STUDY

Requested by the LIBE committee

European Parliament

Protecting civil society space: strengthening freedom of association, assembly and expression and the right to defend rights in the EU

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Protecting civil society space: strengthening freedom of association, assembly and expression and the right to defend rights in the EU

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, covers the challenges facing the civil society space. Watchdog NGOs and other human rights defenders have been under pressure during the humanitarian and rule of law 'crises'. Several EU Member States have passed laws that fall short of international, regional and EU freedom of association standards. Some governments have used the COVID-19 pandemic to further restrict the civic space. The study explores how the EU could protect civil society from unjust state interference by strengthening freedom of association, assembly and expression, as well as the right to defend human rights. The study elaborates on four policy options: introducing a European association statute; establishing internal guidelines to respect and protect human rights defenders; developing a civil society stability index; and creating a network of focal contact points for civil society at EU institutions. It recommends strengthening the independence of critical civil society actors and increasing funding for activities such as strategic litigation to uphold EU laws and values.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

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LIST OF ABBREVIATIONS

AMIF	Asylum, Migration and Integration Fund
CCPR	UN Human Rights Committee
CEPOL	European Union Agency for Law Enforcement Training
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COHOM	Council Working Party on Human Rights
COP 24	24th UN Climate Summit that was organised in Poland in December 2018
CoR	Committee of the Regions
CSE	Civil Society Europe
CSOs	Civil Society Organisations
DRF	Democracy, rule of law and fundamental rights (reports)
EEAS	European External Action Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
ECA	European Court of Auditors
ECF	European Civic Forum
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECNL	European Center for Non-Profit Law
ECOSOC	UN Economic and Social Rights Committee
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights

EIDHR	European Instrument for Democracy and Human Rights
EO	European Ombudsman
ERCI	Emergency Response Centre International
ERGO	European Network of Roma Grass-Roots Organisations
EUCFR	EU Charter of Fundamental Rights
FRA	EU Agency for Fundamental Rights
Frontex	European Border and Coast Guard
GONGs	Government-organised non-governmental organisations
HIAS	Hebrew Immigrant Aid Society
HoMs	Heads of the EU Missions
HRDs	Human Rights Defenders
ICCPR	International Covenant on Civil and Political Rights
LGBTQ	Lesbian, Gay, Bisexual, Transgender and Queer
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
ODIHR	Office for Democratic Institutions and Human Rights
OMCT	World Organisation Against Torture
OFOP	National Federation of Polish NGOs
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PETI	European Parliament's Committee on Petitions
ReSOMA	Research Social Platform on Migration, Asylum and Integration (H2020 project)
SAR	Search and Rescue
SLAPPs	Strategic lawsuits against public participation
SRHR	Sexual and Reproductive Health and Rights

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN SR	United Nations Special Rapporteur
UN HRC	United Nations Human Rights Council
UN OHCHR	UN Office of High Commissioner for Human Rights
UPR	Universal Periodic Review

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EXECUTIVE SUMMARY

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, covers **the challenges facing the civil society space in the EU.** The international and regional standards on freedom of association, assembly and expression, and the right to defend rights oblige states to respect the **independence of civil society actors**. However, critical civil society actors, such as watchdog NGOs and other human rights defenders, have been put under particular pressure across the EU, since they speak 'truth to the power', protest against certain government policies, or defend the rights of others at times of 'crises'.

These civil society actors are essential to upholding the rule of law, fundamental rights and democratic accountability – the Union's founding values – as enshrined in Article 2 of the Treaty on European Union (TEU). The EU, therefore, must **protect civic space from unjust interference by EU Member States** and even by the Union's institutions and agencies.

This study provides legal and socio-political analyses of the situation across the EU. Three countries, Greece, Hungary and Poland, were chosen for a more in-depth assessment. The authors gathered data from various academic, institutional and civil society reports, and case-law of the European and international courts. They complemented desk research with insights from a focus group discussion with 16 civil society actors and academics. Additionally, the authors conducted three follow-up interviews with relevant institutions.

The EU institutional evidence shows that developments over the past five years have worsened **conditions for civil society actors, and especially, for critical ones across the EU**.[1] The study links this trend with various 'crises', that have been declared in the areas of rule of law, asylum and, most recently, public health (COVID-19). The policymakers are limiting democratic accountability, restricting civil society space and infringing on fundamental rights. Thus, watchdog NGOs and other human rights defenders have experienced various forms of policing, ranging from suspicion and harassment to disciplining and criminalisation.[2] The first annual rule of law report acknowledged these challenges in the EU Member States.[3]

So-called NGO transparency laws were introduced in Hungary and Romania in 2017, and recently, in Greece. They intended to put a muzzle on watchdog NGOs. Hungary introduced **'the Lex NGO'** under the pretence of greater transparency. This law has created an unfavourable legislative environment and depicted watchdog NGOs receiving funding from abroad as 'foreign agents'.[4] A recent Court of Justice of the European Union (CJEU) judgment in Case C-78/18 *Commission v Hungary* stated that 'Hungary has introduced **discriminatory, unjustified and unnecessary restrictions** on foreign

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1 European Union Agency for Fundamental Rights (FRA), 'Civic space – experiences of organisations in 2019: Second Consultation', Luxembourg, Publication Office of the European Union, July 2020; FRA, 'Fundamental Rights Report 2020', 11 June 2020; FRA 'Challenges facing civil society organisations working on human rights in the EU', January 2018, Luxembourg, Publication Office of the European Union, 2017;

2 Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and Their Impact on Civil Society,* Hart Publishing, London, January 2019.

3 European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

4 Pardavi, M., M. Szuleka and G. Gheorghe, 'New decade, old challenges: Civic space in Hungary, Poland and Romania', Report of Hungarian Helsinki Committee, Helsinki Foundation for Human Rights and APADOR-CH, March 2020.

donations to civil society organisations' in breach of the EU law.[5] The Court upheld the principle of state non-interference with civil society activities under the EU Charter of Fundamental Rights (EUCFR).

At the beginning of 2020, Greek authorities introduced additional obligations for Greek and foreign NGOs working in the area of asylum, migration and integration to register in newly created databases under the Greek Ministry of Migration and Asylum.[6] The 'Special Secretary of Coordination of the Involved Institutions' gained wide discretionary powers to assess whether to register the applicants. Council of Europe NGO law experts found that such requirements were '**onerous, complex, time-consuming and costly for NGOs**'.[7]

Despite international standard requiring state non-interference with civil society funding,[8] in Poland in 2017, a Center for the Development of Civil Society was set up under the authority of the prime minister. This institution was tasked to distribute public funds to NGOs. Thus, various government-organised NGOs (GONGs) and pro-government NGOs continue to be generously funded, while critical and watchdog NGOs are left to 'starve'.[9]

New emergency laws announced during **the COVID-19 pandemic have exacerbated ongoing trends**. Many LGBT+ associations, Roma, environmental activists, and anti-racist demonstrators have been under pressure to halt their activities because of public health-related restrictions. Placed in a particularly difficult situation were NGOs and volunteers assisting refugees and other migrants. For instance, in France, volunteers helping those stuck in the Calais jungle were sanctioned for violating social distancing rules.[10] International human rights standards deem restrictions disproportionate, if the very right that government aims to defend ('the health of migrants'), is even more at stake without services provided by volunteers.

While civil society actors play a crucial role in upholding EU values in times of 'crises', the EU has not yet devised the framework to protect them from **reprisals and retaliations**. These actors are upholding the Union values in Member States; the EU should in their capacity add **an extra layer of protection from unjust government interference and strengthen the independence of civil society actors**. The study explores the possibilities of introducing a European association statute; of establishing internal guidelines to respect and protect human rights defenders; of creating a civil society stability index and focal contact points for civil society at EU institutions.

Recommendation 1: EU governments need to be monitored on how they respect freedoms, underlying the civic space.

The European Commission needs to follow up on earlier European Parliament calls to set up a comprehensive EU mechanism on democracy, the rule of law and fundamental rights. This mechanism

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5 CJEU, Case C-78/18, *European Commission v Hungary (Transparency of associations)*, judgment of 18 June 2020, ECLI:EU:C:2020:476, para.1.

6 Greek Law No. 4662/2020 of 7 February 2020; Greek Joint Ministerial Decision 3063/2020 of 14 April 2020; Greek Law 4686/2020 of 12 May 2020.

7 Ferstman, C., 'Opinion on the compatibility of recent and planned amendments to the Greek legislation on NGO registration with European standards', the CoE Expert Council on NGO Law CONF/EXP(2020)4, 2 July 2020.

8 UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of Maina Kiai to 39th session of the UN Human Rights Council, A/HRC/23/39, 24 April 2013.

9 Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

10 *Utopia56*, 'L'état d'urgence sanitaire: autorise-t-il les violences envers les exilées et les intimidations envers les bénévoles ?', 28 April 2020.

should monitor how international, regional and EU standards in the area of freedoms of expression, assembly and association, and the right to defend human rights, are respected.

Recommendation 2: The EU should have more legal and policy tools to deal with governments that retaliate against watchdog NGOs and other human rights defenders.

Article 15 of the Treaty on the Functioning of the European Union (TFEU) recognises civil society's role in the EU's good governance; this role should include safeguards against reprisals and retaliation, like those afforded to whistleblowers. The CJEU should also provide for interim procedures, to protect those litigating against governments.

Recommendation 3: Strengthen the independence of civil society actors.

The European Commission should introduce clear **rule of law conditionality and compliance with fundamental rights** for any EU funding schemes. Furthermore, funding for the European Rights and Values programme should be increased significantly. Funding critical activities, such as strategic litigation, would enhance civil society's ability to defend civic space and uphold the EUCFR and other EU laws.

Recommendation 4: EU co-legislators should create a conducive environment for watchdog NGOs and other human rights defenders at the EU level.

The EU laws need to provide legal certainty. The EU co-legislators should remedy the vague definitions of crime that are routinely (mis)used to target human rights defenders, as in the case of the Facilitation Directive.

1. INTRODUCTION

1.1. Key terms used in this study

This study uses the term **'civil society'** to cover associations (whether registered NGOs or not), citizens' mobilisations and assemblies and individuals, that are exercising their civil liberties and participating in public life.[11] The 'civil society' definition is broad and can cover any 'actors' from sports clubs to neighbourhood communities that are neither private sector nor governmental, which are often also referred to as 'third sector'.

The **'civil society space'** or **'civic space'** refers to legislation and various operational conditions for civil society to function. International, regional and EU courts have agreed that one of the key conditions to be respected and protected by government is freedom. Civil society actors must be free from undue government or private actors' interference to conduct their activities independently and impartially. Civic space is based on civil liberties that allow the sharing of ideas and information with wider society. Thus, freedom of expression, freedom of assembly and freedom of association are key rights exercised by civil society actors. These rights are also intrinsically linked to democratic accountability, to the respect for fundamental rights and the rule of law.

This study seeks to explore and uphold the view that only under conditions of **independence and impartiality** can civil society actors in service provision – from associations running homeless shelters to local sports clubs – be free to exercise a **watchdog function** when they witness negligence and human rights violations. However, in countries where governments are shielding from criticism, civil society actors may be restricted to **'pure service provision'.**

The study refers to **civil society actors**. This term encompasses individuals (volunteers, citizens), their assemblies (civic mobilisations, protests) and various forms of associations such as civil society organisation (CSO), and Non-Governmental Organisations (NGOs).

This study focuses mainly on **'critical civil society actors'**; i.e. those who, by exercising the freedoms of speech, association and assembly, are **upholding the rights and freedoms of others**. In this area, civil society actors have two important **functions**: to provide various **services**, including information, and to play a **watchdog** role over human rights compliance by governments and private actors. In a healthy civic space these functions overlap. For instance, **service provision** also encompasses a wide range of activities such as food, shelter or search and sea rescue. Such service providers are upholding the human dignity of marginalised groups and highlighting gaps left by governments. They can thus be seen by authorities as opposing certain government policies.

'**Watchdog NGOs'** in this study are understood as registered civil society organisations whose core function is democratic accountability, monitoring rights compliance and litigating against governments on various human rights or humanitarian grounds, often on behalf of those in a vulnerable or disadvantaged position. Often, these NGOs are also non-profit and represent **the public interest.** In the EU context, the watchdog function entails inputs to the Commission's annual rule of law reports, monitoring fundamental rights, or otherwise ensuring **democratic accountability** at EU level. The latter includes inputs and petitions to the European Parliament, inputs to various

[11] Staszczyk, P. A Legal Analysis of NGOs and European Civil Society, European Monographs 109, Alphen aan den Rijn: Kluwer Law International, 2019.

consultations carried out by the European Commission, the European Economic and Social Committee, the European Committee of the Regions and complaints to the EU supervisory institutions, such as the European Ombudsman (EO), European Court of Auditors (ECA) or Court of Justice of the European Union (CJEU).

The study also refers to '**human rights defenders'** as any individual or organisation that protects and promotes international human rights standards, in line with the UN Human Rights Defenders Declaration. For example, these could be national human rights bodies, institutions, professionals (lawyers, journalists) or even private actors (i.e. media companies). This study mainly focuses on those human rights defenders that fall within the 'civil society' category and are outside government structures and private businesses. It highlights the role of citizens, volunteers, their assemblies and protests, and the role of various CSOs in defending human rights.

1.2. Methodology and structure

The methodology of this study combines legal and socio-policy analyses. The study covers challenges facing civil society space and related developments from 2017 until July 2020. Three countries were chosen for a more in-depth assessment - Hungary and Poland (as countries under Article 7 of the TEU procedure) and Greece (as a country not under Article 7 of the TEU procedure). The authors provide examples from various EU Member States, to illustrate that critical civil society is facing challenges across the EU.

The data-gathering methods included desk research, focus group discussion and additional interviews.

- **Desk research:** The authors gathered data from various academic, institutional and civil society reports, and case-law of the European and international courts. The authors also drew some examples from various monitoring efforts run by civil society and academia.[12] Desk research covered developments until the end of July 2020 (finalisation of the manuscript).[13]
- **Focus group:** The authors complemented desk research with insights from a focus group discussion with 16 civil society actors and academics. It took place on 25 May 2020 via Zoom.
- **Follow-up interviews:** Additionally, the authors conducted three follow-up interviews with the EU institutions/bodies and civil society working at the UN level.

After this introduction, **Chapter 2** will set out the regulatory framework, including instruments of soft law, governing civil society space at the international, regional and EU levels. The legal analysis will

[12] Civic Space Watch, run by European Civic Forum, available at https://civicspacewatch.eu/ ; European Civic Forum, 'Activizenship 4: Civic Space Watch report 2019 – Success stories of resistance', Brussels, December 2019, available at https://civicspacewatch.eu/civic-space-watch-report-2019-%E2%80%A2-success-stories-of-resistance-is-out/. International Center for Not-for-Profit Law (ICNL), COVID-19 Civic Freedom Tracker: Keep civic space healthy, available at https://icnl.org/covid19tracker/; Institute of Race Relations (IRR), 'Calendar of racism and resistance – Incorporating Covid-19 roundup (20 May – 3 June 2020)', 3 June, available at http://www.irr.org.uk/news/calendar-of-racism-and-resistance-incorporating-covid-19-roundup-20-may-3-june-2020; The World Organisation Against Torture (OMCT), Observatory for the Protection of Human Rights Defenders, https://www.omct.org/human-rights-defenders/; ReSOMA, 'The criminalisation solidarity in Europe' Infographic, February, 2020, available at http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/FSR%20Strategic%20Litigation_0.pdf.

[13] With the exception of an update on the European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

provide a brief overview of the international, regional and the EU standards and case-law to safeguard civic space.

Chapter 3 will address the specific challenges faced by civil society, in particular in the areas covered by EU law such as border management, asylum and migration policies, gender equality and Roma inclusion. This Chapter highlighted challenges in the selected countries, namely, Greece, Poland and Hungary and across the EU. The socio-political analysis builds on focus group discussions and interviews, as well as online communication with civil society organisations, NGO law experts, academics, and officials of EU institutions and agencies.

Chapter 4 will elaborate on various proposals that have been suggested by civil society and EU institutions. The in-depth assessment, based on desk research, focus group discussion and interviews, highlights four policy options: 1. European Association Status; 2. The EU Guidelines on human rights defenders; 3. EU Civil Society Stability Index; 4. EU Network of Focal Points for Civil Society.

Chapter 5 will reiterate the main findings and recommendations for future EU action. They are also briefly summarised in the **Executive summary.**

2. REGULATORY FRAMEWORK AT THE INTERNATIONAL AND REGIONAL LEVEL: IS CIVIL SOCIETY SPACE PROTECTED IN THE EU?

KEY FINDINGS

- Civil society space is founded on **freedom of expression, freedom of assembly and freedom of association**. These civic liberties are the key tenets of a democratic and pluralist society.
- Civil society space is protected via freedom of expression, freedom of assembly and freedom of association provisions under, *inter alia,* the **International Covenant on Civil and Political Rights**, the **European Convention on Human Rights** and the **EU Charter of Fundamental Rights** (EUCFR). These standards safeguard the independence and impartiality of civil society actors by prohibiting unjustified interference by governments or private entities.
- Some international and regional bodies have issued tailored **guidelines** to protect civil society actors performing a watchdog function and engaging in the defence of human rights, such as the **UN Human Rights Committee**'s *General Comment No. 34 on Article 19 - Freedom of Expression*, its *General Comment No. 37 on Article 21 – Freedom of Assembly,* the **UN** *Declaration on Human Rights Defenders*, the **OSCE ODIHR** *Guidelines on the Protection of Human Rights Defenders*, and the OSCE ODIHR and (Council of Europe) **Venice Commission**'s *Joint Guidelines on Freedom of Association* and *Joint Guidelines on Freedom of Peaceful Assembly*. These are reflected in EU external policy, but a consistency check is needed to harmonise internal policies.
- The recent Court of Justice of the European Union (CJEU) ruling in the **case *European Commission v Hungary*** (Transparency of Associations) (Case C-78/18) has found a legal basis under the principle of **free movement of capital** (Article 63 of the Treaty on the Functioning of the European Union) to assess what is known as Hungary's 'the **Lex NGO**' in light of EUCFR Articles 7 (right to respect for private life), 8 (right to protection of personal data) and 12 (freedom of association).
- In that case, the CJEU has highlighted the importance of upholding freedom of association, especially when it 'contributes to proper functioning of public life' (para.112) and protecting civil society from '**unjustified government interference'** (para. 91).
- The CJEU has further scrutinised the practice of invoking public policy/national security grounds as justification for interference, as Member States that do so beyond the requirements of proportionality and necessity must also prove that the threat is 'genuine, present and sufficiently serious' (para. 91).
- At EU level, watchdog NGOs and other human rights defenders are **upholding EU values as defined in Article 2 of TEU**, implementing EU laws and policies, and providing democratic accountability at EU level. Nevertheless, they are **unprotected** from reprisals and retaliations, unlike whistleblowers or human rights defenders acting outside the EU framework.

This Chapter will set out the regulatory framework, including instruments of soft law, governing civil society space at the international, regional and EU levels. Given the myriad of fields in which civil society actors may face challenges, a comprehensive overview of all applicable legislative and regulatory instruments at the local and national levels lie beyond the scope of this study. Instead, the study focuses on the standards applicable to the civil society space at the United Nations (*international level*), the Council of Europe and the Organization for Security and Co-operation in Europe (more specifically,

the Office for Democratic Institutions and Human Rights, ODIHR) (*regional level*), and, most important, the European Union (*EU level*).

The examination focus on the applicable legislative and regulatory frameworks, including human rights instruments, as well as their official delineation through guidelines and case law. Furthermore, specific (hard and soft law) instruments, guidance documents and authoritative interpretations are set out. When looking specifically at human rights and other fundamental rights, those most necessary for ensuring and protecting civil society space are freedom of association, freedom of expression and the right to peaceful assembly, as well as the right to defend human rights. Other relevant rights, such as access to justice, right to privacy (including data privacy), the right to a good reputation and the right to participation, will mostly remain outside of the scope of this study.

2.1. International framework and the United Nations

In examining how civil society space is safeguarded at the level of the United Nations, the primary regulatory instruments are the International Covenant on Civil and Political Rights (ICCPR) and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (hereinafter: **UN Declaration on Human Rights Defenders**).[14] The relevant ICCPR provisions[15] define the international standards for civil society space:

- Freedom of **expression**, including the right to seek, receive and impart information and ideas (Article 19.2 of the ICCPR);[16]
- Right of peaceful **assembly** (Article 21 of the ICCPR);
- Freedom of **association** (Article 22 of the ICCPR);

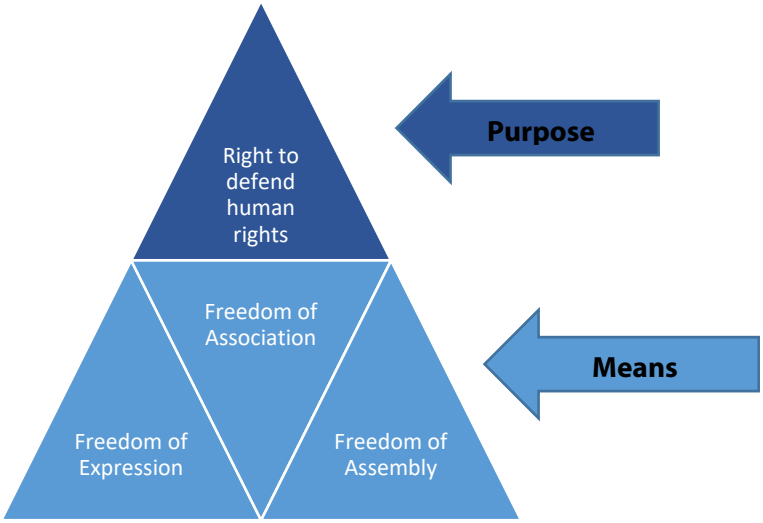
Figure 1 below shows the interrelation of these civil liberties (light blue) with the **right to uphold human rights** (UN Declaration on Human Rights Defenders), which defines the purpose of civil society actors (dark blue).

[14] UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders) of 85th plenary meeting 9 December 1998, adopted by the UN General Assembly Resolution, A/RES/53/144, on 8 March 1999.

[15] Other relevant rights include the right to liberty and security of persons (Article 9 of the ICCPR), the right to a fair trial (Article 14 of the ICCPR), the right to an effective remedy (Article 2.3 of the ICCPR), etc.

[16] Article 20 of the ICCPR restricts certain types of expression, namely propaganda for war and advocacy of hatred intended to incite discrimination, hostility or violence.

Figure 1: The interrelation of civic space and the defence of human rights



Source: Authors, 2020.

The three freedoms constituting the base are necessary within any democratic society to safeguard citizen debate, mobilisation and participation in public life. The ICCPR highlights that states must ensure **freedom from unjust interference in civic space**. Only in exceptional circumstances do they have a narrow margin of discretion to restrict civil society actors. Thus, for all three rights, restrictions must be prescribed by law, and must be 'necessary in a democratic society to protect the rights and freedoms of others', or otherwise 'in the interests of national security, public order, or of public health or morals' as reiterated in ICCPR Articles 19, 21 and 22.

The UN Office of the High Commissioner for Human Rights (UN OHCHR) provides a strict list of the criteria governments must meet when attempting to constrain the civic space by any 'exceptional measures and states of emergency based on public health requirements'. Proposed restrictions must: [17]

- Be necessary and proportionate to the public health need
- Be the least intrusive means of accomplishing the public health objective
- Be non-discriminatory
- Be limited in duration
- Not infringe on certain rights (non-derogable rights), including the right to life, the prohibition against torture and other ill-treatment, and the right not to be arbitrarily detained.

If these criteria are not fulfilled, governments can be subjected to scrutiny as to whether they are misusing such grounds as a pretext for something more dubious or sinister. In light of the COVID-19 pandemic, some governments have criminalised 'fake news',[18] prohibited all public gatherings, or prevented NGOs from accessing border zones, refugee camps, prisons or other detention facilities on 'public health grounds'. In these cases, even if governments have legitimate concerns, the ICCPR test

[17] UN Office of the High Commissioner for Human Rights (OHCHR), 'Civic space and COVID-19: Guidance', 4 May 2020, available at https://www.ohchr.org/Documents/Issues/CivicSpace/CivicSpaceandCovid.pdf.

[18] European Center for Not-for-Profit Law (ECNL), 'Free Speech under Quarantine: When Emergencies Lead to Censorship, EU Law May Help', 25 May 2020, available at https://ecnl.org/free-speech-under-quarantine-when-emergencies-lead-to-censorship-eu-law-may-help/.

of 'necessity' would be failed if less intrusive measures, such as fact-checking, social distancing or wearing masks had not been taken into consideration. Also, the UN OHCHR stressed that civil society organisations are critical to finding effective solutions to the pandemic; thus, 'restrictions to freedom of expression, association, movement or peaceful assembly should **never be used as a pretext to criminalize human rights defenders, journalists and others.**'[19]

The **UN Human Rights Committee (CCPR)** is the body of independent experts that monitors implementation of the ICCPR by its state parties (not to be confused with the UN Human Rights Council (UN HRC), which is an intergovernmental body within the UN system involved in monitoring human rights situation, for instance via the Universal Periodic Review).[20] UN Human Rights Committee has issued General Comments on the interpretation of the rights enshrined in the ICCPR. Specifically, concerning the freedom of expression (Article 19), the Human Rights Committee has issued **General Comment No. 34**.[21] While the General Comment does not explicitly refer to civil society, freedom of expression is vital for any citizens to come together for assembly or association. Moreover, General Comment No. 34 states that such freedom is essential for playing a watchdog function: 'Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights' (para. 4).

General Comment No. 34 makes clear that the freedom of expression enshrined in Article 19.2 of the ICCPR encompasses all expression of 'every form of idea and opinion', including 'political discourse, commentary on … public affairs, … discussion of human rights, journalism' (para. 11), in any form of expression and means of dissemination, including spoken and written communication, non-verbal expression, printed media, audio-visuals and electronic and internet-based modes of expression (para. 12).

General Comment No. 34 also clearly sets out the conditions under which the right to freedom of expression may be restricted under ICCPR Articles 19.3 and 20. Thus, limitations on the exercise of freedom of expression 'may not put into jeopardy the right itself' (para. 21). They 'must be provided by law' (para. 24). Furthermore, restrictions may only be imposed for the reasons exhaustively enumerated in Article 19.3 of the ICCPR (para. 28-32). Restrictions must further be necessary, meaning that the purpose for which the restriction was adopted cannot be achieved in any other way (para. 33). While not expressly stated in Article 19.3, General Comment No. 34 makes clear that any restriction(s) must be 'appropriate to achieve their protective function', be the 'least intrusive instrument' available and must be 'proportionate to the interest to be protected' (para. 34). Thus, the UN standard on necessity in practice incorporates the principle of proportionality, which is observed in separate tests followed by the Council of Europe and European Union institutions and courts.

During the COVID-19 pandemic, the freedom to access and impart information has been at stake. Several countries, including in the EU, have passed laws preventing criticism of government responses to the crisis and even criminalising 'fake' news. The UN OHCHR reiterated that:

> Laws penalizing expressions based on vague concepts such as 'fake news' or disinformation in relation to the COVID-19 pandemic, are not compatible with the requirements of legality and proportionality. Silencing critical or dissenting voices or imposing criminal sanctions for

[19] Ibid.

[20] UN OHCHR, 'Human Rights Committee', available at https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx.

[21] UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

> inaccurate COVID-19 related statements will undermine trust and any effective health response.[22]

Concerning the **right of peaceful assembly**, the UN Human Rights Committee has held that this is a 'fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society'.[23] The Human Rights Committee's **General Comment No. 37,** published in July 2020, fleshes out that concept (para. 1):

> Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain, and to establish the extent of support for or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for inclusive, participatory and peaceful resolution of differences.

General Comment No. 37 also highlights the overlaps and interdependencies with other rights (para. 9):

> The full protection of the right of peaceful assembly is possible only when other, often overlapping, rights are also protected, notably freedom of expression, freedom of association and political participation. Protection of the right of peaceful assembly is often also dependent on the realization of a broader range of civil and political as well as economic, social and cultural rights.

Since they are closely interlinked with other civic and political as well as socio-economic and cultural rights (para. 2),'[a] failure to respect and ensure the right of peaceful assembly **is typically a marker of repression.'**[24]

The right of peaceful assembly is used by various civil society actors, including citizens engaging in more or less spontaneous mobilisation, watchdog NGOs and human rights defenders prompted by news regarding some pressing public issue, for instance, to condemn police brutality, to advance racial equality or to express dissatisfaction about new legislation that undermines the rule of law.

As detailed in the Chapter 3, while this peaceful assembly is often used to create pressure to release human rights defenders, those involved sometimes experience reprisals**,** such as the disproportionate use of force, arbitrary detention or imprisonment, for organising or participating in these protests or even simply monitoring them. For example, Amnesty International has been fighting for the release of Ahmed H, who was convicted for 'complicity in terrorism' in Hungary, after he took part in a protest at the Hungarian/Serbian border zone.[25] In recent months, the UN OHCHR has been denouncing the disproportionate use of force, as well as discriminatory and arbitrary arrests of participants and journalists, by police at 'Black Lives Matter' protests in the United States. [26]

The UN Human Rights Committee's General Comment No. 37, in its general remarks, has further reaffirmed that right to peaceful assembly is (para. 4) 'an individual [right] that is exercised collectively'. This right is not reserved to nationals (para. 5): 'Everyone has the right of peaceful assembly: citizens and non-citizens alike. It may be exercised by, for example, foreign nationals, migrants (documented or undocumented), asylum seekers and refugees, as well as stateless persons.' It was further

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22 UN OHCHR 'Civic space and COVID-19: Guidance', 4 May 2020.

23 *Valery Rybchenko v Belarus* (CCPR/C/124/D/2266/2013), para. 8.6.

24 UN Human Rights Committee, General Comment No. 37: Right of peaceful assembly, CCPR/C/GC/37, 27 July 2020.

25 Amnesty International, 'Ahmed H finally home: What happened?', 28 September 2019, available at https://www.amnesty.org/en/latest/news/2019/09/ahmed-h-what-happened/.

26 UN News, 'Human rights office decries disproportionate use of force in US protests', 24 July 2020, available at https://news.un.org/en/story/2020/07/1068971.

highlighted that (para. 7) 'peaceful assemblies can sometimes be used to pursue contentious ideas or goals' and cause disruptions in public spaces, for instance, by blocking traffic. Nevertheless, these beliefs and tactics cannot be used as a justification for shutting down such assembly. 'Public order' should be narrowly interpreted (para. 44):

> Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration. 'Public order' and 'law and order' are not synonyms, and the prohibition of 'public disorder' in domestic law should not be used unduly to restrict peaceful assemblies.

There should be no discrimination among different kinds of assembly (para. 8). Moreover, violence among protesters cannot serve as justification for arbitrary arrests or detention (para. 9.): 'Where individuals' conduct places them outside the scope of the protection of article 21, for example, because they are behaving violently, they retain their other rights under the Covenant, subject to the applicable limitations and restrictions.' Finally, General Comment No. 37 has acknowledged the changing nature of protests, which are increasingly organised, held and monitored by using online tools; thus (para. 10), 'interference with such communications can impede assemblies.' Such online rallying and its modalities should be also protected from overly intrusive policing: 'While surveillance technologies can be used to detect threats of violence and thus to protect the public, they can also infringe on the right to privacy and other rights of participants and bystanders and have a chilling effect.'

Even in light of emergencies such the COVID-19 pandemic, for which the UN Special Rapporteurs have stated that some restrictions 'may be necessary', blanket prohibitions would not be proportionate. They have asserted:

> States should ensure that the right to hold assemblies and protests can be realized, and **only limit the exercise of that right as strictly required to protect public health**. Accordingly, States are encouraged to consider how protests may be held consistent with public health needs, for example by incorporating physical distancing. Restrictions on public gatherings should be constantly assessed to determine whether they continue to be necessary and proportionate[27]

Concerning the **freedom of association**, the UN Human Rights Committee has held that 'the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society'.[28] The Human Rights Committee has concluded that refusal by a state to register an association must be shown to be compatible with Article 22 of the ICCPR, particularly regarding the necessity that the refusal complies with one of the exhaustively enumerated reasons under Article 22.2 of the ICCPR.[29] Significantly, freedom of association protects unregistered and informal civil society associations, not just registered ones.

Furthermore, the UN Human Rights Committee has held that restrictions stipulated under Article 22.2 of the ICCPR, such as the prohibition of an association or the criminal prosecution of individuals for membership in such organisations, must be shown to be 'in fact necessary to avert a real, and not only

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[27] UN OHCHR 'Civic space and COVID-19: Guidance', 4 May 2020.

[28] See *Khairullo Saidov v Tajikistan* (CCPR/C/122/D/2680/2015), para. 9.9; *Vladimir Katsora and others v Belarus* (CCPR/C/100/D/1838/2005), para. 8.2, emphasis added.

[29] See, e.g., *Sergey Kalyakin v Belarus* (CCPR/C/112/D/2153/2012), para. 9.3; *Vladimir Katsora and others v Belarus*, para. 8.3.

hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose'.[30]

For instance, fundraising activities by civil society organisations and especially by human rights defenders have been a source of suspicion and subject to various restrictions. The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, in his report to the UN Human Rights Council in 2013 emphasised that 'states are obliged to facilitate, not restrict, access to funding so that associations can effectively take part in democratic and developmental processes, just like businesses and governments.'[31] Thus, blanket interference, especially with foreign funding, would constitute interference with Article 22 of the ICCPR.

Since this study focuses on civil society actors fulfilling their watchdog function, the other main pillar of international standards for their protection is the **UN Declaration on Human Rights Defenders**.[32] Acknowledging 'the role of individuals, groups and associations in contributing to the effective elimination of all violations of human rights and fundamental freedoms' (according to the preamble), the Declaration recognises in Article 1 that everyone 'has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels'. The rights provided for in the UN Declaration on Human Rights Defenders can be seen as a paraphrasing of those enshrined in other international human rights instruments, in more detail and specific to human rights defenders,[33] including:

- The right of **peaceful assembly** (Articles 5.a and 12 of the Declaration),
- The **freedom of association** (Article 5.b);
- The **freedom of expression** (Article 6 and 7);
- The right to **public participation** (Article 8); and
- The right to an **effective remedy** (Article 9);

The UN Declaration on Human Rights Defenders recognises the right of those defending human rights to seek, receive and use resources for the **protection and promotion of human rights** (Article 13) and the right to the lawful exercise of one's occupation or profession (Article 11). The Declaration further expressly prohibits persons from receiving punishment or suffering adverse consequences for refusing to violate human rights (Article 10).

States also have specific responsibilities and duties under the UN Declaration on Human Rights Defenders. Thus, Article 2 of the Declaration not only stresses the responsibility of states to promote and protect human rights and fundamental freedoms (Article 2.1) but also requires them to ensure that the rights of human rights defenders enshrined in the Declaration are effectively guaranteed (Article 2.2). States are further required to promote and raise awareness of the rights of their population (Article 14) and to promote education about human rights at all levels (Article 15).

The protection of civil society space (and the role of civil society in human rights protection) has been the subject of various reports at the UN, particularly reports of the **UN High Commissioner for Human**

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30 *Jeong-Eun Lee v Republic of Korea* (CCPR/C/84/D/1119/2002), para. 7.2.

31 UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to 39th session of the UN Human Rights Council, A/HRC/23/39, 2013, op.cit.

32 See UN General Assembly, *UN Declaration on Human Rights Defenders*, adopted by the UN General Assembly Resolution, A/RES/53/144, on 8 March 1999.

33 See OHCHR, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, July 2011, available at https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf.

Rights. Reference can be made, for example, to reports of the UN High Commissioner for Human Rights of 11 April 2016 on 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned',[34] of 18 April 2018 on 'Procedures and practices in respect of civil society engagement with international and regional organisations',[35] and of 20 April 2020 on 'Civil society space: engagement with international and regional organisations'.[36]

The reports emphasise how the protection of civil society is mandated by international human rights law (by requiring states to safeguard the rights necessary to ensure civil society the room it needs to function),[37] but they go further to acknowledge compelling reasons to preserve an environment in which civil society can flourish, including facilitating public participation and, in doing so, contributing to societal cohesion.[38] More importantly, the High Commissioner notes that

> Vibrant civil society participation […] is indispensable to the effective protection and promotion of human rights. Civil society actors identify protection and other gaps in the international architecture, alert the international community of impending crises and campaign for the creation of new standards and mechanisms. Their participation enriches the system's responses by linking them to what is happening at the country level.[39]

Civil society actors also support the work of regional and international organisations, as noted by the High Commissioner, through advocacy and raising awareness, providing expertise and knowledge and contributing to implementation, monitoring and evaluation.[40]

The UN High Commissioner for Human Rights recognises that creating and maintaining civil society space also necessitates ensuring the exercise of certain human rights, including the freedom of expression, the right to peaceful assembly and association, and the right to participate in public affairs; these rights 'serve as vehicles for civil activity'.[41] Concerning freedom of expression, the report on 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society' notes the role played by a free press and other media in fostering public discussion and ensuring the enjoyment of fundamental freedoms, with examples cited of independent and pluralistic media in Croatia monitoring and reporting on human rights issues.[42] For the freedom of association, the report notes that 'minimal legal and administrative provisions, favouring simple notification to a neutral body and available to all at little or no cost, with no compulsory registration requirement for

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34 UN High Commissioner for Human Rights, 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned', Report of the United Nations High Commissioner for Human Rights to the 32nd session of the UN Human Rights Council, A/HRC/32/20, 11 April 2016.

35 UN High Commissioner for Human Rights, 'Procedures and practices in respect of civil society engagement with international and regional organizations', Report of the United Nations High Commissioner for Human Rights to the 38th session of the UN Human Rights Council, A/HRC/38/18, 18 April 2018.

36 UN High Commissioner for Human Rights, 'Civil society space: engagement with international and regional organizations', Report of the United Nations High Commissioner for Human Rights to the 44th Session of the UN Human Rights Council, A/HRC/44/25, 20 April 2020.

37 UN High Commissioner for Human Rights, 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society', 2016, para. 5.

38 Ibid, para. 6.

39 Ibid, para. 8.

40 UN High Commissioner for Human Rights, 2018, 'Procedures and practices in respect of civil society engagement with international and regional organizations', para. 6-12.

41 UN High Commissioner for Human Rights, 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society', 2016, para. 12.

42 Ibid, para. 14-15.

basic operations, best encourage a diverse and independent civil society'.[43] The UN High Commissioner notes, concerning the right to **peaceful assembly,** that 'good practices' include enshrining in law the presumption that assemblies will be peaceful as well as stipulating that no prior authorisation or permit is required to participate in meetings and demonstrations.[44]

The report highlights other conditions required to create a framework for protecting civil society, including access to justice encompassing an independent and effective judiciary and national, regional and international human rights bodies and mechanisms),[45] preservation of a conducive political environment for civil society activities,[46] access to information,[47] the participation of civil society in policy development, decision-making, monitoring and review,[48] and support for civil society through human rights education and awareness-raising, capacity building and funding streams.[49]

The UN High Commissioner for Human Rights also points to the role of the United Nations itself in protecting and ensuring civil society space, broadly categorised in terms of participation, promotion, and protection.[50] In light of the COVID-19 pandemic, the UN OHCHR has further highlighted the essential role of civil society actors, with an emphasis on human rights defenders.

> Human rights defenders are doing critical work to support efforts to stem the spread of the virus, protect vulnerable people, and address impacts of the pandemic on lives and livelihoods. States and other stakeholders should publicly recognize the contributions of civil society, including of human rights defenders, media workers, national human rights institutions, in sharing good practices, shedding light on gaps response, and in public health education.[51]

Moreover, the UN OHCHR called for the immediate release of human rights defenders 'detained in connection with their human rights work, and any persons unlawfully held' in concern for the heightened COVID-19 risks in prisons.[52] The UN OHCHR guidelines have underscored the right to privacy and cautioned that the use of 'contact tracing' ought to be strictly limited for the purposes of public health, and the resulting data should not be retained or misused for any other purposes, notably policing by security or intelligence services.

2.2. Civil society space in a regional context: the regulatory framework in the Council of Europe and the OSCE

In the European context, aside from the EU, the framework for protecting civil society space has been addressed by, among others, the Council of Europe (CoE) – including the European Court of Human

43 Ibid, para. 16.
44 Ibid, para. 19.
45 Ibid, para. 21-25.
46 Ibid, para. 26-33
47 Ibid, para. 34-36.
48 Ibid, para. 37-63.
49 Ibid, para. 64-76.
50 UN High Commissioner for Human Rights, 'Civil society space', 2020, para. 12-14.
51 UN OHCHR 'Civic space and COVID-19: Guidance', 4 May 2020, op. cit.
52 Ibid.

Rights (ECtHR) – and the Organization for Security and Co-operation in Europe (OSCE) – more specifically, its Office for Democratic Institutions and Human Rights (ODIHR).

2.2.1. The Council of Europe: human rights defenders and civil society space

At the Council of Europe, the issues of the environment for civil society and protection of human rights defenders have been taken up through its various institutions. Specifically, Resolution 2225 (2018) of the **Parliamentary Assembly of the Council of Europe** (PACE) on *Protecting human rights defenders in Council of Europe Member States* calls on CoE state parties to, among other concerns, 'respect the human rights and fundamental freedoms of human rights defenders' (para. 5.1), 'refrain from acts of intimidation or reprisal against human rights defenders and protect them against attacks or harassment from non-State actors' (para. 5.2) and 'ensure an enabling environment for the work of human rights defenders' (para. 5.6).

The **Committee of Ministers of the Council of Europe** issued in 2018 a *Recommendation on the need to strengthen the protection and promotion of civil society space in Europe*.[53] The Recommendation sets out a number of priorities for Council of Europe state parties in preserving and promoting civil society, such as to 'ensure an enabling legal framework and a conducive political and public environment for human rights defenders' (I.a), to 'ensure that legislation, in particular on freedom of association, peaceful assembly and expression, is drafted and applied in conformity with international human rights law and standards' (I.b), to 'remove any unnecessary, unlawful or arbitrary restrictions to civil society space' (I.c), to 'prevent violations of the rights of human rights defenders including smear campaigns, threats and attacks against them, and other attempts to hinder their work' (II.a), to 'ensure the independent and effective investigation of such acts and hold those responsible accountable through appropriate administrative measures or criminal procedures, and ensure that criminal, civil and administrative laws and procedures are not applied in a way that hinders and criminalises the work of human rights defenders' (II.b) and to 'ensure access to resources to support the stable funding of human rights defenders … and increase efforts to promote their activities' (III.a).

2.2.2. The European Convention on Human Rights and civic space

Of utmost importance are the role of the **Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR) and the **case law of the European Court of Human Rights** (ECtHR) in interpreting the freedom of expression (Article 10 ECHR) and the freedom of assembly and association (Article 11 ECHR):

> **Article 10. Freedom of expression**
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …

[53] The Council of Europe, Committee of Ministers, Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on the need to strengthen the protection and promotion of civil society space in Europe, , Strasbourg, 28 November 2018.

2. The exercise of these freedoms … may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11. Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. …

Some guidance to jurisprudence on the rights of freedom of expression, peaceful assembly and association has been issued by the Court itself.[54] The main elements of these Convention rights that pertain to the maintenance of civil society space will be summarised below.

a. Freedom of expression (Article 10 of the ECHR)

The right to freedom of expression enshrined in Article 10.1 of the ECHR encompasses, *inter alia,* the freedom to hold opinions, the freedom to impart information and access to information.[55] One of the oft-cited general principles of the ECtHR's case law on Article 10 is telling in this respect:

> Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. … it applies not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly.[56]

This principle clearly sets out the **broad scope of protection** of the freedom of expression by Article 10 of the European Convention on Human Rights (ECHR), and the general approach of a restrictive interpretation of any limitations thereto. The Court's case law on Article 10 has primarily focused on the interpretation of limitations under Article 10.2;[57] only exceptionally has the Court refused to entertain a claim under Article 10 at the outset. This has been the case where Article 10 has been

[54] See ECtHR, Guide on Article 11 of the European Convention on Human Rights. Freedom of assembly and association, Council of Europe/European Court of Human Rights, Strasbourg, 2020; Council of Europe, Freedom of expression. Case-law concerning Article 10 of the European Convention on Human Rights, Human Rights Files, no. 18, Strasbourg: Council of Europe Publishing, 2007.

[55] Cf. Flauss, J.-F., 'The European Court of Human Rights and the freedom of expression', *Indiana Law Journal*, Vol. 84, No. 3, 2009.

[56] See recently, ECtHR (GC), Case of *Perinçek v Switzerland*, Appl. no. 27510/08, judgment of 15 October 2015, para. 196.

[57] Cf. Council of Europe 2007.

invoked to support expression amounting to denial of the Holocaust or other forms of revisionist language.[58]

Freedom of expression, as repeatedly emphasised by the Court, is not absolute. Article 10.2 permits **limitations** on the right to freedom of expression under three conditions: any limitation must be prescribed by law, must be based on one or more of the legitimate interests contained in Article 10.2 ('national security, territorial integrity or public safety …') and must be 'necessary in a democratic society'. Guiding concepts can be deduced from the Court's case law concerning this balancing of interests under Article 10.2 of the ECHR.

The requirement for any interference in the right to freedom of expression to be '**prescribed by law**' must satisfy two conditions, **accessibility and foreseeability**:

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[59]

The scope of foreseeability, according to the Court, depends heavily on 'the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed'.[60] In *The Sunday Times v United Kingdom (no 1)*, the Court held that unwritten law, as is the case in common law jurisdictions, can equally be covered by the expression 'prescribed by law'.[61] In *Mándli and others v Hungary*, the Court reiterated that the criterion of foreseeability permits certain details of restrictions to be set out in secondary legislation, so long as the breadth and conditions of any departure from absolute freedom are clearly delimited.[62] As most recently laid out by the Court in *Kharitonov v Russia*, 'prescribed by law' requires that national law contain 'a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention, and indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise'.[63]

Foreseeability is also dependent on what can be expected of those whose rights may have been infringed. In *Perinçek v Switzerland*, the Court held that the applicant, in making the statements concerning the denial of the Armenian genocide of the early twentieth century, that he 'knew or ought to have known – if need be, *after taking appropriate legal advice* – that these statements could render him criminally liable'.[64] Similarly, in *Mándli and others*, the Court ruled that certain categories of persons carrying out a professional activity (in the case concerned, journalists) can be expected to 'take special care in assessing the risks that such activity entails, for instance by seeking appropriate legal advice'.[65]

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58 See *Perinçek v Switzerland*, para. 212; see also Flauss, 'The European Court of Human Rights and the freedom of expression', 2009, op. cit. pp. 837-838.

59 See ECtHR, Case of *The Sunday Times v United Kingdom (no 1)*, Appl. no. 6538/74, judgment of 26 April 1979, para. 49; more recently, see *Perinçek v Switzerland*, para. 131.

60 See ECtHR (GC), Case of *Magyar Kétfarkú Kutya Párt v Hungary*, Appl. no. 201/17, judgment of 20 January 2020, para. 98.

61 The Sunday Times v United Kingdom (no 1), para. 47.

62 ECtHR, Case of *Mándli and others v Hungary*, Appl. no. 63164/16, judgment of 26 May 2020, para. 49.

63 ECtHR, Case of *Vladimir Kharitonov v Russia*, Appl. no. 10795/14, judgment of 23 June 2020, para. 37.

64 *Perinçek v Switzerland*, para. 137-138.

65 *Mándli and others v Hungary*, para. 50.

As to whether a restriction on the right to freedom of expression pursues a **legitimate aim**, academic sources on the Court's case law seem to indicate that states generally do not face difficulties in proving that one of the aims prescribed in Article 10.2 has been pursued.[66] Instead, the bulk of the ECtHR case law centres on the question of the third condition stipulated by the Court: whether a particular restriction or interference was necessary in a democratic society in light of the aim pursued. On this requirement of necessity, while the Court recognises that states have a margin of appreciation in assessing this 'necessity', the Court clearly emphasises that it is subject to 'European supervision'.[67] This implies not only the demonstration of a 'pressing social need' but must also demonstrate that the restriction was 'proportionate to the legitimate aim pursued' and that 'the reasons adduced by the national authorities to justify it were relevant and sufficient'.[68]

The jurisprudence of the Strasbourg Court shows several important considerations.[69] Particularly concerning defamation cases, the Court makes a clear distinction between statements of fact and 'value judgements'. According to the Court, the truth of value judgements is not 'susceptible to proof'. An interference against a statement amounting to a value judgement may depend on 'whether there exists a sufficient factual basis for the impugned statement'.[70]

Media statements are generally weighted more carefully, as the Court notes that 'while the press must not overstep the bounds set for the protection of [the legitimate aims of Article 10.2 ECHR], it is nevertheless incumbent on the press to impart information and ideas on political issues just as on those in other areas of public interest'.[71]

Of particular importance is the Court's case law regarding the legitimate aim of protecting the reputation of others. Any interference in Article 10 of the ECHR on this ground is subject to a balancing of interests between, on the one hand, the freedom of expression under Article 10, and, on the other hand, the protection of the reputation of others as an element of the right to private life under Article 8 of the ECHR.[72]

The Court has set out the relevant criteria for the balancing exercise, including the value of a particular revelation or opinion adverse to someone's reputation to the general interest, the degree of the

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66 See Electronic Frontier Foundation (EFF),'Necessary & proportionate. International principles on the application of human rights law to communications surveillance', *Background and supporting international legal analysis*, San Francisco, May 2014. In many academic sources citing ECtHR case law where the pursuit of a legitimate aim was 'rejected' by the Court (cf. Kiska R., 'Hate speech: A comparison between the European Court of Human Rights and the United States Supreme Court jurisprudence', *Regent Law Review*, Vol. 25, No. 1, Fall 2012, p. 124-127), a deeper examination of the cases cited shows that the Court's finding of a violation of Article 10 ECHR hinges on the necessity criterion, rather than on the pursuit of a legitimate aim.

67 Cf. *Perinçek v Switzerland*, para. 196.

68 Ibid.

69 For a more substantive examination of the ECtHR's case law concerning the necessity of interferences in Article 10, see Council of Europe 2007; Flauss, 'The European Court of Human Rights and the freedom of expression', 2009, op. cit.; Kiska, 'Hate speech', 2012, op. cit.; Voorhoof, D., 'The right to freedom of expression and information under the European human rights system: Towards a more transparent democratic society', EUI Working Papers RSCAS 2014/12, Florence, European University Institute, February 2014; cf. ECtHR, 'Positive obligations on Member States under Article 10 to protect journalists and prevent impunity', Research Report, Strasbourg, Council of Europe/European Court of Human Rights, December 2011.

70 ECtHR, Case of *Lingens v Austria*, Appl. no. 9815/82, judgment of 08 July 1986, para. 46; ECtHR, Case of *Steel and Morris v United Kingdom*, Appl. no. 68416/01, judgment of 15 February 2005, para. 87.; ECtHR, Case of *Axel Springer AG v Germany*, Appl. no. 39954/08, judgment of 7 February 2012, para. 79.

71 Ibid, para. 41; ECtHR, Case of *Sürek v Turkey (no. 1)*, Appl. no. 26682/95, judgment of 8 July 1999, para. 59.

72 See *Axel Springer AG v Germany*, para. 92-94. A similar balancing of interests between different ECHR rights can be seen in the Court's case law pertaining to expression of religiously offensive statements (which could fall within the scope of protection of Article 9 ECHR); cf. recently ECtHR, Case of *E.S. v Austria*, Appl. no. 38450/12, judgment of 25 October 2018, para. 42-49.

notoriety of the person affected, the subject of the expression, the prior conduct of the person concerned, the content, form and consequences of the publication, and the severity of the sanction imposed.[73] The range of acceptable expression, including criticism of politicians, persons in the public eye and the government is generally broader than it is for private parties.[74] The margin of appreciation for a government to constrain political speech or debate on matters of public interest is narrow.[75]

The Court is extremely clear, however, that hate speech and expression of views entailing incitement to violence are not protected under Article 10 of the ECHR.[76] On hate speech, 'as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any [such measures] are proportionate to the legitimate aim pursued', and that 'concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention'.[77] The Court has similarly granted states wider margins of appreciation to deal with speech that 'may incite violence against individuals, public officials or a sector of the population'.[78]

b. Freedom of assembly (Article 11 of the ECHR)

The case law of the European Court of Human Rights concerning Article 11 of the ECHR as relevant to civil society space covers both - freedom of association and freedom of assembly.[79] On the latter, while the Strasbourg Court has intentionally 'refrained from formulating the notion of an assembly, which it regards as an autonomous concept, or exhaustively listing the criteria which would define it',[80] some general principles can be derived from case law. Thus, only 'peaceful assembly' is protected under Article 11 – with non-peaceful assemblies described as 'gatherings […] where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society'.[81] Individuals exercising the right of assembly do not divest themselves of the enjoyment of this right solely due to (sporadic) violent acts of others, as long as the individual concerned remains peaceful 'in his or her own intentions or behaviour'.[82]

Assembly implies 'common purpose of its participants'.[83] The right to peaceful assembly 'covers both private meetings and meetings in public places, whether static or in the form of a procession; in

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73 *Axel Springer AG v Germany*, para. 89-95. See also ECtHR, Case of *Satukunnan Markkinapörssi OY and Satamedia OY v Finland*, Appl. no. 931/13, judgment of 27 June 2017, para. 162-165.

74 Cf. *Lingens v Austria*, para. 42; *Sürek v Turkey (no 1)*, para. 61; ECtHR, Case of *Erdogdu v Turkey*, Appl. no. 25723/94, judgment of 15 June 2000, para. 52.

75 See *Sürek v Turkey (no 1)*, para. 61; ECtHR, Case of *Morice v France*, Appl. no. 29369/10, judgment of 23 April 2015, para. 125; ECtHR, Case of *Bédat v Switzerland*, Appl. no. 56925/08, judgment of 29 March 2016, para. 49.

76 See Flauss, 'The European Court of Human Rights and the freedom of expression', 2009, op. cit., pp. 838-842.

77 ECtHR, Case of *Gündüz v Turkey*, Appl. no. 35071/97, judgment of 4 December 2003, para. 40-41.

78 See *Sürek v Turkey*, para. 61-64.

79 For a comprehensive overview of the ECtHR's jurisprudence on Article 11 ECHR, see ECtHR 2020; ECtHR, 'Les organisations non gouvernementales dans la jurisprudence de la Cour européenne des droits de l'homme', Research Report, Strasbourg, Council of Europe/European Court of Human Rights, October 2016.

80 See ECtHR (GC), Case of *Navalnyy v Russia*, Appl. nos. 29580/12 and others, judgment of 15 November 2018, para. 98.

81 Ibid; ECtHR (GC), Case of *Kurevičius and others v Lithuania*, Appl. no. 37553/05, judgment of 15 October 2020, para. 92. Non-peaceful assemblies may, under certain circumstances, fall within the scope of Article 10 of the ECHR; see ECtHR 2020, para. 9, 11.

82 See ECtHR, Case of *Primov and others v Russia*, Appl. no. 17394/06, judgment of 12 June 2014, para. 155.

83 ECtHR 2020, para. 14.

addition, it can be exercised by individual participants and by the persons organising the gathering'.[84] According to the Court, the right to freedom of assembly also includes 'the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of Article 11'.[85] However, this does not mean that peaceful assembly may be exercised in any forum, without restrictions. The Court has held that the exercise of freedom of expression (and by extension, assembly for the exercise of the freedom of expression, such as at demonstrations) does not require the 'automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries'.[86]

Abridging the right of peaceful assembly may be permitted only within the confines of and under the conditions stipulated in Article 11.2 of the ECHR. First, the restriction must be **prescribed by law** – which, requires a degree of accessibility and foreseeability.[87] Any laws circumscribing freedom of assembly must also 'afford a measure of legal **protection against arbitrary interferences by public authorities** with the rights guaranteed by the Convention', including sufficient clarity concerning the scope and manner of exercise of any discretion granted to the state authorities.[88] In the pursuit of a **legitimate aim**, much of the case law has focused on the aim of 'the prevention of disorder' (*'la défense de l'ordre'* in the French text of the Convention). Drawing from its case law on Article 10, the Court interprets the meaning of 'the prevention of disorder' in a narrow sense, specifically, narrower than the term 'public order' or '*ordre public*'.[89] Only in exceptional cases has the Court found that restrictions on the freedom of assembly failed to meet the test of legitimate aim under Article 11.2 ECHR.[90]

Restrictions on the right to peaceful assembly must also be **necessary in a democratic society**. This entails that the restrictive measure concerned must correspond to a 'pressing social need', and must be **proportionate** to the legitimate aim pursued, and the reasons invoked by national authorities to justify the restriction must be 'relevant and sufficient'.[91] States have a degree of margin of appreciation, but they are subject to European oversight.[92] The proportionality of a particular restrictive measure is dependent on the nature (e.g., criminal sanction) and severity of the penalties imposed.[93] The Court makes a distinction between content-based restrictions on the freedom of assembly and restrictions of a technical nature; the former type will be subjected to 'the most serious scrutiny by the Court'.[94] The ECtHR's case law specifies that states are entitled to require the holding of meetings to be subject to (prior) notification or authorisation, to the extent that such authorisation is motivated by the need for officials to take 'reasonable and appropriate measures to guarantee the smooth conduct of any assembly, meeting or other gathering'.[95] It has also been held that a general ban on demonstrations is

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84 *Kurevičius and others v Lithuania*, para. 91.

85 ECtHR, Case of *Sáska v Hungary*, Appl. no. 58050/08, judgment of 27 November 2012, para. 21.

86 ECtHR 2020, para. 21, citing, *inter alia,* ECtHR, Case of *Tuskia and others v Georgia*, Appl. no. 14237/07, judgment of 11 October 2018, para. 72.

87 Cf. *Kurevičius and others v Lithuania*, para. 108-109.

88 *Navalnyy v Russia* [GC], para. 115.

89 See *Navalnyy v Russia* [GC], para. 122, referring to *Perinçek v Switzerland*, para. 146-151.

90 See ECtHR 2020, para. 61.

91 *Kurevičius and others v Lithuania*, para. 143.

92 See *Kurevičius and others v Lithuania*, para. 142.

93 *Kurevičius and others v Lithuania*, para. 146. See also ECtHR 2020, para. 76-78.

94 *Navalnyy v Russia* [GC], para. 136. In fact, the Court considers, regarding content-based restrictions, that 'rare are the situations where a gathering may be legitimately banned in relation to the substance of the message which its participants wish to convey'; see *Primov and others v Russia*, para. 135.

95 See *Kurevičius and others v Lithuania*, para. 147-148. See further ECtHR 2020, para. 83-97.

only under exceptional circumstances (and as a last resort) permissible under Article 11.2 of the ECHR.[96] In considering the proportionality of a restrictive measure, such as a prior ban on a proposed assembly or subsequent enforcement practices, the Court has also held that the chilling effect of said measures must be taken into consideration.[97]

c. Freedom of association (Article 11 of the ECHR)

Freedom of association is considered by the European Court of Human Rights to be essential for democracy. There is a direct relationship, according to the Court, between democracy, pluralism and freedom of association.[98] The Court has often emphasised the '**essential role played by** political parties in ensuring pluralism and democracy, **associations** formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy'.[99] The Court has recognised the role played by (specialised) NGOs as 'watchdogs' (in a manner similar to the press), as well as their contribution to informing the public and ensuring democratic accountability.[100]

According to the Court's case law, the freedom of association enshrined in Article 11 of the ECHR encompasses a number of rights. It inherently includes the right to form an association.[101] Associations should generally be entitled to obtain legal personality, and they should not be forced to adopt a specific legal personality.[102] The right to freedom of assembly under Article 11 does not impose an obligation on associations or organisations to admit anyone who wishes to join.[103] Freedom of association also includes the negative right not to be compelled to join or be part of an association.[104]

Case law offers criteria for what is to be considered an 'association',[105] a concept which is given an autonomous interpretation by the Court.[106] Thus, an 'association' presupposes a voluntary grouping

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96 See European Commission of Human Rights, *Christians against Fascism and Racism v United Kingdom*, Appl. no. 8440/78, Commission decision of 16 July 1980, Decisions and Reports 21, p. 150.

97 Cf. ECtHR, Case of *Christian Democratic People's Party v Moldova*, Appl. no. 28793/02, judgment of 14 February 2006, para. 77; ECtHR, Case of *Balçık and others v Turkey*, Appl. no. 25/02, judgment of 29 November 2007, para. 41.

98 See ECtHR (GC), Case of *Gorzelik and others v Poland*, Appl. no. 44158/98, judgment of 17 February 2004, para. 88.

99 See *Gorzelik and others v Poland*, para. 92; ECtHR, Case of *Zhdanov and others v Russia*, Appl. no. 12200/08 and others, judgment of 16 July 2019, para. 138.

100 See ECtHR 2016, p. 31-33, para. 38-41, referring to ECtHR, Case of *Vides Aizsardzības Klubs v Latvia*, Appl. no. 57829/00, judgment of 27 May 2004, para. 42; and ECtHR, Case of *Women on Waves and others v Portugal,* Appl. no. 31276/05, judgment of 3 February 2009, para. 37-39.

101 *Gorzelik and others v Poland*, para. 88.

102 On the right to obtain legal personality (in other words, the classification of the refusal to grant legal personality as an infringement of Article 11), see, *inter alia, Gorzelik and others v Poland*, para. 52; ECtHR, Case of *Zhechev v Bulgaria*, Appl. no. 57045/00, judgment of 21 June 2007, para. 37; ECtHR, Case of *Bekir-Ousta and others v Greece*, Appl. no. 35151/05, judgment of 11 October 2007, para. 40; on the freedom not to be required to adopt a particular form of legal personality, see *Zhechev v Bulgaria*, para. 52-56. Note, however, with regard to the latter that there is no right under Article 11 ECHR to obtain a specific legal status; see EctHR, Case of *Magyar Keresztény Mennonita Egyház and Others v Hungary*, Appl. no. 70945/11 and others, judgment of 8 April 2014, para. 91.

103 See ECtHR, Case of *Associated Society of Locomotive Engineers and Firemen (ASLEF) v the United Kingdom*, Appl. no. 11002/05, judgment of 27 February 2007, para. 39.

104 Cf. ECtHR, Case of *Sigurður A. Sigurjónsson v Iceland,* Appl. no. 16130/90, judgment of 30 June 1993, para. 35; *Chassagnou and others v France*, para. 114.

105 For an overview of the Court's case law on the definition of an 'association', see ECtHR 2020, pp. 22-23, para. 115-119. Also see: ECtHR case of *Chassagnou and Others v. France*, Appl.nos. 25088/94 and others, judgment of 29 April 1999, para. 100.

for a common goal,[107] of a private law nature (notwithstanding its classification under national law).[108] The Court set out a number of criteria to determine whether an association must be considered as private or public, namely: i) whether the association was founded by individuals or by legislature; ii) whether it remained integrated within the structures of the state; iii) whether it was invested with administrative, rule-making and disciplinary power; and iv) whether it pursued an aim that was in the general interest.[109] The classification under national law of an association as public or private is relevant but not decisive in how it is regarded by the Court.[110]

As with most other rights under the ECHR, Article 11.2 stipulates comparable requirements that must be met for any infringement of the right to freedom of association to withstand scrutiny: being **prescribed by law**, pursuing a **legitimate aim**, and being deemed **necessary in a democratic society**. Significantly, the Court has held that Article 11 ECHR cannot be invoked by associations attempting to 'effectively engage in activities aimed at the destruction of the rights and freedoms recognised in the Convention and thus aimed at the end of democracy' or to 'weaken or destroy the ideals and values of a democratic society'.[111]

In respect of the '**necessity**' criterion, the Court maintained that limitations on freedom of association 'are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom',[112] and that 'in determining whether a necessity within the meaning of paragraph 2 of this Convention provision exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts'.[113]

2.2.3. The OSCE ODIHR and the protection of human rights defenders

The OSCE participating states (including all EU Member States) have committed to ensuring special protection for human rights defenders (through the Budapest Summit Declaration of 1994) and have reaffirmed the important role played by civil society and free media in safeguarding human rights.[114] Furthermore, the 1990 Copenhagen Document sets out the commitment of OSCE participating states to recognise a number of fundamental human rights, including freedom of expression, the right of peaceful assembly, and the right of association (para. 9). ODIHR has been directed to assist OSCE participating states in ensuring full respect for human rights and fundamental freedoms (Helsinki

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[107] See European Commission of Human Rights, *Young, James & Webster v United Kingdom*, Appl. no. 7601/76 and no. 7806/77, Commission decision of 14 December 1979, Series B, no. 39, para. 167.

[108] *Chassagnou and others v France*, para. 97-101.

[109] See ECtHR (Fifth Section), Case of *Herrmann v Germany*, Appl. no. 9300/07, judgment of 20 January 2011, para. 76.

[110] *Chassagnou and others v France*, para. 100; see also ECtHR, *Slavic University in Bulgaria and others v Bulgaria*, Appl. no. 60781/00, decision on the admissibility of 18 November 2004.

[111] See ECtHR, *Kalifatstaat v Germany*, Appl. no. 13828/04, decision on the admissibility of 11 December 2006; cf. ECtHR, Case of *Herri Batasuna and Batasuna v Spain*, Appl. no. 25803/04 and no. 25817/04, judgment of 30 June 2009, para. 79, where the Court states that 'a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds'.

[112] See Gorzelik and others v Poland, para. 95.

[113] See ECtHR, Case of *Zhdanov and others v Russia*, Appl. no. 12200/08 and others, judgment of 16 July 2019, para. 140.

[114] OSCE ODIHR, 'ODIHR and the Protection of Human Rights Defenders', Organization for Security and Co-operation in Europe, Warsaw, 2017.

Summit Declaration of 1992).[115] In this capacity, OSCE ODIHR has issued several guidance documents relevant to human rights defenders and civil society space, including the *Guidelines on the Protection of Human Rights Defenders*,[116] the ODIHR and Venice Commission's joint *Guidelines on Freedom of Peaceful Assembly*[117] and joint *Guidelines on Freedom of Association.*[118]

The *Guidelines on the Protection of Human Rights Defenders* (the HRD Guidelines) adopt the definition of human rights defenders enshrined in the UN Declaration on Human Rights Defenders (in Article 1). The framework for the protection of those engaged in defending human rights presented by OSCE ODIHR consists of three elements: a) general principles; b) physical integrity, liberty and security; and c) a safe and enabling environment. The HRD Guidelines affirm that 'the active involvement of people, groups, organisations and institutions is essential to ensure continuing progress towards the fulfilment of international human rights', and recognises the role of civil society in 'assist[ing] states to ensure full respect for human rights, fundamental freedoms, democracy and the rule of law'.[119] It acknowledges the risks faced by human rights defenders in their work, and stresses they 'need specific and enhanced protection at local, national and international levels'.[120]

Regarding general principles, the HRD Guidelines call for the recognition of the international dimension of human rights defenders' protection, guaranteeing the accountability of non-state actors, the centrality of the principle of equality and non-discrimination, the importance of having a legal, administrative and institutional framework in place that is conducive to human rights defenders' work, and the general principle of any limitations on fundamental rights on the threefold basis of legality, necessity and proportionality.[121]

In recognising the specific risks faced by human rights defenders, the HRD Guidelines also propose how to protect them from infringements of physical integrity, liberty and security. The Guidelines call on states to '**refrain from any acts of intimidation or reprisals** by threats, damage and destruction of property, physical attacks, torture and other ill-treatment, killing, enforced disappearance or other physical or psychological harm targeting human rights defenders and their families'.[122]

It also reminds states of their duty to protect human rights defenders from such harms inflicted by **non-state entities**.[123] The Guidelines call on states to make certain that any such attacks are 'promptly, thoroughly and independently investigated in a transparent manner' and sanctioned accordingly.[124] States are called upon to develop appropriate policies, programmes and mechanisms to ensure the safety and security of human rights defenders.[125] Moreover, their protection requires states to guarantee that they will:

> […] not be subjected to judicial harassment by unwarranted legal and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to

[115] Ibid.

[116] OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit.

[117] OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Peaceful Assembly', second edition, Organization for Security and Co-operation in Europe and the Council of Europe, Warsaw/Strasbourg, 2010.

[118] OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Association', Organization for Security and Co-operation in Europe and the Council of Europe, Warsaw/Strasbourg, 2015.

[119] OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit., p. 1, para. 3.

[120] Ibid, para. 4.

[121] Ibid, pp. 2-3.

[122] Ibid, p. 3, para. 12, *emphasis added*.

[123] Ibid, emphasis added.

[124] Ibid, pp. 3-4, para. 13-18.

[125] Ibid, pp. 4-5, para. 19-22.

> criminalisation, arbitrary arrest and detention, as well as other sanctions for acts related to their human rights work.[126]

This entails steps to safeguard human rights defenders against criminalisation or arbitrary and abusive application of legislation for their involvement in activities protected by international standards,[127] as well as arbitrary detention and treatment in detention,[128] and they must be entitled to a fair trial before a competent, independent and impartial tribunal.[129] The Guidelines further call on states to refrain from engaging in, as well as actively endeavouring to counter, stigmatisation and marginalisation of human rights defenders and their work.[130]

The HRD Guidelines recognise that a safe and enabling working environment for human rights defenders requires the full exercise of human rights and fundamental freedoms.[131] The rights to be protected include freedom of expression, including access to information and freedom of the media;[132] freedom of peaceful assembly;[133] freedom of association, including access to funding;[134] the right to participate in public affairs;[135] and the right to private life.[136] The OSCE ODIHR demands that any restrictions on freedom of expression conform with international standards, particularly the principles of necessity and proportionality.[137] The Guidelines draw particular attention to the need to **eliminate vaguely worded provisions in national security and anti-terrorism legislation that may lead to their arbitrary application and call for the repeal of criminal defamation laws**.[138] On access to information, the OSCE ODIHR emphasises the importance of not placing undue limitations on the dissemination of information or access to official documents, as well as the specific protection necessary for whistleblowers.[139]

The OSCE ODIHR observes that protection of freedom of **peaceful assembly** is 'crucial to creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together'.[140] The HRD Guidelines stress that the presumption should be in favour of peaceable assembly.[141] Any restrictions on this right must be in conformity with international standards, in particular the principle of proportionality. ODIHR asserts that restrictions imposed on account of dissenting or controversial opinions and blanket bans on peaceful assembly are generally incompatible with international human rights standards.[142] Prior *notification* for organising assemblies is not required under international law and thus should be required by national law only 'where this is

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[126] Ibid, p. 5, para. 23.

[127] I bid, pp. 5-6, para. 24-30.

[128] Ibid, pp. 6-7, para. 31-35.

[129] Ibid, p. 7, para. 36.

[130] Ibid, pp. 7-8, para. 37-40.

[131] Ibid, p. 8, para. 41.

[132] Ibid, pp. 9-11, para. 42-54.

[133] Ibid pp. 11-13, para. 55-62.

[134] Ibid, pp. 13-15, para. 63-73.

[135] Ibid, pp. 15-16, para. 74-75.

[136] Ibid. pp. 17-18, para. 85-89.

[137] Ibid, p. 9, para. 42.

[138] Ibid, para. 43-44.

[139] Ibid, para. 45-48.

[140] OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Peaceful Assembly',2010, p. 15, para. 1.1.

[141] Ibid., para. 2.1.

[142] See OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit., p. 11, para. 56; OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Peaceful Assembly', 2010, p. 17, para. 2.4, 3.3; p. 40, para. 43; p. 56, para. 94.

necessary to enable the authorities to make arrangements to facilitate the assembly and to protect public order, public safety and the rights and freedoms of others' and should not be onerous or bureaucratic.[143] Policing of gatherings should be guided by human rights principles; law enforcement authorities must 'strictly refrain from using force against human rights defenders who exercise their right to peaceful assembly', and states have an obligation to protect human rights defenders exercising their right to peaceful assembly.[144]

On freedom of **association**, the OSCE ODIHR acknowledges that this human right is 'crucial to the functioning of a democracy, as well as an essential prerequisite for other fundamental freedoms', that associations play an 'important and positive role in achieving goals that are in the public interest', and that 'all forms of associations, interests groups, trade unions and political parties are crucial to a vibrant democracy'.[145] It emphasises that legislation governing the right of association must apply to those defending human rights.[146] It affirms that 'the exercise of the right to freedom of association is not contingent on registration, and human rights defenders must not be criminalised for not registering a group or association'.[147] Formal registration and procedures, if set in legislation, should not be burdensome.[148]

2.3. Regulatory framework in the EU

The EU's framework on civil society space and human rights defenders is multidimensional, with the fundamental treaties, secondary EU law, decisions, recommendations and resolutions by EU institutions, and reports and opinions of various EU bodies, institutions and agencies all weighing in on the protection of an environment in which civil society can flourish. This Section of the study will look at two aspects of civil society in the EU: the legal framework of the treaties, the European Union Charter of Fundamental Rights (EUCFR) and the Court of Justice of the European Union's (CJEU) case law (the rights-centred framework); and actions and decisions by the EU institutions (European Commission, European Parliament, the Council of the EU, and the European External Action Service) concerning civil society.

2.3.1. The rights-centred framework on civil society in the EU: the Treaties, the EU Charter of Fundamental Rights and the Court of Justice of the EU

In setting out the EU's legal framework on civil society and civil society space, one must first examine the legal provisions of the relevant EU treaties and the EU Charter of Fundamental Rights. There are

[143] OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit., pp. 11-12, para. 57; OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Peaceful Assembly', 2010, pp. 17-18, para. 4.1; pp. 63-64, para. 113-117.

[144] OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit., pp. 12-13, para. 59-60; OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Peaceful Assembly', 2010, pp. 19-20, para. 5.3-5.5.

[145] OSCE ODIHR/Venice Commission, 'Guidelines on Freedom of Association', 2015, pp. 15-16, para. 8, 9, 11.

[146] Ibi., p. 18, para. 20.

[147] OSCE ODIHR, 'Guidelines on the Protection of Human Rights Defenders', 2014, op. cit., p. 14, para. 65.

[148] Ibid, para. 66-67.

many provisions in the two EU treaties (Treaty on European Union, or TEU, and Treaty on the Functioning of the European Union, or TFEU) pertinent to the work of the civil society in the EU.

Various **treaty provisions** call for the involvement of civil society in the EU decision-making process. This can be seen in **Article 11 of the TEU** and **Article 15.1** and **15.3 of the TFEU**, which set out the following:

> **Article 11 of the TEU**
> 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
> 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
> 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. […]
>
> **Article 15 of the TFEU**
> 1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. […]
> 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. […]

Of particular importance are the foundational principles of the EU, set out in **Article 2 of the TEU**, which are 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. The principles of equality and non-discrimination, as contained in, *inter alia,* **Articles 8, 10, 18 and 19 of the TFEU**, also matter a lot.

Other fundamental freedoms of the EU also deserve mention, including the **freedom of movement of persons** (and of workers) (Articles 21 and 45-48 of the TFEU), the free movement of **capital** (Articles 63-66 of the TFEU), the freedom of **establishment** (Articles 49-55 of the TFEU, covering the right to set up or manage a business by an EU national of another country) and the freedom to provide **services** (Articles 56-62 of the TFEU). An important preliminary regarding the four freedoms is their lack of application to wholly internal situations, that is, situations confined in all respects to a single Member State.[149]

Concerning the latter two freedoms, **establishment and services**,[150] the current state of EU law does not cover the (principal) activities of non-economic organisations such as those of civil society. This can be seen in Article 54 of the TFEU, which excludes from the freedom of establishment legal persons

[149] See, on the free movement of persons, CJEU, Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, judgment of 15 November 2011, ECLI:EU:C:2011:734, para. 60; on the other fundamental freedoms, see, for example, CJEU, Case C-268/15, *Fernand Ullens de Schooten v État belge*, judgment of 15 November 2016, ECLI:EU:C:2016:874, para. 47, 50-53. See also Iglesias Sánchez, S., 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?', *European Constitutional Law Review*, Vol. 14, No. 1, March 2018, pp. 7-36.

[150] On the CJEU's case law with respect to the freedom of establishment and freedom to provide services, see, *inter alia*, European Commission, Guide to the Case Law of the European Court of Justice on Articles 49 et seq. TFEU. Freedom of Establishment, Brussels, European Commission, 06.04.2017, available at https://ec.europa.eu/docsroom/documents/22543; European Commission, Guide to the Case Law of the European Court of Justice on Articles 56 et seq. TFEU. Freedom to Provide Services, Brussels, European Commission, 19.05.2016, available at https://ec.europa.eu/docsroom/documents/16743.

'which are non-profit-making' (applicable to the freedom of services under Article 62 of the TFEU). The case law of the CJEU in this respect, as reiterated in *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*,[151] clearly sets out that the freedom to provide services (as enshrined in Article 56 of the TFEU) covers services 'normally provided for remuneration', with 'remuneration' interpreted as entailing 'consideration for the service in question'.[152] The crux is that the service provided must have an economic character; in order words, the activity 'must not be provided for nothing'.[153] CJEU case law does not wholly exclude activities of civil society organisations (CSOs) and NGOs from the scope of the freedom of services, however. The CJEU has specified that freedom of services includes the passive freedom to receive (cross-border) services,[154] that the person providing services is not required to seek a profit therein,[155] nor is it necessary for the service concerned to be paid for by the recipient/beneficiary.[156] It is therefore imaginable that CSOs perform certain activities normally classified as of 'general interest', funded by another party under a project with a cross-border nature. **No case law of the CJEU explicitly addressing such a situation has, to date, been issued**.[157]

The **free movement of capital** of non-profit organisations, on the other hand, has been the subject of **rulings of the Court of Justice**.[158] In a number of cases, the CJEU has held that charitable organisations may not, subject to an overriding reason based in the public interest, be discriminated against or subject to different treatment solely on the basis of their domicile (in another Member State). In *Centro di Musicologia Walter Stauffer v Finanzamt München für Körpershaften*, the Court was asked to consider whether national provisions restricting tax exemptions on income from immovable property to charitable organisations established in one Member State was in contravention of the rules on free movement of capital under EU law. The Court ruled that 'where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general

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[151] CJEU, Case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, judgment of 18 December 2007, ECLI:EU:C:2007:816.

[152] *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, para. 28-29. See also CJEU, Case C-169/08, Presidente del Consiglio dei Ministri v Regione Sardegna, judgment of 17 November 2009, ECLI:EU:C:2009:709, para. 23.

[153] *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, para. 32.

[154] Cf. *Presidente del Consiglio dei Ministri v Regione Sardegna*, para. 25.

[155] Cf. *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, para. 33.

[156] Cf. CJEU, Case C-318/05, *Commission v Germany*, judgment of 11 September 2007, ECLI:EU:C:2007:495, para. 70.

[157] See, however, CJEU, Case C-109/92, *Stephan Max Wirth v Landeshaptstadt Hannover*, judgment of 7 December 1993, ECLI:EU:C:1993:916, para. 17, where the Court held that educational activities by private educational establishments, financed primarily out of private funds, may be considered as 'services' under (current) Article 56 TFEU; see also, in the context of competition law and state aid, CJEU, Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and others*, judgment of 10 January 2006, ECLI:EU:C:2006:8, para. 106 et seq., in particular, para. 122, where the Court held that a legal person 'acting itself in the field of public interests and social assistance … is capable of offering goods or services in the market in competition with other operators' in public interest fields can be considered as an undertaking conducting economic activities for the purpose of EU law. See also CJEU, Case C-386/04, *Centro di Musicologia Walter Stauffer v Finanzamt München für Körpershaften*, judgment of 14 September 2006, ECLI:EU:C:2006:568, para. 17-19, where the Court seems implicitly to leave open the possibility for non-profit organisations/foundations to be able to invoke the freedom of establishment in the context of 'genuine economic activity', such as the letting of immovable property. See further on the issue of freedom of establishment of non-profit organisations, Breen, O. B., 'EU regulation of charitable organizations: The politics of legally enabling civil society', *International Journal of Not-for-Profit Law*, Vol. 10, No. 3, June 2008, available at https://www.icnl.org/resources/research/ijnl/eu-regulation-of-charitable-organizations-the-politics-of-legally-enabling-civil-society; Lombardo, S., 'Some reflections on freedom of establishment of non-profit entities in the European Union', *European Business Organization Law Review*, Vol. 14, No. 2, June 2013, pp. 225-263.

[158] For a more general overview of the CJEU's case law on the free movement of capital, see, e.g., European Commission, Case Law Guide of the European Court of Justice on articles 63 et seq. TFEU, Free Movement of Capital, Brussels, European Commission, 23.02.2016, available at https://ec.europa.eu/info/files/160223-guide-case-law-free-movement-capital_en.

public, … the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory'.[159]

In *Hein Persche v Finanzamt Lüdenscheid*,[160] the CJEU was petitioned as to whether the EU rules on free movement of capital preclude Member States from recognising gifts (or other charitable donations in kind) by its residents to charitable organisations situated in another Member State. The Court, having first considered that gifts or donations in kind fell within the scope of the free movement of capital, held that 'the inability in Germany to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of German taxpayers to make gifts for their benefit'.[161] In line with its ruling in the *Stauffer* case, the Court further decided that 'a body which is established in one Member State but satisfies the requirements imposed for that purpose by another Member State for the grant of tax advantages, is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State'.[162]

In *Missionswerk Werner Heukelbach eV v État belge*,[163] the Court considered whether national legislation limiting a lower rate of taxation on inheritance to non-profit-making bodies whose centre of operation is in the same Member State in which the deceased donor resided was in contravention of EU laws governing the free movement of capital. It can be inferred from the Court's ruling that non-profit organisations benefit from the free movement of capital. The Court adjudicated that the legislation under concern 'leads a legacy to be taxed more heavily where the beneficiary is a non-profit-making body which has its centre of operations in a Member State in which the deceased neither actually resided nor worked and, as a consequence, has the effect of restricting the movement of capital by reducing the value of that inheritance', and that 'the application to certain cross-border capital movements of a higher rate of tax than that applied to movements within Belgium is liable to make those cross-border capital movements less attractive, by dissuading Belgian residents from naming as beneficiaries persons established in Member States in which those Belgian residents have not actually resided or worked'.[164]

The EU Charter of Fundamental Rights (hereinafter the Charter or the EUCFR) sets out a number of fundamental rights in the EU relating to civil society, including the right to liberty and security (Article 6), respect for private and family life (Article 7), freedom of expression and information (Article 11), freedom of assembly and of association (Article 12), right of access to documents (Article 42), access to the European Ombudsman and the right to petition (Articles 43 and 44), freedom of movement (Article 45), and the right to an effective remedy and to a fair trial (Article 47). It is important to note that the EU Charter of Fundamental Rights applies to EU institutions, bodies, offices, and agencies and to the EU Member States *only when implementing* EU law (Article 51). Restrictions to any of the rights in the Charter must be 'provided for by law', must respect the principle of proportionality and must be genuinely necessary to 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others' (Article 52.1). To the extent that the rights espoused in the

[159] *Centro di Musicologia Walter Stauffer v Finanzamt München für Körpershaften*, para. 40.

[160] CJEU, Case C-318/07, *Hein Persche v Finanzamt Lüdenscheid*, judgment of 27 January 2009, ECLI:EU:C:2009:33.

[161] *Hein Persche v Finanzamt Lüdenscheid*, para. 38.

[162] *Hein Persche v Finanzamt Lüdenscheid*, para. 50.

[163] CJEU, Case C-25/10, *Missionswerk Werner Heukelbach eV v État belge*, judgment of 10 February 2011, ECLI:EU:C:2011:65.

[164] *Missionswerk Werner Heukelbach eV v État belge*, para. 24-25.

Charter correspond to rights guaranteed in the European Convention on Human Rights, the standard of protection offered by the EUCFR will not be lower than that of the ECHR (Article 52.3 of the EUCFR).

The most recent case concerning the free movement of capital and civil society is the ***Commission v Hungary (Transparency of associations)* judgment**, which also involves other rights encompassed in the EU Charter of Fundamental Rights.[165] The case concerns the compatibility of Hungary's legislation on transparency of foreign funding of non-governmental organisations (the so-called Lex NGO) with EU laws on free movement of capital and the right of freedom of association, among others. The Court, in assessing the validity of the Hungarian law, recognised that funding received by civil society organisations (from sources originating in another Member State or a third country) falls within the scope of the **free movement of capital**,[166] as prescribed in Article 63 of the TFEU. The Court found that the Lex NGO makes a distinction between funding from domestic sources and cross-border funding that is **not justified** by reasons of 'overriding public interest' (in this case, the need for more transparency of funding) or reasons of public policy or public security,[167] and is **disproportionate**.[168] Moreover, the Court found, relying strongly on the case law of the European Court of Human Rights, that the Lex NGO violated the rights to private life (Articles 7 and 8 of the EUCFR), to protection of personal data (Article 8) and to **freedom of association** (Articles 11 and 12).[169] *European Commission v Hungary (Transparency of associations)* not only recognises the applicability of the free movement of capital to the funding sources of civil society organisations; the judgment is also the **first one by CJEU on the right to freedom of association under Article 12 of the EUCFR**.[170]

The CJEU has made several express references to ECtHR rulings establishing freedom of association standards. In this way the CJEU has stressed on the vital role of civil society associations 'in a democratic and pluralist society'. The Court has further highlighted that civic-mindedness is an essential trait for organising 'public life' (para. 112, *emphasis added*):

> In this connection, first, according to the case-law of the European Court of Human Rights the **right to freedom of association** constitutes one of the essential **bases of a democratic and pluralist society**, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so **to contribute to the proper functioning of public life** (ECtHR, 17 February 2004, *Gorzelik and Others v. Poland*, CE:ECHR:2004:0217JUD004415898, §§ 88, 90 and 92, and ECtHR, 8 October 2009, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, CE:ECHR:2009:1008JUD003708303, §§ 52 and 53).

In this same ruling the CJEU reiterates that freedom of association provides the conditions for civil society to conduct activities **independently**, relieved of concerns about government pressure or bias (para. 113, *emphasis added*):

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[165] CJEU, Case C-78/18, *European Commission v Hungary (Transparency of associations)*, judgment of 18 June 2020, ECLI:EU:C:2020:476. For an in-depth analysis of the judgment, see Bárd, P., J. Grogan and L. Pech, 'Defending the open society against its enemies. The Court of Justice's ruling in C-78/18 Commission v Hungary (transparency of associations)', Verfassungsblog, 22 June 2020, available at https://verfassungsblog.de/defending-the-open-society-against-its-enemies/

[166] CJEU, Case C-78/18, European Commission v Hungary (Transparency of associations), para. 47-51.

[167] Ibid, para. 76-93.

[168] Ibid, para. 94.

[169] Ibid, para. 110-134, 139-142.

[170] Regarding the right to freedom of association in the EU Charter of Fundamental Rights in the case law of the CJEU, the General Court has issued five rulings in which this Charter right was (potentially) an object of consideration. Four of these cases (T-57/17, T-54/17, T-16/17 and T-13/17) are unpublished, while in Case T-527/16 (*Margarita Tàpias v Council of the European Union*), the appeal to Article 12 EUCFR was found to be inadmissible.

> [T]hat right [Freedom of Association] does not only include the ability **to create or dissolve an association** (ECtHR, 17 February 2004, *Gorzelik and Others v. Poland*, CE:ECHR:2004:0217JUD004415898, § 52, and ECtHR, 8 October 2009, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, CE:ECHR:2009:1008JUD003708303, § 54), but also covers the possibility for that association to act in the meantime, which means, inter alia, that it must be able to pursue its activities and operate **without unjustified interference by the State** (ECtHR, 5 October 2006, Moscow Branch of the Salvation Army v. Russia, CE:ECHR:2006:1005JUD007288101, §§ 73 and 74).

The Court highlighted that while certain restrictions may be seen as pursuing a legitimate aim, nevertheless the following effects and impacts would be seen not proportional and not necessary within democratic society (para. 114, *emphasis added*):

> [L]egislation which renders **significantly more difficult the action or the operation of associations**, whether by strengthening the requirements in relation to their **registration** (ECtHR, 12 April 2011, *Republican Party of Russia v. Russia*, CE:ECHR:2011:0412JUD001297607, §§ 79 to 81), by limiting their **capacity to receive financial resources** (ECtHR, 7 June 2007, *Parti nationaliste basque — Organisation régionale d'Iparralde v. France*, CE:ECHR:2007:0607JUD007125101, §§ 37 and 38), by rendering them subject to **obligations of declaration and publication** such as to create a negative image of them (ECtHR, 2 August 2001, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, CE:ECHR:2001:0802JUD003597297, §§ 13 and 15) or by exposing them **to the threat of penalties, in particular of dissolution** (ECtHR, 5 October 2005, *Moscow Branch of the Salvation Army v. Russia*, CE:ECHR:2006:1005JUD007288101, § 73) is nevertheless to be classified as **interference in the right to freedom of association** and, accordingly, as a limitation of that right, as it is enshrined in Article 12 of the Charter.

The Court has further elaborated that Lex NGO, by creating an obligation to denounce 'foreign funding' has created wider societal effects expressed that (para 118, *emphasis added*):

> In that context, the systematic obligations in question are liable, […] to have a deterrent effect on the participation of donors resident in other Member States or in third countries in the financing of civil society organisations falling within the scope of the Transparency Law and thus to hinder the activities of those organisations and the achievement of the aims which they pursue. They are furthermore of such a nature as to create **a generalised climate of mistrust** vis-à-vis the associations and foundations at issue, in Hungary, and **to stigmatise them**.

The Court explicitly admonished that the legitimacy of grounds for abridging the freedom of association, such as **for public policy or national security concerns**, will be carefully scrutinised not only to meet the thresholds of proportionality and necessity within a democratic society but also to bear the burden of proof that the threat is 'genuine, present and sufficiently serious' (para. 91, *emphasis added*):

> […] it is settled case-law of the Court that where the grounds of public policy and public security mentioned in Article 65(1)(b) TFEU allow a derogation from a fundamental freedom provided for by the FEU Treaty they must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Therefore, those grounds cannot be relied upon **unless there is a genuine, present and**

sufficiently serious threat to a fundamental interest of society (see, to that effect, judgment of 14 March 2000, Église de scientologie, C 54/99, EU:C:2000:124, paragraph 17).

In all, the CJEU's judgment in the Lex NGO case (C-78/18) upholds the importance of independent, impartial and critical civil society actors for EU policymaking.[171] These actors uphold fundamental rights, contribute to reports monitoring the rule of law and help safeguard democratic accountability at the EU level. Therefore, any interference with the freedom of association under Article 12 of the EUCFR must be in accordance with the EU founding values expressed in Article 2 of the TEU. This is ever more important in the context of countries suspected of backsliding on observing the rule of law, those EU Member States for which a TEU Article 7 procedure is open, or they are subject to a 'dialogue phase' in the EU Rule of Law Framework.

At the moment there is another infringement case pending before the **CJEU on the criminalisation of activities in support of asylum and residence applications (Case C-821/19).**[172] Its ruling is likely to touch on Article 11 - Freedom of expression and information, as one of the core freedoms constituting civic space and the role of civil society in upholding the fundamental rights of others, ensuring correct implementation of asylum *acquis*. Thus, such legislative initiatives targeting civil society space should not be reduced to mere violations of fundamental rights and the secondary EU laws. They entail attempts to limit democratic accountability in the areas falling within the EU competence, in this case – in the Area of Freedom, Security and Justice. Thus, it is also a question of rule of law, as mutual trust and mutual recognition are undermined by removing independent watchdogs.

In both CJEU cases started by the Commission against Hungary, critical civil society actors were targeted by the laws, however, they lacked the right to appear before the court (unless they requested preliminary reference procedure when litigating before the national courts). For instance, in the ongoing Case C-821/19 organisations working with asylum seekers and other migrants were at risk of criminalisation under the Hungarian Criminal Code changes proposed by Bill No. T/333, but they cannot make their submissions before the CJEU (see in-depth discussion on this provision in Subsection 3.1.1.). Also, unlike in the European Court of Human Rights, non-state third-party interveners or *amicus curiae* (friends of the court) in the EU do not have the right to submit their observations or to conduct public interest litigation on behalf of a vulnerable group. Therefore, the EU legislators should strengthen civil society organisations' standing within the Court of Justice of the European Union rules of procedure.[173]

Also, at the moment, civil society actors requesting a preliminary ruling by the CJEU (when litigating before national courts) **are not protected from retaliations.** This situation is different when litigating before the European Court of Human Rights. All litigants, including civil society actors, can invoke **interim procedures** under the Rule 39 of the European Court of Human Rights.[174]

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[171] CJEU, Case C-78/18, *European Commission v Hungary (Transparency of associations)*, judgment of 18 June 2020, ECLI:EU:C:2020:476.

[172] CJEU, Case C-821/19, *European Commission v Hungary,* pending. Commission's action brought on 8 November 2019 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=222334&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=18499068.

[173] Ibid, pp. 20-21.

[174] Carrera, S., M. De Somer and B. Petkova, 'The Court of Justice of the European Union as a fundamental rights tribunal: Challenges for the effective delivery of fundamental rights in the area of freedom, security and justice', CEPS Liberty and Security in Europe series, No. 49/August 2012, available at http://aei.pitt.edu/36443/1/No_49_Carrera_et_al__ECJ_as_Fundamental_Rights_Tribunal2-2.pdf , p 21.

2.3.2. Setting up a framework for civil society in the EU: consultation and protection of civic space

The European Union has a long history engaging with civil society.[175] This Subsection will set out some key elements of the European Union's relationship with civil society affecting civil society space. This Subsection's overview will consider two specific undertakings concerning civil society in the EU: EU forums for civil society and their routine consultation by the EU, and actions taken to protect against the shrinking of civil society space.

Attempts at creating an EU legal status for civil society organisations deserve a brief mention. To date, these are best exemplified by two legislative initiatives that have not passed because of the EU's unanimity rule at the Council of the European Union (see developments described in detail in Section 4.1):[176] the proposal for a Regulation on **the European Association Statute,**[177] and the proposal for a regulation on the European Foundation Statute.[178] in surveying the forums for civil society engagement in the EU, it is important to recall **Article 11 of the TEU**, particularly paragraph 2, which encourages EU institutions to 'maintain an open, **transparent and regular dialogue** with representative associations and civil society'. Consulting with civil society is part of the working procedures of , among others, the European Commission, the European Parliament and the European Economic and Social Committee.[179]

On the part of the European Commission, one of the often-cited documents concerning the consultation of European civil society is the **Commission White Paper on European Governance**.[180] In the White Paper, the Commission recognises that civil society 'plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs', 'mobilise[s] people and support, for instance, those suffering from exclusion or discrimination', and 'often act[s] as an early warning system for the direction of political debate'.[181] While the White Paper generally was more preoccupied with the Commission's broader vision for European governance, its call for reinforcing a 'culture of consultation and dialogue' clearly foresees an important role for civil society.[182] Similar

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[175] For an overview of civil society in the European Union, see, e.g., Staszczyk, *A Legal Analysis of NGOs and European Civil Society*, 2019, op. cit.; Kohler-Koch, B., 'The three worlds of European civil society – What role for civil society for what kind of Europe?' *Policy and Society*, Vol. 28, No. 1, 2009, pp. 47-57; Smismans, S., 'European civil society: Shaped by discourses and institutional interests', *European Law Journal*, Vol. 9, No. 4, September 2003, pp. 473-495; Grote, J. R., 'Civil society and the future of Europe', DOC Expert Comment, Berlin, Dialogue of Civilizations Research Institute, available at https://doc-research.org/2020/02/civil-society-european-union-enthusiasm/; Heidbreder, E. G., 'Civil society participation in EU governance', *Living Reviews in European Governance*, Vol. 7, No. 2, 2002, available at http://www.europeangovernance-livingreviews.org/Articles/lreg-2012-2/; Versteegh, L. C. R. M., 'Civil society under the Treaty of Lisbon: Relationship between national public benefit organizations and European Union policy?', *Nonprofit Policy Forum*, Vol. 2, No. 2, Article 4, 2011; Kutay, A., 'Limits of participatory democracy in European governance', *European Law Journal*, Vol. 21, No. 6, November 2015, pp. 803-818.

[176] For more details on the EU's proposals for a Regulation of European Association Statute and European Foundation Statute, see Staszczyk, *A Legal Analysis of NGOs and European Civil Society*, 2019, op. cit., pp. 304-331; Breen, 'EU regulation of charitable organizations', 2008, op. cit.

[177] See COM(1991) 273 final – SYN 386.

[178] See COM(2012) 035 final.

[179] See further, Staszczyk, *A Legal Analysis of NGOs and European Civil Society*, 2019, op. cit., pp. 155-169; Kohler-Koch, 'The three worlds of European civil society', 2009, op. cit., p. 48; Smismans, 'European civil society', 2003, op. cit., pp. 475-484.

[180] COM(2001) 428 final.

[181] Ibid, p. 11.

[182] Ibid, pp. 13-14; cf. Kutay, 'Limits of participatory democracy in European governance', 2015, op. cit., pp. 805-806; Heidbreder, Civil society participation in EU governance', 2012, op. cit., p. 15; Smismans, 'European civil society', 2003, op. cit., p. 480. See also European Commission, Communication from the Commission –Towards a reinforced culture of

language on consultation between the Commission and non-governmental organisations can be found in the Commission's discussion paper of 2000 on '**The Commission and non-governmental organisations: building a stronger partnership**'.[183] Two important methods through which the European Commission consults civil society in policy and decision-making processes are online consultations and consultative committees.[184]

Civil society's contribution to the work of the **European Parliament**, outside of informal arrangements, is encapsulated, as set out by Piotr Staszczyk, in two instruments, namely, the right to petition, and structured dialogue. The **right to petition** the European Parliament, is enshrined in **Articles 24 and 227 of the TFEU**. Article 227 of the TFEU states that:

> […] any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly (emphasis added).[185]

Structured dialogue between the EP and civil society, is referenced in, *inter alia,* Rule 27.5 on the duties of the Conference of Presidents ('The Conference of Presidents shall be responsible for organising structured consultation with European civil society on major topics') and Rule 35 on **Intergroups** ('Individual Members [of the European Parliament] may form Intergroups or other unofficial groupings of Members, for the purpose … of promoting contact between Members and civil society') of the Rules of Procedure of the European Parliament.

The TFEU also formally welcomes civil society into EU (advisory) bodies, specifically, the **European Economic and Social Committee**. Article 300.2 of the TFEU directs that the EESC's membership shall consist of 'representatives of organisations of employers, of the employed, and of other *parties representative of civil society*, notably in socio-economic, civic, professional and cultural areas' (*emphasis added*). The EESC must formally be consulted in the EU legislative process wherever the Treaties so provide, but it is also competent to issue opinions at its own initiative (Article 304 of the TFEU). The EESC has issued many opinions on the role of civil society in various EU policy fields.[186] Specific attention should be paid to two of them , namely, on 'Resilient democracy through a strong and diverse civil society',[187] and on 'Financing of civil society organisations by the EU'.[188] As noted by Stijn Smismans, the EESC 'claims a role as '**forum of organised civil society**'' and can be seen to function as a 'forum in which to further broaden civil dialogue'.[189]

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consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final, noting that 'civil society organisations play an important role as facilitators of a broad policy dialogue' and the 'specific role of civil society organisations in modern democracies is closely linked to the fundamental rights of citizens to form associations in order to pursue a common purpose'.

183 COM(2000) 11 final.

184 See Staszczyk, *A Legal Analysis of NGOs and European Civil Society*, 2019, op. cit., pp. 162-164. Cf. European Commission, Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final, Brussels, 30.5.2016.

185 More detailed provisions on the right of petition and examination thereof by the European Parliament are contained in Rules 226-230 of the Rules of Procedure of the European Parliament.

186 These opinions can be found at Eur-Lex. A cursory search for opinions of the EESC with either 'civil society' or 'CSO' in the title returned 94 results.

187 EESC 2018/04661, OJ *C* 228, 5.7.2019, pp. 24-30.

188 OJ *C* 81, 2.3.2018, pp. 9-15.

189 Smismans, 'European civil society', 2003, op. cit., pp. 482-483.

The problem of shrinking civil society space has been commented on by EU institutions, agencies and bodies. **Recent resolutions of the European Parliament** have reinforced the point that 'a vibrant civil society … play[s] a vital role in promoting an open and pluralistic society, public participation in the democratic process, and strengthening the accountability of governments'[190]. The EP observes the increasing attacks against civil society in certain EU Member States.[191] Constriction of civil society space has also been highlighted as a threat to democracy and the rule of law by the **European Commission**.[192]

Both the **EU Agency for Fundamental Rights** and the **European Economic and Social Committee** have issued recent **reports** detailing the challenges faced by civil society organisations in the EU in a political climate of changing and intensifying attacks against civil society.[193] The subsequent Subsection of the study details changes in the regulatory environment for associations and assemblies in light of countries backsliding on the rule of law, particularly in the case of Europe's refugee situation. The current COVID-19 public health crisis has also led some governments to introduce disproportionally strict limitations on freedom of speech and freedom of assembly.

2.3.3. European Union external guidelines on human rights defenders

The European External Action Service (EEAS) has drawn up a set of European Union Human Rights Guidelines. This toolbox also includes **EU Human Rights Defenders Guidelines** that focus on ensuring defenders protection, however, it is applicable **only** when they are acting abroad. [194] According to the Guidelines: 'Support for human rights defenders is already a long established element of the European Union's human rights external relations policy.' The EEAS spells out that, 'although the primary responsibility for the promotion and protection of human rights lies with states, the EU recognises that individuals, groups and organs of society all play important parts in furthering the cause of human rights.'[195] The Guidelines acknowledge that the work of human rights defenders often involves criticism

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[190] Cf. European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)), P8_TA(2017)0442; European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), P8_TA(2017)0216; European Parliament resolution of 19 April 2018 on the need to establish a European Values Instrument to support civil society organisations thay promote fundamental values within the European Union at the local and national levels (2018/2619(RSP)), P8_TA(2018)0184.

[191] See European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), P8_TA(2017)0216; European Parliament resolution of 16 March 2017 on EU priorities for the UN Human Rights Council sessions in 2017 (2017/2598(RSP)), P8_TA(2017)0089. See also the EP parliamentary debate on shrinking civil society space of 7 February 2018, available at https://www.europarl.europa.eu/doceo/document/CRE-8-2018-02-07-ITM-018_EN.html. See further, e.g., European Parliament resolution of 3 October 2017 on addressing shrinking civil society space in developing countries (2016/2324(INI)), P8_TA(2017)0365.

[192] See, e.g., European Commission, Communication from the Commission to the European Parliament , the European Council and the Council. Further strengthening the Rule of Law within the Union. State of play and possible next steps, COM(2019) 163 final, Brussels, 3.4.2019, pp. 8-9; European Commission/HRVP, Joint Communication to the European Parliament and the Council. EU Action Plan on Human Rights and Democracy 2020-2024, JOIN(2020) 5 final, Brussels, 25.3.2020, p. 2. Cf. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Rights and Values programme, Explanatory Memorandum, COM(2018) 383 final, Brussels, 30.5.2018.

[193] FRA, 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit.; EESC, 'Fundamental rights and the rule of law - National developments from a civil society perspective, 2018-2019', Brussels, European Economic and Social Committee, 2020, available at https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/fundamental-rights-and-rule-law-national-developments-civil-society-perspective-2018-2019-report-june-2020.

[194] European External Action Service (EEAS), Ensuring Protection - European Union Guidelines on Human Rights Defenders, 2004, available at https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf.

[195] Ibid, para. 4.

directed toward governments[196] and such watchdog activities might well lead to retaliation. Those defending human rights 'themselves have increasingly become targets of attacks and their rights are violated in many countries'. [197] Therefore, as one initiative of the external relations policy of the EU, 'it is important to ensure the safety and protect the rights of human rights defenders'.[198]

The EEAS Guidelines 'provide for interventions by the Union for human rights defenders at risk and suggest practical means to support and assist human rights defenders.'[199] The EEAS operationalised such assistance and support by proposing concrete actions that Heads of the EU Missions can take. For instance, they are required to gather information and report to the Council Working Party on Human Rights (COHOM) about 'the occurrence of any threats or attacks against human rights defenders'.[200]

In addition, they are instructed to reflect on potential remedies and assess their results:

> HoMs *[Head of Missions]* should make recommendations to COHOM [Working Party on Human Rights at the Council] for possible EU actions, including condemnation of threats and attacks against human rights defenders, as well as for demarches and public statements where human rights defenders are at immediate or serious risk. HoMs should also report on the effectiveness of EU actions in their reports.[201]

Also, when the EU is undertaking action regarding human rights in a given country, EU missions are called to consult with local human rights defenders to assess and weigh the potential for reprisals against them.[202]EU missions are instructed to share relevant information with such activists, to raise their public profile through various invitations, and to attend and observe their trials, to ensure their impartiality. The Guidelines include ways that EU or Member State delegations can support various UN Special Rapporteurs, including the UN Special Rapporteur on Human Rights Defenders and various regional mechanisms.[203]

The most tangible element is the **EU human rights defenders' mechanism ProtectDefenders.eu,** which received €20 million for 2015-2019 under the European Instrument for Democracy and Human Rights (EIDHR) funding stream to protect human rights defenders. EEAS's 2019 report highlights: 'It has provided support to more than 30 000 HRDs and their families since 2015 through a combination of short, medium and long-term initiatives (including direct support, training, advocacy and outreach activities).'[204]

Given its importance, this mechanism was renewed for another three years with a budget of €15 million. Besides, there is an **EU emergency fund for human rights defenders**, aimed at 'ensuring ad hoc support to human rights defenders at risk in a context of rising threats against them and shrinking civic and democratic space in many countries around the globe.' Thus, EIDHR's financial planning took

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196 Ibid, para. 5.

197 I bid, para. 6.

198 Ibid, para. 6.

199 Ibid, para. 7.

200 Ibid. para. 8.

201 Ibid. para. 9.

202 Ibid. para. 10.

203 International Service for Human Rights (ISHR), 'EU Guidelines on Human Rights Defenders'. ISHR, https://www.ishr.ch/news/eu-guidelines-human-rights-defender, 16 August 2010. Accessed 11 June 2020.

204 European External Action Service (EEAS), 'The EU annual report on Human Rights and Democracy in the world 2019', 2020, available at https://eeas.europa.eu/sites/eeas/files/annual_report_e-version.pdf.

into account the overall trends putting pressure on civic space to predict the increased need for this type of funding.

In addition, the EEAS, the Council of the EU and the European Parliament similarly have been dealing with the issue of human rights and human rights defenders as a matter of foreign relations. At the Council of the EU, there is a dedicated **Working Party on Human Rights (COHOM)**, which 'deals with human rights aspects of the external relations of the EU'.[205] COHOM coordinates EU positions at the UN General Assembly and the UN Human Rights Council (which also includes the Universal Periodic Review). Moreover, COHOM 'promotes the development and oversees the worldwide implementation of EU policy in the field of human rights and democracy.' The working methods include the EU Human Rights Guidelines and human rights dialogues and consultations with non-EU countries. The EEAS Guidelines on Human Rights Defenders discussed above are also part of this toolbox.

The European Parliament's Subcommittee on Human Rights (DROI) is tasked with scrutinising impacts on human rights resulting from various EU external policies, such as trade or asylum and migration. DROI avows that 'the European Union remains deeply committed to the protection and promotion of the universality of human rights in its internal and external policies'.[206] DROI also uses its political leverage to press for the release of human rights defenders. The recent EP resolutions on the human rights situation around the world have acknowledged the value added of ProtectDefenders.eu for those at risk and called for its further strengthening. Since human rights defenders frequently face various obstacles to reaching UN venues, DROI has requested that the Commission and Council establish more tangible measures such as 'a coordinated procedure for granting visas to HRDs, and where appropriate, facilitating temporary shelter' [207]

In addition, the EP wants special attention to be paid to the challenges that those engaged in promoting human rights defenders and civic society space must contend with in EU Member States and neighbouring countries, which, as the resolution underlines, are not under same scrutiny:

> [*The European Parliament*] calls for the EU and the Member States to continue to closely monitor developments that negatively affect governance and civil society space worldwide, *without exception*, and to systematically respond, using all appropriate means, to policies and legislative changes led by authoritarian governments that are aimed at undermining governance based on fundamental democratic principles and at shrinking civil society space.[208]

Nevertheless, as discussed earlier, comparable toolboxes and rights protection mechanisms are lacking inside the EU itself, where civil society actors are helping uphold EU fundamental rights and the rule of law and democratic institutions. Therefore, one of the proposals made later in the study (Section 4.2) is to undertake an internal/external consistency check with regard to human rights policy and to devise similar guidelines for the protection of human rights defenders inside the EU. Another possibility would be to follow along the line of whistleblower protections provided in the Directive (EU) 2019/1937 and to adopt a directive to protect civil society actors from retaliation.

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[205] The Council of the European Union, 'The Working Party on Human rights (COHOM)', available at https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-human-rights/.

[206] The European Parliament, 'Subcommittee on Human Rights (DROI)', available at https://www.europarl.europa.eu/committees/en/droi/about.

[207] European Parliament, Resolution of 15 January 2020 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2018 (2019/2125(INI)), 15 January 2020, para. 32.

[208] Ibid, para. 24 (*emphasis added*).

3. STATE OF PLAY: CRITICAL CIVIL SOCIETY AT RISK IN THE EU

KEY FINDINGS

Civic space is 'the legal, political and societal framework, which is essential for new civil society initiatives and organisations to flourish'. In the **rights-based approach,** it entails freedom of expression, assembly and association. In the civil society **ecosystem approach,** civic space is first among other significant conditions, such as public perceptions, funding, human resources (talent and training), possibilities for collaboration with others at relevant forums and policymaking impact.

Attacks and retaliation against the civil society players, such as watchdog NGOs and human rights defenders, need to be taken particularly seriously. They demonstrate that some Member States and certain areas of the EU law are falling short with respect to fundamental rights, the rule of law and democratic accountability standards. These areas include:

- **Encroachments on freedom of association**: regulatory changes like the Lex NGO in Hungary or re-registration requirements targeting NGOs working in the area of international protection, migration and social inclusion in Greece; smear campaigns directed at watchdog NGOs and human rights defenders involved in particular politically contested fields, and subsequent policing and criminalisation;
- **Restrictions on freedom of assembly**: overpolicing and overuse of force against peaceful protesters;
- **Reprisals against freedom of expression**: various attacks and strategic lawsuits against public participation filed to muzzle watchdog NGOs and other human rights defenders that are criticising those holding economic and political power.

The Court of Justice of the EU judgment on the Lex NGO is stepping up the understanding among EU policymakers that civil society actors, just like other economic actors, need equivalent if not heightened **protection**. Civil society organisations, by defending individuals' rights and freedoms and thereby representing the general interest, support the EU values on which the Union is based, such as democracy, the rule of law and fundamental rights, dignity, freedom, equality and the protection of minorities.

This Chapter of the study focuses on ongoing challenges that watchdog civil society organisations face across the EU. It takes a closer look at three selected Member States – Greece, Hungary and Poland. The FRA report on 'Challenges facing civil society organisations working on human rights in the EU' indicates that similar worrying developments are happening in other EU Member States.[209]

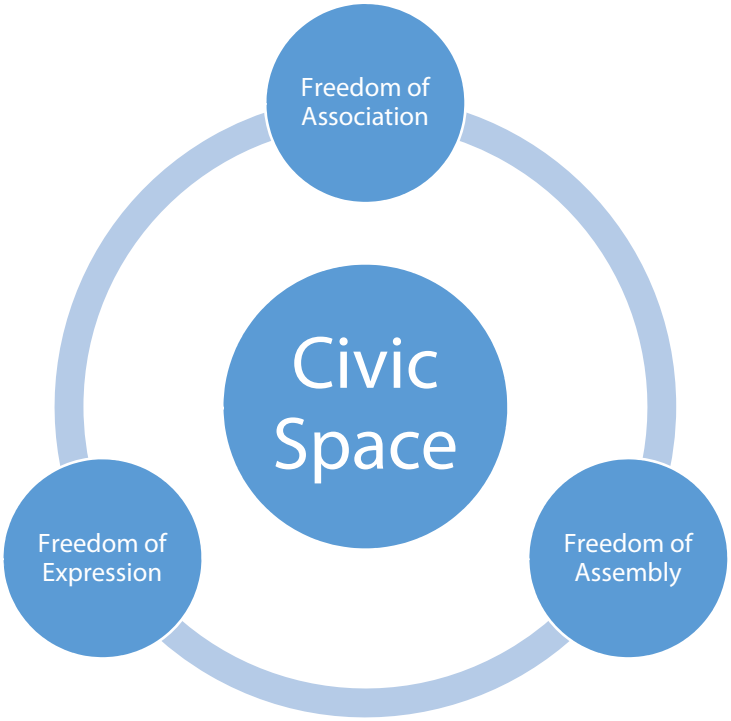
Civic space will be examined through the lens of two different models, to capture all the relevant aspects useful for the analysis: the 'rights-based' approach, and the 'civil society ecosystem' approach. Practitioners define civic space through a rights-based approach. The ecosystem approach postulates that civic space is '**the legal, political and societal framework**, which is essential for new civil society

[209] FRA, 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit.

initiatives and organisations to flourish'.[210] In the ecosystem approach, civic space is first among other significant conditions, such as public perceptions, funding, human resources (talent and training), possibilities for collaboration with others at relevant forums and policymaking impact.

The European Center for Non-for-Profit Law (ECNL) defines civic space as critical to ensuring fundamental rights in the EU since it is 'an environment where individuals and civil society organisations are enabled to exercise their fundamental civic freedoms to associate, operate, assemble peacefully, express their views and participate in public decision-making, which are instrumental to the exercise of all the other civic, political, socioeconomic and cultural rights.'[211] The European Civic Forum (ECF) takes a similar approach, and its 'Civic Space Watch' is based on three freedoms (see Figure 2 below).

Figure 2: Civic space from a rights-based approach



Source: Authors, 2020.

The three freedoms: freedom of speech, freedom of assembly and freedom of association underpin **civic space in a rights-based approach** (see Figure 2 above). Although freedom of information, freedom of conscience and the right to privacy could also be incorporated as standalone pillars, they are left out of the analysis in this study. These freedoms build up a 'civic resilience and capacity to stand up against regressive trends [which] is crucial to oppose the systematic erosion of our democracy.'[212]

[210] Schwarz, J., 'An Eco-System Approach for Civil Society'. CSA, 15 June 2017, available at https://www.civilsocietyacademy.org/post/an-eco-system-approach-for-civil-society.

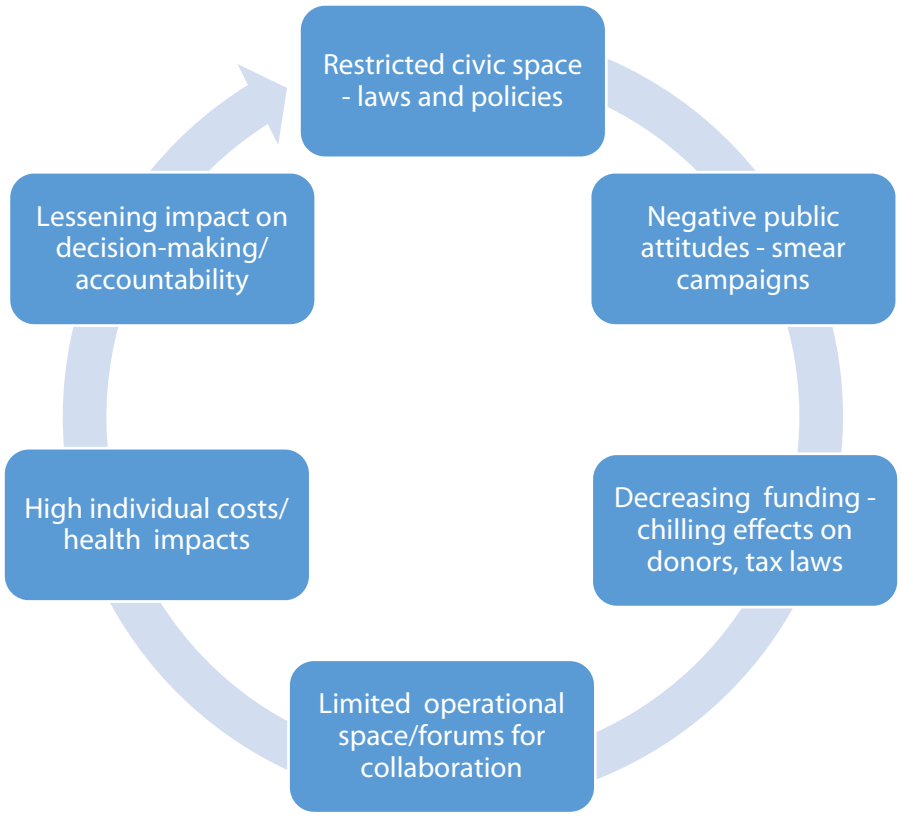
[211] Fannuci, F., and H. Surmatz, *Handbook on How to Use EU Law to protect Civic Space*, on behalf of the European Center for Not-for-Profit Law Stichting (ECNL), the European Foundation Centre (EFC) and the Donors and Foundations Network in Europe (DAFNE), 2020, available at https://ecnl.org/wp-content/uploads/2020/05/EU-Law-Handbook.pdf.

[212] European Civic Forum, 'What is Civic Space?', available at http://civicspacewatch.eu/what-is-civic-space/.

Thus, the health of civic space should be assessed according to what happens to civil society organisations, civic mobilisation, activists and journalists, notably at times of crisis.

What has happened to those 'resisting' or pointing to (un)intentional gaps left in the protection of human rights or in upholding humanitarian obligations? The 2018 FRA report has shown the tight relationship between the general situation of fundamental rights in the Union and those who defend them. In the EU, civil society is experiencing challenges, namely: 1. worsening of the regulatory environment; 2. reduced participation in policymaking processes; 3. limited access to funding; 4.:intimidation, harassment, physical attacks.

Figure 3: Civic space within a 'civil society ecosystem' approach



Source: Authors, 2020.

The 'civil society ecosystem' approach highlights the interdependence between different societal forces, such as public attitudes, funding, rights and justice (see Figure 3 above). The current negative legal and political environment is likely to affect majority perceptions of civil society, to introduce rules or practices that limit state and external funding or discourage individuals from private donations. Lack of funding can further limit opportunities for collaboration with EU-wide networks, regional and international organisations. Possibilities to participate in and influence policymaking at the national and EU levels are reduced as well as opportunities to report findings to the to be set up EU rule of law mechanism[213] and other regional and international human rights or other standard-setting bodies.

[213] European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, (2015/2254(INL)), Brussels, 2016; European

Also, the ecosystem approach takes into account the situation of individuals who work or volunteer for civil society organisations or join citizen mobilisations, whether they are motivated or discouraged by legal, societal, political or financial conditions.

The European Commission in its First Annual Rule of Law report similarly has acknowledged the importance of 'enabling ecosystem' to uphold the rule of law and ensure democratic accountability:

> The rule of law requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society. [...] Investigative journalists, independent media and the scrutiny of civil society are vital to keeping decision-makers accountable.[214]

In the First Annual Rule of Law report, civil society actors are seen as playing a role of 'checks and balances' in a democratic society. The report also has highlighted numerous attacks on critical civil society in the countries under Article 7 procedure, and others, that are seen as 'Rule of Law' compliant.

Governments that are circumventing the rule of law do not target all types of civil society. They squeeze out and challenge **critical civil society actors** - those who adopt an adversarial posture, or who defend various minorities.[215] Regimes in such countries see watchdog NGOs and other human rights defenders as inconvenient, in the same vein as censorious academics, investigative journalists or whistleblowers (see Figure 4 below shows overlaps between civic space and critical space). The limitations imposed on space for critical expression, from regulatory changes to campaigns of intimidation, lead to winnowing of civil society to pure service providers. Speech or actions perceived by the government as negative or overly political can lead to loss of tax-exempt status, charity status, state funding or access to state-run facilities, that is, where groups or individuals assist persons with disabilities, prisoners or refugees and asylum seekers.[216]

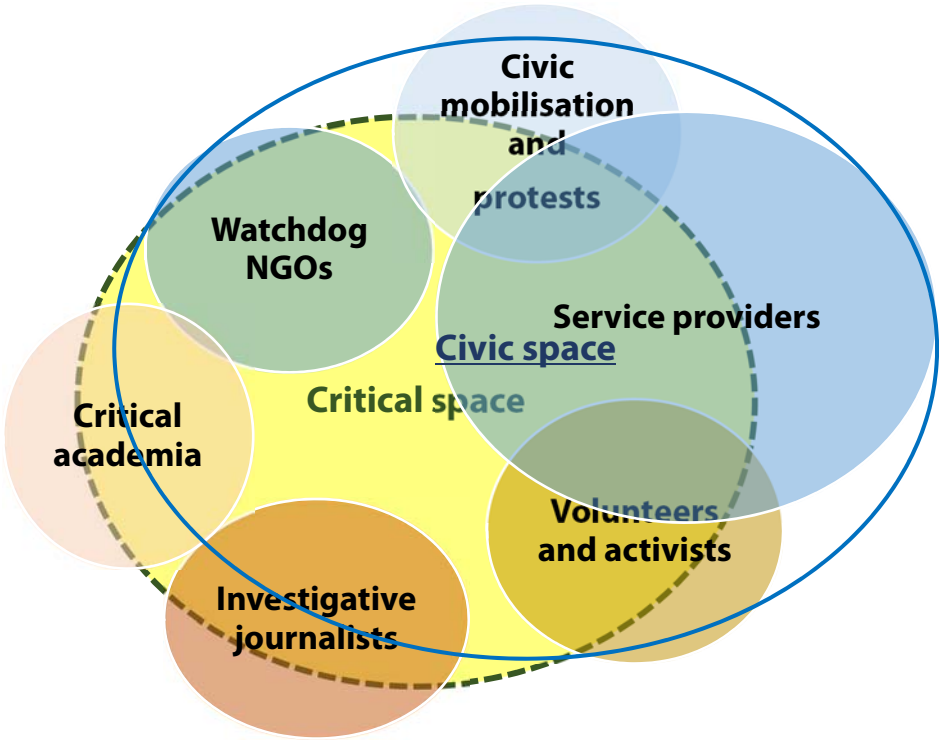
Parliament, Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)), Brussels, 2018.

[214] European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

[215] Carrera S., E. Guild, L. Vosyliūtė and P. Bard, 'Towards a Comprehensive EU Protection System for Minorities'. Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, August 2017, available at https://www.ceps.eu/publications/towards-comprehensive-eu-protection-system-minorities.

[216] FRA 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit.

Figure 4: Overlaps between civic space and critical space



Source: Authors, 2020.

Attacks on civic civil society space thus need to be taken particularly seriously. They demonstrate that some Member States and certain areas of the EU law are falling short of fundamental rights, the rule of law and democratic accountability standards. As Małgorzata Szuleka has aptly summarised, watchdog NGOs usually are 'the first victims' of regimes backsliding vis-à-vis the rule of law because such civic organisations are seen as 'the last guardians' of open and liberal societies. [217] Authoritarian governments fear civil society since it may still be capable of mobilising citizens and changing one-sided narratives.

The worsening legislative and political environment takes a toll not only on competing ideas in a pluralist democratic society but also **on individuals**. Volunteers and employees of NGOs are singled out and targeted for their opinions, advocacy causes or revelations about malfeasance by national or EU institutions and agencies. Civil society members across the EU are sharing testimony about being under surveillance, intimidated, arrested, frisked, sexually or physically assaulted, searched, or even

[217] Szuleka, 'First Victims or Last Guardians?', 2018, op. cit.

criminalised for the types of activity they have undertaken.[218] Policing humanitarian assistance to refugees and other migrants and various aggressive tactics have been well documented.[219]

The civil society organisations, citizens, academics and journalists challenging the constitutional abuses of power in Hungary and Poland have been subjected to various smear campaigns on institutional and individual levels.[220] The recent FRA[221] and UN[222] civil society reports show that the cost of EU failing to check these abuses may lead to the erosion of EU founding values in some Member States. This is also true for certain fields of the EU law, where policymaking in crisis mode has compromised founding values, particularly where migration and borders and anti-terrorism efforts are concerned. [223]

The dependence on official cooperation to fulfil a civil society agency's mission can also lead to insidious forms of **self-censorship**. For instance, in November 2016, when Amnesty International report on forced fingerprinting practices in EU hot spots came out, [224] another 70 NGOs supported the report. The Italian Ministry of Interior commented, during interviews, that none of the NGOs working with them in the hot spots had witnessed or knew about the forced fingerprinting practices. Indeed, various associations that had contracts with the government were very careful not to say anything that could be viewed as controversial.[225]

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[218] Fekete, L., F. Webber and A. Edmond-Pettitt, *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, London, 2017; Vigny, E., 'Calais: the police harassment of volunteers', Study of 1st November 2017 to 1st July 2018 on behalf of L'Auberge des Migrants, Utopia 56, Help Refugees, Refugee Info Bus, 2018, available at https://helprefugees.org/wp-content/uploads/2018/08/Police-Harrassment-of-Volunteers-in-Calais-1.pdf; Fekete, L., F. Webber and A. Edmond-Pettitt, *When witnesses won't be silenced: citizens' solidarity and criminalisation*, Institute of Race Relations, London, 2019; European Civic Forum, 'Activizenship 4', 2019, op. cit.

[219] Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliūtė, *Policing Humanitarianism: EU Policies Aagainst Human Smuggling and Their Impact on Civil Society,* Hart Publishing, London, January 2019, available at https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/.; Allsopp, J. C., L. Vosyliūtė, and S. Brenda Smialowski, 'Picking 'low-hanging fruit' while the orchard burns: The costs of policing humanitarian actors in Italy and Greece as a strategy to prevent migrant smuggling', *European Journal on Criminal Policy and Research, Special Issue* (forthcoming in 2020); Vosyliūtė, L., 'How could strategic litigation prevent policing of humanitarianism?', ReSOMA Policy Options Brief, December 2019, available at http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/POB%20Strategic%20Litigation.pdf; Vosyliūtė, L. and C. Conte, ReSOMA Final Synthetic Report: Crackdown on NGOs assisting refugees and other migrants, June 2019. http://www.resoma.eu/node/194. Conte, C., and S. Binder, 'Strategic Litigation: The role of EU and international law in criminalising humanitarianism', ReSOMA Discussion Brief, July 2019, available at http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Discussion%20Policy%20Briefs%20-%20Strategic%20Litigation.pdf.

[220] Bárd, P., J. Bayer, N. Chun Luk and L. Vosyliūtė, 'SLAPP in the EU context', ad hoc study requested by DG JUSTICE within the frame of EU-CITZEN project, 29 May 2020, available at https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf?fbclid=IwAR1q6y8CgvplX84nQO3q7oUu_U2gT11NKr6GvPPrghFzn_SJoi5Es02umeQ. Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.; Szuleka, M., 'First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland', CEPS Paper on Liberty and Security in Europe No. 2018-06, CEPS, Brussels, 24 April 2018, available at https://www.ceps.eu/publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies.

[221] FRA 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit.

[222] UN OHCHR , Report, 'The case for a human rights approach to the rule of law in the European Union', Brussels, May 2020, available at https://europe.ohchr.org/EN/Stories/Documents/Publication.pdf.

[223] Carrera, S. , 'An appraisal of the European Commission of crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?' CEPS Paperbacks, 21 January 2019, available at https://www.ceps.eu/publications/appraisal-european-commission-crisis.

[224] Amnesty International, 'Hotspot Italy, How EU's flagship approach leads to violations of refugee and migrant rights', November 2016, available at https://www.amnesty.org/en/documents/eur30/5004/2016/en/.

[225] Carrera, Mitsilegas, Allsopp and Vosyliūtė, *Policing Humanitarianism,* 2019, op. cit.

Similarly, focus group participants explained how in Poland, associations established by the government, government-organised NGOs, or GONGs, are generously funded, while organisations more likely to antagonise the ruling party are left to 'starve'.[226] Thus, within the realm of civic space, some governments shielding themselves from criticism have created a binary of 'good' versus 'bad' NGOs. GONGs or even pure service providers are played against watchdog NGOs and human rights defenders at the local, national and even EU level.

On the one hand, even EU funding can be and is used as a tool of control by some governments. For instance, Asylum, Migration and Integration Fund (AMIF) money gets channelled through Ministries of Interior.[227] On the other hand, **civil society lacks funding for critical and watchdog activities**, such as strategic litigation or advocacy.[228] Currently, these vital activities to uphold and promote EU fundamental rights are funded by various private foundations, like the one set up by the Hungarian-American philanthropist George Soros, rather than by the EU itself. This has led to a 'Stop Soros' campaign in Hungary, which was echoed in other EU Member States.

The European Commission proposed a budget of EUR 641.7 million for the new Right and Values programme in light of upcoming 2020 – 2027 multiannual financial framework:[229]

> The new funding programme 'Rights and Values' will aim at protecting and promoting rights and values as enshrined in the EU Treaties and in the EU Charter of Fundamental Rights, including by supporting civil society organisations, in order to sustain open, democratic and inclusive societies.

The Rights and Values programme, together with the Justice programme, will be part of a new Justice, Rights and Values Fund of the EU budget 'that will also help to empower people by protecting and promoting rights and values and by further developing an EU area of justice' (in total, EUR 841 million foreseen for this envelope).[230] This programme is of the key importance for watchdog NGOs and various human rights defenders to conduct their activities inside the EU.

The European Parliament has further proposed to triple the funding to the 'Rights and Values' programme and to allocate a budget of EUR 1.83 billion. The MEPs claimed that 'the EU should do more to promote democracy, rule of law and fundamental rights across the EU, including through support to civil society organisations'. [231]The Commission refused to increase the funding. Besides, on 27 May 2020 the European Commission proposed to further cut the Rights and Values Programme's budget by more than 20%, in light of COVID-19 pandemic.[232]

More than 300 European and grass-roots organisations signed an open letter addressed to the President of the European Commission, Ursula von der Leyen, relevant Commissioners and other EU institutions calling to reconsider this decision, since civil society has been playing an important role in

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[226] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[227] Szuleka, 'First Victims or Last Guardians?', 2018, op. cit.

[228] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[229] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Rights and Values programme (2021 to 2027), COM/2018/383, Brussels, 30 May 2018, p. 4.

[230] Ibid.

[231] European Parliament, 'Promoting rule of law and fundamental rights in the EU', press release, 17 January 2019, available at https://www.europarl.europa.eu/news/en/press-room/20190109IPR23024/promoting-rule-of-law-and-fundamental-rights-in-the-eu.

[232] European Commission, 'The EU budget powering the recovery plan for Europe', COM/2020/442 final, Brussels, 27 May 2020.

addressing the pandemic and upholding rights.[233] The civil society representatives expressed their concerns:

> We are afraid that cutting the funds for the civil society will only aggravate the social and political problems that the EU will be facing in the coming years. It will also send a wrong signal about the EU's commitment to its values and citizens' rights.[234]

Eventually, the European Commission has changed its position and advised the European Council not to cut further the EU budget for programmes aimed at uphold rights and values.[235] The EU leaders agreed that the financial envelope for all the Justice, Rights and Values Fund will remain unchanged and a budget of EUR 841 million is allocated.[236] Nevertheless, **EU funding for critical civil society activities to uphold EU values remains still significantly lower**, than what the European Parliament has been proposing in 2019.[237] The European Parliament in a subsequent resolution has deplored that 'European Council cancelled most of the top-ups'.[238]

Besides lack of funding, some of the interviewees were concerned about the design of the project calls under these programmes that prevent any sort of criticism. For instance, the European Commission often asked civil society actors to share 'best practices', without analysing the issues or lessons learned from improper practices.

The case studies presented in this Chapter from **Greece** (as a country not under Article 7 of the TEU procedure) **Hungary and Poland** (as countries under Article 7 of the TEU procedure) are not meant to be exhaustive but rather indicative of how the civil society ecosystem has been impaired by smear campaigns, changing regulatory environments, disproportionate or unjustified use of force against protesters, threats and attacks, funding pressures and the misuse of criminal law instruments against civil society actors. Such assaults are levelled against EU, regional and international standards (see Chapter 2). The case studies pay particular attention to civil society actors who bolster democratic accountability, uphold fundamental rights and monitor rule of law violations in the areas where the EU has gained considerable competence. Such areas include migration and borders, the Common European Asylum System, inclusion policies directed toward Roma communities, non-discrimination, rights of mobile EU citizens and environmental protection.

The **misuse of EU directives and operations**, in the sphere of criminal law, in particular, is another area of concern. For crimes of facilitation of irregular migration, for the fight against money laundering and organised crime, and various terrorism-related provisions, EU legal instruments are supposed to set minimum standards across the Union and to be implemented in line with fundamental rights and other EU principles. Nevertheless, as examples below indicate, civil society actors are increasingly being investigated by the targeted application of vague legal provisions that fall short of guidelines for better

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233 European Civic Forum, 'Fundamental Rights: put our money where our mouth is', Open Letter to EU and national leaders about the next EU Budget, 8 June 2020, available at https://civic-forum.eu/publications/open-letter/letter-to-eu-and-national-leaders.

234 Ibid.

235 European Civic Forum, Batrory Foundation et al., 'Follow-up Letter on European Rights and Values Programme', 6 July 2020, available at https://civic-forum.eu/wp-content/uploads/2020/07/Follow-up-letter-Rights-and-Values-Programme.pdf.

236 European Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20, Brussels, 21 July 2020.

237 Sapala, M., 'Cohesion funds, values and economic and monetary union in the 2021-2027 MFF: European Parliament position on Heading 2 – Cohesion and values, EPRS Briefing MFF 2021 – 2027, European Parliamentary Research Service, PE 633.148- May 2019.

238 European Parliament resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 (2020/2732(RSP)), para. 13.

legislation and better regulation. So far, the EU seems to have struggled to find an effective remedy that would preserve protections for watchdog NGOs and other human rights defenders while at the same time satisfying the concerns and sensitivities of some EU Member States.

As witnessed in the past five years, even the 'Guardian of the Treaties', the European Commission, has acted in crisis mode at times in response to the explosion of refugee populations, as some of the speedy solutions by the Commission and national governments have created injustices for most marginalised communities and those who are trying to assist them.[239] In the words of European Civic Forum Director Alexandrina Najmowicz, 'when injustice becomes law, resistance becomes duty'.[240] Thus, this Chapter aims to take into account **migratory, rule of law and health crises**, the way that attempts to cope with them have infringed on the freedom of association, freedom of assembly and freedom of speech of critical civil society actors, especially activists, humanitarians and other frontline human rights defenders.

3.1. Freedom of association

3.1.1. Crises and changing regulatory environment

The second FRA consultation with civil society has shown the worrying trends:

> Among respondents from civil society organisations working at national and local level, almost half say that the situation in their country 'deteriorated' or 'strongly deteriorated'. The rest of such respondents believe that the situation 'stayed the same'. [241]

Moreover, some of these challenges are related to the legislative framework, 'in particular from provisions on freedom of expression and assembly, as well as data protection regulations, and legislation on consultation/participation' has been mentioned as raising 'unintended (side-) effects'.[242]

Since 2017, so-called NGO transparency laws have been passed **in Greece, Hungary and Romania.** Recently, the idea to pass such law has been discussed in **Poland**, where, as reported by the media, the Law and Justice–led government had already created administrative structures to oversee civil society.[243] Greece, Hungary and Poland have been selected for a more in-depth analysis, as the civic space ecosystem is under multiple pressures due to the changing legislative framework in these countries. This Subsection thus does not attempt to provide an EU-wide overview of ongoing legislative changes but a more in-depth look at how these proposals came about and how they are affecting civic space in these particular countries.

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239 Carrera, S., 'An Appraisal of the European Commission of Crisis', 2019, op. cit.

240 *European Civic Forum, 'Activizenship* 4', 2019, op. cit.

241 European Union Agency for Fundamental Rights (FRA), 'Civic space – experiences of organisations in 2019: Second Consultation', Luxembourg, Publication Office of the European Union, July 2020. Available at https://fra.europa.eu/en/publication/2020/civic-space-experiencesp.1.

242 Ibid.

243 'Polish government considers law forcing NGOs to declare foreign funding', *Reuters*, 11 May 2020, available at https://www.reuters.com/article/poland-ngos-idUSL8N2CT53C.

a. Greece – regulatory change targeting NGOs assisting refugees and other migrants

The new NGO 'transparency' registry' in Greece follows on the initial efforts to rein them in, which started shortly after the peak of arrivals of asylum seekers in summer 2015 (in response to the escalation of crises in Syria and elsewhere). In January 2016 a ministerial decision was proposed by the Greek government. It obliged all NGOs responding to a humanitarian 'crisis' and assisting asylum seekers to register with local authorities. The EU FRA recalls that already by that time, a legislative reform had 'put all NGOs in Lesvos directly under state control and refused to recognise the operations of independent and unregistered NGOs, effectively criminalising them.'[244]

The legislative reform came about even though 'several ministries [already] have lists with NGOs'.[245] Empirical research conducted between 2016 and 2018 has confirmed that local authorities were registering both NGOs (legal persons) and volunteers for the purpose of accessing refugees and asylum seekers who are *de facto* detained in hotspots. Interviews with the EU and national law enforcement and border authorities conducted in 2017 revealed that Frontex, the EU's Border and Coast Guard Agency, had their lists of NGOs operating in Lesvos.[246] Research has shown that the UNHCR regularly held coordination meetings to avoid overlap and complications.[247] Thus, local and EU authorities as well as UN agencies had a close overview of who was doing what when it came to refugee/migrant assistance. Some civil society actors also said that their activities had already been subject to close monitoring and even policing.[248]

A new NGO law targeted those working for the international protection and social inclusion of migrants. It came about towards the end of 2019, at the peak of tensions between the local population, namely, people living on five Greek hot-spot islands and the Greek government over newly established pre-removal detention facilities and an increase in migrant flows.[249]

In November 2019, the Greek Parliament passed a new law that has enabled the Ministry of Migration and Asylum to establish a special 'transparency' registry for NGOs working in the field of international protection, migration and social inclusion.[250] The new law envisages that both **Greek and foreign-based NGOs** and also **individuals working or volunteering for these NGOs need to submit their data** within a new **'NGO transparency registry'**. The law has come into force; nevertheless, the joint ministerial decree establishing the registry was passed only in April 2020.[251]

The Greek authorities have included some vague justifications for the law:

> Their registration and certification is a necessary requirement not only for their activities within the Greek territory but also for their cooperation with the Greek authorities […] NGOs whose registration is pending or that have not registered are required to do so in a 3-month deadline from the publication of this article. […] With the decision of the minister of Migration and Asylum, there are defined the processes and required documents and certification at the

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244 FRA, 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit., p. 22.

245 'Greece's refugee, migrant NGO's face ban unless registered', *The National Herald,* 27 November 2019, available at https://www.thenationalherald.com/271063/greeces-refugee-migrant-ngos-face-ban-unless-registered/.

246 Carrera, Mitsilegas, Allsopp and Vosyliūtė, *Policing Humanitarianism,* 2019, op. cit.

247 Ibid.

248 Ibid.

249 European Union Agency for Fundamental Rights (FRA), Migration: Key fundamental rights concerns - Quarterly bulletin 1 – 2020, 18 February 2020, https://fra.europa.eu/en/publication/2020/migration-key-fundamental-rights-concerns-quarterly-bulletin-1-2020.

250 Greek Law No. 4636/19 of 1 November 2019.

251 Greek Joint Ministerial Decision 3063/2020 of 14 April 2020.

> registry, but also the prerequisites of removal from the registry and every other necessary detail of its function.[252]

In February 2020, Greek law introduced many additional requirements to register.[253] In April 2020, Join Ministerial Decree created registries, one for legal 'persons' (NGOs, associations) and another for individuals working with them (staff and volunteers).[254] This Joint ministerial decree allowed NGOs only three months to register their members, employees and partners who are active in Greece. This registry excluded non-registered and newly established organisations NGOs from applying since registration certificates were needed, also to prove two years of activity. This requirement was seen as particularly 'burdensome' by civil society since it required the following:

> […] annual and detailed project reports of activities of the last two years which, as a minimum, must refer to the operation of facilities type/ title/ number of beneficiaries/ cost of operation, services provided in accommodation facilities, actions undertaken by the entity in the previous two years, number of activities implemented per category of action/ titles of these activities, beneficiaries, cooperation with agencies, current interventions.[255]

The Joint Decree also created a civil society oversight structure under the Ministry of Asylum and Migration - the 'Special Secretary of Coordination of the Involved Institutions' with a wide margin of discretion, as this authority was supposed to verify submitted applications and had the power to reject them.

Civil society argued that this procedure lacked the principle of 'foreseeability' under the ECtHR jurisprudence on Article 11:

> [*In case*] *Hasan and Chausch v. Bulgaria*[256] para. 84, where the Court found that '(i)n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise'.[257]

Civil society organisations fear that this registry constitutes unjustified repression of their freedom of association and that any critical NGO can be easily de-registered and thus precluded from carrying out its watchdog function in Greece.[258] Also, according to the Council of Europe NGO law experts, such requirements seem onerous, complex, time-consuming and costly for NGOs. Thus, the new laws lack

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252 Greek Law No. 4636/19 of 1 November 2019.

253 Greek Law No. 4662/2020 of 7 February 2020.

254 Greek Joint Ministerial Decision 3063/2020 of 14 April 2020; Greek Law 4686/2020 of 12 May 2020.

255 HIAS Greece, 'Some thoughts on the new Joint Ministerial Decision, regulating the registration of migration-related NGOs in Greece', 8 May 2020.

256 ECtHR, Case of *Hasan and Chaush v. Bulgaria*, Appl. no. 30985/96, judgment of 26 October 2000.

257 HIAS Greece, 'Some thoughts on the new Joint Ministerial Decision', 2020, op. cit.

258 Ibid. Also, Refugee Support Aegean (RSA) Report, 'Risk of repression: New rules on civil society supporting refugees and migrants in Greece', May 2020, available at https://rsaegean.org/wp-content/uploads/2020/05/RSA_Comments_NGO_Registry.pdf.

legitimacy and proportionality in light of the European Convention on Human Rights and are likely to create chilling effects on civic space.[259]

Civil society has expressed grave concerns regarding the non-compliance of this law with Greek constitutional principles, as well as international and regional freedom of association (not to mention EU fundamental rights), standards.[260] In line with Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on Human Rights, as well as Article 12 of EU Charter of Fundamental Rights, the Greek government would need to prove that measures are not only legitimate but also that they are proportionate and necessary within a democratic society, and that less intrusive means, such as merely investigating cases where there is suspicion of misconduct, were not possible.

To comply with the EU General Data Protection Regulation, the authorities would need to include a limitation on purpose, and define who will access such a registry and under which circumstances since the stated rationale of 'more effective supervision' is not sufficiently concrete or precise as to create legal certainty. According to civil society representatives, many issues have not yet been clarified, for instance, who may access such database and for which purposes, and why the Ministry of Migration and Asylum needs the personal data of employees not on a case-by-case basis but as a matter of procedure.

The latest developments, according to the interviewees, are that '18 NGOs operating in camps have registered and 22 didn't manage to register yet. Apparently as of Monday [*28 June 2020*], these NGOs will not be able to enter the camps so their essential services (child protection, medical care etc) will be suspended.'[261] Besides, there is information that the Ministry of Migration and Asylum is preparing a new draft law for an NGO registry that will be voted on in Parliament at the end of July.[262].'

Deliberation on this law was accompanied by smear campaigns against NGOs working with migrants, alluding their complicity in money laundering and thus justifying the need for tighter control (see more on narrative in the subsection 2.1.2). In the wake of the COVID pandemic, legislators have ventured further to restrict NGOs' operations in the migrant camps as well as freedom of assembly.[263] This led to cases of disciplining several organisations for non-compliance with COVID-19 restrictions, including migrants' self-organised groups. For instance, the migrant-led organisation Moria Corona Awareness was sued over a Facebook post.[264] (see Box 4 in Section 3.3 for more detail).

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[259] Ferstman, C. (on behalf of the CoE Expert Council on NGO Law of the Conference of INGOs of the Council of Europe), 'Opinion on the compatibility of recent and planned amendments to the Greek legislation on NGO registration with European standards', the CoE Expert Council on NGO Law CONF/EXP(2020)4, 2 July 2020, available at https://rm.coe.int/expert-council-conf-exp-2020-4-opinion-ngo-registration-greece/16809ee91d.

[260] HIAS Greece, 'Some thoughts on the new Joint Ministerial Decision', 2020, op. cit.; Refugee Support Aegean (RSA) Report, 'Risk of repression', 2020, op. cit.

[261] Unnamed NGO operating in Greece, E-mail correspondence with authors on Greek NGO law, 25 June 2020.

[262] Greek Joint Ministerial Decision 10616/2020 has been published on 10 September 2020. It adds further specifications of operations concerning the 'Register of Greek and Foreign NGOs' and the 'Register of Members of NGOs', which are active in matters of international protection, immigration and social integration within the territory of Greece.

[263] Karavokyris, G., The coronavirus crisis-law in Greece: A (constitutional) matter of life and death, VerfBlog, 2020 April 14, available at https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/.

[264] 'NGO sued over Lesvos post', *Kathimerini*, 25 May 2020, available at http://www.ekathimerini.com/253027/article/ekathimerini/news/ngo-sued-over-lesvos-post.

b. Hungary – Lex NGO judgment, Bill No. T/333 and COVID-19 emergency decree

The Lex NGO passed in 2017 was not unprecedented, yet it was the most aggressive attack on civil society in Hungary, setting off alarms in the rest of the EU. The Hungarian authorities have introduced the Lex NGO under the pretext of advancing 'transparency of associations'.[265] However, the CJEU in its recent ruling C-78/18 declared that Lex NGO imposed 'discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations.'[266]

This CJEU's judgment in the Lex NGO case (C-78/18) was celebrated by civil society across Europe. The Observatory for the Protection of Human Rights Defenders (FIDH-OMCT) 'welcomes this decision and hopes it will put an end to the Hungarian government's constant attempts to delegitimise civil society organisations and impede their work.'[267]

Nevertheless, some academics were more cautious about the likelihood of Hungarian authorities complying with the CJEU ruling.[268] They called on the Commission to 'stand ready to promptly return to the ECJ to sanction non-compliance.'[269] They were also careful about the potential misuse of Court's 'focus on *indiscriminate nature of the law*' (implying that should this law target not only foreign-funded NGOs but all NGOs), there may be fewer grounds to find a violation of EU law, since authorities can misuse the generic 'transparency' laws by applying them in a targeted manner, for instance, against 'those willing to challenge the weakening constraints on executive power and rule of law backsliding'.[270]

Besides, the 'Stop the Soros' package laws included targeted revisions of the Hungarian Criminal Code. On 29 May 2018, the Hungarian government presented a bill amending certain laws relating to measures to combat illegal immigration, known as Bill No. T/333. It aimed to portray information provision and legal aid to asylum seekers as criminal 'facilitation of illegal migration' within draft Article 353A of the Hungarian Criminal Code. The European Commission brought an action before the CJEU in November 2019, arguing that such provision violates asylum *acquis,* namely, the Asylum Procedures Directive (2013/32/EU) and the Reception Conditions Directive (2013/33/EU):

> […] by adopting measures which criminalise organising activity carried out in order to enable asylum proceedings to be brought in respect of persons who do not meet the criteria established in national asylum law, and which prescribe the adoption of restrictive measures with regard to persons accused or convicted of such an offence, Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32/EU, and under Article 10(4) of Directive 2013/33/EU.[271]

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[265] Bárd, P. 'The Open Society and Its Enemies: An attack against CEU, academic freedom and the rule of law.' CEPS Policy Insights No. 2017/14, April 2017, available at https://www.ceps.eu/ceps-publications/open-society-and-its-enemies-attack-against-ceu-academic-freedom-and-rule-law/.

[266] CJEU, Case C-78/18, *European Commission v Hungary (Transparency of associations*), judgment of 18 June 2020, ECLI:EU:C:2020:476, para.1.

[267] The World Organisation Against Torture (OMCT),'Hungary: EU top court rules that Hungary's anti-NGO law unduly restricts fundamental rights, 18 June 2020 / Urgent Interventions, Human Rights Defenders, available at https://www.omct.org/human-rights-defenders/urgent-interventions/hungary/2020/06/d25904/.

[268] Bárd, Grogan and Pech, 'Defending the Open Society against its Enemies', 2020, op. cit.

[269] Ibid, *emphasis original.*

[270] Ibid, *emphasis original.*

[271] CJEU, Case C-821/19, European Commission v Hungary, pending. Commission's action brought on 8 November 2019, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=222334&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=18499068.

Hungarian authorities have resorted to the EU Facilitation Directive (2002/90/EC), when justifying the criminalisation of civil society activities in the area of migration and asylum, after 14 civil society organisations submitted to the Hungarian Constitutional Court. The Hungarian Constitutional Court (in its decision *No. 3/2019.(III. 7.) AB)* argued, that (paras 59 – 60, *emphasis added*):

> [59] The effect of the [Facilitation] Directive covers, in principle, **the obligation of establishing sanctions applicable to the wilful facilitation of unauthorised entry or transit manifested under the umbrella of humanitarian action** [Article 1 (2)], except when the Member State decided on applying its national laws and practice in the cases when this conduct is aimed at humanitarian assistance. [60] … It is sufficient to state that the **Directive obliges** the Member States to impose sanctions on the facilitation of unauthorised entry, transit and stay in the scope specified therein, however it also **allows the Member States to take further measures**.'[272]

The fact that legitimate civil society activities 'under the umbrella of humanitarian action' can currently be criminalised under EU law is a serious issue. The EU-level cooperation in criminal matters, including in the area of migrant smuggling, is based on 'mutual trust' and 'mutual recognition'. Thus, it is not only a breach of asylum *acquis*, as Commission is currently arguing, but a wider criminal justice and rule of law issue.

The OSCE ODIHR and Venice Commission went further and assessed Bill T/333 in light of freedom of association under Article 11 of the European Convention for Human Rights (ECHR):

> […] in principle, a legal provision concerning facilitating irregular migration, in light of the case-law of the European Court of Human Rights, may pursue the legitimate aim of prevention of disorder or crime under the second paragraph of Article 11[ECHR], they [OSCE ODIHR and Venice Commission] stress that the legitimate aims must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from *applying* for asylum. The reasoning by the Hungarian authorities and the surrounding rhetoric of the criminal provision under examination raise serious doubts about the legitimacy of the aim behind the draft provision.[273]

The EU law has thus been used to create an environment that is not conducive to the activities of watchdog NGOs and human rights defenders inside the EU. On the one hand, civil society actors are expected to uphold fundamental rights, to ensure democratic accountability of governments' compliance with EU asylum *acquis,* Schengen Borders Code, and EUCFR, but on the other hand, EU laws still allow governments to criminalise them for precisely the same activity. The OSCE ODIHR has called out dangers for human rights defenders in similar situations, and that '[any]legal provisions that directly or indirectly lead to the criminalisation of such [human rights] activities should be immediately amended or repealed'.[274]

Recent COVID-19 related emergency law in Hungary also threatens the operations of independent civil society. The Hungarian emergency law became a subject of debate at the EU level. In the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), a debate with EC Vice President Vera Jourová and the Croatian Presidency of the EU 'underlined that the emergency measures taken by the Hungarian Government to fight the COVID-19 pandemic, including the

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Hungarian Constitutional Court, Decision 3/2019. (III. 7.) AB, Budapest, 25 February 2019, Constitutional Court file No.: IV/1564/2018. Published in the Official Gazette (Magyar Közlöny) MK 2019/36, available at https://hunconcourt.hu/uploads/sites/3/2019/05/3_2019_en_final.pdf.

[273] Venice Commission and OSCE ODIHR, 'Hungary: Joint Opinion on the provisions of the so-called "Stop Soros" draft legislative package which directly affect NGOs', 2018, op. cit., para. 80.

[274] OSCE ODIHR, Guidelines on the Protection of Human Rights Defenders, 10 June 2014, para. 24.

declaration of an unlimited state of emergency, are not in line with EU rules and warned of the increasing risk to democracy.'[275] During the LIBE debate MEPs implored the Commission 'to make full use of all available EU tools and sanctions to address this serious and persistent breach, including budgetary ones', and urged the Council 'to put back on its agenda the ongoing Article 7 procedure against Hungary.'[276]

The Hungarian government appeared to react to the pressure from the European Union institutions and to terminate the emergency decree. However, civil society space remains at risk. The Hungarian Helsinki Committee, raised concerns regarding the law terminating emergency measures as it seemed to dismantle further the rule of law and fundamental rights safeguards:[277]

> Shortly before midnight on 26 May, Hungarian Deputy Prime Minister Zsolt Semjén submitted to parliament the Bill on Terminating the State of Danger (T/10747) and the Bill on Transitional Provisions related to the Termination of the State of Danger (T/10748). The government hails the Bills as allaying the fears of those who had warned about the dangers of government rule-by-decree powers. However, the proposals are unsuitable to dispel these fears. On the contrary: they shed a harsh light on the true nature of the regime.

Civil society monitoring situation of human rights defenders reacted sharply to this new threat. For instance, the World Organisation Against Torture called for the rejection of a bill that 'lacks essential safeguards for fundamental human rights and undermines the most essential tenets of democracy.'[278]

The Commission decided to split the annual reports into three issues - rule of law, democratic participation and fundamental rights. Such an approach lacks the recognition that the rule of law, fundamental rights and democracy are closely interrelated, reinforcing (or weakening) each other and thus cannot be treated as separate issues. It is welcomed, however, that the situation of civil society in different Member States is discussed among 'other checks and balances' (see Section 2.4. of the Commission's report).[279] The in-depth assessment of challenges facing civil society actors is subject to a separate report on Democratic Participation in the EU. Nevertheless, only a comprehensive assessment would show the real situation and cumulative effects of various breaches in each of EU Member States. The civic space, in particular, watchdog NGOs and therefore human rights defenders, should constitute one of the key criteria in the Annual Democracy, Rule of Law and Fundamental Rights assessment by the independent expert body.[280]

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[275] European Parliament, Hungary and COVID-19: Debate on fundamental EU values under threat, 13 May 2020, Briefing, Newsletter - 13-16 May 2020 - Brussels plenary session available at https://www.europarl.europa.eu/news/en/agenda/briefing/2020-05-13/3/hungary-and-covid-19-debate-on-fundamental-eu-values-under-threat.

[276] Ibid.

[277] Amnesty International Hungary, Hungarian Civil Liberties Union and Hungarian Helsinki Committee, 'Never - Ending Story? Rapid analysis of the Bills T/10747 and T/10748', 27 May 2020, available at https://www.helsinki.hu/wp-content/uploads/NeverEnding_Story_HHC-AI-HCLU_rapid_reaction_27052020.pdf

[278] World Organisation Against Torture (OMCT), 'Hungary: COVID-19 is no pretext to quarantine the rule of law, Urgent Interventions, Press Releases, 30 March 2020 / OMCT, available at https://www.omct.org/press-releases/urgent-interventions/hungary/2020/03/d25763/.

[279] European Commission, '2020 Rule of Law Report:The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

[280] Bárd, Carrera, Guild, and Kochenov, 'An EU mechanism on democracy, the rule of law and fundamental rights', CEPS Paper in Liberty and Security in Europe, 2016.

The Venice Commission has 'consistently underlined that State security and public safety can only be effectively guaranteed in a democracy which fully respects the rule of law.'[281] It issued a reminder that *the Rule of Law Checklist* to be consulted during emergencies, among other issues, covers fair trial guarantees, issues related to corruption and collection of data and surveillance.[282] Regrettably, narrow interpretation of the rule of law sometimes tends to leave out the freedom of assembly, association and expression. The recent UN report 'The Case for a Human Rights Approach to the Rule of Law in the European Union' demonstrates the need to restore fundamental rights and civic space to centre stage in the debate on the rule of law.[283]

c. Poland – the situation with rule of law and 'civic space'

According to international institutions, in Poland NGO funding became subject to political oversight, meaning a tighter grip over watchdog organisations and those inclined to criticise official policies.[284] The National Freedom Institute - Center for the Development of Civil Society, established in 2017, to distribute public funds to NGOs, was quickly brought under the authority of the prime minister.[285] Poland's Commissioner for Human Rights, warned back in 2017 that changes in the regulatory environment have wider ramifications: 'If the government doesn't like some of the NGOs, people are going to think twice about supporting them', he said. 'Each money transfer is traceable, after all.'[286]

This new authority was later scrutinised by the UN Human Rights Office, the Polish Ombudsman and civil society representatives.[287] Such oversight mechanisms fall short of international and regional standards that call for state 'non-interference' in civil society funding.[288] Poland's Commissioner for Human Rights evidenced that the government violated the impartiality principle when facilitating civil society funding via newly established authority:

> […] certain civil society organizations that were not pro-Government would have trouble getting funding, and were already finding it increasingly difficult to express their opinions in public, as they are often unable to adequately access official media.[289]

Civil society representatives defined this authority 'as the main instrument to silence individuals or entities that do not agree with the Government'.[290] Also, in many countries, a less intrusive alternative is civil society self-regulation and a civil society partnership model in designing and disbursing EU funds.

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[281] CoE Venice Commission, 'Emergency Powers - What Standards?' CoE Directorate General on Human Rights and Rule of Law, 14 April 2020, available at https://www.coe.int/en/web/human-rights-rule-of-law/venice-commission-covid19.

[282] CoE Venice Commission, Rule of Law Checklist, CDL-AD(2016)007-e, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), available at https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e.

[283] UN OHCHR , 'The case for a human rights approach to the rule of law in the European Union', 2020, op. cit.

[284] UN OHCHR 'Poland: UN Human Rights Office Troubled by Shrinking Civic Space, Growing Extremist Rhetoric', Brussels, 7 March 2018, available at https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=134&LangID=E.

[285] Ciobanu, C., and W. Kosc, 'Warsaw grabs purse strings of Polish NGOs,' *POLITICO*, 8 December 2017, available at https://www.politico.eu/article/pis-polish-ngos-fear-the-governments-embrace/..

[286] Ibid.

[287] UN OHCHR, 'Poland: UN Human Rights Office Troubled by Shrinking Civic Space', 2018, op. cit.

[288] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to 39th session of the UN Human Rights Council, A/HRC/23/39, 2013, op. cit.

[289] UN OHCHR, 'Poland: UN Human Rights Office Troubled by Shrinking Civic Space', 2018, op. cit.

[290] Ibid.

On 11 May 2020, in the aftermath of COVID-19 restrictions, the ruling Law and Justice party (in its Polish acronym, PiS) announced that it was considering a home-grown version of Hungary's Lex NGO. Poland's environment minister has announced publicly that such a law 'would oblige non-governmental organisations to declare any foreign sources of financing'.[291] Nevertheless, the Polish government does not seem willing to pursue this proposal further.[292] In this case, the very proposal constituted a smear campaign against the Polish NGOs. For instance, Ewa Kulik-Bielinska, director of the Batory Foundation in Poland, said that 'the aim was to portray NGOs as organisations that work in the interests of foreign intelligence or foreign capital, discrediting them in the eyes of the public'.[293]

Such state interferences (or attempts to do it) with the civil society funding in Poland resonates with the recent CJEU judgment in the Lex NGO case (Case C-78/18), where the Court was scrutinising the negative effects created by Hungarian authorities, such as creating a climate of 'general mistrust' and stigmatising certain NGOs.[294]

3.1.2. Smear campaigns, and intimidation of civil society actors

EU institutions are obliged by the Treaties to ensure good governance and sound legislation that provide for legal certainty for all citizens and associations to function freely, including critical civil society actors. Paradoxically, at times EU legislation has served not as an additional layer of protection but **as an additional means of policing and criminalisation**. The negative impacts of the EU Facilitators Package, that consists of the Facilitation Directive (2002/90/EC) 'defining the facilitation of unauthorised entry, transit and residence' and the accompanying Council Framework Decision (2002/946/JHA) 'on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence'. [295] have been analysed in-depth in a study requested by the EP's Petitions Committee, or (PETI).[296]

The EU Facilitation Directive (2002/90/EC) was designed to slash the facilitation of irregular arrivals of asylum seekers and other migrants and their irregular stay. However, in multiple ways it is falling short of the UN Migrant Smuggling Protocol, EU Fundamental Rights Charter and the EU 'good governance' and 'better legislation principles'.[297] For instance, while the UN Smuggling Protocol defines a crime of 'migrant smuggling' only when it is committed for 'financial or other material benefit', the EU Facilitation Directive created a vague provision of 'facilitation of entry' that criminalises 'any assistance' and **does not require proof of financial or other gain for facilitation of entry**.[298]

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[291] 'Polish government considers law forcing NGOs to declare foreign funding,' *Reuters*, 11 May 2020, op. cit.

[292] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[293] 'Polish government considers law forcing NGOs to declare foreign funding,' *Reuters*, 11 May 2020, op. cit.

[294] CJEU, Case C-78/18, European Commission v Hungary (Transparency of associations), judgment of 18 June 2020, para. 118, ECLI: EU:C:2020:476.

[295] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17–18; Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 1–3.

[296] Carrera, S., L. Vosyliūtė, J. Allsopp, G. Sánchez and S. Brenda Smialowski, 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update', Study for the EP Petitions Committee, January 2019, available at https://www.ceps.eu/publications/fit-purpose-facilitation-directive-and-criminalisation-humanitarian-assistance

[297] Vosyliūtė, 'How could strategic litigation prevent policing of humanitarianism?', 2019, op. cit.

[298] Carrera, Vosyliūtė, Allsopp, Sánchez and Brenda Smialowski, 'Fit for purpose?', 2019, op. cit.

The legal uncertainty created by the vague definition of crime enabled the investigation and prosecution of civil society actors and their family members who assist for charitable or altruistic purposes. These purposes were not intended to be criminalised by the drafters of the UN Migrant Smuggling Protocol, since it is not the aim of criminal justice to circumvent such activities. Nevertheless, the EU version of 'crimes of facilitation' has enabled a broad use of criminal measures to achieve greater migration management efficiency, but disregards the various chilling effects it has created for asylum seekers and other migrants and civil society actors assisting them.[299] ReSOMA research shows that at least 171 individuals have been brought under criminal prosecution/investigation on charges of 'facilitating or irregular entry and/or irregular stay' in the four years between 2015 and 2019.[300]

Migrant search and rescue (SAR) NGOs alone, in the two years between 2018 and 2020, experienced 40 cases of criminal charges, disciplining including administrative fines, de-flagging, seizure and confiscation of ships, or their crews otherwise were prevented from leaving or docking in the ports.[301] National provisions on 'espionage', 'conspiracy against the state' and 'threat to public policy and public security' have been instrumental in criminalising various legitimate activities carried out by civil society.[302]

The recent Council of Europe Expert Council on NGOs and the UN Special Rapporteur on Human Rights of Migrants reports have demonstrated how vague criminal definitions curtailed freedom of association.[303] The research highlights that some EU-level regulatory definitions, such as 'crimes of facilitation' under the Facilitation Directive (2002/90/EC) have been more closely linked to other aggravating or 'related crimes', such as 'participation in organised criminal group' or 'money laundering', or 'financing criminal activity'.[304]

For instance, 'participation in an organised criminal group' cannot be applied if the activity carried out by two or more people does not fall under the definition of a base crime.[305] This once again shows how important for the protection of civic space it is to have a clear criminal definition since by default civil

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[299] Vosyliūtė and Conte, 'Crackdown on NGOs assisting refugees and other migrants', 2019, op. cit.

[300] ReSOMA, 'The criminalisation solidarity in Europe', 2020, op. cit.; Allsopp, Vosyliūtė, and Brenda Smialowski, 'Picking "low-hanging fruit" while the orchard burns', 2020, op. cit.

[301] European Union Agency for Fundamental Rights, '2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them', 15 June 2020, available at available at https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities.

[302] Conte and Binder, 'Strategic Litigation', 2019, op. cit.

[303] UN Special Rapporteur on the human rights of migrants, Report on right to freedom of association of migrants and their defenders, A/HRC/44/42, 13 May 2020, available at https://undocs.org/en/A/HRC/44/42; Council of Europe (CoE), Expert Council on NGO Law, Guidelines on protecting NGO work in support of refugees and other migrants, prepared by the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, CONF/EXP(2020)3, May 2020, available at https://rm.coe.int/expert-council-conf-exp-2020-3-guidelines-on-protecting-ngo-work-in-su/16809e4a81.

[304] See for instance: Venice Commission and 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), Venice Commission Opinion No. 919 and 2018 OSCE/ODIHR Opinion No. NGOHUN/326/2018, Strasbourg, 25 June 2018, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e; Ferstman, 'Opinion on the compatibility of recent and planned amendments to the Greek legislation on NGO registration with European standards',the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, 2020, op. cit. Ferstman, C. (on behalf of the CoE Expert Council on NGO Law of the Conference of INGOs of the Council of Europe), 'Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States: A review of the practice and the identification of guidelines', Strasbourg, December 2019, available at https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969.

[305] Guild, E., S. Carrera, L. Vosyliūtė, A. Scherrer and V. Mitsilegas, 'The Cost of Non-Europe in the Area of Organised Crime', Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2016 April 2. Available at https://www.ceps.eu/publications/cost-non-europe-area-organised-crime.

society activities are organised. Thus, a vague base crime can easily be misapplied, with aggravation of 'participation in a criminal organisation', for instance in SAR cases (discussed below). This also poses risks to those donating money for civil society causes, since in turn they can also be accused of 'financing criminal activity'. Thus, the EU has sufficient cause to review these concerns in light of the EU Charter of Fundamental Rights (EUCFR). For instance, ample evidence has been gathered on the misuse of 'facilitation of irregular migration' as a key rationalisation for tightening the official grip over civil society organisations that are engaged in assisting refugees and other migrants.[306]

Anti-money laundering directives are another source of contention. The EU Directive 2018/1673 on Combating Money Laundering by Criminal Law has foreseen some clear safeguards, nevertheless, it is subject to other vague criminal provisions.[307] For instance, the definition of money laundering must conform to some criminal financial purpose (Article 2), and yet, 'smuggling' is among the enumerated purposes. Thus, it seems that the vague definition of 'facilitation of entry' kicks in through the back door via this provision of the law. Nevertheless, as the EU Anti-money laundering Directive 2018/1673 acknowledges in para. 21, the international, regional and EU standards all maintain that anti-money laundering investigations and prosecutions are subject to review for the EU legal principles and fundamental rights, not the least proportionality (Preamble of The EU Directive 2018/1673 on Combating Money Laundering by Criminal Law, *emphasis added*):

> This Directive respects the principles recognised by Article 2 of the Treaty on European Union (TEU), respects fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, including those set out in Titles II, III, V and VI thereof which encompass, inter alia, the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, **covering also the requirement of precision, clarity and foreseeability in criminal law,** the presumption of innocence, as well as the rights of suspects and accused persons to have access to a lawyer, the right not to incriminate oneself and the right to a fair trial.

Some governments initiated NGO 'transparency' laws that have been accompanied by smear campaigns of civil society working in the area of migration and asylum. Mostly, critical civil society actors have been portrayed as 'untransparent', 'foreign agents', or working 'undercover for criminal organisations and money laundering [schemes]'.[308] Such laws are often inspired by non-democratic regimes but end up (mis)using the provisions falling under the rubric of the EU criminal law. For example, anti-money laundering narrative was woven around legislative initiatives in Greece and Hungary. In other countries, the prevalent narrative was about migrant smuggling, for example in Italy the narrative was around the 'Code of Conduct for SAR NGOs' that was followed by some governments

[306] Carrera, Mitsilegas, Allsopp and Vosyliūtė, *Policing Humanitarianism,* 2019, op. cit.; ReSOMA 'The criminalisation solidarity in Europe', 2020, op. cit.; Vosyliūtė and Conte, 'Crackdown on NGOs assisting refugees and other migrants', 2019, op. cit.

[307] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, OJ L 284, 12.11.2018, p. 22–30.

[308] See for instance: Ferstman, 'Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States' 2019, op. cit.; Pardavi, Szuleka, Gheorghe, 'New decade, old challenges', 2020, op. cit.; Vosyliūtė, 'How could strategic litigation prevent policing of humanitarianism?', 2019, op. cit.

in the Malta Declaration.[309] In Hungary, both narratives intertwined but were eventually challenged by the Commission (see Subsection 3.1.1. b).

The laws mentioned above cast a shadow over certain NGOs working on state territory, are too onerous to be justifiable from the perspective of the ICCPR, Article 22. If the police have reasonable suspicion about money laundering or migrant smuggling they are obliged to pursue it precisely as a criminal case, rather than creating 'predictive policing tools', making general accusations that amount to a reputational assault. International and regional freedom of association standards also preclude states from creating additional discriminatory registration requirements that are targeting only NGOs assisting refugees and migrants or those that get foreign funding.[310] Moreover, the EU General Data Privacy Regulation (EU 2016/679), precludes national authorities and private actors from sharing data whether about individuals or associations, when they fall outside the purpose for which such data has been gathered (the purpose limitation clause).

a. Narrative around the new Greek law explicitly targeting NGOs working in the area of migration and asylum

The new Greek 'NGO transparency' registry explicitly targets civil society actors working in the area of migration and asylum (as discussed in Subsection 3.1.1. a.). The new laws cast suspicion over NGO activities and stirred controversy on various occasions, including incidents of verbal and physical attacks against the volunteers.[311]

Greek officials publicly claimed that the fight against money laundering was the goal behind the need for a separate registry under the Ministry of Migration and Asylum:[312]

> The move came after the anti-money laundering authority under Supreme Court Deputy Prosecutor Anna Zairi, started compiling registered NGOs to eventually audit them, saying it wants to probe financial transactions. The authority wants to investigate possible illegal financial transactions that would point to money laundering.

The press release about the law suggesting that NGOs will have only 10 days to comply with the new registry or face a ban was portrayed as enhancing transparency. In light of international and regional freedom of association standards discussed in Chapter 2, it constitutes quite a disproportionate penalty.[313] According to civil society representatives who participated in the focus group conducted for this study, the new law looks like a collective penalty for all NGOs working in the area of migration. It institutionalizes suspicions of corruption, money laundering and the like. Similar criteria are not applied to private entities that are providing services in the refugee camps, such as food, hygiene,

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309 Carrera, S., and R. Cortinovis, 'The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?', CEPS Policy Insight, No. 2019-14, 11 October 2019, available at https://www.ceps.eu/ceps-publications/the-malta-declaration-on-sar-and-relocation/.

310 Ferstman, 'Opinion on the compatibility of recent and planned amendments to the Greek legislation on NGO registration with European standards',the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, 2020, op. cit.

311 European Civic Forum, 'Violence against migrants, volunteers and NGOs intensifies in the islands – Interview with Greek Forum of Refugees – Civic Space Watch', 17 February 2020, available at http://civicspacewatch.eu/greece-violence-against-migrants-volunteers-and-ngos-intensifies-in-the-islands-interview-with-greek-forum-of-refugees/.

312 'Greece's refugee, migrant NGO's face ban unless registered', *The National Herald*, 27 November 2019, op. cit.

313 'Greece gives NGOs 10 days to register or face ban,' *Kathimerini*, 26 November 2019, available at http://www.ekathimerini.com/246872/article/ekathimerini/news/greece-gives-ngos-10-days-to-register-or-face-ban.

rubbish collection, security. The law thus touched off fresh allegations against NGOs working in the field:[314]

> Deputy Migration Minister George Koumoutsakos has denounced **the illegal networks of financial exploitation of immigrants involving NGOs, lawyers and doctors**. Government spokesman Stelios Petsas told reporters on Tuesday that the new law would help 'control the activities of hundreds of NGOs operating in Greece'. […] Petsas said the registry will include 'members, staff and partners of organisations, so there is transparency and responsibility, as many NGOs may have helped decisively' in managing the issue of migration, 'but others operated in a faulty and parasitic manner. The new law also provides that the registry will be overseen by a specially appointed secretary.

Civil society organisations, like the European Civic Forum, have characterised the narrative around this law as 'very alarming and connected with increased tensions and violence'.[315] A recent interview with the Greek Forum of Refugees describing the situation linked the increase of racist and hate crime attacks against volunteers with the aggressive rhetoric of public officials.[316]

Nevertheless, the risks to freedom of association extend well beyond narrative. The new registry and related rules open the door to a new form of control by the Ministry of Migration and Asylum. In a democratic society, NGOs should be bound by the general laws and not specially tailored decrees. Such decrees and potential misuse of the database would put watchdog NGOs and other human rights defenders in a difficult position.

A recent Council of Europe report found that even previous, generally applicable NGO law has already been used to discipline some NGOs working in the area of migration: 'Tax officials have attended at community centres working with migrants in Athens and on the islands and imposed arbitrary fines for failing to comply with new procedures not communicated in advance.'[317]

b. Smear campaigns across the EU against SAR NGOs and human rights defenders assisting migrants

Smear campaigns against SAR NGOs have been started on the assumption that such NGOs act as 'migrant taxis' or potential migrant smugglers. Such campaigns have been condemned by UN experts. They have called on the Italian authorities to stop controversial legal changes and to uphold human rights.[318] These campaigns, as a European Civic Forum report shows, have resulted in an overall drop in trust towards the whole civil society sector, not just SAR NGOs.[319]

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[314] Karaoulanis, T., 'Greece passes new law to better monitor NGOs dealing with migration', *Euractiv,* 5 February 2020, available at https://www.euractiv.com/section/justice-home-affairs/news/greece-passes-new-law-to-better-monitor-ngos-dealing-with-migration/, (*emphasis added)*.

[315] European Civic Forum 'Violence against Migrants, Volunteers and NGOs Intensifies in the Islands', 2020, op. cit.

[316] UNHCR, 'Racist Violence Recording Network expresses concern over xenophobic reactions against refugees - UNHCR Greece', https://www.unhcr.org/gr/en/13232-racist-violence-recording-network-expresses-concern-over-xenophobic-reactions-against-refugees.html.

[317] Ferstman, 'Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States', 2019, op. cit., para. 112.

[318] UN OHCHR, 'Legal Changes and Climate of Hatred Threaten Migrants' Rights in Italy, Say UN Experts', 21 November 2018, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=E.

[319] European Civic Forum, 'Activizenship 4', 2019, op. cit.

The UN SR on the Human Rights of Migrants has highlighted how such smear campaigns, surveillance and in particular disciplining and criminalisation actions negatively affect the rights of migrants.[320] Empiric research showed how such narratives and practices lead to less security and rights.[321] At the moment national laws transposing the EU Facilitation Directive (2002/90/EC) do not require law enforcement to have a reasonable suspicion about financial or other material gain to start the prosecution, nor do they need to collect evidence to prove it. Conversely, they and the resulting legislation make it more difficult for law enforcement officials to address the issue from a criminal justice perspective.

Earlier research has illustrated how, as a result of such smear campaigns and vague EU legal provisions, some civil society organisations assisting refugees and other migrants became subject to policing and surveillance.[322] For instance, the **Italian** authorities placed a secret agent on the Save the Children Vos Hestia ship to gather intelligence about the NGO SAR operations. The infiltration of an undercover agent was done on the presumption that they were potentially 'colluding with' migrant smugglers.[323]

In September, 2019 **Frontex** launched a public tender that aimed to create a 'pre-warning mechanism' or 'predictive intelligence tool' on irregular migration, by tracking the social media profiles of suspect smugglers, smuggled migrants, diaspora communities and also NGOs assisting migrants. The idea was dropped after Privacy International challenged the tender specifications on the grounds of potential data privacy violations. [324]

In Greece, five volunteers from Spanish and Danish SAR NGOs were arrested on 14 January 2016.[325] Although the five volunteers were acquitted, Greek authorities started a new criminal investigation targeting mainly Emergency Response Centre International (ERCI) volunteers on the basis of very slim evidence.[326] As ReSOMA research explains:

> Their ongoing prosecution is the largest case of criminalisation of solidarity in Europe, as the investigation has involved a total 37 people, with 24 now being prosecuted and five in pretrial detention. They have been charged with several felonies, including espionage, assisting human-smuggling networks, membership of a criminal organisation, and money laundering.[327]

This case has gained attention from various international and regional bodies, including FRA and the UN Special Rapporteur on the Human Rights of Migrants.[328] The court hearing has been postponed to October due to the COVID-19 situation. If found guilty, ERCI volunteers would face 25 years in prison.

Some criminalised individuals also experienced reprisals after speaking out at EU and international forums. For instance, Salam Kamal Aldeen, founder of Danish NGO Team Humanity (that was operating

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320 UN Special Rapporteur on the human rights of migrants, Report on Right to freedom of association of migrants and their defenders, A/HRC/44/42, 13 May 2020, available at https://undocs.org/en/A/HRC/44/42.

321 Carrera, Mitsilegas, Allsopp and Vosyliūtė, *Policing Humanitarianism,* 2019, op. cit.

322 Vosyliūtė, 'How could strategic litigation prevent policing of humanitarianism?', 2019, op. cit.

323 Hall, R., 'Inside Italy's plot to infiltrate migrant rescue boats in the Mediterranean", GlobalPost Investigations, Public Radio International (PRI), , 28 June 2018, available at https://gpinvestigations.pri.org/inside-italys-plot-to-infiltrate-migrant-rescue-boats-in-the-mediterranean-d7ae5b969c61.

324 Privacy International, '#PrivacyWins: EU Border Guards Cancel Plans to Spy on Social Media (for now)', 19 November 2019, available at https://privacyinternational.org/advocacy/3289/privacywins-eu-border-guards-cancel-plans-spy-social-media-now.

325 Carrera, Vosyliūtė, Allsopp, Sánchez and Brenda Smialowski, 'Fit for purpose?', 2019, op. cit.

326 Conte and Binder, 'Strategic Litigation', 2019, op. cit.

327 ReSOMA, 'The criminalisation solidarity in Europe', 2020, op. cit.; Vosyliūtė and Conte, 'Crackdown on NGOs assisting refugees and other migrants', 2019, op. cit.

328 UN Special Rapporteur on the human rights of migrants, Report on Right to freedom of association of migrants and their defenders, 2020, op. cit.

in Greece since 2015) has been enlisted as a 'threat to public policy and public security' in Greece, according to lawyers defending him, following his participation at the hearing of the European Parliament.[329] He has been banished from the country and thus physically prevented to continue his humanitarian activities near Moria camp.

Broadly drafted laws end up limiting legitimate civil society activities in a ways that are disproportional and not necessary in a democratic society.[330] The above-mentioned practices create a situation when all NGOs working in the area of asylum, migration and integration are categorized as 'bad apples'. Since the category becomes broader, it gets more difficult for law enforcement to process all the information and to identify the actual 'bad apples', for instance, to identify those that have been acting with a profit motive. In this way, 'bad laws' undermine not only civic space, but also the trust between law enforcement and NGOs that is so important in this sensitive area. Without trust, NGOs will be less likely to cooperate with national authorities and police when issues arise, for instance when they hear accounts about smugglers, who abuse migrants. [331]

c. Environmental activists in UN Climate Summit

Another UN OHCHR report concerned the 24th UN Climate Summit that was organised in Poland in December 2018 (COP 24). Environmental activists and human rights defenders were harassed or not allowed into the country to prevent them from attending this important UN-level event in Katowice.[332] In preparation for the UN Climate Summit, several UN Special Rapporteurs have called Polish authorities to ensure 'free and full participation, specifically the promulgation of a new safety and security law which was drafted for the conference and which they said could hamper civil society's involvement.' [333] They highlighted the importance of 'full and effective participation and access to COP24 to all civil society representatives, and to enable all human rights defenders to gather and exercise their rights to freedom of expression and opinion, association and peaceful assembly.' [334]

3.1.3. COVID-19 restrictions on operational space and rights

The COVID-19 public health crisis has become yet another pretext to restrict operational civil society space. The UN Special Procedures came together to define the limits on the states' margin of appreciation when deliberating emergency-related laws, and how not to infringe different rights.[335] For instance, the UN experts also called governments to engage NGOs representing the most marginalised and thus likely the most affected groups in decision-making. They noted that 'However, measures are largely imposed from the top-down, and the regular consultation and participation processes are

[329] Global Legal Action Network (GLAN),'Salam Aldeen', available at https://www.glanlaw.org/salamaldeen.

[330] Ferstman, 'Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States' 2019, op. cit.

[331] Carrera, S., J. Allsopp and L. Vosyliūtė, 'Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism', International Journal of Migration and Border Studies, vol. 4/3. 9 August 2018, available at https://doi.org/10.1504/IJMBS.2018.093912.

[332] UN OHCHR, 'Poland: UN Experts Condemn Measures to Stop Human Rights Defenders Join Climate Talks', 13 December 2018, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24017&LangID=E.

[333] Ibid.

[334] Ibid.

[335] UN OHCHR, 'COVID-19: States Should Not Abuse Emergency Measures to Suppress Human Rights – UN Experts', 16 March 2020.

frequently disrupted by confinement or circumvented.'[336] They further provided the guidelines on Freedom of Assembly and Association.[337]

Watchdog NGOs reported how COVID-19 was used 'as an excuse for non-assistance' to migrants **at high seas**.[338] The Council of Europe Commissioner for Human Rights, Dunja Mijatović, explained that actions by **Italian and Maltese authorities** 'have led to the closure of ports to SAR NGO vessels carrying rescued migrants, and to the discontinuation of activities to co-ordinate rescue operations and disembarkation of those in distress'.[339] Later commenting on the blocking of 400 people by **Malta**, she reiterated that 'despite the challenges presented by Covid-19, safe and prompt disembarkation of persons rescued at sea should continue.'[340]

NGOs and volunteers **assisting migrants and asylum seekers in hotspots** and other semi-detention facilities have also experienced restrictions. For instance, volunteers in 'Calais jungle' **in France,** assisting asylum seekers and other migrants to cope with the dire situation were sanctioned for violating social distancing rules.[341] The application of 'social distancing' rules should take into account the rights of others, in this case – the right to human dignity, and even the right to basic services, such as food and water. According to the international and regional standards on human rights, the restrictions that make obsolete the very right that governments are trying to defend (in this case, social distancing was intended to uphold public health, including migrants' health) would be deemed as disproportionate.

In Greece, refugees and migrants have experienced more severe restrictions of their freedoms due to COVID-19. Civil society has been vocal about the prolongation of lockdown in Greek hotspots: 'while Greece loosened restrictions for locals and tourists, refugees and asylum seekers are still held under inhumane conditions in overcrowded camps. The restrictive measures limit refugees and asylum seekers to access hospitals, legal advice and to meet their basic needs.' [342] In light of the UN guidance this measure could be seen as discriminatory as it provides one set of rules for nationals, and other for asylum seekers and migrants. This has also meant that civil society could not access the people who are under strict lockdown. For instance, a Greek NGO working on Chios and Samos stated in a media interview that 'We are deeply worried by the psychosocial and medical impact these measures have on

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[336] UN OHCHR, '"Leave No One behind"' – Don't Forget Your Commitments in Your Response to the COVID-19 Crises, UN Expert Urges States', 9 April 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25786&LangID=E.

[337] UN OHCHR, 'COVID-19 Restrictions Should Not Stop Freedom of Assembly and Association, Says UN Expert', 14 April 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25792&LangID=E.

[338] The Alarm Phone, 'The Covid-19 Excuse: Non-Assistance in the Central Mediterranean Becomes the Norm', 11 April 2020, available at https://alarmphone.org/en/2020/04/11/the-covid-19-excuse/.

[339] The Council of Europe, Commissioner for Human Rights, Statement 'States should ensure rescue at sea and allow safe disembarkation during the COVID-19 crisis', 16 April 2020, available at https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation-during-the-covid-19-crisis.

[340] The Council of Europe, Commissioner for Human Rights, Statement 'Immediate Action Needed to Disembark Migrants Held on Ships off Malta's Coast', 4 June 2020, available at https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast.

[341] *Utopia 56*, 'L'état d'urgence sanitaire: autorise-t-il les violences envers les exilées et les intimidations envers les bénévoles ?', 28 April 2020, available at http://www.utopia56.com/en/actualite/letat-durgence-sanitaire-autorise-t-il-violences-envers-exilees-intimidations-envers.

[342] Europe Must Act, 'Grassroots NGOs Demand Equal Lockdown Measures for Refugees on the Aegean Islands'. 22 June 2020, available at https://www.europemustact.org/post/grassroots-ngos-demand-equal-lockdown-measures.

the refugee populations living in these overcrowded camps. We want to understand the rationale behind extending these measures for such a specific community.' [343]

In countries such as Bulgaria, Hungary, Poland and Spain, civil society organisations working with **LGBT communities and those advocating** for their rights also felt targeted by restrictive laws and/or rhetoric. [344] According to ILGA-Europe, in **Spain**, LGBTQ gatherings were scapegoated for 'spreading the virus', while in **Bulgaria** similar message has been created by broadcasting homophobic statements of Erdogan.[345] In many more countries access to health, treatment became an issue.[346] **In Hungary**, soon after the Fidesz-led government seized emergency powers to deal with the pandemic, the law prohibiting a change of gender in birth certificates and other official documents came about, targeting the intersex and transgender community.[347]

As reported by the media, in Poland, encouraged by PiS, approximately 100 local authorities made declarations about establishing **'LGBT-free zones'**.[348] The European Parliament expressed concerns regarding the treatment of women, transgender and LGBTQ community in Hungary and Poland. The European Parliament asserted that it ' strongly rejects any attempts to backtrack on SRHR and LGBTQ rights, and in this context condemns the attempts to further criminalise abortion care, stigmatise HIV positive people, and undermine young people's access to sexuality education in Poland, as well as the attack on transgender and intersex people's rights in Hungary'.[349]

The European Network of Roma Grass-Roots Organisations (ERGO) at the time of writing has been gathering information on how COVID-19 affected **Roma communities** and those who assist them.[350] An NGO in **Spain**, the Fundación Secretariado Gitano, carried out a telephone survey among 11,000 Roma people to find out their actual needs and to communicate them to the government.[351] It can be seen as example of the important role played by watchdog NGOs in shedding light for national and the EU authorities on the needs of disproportionately affected communities and the evidence-based ways to address them.

To conclude, many of the examples of restrictions listed above do not meet the UN guidance on how to uphold the civic space while dealing with COVID-19. [352] Such restrictions are not necessary and most of the time are disproportionate to the public health need. However, frequently, the public authorities do not employ 'the least intrusive means of accomplishing the public health objective'. Any restrictions shall bequalified as 'discriminatory' if they target only certain associations with disproportionate,

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343 Ibid.

344 ILGA-Europe, 'COVID-19 impacts on LGBTI communities in Europe and Central Asia: A rapid assessment report', 19 June 2020, available at https://ilga-europe.org/sites/default/files/covid19-lgbti-assessment-2020.pdf.

345 Ibid, para. '2. Hate speech by political and religious leaders'.i

346 Ibid, para. '1. Health and access to health'.

347 ILGA-Europe, 'Hungary Rolls Back Legal Protections, Puts Trans and Intersex People at Risk' 19 May 2020, available at https://ilga-europe.org/resources/news/latest-news/hungary-rolls-back-legal-protections-puts-trans-and-intersex-people-risk.

348 Noack, R., 'Polish Towns Advocate 'LGBT-Free' Zones While the Ruling Party Cheers Them On', *Washington Post,* 19 July 2019, available at https://www.washingtonpost.com/world/europe/polands-right-wing-ruling-party-has-found-a-new-targetlgbt-ideology/2019/07/19/775f25c6-a4ad-11e9-a767-d7ab84aef3e9_story.html.

349 European Parliament, Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), para. 48.

350 ERGO Network, 'The Impact of Covid-19 Pandemic on Roma, Sinti and Traveller Communities', available at http://ergonetwork.org/2020/07/the-impact-of-covid-19-pandemic-on-roma-sinti-and-traveller-communities/.

351 Fundación Secretariado Gitano, 'The Fundación Secretariado Gitano Carries out a Telephone Survey to 11,000 Roma People That Reveals the Serious Social Impact of the Covid-19 Crisis', 27 April 2020, available at https://www.gitanos.org/actualidad/archivo/131067.html.

352 UN OHCHR, 'Civic space and COVID-19: Guidance', 4 May 2020, op. cit.

stricter or more onerous requirements, for instance, associations of refugees and other migrants and those who assist them or associations of LGBTQ communities and those who advocate on behalf of them.

3.2. Freedom of assembly: disproportionate use of force, criminalisation of protest participants and COVID-19

3.2.1. Disproportionate or unjustified use of force and harassment against protestors

The UN Special Rapporteurs were concerned with the intimidation and humiliation of **'yellow vest'** protesters **in France in 2018**. The UN experts noted that:

> Since the start of the yellow vest protest movement in November 2018, we have received serious allegations of excessive use of force. More than 1,700 people have been injured as a result of the protests across the country.[353]

In this case, the French national authorities made an assumption and labelled the whole assembly as 'violent', simply aiming to disperse the participants, which led to more violence and more backlash. The UN standards on the 'right to peaceful assembly' under ICCPR Article 21 require national authorities to act on the presumption that assembly as such is peaceful and that it is the job of the authorities to distinguish violent participants from non-violent ones. For instance, in this case, UN General Comment No. 37 on the right to peaceful assembly highlighted that:

> […] isolated acts of violence by some participants should not be attributed to others, the organisers or to the assembly as such. Thus, some participants in an assembly may be covered by article 21, while others in the same assembly are not.[354]

The UN General Comment No. 37 states that violence during the assembly can originate from several sources:

> […] whether or not an assembly is peaceful must be answered with reference to violence that originates from the participants. Violence against participants in a peaceful assembly by the authorities, or by *agents provocateurs* acting on their behalf, does not render the assembly non-peaceful. The same applies to violence by members of the public aimed at the assembly, or by participants in counter-assemblies.

To arrest or prevent such individuals, the authorities have to 'present credible evidence that, before or during the event, those participants are inciting others to use violence, and such actions are likely to cause violence; the participants have violent intentions and plan to act on them, or violence on their part is imminent.'[355]

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[353] UN OHCHR, 'France: UN Experts Denounce Severe Rights Restrictions on 'Gilets Jaunes' Protesters,' 14 February, 2019, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24166&LangID=E.

[354] UN Human Rights Committee (CCPR), General Comment No. 37: Right of peaceful assembly, CCPR/C/GC/37, 27 July 2020, para. 17.

[355] Ibid. para. 19.

Moreover, the guidance issues clarification on the duties of those policing the assemblies. First and foremost, that whenever violence arises, the 'law enforcement officials should seek to de-escalate situations that might result in violence.'[356]

It also does not justify arbitrary arrests, disproportionate use of force since:

> They [*law enforcement officials*] are obliged to exhaust non-violent means and to give a warning if it is absolutely necessary to use force, unless doing either would be manifestly ineffective. Any use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination applicable to articles 6 and 7 of the Covenant, and those using force must be accountable for each use of force. Domestic legal regimes on the use of force by law enforcement officials must be brought in line with the requirements posed by international law, guided by standards such as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and the *UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*.'[357]

According to UN General Comment No. 37, even violent protestors should enjoy all the remaining rights, such as the right to a fair trial, as well as prohibitions of arbitrary deprivation of liberty, and non-derogatory prohibition of torture, inhuman and degrading treatment, and equality of treatment before the law.

The recent report of the UN Special Rapporteur on the Human Rights of Migrants has highlighted how **migrants' associations** have faced additional challenges for organising and contacting civil society associations, and have faced retaliation when speaking out about detention conditions by holding **hunger strikes and protests**.[358] For instance, **in Greece**, more than 110 asylum seekers and only two Greek nationals were arrested in Sappho square, when the latter attacked peaceful protests in April 2018.[359] The death of an Afghan asylum seeker in the Moria camp, sparked sit-in protests to raise concerns about their deplorable conditions. The European Council on Refugees and Exiles (ECRE) reported:

> Around 200 asylum seekers, mainly from Afghanistan, had gathered in the Sappho square of Lesvos to condemn the inhumane reception and living conditions on the island. The protest escalated as a group of far-right activists threw stones and flares at them, resulting in several injuries and the arrest of two Greek nationals and around 110 asylum seekers, including children. The detained asylum seekers were charged with **illegal occupation of the square** and the use of force and resistance against the police.[360]

The asylum seekers were acquitted on 8 May 2019. However, Vassilis Kerasiotis, the Director of Hebrew Immigrant Aid Society (HIAS) Greece, who defended 33 asylum seekers, commented:

> The mere fact that 110 participants of a peaceful protest were tried in a court of justice, after suffering a racist attack and disproportionate use of violence by the police, is deeply

[356] Ibid para 78.

[357] Ibid para 78.

[358] UN Special Rapporteur on the human rights of migrants, Report on Right to freedom of association of migrants and their defenders, 2020, op. cit., paras. 63-64.

[359] European Council on Refugees and Exiles (ECRE), '100 Asylum Seekers Acquitted in Greece after Protest', 17 May 2019, available at https://www.ecre.org/100-asylum-seekers-acquitted-in-greece-after-protest/.

[360] Ibid, *emphasis added.*

> concerning. Local actors also raised concern over the impunity for the extremists involved in the attack, as 26 persons have been identified but none of them have faced trial yet.[361]

This issue raises the issue of discriminatory policing of the assembly since it was not the 'violent counter-protesters' (in this case local far-right group members) but the peaceful participants of the assembly (asylum seekers) that were dispersed and even prosecuted for using the public space to protest. In this case, the asylum seekers' right to peaceful assembly was violated. Moreover, based on civil society submission, it can be argued that in this case the principle of non-discrimination and the principle of equality before the law also seems to have been violated by the Greek authorities.[362]

Therefore, General Comment No. 37, and the OSCE ODIHR guidelines on the right to peaceful assembly and on the policing of such assemblies are valuable practical tools that can guide national authorities, and especially law enforcement authorities, to respect and protect peaceful assembly rights. The EU could also promote such handbooks via its venues of cooperation on criminal and judicial matters. For instance, the European Union Agency for Law Enforcement Training (CEPOL) could play a role in promoting and training police officers on how to police assemblies, in line with the UN and European standards.

In this regard, the European Parliament has recently called upon the European Commission to 'to create an independent expert group tasked with developing **an EU Code of Police Ethics**'.[363] Such a code should build on the OSCE ODIHR *Handbook on policing of assemblies*.[364] Besides addressing racial profiling and non-discrimination, the code should also inform police about their role in respecting and protecting the human rights defenders, in light of the *UN Declaration on Human Rights Defenders* and the OSCE ODIHR *Guidelines on the Protection of Human Rights Defenders*.

3.2.2. Use of 'terrorism' and other criminal clauses against protestors and activists

Although the EU counter-terrorism directive specifies 'terrorist offences' in Article 3, in practice there seems to have been a wide margin of discretion given to the EU Member States. [365] Ahmed H, a Syrian refugee who was a long-term resident in Cyprus, was one of many victims of judicial harassment **in Hungary**. He spent four years in jail in Hungary under terrorist charges for participating in or initiating a peaceful protest among refugees and other migrants stranded at the Hungarian-Serbian border. The Hungarian authorities alleged that the protest had been mounted against the Hungarian state and was a terrorist attempt. Amnesty International and other NGOs campaigned for the release of Ahmed H. While eventually he was found not guilty, his punishment entailed being deprived of liberty and from seeing his family for four years. [366]

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[361] Ibid, *emphasis added*.

[362] Ibid.

[363] European Parliament, Motion for a Resolution on the anti-racism protests following the death of George Floyd (2020/2685(RSP)), 16 June 2020, para. 24.

[364] OSCE ODIHR, *Human rights handbook on policing of assemblies,* 2016, available at https://www.osce.org/files/f/documents/c/5/226981.pdf.

[365] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

[366] Amnesty International, 'Ahmed H Finally Home', 2019, op. cit.

In the UK, in 2017 (at that time still an EU Member State), Stansted 15 is another prominent case where the anti-terrorism charge has been used against human rights defenders. In this case, activists in Stansted attempted to prevent a deportation flight:

> They had broken into Stansted airport's 'airside' area in March 2017 and chained themselves together around a Boeing 767 chartered by the Home Office to deport 60 people to Nigeria, Ghana and Sierra Leone. After a 10-week trial, a jury found them guilty of the charge – an offence that carries a potential life sentence.[367]

The UK accused the protesters of terrorism and endangering airport security, although the act itself entailed the activists chaining themselves to the aircraft and could not be seen as posing a risk to staff or other passengers. The UN experts also found that UK had used its security laws disproportionately in the conviction of Stansted 15.[368]

3.2.3. Covid-19 restrictions on freedom of assembly

The UN SR on Freedom of Assembly and Association has been concerned about the developments across the world. He noted that restrictions on assemblies cannot be blanket:

> Laws limiting public gatherings, as well as freedom of movement, have been passed in many States. Restrictions based on public health concerns are justified, where they are necessary and proportionate in light of the circumstances. … In addition, those laws and regulations have often been broad and vague, and little has been done to ensure the timely and widespread dissemination of clear information concerning these new laws, nor to ensure that the penalties imposed are proportionate, or that their implications have been fully considered.[369]

Freedom of assembly has also been curtailed **in all EU Member States**, **except Sweden**.[370] COVID-19 related emergency laws have been restricting the right to peaceful assembly in the several EU Member States. Civil society has questioned whether such prohibitions are in line with national and European laws.[371]

In the city of Giessen in **Germany**, protests against the COVID-19 restrictions on fundamental rights have been prohibited by the local authorities. [372] However, civil society has brought this provision before the local courts, later the case was appealed and went to the German Federal Constitutional Court that carefully balanced freedom of assembly with the public health risk. The German Federal

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[367] Gayle, D., 'Stansted 15: No Jail for Activists Convicted of Terror-Related Offences'. *The Guardian*, 6 February 2019, available at http://www.theguardian.com/global/2019/feb/06/stansted-15-rights-campaigners-urge-judge-to-show-leniency.

[368] UN OHCHR, ' The UK Must Stop Disproportionate Use of Security Laws after Conviction of Stansted 15, Say UN Rights Experts', 6 February 2019, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24141&LangID=E.

[369] UN OHCHR, 'States Responses to Covid 19 Threat Should Not Halt Freedoms of Assembly and Association' , 2020, op. cit.

[370] Marzocchi, O., 'The impact of Covid-19 measures on democracy, the rule of law and fundamental rights in the EU', Briefing, requested by the LIBE Committee Monitoring Group on Democracy, Rule of Law, Fundamental Rights, European Parliament, Directorate-General for Internal Policies PE 651.343, 23 April 2020.

[371] European Center for Not-for-Profit Law (ECNL), 'Can EU Citizens Be Stripped of Their Right to Protest? Public Emergencies, Peaceful Assembly and EU Law', 12 June 2020, available at https://ecnl.org/can-eu-citizens-be-stripped-of-their-right-to-protest-public-emergencies-peaceful-assembly-and-eu-law/.

[372] German Federal Constitutional Court 'Application for a temporary injunction against a ban on the meeting was partially successful' Decision of April 15, 2020, Case No. BvR 828/20, Press release No. 25/2020, April 16, 2020, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-025.html.

Court found that a blanket restriction of assemblies to only two persons that was imposed by one of the Giessen city was unjustifiable:

> The assembly authority [of Giessen] had incorrectly assumed that the ordinance of the Hessian state government to combat the coronavirus contained a general ban on assemblies of more than two people who do not belong to the same household and therefore violate the constitutionally protected freedom of assembly because they did not take into account that there was scope for their protection to make decisions.[373]

This case sets a positive precedent since the Court upheld the right to protest. In light of pandemic, protestors were subject to additional social distancing rules. This subsequently became a standard for protests in Germany. It goes in line with international and regional standards on right to peaceful assembly.

In many cities across the EU on 6 June 2020, many **Black Lives Matter** protests took place. For instance, in Paris, **France**, local authorities attempted to ban the protest for 'the public health' risks (in light of COVID-19 pandemic, only 10 persons were allowed to gather at a time) and 'fears of public unrest'.[374] Approximately 5500 protestors gathered in Paris, despite the restrictions. Authorities seemed to tolerate the assembly and did not clash with participants. Although, a week later, on 13 June 2020 in Paris, police has blocked a more numerous demonstration of 15 000 people. This time authorities invoked the COVID-19 ban and media reported the clashes with the police, the use of tear gasses.[375] This demonstration was calling justice for Adama Traore, who like George Floyd in the US, died of asphyxiation while in police custody in 2016 and no one was charged for his killing.

However, some of the Black Live Matter assemblies were unduly equated with some participants or rather provocateurs who were looting stores, after the gathering. For instance, on the same day, in Brussels, **in Belgium**, 10 000 protestors gathered for a peaceful assembly. After the official demonstration police attempted to disperse the crowd by channelling them to smaller streets.[376] In some shopping streets a group of individuals, called 'trouble makers' by the Mayor of Brussels, broke shop windows, and others provoked police by throwing stones. Police subsequently resorted to using water cannons and tear gas to disperse the crowd and arrested more than 150 suspected individuals.[377]

The international standards on right to peaceful assembly state, that 'only the minimum force necessary may be used where this is required for a legitimate law enforcement purpose during an assembly' [378] and that **dispersal is a measure of the last resort**.

The UN SR on the Freedom of Assembly and Association warned against the **discriminatory or targeted use of prohibition of assemblies**: 'In many cases, it appears these measures are being

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[373] Ibid.

[374] Sandford, A. 'George Floyd: Protests Continue in Europe despite Virus Restrictions', *Euronews*, 6 June 2020, available at https://www.euronews.com/2020/06/06/black-lives-matter-protesters-take-to-streets-in-europe-despite-pandemic-restrictions.

[375] Dellanna, A. 'Black Lives Matter: Tear Gas Fired as Thousands Defy Ban on Gatherings.' *Euronews*, 13 June 2020, available at https://www.euronews.com/2020/06/13/black-lives-matter-police-fire-tear-gas-in-paris-to-disperse-unauthorised-march-of-15-000.

[376] Moens, B. 'Thousands Protest Racism in Brussels before Violence Breaks Out'. *POLITICO*, 7 June 2020, available at https://www.politico.eu/article/thousands-protest-racism-in-brussels-as-us-black-lives-matter-movement-sweeps-europe/.

[377] Ibid.

[378] UN Human Rights Committee (CCPR), General Comment No. 37: Right of peaceful assembly, CCPR/C/GC/37, 27 July 2020, para. 79.

enforced in a discriminatory manner, with opposition figures and groups, together with vulnerable communities, constituting prime targets.'[379]

In Greece assemblies that infringed COVID-19 restrictions have been treated differently by the police. Those organised by public authorities, such as the Mayor of Athens, were policed to provide security for the inauguration of the fountain, for example, even though social distancing rules were not upheld.[380] Yet, other gatherings, where according authorities 'anarchist' groups assembled to socialise in public squares, were subject to violent policing.[381] The media outlet *Balkans Insight* gathered accounts from the social media where episodes of violent policing are vividly depicted:

> […] witnesses spoke of broken teeth, officers spitting in a woman's face and the detained being bundled off, five to a patrol car, in clear violation of social distancing rules. Fragments of mobile phone video showed motorbike-riding police sweeping through the square and down surrounding streets for a long period after the initial raid, firing teargas and detaining fleeing groups of people.[382]

The case ended up before the Greek Ombudsman and the Greek Public Order Minister. The latter commented that: 'The police have no reason to be in the squares.'[383] Nevertheless, the violent policing of St George Square sparked subsequent protests against police brutality. In light of the above, UN Special Rapporteurs' opinions remain applicable. UN Special Rapporteurs have reiterated that during COVID-19 police **violence against protestors is not justifiable**: 'Breaking a curfew, or any restriction on freedom of movement, cannot justify resorting to excessive use of force by the police; under no circumstances should it lead to the use of lethal force.'[384]

3.3. Restrictions on freedom of expression exercised by civil society and other human rights defenders

The assassination of investigative journalist Daphne Galizia Caruana **in Malta** shocked both EU citizens and EU institutions. In recent years, many investigative journalists have become the target of **'strategic**

[379] UN OHCHR, 'States Responses to Covid 19 Threat Should Not Halt Freedoms of Assembly and Association' – UN Expert on the Rights to Freedoms of Peaceful Assembly and of Association, Mr. Clément Voule, 14 April 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E.

[380] 'Crowding Overshadows Inauguration of Omonia Fountain, Athens Mayor under Fire', *Keep Talking Greece,* 14 May 2020, available at https://www.keeptalkinggreece.com/2020/05/14/omonia-square-fountain-crowding-athens-mayor-under-fire/.

[381] 'In Pandemic-Era Greece, Fighting for Control of the Square', Balkan Insight, 14 May 2020, available at https://balkaninsight.com/2020/05/14/in-pandemic-era-greece-fighting-for-control-of-the-square/.

[382] Ibid.

[383] Ibid.

[384] UN OHCHR, 'COVID-19 Security Measures No Excuse for Excessive Use of Force, Say UN Special Rapporteurs', 17 April 2020, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25802&LangID=E.

lawsuits against public participation' (SLAPPs) initiated by private entities and governments or powerful individuals on the grounds of libel and defamation.[385]

Just like journalists (and quite often together with journalists), watchdog NGOs and other human rights defenders are attempting to reveal the wrongdoings of those in power. This Section provides several examples of SLAPPs against NGOs in Cyprus (Box 1), Poland ((Box 2 and Box 3) and Greece (Box 4). Also, SLAPPs-like attacks are made against critical academics, journalists and public officials, and those involved with and speaking on behalf of marginalised communities, or other civil society at national or even the EU foras.

The recent attack against **Karolina Dreszer-Smalec**, a member of the European Economic and Social Committee (EESC) Diversity Europe Group (Group III), which represents civil society organisations in Europe covering a wide range of interests, including human rights is a vivid illustration of how the very functioning of the EU institutions and democratic deliberations are dependent on freedom of speech being exercised by critical civil society, academics, journalists and concerned citizens[386] (see Box 3: Poland: retaliation against Ms Karolina Dreszer-Smalec, Member of the EESC).

In 2018, FRA provided accounts from civil society in Hungary, where: 'public officials, especially in small towns, continued to use libel and defamation laws to silence criticisms from citizens and journalists; there were allegedly several dozen cases per year in which public officials pursued both criminal and civil charges (often simultaneously) against individuals for criticising officials or their policies.' [387]

FRA describes how statements by critical civil society actors such as various 'watchdog NGOs' and other human rights defenders 'may sometimes be perceived to be defamatory or insulting by politicians or state officials.'[388] The FRA report has reiterated that while the right to a good reputation needs to be carefully balanced with the freedom of speech, differentiation can be made according to who is speaking. For instance, the European Court of Human Rights has drawn an important distinction such that 'the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.'[389] Besides, the ECtHR in *Lingens case* finds that statements of fact and value judgements or opinions also afford a different level of discretion (see Chapter 2 for an in-depth elaboration of this point).

The examples below illustrate how crucial it is for the EU to protect those that are acting in the 'public interest' – upholding fundamental rights, rule of law and democratic accountability or are simply trying to respond to a humanitarian emergency.[390]

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385 Bárd, Bayer, Chun Luk and Vosyliūtė,'SLAPP in the EU context', 2020, op. cit. See also, European Centre for Press and Media Freedom (ECPMF), 'SLAPPs: Strategic Lawsuits Against Public Participation', 19 December 2019, available at https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation.

386 The World Organisation Against Torture (OMCT), 'Poland: Threats and retaliation against Ms. Karolina Dreszer-Smalec, a Member of the European Economic and Social Committee', urgent interventions / human rights defenders, June 26, 2020, available at https://www.omct.org/human-rights-defenders/urgent-interventions/poland/2020/06/d25935/.

387 FRA, 'Challenges facing civil society organisations working on human rights in the EU', 2018, op. cit, p. 24.

388 Ibid.

389 ECtHR, Case of *Lingens v. Austria,* No 9815/82, 8 July 1986, para. 42. 'Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance'

390 Bárd, Bayer, Chun Luk and Vosyliūtė,'SLAPP in the EU context', 2020, op. cit.

Box 1: Cyprus: Defamation case against NGO KISA

KISA is a civil society organisation working in the area of migration and asylum, non-discrimination and anti-racism. It is also part of FRA NGO Platform [1]. Ten years ago, KISA initiated a call to other NGOs to petition against two, at that time Cyprus representatives at the European Union Agency for Fundamental Rights (FRA) Management Board: Mr CC and his alternate at the FRA Board Mr XX [2].

According to KISA press release, the facts of the case were following [2]:

Mr XX was considered to be among the administrators of the website that contained the online hate speech. Mr CC gave an interview at the relevant blog. The Cypriot authorities decided to investigate whether the post consisted the hate speech. Mr CC represented his alternate, Mr XX, against the actions of the authorities to investigate the hate speech online.

Therefore, according to KISA, alleged involvement of Mr CC, implied condoning the hate speech online of Mr XX and was seen as non-compliant with their ongoing public mandate at FRA. The KISA initiated a petition among Cypriot NGOs to object their position at FRA Board. It has not been made public, nor was it shared with the FRA, when persons concerned learned about the initiative and sued KISA for libel (a written defamatory statement).

The case was decided only in June 2020, and NGO was found guilty for the defamation by Cypriot courts. KISA has reiterated their reservations regarding the 'right to fair trial' and has found this decision extremely burdensome. In their press release, KISA explains that [2]:

> 'The award of damages amounting to **EUR10,000**, plus interest for a period of ten years while the case was in court as well as legal expenses, strikes a severe blow against a non-profit organisation with no resources other than those from projects funded by the EU.'

Source:
[1] KISA, Mission & Objectives, available at https://kisa.org.cy/mission-objectives/;
[2] KISA, KISA Convicted for Action in 2010 against Online Hate Speech, 2020, available at https://kisa.org.cy/kisa-convicted-for-action-in-2010-against-online-hate-speech/.

The case serves as an example of how defamation lawsuits can be used to prevent public scrutiny of people who are taking a public role, in this case within the FRA – the very EU institution, that aims at upholding Fundamental Rights Charter. Another focus group discussant mentioned multiple libel suits initiated against a Polish academic, Wojciech Sadurski. The case below illustrates how chilling effects on freedom of speech for critical academia can be used as a strategy to intimidate watchdog NGOs and other human rights defenders.

Box 2: Poland: four libel cases brought against academic Wojciech Sadurski

Wojciech Sadurski is a constitutional law professor at Sidney University. In 2019 he published a book, *Poland's Constitutional Breakdown* [1] (part of Oxford comparative constitutional law series), that was critical of Poland's governing PiS party. In reaction to the book, as well as to his op-eds and tweets, four legal suits were brought against Mr Sadurski. As he explains [2]:

> 'Two of them are started by Polish State TV that is fully government funded and managed thus is an entity of a Polish Government. Both are defamation cases. Except that one is civil and another – criminal. Third one is [a civil] defamation case by Polish ruling party – Law and Justice. […] And fourth one is a private [criminal] defamation suit is by a very prominent figure, member of current legal establishment […] but it is in an early obligatory mediation stage'.

There have been other criminal defamation cases in Poland against investigative journalists, public figures and officials, including national Human Rights Commissioner. However, it is unprecedented that one person would face four different cases. Mr Sadurski asserts that he has been the target of this strategic lawsuit due his academic standing. Euronews reported that [3]:

> 'If Sadurski loses both civil cases, he will face fines of 20,000 PLN (€4,600) per case to be made in the form of charitable donations as well as footing all legal costs. TVP is also seeking a public apology to be published as an advert on Onet, one of the most used Polish web portals.[…] Criminal defamation [case]… if successfully prosecuted in the third trial, he could be handed either a large punitive fine, community service or potentially a prison sentence of up to two years.'

If successful, this judicial harassment creates a precedent that would lead to wider chilling effects on freedom of speech. It aims to intimidate and silence civil society and citizens' mobilisations that are still willing to criticise the government for violations of the rule of law, fundamental rights and democratic accountability [3 & 4].

Sadurski received support from 650 scholars and professors from all around the globe, who underlined that freedom of speech is an important tenet of democratic society. They highlighted that [4]:'such attempts to silence critics are not solely a matter of Polish law but also of European Union law and European human rights law, particularly in the context of the ongoing Article 7 TEU procedure against Poland'. As of the end of July 2020 the case was still pending.

Source:
[1] Wojciech Sadurski, 'Poland's Constitutional Breakdown', Oxford University Press, 2019 May;
[2] IACL-AIDC, 'Wojciech Sadurski Interviewed by Tom Daly'. IACL-IADC Blog, 11 June 2020, available at https://blog-iacl-aidc.org/scholar-conv/2020/6/11/wojciech-sadurski;
[3] Walsh, D., 'Critic of Poland's Ruling Party PiS Slams 'Politically Motivated' Libel Cases'. *Euronews*, 13 May 2019, available at https://www.euronews.com/2019/05/13/critic-of-poland-s-ruling-party-pis-slams-political-motivated-libel-cases.
[4] Verfassungsblog, 'Open Letter in Support of Professor Wojciech Sadurski', available at https://verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/.

As reported by the World Organisation Against Torture, the Polish government has also recently retaliated against civil society representative Ms Karolina Dreszer-Smalec who, as a Member of the EESC, is fulfilling Article 11 of TEU. Accusations against Ms Dreszer-Smalec include 'spreading lies and false information', made in response to her critical inputs into democratic accountability, rule of law

and fundamental rights.[391] This case needs to be analysed in light of the Sadurski case. Various professionals acting within their mandates, such as academics, investigative journalists, and even Polish Ombudsman Adam Bodnar, have been sued for libel.[392]

Box 3: Poland: retaliation against Ms Karolina Dreszer-Smalec, Member of the EESC

Ms. Karolina Dreszer-Smalec has been a member of EESC, Diversity Europe Group (Group III) since 2015. She has been initially nominated to the EESC as she is also the vice-president of the National Federation of Polish NGOs (OFOP), and vice-president of the National Platforms at the European Civic Forum (ECF). In 2018, she was appointed vice-president of the EESC Fundamental Rights and Rule of Law Group (FRRL Group). She was involved organising a mission to Poland and drafting a critical report on the situation of the Rule of Law and Fundamental Rights in Poland. In 2020, she was elected by the EESC to serve for the next term up to 2023. However, the civil society evidence demonstrates that government objected to her nomination and defamed her in national media.

In June, 2020 the retaliations against Ms Dreszer-Smalec and the accompanying narrative about 'lies' and 'false information' came under the radar of the World Organisation Against Torture (OMCT) Human Rights Defenders Observatory [1]:

> 'The OMCT has expressed serious concerns over the Polish authorities open retaliation against an EESC member for her work in support of the rule of law and fundamental rights. The Observatory expresses and considers these acts as an unlawful interference in the Committee's work and an attempt to intimidate civil society organisations defending fundamental rights and the rule of law. The Observatory also fears that Ms. Karolina Dreszer-Smalec and other local civil society organisations could suffer further pressure and hindrance to their work and human rights activities in Poland, and that this could have a chilling effect on Polish civil society.'

The OMCT also highlighted that such retaliations against civil society representatives are not compatible with respect for the EU fundamental values enshrined in Article 2 of the TEU. And thus called on EU institutions to 'strongly condemn' such interferences with civil society independence. The OMCT also reiterated that this episode deserved EU institutions' scrutiny in light of ongoing (pre-)Article 7 proceedings against Poland.

Source: [1] The World Organisation Against Torture (OMCT), 'Poland: Threats and Retaliation against Ms. Karolina Dreszer-Smalec, a Member of the European Economic and Social Committee', Urgent Interventions / human rights defenders, June 26, 2020, available at https://www.omct.org/human-rights-defenders/urgent-interventions/poland/2020/06/d25935/. Related media reports: Wyborcza.Pl. 30 May 2020, available at https://wyborcza.pl/7,75398,25987498,pis-nie-pozwala-na-nominacje-polki-w-unii-europejskiej-bo-jest.html?disableRedirects=true; NGO.pl, Bitwa o EKES. Przegrał dialog, 28 May 2020, available at https://publicystyka.ngo.pl/bitwa-o-ekes-przegral-dialog.

[391] The World Organisation Against Torture, 'Poland: Threats and Retaliation against Ms. Karolina Dreszer-Smalec', 2020, op. cit.

[392] Walsh, D., 'Critic of Poland's Ruling Party PiS Slams 'Politically Motivated' Libel Cases'. *Euronews*, 13 May 2019, op. cit.

The last, somewhat anecdotal example from **Greece** comes as an illustration of why EU legislators need to protect freedom of speech, at the times of 'crises'. As UN Special Rapporteurs have asserted, freedom of speech is ever more important when citizens and civil society are trying to respond to COVID-19 pandemic.[393]

Box 4: Greece: Moria Corona Awareness Team faces lawsuit over Facebook post

The NGO that was trying to halt the spread of COVID-19 in the Moria refugee camp was sued by Greek authorities over a Facebook post allegedly 'questioning national sovereignty'. International Race Relations – Calendar of Resistance[1] re-posted this piece of news from Kathimerini [2]:

> 'The Regional Authority of the Northern Aegean said on Monday that it was taking legal action against a nongovernment organization called Moria Corona Awareness Team after it referred to "the Greek side of the island" of Lesvos in a post on its Facebook page last Thursday, thereby implying that there is a non-Greek side of the island. The regional authority said it had lodged a legal suit against the NGO with a prosecutor, "because the questioning of our indisputable national sovereignty is a criminal offense." On its Facebook page, the organization said it was set up in March by migrants living in Lesvos' overcrowded Moria camp to raise awareness about the pandemic and that it has collaborated with the Greek NGO Stand by Me Lesvos.'

This example raises several questions about the surveillance of civil society's online presence, the proportionality of lawsuits and, more generally, about attitudes towards pro-migrant rights NGOs and civic mobilisations.

Source:
[1] Institute of Race Relations (IRR), 'Calendar of Racism and Resistance – Incorporating Covid-19 Roundup (20 May – 3 June 2020)', 3 June, available at http://www.irr.org.uk/news/calendar-of-racism-and-resistance-incorporating-covid-19-roundup-20-may-3-june-2020/;
[2] 'NGO Sued over Lesvos Post', *Kathimerini*. *25 May 2020.* available at http://www.ekathimerini.com/253027/article/ekathimerini/news/ngo-sued-over-lesvos-post.

Despite international and regional human rights standards recommending that defamation shall be decriminalised and subject to civil law, several EU Member States still consider defamation or libel as a criminal offence (see Chapter 2). At the EU level, there is no clear guidance on the issue either. Also, claimants can choose in which jurisdiction to pursue the case. This is often used to intimidate those speaking in the public interest.[394]

Currently, there are insufficient safeguards to prevent SLAPPs. Jurisdictional rules allow several parallel lawsuits to be mounted, and the very likelihood of paying costly litigation expenses can serve as a chilling effect on journalists, NGOs and individual activists that act on grounds of public interest.[395] SLAPPs strategy is not even to win the case but to exhaust the other party – to make litigation costly,

[393] UN OHCHR, 'States Responses to Covid 19 Threat Should Not Halt Freedoms of Assembly and Association' , 2020, op. cit.
[394] Bárd, Bayer, Chun Luk and Vosyliūtė,'SLAPP in the EU context', 2020, op. cit.
[395] Ibid.

lengthy and burdensome. Public participation is thus halted, as limited civil society resources are drawn away from their primary activities.[396]

Therefore, the EU should play a role in safeguarding 'political speech' Article 11 (freedom of expression) in light of Article 12 (freedom of association), as enshrined in the EU Charter of Fundamental Rights (EUCFR). There could even be a heightened role for the EU to protect the civil society that is in dialogue with EU institutions (under Article 11 of the TFEU) and those upholding EU values (enshrined in Article 2 of the TEU). It seems incompatible with the EUCFR that state officials can accuse watchdog NGOs and other human rights defenders of 'defamation' or 'libel' with no possibility for a subsequent investigation into the motives of initiating such prosecution.

[396] Ibid.

4. PROPOSED SOLUTIONS TO SAFEGUARD CRITICAL CIVIL SOCIETY SPACE AT EU LEVEL AND THEIR FEASIBILITY

KEY FINDINGS

An independent and critical 'civil society' is fundamental to 'good governance' (Article 15 of the TFEU). At the same time, EU institutions need to ensure 'open and transparent dialogue' with civil society. This Chapter looks at different policy options to protect civic space by operationalising these provisions within EU treaties:

- **European Association** Status – refers to the EU legislative initiative to set standards for common statutes to ensure that the whole non-profit sector will have a **legal personality** recognised at the EU level and across EU Member States. This policy option could reduce the risks of governments setting up a discriminatory and hostile regulatory environment. Nevertheless, Article 352 of the TFEU requires unanimity in the Council and this could represent an obstacle in the short run. The EU could also promote Member State's accession to the **CoE Convention** on the Recognition of the Legal Personality of International Non-Governmental Organisations.
- **EU Internal Guidelines on Human Rights Defenders** – is a non-legislative EU policy tool to ensure the internal/external EU policy consistency check. It could provide detailed instructions on how to respect, protect and promote Human Rights Defenders by EU institutions and agencies, as well as by the Member States in areas falling within the competence of the Union. Also, it could promote the implementation of the UN Declaration on Human Rights Defenders and the OSCE ODIHR Guidelines on Human Rights Defenders.
- **EU Civil Society Stability Index** – this proposal is inspired by Freedom House and similar indexes. It suggests that the EU could request the FRA, or could finance an independent body, to devise a rigorous methodology to conduct continuous **monitoring** and assess the 'health' of the critical civic space ecosystem. The results of such an index could also feed into EP Democracy, Rule of Law and Fundamental Rights reports and the wider EU rule of law mechanism.
- **EU Network of Focal Points for Civil Society** – each EU institution should designate a focal point for civil society, with the aim of ensuring the swift exchange of information when civil society is witnessing violations of EU law, or when civil society itself faces challenges and retaliations for upholding fundamental rights, thereby providing inputs into the EU rule of law mechanism, and upholding the democratic accountability of their governments.

This Chapter elaborates on various proposals that have been suggested by civil society and EU institutions. The main question in this assessment is: to what extent could these proposals address the challenges facing 'critical civic space'? The in-depth assessment, based on desk research, focus group discussion and interviews, highlights four policy options (see Key Findings above):

- **European Association Status**
- **EU Guidelines on human rights defenders**
- **EU Civil Society Stability Index**
- **EU Network of Focal Points for Civil Society**

These proposals are not mutually exclusive and can be realised in combination. Table 1 below sets out the main challenges or difficulties from the perspective of civil society.[397] These proposals are closely linked with the European Parliament's EU mechanism on Democracy, the Rule of law and Fundamental Rights, where an independent expert panel could monitor the issues regarding civic space, among other things.[398] The latter is yet to be followed up by the Commission.

Table 1: Overview of policy options

Policy options discussed	Timeline	The shortcomings	The value-added
European Association Status	Long term	The unanimity rule and principle of subsidiarity under Article 352 of the TFEU; MS still maintains its tax and employment laws; MS could 'misuse' merger/conversion procedures by requesting additional documentation or need for 're-registration' or shaping it into yet another NGO 'Code of Conduct'	Narrowing possibilities to misuse the regulatory framework against freedom of association; Adding legal certainty by defining the notion of 'non-profit actors' in the EU; Enabling cross-border cooperation and engagement of EU citizens.
EU Guidelines on human rights defenders	Medium-term	Not legally binding; Risk of narrowing the meaning of 'defenders' for legally established NGOs, NHRIs, Ombudspersons, but not activists, volunteers and citizen mobilisations that are covered by the UN Declaration of Human Rights; Risk of not protecting HRDs where EU policies fall short of EU fundamental rights standards.	Undergoing a consistency check between EU's internal/ external policy on HRDs; Drawing lessons and experiences from EEAS in third countries; Recognising that EU Member States fall short of the EUCFR and thus EU needs human rights defenders to uphold EU fundamental rights standards; The creation of tools to protect HRDs from retaliation and reprisals.
EU Civil Society Stability Index	Medium-term	Need for funding; Robust and impartial methodology; A trap of creating a relativism that 'there are issues everywhere.'	Possibility to inform the EU citizens and EU policymakers via dissemination about challenges; Possibility to track and early signal the worsening 'ecosystem' for critical civil society.

[397] These 'civil society' views have been identified during the focus group and subsequent interviews conducted for this study.

[398] Bárd, P., S. Carrera, E. Guild, E., and D. Kochenov, 'An EU mechanism on democracy, the rule of law and fundamental rights. *CEPS Paper in Liberty and Security in Europe*, 2016, available at https://www.ceps.eu/ceps-publications/eu-mechanism-democracy-rule-law-and-fundamental-rights/. van Ballegooij, W. and T. Evas, 'An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the legislative initiative report' ,(Rapporteur: Sophie in 't Veld) In-depth Analysis, October 2016, European Added Value Unit, EPRS, available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328_EN.pdf.

EU Focal Points for Civil Society	Short-term	Risk of being treated as 'tick-box' if the role of civil society is not fully understood; Even if focal points are informed, they could be denied the power to act to address the issues raised or lack of the willingness to do it.	Creating 'trust-based' relationship with EU institutions and policymakers; Focal points could be encouraged to react and use political leverage when issues arise.

Source: Authors, 2020.

Besides four proposals chosen for in-depth assessment, some other ideas on strengthening civil society are briefly described below. For instance, the EESC has proposed the possibility of designating an Ombudsperson to monitor the civic space in the EU.[399] The FRA highlighted the importance of strengthening independence and funding of National Human Rights Institutions (NHRIs) and Equality bodies.[400] In addition, FRA's Fundamental Rights Platform called for increased funding for Charter training.[401] The FRA report suggested ideas for tracking how much of the EU, national and private funding is spent in the area of fundamental rights.

Interviewees highlighted the need to increase direct EU funding for promoting and upholding fundamental rights. In particular, the **Strategic Litigation Fund** should not only elaborate on best practices in advocacy and litigation[402] but also provide much-needed funding for watchdog NGOs and other human rights defenders, also their lawyers, to play their role in upholding fundamental rights.

The second FRA consultation on civic space also has highlighted funding-related challenges:

> The prevalence of short-term, project-based funding makes it difficult for CSOs to plan and operate sustainably in the long term. Adequately resourced, the proposed EU Justice, Rights and Values Fund would be an important initiative in this regard.[403]

Civil society representatives managed to revert COVID-19 related additional cuts on Justice, Rights and Values Fund. They have been calling the European Commission, to follow the European Parliament's proposal to increase this fund to EUR 1.83 billion, to uphold EUs values in these trying times.[404]

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399 European Economic and Social Committee (EESC), 'Financing of CSOs by the EU' (own-initiative opinion), Adopted on 19 October 2017, Official Journal: OJ C 81, 2.3.2018, p. 9–15.

400 FRA, 'Fundamental Rights Report 2020', 2020, op. cit.,p. 25.

401 Ibid.

402 European Commission, 'Capacity building for litigating cases relating to democracy, rule of law and fundamental rights violations', Justice programme call, JUST-PPPA-LITI-AG-2018, available at https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/just-pppa-liti-ag-2018.

403 FRA, 'Civic space – experiences of organisations in 2019: Second Consultation', 2020, op. cit., p.1.

404 European Civic Forum, Batrory Foundation et al., 'Follow-up Letter on European Rights and Values Programme', 6 July 2020. Available at https://civic-forum.eu/wp-content/uploads/2020/07/Follow-up-letter-Rights-and-Values-Programme.pdf.

4.1. European association status

The origins of the so-called statute for a European association[405] take us back three decades in time (see Subsection 2.3.1. for an in-depth discussion).[406] 'Freedom of association' experts have described the overly complicated and lengthy EU legislative process that ended without results as 'demotivating'.[407] Thus, for organisations that facing ongoing legal, policy and funding challenges (see Chapter 3), it was not seen as a tool that responded to their immediate needs. The return (that is to say the possibility to get it passed and the subsequent protection) on investment (time for advocacy) among focus group participants was considered to be rather low.[408]

Nevertheless, there is some potential of this policy option, since it has been based on the so-called internal market logic. The **legal basis and subsidiarity** were the main reasons for the Member States of the then European Community to contest the proposal. However, recent CJEU judgments in the Lex CEU case and Lex NGO case (C-78/18 *Commission v Hungary* (transparency of associations))[409]show that freedom of education and freedom of association are closely linked and can be protected by using EU internal market arguments.

The proposed **European Association Statute (EAS)** originated in the resolution of the European Parliament of 13 March 1987 on non-profit-making associations in the European Communities,[410] calling on the Commission to draft a proposal for a Regulation that would constitute a 'Community-wide statute for associations covering the requirements of associations operating in more than one Member State and national associations.'[411] The Commission followed up this call in its Communication to the Council in 1989.[412] The EESC endorsed this proposal.[413] The Commission presented its proposal for a Council Regulation for a Statute for a European Association on 6 March 1992.[414] After an exchange with the Parliament, the Commission submitted an amended version of the proposed Regulation to the Council in 1993.[415] The proposal for a Regulation was accompanied by a supplementing directive regarding involvement of employees.[416]

However, the legislative process on the EAS did not make much further progress and **in 2005 the Commission withdrew its proposal**, in light of 'Better Regulation' guidelines, since 'not sufficient

[405] During focus group discussion, only two out of 16 participants knew about the European Association Statute.

[406] Anheier, H.K., and J. Kendall. *Third Sector Policy at the Crossroads: An International Non-Profit Analysis*. Routledge, 2012; Wöffen, T., 'European Associations: The Political Debate and Basic Legal Questions', We are Europe, Version: October 2018, available at https://we-are-europe.org/wp-content/uploads/2018/11/wae_eas_historyandlegal_221018.pdf.

[407] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[408] Ibid.

[409] CJEU, Case *C-78/18, European Commission v Hungary (Transparency of associations),* judgment of 18 June 2020, ECLI:EU:C:2020:476. For an in-depth analysis of the judgment, see Bárd, Grogan and Pech, 'Defending the Open Society against its Enemies', 2020, op. cit.

[410] European Parliament, Resolution of 13 March 1987 on non-profit-making associations in the European Communities OJ No C 99, 13 April 1987, p. 205.

[411] Wöffen, 'European Associations: The Political Debate and Basic Legal Questions', 2018, op. cit.

[412] Commission Communication to the Council, SEC(89) 2187 final of 18 December 1989

[413] European Economic and Social Committee, OJ No C 332, 31.12.1990, p. 81.

[414] Commission of European Communities, Amended proposal for a Council Regulation (EEC) on the statute for a European association (92/C99/01)COM(91)273final—SYN386.

[415] Ibid.

[416] Commission of European Communities, Amended proposal for a Council Directive supplementing the statute for a European association with regard to the involvement of employees, (II) (93/C 236/02) COM(93) 252 final.

progress had been made' on this file.[417] In 2012, the European Commission submitted the proposal for a European Foundation Statute. As with the EAS proposal, little progress was made, and in 2015 the European Commission similarly withdrew the proposal for European Foundation Statute.[418]

In 1993, when the Commission submitted its amended EAS regulation proposal to the Council, it used the argument that associations are important actors within economic life.[419] The Commission used Article 100a of the Treaty Establishing the European Community (TEC) as the legal basis for the proposal, giving the Commission the power to progressively create the internal market by common approximation, competition and taxation rules.[420] The Commission highlighted the role of the so-called third sector within the economy of European Communities and supported the view that it must enjoy the same freedoms, including 'full freedom of establishment'.

For instance, it reiterated that:

> [...] the completion of the internal market means that there must be full freedom of establishment for all activities which contribute to the objectives of the Community, irrespective of the form taken by the body which carries them on.[421]

The Commission went on to argue how non-profit associations, by addressing 'general interest', contribute to the objectives of the Community and highlighted their contributions 'in [economic] fields such as education, culture, social work or development aid'. The amended proposal acknowledged that associations not only are non-profit but also have their mandate, as they 'operate in accordance with their own principles, which are different from those applying to other businesses'.[422]

The Commission provided a wide definition of 'European Association' (Article 1) and proposed requiring that Member States swiftly recognise the legal personality (Article 2). The text highlighted that 'legal personality shall include in particular the following rights necessary for the pursuit of the EA's objectives:

- (a) to conclude contracts and perform other legal acts;
- (b) to acquire movable and immovable property;
- (c) to receive donations and legacies, including through appeals to public generosity;
- (d) to employ staff;
- (e) to be a party to legal proceedings.

The role of associations within the functioning of 'internal market' has led to objections from EU Member States:

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417 Wöffen, 'European Associations: The Political Debate and Basic Legal Questions', 2018, op. cit.

418 See OJ *C* 80, 7.3.2015, p. 21.

419 COM(93) 252 final — SYN 386.

420 Treaty establishing the European Community (Nice consolidated version) Part Three: Community policies - Title VI: Common rules on competition, taxation and approximation of laws - Chapter 3: Approximation of laws - Article 95 - Article 100a - EC Treaty (Maastricht consolidated version), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E095.

421 Commission of European Communities, Amended proposal for a Council Regulation (EEC) on the statute for a European association (I) (93/C 236/01) COM(93) 252 final — SYN 386 (Submitted by the Commission pursuant to Article 149 (3) of the EEC Treaty on 6 July 1993.

422 Commission of European Communities, Amended proposal for a Council Regulation (EEC) on the statute for a European association (I) (93/C 236/01) COM(93) 252 final — SYN 386 (Submitted by the Commission pursuant to Article 149 (3) of the EEC Treaty on 6 July 1993.

> Governments known to be fundamentally opposed to the proposal at the time were Germany, Denmark, and the United Kingdom. They argued in part that it was against the principle of subsidiarity to provide EU legislation in the field of associations that should remain in the sole jurisdiction of Member States. Also, they questioned that there was any proven need for an EAS.[423]

Approximation of laws under Article 100a of the TEC required **unanimity at the Council**. This way, they have effectively challenged EU competence over non-profit actors and foundations. Some **opposition was mounted by civil society** as well. For instance, the German Free Welfare Organization argued in 1998 that 'free welfare associations, which dominate the third sector in Germany are voluntary, *ideal associations,* and inherently cannot be "economic" entities or firms'.[424] The Commission proposal was seen as too 'idealistic' by Member States, and overly 'pragmatic' by some civil society organisations.

Currently, the post-Lisbon Article 352 of the TFEU also requires a unanimous vote. As focus group participants explained, 'the failure of the European Foundations statute demolished any hope for the EAS'.[425] While newly Lisbon-introduced articles could be used as a reason for a new EAS proposal, such as Article 2 of the TEU on EU fundamental values, Article 11 of the TEU on engagement with civil society, or Article 12 of the EUCFR, the unanimity vote at the Council could continue to jeopardise the feasibility of such a legislative proposal.

As previous study has highlighted, the 'unanimity rule' can be particularly concerning when some EU countries are in 'pre-Article 7' procedures but are still voting on the rule of law, democratic accountability and fundamental rights-related matters.[426] That said, an examination of the desirability and feasibility of a new initiative on the EAS could be carried out by launching a public and stakeholder consultation on the matter, and exploring the views and positions of Member States on this possibility.

The Commission could make a stronger claim about 'having a legal basis' after the Lex NGO judgment (Case C-78/18). The CJEU, in this case, upheld the Commission arguments for the infringement procedure, namely that undue **restriction of civil society funding affects the freedom of movement of capital under Article 63 of the TFEU**. Therefore, the Commission could use the same argument to propose Internal EU Guidelines on human rights defenders. However, when the issues fall under areas governed by the EU law, for instance in the area of migration and asylum, EU institutions already have the mandate to ensure the compliance with the EUCFR and Article 2 of the TEU.[427]

As an alternative, the EU could promote the ratification of the CoE **'European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations'**,[428] as suggested by Wöffen. However, as he noted, 'so far, it has been ratified only by 12 European countries.

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[423] Wöffen, 'European Associations: The Political Debate and Basic Legal Questions', 2018, op. cit.

[424] Anheier, H. K., L. Carlson and J .Kendall 'Third sector policy at the crossroads: Continuity and change in the World of non-profit organisations, in Anheier, H. K., and J. Kendall (eds.), *Third Sector Policy at the Crossroads*, 2012, op. cit. *Emphasis original.*

[425] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[426] Bárd, Carrera, Guild, and Kochenov, 'An EU mechanism on democracy, the rule of law and fundamental rights', 2016, op. cit.

[427] Peers, S. 'EU Law Analysis: Should the EU Sanction Its Member States for Breaches of Rule of Law and Human Rights? Part 2: The Application of Ordinary EU Law'. *EU Law Analysis*, 29 October 2019. Available at https://eulawanalysis.blogspot.com/2019/10/should-eu-sanction-its-member-states.html.

[428] CoE, European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations' on 24 April 1986, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/124.

Many large countries, such as Germany, Italy, Spain, Poland, and Sweden, have not yet ratified it and will probably never do.'[429]

The Hungarian Lex NGO, the relative judgment by the CJEU and the fact that similar draft laws are tabled and discussed in other EU MS, could renew interest in achieving an EAS at EU level and/or ratifying the CoE Convention. Also, the EU institutions could use political leverage and incentives to convince EU Member States to ratify the abovementioned CoE convention, while EU-level drafting on the EAS is ongoing.

Besides, the 'lack of harmonization in the area of tax treatment is a significant obstacle for European associations.'[430] Article 352 of the TFEU also provides the basis for a supplemental directive regarding harmonised taxation, which could, for instance, regulate exemptions for the non-profit sector, since the EU has jurisdiction on indirect taxes under Article 113 of the TFEU. Further, Article 115 of the TFEU foresees a possibility to harmonise taxes when 'it is necessary for the functioning of the internal market' and 'to avoid distortion of competition'.[431]

It could be interesting to explore whether **a tax exemption** or the setting of a ceiling for taxes for NGOs is desirable or feasible, for instance, whether the EU could introduce clauses preventing governments from introducing excessive and discriminatory taxes. In Hungary, for example, NGOs and other actors aiming to assist and integrate refugees and migrants are subjected to 40% tax, when other types of activities are tax exempt. Whether taxes on CSOs could also be seen as indirect taxes on the EU budget could be further examined, since AMIF (the Asylum, Migration and Integration Fund), ESF, FEAD (now ESF+) and other funds could theoretically be used to finance such discriminatory civil society tax. Furthermore, in some countries, non-profit NGOs are taxed while in others they are exempted from taxation. This could also be seen as creating an uneven playing field when competing for EU funding.

Nevertheless, international and regional freedom of association standards cover both, registered and unregistered entities. Thus, any deliberations on EAS, should not be used as an excuse to reduce civic space to registered associations.

4.2. EU internal guidelines on human rights defenders

Some civil society representatives proposed to draft EU Internal Guidelines on Human Rights Defenders.[432] It could be a non-binding yet authoritative policy tool. Should they be adopted, such EU internal guidelines could articulate concrete procedures on how they should be respecting, protecting and promoting the work of human rights defenders. In this way, EU Member States and EU institutions could play a greater role in realising the EU Charter on Fundamental Rights and EU legal principles inside the EU.

There are several ways for EU institutions to realise the objectives of these Guidelines; this Section focuses on two possible scenarios. In the first, the current EEAS Guidelines on Human Rights Defenders (discussed in Subsection 2.3.3.) could be used as a basis for non-binding internal guidelines.

[429] Wöffen, 'European Associations: The Political Debate and Basic Legal Questions', 2018, op. cit.

[430] Ibid.

[431] Ibid.

[432] See for instance, PICUM et al., Civil society inputs to the forthcoming European Commission guidelines on preventing the criminalization of human rights defenders, February 2020.

Alternatively, inspiration could be drawn from the EU's Whistleblowers' Protection Directive (EU 2019/1937) to create a legally binding tool to protect those that are defending EU values against reprisals and retaliations by states.

- **Non-binding EU internal guidelines on human rights defenders**

These Guidelines are used by the EU External Action Service to guide its missions, which are expected to follow concrete procedures to protect and promote human rights defenders (see Subsection 2.3.3.). By analogy, European Commission and Parliament representations and agencies (EU staff) within the EU could use similar internal guidelines and undertake the role of protecting and promoting human rights defenders carrying out their activities in the Union.

The consistency check is needed between EU external and internal policies on HRDs. While the UN Human Rights Defenders declaration reaffirms principles of indivisibility, interrelatedness and impartiality of human rights, EU institutions seem to differentiate between human rights inside and outside the EU, by offering different levels of recognition and protection for human rights defenders. The EU Internal Guidelines on Human Rights Defenders could be framed around the EU commitment to strengthen its respect of the EUCFR, which has been legally binding for a decade. This initiative could be already launched in the announced Commission proposal for a 'New Strategy for the Implementation of the Charter of Fundamental Rights' foreseen for the 4th quarter of 2020. The internal guidelines could also be accompanied by additional and theme-specific handbooks and training for EU personnel (i.e. in the context of Frontex or Europol deployments) in EU Member States.

Also, the FRA's Fundamental Rights Platform has called 'for practical implementing guidelines that can help national bodies to implement EU law in compliance with the Charter.' [433] For instance, 58 civil society organisations have called upon the European Commission to exempt Human Rights Defenders from criminalisation under the Facilitators' Package.[434] While some focus group participants stressed the need to equip a wide range of human rights defenders within the EU and especially the watchdog NGOs with such guidelines at EU level, some had doubts as they saw a risk that the European Commission could use this opportunity to narrow the scope of the UN Human Rights Defenders Declaration if such EU internal guidelines were to be developed.[435] However, from their point of view, the main controversy is the protection of activists and volunteers who do not formally belong to associations.

Within the Commission it should be the role of the **Directorate General on Justice and Consumer Rights** (DG JUST) to initiate such non-binding internal guidelines. DG JUST could take the lead in encouraging the European Commission's representation offices within the EU Member States to undertake a similar role to that played by EU Missions in third states in engaging with and promoting the work of human rights defenders. For instance, to protect and shield them from governments and protect human rights defenders that are contributing to the rule of law assessments, or to attend trials of human rights defenders.

[433] FRA, 'Fundamental Rights Report 2020', 2020, op. cit., p. 25.

[434] PICUM et al., Civil society inputs to the forthcoming European Commission guidelines on preventing the criminalization of human rights defenders, 2020, op. cit.; PICUM et al., Joint Statement: The EU must stop the criminalisation of solidarity with migrants and refugees, 26 July 2019, available at https://picum.org/wp-content/uploads/2019/08/190731-Joint-Statement-Criminalisation-5.pdf.

[435] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

Alternatively, the **European Parliament** should take the lead, given its mandate as a democratic institution representing European citizens and defending their rights. For instance, the European Parliament – and notably its committee on Civil Liberties, Justice and Home Affairs – adopted a resolution on the situation on fundamental rights in the Union in the previous year(s). The last report providing an overview of the situation in 2017 expressed concerns regarding:

> the obstacles existing to the work of human rights defenders, including civil society organisations (CSOs) active in the field of fundamental rights and democracy, including serious restrictions on freedom of association and freedom of speech for the organisations and citizens concerned, as well as restrictions on financing;[…] stresses that they should be able to carry out their work in a safe and well-supported environment.[436]

The report on the situation inside the EU arrives at similar conclusions to those on human rights outside the EU.[437] Within the LIBE committee, a Working Group (WG) on Democracy, the rule of law and fundamental rights is currently conducting this internal and external consistency check. This working group has discussed the situation of human rights defenders and civic space in general and then specifically in light of the impact of COVID-19 pandemic on CSOs. For instance, in the meeting of 28 May, the WG discussed 'how to protect civil society organisations from threats and attacks and the ways to audit the negative impacts of legislative changes.'[438] The mandate of this group could be further extended to protect human rights defenders and mobilise the EU-wide reaction, when needed.

The EP also insisted on ensuring that adequate financial support is provided to NGOs through the European Values Initiative, that now became Justice, Rights and Values Fund.[439] This was reiterated also by the EESC in its own-initiative opinion that called for the European Instrument for Democracy and Human Rights (EIDHR)-like mechanism inside the EU, among other issues.[440] Nevertheless, recent cuts to the funding of Justice, Rights and Values Fund and vague rule of law conditionality prove that human rights issues may be more difficult to discuss and resolve when speaking about EU Member States (see in-depth discussion in Chapter 3).

- **Binding EU internal guidelines/directive on human rights defenders**

The EU legislators could build on the Whistleblowers' Protection Directive (EU) 2019/1937 in two ways. Firstly, it provides a 'protection of financial interests of the Union' as one of the possible legal bases (under Articles 310(6) and 325(1) and (4) of the TFEU. The recent CJEU judgment in the Lex NGO case (Case C-78/18) provides the Commission and Parliament with the new legal basis to act in this area of civil society funding - freedom of capital (Article 63 of the TFEU). There is also an increasing recognition that civil society plays a role in the economy and ensuring financial interests of the Union. Secondly, it could serve as a template to guard against similar retaliations to those reporting to the to be set up EU

[436] European Parliament resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017 (2018/2103(INI)), 2019, para. 30.See also, Draft Report on the situation of fundamental rights in the European Union - Annual Report for the years 2018 – 2019, (2019/2199(INI)), Rapporteur: Clare Daly, Committee on Civil Liberties, Justice and Home Affairs, 3 February 2020.

[437] European Parliament, Resolution of 15 January 2020 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2018 (2019/2125(INI)), 15 January 2020, para. 24.

[438] European Union Agency for Fundamental Rights (FRA), 'Exploring Civil Society Space with the European Parliament's Rights Monitoring Group.', 5 June 2020, available at https://fra.europa.eu/en/news/2020/exploring-civil-society-space-european-parliaments-rights-monitoring-group.

[439] European Parliament, 'Promoting rule of law and fundamental rights in the EU', 2019, op. cit..

[440] European Economic and Social Committee (EESC), 'Financing of CSOs by the EU' op. cit.

rule of law mechanism,[441] submitting Democracy, rule of law and fundamental rights (DRF) reports or otherwise ensuring democratic accountability.[442]

Such whistleblower-like protection is very important for civil society reporting in the framework of the EU rule of law mechanism. Civil society representatives stated that while they find the exercise meaningful and want to be engaged in the mechanism, it entails the risk of reprisals and retaliation from national governments.[443] The EESC member contributing to the EESC DRF report on Rule of Law in Poland experienced retaliations for her activities.[444] Therefore, the EU needs to develop 'EU protection schemes' for those who report on rule of law and fundamental rights issues.

A recent study finds that the directive, besides work-related retaliations, can also prevent cases of defamation and libel.[445] Similarly, human rights defenders who are often targeted by SLAPPs because of their work, they too 'should not incur a liability of any kind as a result of their reports or public disclosures.'[446]

[441] European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, op. cit.; European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights op. cit.

[442] Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law

[443] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[444] The World Organisation Against Torture, 'Poland: Threats and Retaliation against Ms. Karolina Dreszer-Smalec', 2020, op. cit.

[445] Bárd, Bayer, Chun Luk and Vosyliūtė,'SLAPP in the EU context', 2020, op. cit.

[446] *Id.* in Recital (97) and Article 21(7).

Box 5: Building on the Whistleblowers Protection Directive

The Whistleblowers Protection Directive (EU) 2019/1937 was adopted in October 2019.[1] This Directive is not aimed at regulating the operations of civil society actors, but the role of civil society is mentioned. The Directive enabled whistleblowers to report corruption or other breaches of EU law in cases where the EU is funding and implementing various policy measures, from waste management, to food safety or public health. The explanatory memorandum of the legislative proposal provides that **the legal basis is the protection of the financial interests of the Union:**

> 'On the protection of financial interests of the Union, the Treaty stipulates in Articles 310(6) and 325(1) and (4) TFEU, the need for Union legislative action on setting out equivalent and deterrent measures to protect them against unlawful activities.'[2]

By analogy, an argument could be made to introduce a similar directive that not only private individuals but **also civil society organisations** – by uncovering various breaches of EU law, including corruption, mismanagement of EU funds in the areas from environment to migration – are also safeguarding the financial interests of the Union and beyond. This legal basis could be strengthened by the recent CJEU judgment in the Lex NGO case, since freedom of association was seen as falling under the TFEU Article 63 - freedom of movement of capital protections.

The Directive could also serve as **a template to draft a directive protecting from similar retaliations when watchdog NGOs or human rights defenders are reporting to the EU rule of law mechanism.** Directive EU 2019/1937 calls for protection from retaliations against various actors who disclose whistleblowers' reports, including **civil society** [1]. It is done 'as a means of safeguarding freedom of expression and media freedom' (recital 43).

The Directive acknowledges that even when providing free, impartial and legal advice to whistleblowers, civil society risks becoming the target of various pressures (recital 89):

> 'Member States should ensure that such organisations do not suffer retaliation, for instance in the form of economic prejudice through a restriction on their access to funding or blacklisting that could impede the proper functioning of the organisation.'

Source:
[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, PE/78/2019/REV/1, OJ L 305, 26.11.2019, p. 17–56.
[2} European Commission, Proposal for a Directive on the protection of persons reporting on breaches of Union law, COM/2018/218 final - 2018/0106 (COD), 23 April 2018.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0218#footnote21.

The main challenge for the Commission to go forward with either binding or non-binding EU Internal Guidelines on Human Rights Defenders could be the increasing sensitivity of Member States on the issue and potential political blockage. Another issue that could be used by Member States backsliding on the rule of law is the lack of an EU legal basis. Nevertheless, the answer could be that Internal Guidelines are not a legislative initiative, unlike the EAS (discussed above). Some interviewees argued that 'sensitivities are overrated' and that long ignored or delayed 'inconvenient' conversations about the state of fundamental rights escalate into even more 'inconvenient' infringements or Article 7

procedures. Civil society reports have argued that in situations like those of Hungary, Poland and Romania, when legislative proposals targeting civil society become laws, it is no longer time for debate, but for infringement procedures at the CJEU.[447]

It is very difficult for EU institutions and agencies to communicate the fact that human rights defenders are at risk inside the EU. Sometimes, such human rights defenders experience similar forms of surveillance, intimidation and harassment, disciplining and criminalisation. As has been described in Chapter 3, vague criminal provisions, including those resulting from the EU level legislation, such as the EU Facilitation Directive (2002/90/EC), can be misused against watchdog NGOs and human rights defenders.[448]

Civil society representatives highlighted the importance of **firm and speedy EU reaction to the smear campaigns** and **attacks on civil society**.[449] The EU could intervene more often to condemn attacks and smear campaigns against civil society and individuals working in the area of human rights. [450] On several occasions, MEPs have observed trials of watchdog NGOs and other human rights defenders. For instance, in a follow-up to a petition received by the Parliament's Committee on Petitions (PETI),[451] besides the official response received by the Commission, some MEPs took a personal initiative and followed the trials of SAR NGOs.[452]

Chapter 3 elaborated on the risks and challenges that watchdog NGOs and other human rights defenders including, citizens' mobilisations, volunteers on the ground, and even civil society representatives at EU bodies, have to face when carrying out their activities. Also, academics, as well as investigative journalists, even judges and whistleblowers are experiencing various pressures when attempting to uphold fundamental rights and ensure democratic accountability vis-a-vis the EU institutions.[453] All of these actors qualify as human rights defenders, in light of the definition provided by the UN Declaration on Human Rights Defenders. However, **no regional mechanism is developed to protect HRDs in Europe**.

Civil society representatives suggested **'replicating' the models of the UN** where it provides for possibilities of UN mediation and funding.[454] While there are various emergency funding schemes available at the international level, they are little known among civil society actors working inside the EU.

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[447] Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.

[448] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17–18.

[449] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[450] Ibid.

[451] Schmid Porras, P., 'Petition No 1247/2016 to European Parliament, Committee on Petitions by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea', Brussels, 31 July 2017, available at https://www.europarl.europa.eu/petitions/en/petition/content/1247%252F2016/html/Petition-No-1247%252F2016-by-Paula-Schmid-Porras-%2528Spanish%2529-on-behalf-of-NGO-Professional-Emergency-Aid-%2528PROEM-AID%2529-concerning-the-criminalisation-of-persons-engaging-with-migrants-in-an-irregular-situation-and-the-criminalisation-of-humanitarian-assistance-at-sea.

[452] For instance MEPs observed the trial of two Team Humanity and three PROEM AID volunteers in Lesvos on 8 May 2018, that ended in acquittal of all volunteers. Also, MEPs followed-up with Greek authorities regarding pre-tral arrest of ERCI volunteers, who were kept at the high-security prison for more than three months.

[453] Bárd, Bayer, Chun Luk and Vosyliūtė,'SLAPP in the EU context', 2020, op. cit.

[454] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

Some international and regional organisations are stepping up the protection of human rights defenders. For example, OSCE ODIHR at the moment is developing a toolbox on how to ensure the physical and operational security of human rights defenders operating in OSCE countries. In particular, the **OSCE ODIHR Guidelines on Human Rights Defenders** could serve as a blueprint for the EU institutions and their agencies when interacting with civil society.

4.3. EU civil society stability index

The need for **EU civil society stability index** has been proposed by human rights organisations working in the context of rule of law backsliding in Hungary, Poland and Romania.[455] They claimed that such an index would highlight and make it easier to understand what is the state of civic space in each EU Member State. This index could also feed into the EU rule of law review, given the robust methodology and its independent set up.

Box 6: Towards the EU civil society stability index

A recent civil society report [1] highlighted the usefulness of reports prepared by USAID Civil Society Sustainability Index, where the US Missions are covering in detail legal and socio-political changes in countries in Central and Eastern Europe and the Balkans. The authors regretted that at the EU level 'there is no pan-European, comprehensive and regular study analysing the state of civil society and the situation of civil society organizations in the European Union.'[1]

The authors acknowledged the value of such research, by recalling the FRA study on Civil society challenges conducted in 2018 [2]. They called on FRA to 'regularly conduct monitoring of civic space' and also the European Commission 'to prepare annual reports describing the trends and changes in the civic sector.' Most importantly this report should not only serve for publicity, but also 'should become a part of the rule of law review cycle and form the basis of a dialogue between the EU institutions and national governments as well as affected stakeholders.'

Source:
[1]Pardavi, M., M. Szuleka, G. Gheorghe, 'New decade, old challenges: Civic Space in Hungary, Poland and Romania', Report of Hungarian Helsinki Committee, Helsinki Foundation for Human Rights and APADOR-CH, March 2020.
[2] European Union Agency for Fundamental Rights (FRA) 'Challenges facing civil society organisations working on human rights in the EU', Luxembourg, Publication Office of the European Union, 2018, https://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-organisations-working-human-rights-eu.

Another output by the ECNL and Civil Society Europe (CSE) has devised a potential methodology for a civic space/civic freedoms monitoring mechanism that could feed into the rule of law cycle.[456] The

[455] Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.

[456] European Centre for Non Profit Law (ECNL), et al.,' Strengthening Rule of Law Through Supporting Civic Space', Draft Paper For Discussion, July 2020.

methodology includes the indicators the EU already uses when monitoring non-EU countries to ensure consistency checks.

The EU could deploy a similar index based on international and regional standards, and add the EU rule of law specificities. In the first RoL report civil society was analysed among 'other checks and balances', however, the situation of civil society should constitute one of the key criteria.[457] Similarly, the FRA Fundamental Rights Platform also has asserted the need for the EU 'to revamp its efforts to collect information on how the EU Member States apply the Charter'.[458] While some civil society representatives considered that the FRA could draft such an EU Civil Society Stability Index; others thought it could be independent, drafted by well-known civil society organisations or academia, as for the Freedom House indexes.[459] This study considers the benefits of civil society and academia to ensure independence and impartiality. However, the EU should grant appropriate funding to perform such an important task.

Civic space is hard to conceptualise for the general public and even for policymakers; for this reason, the index would prove useful. Also, EU-level institutions could track developments early on and intervene promptly. Among the main challenges is the need for a robust methodology. Governments unhappy with the outcome of such an evaluation could fight back by criticising methodological issues. Interviewees underlined that such an index would need to have a robust methodology to capture the civil society and civic space within the wider rule of law, fundamental rights and democratic institutions context. Thus, it should combine qualitative and quantitative methods to reveal not only numbers but also to explain the dynamics playing out in a specific country and across the EU. Further, the index should include both the amount of funding received by civil society actors to carry out their activities and the type of civil society organisation. The index indicators would need to be well defined to avoid the results being relative, for instance, by only referring to absolute funding for civil society actors without specifying or watchdog NGOs and human rights defenders. In some countries, while human rights defenders are 'starved out', organisations established by government – so-called GONGs – are well funded.[460]

The index methodology should take into account legislative changes and issues related to funding, smear campaigns, attacks and harassment, non-investigation of crimes perpetrated against civil society actors and their employees or volunteers. The EU civil society stability 'index' could also be linked to existing observatories, such as the OMCT, Civic Space Watch, to track attacks against human rights defenders. It is ensuring to see that the European Commission, in its first annual rule of law report took a similar approach.[461]

[457] European Commission, '2020 Rule of Law Report:The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

[458] FRA, 'Fundamental Rights Report 2020', 2020, op. cit.

[459] Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

[460] Ibid.

[461] European Commission, '2020 Rule of Law Report:The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

4.4. EU focal point for attacks against civil society

Article 11 (2) of the TEU requires EU institutions to 'maintain an open, transparent and regular **dialogue with representative associations and civil society'** (*emphasis added*) by establishing an EU focal point or a network of focal points for civil society. Civil society actors working in the area of migration, human rights and rule of law have said that they do not know how to approach the EU institutions and agencies when issues arise.[462] It is not clear for them where and to whom they could speak about legislative changes, funding restrictions or physical attacks and harassment.

Civil society organisations in countries where rule of law is backsliding, like Hungary and Poland, feel that at the domestic level it is hard, indeed increasingly impossible to access justice and receive fair treatment[463]. They seek the protection of the civic space at the EU level. After all, watchdog civil society is also supposed to uphold the EU values enshrined in Article 2 of the TEU. Thus, the EU, to ensure the effective enjoyment of the right of freedom of association and freedom of assembly, should establish open and transparent communication channels for affected civil society organisations. For example, in the recent report by the Hungarian Helsinki Committee, the Polish Foundation for Human Rights and APADOR from Romania it is stated that:

> [...] contact points for civil society organisations should be established within the structures of the European Parliament and the European Commission, which should serve as units gathering information on attacks on civil society organisations and civil society activists and fast-tracking this information to relevant specialised units within both of these institutions.[464]

The portfolio of Věra Jourová, the Vice President of the European Commission for Values and Transparency , is the one best placed to act as a **focal point**.[465] There is a clear division of responsibilities within Jourová's cabinet between advisors focusing on civic space and those focusing on freedom of speech. The more prominent role this contact person can play in the cabinet, the better they can represent civil society. For example, such focal contact point could mediate with national governments when the legal basis for Commission's infringement is lacking, and when pressures on civil society actors run against the spirit and principles of the EU enlisted in the Article 2 of TEU and the EUCFR.

Many human rights activities carried out by CSOs take place in areas of EU competence (i.e. implementation of asylum *acquis*, Schengen *acquis*, Roma integration policies, EU citizens' rights, 'the Green Deal'), so CSOs also ensure the accountability of Member States, EU agencies and even different EU institutions. Article 11 (1) of the TEU also obliges EU institutions to, 'by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'.

Thus, in addition to the EU legislative consultations and 'citizens' dialogues', there could be more sustainable access to different Commission DGs and EU agencies, so that they would have dedicated persons for relations with civil society too. One of the interviewees asserted that such an initiative could translate into a **broader EU Network of Contact points for Civil Society**. Potentially it could create closer links with civil society and diversify the Commission's 'socialisation' and gathering of information methods, which could lead to more nuanced policymaking.

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462 Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

463 Ibid.

464 Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.

465 Focus group convoked for the purpose of this study on 25 May 2020 via Zoom.

The **EESC** is another EU institution that represents employers, workers and various interests, among them - various **civil society organisations**. Contacts with EESC are maintained either via the Secretariat of Diversity Europe Group (III) or via concrete EESC members that are preparing relevant opinions. The EESC has also launched a call for a study looking into various effects of COVID-19 on civil society, and made various important opinions on rule of law and civic participation, calling for Civil Society Days.

Nevertheless, because the EESC does not have legislative initiative power like the EC or the EP, it is often not used as a venue by and for civil society.[466] Some interviewees were critical of the fact that EESC members are appointed by their countries. Such procedure lacks visibility and does not engage civil society to 'elect their representatives'. According to one interviewee, this creates difficulties for watchdog organisations in certain countries to be represented at the EESC. The recent episode discussed in this study about retaliation against the Polish EESC member (see Section 3.3.) is yet more proof that the institution and its members need to preserve their independence when representing civil society.

[466] Ibid.

5. CONCLUSIONS, RECOMMENDATIONS AND POLICY OPTIONS

5.1. Conclusions

The EU institutional evidence shows that various developments **over the past five years, have worsened functional conditions for civil society actors across the EU**.[467] The main hypothesis driving this study is that civic space is not shrinking equally for all civil society actors. Some governments are targeting those that frequently criticise them, especially watchdog NGOs and other human rights defenders, while others that take a less critical stance may not face such restrictions. Some NGOs are even generously rewarded for legitimising certain government policies and practices that may fall short of international or European human rights standards.

The study argues that **the role of these critical civil society actors is essential** in democratic societies and essential to upholding the rule of law, fundamental rights and democratic accountability – the Union's founding values – as enshrined in the Article 2 of the Treaty on European Union (TEU). **The EU, therefore, has a role to protect civic space from unjust and undue interference** by Member States and even by the Union's own institutions and agencies. The 'protection' proposed in this study is not meant to 'paternalise' civil society but rather to monitor governments' respect of civic and political rights, to prevent retaliation against watchdog NGOs and other human rights defenders, and to strengthen their independence and impartiality.

The European Commission and the Member States, faced with exceptional situations and extraordinary pressures, have resorted to 'policymaking in the crisis mode'.[468] In recent years, 'crises' have been declared in the areas of **rule of law,** the **Common European Asylum System** and, most recently, **public health**. The policymakers acting in 'crisis mode' are aiming for flexibility and speed, often by limiting democratic accountability, restricting civil society space and infringing fundamental rights.

EU institutions have been struggling to address the **rule of law crisis in Hungary and Poland**. There, civil society actors have been under continuous pressure, yet they have played a central role in ensuring democratic accountability. Watchdog NGOs and other human rights defenders highlighted the rule of law backsliding at EU, regional and international forums. In Hungary and Poland critical civil society actors have taken to the streets to challenge the legality of various restrictive laws and practices. Some watchdog NGOs have also submitted cases before Constitutional courts in Hungary and Poland, as well as before European Court of Human Rights (ECtHR) in Strasbourg and contributed to the infringement proceedings started by the European Commission before the Court of Justice of the European Union (CJEU) in Luxembourg.[469] This has led to retaliation on various fronts. For instance, in Poland, governing party Law and Justice (PiS) assumed control over civil society via establishment of the National Freedom Institute - Center for the Development of Civil Society, in 2017. This centre, under the

[467] FRA, 'Civic space – experiences of organisations in 2019: Second Consultation', 2020, op. cit. ; FRA, 'Fundamental Rights Report 2020', 2020, op. cit.; FRA 'Challenges facing civil society organisations working on human rights in the EU', 2018,op. cit.; European Parliament resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017 (2018/2103(INI)); European Parliament, Draft Report on the situation of fundamental rights in the European Union - Annual Report for the years 2018 – 2019, (2019/2199(INI)), op. cit..

[468] Carrera, 'An appraisal of the European Commission of crisis', 2019, op. cit.

[469] Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.

authority of the prime minister, had a mandate to distribute public funds to NGOs,[470] while international standard on freedom of association requires 'non-interference' with civil society funding.[471] The Fidesz-led government in Hungary in 2017 introduced what was termed '**the Lex NGO'** under the pretence of greater transparency of associations. This law has created an unfavourable legislative environment for organised civil society. Furthermore, government and pro-government media engaged in a smear campaign depicting watchdog NGOs as 'foreign agents'.[472]

A recent Court of Justice of the European Union (CJEU) judgment in **Case C-78/18 *Commission v Hungary (transparency of associations)*** that 'Hungary has introduced discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations' in breach of the EU law.[473] The Court showed that civil society funding falls within the Union's competence under Article 63 of the TFEU – concerning the free movement of capital. The CJEU found a violation of this freedom, as well as of provisions within the Charter of Fundamental Rights of the European Union (EUCFR), namely: Article 7 – the right to respect for private life, Article 8 – the protection of personal data and Article 12 – freedom of association. The Court also expounded upon the wider 'dissuasive and deterrent effects' on the functioning of civil society if organisations obtain grants from individuals or foundations abroad.[474] The CJEU stressed how the Lex NGO created 'a generalised climate of mistrust' in Hungary, and stigmatised civil society actors.[475] The Court highlighted governments' obligation not to interfere unjustifiably in civil society activities and thus established that their **independence and impartiality** is the key condition to be respected in the EU.

Article 11 (2) of the TEU specifies that the EU institutions 'shall maintain an **open, transparent and regular dialogue with representative associations and civil society**'. Nevertheless, several examples show that 'speaking truth to power' at EU forums may lead to reprisals. The Polish government retaliated against Karolina Dreszer-Smalec, who represents Polish civil society organisations at the European Economic and Social Committee (EESC). She was vilified in national media, and the prolongation of her mandate was rejected after she contributed to the EESC report on the rule of law and fundamental rights.[476] Currently, there is no mechanism to protect civil society from such reprisals when ensuring democratic accountability, upholding the rule of law, or defending fundamental rights.

During the so-called **European humanitarian and refugee crisis** civil society actors attempted to plug the gaps in humanitarian aid. They also observed the implementation of the EU asylum *acquis* and compliance with fundamental rights standards at the external borders of the Schengen area and on the high seas.[477] Some **governments have scapegoated such civil society actors** as the main reason for irregular arrivals, disregarding ongoing conflicts and protracted displacement.[478] The SAR NGOs and migrant rights' defenders were subject to smear campaigns, verbal and physical attacks, administrative

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[470] Ciobanu and Kosc, 'Warsaw grabs purse strings of Polish NGOs,' *POLITICO*, 8 December 2017, op. cit.; UN OHCHR, 'Poland:UN Human Rights Office Troubled by Shrinking Civic Space', 2018, op .cit.

[471] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to 39th session of the UN Human Rights Council, A/HRC/23/39, 2013, op. cit.

[472] Pardavi, Szuleka and Gheorghe, 'New decade, old challenges', 2020, op. cit.

[473] CJEU, Case C-78/18, *European Commission v Hungary (Transparency of associations*), judgment of 18 June 2020, ECLI:EU:C:2020:476, para.1.

[474] Bárd, Grogan and Pech, 'Defending the Open Society against its Enemies' , 2020, op. cit..

[475] CJEU, Case C-78/18, *European Commission v Hungary, op. cit.,* para. 118

[476] The World Organisation Against Torture, 'Poland: Threats and Retaliation against Ms. Karolina Dreszer-Smalec', 2020, op. cit.

[477] Carrera, Mitsilegas, Allsopp and Vosyliūtė, *Policing Humanitarianism,* 2019, op. cit.

[478] Carrera and Cortinovis, 'The Malta declaration on SAR and relocation', 2019, op. cit.

fines and even criminal prosecutions.[479] In some countries, like Hungary and, more recently, Greece, regulatory changes and practices targeted associations and volunteers working in the area of asylum, migration and integration.[480]

At the moment there is another infringement case pending before the **CJEU on the criminalisation of activities in support of asylum and residence applications (Case C-821/19).** Its ruling is likely to touch on Article 11 - Freedom of expression and information, as one of the core freedoms constituting civic space and the role of civil society in upholding the fundamental rights of others, ensuring correct implementation of asylum *acquis*. Thus, such legislative initiatives targeting civil society space should not be reduced to mere violations of fundamental rights and secondary EU laws. They entail attempts to limit democratic accountability in the areas falling within EU competence, in this case – in the Area of Freedom, Security and Justice. Thus, it is also a question of rule of law, as mutual trust and mutual recognition are undermined by removing independent watchdogs.

The **COVID-19** pandemic, beginning in March 2020, has exacerbated some of the aforementioned trends. Some **governments used this occasion to further restrict civic space**.[481] The UN Special Rapporteur on the rights to freedom of peaceful assembly and association, Clément Nyaletsossi Voule, expressed concerns 'about worrying trends and limitations emerging from civil society reports around the world, including on civil society's ability to support an effective COVID-19 response.'[482] The report provides several illustrations that EU Member States were not immune to this trend either. For instance, in Hungary, a new law has been passed criminalising 'fake news' and thus creating a chilling effect on views not corresponding with those of the government.[483]

COVID-19 restrictive measures disproportionately affected minority groups and those associated with them. For instance, volunteers in Calais, France, assisting asylum seekers and other migrants in coping with a dire situation were sanctioned for violating social distancing rules.[484] A legal suit against a Corona Awareness Team, a migrant self-help mobilisation in the Moria refugee camp on the Greek island of Lesvos, is another example. Greek authorities sued the Team for 'questioning national sovereignty' after it referred to the 'Greek side of the island' in a Facebook post.[485] The Council of Europe's Commissioner for Human Rights, Dunja Mijatović, raised concerns about practices and policies pursued by Italian and Maltese authorities that prevent SAR NGOs from disembarking rescued migrants. She stated that 'the COVID-19 crisis cannot justify knowingly abandoning people to drown, leaving rescued migrants stranded at sea for days, or seeing them effectively returned to Libya where they are exposed to grave human rights violations.'[486]

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[479] Carrera, Vosyliūtė, Allsopp, Sánchez and Brenda Smialowski, 'Fit for purpose?', 2019, op. cit..

[480] See for instance: Venice Commission and OSCE ODIHR, 'Hungary: Joint Opinion on the provisions of the so-called 'Stop Soros' draft legislative package which directly affect NGOs', 2018, op. cit.; Ferstman, 'Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States' 2019, op. cit.; Ferstman, 'Opinion on the compatibility of recent and planned amendments to the Greek legislation on NGO registration with European standards',the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, 2020, op. cit..

[481] Marzocchi, 'The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU', 2020, op. cit.

[482] UN OHCHR, 'States Responses to Covid 19 Threat Should Not Halt Freedoms of Assembly and Association' , 2020, op. cit.

[483] ECNL, 'Free Speech under Quarantine', 2020, op. cit.

[484] *Utopia 56*, 'L'état d'urgence sanitaire', 2020, op. cit.

[485] ' NGO Sued over Lesvos post', *Kathimerini,* 25 May 2020, op. cit.

[486] The CoE, Commissioner for Human Rights, 'States Should Ensure Rescue at Sea and Allow Safe Disembarkation during the COVID-19 Crisis', 2020, op. cit.

5.2. Recommendations

The recommendations below are horizontal, reflecting an assessment of the legal framework and the ongoing challenges. The recommendations also incorporate some of the policy options described in Chapter 4 as being best suited to address certain challenges.

Recommendation 1: EU governments need to be better monitored on how they respect freedoms, underlying the civic space as part of the ongoing EU mechanism of democracy, the rule of law and fundamental rights

- First and foremost, the European Commission needs to follow up on earlier European Parliament calls to set up **a comprehensive EU mechanism on democracy, the rule of law and fundamental rights**.[487] This study illustrates that civil society is placed tightly in this triangular relationship. Watchdog NGOs and human rights defenders are playing a crucial role in alerting EU institutions about the rule of law 'backsliding', the phenomenon that cannot be discussed in isolation from fundamental rights and democratic accountability. Therefore, the European Commission in its follow-up should ensure the comprehensive nature of this mechanism.
- Second, this mechanism should monitor how international, regional and EU standards in the area of freedoms of expression, assembly and association, as well as the right to defend human rights, are respected.
- Third, the European Commission should use infringement proceedings more swiftly, where the EU has competence (such as the AFSJ), to sanction government attempts to restrict the civic space. Particular attention should be paid when governments 'acting in a crisis mode' restrict the independence and impartiality of civil society actors or limit their operational space.488 By sanctioning such governments, EU institutions would strengthen democratic accountability and the conditions for mutual trust.
- Fourth, even on issues that seemingly fall outside of EU secondary law, in the spirit of Article 2 of the TEU, EU co-legislators should use their political leverage and condemn various initiatives aimed at restricting civic society, for instance by following up on the European Parliament's call to observe 'non-violent policing of assemblies and protests'.[489]
- This study assessed the benefits of creating **an independent EU civil society index, a policy option that has been proposed by civil society.** This index could be set up collaboratively by civil society and academia to ensure impartiality and independence. Based on a rigorous methodology, including qualitative country-by-country assessments, such an index would track whether the **independence of civil society organisations** is improving or worsening across EU Member States. The index could feed into a comprehensive EU mechanism on democracy, the rule of law and fundamental rights, as proposed by the European Parliament,

[487] European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, op. cit.; European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, op. cit.

[488] Carrera, 'An appraisal of the European Commission of crisis', 2019, op. cit.

[489] European Parliament, Resolution of 14 February 2019 on the right to peaceful protest and the proportionate use of force (2019/2569(RSP)).

promptly.[490] While this mechanism is pending, the index could also inform the annual Rule of Law report, among the key criteria.[491]

- The situation of civil society in different Member States is discussed among 'other checks and balances' in the first annual Rule of Law report (Section 2.4. of the Commission's report).[492] The in-depth assessment of challenges facing civil society actors is subject to a separate report on Democratic Participation in the EU. However, only a comprehensive assessment would show the real situation and cumulative effects of various breaches in each of EU Member States. The civic space, in particular, watchdog NGOs and human rights defenders, should constitute one of the key criteria in the Annual Democracy, Rule of Law and Fundamental Rights assessment.
- Another policy option explored in this study proposes revisiting the **European Association Statute to ensure a level playing field** and common registration requirements for various NGOs across the EU in light of existing freedom of association standards. The European Association Statute was drafted by the Commission in 1992, but due to lack of progress on this file, it was withdrawn in 2005. It also required unanimous support at the Council. In light of the recent CJEU ruling on the Lex NGO, co-legislators could also be using Article 63 of the TFEU – concerning the free movement of capital as a legal basis.

Recommendation 2: The EU should have more legal and policy tools to deal with governments that retaliate against watchdog NGOs and other human rights defenders

- In light of Article 11 (2) of the TEU, EU institutions and agencies should provide legal protection for civil society (where issues directly fall under the EU's competence) and exert political pressure to ensure that these rights are not restricted and violations are dealt with appropriately.
- Article 15 of the Treaty on the Functioning of the European Union (TFEU) recognises civil society's role in the EU's good governance; this role should include safeguards against reprisals and retaliation.
- Civil society participants requesting a preliminary ruling by the CJEU when litigating before national courts **should be eligible for specific protections from retaliation**, such as the possibility to access **interim procedures** equivalent to those of Rule 39 of the European Court of Human Rights.[493]
- The European Commission should draw up internal guidelines to respect and protect human rights defenders when they uphold EU values inside the Union. This should be done to ensure a consistency check on human rights policy, both internally and externally. Such **EU Internal Guidelines on Human Rights Defenders** guidelines would need to follow the *UN Declaration on Human Rights Defenders*, the Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines on the Protection of Human Rights Defenders* and European External Action Service's *Ensuring protection - guidelines on human rights defenders*. Such guidelines could be an authoritative policy tool reminding obligations of EU Member States, EU institutions, or agencies.

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[490] European Parliament, Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, op. cit.

[491] European Commission, 'Rule of Law Report', 2020, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en.

[492] European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union', COM(2020) 580 final, Brussels, 30 September 2020.

[493] Carrera, De Somer and Petkova, 'The Court of Justice of the European Union as a fundamental rights tribunal',2012, op. cit., p. 21.

- Whenever governments that are considered to be in contempt of the rule of law and thus subject to TEU **Article 7** procedures target the watchdog function performed by NGOs and other human rights defenders, EU legislators should assess this **in light of Article 2 of the TEU as an issue of rule of law, fundamental rights and democratic accountability.**
- Another policy option proposed by civil society and assessed in this study calls on EU co-legislators to **draft a directive to protect human rights defenders from retaliation.** Just like whistleblowers in the private sector, civil society actors are bringing to light various questionable practices in the public sector and help to protect the financial interests of the Union. Watchdog NGOs and other human rights defenders routinely denounce malpractices like corruption or mismanagement of EU funds. These denouncements are directly linked to **the protection of financial interests of the Union,** as stipulated in Articles 310(6) and 325(1) and (4) of the TFEU and indirectly – by pointing to non-compliance with fundamental rights.

Recommendation 3: Strengthening the independence and impartiality of civil society

- The European Commission should introduce clear **rule of law conditionality and compliance with fundamental rights** for any EU funding schemes.
- Budget for of the **European Rights and Values programme for 2021 -2027, should be significantly increased**, in line with European Parliament's calls in 2019,[494]since it aims to support watchdog activity and defend human rights. The EU should also increase the budget of **strategic litigation fund,** which would enhance civil society's ability to defend itself and uphold the EU Charter of Fundamental Rights (EUCFR) and other EU laws.
- EU legislators should strengthen **civil society organisations' standing within the Court of Justice of the European Union**. Unlike in the European Court of Human Rights, non-state third-party interveners or *amicus curiae* (friends of the court) in the EU do not have the right to submit their observations or to conduct public interest litigation on behalf of a vulnerable group.[495]
- Another policy option would explore the **European Union designating contacts or a network of contacts for civil society.** That way, the Union would be better equipped to monitor civil society space and to react swiftly if circumstances warrant it.

Recommendation 4: EU co-legislators should create a conducive environment for watchdog NGOs and other human rights defenders at the EU level

- EU co-legislators need to **uphold the 'better regulation' and 'better legislation' principles** by providing legal certainty for all, including civil society. Thus, legislators should remedy the vague definitions of crime that are routinely (mis)used by some governments to target watchdog NGOs and human rights defenders, especially if they are based on EU law (as in the case of the Facilitation Directive (2002/90/EC)).

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[494] European Parliament suggested to triple initially proposed Commission's funding for this programme and to constitute EUR 1.83 billion budget in the new multiannual financial framework for 2021-2027, see: European Parliament, 'Promoting rule of law and fundamental rights in the EU', 2019, op. cit.

[495] Ibid, pp. 20-21.

- To prevent undue policing of civil society actors, the European Commission should 'create an independent expert group tasked with developing **an EU Code of Police Ethics**'.[496] Such a code should build on the OSCE ODIHR *Handbook on policing of assemblies*.[497] Besides detailing policies on non-discrimination and guarding against racial profiling, the code should also advise on the role of policing in respecting and protecting human rights defenders.

[496] European Parliament, Motion for a Resolution of 16 June 2020 on the anti-racism protests following the death of George Floyd (2020/2685(RSP)), para. 24.

[497] OSCE ODIHR, *Human rights handbook on policing of assemblies,* Warsaw, 2016, op. cit.

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- ICCPR Case, *Jeong-Eun Lee v Republic of Korea* (CCPR/C/84/D/1119/2002)
- ICCPR Case, *Khairullo Saidov v Tajikistan* (CCPR/C/122/D/2680/2015)
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- ICCPR Case, *Sergey Kalyakin v Belarus* (CCPR/C/112/D/2153/2012)
- ICCPR Case, *Valery Rybchenko v Belarus (*CCPR/C/124/D/2266/2013)
- ICCPR Case, *Vladimir Katsora et. al. v Belarus* (CCPR/C/100/D/1838/2005)

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, covers the challenges facing the civil society space. Watchdog NGOs and other human rights defenders have been under pressure during the humanitarian and rule of law 'crises'. Several EU Member States have passed laws that fall short of international, regional and EU freedom of association standards. Some governments have used the COVID-19 pandemic to further restrict the civic space. The study explores how the EU could protect civil society from unjust state interference by strengthening freedom of association, assembly and expression, as well as the right to defend human rights. The study elaborates on four policy options: introducing a European association statute; establishing internal guidelines to respect and protect human rights defenders; developing a civil society stability index; and creating a network of focal contact points for civil society at EU institutions. It recommends strengthening the independence of critical civil society actors and increasing funding for activities such as strategic litigation to uphold EU laws and values.

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