or religious activities. The Commissioner stressed that foreign-funded NGOs should not be stigmatised or put at any disadvantage whatsoever on the basis of the foreign origin of their funding and urged the members of the Hungarian Parliament to reject the draft law.

The Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General of the CoE on migration and refugees, to Serbia and two transit zones in Hungary, found in the meantime cases involving the pushing back of migrants and refugees, sometimes accompanied by violence, reported in 2017, for example from Hungary to Serbia, from Croatia to Serbia and from Serbia to Bulgaria.³¹ In Hungary, border asylum procedures introduced to cope with the challenges of migration have raised concerns as to whether they are accompanied by adequate procedural safeguards and whether they involve an individualised assessment of the risk of a breach of Articles 2 and 3 of the ECHR in the case of return to countries of origin or third countries³² (e.g., concern was raised regarding the legality of the alleged *de facto* detention of the applicants in the Röszke transit zone in Hungary, *Ilias and Ahmed v. Hungary*, 47287/15.)

Monitoring and investigation of violations in Europe: The European Union’s role

In the course of European integration, the issue of human rights has gradually come to the fore, due to the jurisprudence of the Court of Justice of the European Union (CJEU).³³ European integration was primarily about economic cooperation and the European Economic Community (ECC) and its priorities did not include the protection of human

³¹ See the reports of Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, on fact-finding missions to Italy (SG/Inf(2017)8) (<https://bit.ly/2lCZ3RT>), and to Serbia and two transit zones in Hungary (SG/Inf(2017)33) (<https://bit.ly/2GyWxTi>). See also the Special Report further to a visit undertaken by a delegation of the Lanzarote Committee to transit zones at the Serbian/Hungarian border (5-7 July 2017) (<https://bit.ly/2C6bYyZ>). CoE Report p.93.

³² State of Democracy, Human Rights and the Rule of Law; Role of institutions Threats to institutions, Report by the Secretary General of the Council of Europe 2018, Council of Europe Publications F-67075 Strasbourg Cedex www.coe.int, May 2018 Printed at the Council of Europe. URL: <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5> [16-11-2018] p. 95.

³³ CJEU was originally established in 1952 as a single court called the Court of Justice of the European Coal and Steel Communities (as of 1958 the Court of Justice of the European Communities (CJEC)).

rights. This, of course, did not mean that the question of democracy and human rights had not been discussed in the ECC, but if so, then it happened mainly in the context of future enlargements, as to what should be a prerequisite for becoming a member of the ECC.

On 19 December 1961, the European Parliamentary Assembly unanimously adopted the report (the Birkelbach Report) drawn up on behalf of the Political Committee on the political and institutional aspects of accession to or association with the European Economic Community (EEC).³⁴ This report supported political integration and supra-national decision-making in the ECC and stated that [...] *“only states which guarantee on their territories truly democratic practice and respect for human rights and freedoms can become members of our community”*.³⁵ In the early 1970s, as a result of the European Court's decisions, the ECC increasingly believed in the need to promote respect for human rights. In 1969 for the first time, the European Court of Justice stated that its task includes ensuring the respect of fundamental human rights enshrined in the general principles of Community law. The Copenhagen Declaration on European Identity (1973) declared that [...] *“Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity.”*³⁶ In 1978, the Council solemnly proclaimed that *“respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European communities”*.³⁷

³⁴ Rapport fait au nom de la commission politique de l'Assemblée parlementaire européenne sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté par M. Willi Birkelbach, Rapporteur (19 décembre 1961) Conditions préalables à une adhésion, 3. Conditions politiques, “25. La garantie de l'existence d'une forme d'État démocratique, au sens d'une organisation politique libérale, est une condition à l'adhésion. Les États dont les gouvernements n'ont pas de légitimation démocratique et dont les peuples ne participent aux décisions du gouvernement ni directement ni par des représentants élus librement, ne peuvent prétendre être admis dans le cercle des peuples qui forment les Communautés européennes.”

URL

https://www.cvce.eu/en/obj/report_by_willi_birkelbach_on_the_political_and_institutional_aspects_of_a_cession_to_or_association_with_the_community_19_december_1961-en-html [11-09-2018]

³⁵ Op.cit.

³⁶ At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept of European identity into their common foreign relations. URL: http://www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html [13-09-2018]

³⁷ European Council, 20 April 1978, Copenhagen, Conclusions of the Presidency, Declaration on Democracy, ANNEX D. URL: https://www.consilium.europa.eu/media/20773/copenhagen_april_1978_eng_pdf [13-09-2018].

The requirement of the respect for human rights was kept in mind in the foreign relations of the European Union as a basic precondition of regional or bilateral treaties and agreements, such as Association Agreements and Partnership and Cooperation Agreements with third countries.³⁸ Accession partnerships, including EU pre-accession financial aid, are conditional upon compliance with the requirement of respect for democratic principles. If the rule of law, respect for human rights or the protection of minorities are violated, or if the country concerned fails to make continuous progress towards the fulfilment of any one of the above-mentioned conditions, the partnership has to be suspended. Concerning accession to the EU, the Treaties stated that any European country may apply for membership if it respects the democratic values of the EU and is committed to promoting them. The European Council, meeting in Luxembourg on 12 and 13 December 1997, reaffirmed that “*Compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations.*”³⁹ In other words it means that a state that wishes to apply for membership of the Union must satisfy this condition through the achievement of institutional stability as a guarantee of democratic order, rule of law and ensuring respect for human rights, as well as respect for and the protection of minorities.⁴⁰ This also means that the EU requires the applicant countries that they set up democratic institutions and independent judicial and constitutional authorities and that they carry out specific substantive reforms within a specific time frame.⁴¹

³⁸ Following the adoption of the Agenda for Change and the Strategic Framework on Human Rights and Democracy in 2012, the EU became committed to moving towards a Rights-Based Approach (RBA) for development cooperation. Council conclusions on a rights-based approach to development cooperation, encompassing all human rights Foreign Affairs (Development) Council meeting Brussels, 19 May 2014. URL: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/142682.pdf [16-09-2018].

More recently, the Global Strategy for the European Union’s Foreign and Security Policy reaffirms the commitment to mainstream human rights across all policy sectors, as does the European Commission proposal for a new European Consensus on Development, which will align EU development cooperation policy with the 2030 Agenda, Proposal for a new European Consensus on Development Our World, our Dignity, our Future, COM(2016) 740 final, Strasbourg, 22 November 2016. URL: https://ec.europa.eu/europeaid/sites/devco/files/communication-proposal-new-consensus-development-20161122_en.pdf [12-09-2018]

³⁹ Commission opinions and accession negotiations, [...] 25. Compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations. p.5. URL: http://aei.pitt.edu/43332/1/Luxembourg_European_Council.pdf [15-09-2018]

⁴⁰ This condition applies the ratification and implementation of legal human rights standards, e.g. respect for the rights of minorities, the right to freedom of speech, and the freedom of the media, the abolition of capital punishment, where applicable, the legal accountability of police, military and secret services, the elimination of torture and ill-treatment, the acceptance and encouragement of the non-profit-making sector, as guardians of the effective protection of fundamental rights and civil liberties.

⁴¹ URL: http://www.europarl.europa.eu/enlargement/briefings/20a2_en.htm [05-10-2018].

The EU also strives to enhance the effectiveness of bilateral diplomacy for human rights and to improve the mainstreaming of human rights across the EU's external action.⁴² Mention should be made of the EU **human rights dialogues** with over forty countries and organisations by which the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations. Each dialogue is established in accordance with the *EU Guidelines on human rights dialogues*.⁴³ The guidelines are adopted at the ministerial level, as a clear signal of the priority the EU and its member States attach to the issues covered in them. The *Guidelines* are aimed at all officials of EU institutions and EU member States working on external relations with impacts outside the EU, i.e. in the realm of foreign, security, migration, trade and other policies.

Human rights are an important part of the EU-UN relationship and the European Union is very active on UN human rights, regularly presenting initiatives on country situations of concern as well as thematic priorities, and participating actively in debates of the UN Human Rights Council (hereafter: UNHRC).⁴⁴ The EU strongly supports the resolution on civil society space, and continues to underline the important role of civil society actors, whose contributions are vital to the work of the UNHRC. From 10 to 28 September 2018, the 39th session of the UNHRC took place in Geneva, while the European Union marked the 70th anniversary of the UDHR, and reaffirmed its support to an effective and efficient functioning of the HRC.⁴⁵ However, the European Union is not

⁴²The European Union (EU) currently has nine Special Representatives (EUSRs) covering the following countries or regions: Central Asia, Middle East Peace Process, Afghanistan, Bosnia and Herzegovina, Kosovo, the South Caucasus and the crisis in Georgia, Horn of Africa, Human Rights and the Sahel. URL: http://eeas.europa.eu/background/eu-special-representatives/index_en.htm [07-10-2018].

⁴³ Since the first Action Plan on Human Rights and Democracy (2012-2014) the EU has adopted several new EU Guidelines on Human Rights, and a Toolbox on a Rights-Based Approach to Development. The EU now has guidelines on the following subjects: Death Penalty (updated in 2013), Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (updated in 2012), Human Rights Dialogues (updated in 2009), Children and Armed Conflict (CAAC) (updated in 2008), Human Rights Defenders (updated in 2008), Promotion and Protection of the Rights of the Child (updated in 2008, 2017), Violence against Women and Girls and Combating all Forms of Discrimination against them (2008), Promoting Compliance with International Humanitarian Law (updated in 2009), Promotion and Protection of Freedom of Religion or Belief (2013), Promotion and Protection of the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual Transgender and Intersex (LGBTI) Persons (2013), Freedom of Expression Offline and Online (2014).

⁴⁴ Hungary has been a member of the HRC between 2009 and 2012 and has been elected a member of the HRC again in October 2016. Iceland was elected on July 2018 to serve as a member from 13 July 2018 to 31 December 2019 to replace the vacancy left by the United States following its decision to withdraw its membership. [10-10-2018].

⁴⁵ In 2018 the HRC adopted several reports on serious violations of international humanitarian law and international human rights law e.g. inquiry on the Syrian Arab Republic (Syria Arab Republic (A/HRC/39/65), South Sudan, Myanmar Report of the Independent International Fact-finding Mission on Myanmar (A/HRC/39/64(27 August 2018), Burundi, the occupied Palestinian territory, the Democratic

always able to represent a common position on UN fora. A typical example of this is the debate on the UN global migration pact⁴⁶ on which EU could not reach a common position, since some EU member States, including Hungary and Austria (the latter currently holds the rotating presidency of the European Union), did not sign this pact approved by most EU countries, voicing the view that they feared that the pact would lead to “a human right to migration.”⁴⁷ Later, the Czech Prime Minister also stated that the Czech Republic wanted to halt the process of joining the pact, arguing that the difference between legal and illegal migration was becoming blurred by it.⁴⁸ Poland, which has also clashed with Brussels by resisting national quotas for asylum seekers, is also considering withdrawing its support.

On international fora, the EU tries to present common positions on the main issues of world politics, but because of the blocking influence of some member States, this often founders. In the end of April 2018, the European Union organised a meeting in Marrakesh with the participation of several African leaders, aiming to negotiate an agreement on EU funds to be transferred to African countries in exchange for their hindering of migration. One of the goals of this planned agreement was to stand up against smugglers and to pay Libyans to return home instead of being shipped to Europe illegally. The key aim was thus to weaken irregular migration and to ease the pressure of

Republic of the Congo, Yemen, Ukraine and Libya, and the HRC engaged in dialogues with Special Procedure mandate holders on the situation of human rights and technical assistance in Cambodia, Somalia, Sudan and the Central African Republic. URL: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session39/Pages/39RegularSession.aspx> [10-10-2018].

⁴⁶ The Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, will be held in Marrakech, Morocco on 10 and 11 December 2018. The Conference is convened under the auspices of the UNGA and is held pursuant to resolution 71/1 of 19 September 2016, entitled "New York Declaration for Refugees and Migrants," which decided to launch a process of intergovernmental negotiations leading to the adoption of the Global Compact for Migration. Resolution adopted by the General Assembly on 19 September 2016 [without reference to a Main Committee (A/71/L.1)] 71/1. New York Declaration for Refugees and Migrants. URL: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1&=E%20; URL <http://www.un.org/en/conf/migration/> [13-09-2018].

⁴⁷ Österreich zieht sich aus Uno-Migrationspakt zurück, Österreich steigt aus dem Uno-Migrationspakt aus. Die Regierung in Wien befürchtet den Verlust österreichischer Souveränität in der Einwanderungspolitik. Nach den USA, Ungarn und Australien zieht sich auch Österreich aus dem geplanten globalen Migrationspakt der Vereinten Nationen zurück. Kanzler Sebastian Kurz (ÖVP) und Vizekanzler Heinz-Christian Strache (FPÖ) begründeten dies mit der Sorge, dass Österreich bei einer Unterzeichnung nicht mehr selbst bestimmen könne, wer ins Land kommen dürfe. URL: <https://www.handelsblatt.com/politik/international/migration-oesterreich-zieht-sich-aus-uno-migrationspakt-zurueck/23250628.html> [31-10-2018].

⁴⁸ A European commission spokeswoman said: “We regret the decision that the Austrian government has taken. We continue to believe that migration is a global challenge where only global solutions and global responsibility sharing will bring results.” URL <https://www.theguardian.com/world/2018/nov/01/austria-criticised-not-signing-un-global-migration-compact-european-commission> [05-11-2018].

migration overall. Hungary, one of the loudest advocates of the fight against illegal immigration, vetoed the planned agreement (called the ‘Euro-African declaration on migration’), which could, thus, not be put forward as a common EU position. Hungary, despite the acceptance of this document by representatives from 27 European and 28 African countries, refused to sign the declaration because it recognised advantages of migration, and because in its view it did not clearly condemn migration and did not differentiate refugee policy from migration policy.⁴⁹ Several representatives of the EU member States (e.g. Belgium, Portugal, Italy, France, Germany, Spain Austria and Finland) expressed their indignation related to the Hungarian position and the initiation of future amendments to the agreement (after one year of common preparation). The amendments proposed by Hungary were considered unacceptable, and capable of undermining and harming the reputation of the European Union as well as to hinder efforts in the defence of the EU’s borders and the effectiveness of deportations.⁵⁰

Despite of the general disappointment towards Hungary for regularly obstructing the cooperation between states, the Hungarian government generally represents a hard-line anti-immigration platform. It promised to oppose the agreement between the European Union and the so-called APC countries if it is to find the text too supportive of migration. Central European countries, including Hungary, also opposed the decision of the European Union to issue a common warning for China to stick to basic human rights.⁵¹

⁴⁹ Hungarian Foreign Minister Peter Szijarto stated that “According to the statement, which Hungary was alone in refusing to support, the countries of Europe are supporting the position of the African countries. And this is totally at odds with the Rabat Process that began ten years ago, the original goal of which was precisely to use European funding to realise development projects in Africa in the interests of reducing emigration” The Marrakech statement could lead to a fresh wave of migration. URL <http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-marrakech-statement-could-lead-to-a-fresh-wave-of-migration> [03-09-2018].

⁵⁰ URL: <https://dailynewshungary.com/hungary-veto-eu-africa-summit-agreement/> [13-09-2018].

⁵¹ China set up artificial bases in the South China Sea. On 12 July 2016 the Permanent Court of Arbitration (PCA) in Hague ruled unanimously that China has no historic rights to resources within the so-called "nine-mile dash," that it has interfered with traditional Philippine fishing rights at Scarborough Shoal, and has no rights to an economic zone within 200 miles of Mischief Reef or Thomas Shoal. (The Republic of the Philippines v. The People’s Republic of China). The Court stated that the artificial bases violated Manila’s economic and sovereign rights under the 1982 U.N. Convention on the Law of the Sea. While the European Union is neutral in China’s dispute with its Asian neighbours in the South China Sea, Britain, France and Germany wanted to make it clear that Beijing must uphold international law as it seeks a bigger global role. (“committed to maintaining a legal order of the seas and oceans.”) Nevertheless the suggested European common position had become difficult as some governments, including Hungary and Greece, were unwilling to criticize Beijing. After three days of difficult talks in Brussels to reach a common position, the European Union said all sides should resolve the maritime dispute “through peaceful means, to clarify their claims and pursue them in respect and in accordance with international law.” Robin Emmott: EU's statement on South China Sea reflects divisions. URL: <https://www.reuters.com/article/us-southchinasea-ruling-eu-idUSKCN0ZVITS> [13-09-2018].

As to the human rights situation within the EU, respect for the rule of law and human rights is of particular importance – in accordance with the international law. It is a prerequisite for the protection of all the fundamental values listed in the Treaties and also is a prerequisite for upholding all rights and obligations.

The often cited Article 7 of the *Treaty on the European Union* (hereafter: TEU and Article 7 TEU, respectively) aims at ensuring that all EU countries respect the common values of the EU, including the rule of law. This Article was established as a way to hold EU member States accountable for violations of the European values and fundamental rights. This procedure can be triggered by a reasoned proposal by one third of the member States, by the European Parliament or by the Commission. There are two parts — Article 7.1 can be activated in case of a “*clear risk of a serious breach*” and can allow the Council to give a formal warning to any country accused of violating fundamental rights. If that does not have the desired effect, in case of a “*serious and persistent breach*” of EU values, invoking Article 7.2 can lead to the imposition of sanctions and the suspension the voting rights of the country concerned. It is important to stress, however, that neither the preventive nor the sanctioning mechanisms of Article 7 TEU have so far been applied. Having seen how this mechanism is unsuitable for managing the specific rule of law problems within the EU, on 19 March 2014, the European Commission adopted a new ‘EU Framework to strengthen the Rule of Law’ for addressing systemic threats to the rule of law in EU member States. This new rule of law framework is complementary to infringement procedures and to the „Article 7 procedure” (the so-called “nuclear option”) and has a three-step mechanism for addressing systematic threats to the rule of law in EU Member States.⁵² This new framework established a tool allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law,⁵³ and to thus, if possible, avoid a situation where the Commission would need to make use of its power of issuing a proposal to trigger the mechanisms of Article 7 TEU. In its reasoning, the Communication described that “*different constitutions and judicial systems of the EU member States are, in principle, well designed and equipped to protect citizens against*

⁵² See more: Dimitry Kochenov and Laurent Pech: Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction, EUI Working Paper RSCAS 2015/24, Robert Schuman Centre for Advanced Studies Global Governance Programme-164, ISSN 1028-3625. URL: http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3 [10-09-2018.]

⁵³ Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

any threat to the rule of law. However, recent events in some member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action.”

The new framework is therefore meant to fill a gap.⁵⁴ It is not an alternative to, but rather precedes and complements, Article 7 TEU mechanisms. The Commission stated that if such a threat cannot be effectively addressed by the safeguards at the national level, or by the existing instruments at the EU level, in particular through infringement procedures, this Framework should be applied. It establishes a three-stage process: a Commission assessment, a Commission recommendation and the monitoring of the member State’s follow-up to the Commission’s recommendation.

This is an adversarial procedure, which means that at all stages, a dialogue should be maintained between the Commission and the member State concerned. The new Framework for addressing systemic threats to the rule of law was used for the first time concerning Poland and Hungary, signalling a fight taking place between liberal and illiberal forces in the EU that has come to be perceived by many as a conflict between Western and Central Europe. The long way to triggering Article 7 (1) started in January 2016, when the Commission expressed its concern about developments in Poland, in particular regarding the political and legal dispute over the composition of the Constitutional Tribunal.⁵⁵ On 26 April 2017, the European Parliament held a debate on Hungary, and on 7 December 2017, the Committee on Civil Liberties, Justice and Home Affairs of the *European Parliament* organised a public hearing on “The situation in Hungary.” The hearing was initiated by Green MEP Judith Sargentini, who submitted

⁵⁴ Ibid.

⁵⁵ On 19 November, the new legislature, through an accelerated procedure, amended the Law on the Constitutional Tribunal, introducing the possibility to annul the judicial nominations made by the previous legislature and to nominate five new judges. The amendment also shortened the terms of office of the President and Vice-President of the Tribunal from nine to three years, with the current terms coming to an automatic end within three months of the amendment's adoption. On 25 November the new legislature annulled the five nominations by the previous legislature and on 2 December nominated five new judges. The Constitutional Tribunal was seized concerning the decisions of both the previous legislature and the incoming legislature. The Tribunal delivered two judgements, on 3 and 9 December 2015. On 3 December, the Court ruled that the previous legislature was entitled to nominate three judges for seats vacated during its mandate, but was not entitled to make the two nominations for seats vacated during the term of the new legislature..On 9 December, the Court ruled that the new legislature was not entitled to annul the nominations for the three appointments under the previous legislature, but that it was entitled to appoint the two judges whose mandate began under the incoming legislature. The Constitutional Tribunal also declared invalid the shortening of the terms of office of the current President and Vice-President of the Tribunal. URL: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm [16-10-2018].

her updated report on Hungary on 12 September 2018.⁵⁶ As many as 58% of EPP members voted in favour of the Sargentini Report, while 29% voted against and 14% abstained. For the first time in history, there was a two-thirds majority in the European Parliament to initiate this process. Article 7 (1) has also been triggered against Poland, but by the European Commission, not the European Parliament.

The Hungarian government received open criticism that is much harsher than ever before. The main concerns include changes to the constitution and the electoral system; the independence of the judiciary; corruption; privacy and data protection; freedom of expression; academic independence; freedom of religion and association; the right to equal treatment; the rights of minorities, migrants, asylum-seekers and refugees; and the abolition of economic and social rights. The President of the European Parliament, Antonio Tajani, even threatened with further procedures, e.g. against Romania, Bulgaria and Malta. The vote on the Sargentini report could be seen as a message to other countries that not all so-called illiberal adventures remain without political consequences. However, the Hungarian government is reporting about alleged fraud in the EP voting system, and for this reason turned to the *Court of Justice of the European Union* (CJEU) asking for the decision to be annulled.

In conclusion

If the European Union does not take effective measures to enforce the protection of human rights, it will establish a breeding ground for serious conflicts. The current EU rules seem inadequate to effectively enforce the protection of the EU's own fundamental values, including respect for human rights. It is unlikely that the TEU will be changed by the member States any time soon, and so political bargaining is likely to remain even over issues of human rights and the rule of law.

It cannot be emphasized too strongly that the credibility of the European Union is at stake because of this, and that more significant efforts will be necessary to modify and refine the existing human rights mechanism.

⁵⁶ As part of the preparatory work for the report to be drafted by [Judith Sargentini \(Greens/EFA, NL\)](#), MEPs held a hearing in which Hungary Foreign Affairs and Trade Minister Péter Szijjártó presented the government's views. Hungarian Helsinki Committee Co-Chair Marta Pardavi, University of Pécs, and Mertek Media Monitor representative Gábor Polyák, as well as Centre for Fundamental Rights Director Miklós Szánthó also took part. URL: <http://www.europarl.europa.eu/news/en/press-room/20171205IPR89530/rule-of-law-and-democracy-in-hungary> [15-11-2018].