Chapter 7 – Fostering Human Rights Infrastructure

Human Rights protection does not exist in a vacuum. The substantive and procedural guarantees of Human Rights law depend on infrastructure to render them effective. Such structures and procedures exist on a political and administrative level, a judicial level, and a civil-societal level. In line with the UN Declaration on Human Rights Defenders,[790] we consider a range of supervisory bodies, the judiciary, and civil society actors – each contributing by different means to the effective protection of migrants' individual rights – to form the vital Human Rights infrastructure in the field of European migration policy.

International and national supervisory bodies such as UNHCR, UN Special Rapporteurs, the Council of Europe's Commissioner for Human Rights, National Human Rights Institutions (NHRI), ombudspersons (including the European Ombudsman), and the EU Agency for Fundamental Rights (FRA) play particularly important roles in protecting migrants' Human Rights. Regarding the judiciary, independent, effective, and respected judges and courts form the heart of any Human Rights infrastructure. In the case of the EU this is true both at the Union and the Member State level. The ECtHR plays a pivotal role in the interpretation of international law, alongside the 'quasi-judicial' UN treaty bodies (the Human Rights Committee or the Committee Against Torture, among others). But apart from any public institutions, the implementation and protection of Human Rights depends on civil society actors, be they individuals or associations, most notably lawyers, journalists, NGOs, and volunteers.[791] These may be involved in various ways in protecting the interests of migrants – for example, by engaging in actual rescue operations at sea, in providing social assistance and legal advice to migrants, or in reporting on the Human Rights situation in countries of origin or transit, and in drawing public attention to instances of Human Rights violations.

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790 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, Resolution adopted on 9 December 1998, A/RES/53/144, available at https://undocs.org/A/RES/53/144.

791 On the important role of NGOs as 'entities acting in the collective interest of European civil society', see P. Staszczyk, *A Legal Analysis of NGOs and European Civil Society* (2019).

While these structures and activities evolved, for the most part, independently from the EU, the EU has committed itself to preserving and fostering them. This follows from Art. 2 TEU as well as from the EU-CFR, which reaffirms in its preamble that the EU is based on the 'indivisible, universal values of human dignity, freedom, equality and solidarity'. Furthermore, with the creation of the FRA the EU has established an institution for, among other things, the implementation of 'activities in the field of promotion of fundamental rights and capacity building'.[792]

7.1 Structural challenges and current trends

The legitimacy of the historically grown, multi-layered infrastructure of Human Rights protection in Europe has long been widely accepted, and was by some even considered as self-evident. Recent years, however, have seen a number of developments that cast doubt on this general acceptance. Various political actors, including governments, have made attempts to limit, or even abolish, essential elements of this Human Rights infrastructure. In our view, three developments stand out: the criminalization of civil society actors supporting migrants (trend 1), the growing populist pressure on judges protecting the rights of migrants (trend 2), and challenges to the role of the ECHR as guardian of migrants' Human Rights (trend 3).

Trend 1: Criminalization of civil society actors supporting migrants

We observe a trend in several EU Member States toward restricting the activities of civil society actors promoting and striving for the protection

792 FRA Strategy 2018–2022, at 4; see Art. 2 Regulation 168/2007 establishing a EU Agency for Fundamental Rights (FRA Regulation): 'The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.' Notably, in the years 2018–2022, such FRA activities are supposed to focus among other things on 'migration, borders, asylum and integration of refugees and migrants'. Cf. Art. 2(e) of the Council Decision 2017/2269 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022.

and realization of Human Rights, including the rights of migrants. These Human Rights defenders – as individuals or organizations – have increasingly come under pressure from state authorities in many respects, including restricted access to public funding (and, in some instances, also to private funding), administrative and judicial harassment, abusive inspections (sometimes referred to as 'discriminatory legalism'[793]), and missing protection against hate speech by other private actors.[794]

This development has been accurately labeled by numerous observers and institutions such as the European Parliament, FRA or the Council of Europe's Commissioner for Human Rights as a 'shrinking space for civil society'[795] or 'shrinking space for human rights organisations'.[796] The restrictions affect civil society actors in general and those supporting migrants in particular.[797] For example, attempts to intimidate humanitarian actors in this area aim to restrict the access of asylum seekers to protection or to facilitate the return of irregular migrants. These attempts take different forms and are not confined to Member States marked by semi-authoritarian tendencies.[798]

An outstanding example is the criminalization of activities by humanitarian actors to rescue migrants in distress at sea by Member State authori-

793 J.W. Müller, *What Is Populism?* (2016), at 28.

794 See St. Kleemann, *Human Rights Defenders under Pressure: 'Shrinking Space' in Civil Society* (2020), at 55–83.

795 European Parliament, Shrinking space for civil society: the EU response, Study (2017), available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO_STU(2017)578039_EN.pdf; FRA, Challenges Facing Civil Society Organisations Working on Human Rights in the EU (2017), at 18.

796 Council of Europe: Commissioner for Human Rights, The Shrinking Space for Human Rights Organisations, Statement (2017), available at https://www.coe.int/mk/web/commissioner/-/the-shrinking-space-for-human-rights-organisations.

797 For an overview: S. Carrera et al., *Policing Humanitarianism: EU Policies against Human Smuggling and Their Impact on Civil Society* (2019); Amnesty International, *Europe: Punishing Compassion: Solidarity on Trial in Fortress Europe,* 3 March 2020, available at https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR0118282020ENGLISH.pdf.

798 For example, in spring 2019, the German Ministry of Interior proposed in its first draft of a new legislation (*Geordnete-Rückkehr-Gesetz*) to introduce a provision that would have allowed punishing those who publish or disseminate deportation dates with up to three years imprisonment. Similarly, humanitarian organizations would have been criminalized if they informed irregular migrants about identification measures. The project was only dropped following massive protest from civil society and the Council of Europe's Commissioner for Human Rights. See https://rm.coe.int/letter-to-andrealindholz-%20%20chairwoman-of-the-committee-on-internal-affa/168094799d.

ties. Private rescue operations became a form of 'transnational maritime civil disobedience'.[799] While this is not an entirely new phenomenon,[800] since the end of 2016, Italy, Greece, and Malta have increased their efforts to de-legitimize and criminalize Search and Rescue (SAR) operations in the Mediterranean Sea conducted by NGOs, including through the seizure of rescue ships,[801] the imposition of a binding 'code of conduct' for SAR NGOs in August 2017 by the Italian government,[802] and the actual criminal prosecution of humanitarian actors for their rescue activities.[803] By 2019, most of the SAR vessels operated by NGOs or private actors had been either seized or had ceased activity due to political pressure and legal prosecution of their crews.[804] What is more, since 2020 the COVID-19 pandemic has been used as a pretext for closing ports to NGO rescue vessels[805] or for putting further constraints on the crew members of the few remaining private SAR vessels. Italian health authorities, for example, required crew to undergo a two-week quarantine on board after the disembarkation of rescued migrants.[806]

Other instances of the criminalization of migrants' Human Rights defenders can be observed in semi-authoritarian EU Member States like Hungary. Severe restrictions were imposed on Hungarian civil society

799 Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning', 21 *German Law Journal* (2020) 598, at 616.

800 For an early example, see the 2004 *Cap Anamur* boat incident: Cuttitta, 'Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean', 23 *Geopolitics* (2018) 632.

801 For further references, see S. Carrera et al., *Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update* (2018), at 69 et seq. and 107, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf.

802 Ibid., at 68.

803 Ibid., at 69 et seq. and 107; see also: Global Legal Action Network, 'Case filed against Greece in Strasbourg Court over Crackdown on Humanitarian Organisations', Press statement, 18 April 2019, available at https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations.

804 For an overview, see FRA, Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations (2018); FRA, 2019 Update: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations (2019).

805 Deutsche Welle, 'Coronavirus crisis hampering Mediterranean migrant rescues', 17 April 2020, available at https://www.dw.com/en/coronavirus-crisis-hampering-mediterranean-migrant-rescues/a-53168399.

806 FRA, June 2021 Update: Search and Rescue (SAR) Operations in the Mediterranean and Fundamental Rights (2021).

organizations in 2017 with the so-called 'Stop Soros' legislation – which, among other things, requires every NGO in Hungary to register as an 'organisation receiving foreign funds' once a certain threshold of donations is reached.[807] This was found to be in breach of EU law by the CJEU in 2020.[808] Specifically directed against migrants' Human Rights defenders, a 2018 modification of the Hungarian Criminal Code ensures that criminal sanctions can be imposed on NGOs and individuals providing legal or other types of aid to migrants arriving at Hungarian borders; a new provision of the Hungarian Criminal Code was introduced that criminalizes 'facilitating illegal immigration' by extending already existing prohibitions to a wide range of organizational activities related to migration.[809] According to an official press statement issued by the Hungarian government, this was to be regarded as a 'strong action' directed 'against the organisers of migration'.[810] While a complaint against the new law was rejected by the Hungarian Constitutional Court in 2019,[811] the European Commission instituted an infringement proceeding and in late 2019 decided to refer Hungary to the CJEU concerning this legislation.[812]

807 An unofficial English translation of the 'Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds' by the Hungarian Helsinki Committee is available at https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf.

808 CJEU, Case C-78/18, *Commission v. Hungary* (transparency of associations) (EU:C:2020:476).

809 Alongside the new Art. 353/A of Act C of 2012 of the Hungarian Criminal Code, a subheading 'Facilitating illegal immigration' was introduced.

810 Hungarian Government, 'Strong Action is Required Against the Organisers of Migration', 24 May 2018 (the document has been removed from the official website).

811 Hungarian Constitutional Court, Decision 3/2019 on the Support of Illegal Immigration, 28 February 2019, available at https://hunconcourt.hu/uploads/sites/3/2019/05/3_2019_en_final.pdf. Cf. also Kazai, 'Stop Soros Law Left on the Books: The Return of the "Red Tail"?', *Verfassungsblog* (2019), available at https://verfassungsblog.de/stop-soros-law-left-on-the-books-the-return-of-the-red-tail/

812 Case C-821/19, *Commission v. Hungary* (*Criminalisation of assistance for asylum seekers*), application submitted on 8 November 2019. See also the Opinion of Advocate General Rantos in this Case, delivered on 25 February 2021 (EU:C:2021:143).

Trend 2: Populist pressure on judges protecting the rights of migrants

We also observe a trend in several Member States of growing public pressure on judges in charge of asylum and other migration law cases to take a restrictive approach and to deny applicants an adequate level of Human Rights protection. This development may be observed particularly in Member States marked by strong populist movements – either governing the Member State or as an influential faction of the opposition.

Populist pressure on the independence of the judiciary extends across a continuum and takes various forms, reaching from rather diffuse exertion of political influence, to the defamation of critical judges through 'smear campaigns', the selective and arbitrary application of legal provisions, to actual institutional reforms. Some Member States have also formally limited judicial independence. Enhanced political control – for example, by tightened disciplinary regimes for judges – undermine the guarantee of impartial and effective adjudication and protection of rights, including the effective implementation of EU law, thus threatening the stability of existing Human Rights and rule of law infrastructures.

In recent years, systemic and repeated assaults on the independence of the judiciary in general, and among the branches in charge of asylum and migration cases in particular, have become a prominent issue in a number of EU Member States, in particular Bulgaria, Hungary, Poland, and Romania. These assaults are identified as an essential ingredient of what is referred to as the 'rule of law crisis' in the EU.[813]

Examples of this trend are numerous. For instance, since December 2015 Poland has passed a number of legislative acts on judicial reform, leading the Commission, as early as in January 2016, to activate the so-called rule of law framework in the context of Art. 7 TEU for the very first time.[814] According to the Commission, the Polish reforms pose 'systemic threats' to the rule of law.[815] One example of the problematic legislative

813 For an overview, see C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (2016).

814 European Commission, 'Rule of law in Poland: Commission starts dialogue', Press release, 13 January 2016, available at https://ec.europa.eu/commission/presscorner/detail/en/WM_16_2030.

815 European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court', Press release, 24 September 2018, available at http://europa.eu/rapid/press-release_IP-18-5830_en.pdf.

acts on the matter[816] is Poland's 2018 Law on the Supreme Court,[817] lowering the retirement age and applying it to current Supreme Court judges, thus terminating the mandate of more than a third of serving judges, as well as establishing a new disciplinary regime for Supreme Court judges, among other things. The law was partly reversed in 2018 following interim relief by the CJEU.[818] In 2021 the ECtHR ruled that the appointment of three judges to the Polish Constitutional Tribunal in 2015 was unlawful – with the consequence that the current composition of the Polish Constitutional Tribunal violated the right to a 'tribunal established by law', as the right to a fair trial enshrined in Art. 6(1) ECHR requires.[819]

Similar developments concern the independence of the judiciary and the rights of judges in Hungary. In 2011, a controversial law lowered the retirement age of Hungarian judges and other legal professionals, removing judges, prosecutors, and notaries from office. This law was later determined to be unlawful by the CJEU for infringing the Equal

816 Other examples include:
the 2017 Law on the National School of Judiciary, allowing among other things assistant judges – without being subject to Constitutional guarantees protecting judicial independence – to act as single judges in district courts (Law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organization and certain other laws, published in Polish Official Journal on 13 June 2017, in force since 20 June 2017);
the 2017 Law on Ordinary Courts Organization, reducing the retirement age of ordinary judges while giving the Minister of Justice the power to decide on the prolongation of judicial mandates, among other things (Law amending the law on the Ordinary Courts Organization, published in the Polish Official Journal on 28 July 2017, in force since 12 August 2017);
the 2018 Law on the National Council on the Judiciary, providing for the premature termination of the mandate of all judges-members of that Polish institution and, by establishing a new regime for the appointment of its judges-members, guaranteeing strong political influence (Law amending the law on the National Council for the Judiciary and certain other laws of 8 December 2017, published in the Polish Official Journal 2018, item 3, entry into force in March 2018);
the 2018 Supreme Court Act, constituting the basis for the jurisdiction of a Disciplinary Chamber of the Supreme Court (Law of 8 December 2017, Official Journal 2018, item 5), found unlawful in CJEU, Case C-791/19, *Commission v. Poland* (EU:C:2021:596).

817 Law on the Supreme Court (*Ustawa o Sądzie Najwyższym*) of 8 December 2017, Polish Official Journal 2018, item 5, which entered into force on 3 April 2018.

818 CJEU, Case C-619/18, *Commission v. Poland* (EU:2018:852), in French.

819 ECtHR, *Xero Flor v. Poland*, Appl. no. 4907/18, Judgment of 7 May 2021.

Treatment Directive.[820] Further concerns over violations of the rule of law led the European Parliament in September 2018 to activate a breach of value procedure under Art. 7 TEU against Hungary (see section 7.2.4 for details).[821] The Hungarian government argued that this step was an act of 'revenge' by 'pro-immigration politicians' reacting to Hungary's stance on migration.[822] Additionally, two laws[823] passed in December 2018 were intended to create a separate administrative court system in Hungary as of 1 January 2020, in charge of asylum cases but also of cases concerning elections or freedom of assembly. These courts would be placed under the supervision of the Minister of Justice. However, following heavy criticism, in mid-2019 the reform was suspended.[824] At about the same time, the initiation of disciplinary proceedings in 2019 against a Hungarian judge for referring questions to the CJEU, supposed to have a 'chilling effect' on other judges in terms of discouraging them from fully applying EU and

820 CJEU, Case C-286/12, *Commission v. Hungary* (EU:C:2012:687).

821 European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html?redirect. In 2020, the European Parliament complained that the rule of law situation in Hungary (as well as in Poland) had deteriorated since the triggering of the procedure and that the Council had failed to make effective use of it, cf. European Parliament, Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.pdf.

822 R. Staudenmaier, 'EU Parliament votes to trigger Art. 7 sanctions procedure against Hungary', Deutsche Welle, broadcasted on 12 September 2018, available at https://p.dw.com/p/34k9I.

823 Act on Public Administration Courts and Act on the Coming into Force of the Act on Public Administration Courts and Certain Transitional Regulations, both adopted by the National Assembly on 12 December 2018.

824 Hungarian Government: Ministry of Justice, 'Government to postpone the coming into force of the Act on Public Administration Courts', Press release, 30 May 2019 (the document has been removed from the official website). For an example of the criticism, see the report of the Venice Commission from 19 March 2019 on the legislative acts (Opinion no. 943/2018), available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e.

Human Rights law,[825] furnishes yet another example of the many faces of the rule of law crisis.

Despite the trend just described, we also notice that a considerable number of judges in the countries most affected by populist assaults on the independence of the judiciary resist the pressure. One means by which they draw attention to these developments, and seek to restore the rule of law in their countries, is referring questions to the CJEU, indicated for example by the multitude of preliminary references to the CJEU by Polish and Hungarian courts.[826]

Cases of assaults on judicial independence and the rule of law are not limited to one particular group of EU Member States. For example, in a case widely discussed by the German public in 2018, a Tunisian national living in Germany for more than a decade and suspected of posing a threat to public security was deported to Tunisia despite a pending injunction procedure and concerns of the first instance court that the deportee could face torture in his home country. The Higher Administrative Court of North Rhine-Westphalia later ruled that the deportation was 'evidently unlawful' and that the behavior of the ministry of the State involved in the case – namely, the admittedly deliberate concealment of the deportation date despite request from the court of first instance – was 'incompatible with the rule of law and the separation of powers'.[827]

Trend 3: Challenges to the ECtHR as a guardian of migrants' Human Rights

We furthermore observe a tendency in Europe to challenge the relevance and legitimacy of the ECHR as interpreted by the ECtHR. This trend also comes in a variety of forms.

First, the development concerns the domestic implementation of ECtHR judgments in Member States. There appears to be a growing reluctance in recent years to fully implement ECtHR decisions, leading inter alia to a high number of 'repetitive cases' hindering the effective work

825 Hungarian Helsinki Committee, Disciplinary Action Threatens Judge for Turning to EU Court of Justice, Statement, 7 November 2019, available at https://www.helsinki.hu/en/disciplinary-action-threatens-judge-for-turning-to-cjeu/.

826 See Bárd, 'Luxemburg as the Last Resort', *Verfassungsblog* (2019), available at https://verfassungsblog.de/luxemburg-as-the-last-resort/.

827 Higher Administrative Court of North Rhine-Westphalia (*Oberverwaltungsgericht Nordrhein-Westfalen*), Decision of 15 August 2018 (17 B 1029/18).

of the Court.[828] In a similar vein, efforts were made to limit the ambit of ECtHR decisions by stressing the particular context of the Court's decisions.[829] These developments concern not only specific Member States but have been described as a wider European trend of 'principled resistance' to the ECHR and the full implementation of ECtHR judgments.[830]

At the same time, the overloading and resulting backlog of cases waiting to be heard by the ECtHR, and the length of proceedings, further weakens the impact of the Court. Justice delivered too late often does not have substantial impact on domestic discourse, and governments may even reckon with the considerable delay of remedies when resorting to practices of questionable conformity with Convention rights, knowing that the measures may already be completed by the time the ECtHR renders a decision.

Beyond these questions of implementation of ECtHR decisions, there have also been Member State initiatives, particularly in the context of the so-called Interlaken reform process (2010–2019), to change the architecture and legal basis of the ECHR and ECtHR itself – in particular, by strengthening the principle of subsidiarity and, by implication, lowering the standard of scrutiny applied by the Court.[831] Most notably, in 2018 Denmark spearheaded an initiative intending to massively limit the competence of the ECtHR in asylum and immigration cases to 'the most exceptional circumstances'.[832] Arguably, the message sent by this initiative has had a

828 On this problem, see Council of Europe: Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights 2018: 12th Annual Report, April 2019, at 13, available at https://rm.coe.int/annual-report-2018/168093f3da. Repetitive cases – those cases 'relating to a structural and/or general problem already raised before the Committee in the context of one or several leading cases' (at 91) – account for the vast majority of new cases coming to the Court – in 2018, 88 % of the 1272 new cases were classified as repetitive cases (at 52). Several EU Member States (Bulgaria, Greece, Hungary, Italy and Romania) are among the main states with cases under 'enhanced supervision' (at 71).

829 Cf. Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), Judgment of 12 June 2018 (2 BvR 1738/12).

830 M. Breuer (ed.), *Principled Resistance to ECtHR Judgments: A New Paradigm?* (2019).

831 Cf. Spano, 'The Future of the European Court of Human Rights. Subsidiarity, Process-Based Review and the Rule of Law', 18 *Human Rights Law Review* (2018) 473.

832 See, e.g., the draft Copenhagen Declaration, 5 February 2018, at para. 26, available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf. On the wider

lasting impact on the ECtHR judges, even if it was defused in the final version of the Copenhagen Declaration.[833]

7.2 Legal evaluation

7.2.1 General legal framework regarding Human Rights infrastructure

Duties to provide for functioning and effective institutions and mechanisms to protect Human Rights already follow as an annex or logical implication from all substantive guarantees of Human Rights in international law. As normative principles always depend on certain structures and institutions to take effect, these principles presuppose a legal and political endorsement of Human Rights infrastructures. For example, due respect of the Human Right to non-refoulement requires a functioning administration to assess claims of protection as well as a judiciary ready to examine and correct possible breaches of this right by state officials.

In light of this inference, it comes as no surprise that explicit provisions specifically referring to institutional aspects of the protection of Human Rights are rather sparse in international law. The concrete shaping of these institutions is often regarded as a prerogative of States, so long as the substantive Human Rights guarantees are (somehow) implemented. However, some abstract (re-)statements of the obligations of States to render Human Rights effective, as well as a few more specific provisions, can be found in international law and in EU law, including provisions of soft law.

The preamble of the UDHR recalls the pledge of States to the 'promotion' of the observance of Human Rights under the UN Charter, as does the preamble to the ICCPR. States Parties to the ICCPR are also required to 'give effect' to the rights under the Covenant by domestic legislation or other measures. More specifically, they must provide for effective remedies before 'competent authorities', having the power to enforce such remedies when granted (Art. 2 ICCPR). UN Human Rights treaties also stipulate procedures before treaty bodies (such as the Human Rights Committee

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historical context, see Feihle 'Asylum and Immigration under the European Convention on Human Rights: An Exclusive Universality?', in H.P. Aust and E. Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (2021) 133, at 150.

833 Council of Europe: High Level Conference of the States Parties, Copenhagen Declaration, 12–13 April 2018, available at https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

or the Committee against Torture) to monitor the observance of Human Rights by States Parties. Importantly, the treaties oblige States Parties to submit periodic reports on the implementation of their treaty obligations (see, e.g., Art. 40 ICCPR, Art. 16 ICESCR, Art. 19 CAT, Art. 44 CRC). Some treaties also provide for individual complaints procedures (e.g., First Optional Protocol to the ICCPR, Art. 22 CAT, Optional Protocol to CRC on a communications procedure).

In a similar vein, Art. 1 ECHR obliges the Contracting Parties to 'secure' the substantive rights enshrined in this Convention. Effective remedies for violations of Convention rights have to be provided before national authorities (Art. 13 ECHR), and, of course, the ECtHR in Strasbourg is vested with the power to receive individual complaints from victims of Human Rights violations (Art. 34 ECHR). Other Human Rights treaties in the framework of the Council of Europe – such as the European Convention for the Prevention of Torture, which provides the legal basis for the work of the Committee for the Prevention of Torture (CPT) – are also essential parts of the Human Rights infrastructure in Europe.

At the universal level, the UN Member States committed to implement the Global Compact for Migration promise to 'ensure' the 'effective respect for and protection and fulfilment of the human rights of all migrants' (GCM, para. 15, point f), while the Global Compact on Refugees urges States to do likewise (GCR, para. 9). A more specific catalog of the rights of civil society agents in defense of Human Rights was provided by the UN General Assembly in the 1998 Declaration on Human Rights Defenders.

The interconnectedness of the Human Rights regime and the respect for the rule of law has already been discussed in Chapter 3. Respect for the rule of law and for judicial independence is a prerequisite for Human Rights protections to become alive and effective. As early as 1948, the preamble of the UDHR stated that it was 'essential' for Human Rights to be 'protected by the rule of law'. More recently, the GCM and GCR have reaffirmed the importance of the rule of law, the former by stating that it is 'fundamental to all aspects of migration governance' (cf. GCM, para. 15, point d; GCR, para. 9). Particular significance has always been attributed to the rule of law in the Council of Europe. Its importance was acknowledged by references in the preambles to the 1949 Statute of the Council of Europe[834] and to the ECHR. Furthermore, the Statute of the 1990 Euro-

834 Art. 3 of the Statute makes respect for the principle of the Rule of Law even a precondition for accession of new Member States to the Organisation.

pean Commission for Democracy through Law ('Venice Commission') – an advisory body of the Council of Europe, which provides politically important (though not legally binding) opinions on constitutional law – refers to the rule of law as a priority objective.[835]

The commitment to both effective Human Rights protection and the rule of law is mirrored in the EU Treaties. Human Rights and the rule of law are not only referred to in the preamble to the TEU but characterized as foundational values of the Union and its Member States in Art. 2 TEU. The preamble of the EU-CFR repeats that the Union is 'based' on the rule of law and not only affirms the ECHR but even explicitly embraces the case-law of the ECtHR. The Charter furthermore gives specific meaning to the rule of law in providing for the rights to good administration (Art. 41 EU-CFR) and to an effective judicial remedy (Art. 47 EU-CFR). The latter also follows from the TEU, which obliges Member States to ensure effective legal protection through sufficient remedies in the fields governed by EU law (Art. 19(1) TEU). According to the CJEU, this implies a comprehensive duty of all Member States to respect the independence of the national judiciary.[836]

7.2.2 Specific issue: Criminalization of private actors involved in SAR activities and other migrants' Human Rights defenders in civil society

Providing search and rescue (SAR) – that is, assistance to people in distress at sea – is a duty of all States and shipmasters under international law. This duty to SAR follows from a number of provisions of international law, most notably the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR Convention), and the 1982 UN Convention on the Law of the Sea (UNCLOS). Shipmasters both of private and governmental vessels are obliged to assist those in distress at sea, irrespective of their nationality, status, or the circumstances in which they were found (Art. 98(1) UNCLOS; Annex 2.1.10 to the SAR Convention).

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835 Art. 1 Revised Statute of the European Commission for Democracy through Law, Resolution (2002)3, 21 February 2002, available at https://www.venice.coe.int/WebForms/pages/?p=01_01_Statute.

836 CJEU, Case C-64/16, *ASJP (Trade Union of Portuguese Judges)* (EU:C:2018:117); Case C-619/18, *Commission v. Poland* (EU:C:2019:531).

The criminalization of NGOs and other private actors conducting SAR operations, including the seizure of SAR vessels, thus constitutes a violation of international law as it prohibits the fulfillment of the duties mentioned above. There is, arguably, even a positive obligation of EU Member States bordering the Mediterranean Sea to actively conduct SAR in order to assist people in distress at sea.[837] Following this assumption, the failure to do so would constitute a first rights violation (by omission) while the hindrance of private SAR activity would constitute a second violation. UNHCR,[838] the European Parliament,[839] and the FRA[840] have come to similar conclusions, asking EU Member States to prevent humanitarian assistance in SAR from being criminalized.

The criminalization of Human Rights defenders from civil society assisting migrants in distress at sea, as well as, more generally, those assisting migrants who try to enter EU territory irregularly, is also at odds with the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 Palermo Convention against Transnational Organised Crime. The Protocol defines 'smuggling of migrants' as 'procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.[841] As an *argumentum a contrario*, one may infer that support of irregular migration in the case of an altruistic motivation does not amount to 'smuggling' and, thus, is to be exempted from criminalization.

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837 This may follow from Art. 98(2) UNCLOS; see A. Farahat and N. Markard, *Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility*, February 2020, at 37 et seq., available at https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility. On disembarkation, see also Chapter 1 of this volume.

838 UNHCR, General legal considerations: Search-and-rescue operations involving refugees and migrants at sea (2017), available at https://www.refworld.org/docid/5a2e9efd4.html.

839 European Parliament, Guidelines for Member States to prevent humanitarian assistance from being criminalized, Resolution of 5 July 2018, P8_TA(2018)0314, available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0314_EN.pdf?redirect.

840 FRA, Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations (2018); FRA, 2019 Update: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations (2019).

841 Art. 3 UN Protocol against the Smuggling of Migrants; see also the enumeration of certain criminal acts enabling the smuggling of migrants in Art. 6 UN Protocol against the Smuggling of Migrants.

Furthermore, the criminalization of SAR activities and other forms of altruistic assistance for irregular migration is contrary to the UN Declaration on Human Rights Defenders. According to this Declaration, '[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels' (Art. 1 Declaration on Human Rights Defenders). The Declaration also protects the right of individuals and associations of individuals to 'participate in peaceful activities against violations of human rights and fundamental freedoms' (Art. 12(1) of the Declaration). In this regard, 'everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights' (Art. 12(3) of the Declaration).

Despite these provisions, EU law not only fails to outlaw criminalization of humanitarian actors but even buttresses such measures, most notably by way of the Facilitation Directive (Directive 2002/90/EC).[842] This Directive, as it stands, asks Member States to sanction 'any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens' (Art. 1(1)(a) Facilitation Directive), while leaving it up to the Member States' discretion to refrain from such sanction 'where the aim of the behaviour is to provide humanitarian assistance to the person concerned' (Art. 1(2) Facilitation Directive).

The EU's definition of facilitation of entry and transit in the Directive thus suffers from two main deficiencies: It does not insist on any requirement of 'financial or other material benefit' nor does it oblige Member States to exempt 'humanitarian assistance' from the definition. On the contrary, it rather leaves discretion to Member States to decide whether they want to criminalize humanitarian actors.[843] The Facilitation Directive

842 Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive). On this matter, see also Ghezelbash, Moreno-Lax, Klein and Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia', 67(2) *International and Comparative Law Quarterly* (2018) 315, at 347 et seq.

843 S. Carrera et al., *Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (2016), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf; S. Carrera et al., *Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update*

thus falls foul of the UN Smuggling Protocol which it intends to implement. This is partly recognized in a 'Guidance' on the implementation of the Facilitation Directive issued by the European Commission in 2020.[844] However, this is an insufficient remedy to the flaws of the Facilitation Directive, as the 'Guidance' only calls on States to not criminalize humanitarian assistance that is 'mandated by law', in particular SAR operations at sea, and, crucially, is not legally binding.

In the absence of a reform of the Facilitation Directive to introduce an explicit exemption for humanitarian assistance, Member States, when making use of their discretionary power, are required to interpret the law as it stands in conformity with Human Rights law, and thus must not criminalize anybody for rescuing persons in distress or for supporting immigration in other ways driven by an altruistic motivation. However, in view of Member State practice to the contrary, these obligations derived from international law does not obliterate the EU's accountability for reiterating and specifying them in EU law (see above, introductory chapter).

7.2.3 Specific issue: Requirements to strengthen migrants' Human Rights defenders

The positive obligation on the part of the EU to foster Human Rights by supporting civil society actors in Member States defending the rights of migrants is of a very general nature. Nevertheless, the EU is accountable for such support within the scope of its powers. The EU's general commitment to Human Rights implies obligations to support such measures as are necessary to render Human Rights effective (see section 7.2.1 above).

These obligations have been specified in a number of documents. Notably, the 1998 UN Declaration on Human Rights Defenders states the duty of States to effectively guarantee the rights of civil society engaged in the defense of Human Rights through, inter alia, appropriate legislative and administrative acts (Art. 2(1) of the Declaration) in general and, for example, by promoting and facilitating the teaching of Human Rights at

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(2018), at 106, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf.

844 European Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 23 September 2020, C(2020) 6470, available at https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf.

all levels of education, such as the training of lawyers, law enforcement officers and public officials (Art. 15 of the Declaration). A UN Special Rapporteur on the situation of Human Rights defenders monitors the implementation of the Declaration.[845] A 2008 Declaration by the Committee of Ministers of the Council of Europe reaffirms the importance of the 1998 UN Declaration and, among other things, calls upon Council of Europe Member States to 'take effective measures to prevent attacks on or harassment of human rights defenders', to 'take effective measures to protect, promote and respect Human Rights defenders and ensure respect for their activities' and to provide for a legal basis to enable individual or associated Human Rights defenders 'to freely carry out activities'.[846]

These requirements are mirrored and further specified in EU law. While the general obligation to protect and promote Human Rights is stated in Art. 2 TEU, numerous provisions, institutions and programs establish, or require, specific measures. Interestingly, the 2004 EU Guidelines on Human Rights Defenders[847] endorse the UN Declaration on Human Rights Defenders – but focus on the support for Human Rights defenders *outside* the EU as, at the time, this was regarded as an issue of external relations. In contrast, the mandate of the FRA, according to its founding Regulation, requires the Agency to 'closely cooperate with non-governmental organisations and with institutions of civil society, active in the field of fundamen-

845 The mandate was established in 2000 by the UN Commission on Human Rights Resolution 2000/61 and renewed by the UN Human Rights Council Decision 43/115 in 2020.

846 Council of Europe: Committee of Ministers, Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted on 6 February 2008, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52. In a similar vein, the 2014 OSCE Guidelines on the Protection of Human Rights Defenders identify the right to defend human rights as a 'universally recognized right', requiring states not only to refrain from acts that violate the rights of human rights defenders because of their work and to protect human rights defenders from abuses by third parties but also to take 'proactive steps' to promote the full realization of the rights of human rights defenders, available at https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders.

847 Council of the EU, Ensuring Protection: European Union Guidelines on Human Rights Defenders, 10056/1/04, 14 June 2004, available at https://www.refworld.org/docid/4705f6762.html. On the lack of implementation of the guidelines: European Parliament, Resolution of 17 June 2010 on EU policies in favour of human rights defenders, 2009/2199(INI), available at https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0226.

tal rights' within the framework of the Fundamental Rights Platform as a cooperation network (Art. 10(1) FRA Regulation).

7.2.4 Specific Issue: Obligations and options to ensure the independence of judges deciding on migration law cases

As to the populist pressure on judges protecting the rights of migrants and the more general rule of law crisis in a number of EU Member States identified in the first section of this chapter, legal questions arise both in respect of identifying the legal obligations and in relation to the EU's options for responding to such rule of law deficits.

Legal definitions of the exact meaning of the rule of law are rare, and it remains notoriously contested as a concept, with the rule of law, *Rechtsstaat* or *État de droit* understood differently in each EU Member State due to different constitutional traditions. However, a comprehensive definition is not needed for the present purposes (the assessment of Member State challenges to an independent judiciary). It suffices to state here that, among other important elements such as the principle of legality, there is a solid consensus that access to justice provided by impartial and independent courts is an indispensable requirement of the rule of law.[848]

While the importance of the rule of law is reaffirmed in numerous documents of international law (see section 7.2.1), it is frequently referred to in preambles in a rather general way, so that its legal status often remains questionable. Specific and legally binding obligations concerning the rule of law are rather scarce in international law. The rights to a fair trial and to a fair procedure, enshrined in Art. 6 and 13 ECHR, are important exceptions in this respect and protect essential parts of the rule of law (for details on these provisions, see Chapter 3).

As to dealing with the rule of law crisis in a number of EU Member States in the past years, rule of law guarantees in EU constitutional law have proven to be of paramount importance, especially the recognition of the rule of law as a foundational value (Art. 2 TEU) and the substantive

848 See, e.g., the definitions by the European Commission and the Venice Commission: European Commission, Further strengthening the Rule of Law within the Union: State of play and possible next steps, COM(2019) 163, 3 April 2019, at 1; Venice Commission, Report on the rule of law, CDL-AD(2011)003rev, 25–26 March 2011, at 10, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e.

provisions in Art. 41 and 47 EU-CFR and Art. 19(1) TFEU. For example, regarding Poland's 2018 Law on the Supreme Court, mentioned in section 7.2.1 above,[849] the CJEU has confirmed that the lowering of the retirement age for Polish Supreme Court judges undermines, where serving judges are affected, the principle of irremovability of judges and judicial independence and, thus, infringes EU law.[850] Irrespective of the wording of Art. 19(1) TEU, which limits its scope of application to 'the fields covered by Union law', the value of the rule of law has gained great importance for the protection of judicial independence in the Member States: As the CJEU has established, Art. 19(1) TEU guarantees judicial independence of every Member State court that *could* apply EU law – even if it does not actually apply it in the specific case at hand.[851] Further significance could be attributed to other values proclaimed in Art. 2 TEU. The actual status of the foundational values enshrined in this provision – among them, democracy and Human Rights – needs further elaboration. This, however, is beyond the focus of this study.[852]

When it comes to the rule of law, procedural aspects may be as important as substantive guarantees. There is already a wide array of procedures at EU level to protect the rule of law in its Member States.[853] Most important among these are infringement proceedings (Art. 258 TFEU), preliminary references from national courts (Art. 267 TFEU), and breach of value procedures (Art. 7(1) and (2) TEU procedures), possibly leading to the suspension of certain (e.g., voting) rights of the Member State concerned. These are supplemented by the EU Justice Scoreboard monitoring

849 Law on the Supreme Court (*Ustawa o Sądzie Najwyższym*) of 8 December 2017, Polish Official Journal 2018, item 5, which entered into force on 3 April 2018.

850 CJEU, C-619/18, *Commission v. Poland* (EU:C:2019:531).

851 Ibid.; CJEU, C-64/16, *ASJP (Trade Union of Portuguese Judges)* (EU:C:2018:117).

852 On their applicability and primacy, see von Bogdandy and Spieker, 'Countering the Judicial Silencing of Critics: Art. 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', 15 *European Constitutional Law Review (EuConst)* (2019) 391; for a short version, see von Bogdandy and Spieker, 'Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values', *Verfassungsblog* (2019), available at https://verfassungsblog.de/countering-the-judicial-silencing-of-critics-novel-ways-to-enforce-european-values/.

853 For an overview, see European Parliament, Protecting the rule of law in the EU: Existing mechanisms and possible improvements, Briefing (2019), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf.

instrument,[854] the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania,[855] and the 2014 European Commission Framework for addressing systemic threats to the rule of law in any of the Member States, allowing for a staged dialogue with the States affected. Since 2021, breaches of the rule of law in a Member State can also have budgetary consequences, such as the suspension of EU payments, provided that the specific violation of the rule of law risks affecting financial interest of the Union in a 'sufficiently direct' way.[856]

Despite this arsenal of different instruments, their application by the EU in response to the rule of law crisis has been described as 'too late, too long, too mild'.[857] Some have criticized the idea of a staged dialogue as part of the pre-Art. 7 TEU procedure as ineffective, particularly in comparison with infringement proceedings and preliminary references. However, the Art. 7 TEU procedure may be the most appropriate legal instrument to respond to a 'systemic deficiency',[858] while infringement proceedings and preliminary references may be very helpful as auxiliary thereto, as well as in dealing with more specific cases.

In a political context, however, further consequences with a focus on the anti-immigration policies of Member States, often underlying assaults on the rule of law, should be considered. Thus far, the European Commission has been rather reluctant to address violations of the rule of law as targeted attacks on the asylum and immigration *acquis*.[859] Without prejudice to whether this blind spot is to be attributed to deficient analysis or – to a

854 European Commission, EU Justice Scoreboard, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en.

855 European Commission, Cooperation and Verification Mechanism for Bulgaria and Romania, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en.

856 Art. 4(1) Regulation 2092/2020; see Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020: Is it all About the Money?', 13 *Hague Journal on the Rule of Law* (2021) 79.

857 Kustra-Rogatka, 'The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism', *Verfassungsblog* (2019), available at https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/.

858 Cf. von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States', *57 Common Market Law Review (CMLRev.)* (2020) 705.

859 For example, migration and asylum issues are hardly treated at all in the Commission's 2020 Rule of Law Report, COM(2020) 580, 30 September 2020.

certain extent – to tacit toleration, disclosing and discussing the political objectives of the breaches may help to more effectively protect both the institutions and persons affected as well as the authority of the EU's provisions and values called into question by such policies.

7.3 Recommendations

Recommendation 1: Strengthen migrants' Human Rights defenders by amending the Facilitation Directive and adopting consistent EU supporting policies

The criminalization of civil society SAR activities is contrary to the international law of the sea and to the UN Declaration on Human Rights Defenders which specifies positive obligations derived from Human Rights law. It is also incompatible with the Union's commitment to protect Human Rights. We therefore recommend the EU to develop consistent support policies for NGOs and other civil society actors engaged in defending migrants' Human Rights. These measures should encompass both protection from and support against attacks from Member State governments as well as active assistance, such as funding, training, and fostering information exchange.

As a first and necessary step, the EU should decriminalize rescue operations of civil society actors and amend the Facilitation Directive 2002/90 accordingly. Art. 1(1)(a) and Art. 1(2) of this Directive currently do not insist on a requirement of 'financial or other material benefit' in defining the facilitation of entry or transit, and do not oblige Member States to exempt 'humanitarian assistance'. The exemption of humanitarian actors should be obligatory: it must not be an option seemingly offered by EU law to criminalize humanitarian assistance.

On a more operational level, the European Commission should also take a much clearer stance on the criminalization of activities of humanitarian actors by Member States. While the FRA has – albeit cautiously – addressed this issue in the past, the Commission has remained largely silent on the question in the context of, for example, the imposition of sanctions against the crews of NGO SAR vessels. This contradicts not only the general EU commitment to the protection of Human Rights as enshrined in Art. 2 TEU but also specific promises made by the Commission in 2013 in the aftermath of the Lampedusa tragedy: '*Shipmasters and merchant vessels* should be reassured once and for all that helping migrants in distress will

not lead to sanctions of any kind and that fast and safe disembarkation points will be available. It has to be clear that, provided they are acting in good faith, *they would not face any negative legal consequences for providing such assistance*.'[860] This declaration stands in sharp contrast with the subsequent silence and inactivity of the Commission regarding the persecution by Member States of humanitarian actors rescuing migrants in distress at sea.

As to positive measures, the FRA's Fundamental Rights Platform (FRP) already provides for a forum and network for cooperation with civil society organizations from across the EU.[861] As the FRA mandate encompasses capacity-building for civil society organizations, it should increase its efforts in those Member States in which humanitarian actors have come under the most severe political and legal pressure in recent years. A positive example of such support is the 2019 training of NGO lawyers in Hungary and from neighboring EU Member States with an external EU border, conducted by the FRA in cooperation with UNHCR.[862]

Recommendation 2: Take a firm stance on violations of EU migration law

We recommend the EU take a firm stance on, and adopt a systematic approach to, violations of the EU asylum and immigration *acquis* in Member States. The EU should not tolerate political pressure on migration law judges in Member States.

On a more general level, a clear stance should be taken by the EU on any developments in Member States undermining Human Rights infrastructures and the rule of law. The European Commission should, therefore, thoroughly pursue ongoing infringement and Art. 7 TEU procedures regarding judicial reforms in Member States. The independence of the judiciary in Member States is indispensable to guarantee the effective

860 European Commission, 'Lampedusa follow up: Concrete actions to prevent loss of life in the Mediterranean and better address migratory and asylum flows', Press release, 4 December 2013, available at http://europa.eu/rapid/press-release_IP-13-1199_en.htm (emphasis added).

861 Art. 10 FRA Regulation; for further information on the Fundamental Rights Platform, see https://fra.europa.eu/en/cooperation/civil-society.

862 FRA, 'Training NGO lawyers on the Schengen Borders Code and fundamental rights', Press release, 26 April 2019, available at https://fra.europa.eu/en/news/2019/training-ngo-lawyers-schengen-borders-code-and-fundamental-rights.

application of EU law in general, and the asylum and immigration *acquis* in particular.

However, before any measure that could be interpreted as 'punitive' is taken, all possible effects and alternatives should be carefully examined and weighed. Infringement and Art. 7 TEU procedures can only have short- and medium-term effect in preventing the actual dismantling of democratic institutions in a Member State and as a normative assertion of the validity and effectiveness of the fundamental values of the EU. In the long term, respect for Human Rights and the rule of law in Member States cannot be based on the motivation of avoiding sanctions, but must instead be grounded in an actual commitment to shared values.

Finally, any such measures must also respect the principles of coherence and equality before the law. For example, the EU should systematically examine the possibility of taking legal actions and, ultimately, launching Art. 7 TEU procedures against Greece, Italy, and Malta regarding the policies of criminalizing humanitarian actors.

Recommendation 3: Strengthen the role of the ECtHR as a 'migrants court' by acceding to the ECHR

We call upon the EU to adopt a clear political stance on any Member State attempt to challenge the legitimacy and relevance of the ECHR and the ECtHR. There should be no doubt that full respect for the ECHR and the decisions of the ECtHR are an integral aspect of membership in the EU and feature among its core commitments.

Furthermore, we recommend the EU actively strengthen respect for the ECHR and the decisions of the ECtHR by prioritizing the resumed accession process of the EU to the ECHR as foreseen in Art. 6(2) TEU, despite the negative Opinion issued by the CJEU in 2014.[863] This would credibly underline the EU's commitment to the Convention and, at the same time, would send an important message to the Member States.

A duty of the EU to accede to the ECHR does not follow from international law but it is a legal obligation under Art. 6(2) TEU. However, the accession process has stagnated since the CJEU's Opinion. Despite some rather vague public statements in favor of completing the accession process and the formal resumption of negotiations with the Council of Europe in

863 CJEU (Full Court), Opinion 2/13, *ECHR II* (EU:C:2014:2454).

September 2020,[864] the Commission does not seem eager to do so quickly. This does not come as a surprise, considering that accession to the ECHR would also limit the Commission's discretion by submitting the EU legislature to the judicial review of the ECtHR regarding its compliance with Human Rights.

Legal scholarship has convincingly demonstrated that it is possible to reconcile the autonomy of EU law (the CJEU's core concern) with membership in the pan-European Human Rights protection system.[865] The reluctance on the part of the EU institutions to explore these possibilities is all the more worrying as the EU is apparently determined to shield the gaps in its own system of fundamental rights protection, including Human Rights violations in the context of the Dublin system, against 'outside' interference. If the EU, at long last, were to accede to the ECHR, this would also reinforce the ECtHR's role as a crucial component of the Human Rights infrastructure defending the rights of migrants.

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864 European Commission, 'The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission', Press statement, 29 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/es/statement_20_1748. On further meetings and the status of the accession process, see European Parliament, Completion of EU accession to the ECHR: Area of Justice and Fundamental Rights, Legislative Train Schedule 06.2021 (2021).

865 Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', 16 *German Law Journal (GLJ)* (2015) 105.