

## The Effectiveness of the Tools of the Council of Europe Against Democratic Backsliding: What Lessons Can be Learned from the “Greek Case”?

Wolfgang Benedek,\* Graz

**Abstract:** The “Greek Case” which led to the de facto suspension of Greece in 1969 was a very particular part of the history of the Council of Europe in the protection of human rights and democracy. This contribution, based on a keynote given at a pertinent conference in Athens, will ask whether the spirit and political will to confront major human rights violations existing at that time can still be found in the Council of Europe of today. It will investigate the impact on the work of the Council of Europe at the time and draw some conclusions on lessons learned for today. In this context it will highlight the role of personalities acting on behalf of the Council of Europe at the time. It will also analyse the impact of its enlarged membership on the upholding of its values today. The institutions and tools at the disposal of the Council of Europe as the democratic conscience of Europe against democratic backsliding then and today will be compared with a view to the question of their effectiveness. In this context the examples of the Russian Federation and of Turkey regarding the challenges from anti-liberal forces and authoritarianism for democracy and human rights will be addressed as will be the use of the state of emergency. Which factors influence the “socialization” of member states to become guardians of common European values? Is the Council of Europe able to meet its accountability towards the citizens of Europe? This will lead to some conclusions on the legacy of the “Greek Case” for a proper response to the challenges of democratic backsliding and a shrinking space for human rights and the rule of law in the Council of Europe today as well as some recommendations for the future.

**Keywords:** Council of Europe, Inter-state application, human rights tools, democracy, Parliamentary Assembly, Greece, Russian Federation, Turkey.

### I. Introduction<sup>1</sup>

The “Greek Case” has a central place in the history of the performance of the Council of Europe in the protection of human rights and democracy. It was a test case whether the bodies of the Council of Europe would be able to live up to the principles of their organization. This contribution will address some elements of this challenge and ask the question whether the political will to confront

---

\* Wolfgang Benedek is Professor at the Institute of International Law and International Relations of the University of Graz and former Director of the European Training and Research Centre for Human Rights and Democracy of the University of Graz.

<sup>1</sup> This contribution is based on a keynote given at the International Conference on The “Greek Case” in the Council of Europe: A Game Changer for International Law and Human Rights? National and Kapodistrian University of Athens, 14 December 2019. Particular thanks go to Peter Leuprecht for his feedback on this contribution.

major human rights violations existing at that time can still be found in the Council of Europe of today. Has there been a particular impact on the work of the Council of Europe at the time and what are the lessons learned for today? What are the similarities and differences at stake? What was the role of the personalities acting on behalf of the Council of Europe and what is the impact of its enlarged membership today? Furthermore, the institutions and tools at the disposal of the Council of Europe as the democratic conscience of Europe against democratic backsliding then and today will be compared asking the question what are the factors influencing the effectiveness of their use. Which are the factors influencing the “socialization” of member states to become guardians of common European values? In this context present-time challenges from anti-liberal forces and authoritarianism for democracy and human rights will be addressed using the recent practice of the Russian Federation and of Turkey, while other examples like Azerbaijan will not be dealt with in any detail for lack of space. How has the Council of Europe dealt with the state of emergency declared by Turkey in 2016 and how did it deal with the declarations of emergency in the so-called Corona crises? The conclusions will focus on what is the message of the “Greek Case” for a proper response to the challenges of democratic backsliding and a shrinking space for human rights and the rule of law in the Council of Europe today. Finally, some recommendations for the future will be made.

## **II. Particularities of the “Greek Case” and Impact at the Time**

### **A. Particularities of the “Greek Case”**

#### **1. Responsibility taken by Member States**

In April 1967 the government of Greece was overthrown by a military coup. Efforts by the Council of Europe towards a return to democracy of the colonels remained without result. In this context the tool of an inter-state complaint was used by some concerned governments, i.e. Denmark, Norway, Sweden and the Netherlands.<sup>2</sup> The main particularity of the “Greek case” can be seen in the fact that those governments were not directly affected by the Greek events, but used the inter-state application for the sake of the common good, i.e. the preservation of trust in the European human rights system. The Consultative Assembly (which later became the Parliamentary Assembly - PACE), had an important role because it called in a resolution on member states to bring the case as a collective action. This kind of “actio popularis” was taken against massive pressures and lobbying. The case had two stages. One of the applicants, the Netherlands, did not join the others when they extended their application to cover also Article 3 violations, a crucial move for the whole case. To bring the case meant investing significant time and resources. Establishing the facts was a big challenge in the circumstances of the time. The applicant states, not least because of the

---

<sup>2</sup> Denmark, Norway, Sweden and the Netherlands vs. Greece Applications Nos. 3321-3323/67 and 3344/67 of 20<sup>th</sup> September 1967, Decisions of the Commission as to the Admissibility of Jan. 24, and of May 31, 1968; Report of the Sub-Commission on “The Greek Case” of Oct. 4, 1969, in 11 YECHR Vol. I (1969), Martinus Nijhoff/The Hague 1972.

many actors in the background like Amnesty International which produced a pertinent report<sup>3</sup> felt a moral duty to act which has become scarce in the world of pragmatism today.

## 2. Role of the European Commission on Human Rights, the Assembly and the Committee of Ministers

The former European Commission of Human Rights which was in charge of the case submitted in September 1967 decided on its admissibility and established a Sub-Commission to examine the merits. It should be noted that Greece at that time had not ratified either former Article 25 ECHR on individual applications or former Article 46 on the compulsory jurisdiction of the European Court of Human Rights. The Commission took the case very seriously and sent a fact-finding group to Greece making use of its powers of investigation. It needed courage to stand against the denials of the Greek government, in particular to interpret Article 15 ECHR on the state of emergency in a way that did not prevent the Commission from investigating violations of several articles of the Convention, not only the non-derogable ones like Article 3 ECHR which played a major role after the extension of the complaint in March 1968. Its Sub-Commission insisted on investigations on the spot and on confronting the accused with the victims, which took place in March 1969 after the hearings in Strasbourg in November 1968. This allowed important fact-finding on site including historic confrontations of victims with their torturers. However, the procedure was delayed because of the tactics of the Greek government. All stages were completed including negotiations on a possible friendly settlement. However, as this would have required basic changes it was not accepted by the regime. On 18 November 1969 the Commission presented its report to the Committee of Ministers finding that the quasi-totality of the articles of the Convention had been violated.<sup>4</sup> Together with the findings of the Consultative Assembly, which had already requested the expulsion of Greece, the pressure on the Committee of Ministers increased. At its meeting of 12 December 1969 several ministers emphasized that the trust, legitimacy and reason for the existence of the Council of Europe was at stake.<sup>5</sup> When a two-thirds majority for a suspension of Greece appeared certain, the Greek government itself withdrew from the Council of Europe before a vote could take place resulting in a so-called “de facto suspension”. While this contributed to the isolation and finally the fall of the junta, the end of the dictatorship still took until July 1974. Subsequently, on the request of the new democratic government Greece was readmitted to the Council of Europe on 28 November 1974.<sup>6</sup>

---

<sup>3</sup> See James Becket, *The Greek Case before the European Human Rights Commission*, Vol. 1, No.1 HUMAN RIGHTS 91-117 (1970); id. BARBARISM IN GREECE, A YOUNG LAWYER'S INQUIRY INTO THE USE OF TORTURE IN THE WORLD'S OLDEST DEMOCRACY (Tower 1970).

<sup>4</sup> See id. at 107 et seq. The comprehensive Report of the Commission was adopted on Nov. 5, 1969; see 11 YECHR, Vol. II (1969). According to the procedural rules the report could be adopted by the Committee of Ministers only after a three-months delay, if it was not submitted to the Court and by a two-thirds majority, which took place on 15 April 1970; see 12 YECHR Part II (1969), 511.

<sup>5</sup> Peter Leuprecht, *Fighting a dictatorship in the “homeland of democracy”*, in COUNCIL OF EUROPE, EUROPE: A HUMAN ENTERPRISE, 30 STORIES FOR 70 YEARS OF EUROPEAN HISTORY 31-36 (Council of Europe Publishing, 2019).

<sup>6</sup> See Stelios Perrakis, *The Greek case before the Council of Europe 1967-1974* (1998); see also *The Greek Junta and the International System: A Case Study of Southern European Dictatorships, 1967-74* (Antonis Klapsis, Constantine Arvanitopoulos, Evanthis Hatzivassiliou and Effie F.G. Pedaliu eds., Routledge. 2020).

The Consultative Assembly (renamed Parliamentary Assembly in 1974) played a major role in addressing the challenge of the Greek coup by the colonels. It was quick to denounce the coup already in April 1967 thanks to an Austrian parliamentarian, Karl Czernetz, and express its solidarity with the Greek people,<sup>7</sup> and it appointed a special rapporteur first in the person of Willem E. Siegmann and then Max van der Stoel, both from the Netherlands. Based on visits to Greece they produced very clear reports on the situation on the ground. Finally, Max van der Stoel was declared persona non grata by the Greek authorities. He was accompanied by a young civil servant by the name of Peter Leuprecht. In a recent article, published under the title of "Fighting a dictatorship in the 'homeland of democracy'" written on the occasion of the 70<sup>th</sup> anniversary of the establishment of the Council of Europe,<sup>8</sup> Peter Leuprecht shared some memories of this time. According to his account, "the 'Greek question' was a test case of how solid the Council was and how committed it was to its fundamental principles." He reported that the Assembly was a driving force behind the campaign of the Council against the military regime. He had been in charge of helping the rapporteur on his trips and in preparing his reports, which had a major impact on the action taken by the Assembly. While the United States tried to persuade the Council of Europe not to take action against the NATO ally, the rapporteur was not convinced by the explanations of the junta that this was a revolution in order to establish a better democracy and that it was necessary in order to fight the communist threat. Leuprecht also pointed to the nationalist and religious connotations of the rule of the colonels.

### 3. Role of personalities

Max van der Stoel<sup>9</sup> was the first to bring convincing evidence of the so-called "administrative practice of torture". On the basis of his reports the Assembly recommended to the Committee of Ministers the suspension of Greece. Being a man of strong principles, he contributed to the isolation and finally the fall of the dictatorship. He later became foreign minister of his country, the Netherlands and the first High Commissioner on National Minorities of OSCE. One street in Athens has been named after him. His assistant at the time, Peter Leuprecht himself became Director of Human Rights and Deputy Secretary-General of the Council of Europe. As a man of principles he left the Council of Europe in 1997 because he was not convinced that the admission of some new states which missed the necessary qualifications, such as Russia, could be absorbed by the Council of Europe without damage to the organization.<sup>10</sup>

## B. Impact on the Council of Europe

### 1. State complaint against Turkey

The "Greek case" appears to have had some impact a few years later, when a military coup in Turkey in 1980 resulted in the dissolution of the parliament and the abrogation of the

---

<sup>7</sup> Consultative Assembly, Decision 346 of 23 June 1967, 10 YECHR (1967), 94 et seq.

<sup>8</sup> Peter Leuprecht, *supra* note 5.

<sup>9</sup> Peter Leuprecht, *Max van der Stoel – a tireless defender of Greek democracy*, Vol. 22 SECURITY AND HUMAN RIGHTS 183-185 (2011); see also Antoine Buyse, *Max van der Stoel (1925-2011), The indefatigable Traveller*, in THE FACES OF HUMAN RIGHTS 231-238 (Kasey MacCal-Smith, Jan Wouters and Felipe Gomez Isa eds., Hart, 2019).

<sup>10</sup> Wolfgang Benedek, *Peter Leuprecht*, in THE FACES OF HUMAN RIGHTS 259-268 (Kasey MacCal-Smith, Jan Wouters and Felipe Gomez Isa eds., Hart, 2019).

constitutional protection of human rights. Again, in 1982, a similar group of member states, i.e. Denmark, France, Netherlands, Norway and Sweden resorted to an inter-state application, claiming the violation of a whole list of human rights. The European Commission on Human Rights declared the complaint admissible in December 1983. The Turkish military government had declared a state of emergency based on Article 15 ECHR, which was not considered justified by the applicants when they brought their case in 1982. However, the Turkish government made some steps towards re-establishing democracy by organizing elections in November 1983 and dissolving the National Security Council. In the end, the case was terminated by a friendly settlement in December 1985 after a delegation of the Commission had visited Turkey that year.<sup>11</sup> Accordingly, Turkey committed to a progressive lifting of its martial law, an amnesty and guarantees of the Convention rights.

It should also be noted that by not recognizing the credentials of the Greek and later also of the Turkish deputies in 1969 and 1981 respectively, the Assembly used its powers to exclude them from the work of the Assembly, whereas in later cases like the ones of Russia in 2000, 2014 and 2015 PACE limited itself to a suspension of voting rights.<sup>12</sup>

## 2. Role of Council of Europe in Democratisation of Europe

In the inter-state complaint of *Austria v. Italy* the European Commission on Human Rights formulated the principle that the Convention was not about reciprocal rights and national interests, but that its purpose was “to realise the aims and ideals of the Council of Europe, as expressed in its statute, and to establish a common public order of the free democracies of Europe with the objective of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.”<sup>13</sup> This principle appears to have been followed in the Greek case. The experience of the Greek case had also its effect on the accession of Portugal and Spain, when in spite of the enthusiasm about this enlargement after the democratization of the two countries the Assembly required a stringent scrutiny of the new candidates in order to ensure there was no backlash.<sup>14</sup>

## III. Relevance for Present-Day Challenges for Human Rights and Democracy

### A. Nature of present-day challenges

Present-day challenges are characterized by populist and authoritarian governments, neglect of European values, violations of key human rights, lack of respect for the division of powers, which

---

<sup>11</sup> France, Norway, Denmark, Sweden, Netherlands and Luxembourg vs. Turkey, Application Nos. 9940-9944, Report by the European Commission on Human Rights of Dec. 7, 1985, YECHR 28, 150.

<sup>12</sup> Andrew Drzemczewski, *The Parliamentary Assembly's key role in upholding the Council of Europe's core values*, in *El futuro de la Union Y la amenaza de uno no Europa. La crisis de valores de la UE (The crises of Values and the Future of Europe)* 10, S. Sanz Caballero ed., Aranzadi. (2020).

<sup>13</sup> European Commission of Human Rights, *Austria v. Italy*, No. 235/56, Decision of 10 June 1958, 2 YECHR, 256.

<sup>14</sup> Roger Massie, *An Iberian dawn, Portugal and Spain – 1974-1977*, in *EUROPE: A HUMAN ENTERPRISE, 30 STORIES FOR 70 YEARS OF EUROPEAN HISTORY 1949-2019*, 39 et seq. (Council of Europe, 2019).

all form part of the phenomenon of democratic backsliding. Certainly, the Council of Europe has been confronted with major challenges before like the second Chechen war on the territory of a member state or the violent conflicts in former Yugoslavia which led to its dissolution, but this contribution focuses on the potential relevance of the Greek case for human rights and democracy. As the Freedom House report of 2019 indicates, 2018 had been the 13<sup>th</sup> year of a worldwide backsliding of democracy and freedom of expression as one of its key human rights.<sup>15</sup> This raises the question whether the tools of the Council of Europe to protect human rights and democracy developed over time are sufficient and have been adequately used to counter this trend.

### **B. “Socialisation effect” of membership in Council of Europe**

Which factors influence the “socialization” of member states to become guardians of common European values? The theory of “socialization” is based on the assumption that members of a club would have an interest in living up to its principles and values and thus be earning recognition and reputation.<sup>16</sup> This has also been a major outcome of Council of Europe membership for new democracies, which benefitted from their membership to transform their political system. However, the attractiveness of membership has lost appeal for some member states, which seem to consider it - at least as much as their human rights obligations are concerned - rather as a burden. The same holds true for the principles of democracy and the rule of law, which for some governments stand in the way of their authoritarian ambitions. Against democratic backsliding various forms of social pressures have been used by bodies of the Council of Europe, but without much success. These included “dialogues” and offers of assistance, like the opinions of the Venice Commission, but they met with little interest if not animosity by states which have developed a different vision as can be seen from the cases of the Russian Federation, Turkey, Hungary and Poland.<sup>17</sup>

### **C. Backsliding on human rights and democracy in Europe today**

The recent trend of democratic backsliding is mainly due to the emergence of populist governments, which revive nationalist rhetoric to establish authoritarian regimes. This trend to authoritarianism existing already in some Eastern European countries like Azerbaijan appears to have now reached also the Eastern and South-East European states, like Serbia.<sup>18</sup> Human rights have come under pressure and with this also the institutions for their protection starting with the ECtHR. While the Council of Europe disposes of highly developed tools to protect human rights and democracy they seem still to be insufficient to prevent this backsliding.<sup>19</sup> As the cases of Poland

---

<sup>15</sup> Freedom House, *Freedom in the World 2019, Democracy in Retreat*, Freedom House 2019, at <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat> (last visited 02.12.2020).

<sup>16</sup> See Ryan Goodman and Derek Jinks, *Socialising States: Promoting Human Rights through International Law* (Oxford University Press 2013); *The Persistent Power of Human Rights: From Commitment to Compliance* (Thomas Risse, Stephen C. Ropp, Kathryn Sikkink eds., Cambridge University Press 2013); see also Lauri Mälksoo, *Russia, Strasbourg, and the paradox of a human rights backlash*, in *Russia and the European Court of Human Rights, The Strasbourg Effect* 19 et seq. (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>17</sup> Niels Muiznieks, *The Council of Europe’s Response to Recent Democratic Backsliding*, in *EUROPEAN YEARBOOK ON HUMAN RIGHTS* 2019 3-31 (Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak, Gerd Oberleitner eds., 2019).

<sup>18</sup> See Florian Bieber, *The Rise of Authoritarianism in the Western Balkan States* (palgrave macmillan. 2020).

<sup>19</sup> See Muiznieks, *supra* note 17, at 14 et seq.

and Hungary have shown, the judicial, but also the political tools of the Council of Europe or their use could not prevent the democratic backsliding. This is even more so in the case of the Russian Federation and Turkey. In this context, it is important that the Council uses all its tools and also closely cooperates with the European Union, for example by establishing the facts as a basis of the political action by the Union.

#### **IV. Tools of the Council of Europe to avoid Democratic Backsliding today**

What are the main tools the Council of Europe can use to live up to its role as the democratic conscience of Europe today? In the following, a general overview will be provided without going into detail.

##### **A. The role of the European Court of Human Rights**

The European Court of Human Rights (ECtHR) can be considered the major pillar against backsliding in the field of human rights and democracy. This is also the main reason why it has come under attack by those governments which consider its jurisprudence an obstacle for their national and sometimes nationalist policies. They were joined also by others like the UK and the Danish government. Those governments emphasized their sovereignty and asked for a stronger application of the principle of subsidiarity and of the margin of appreciation. They also used the undisputed need of the Court to reform its working methods in order to cope with the large number of cases to press for their agenda in the successive Committee of Ministers' high-level conferences, the so-called "Interlaken process", which was declared completed in 2019. Fortunately, the restrictive voices did not succeed.<sup>20</sup> The Court has also been criticized by some governments of being too evolutionary in its jurisprudence leaving behind states which want to stick to more conservative values.<sup>21</sup> Its authority has been put in question by the non-enforcement or weak implementation of its judgments.<sup>22</sup>

Regarding democratic backsliding the Court mainly deals with individual communications and therefore, in principle is not at ease in addressing structural issues. If it would make more use of the pilot case procedure this might have a stronger structural effect. But there is also the problem of the length of time it needs to deal with the cases and the lack of implementation of its judgements by some governments. For example, when the judiciary in Turkey had largely been brought under the control of the government and many thousands of civil servants, teachers and journalists removed from their positions for political reasons, the decision of the Court not to find a denial of justice because of a review of these decisions proposed by the Turkish government did not appear appropriate and left the victims with hardly any protection. In the Greek case the lack

---

<sup>20</sup> See Lize R. Glas, *From Interlaken to Copenhagen: What has become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?*, Vol. 20 HUMAN RIGHTS LAW REVIEW 1-31 (2020).

<sup>21</sup> See, for example, Dimitri Bartenev, *LGBT rights in Russia and European Human Rights Standards*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 326-352 (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>22</sup> See George Stafford, *The Implementation of judgments of the European Court of Human Rights: Worse than You think – Part 2: The Hole in the Roof*, EJIL:TALK!, Oct. 8, 2019.

of independence of the judiciary was clearly established by the Commission in spite of claims of the government to the contrary. Accordingly, no requirement of the exhaustion of domestic remedies was accepted. Although the two cases are not of the same nature because of the democratic election of the Turkish government, the question of the denial of justice because of an inefficient remedy remains.<sup>23</sup>

## **B. The role of the other key institutions of the Council of Europe**

Besides the European Court of Human Rights, the Parliamentary Assembly (PACE) as the democratic representation of the parliaments of member states plays a major role in the development and monitoring of democracy in the member states in continuity of its role at the time when former dictatorships joined the Council of Europe or in the cases of Greece and Turkey. If the Council of Europe can be considered as a “club of democracies”, the Assembly consisting of 324 members appointed or elected from the parliaments of all member states has a central role in upholding its core values.<sup>24</sup> However, the recent past rather revealed a crisis of maintaining those values and of PACE altogether as will be shown later. Also, PACE as a political body in which the deputies of the backsliding country are represented will mainly act in very serious cases as could be seen in cases related to the right to life or the freedom from torture in so-called “new democracies” in the past. However, in the recent cases of Poland and Hungary, PACE did use its monitoring possibilities only to a limited extent. While it requested several legal opinions from the Venice Commission it did not extend its procedure of full monitoring to these countries. Interestingly, in 2019 Assembly decided that its monitoring committee should in the future produce regular periodic reviews on all member states of the Council of Europe.<sup>25</sup>

Obviously, the Committee of Ministers always had a key role, but the enlargement of the Council of Europe in the 1990s has also led to a wider diversification of views, of interests and approaches, which makes it difficult for the Committee of Ministers to reach agreement on political matters. Several bodies do prepare the ground for its decisions. In the “Greek case” the Committee of Ministers showed itself hesitant for a while but then under the impression of the clear findings from the European Commission on Human Rights and the Assembly as well as public opinion it acted according to its responsibilities. But because of the Greek withdrawal it did not have to use its powers under Article 8 of the Statute to suspend or expel Greece from the organization because of a violation of its standards and there has been no other case where this has ever happened. Indeed, the Assembly representing national parliaments rather than governments is more inclined to react to major violations of those standards and thus act as the “conscience of Europe” although this did not happen in all instances, as the case of Azerbaijan shows.<sup>26</sup>

---

<sup>23</sup> See *Köksal v. Turkey*, Application no. 70478/16 of Jun. 12, 2017, in which the Court decided that civil servants dismissed after the attempted coup had first to bring their complaint to a state commission set up for that purpose, the decision of which had then to be appealed to an administrative court and finally petitioned to the Constitutional Court before the person could address an application to the European Court of Human Rights.

<sup>24</sup> Andrew Drzemczewski, *The Parliamentary Assembly's key role in upholding the Council of Europe's core values*, in *El futuro de la Unión Y la amenaza de uno no Europa. La crisis de valores de la UE (The crises of Values and the Future of Europe)* 43-56, S. Sanz Caballero ed., Aranzadi. 2020).

<sup>25</sup> Council of Europe, Parliamentary Assembly Resolution 2325 (2020) of Jan. 30, 2020 on The progress of the Assembly's monitoring procedure (January – December 2019), para. 5.1.

<sup>26</sup> Drzemczewski, *supra* note 24, at 49 et seq.



One major mechanism is the Venice Commission for Democracy through Law created in 1990, which has built a reputation for its high-quality opinions, produced to guide the political bodies on the national and European levels. Importantly, the services of the Venice Commission can be requested by a wide range of actors, going beyond the 62 states parties to the Venice Commission. Requests may come not only from the Council of Europe like PACE, but also from the European Parliament or OSCE. For example, during the recent state of emergency in Turkey, on the request of the Monitoring Committee of PACE the Venice Commission provided an opinion on the emergency laws.<sup>27</sup> In the case of Hungary, between 2011 and 2019, the Venice Commission prepared 18 opinions, most of which, however, had little effect.<sup>28</sup> The same can be said on the numerous opinions produced in the cases of the Russian Federation and Turkey. The findings and advice of the Venice Commission are important because they highlight legal problems, but they are not always appreciated, in particular if they are critical of government policies. Accordingly, it is the task of all interested actors starting from the requesting institution to strengthen its authority against unwilling governments as the opinions themselves are only advisory.

Mainly as a result of the challenges from its enlargement by numerous “new democracies” in the 1990s leading to a doubling of its membership from 23 Western European states to a pan-European organization of 47 states, the Council of Europe has created a number of additional mechanisms like the Advisory Committee on National Minorities, the European Commission on Racism and Intolerance (ECRI) and the European Commissioner for Human Rights, all of which have strengthened the political role of the Council of Europe. The European Committee against Torture (CPT) as a preventive mechanism had already been established in 1987.<sup>29</sup> In view of the fact that some new members were admitted for political reasons before they had attained the necessary standards, also monitoring systems were set up for the new and then all member states by PACE and by the Committee of Ministers on a temporary basis, the latter addressing certain thematic key human rights.<sup>30</sup> Since 1994, new members had to accept the ECHR together with some other key conventions within a year and since Protocol No. 11 to the ECHR of 1998 came into force, all new members had to accept the jurisdiction of the Court. As already shown the two main human rights bodies were merged into one, the single European Court of Human Rights strengthening the judicial approach. Democracy, human rights and the rule of law were reconfirmed as the key value basis of the Council of Europe, but the enlargement also increased the problems of compliance.

The European Commissioner for Human Rights is a more activist institution, which has been created in 1999 with a general mandate to fill gaps within the protection system. In cases of democratic and human rights backsliding the Commissioner can get involved in various ways like

---

<sup>27</sup> Venice Commission, Turkey – Opinion No. 865/2016 on Emergency Decree Laws Nos 667-676 adopted following the failed coup of Jul. 15, 2016 (Dec. 12, 2016).

<sup>28</sup> See the opinions on the website of the Venice Commission, at <https://www.venice.coe.int/webforms/documents/default.aspx?country=17&year=all&other=true> (last visited 02.12.2020).

<sup>29</sup> Renate Kicker, *The European Committee for the Prevention of Torture: a success story?*, in THE COUNCIL OF EUROPE, PIONEER AND GUARANTOR FOR HUMAN RIGHTS AND DEMOCRACY (Renate Kicker ed., Council of Europe, 2010); RENATE KICKER, MARKUS MÖSTL, STANDARD-SETTING THROUGH MONITORING? THE ROLE OF COUNCIL OF EUROPE EXPERT BODIES IN THE DEVELOPMENT OF HUMAN RIGHTS (Council of Europe 2012).

<sup>30</sup> ALINE ROYER, THE COUNCIL OF EUROPE, at 40 et seq. (Council of Europe 2010).

public statements, reports or personal visits. The Commissioner has a particular focus on the protection of human rights defenders. For this reason, she or he closely monitors the human rights situation on the ground. The Commissioner can act quickly on human rights issues by statements or country visits and reports, opinions and by mobilising the media.<sup>31</sup> She or he can appear as a third party before the Court as it happened in a recent Grand Chamber case against Turkey.<sup>32</sup> Unfortunately, the Commissioner, in addressing human rights backsliding of countries, can only sound the alarm and mobilise action as well as help in individual cases.

In reaction to the problems of the backlash affecting several democracies in Europe the Secretary General became more involved, which mostly happened behind the scenes by way of silent diplomacy. As his successes remained limited one way of speaking up was the Annual Report on Democracy, Human Rights and the Rule of Law published for the years between 2014 and 2018. For example, the annual report on democracy, human rights and the rule of law of 2018, without mentioning a single state, draws attention to the disturbing outcome of populism, which had been a focus of the 2017 report, and identifies alarming threats to the institutions of human rights protection, like the judiciary, key human rights such as freedom of expression and freedom of assembly and association as well as threats to democratic institutions and to inclusive societies which the report found to be undermined at the national and regional levels. It calls for a re-commitment to shared values and the defense of the institutions.<sup>33</sup>

Another tool of the Secretary General is the inquiry procedure under Article 52, according to which a member state on request by the Secretary General has to provide “an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.” This possibility has so far has been used only a few times, but could be used more actively. For example, in the context of the emergency measures taken by numerous states in response to the COVID-19 crises without formally resorting to the notification of a state of emergency according to Article 15 ECHR it has been suggested to use this tool to meet loopholes in the system of supervision of derogations. This has already been recommended by PACE in its Resolution 2209 according to which, *inter alia*, the Secretary General should open an inquiry under Article 52 in relation to any state which derogates from the Convention.<sup>34</sup>

### C. Role of civil society, media and academia

Today, civil society faces a shrinking space in Europe as can be seen from the situation of human rights defenders in Azerbaijan, Turkey and the Russian Federation in particular. One example was the trial of Oyub Titiev, the head of the human rights centre of the Russian human rights NGO “Memorial” in Grozny, who after denouncing forced disappearances and torture was put on trial on fabricated charges of possession of narcotic drugs in early 2018. His case received much

---

<sup>31</sup> Muizniek, *supra* note 17, at 11 et seq.

<sup>32</sup> Hearing of the Grand Chamber of Sep. 18, 2019 on pre-trial detention of Selahattin Demirtas, Selahattin Demirtas (No. 2) vs. Turkey, appl. no. 14305/17.

<sup>33</sup> Report by the Secretary-General of the Council of Europe, Thorbjørn Jagland, State of Democracy, Human Rights and the Rule of Law, Role of institutions, Threats to institutions, Council of Europe, May 2018.

<sup>34</sup> Parliamentary Assembly of the Council of Europe, Resolution 2209 of Apr. 24, 2018 on State of emergency – proportionality issues concerning derogations under Article 15 ECHR; see Kushtrim Istrefi, Stefan Salomon, *Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations*, Vol. 22 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW, 25 et seq. (2017), 2019.

attention and he was awarded the Vaclav Havel Human Rights Prize by the Parliamentary Assembly in November 2018. In 2019 he received a relatively mild sentence allowing for his release soon after, but could not continue his work in Chechnya any more. The shrinking space for civil society in Europe has also been addressed by a pertinent recommendation of the Committee of Ministers of 2018, which requested Member States to provide an enabling legal framework and a conducive political environment as well as effective measures to protect and promote civil society space.<sup>35</sup>

Civil society partly derives its strength from its access to the media, which disseminate its findings and requests and thus allow it to mobilize public opinion. The media themselves, in particular by way of investigative journalism play an indispensable role for denouncing human rights violations, by “naming and shaming”. Both can influence public opinion, which is crucial in pursuing a case against a government as can be seen from the “Greek case”.<sup>36</sup>

Academia has the role of researching and analyzing, interpreting obligations and commenting on the appropriateness and consistency of international action. It might also provide assistance to victims in accessing national and international remedies as can be shown for the case of Russia.<sup>37</sup> It has recently been facing an anti-elitist sentiment by populist governments, but its contribution is needed for the development of policies based on facts as shown by the COVID-19 crises.

## D. Case studies of Russian Federation and Turkey

### 1. Russian Federation

After the dissolution of the Soviet Union, succeeded by the Russian Federation (RF), the latter applied for membership in the Council of Europe. The application was granted in 1996 in spite of the results of fact-finding by PACE which showed that the Russian Federation was not as yet in a position to meet the membership criteria.<sup>38</sup> Nonetheless, in order not to lose the window of opportunity of the Russian interest in accession, the Russian Federation was admitted in 1996 with the understanding that the commitments entered into upon accession and the monitoring procedure would help Russia to undertake the necessary reforms. The accession meant that Russia also became a party to the European Convention on Human Rights and had to accept the jurisdiction of the European Court of Human Rights (ECtHR), which by the reform of 1998 became a single institution to decide all cases. Since, the RF has been found in violation of its obligations in thousands of cases, which in the early period of its membership led to important legal reforms in which the newly established Constitutional Court of the RF had a key role. The Convention and the Court and their “Strasbourg effect” were welcome to support the modernization and

---

<sup>35</sup> Council of Europe, Committee of Ministers Recommendation CM/Rec(2018)11 of Nov. 28, 2018 on the need to strengthen the protection and promotion of civil society space in Europe.

<sup>36</sup> Anne-Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* 42 et seq. (Princeton University Press 2001).

<sup>37</sup> See, Anton Burkov, *The use of European human rights law in Russian courts*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 59 et seq. (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018); Philip Leach, *Egregious human rights violations in Chechnya: appraising the pursuit of justice*, id., 255 et seq.

<sup>38</sup> Petra Roter, *Russia in the Council of Europe: Participation à la carte*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 40 et seq. (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018); see the opinion by PACE on Russia's application for membership in the Council of Europe, Doc. 7463 of Jan. 18, 1996.

Europeanization of the Russian legal system.<sup>39</sup> However, a degradation in the relationship can be observed since about 2008 and in particular 2012 when the Court decided some cases against the expectations of the RF. The cases of *Markin, Catan and Others* and *Alekseyev* need to be highlighted in this context.<sup>40</sup> With the annexation of Crimea in 2014 and the Western counter-measures this trend was reinforced. But the Russian attitude towards Western values also changed as a result of its decision to rather develop a Russian nativist approach.<sup>41</sup> The situation culminated in 2018, when the Duma gave the Constitutional Court new powers to review the conformity of the judgments of the ECtHR with the constitution of the Russian Federation. Although in practice these new powers have only been used in two cases<sup>42</sup> so far, the RF can now feel more at ease to deny the enforcement of Court judgments, which in some cases has been slow anyway.<sup>43</sup> Still, with a compliance rate of 26.53% (2017) the performance of the RF has been better than the performance of several other member states while the Council of Europe average is 72.6%.<sup>44</sup> It can be taken as a positive sign that in 2019 the RF found a way to comply with the judgment in *Anchugov and Gladkov* as announced by the Council of Europe although the Russian Constitutional Court at the time had held that it was impossible to comply.<sup>45</sup>

The Council of Europe member state Azerbaijan is known for problems of compliance. In the notorious *Mammadov* case, the Committee of Ministers for the first time used the infringement procedure under Article 46 (4) ECHR referring the case to the European Court of Human Rights for refusal to abide by a final judgment. The Grand Chamber of the Court unanimously found a violation.<sup>46</sup> In the context of the work of PACE it was found that Azerbaijan had bribed several PACE members with gifts and high payments, which raised the question of the credibility of the institution. PACE finally reacted to the revelations mainly coming from the NGO "European Stability

<sup>39</sup> See Alexei Trochev, *The Russian Constitutional Court and the Strasbourg Court: judicial pragmatism in a dual state*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 125-149 (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018); see also Bill Bowring, *Russia and the Council of Europe: an incompatible ideology, and a transplanted legal regime?* in *RUSSIAN DISCOURSES ON INTERNATIONAL LAW* (P. Sean Morris ed., Routledge 2019).

<sup>40</sup> See the decisions on *Konstantin Markin v. Russia*, Application no. 30078/06 of 2012 (GC), *Catan and Others v. Moldova and Russia*, Applications nos. 43370/04, 8252/05 and 18404/06 of 2012 (GC) as well as *Alekseyev v. Russia*, Applications nos. 4916/07, 25924/08 and 14599/09 of 2011; see also Bill Bowring, *Russia's cases in the ECtHR and the question of implementation*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 188-221 (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>41</sup> See Benedikt Harzl, *Nativist ideological responses to European/liberal human rights discourses in contemporary Russia*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 355-384 (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>42</sup> See the cases of *Anchugov and Gladkov*, Application nos. 11157/04 and 15162/05 of 2013 dealing with voting rights of prisoners and of *Yukos (just satisfaction)*, Application no. 14902/04 of 2014 concerning property rights. The latter concerned a compensation of 1.9 Bio EUR.

<sup>43</sup> Bill Bowring, *Russia's cases in the ECtHR and the question of implementation*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 188-221 (Lauri Mälksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>44</sup> See Elisabeth Lambert, *The first infringement proceedings within the European system of human rights: Using the Court as a last bastion for the credibility of the Council of Europe*, *EUROPEAN HUMAN RIGHTS LAW REVIEW* 325-335 (2018); see also Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2019*, 13<sup>th</sup> Annual Report, Council of Europe 2020.

<sup>45</sup> See CM/ResDH(2019)240 of Sep. 25, 2019.

<sup>46</sup> Lambert, *supra* note 44; see European Court of Human Rights, *Proceedings under Article 46 § 4 in the case of Ilgar Mammadov v. Azerbaijan (Application no. 15172/13)*, Judgment of May 29, 2019 (GC).

Initiative" (ESI) by establishing an external investigation which confirmed most of the allegations and led to sanctions against a number of parliamentarians involved.<sup>47</sup>

The sanction of stripping the Russian members of PACE of their voting rights after the illegal occupation of Crimea in 2014 put particular stress on the relations between the Council of Europe and the RF. The latter responded to it by boycotting the work of the Assembly by not sending their deputies anymore and not allowing any PACE rapporteurs to visit the RF; furthermore it froze its sizable financial contribution and threatened to withdraw from the Council of Europe altogether. Members of the Russian Duma, but also academia also severely criticized the judgments of the Court in certain cases like the ones related to same sex relationships.<sup>48</sup> After a face-saving agreement reached in May 2019<sup>49</sup> the Russian PACE members returned and the RF resumed its contributions. Still fundamental differences remain and the situation of democracy, human rights and the rule of law in the RF has been characterized by a continuous backsliding as can be seen by the laws on banning the propaganda of homosexuality, on declaring certain human rights NGOs as foreign agents and, in particular, the human rights situation in Chechnya.

The situation of human rights in the Chechen Republic, which in the past experienced major violations during the Chechen wars, became notorious again in 2017, after several purges of LGBTI people and alleged summary executions of presumed terrorists. There were reports of a persistent pattern of torture by the security forces in Chechnya. In reaction, a group of 16 Contracting Parties of OSCE resorted to the Moscow Mechanism to enable an investigation of the allegations in a report done by a single rapporteur because the RF contrary to its obligations declined any cooperation.<sup>50</sup> In March 2019 the European Committee for the Prevention of Torture (CPT) resorted to the rare tool of a public statement, in which it made some of the findings of its visit of 2017 public and deplored that the RF authorities had not been ready to react to its findings for a long period.<sup>51</sup>

---

<sup>47</sup> See Report of the Independent Investigation Body on the allegations of corruption within the Parliamentary Assembly of Apr. 15, 2018, at <http://assembly.coe.int/Communication/IBAC/IBAC-GIAC-Report-EN.pdf> (last visited 02.12.2020); the Assembly consequently adopted resolution 2216 (2018) of Apr. 26, 2018 declaring "zero tolerance for corruption".

<sup>48</sup> See Dmitri Bartenev, *LGBT rights in Russia and European human rights standards*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS, THE STRASBOURG EFFECT* 326-351 (Lauri Mäiksoo, Wolfgang Benedek eds. Cambridge University Press. 2018).

<sup>49</sup> See PACE Resolution 2287 (2019) of Jun. 25, 2019 on "Strengthening the decision-making of the Parliamentary Assembly concerning credentials and voting"; see also Andrew Drzemczewski, *The (Non-) Participation of Russian Parliamentarians in the Parliamentary Assembly of the Council of Europe: an Overview of Recent Developments*, *EUROPE OF RIGHTS AND LIBERTIES* (2020), forthcoming; Lize R. Glas, *Russia left, threatened and won: Its return to the Assembly without sanctions*, *Strasbourg Observers* of Jul. 2, 2019, at <https://strasbourgobservers.com/2019/07/02/russia-left-threatened-and-has-won-its-return-to-the-assembly-without-sanctions/> (last visited 02.12.2020).

<sup>50</sup> See OSCE Rapporteur's Report under the Moscow Mechanism on the alleged human Rights Violations and Impunity in the Chechen Republic of the Russian Federation of Dec. 13, 2018 by Professor Dr. Wolfgang Benedek, at <https://www.osce.org/odihr/407402?download=true> (last visited 02.12.2020).

<sup>51</sup> Council of Europe, Committee for the Prevention of Torture, Public Statement of Mar. 11, 2019 on the Russian Federation concerning the Chechen Republic and other republics of the North Caucasian region, CP/Inf (2019)6; see Council of Europe anti-torture Committee urges the Russian Federation to carry out effective investigations into allegations of torture in the Northern Caucasian region, at <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-urges-the-russian-federation-to-carry-out-effective-investigations-into-allegations-of-torture-in-the-norther> (last visited 02.12.2020).

Generally, the member states being preoccupied with the situation in Crimea and Eastern Ukraine have shown only limited interest in using the tools of the Council of Europe in the case of the Chechen Republic while PACE has been very active by pursuing reports like the one on the persecution of LGBTI people in the Chechen Republic of 2018.<sup>52</sup> The Secretary General in his annual report of 2018 referred to the critique by PACE regarding the harassment of opposition activists and NGOs and their request to abrogate the law on foreign agents. The Russian government declines responsibility for the events in Chechnya although it is legally responsible for human rights violations in its Republic. Without a more concerted action of Council of Europe member states, the highly problematic human rights situation in which investigative journalists, human rights organizations and anyone critical of the government find themselves at risk might not improve.

## 2. Turkey

After a time of degradation of democracy and freedom of expression in Turkey and the attempted coup by parts of the army, the following state of emergency of 2016 led to a massive repression of people considered as Gülenists and anybody critical of the Erdogan government in the public sphere. In this context some 150 000 civil servants were purged, 77 000 charged for suspected links to the coup, some 4000 judges and prosecutors were dismissed and also a large number of academics lost their positions. Many found themselves in prison together with numerous journalists and elected parliamentarians from the mainly Kurdish Peoples' Democratic Party (HDP), which became a particular object of government repression. Some 700 journalists lost their accreditation. The Commission set up by the Turkish government in agreement with the Council of Europe in 2017 to review the cases of the civil servants by 2018 had only reviewed 36 000 cases, with only about 2300 persons reinstated in their positions. Some 50 000 persons had been charged with terrorism while many others were waiting in pre-trial detention to be charged.<sup>53</sup>

While the Turkish government on the initiative of the Ministry of Justice in 2014 still had adopted an Action Plan on Prevention of ECHR Violations,<sup>54</sup> there was little progress from 2015 onwards. Joint projects of the Council of Europe and the European Union like the one on strengthening the capacity of the Turkish judiciary on freedom of expression were undermined by political events while nearing completion.<sup>55</sup> After the Vaclav Havel prize had been awarded by PACE in November 2017 to Murat Aslan, former chair of the judges and prosecutors arrested by Turkey in 2016 for suspected links to the Fetullahist Organization considered responsible for the military coup, Turkey also withdrew its voluntary support for the Council of Europe where it had become one of the six major funders.<sup>56</sup>

---

<sup>52</sup> Parliamentary Assembly, The Persecution of LGBTI people in the Chechen Republic (RF), rapporteur Piet de Bruyn, Jun. 8, 2018.

<sup>53</sup> Human Rights Watch, 2019 World Report, section on Turkey, available at <https://www.hrw.org/world-report/2019/country-chapters/turkey> (last visited 02.12.2020).

<sup>54</sup> Action Plan on Prevention of ECHR Violations, available at <http://www.judiciaryofturkey.gov.tr/pdfiler/action.pdf> (last visited 02.12.2020).

<sup>55</sup> Strengthening the Capacity of Turkish Judiciary on Freedom of Expression, Joint EU – Council of Europe project, 2014-2016.

<sup>56</sup> Hurriyet Daily News of Nov. 9, 2017: Turkey no longer Council of Europe major donor, at <https://www.hurriyetdailynews.com/turkey-no-longer-council-of-europe-donor-minister-122219> (last visited 02.12.2020).

The European Parliament reacted with a resolution against the restrictions of freedom of expression, which had started well before the coup, at the end of 2014,<sup>57</sup> while the European Court of Human Rights found a violation of freedom of expression in the blocking of YouTube by the Turkish government.<sup>58</sup> While YouTube was able to go online again, the Kurdish politician Selahattin Demirtas, co-chair of the HDP, which had been very successful in the elections of June 2015 and who was arrested in 2016 is still in prison although the Court in 2018 found that the length of his pre-trial detention could not be justified and that he should be released at the earliest possible date. President Erdogan is on record saying that the judgments of the Court were not binding for Turkey. Already in December 2017 the Constitutional Court of Turkey had found his application inadmissible. Indeed, the case was referred to the Grand Chamber of the Court, which in September 2019 held a hearing in this case. At the hearing the European Commissioner for Human Rights, Dunja Mijatovic accused the Turkish government of using the judiciary to silence critics.<sup>59</sup> The well-known Turkish law professor Kerem Altiparmak is on record for having characterized this case as a symbol for Turkey's struggle for democracy and the state of law.<sup>60</sup>

After the failed military coup on 15-16 July 2016 a state of emergency was declared on 22 July 2016. It was prolonged six times until 8 August 2018 after Tayyip Erdogan had been sworn in as president under the newly established presidential system, which gave him far-reaching powers as a result of the constitutional changes accepted by referendum in April 2017. The Turkish state of emergency after the attempted coup and the reaction by the Council of Europe raises several issues discussed below under the section on state of emergency.

The Parliamentary Assembly actively responded to the degrading situation of human rights and democracy in Turkey after the Coup by expressing serious concerns about the proportionality of the emergency measures and requesting the implementation of the recommendations of the Venice Commission and of the European Commissioner for Human Rights. In its resolution of 2017 on Turkey the Parliamentary Assembly announced the reopening of its monitoring procedure for Turkey until its concerns were addressed in a satisfactory manner.<sup>61</sup> At the time this procedure was also still applied to nine other member states including the Russian Federation.

Unfortunately, in its decision in the case of *Zihni v. Turkey*<sup>62</sup> the European Court of Human Rights did not consider the thousands of complaints of civil servants as well as many complaints from other sources as applicable but referred the complainants to the troublesome domestic remedies, which in practice were not effective.<sup>63</sup> The establishment of an Ad Hoc Inquiry Commission after consultations with the Council of Europe based on emergency decree law No. 685 with the

---

<sup>57</sup> European Parliament resolution of 15 January 2015 on freedom of expression in Turkey: Recent arrests of journalists, media executives and systematic pressure against media (2014/3011(RSP)).

<sup>58</sup> Cengiz and Others v. Turkey (Applications nos. 48226/10 and 14027/11), Dec. 1, 2015.

<sup>59</sup> Selahattin Demirtas v. Turkey (No.2), Application No. 14305/17, Judgement of Nov. 20, 2018, referred to the Grand Chamber in Mar. 18, 2019; see European Court of Human Rights Press Release ECHR 316(2019) of Sep. 18, 2019.

<sup>60</sup> See <https://ahvalnews.com/selahattin-demirtas/echr-holds-grand-chamber-meeting-case-jailed-pro-kurdish-leader-demirtas> (last visited 02.12.2020).

<sup>61</sup> See Parliamentary Assembly, The functioning of democratic institutions in Turkey, Resolution 2156 (2017) of Apr. 25, 2017, in particular para. 38.

<sup>62</sup> *Zihni v. Turkey*, Application no. 59061/16, Decision of Nov. 29, 2016.

<sup>63</sup> Kerem Altiparmak, Senem Gürol, *Turkey's Derogation of Human Rights under the State of Emergency: Examining its Legitimacy and Proportionality*, Vol. 22 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 125 et seq. (2017)2019.

possibility of appeal to the Ankara administrative courts led to another decision on exhaustion of local remedies<sup>64</sup> and the striking off of some 12.600 cases by the Court. The functioning of this decree law as effective remedy is denied by Turkish legal experts.<sup>65</sup> In conclusion, instead of using its pilot case procedure the Court left the victims of the political purges largely unprotected. Recently again, the Court decided in the prominent case of *Kavala* that the person had to be released immediately. In this case the Court also found a violation of Article 18 of the Convention finding an abuse of power by the extended detention of a human rights defender in order to silence him.<sup>66</sup> The EU has followed up requesting Turkey to act on the judgment, but so far without any result.<sup>67</sup>

In the case of several journalists, the judgment of the ECtHR was undermined as they were released, but then put in detention again based on new accusations.<sup>68</sup>

The member states are the guardians of the European Convention and of the system of human rights protection build on it. They are supposed to act in the general European public interest. What has been the reaction by member states of the Council of Europe, have inter-state applications been considered at all against the systematic violations of human rights and the backsliding of democracy in Turkey? Obviously not, although this would have been a powerful signal to the Turkish president.

### 3. Similarities and Differences to the “Greek Case”

In order to draw useful conclusions, it is important to note the similarities and differences. The “Greek case” may be considered as an extreme one, but in the structure of events there are similarities to be found and lessons to be learned.

The main similarity is the need for determined action on behalf of member states in order to preserve the human rights system. The main difference obviously is the fact that the military coup in the “Greek case” abolished democracy and introduced a military government, which was using torture as a general means of oppression, at least in the first phase. Such a government should not have a place within democratic nations. In the context of the European Union there is Article 7 to respond to such cases of backlash.

However, the crucial question is what to do with authoritarian governments which use populist and sometimes even fascist policies in order to stay in power. They are usually democratically elected, but do not respect the values of the Council of Europe or the EU. They have not – as yet – reintroduced the death penalty (as Erdogan threatened to do). They generally accept the judgments of the ECtHR, but may not implement those they dislike. They pursue a so-called “illiberal democracy”, which is alien to the foundations of the Council of Europe.

---

<sup>64</sup> *Köksal v. Turkey*, Application no. 70478/16, Decision of Jun. 6, 2017.

<sup>65</sup> See Altıparmak, Gürol, *supra* note 63, 127-130.

<sup>66</sup> *Kavala v. Turkey*, Application no. 28749/2018, Judgment of Dec. 10, 2019.

<sup>67</sup> See Statement by the EU-spokesperson, at [https://eeas.europa.eu/headquarters/headquarters-homepage/71927/statement-spokesperson-following-european-court-human-rights-verdict-mr-kavala-still-detained\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/71927/statement-spokesperson-following-european-court-human-rights-verdict-mr-kavala-still-detained_en) (last visited 02.12.2020).

<sup>68</sup> See Altıparmak, Gürol, *supra* note 63, 113.



The findings and recommendations of the opinions of the Venice Commission are often ignored as they are not welcome to the governments pursuing a different policy.

Where to draw the red line, which is in danger of being redrawn all the time? There is a need of stronger vigilance as any softening and compromise might damage the common good and the common concern, the European system of human rights.

#### 4. Dealing with a state of emergency

In several cases, like in the “Greek case”, states of emergency have been announced by governments in order to free themselves from obligations under the Convention. The “Greek case” stands for the approach of the European Commission on Human Rights to insist on a right to review whether a state of emergency was justified and whether the measures taken by states were necessary for a legitimate purpose. Both, in the “Greek case” as well as in the Turkish case in the 1980s, the Commission did not find the declared states of emergency justified. The state of emergency after the recent attempted coup in Turkey can be considered as an “entrenched” derogation, while derogations under Article 15 according to the findings of international bodies and the doctrine should be temporary.<sup>69</sup> This raises the question of an abuse of the right similar to the British proposal to derogate from the ECHR in future extraterritorial military operations.<sup>70</sup> It is worth noting that the PACE rapporteur on State of Emergency in his report adopted by the Assembly concluded that derogations must be limited in duration<sup>71</sup> and questioned the derogation made by France to address “lasting” terrorist threats. Regarding Turkey the report found that the length of the derogation exceeded what was strictly required.<sup>72</sup> The practice of the Court, however, seems to suggest that there is no obligation of temporariness as this also does not appear in Article 15.<sup>73</sup> The Court somewhat disturbingly also does not consider derogatory measures under a state of emergency as “urgent cases”, which shows a potential discrepancy with the approach taken by the Assembly. In resolution 2209 on state of emergency the Assembly proposed that the Secretary General of the Council of Europe should use its powers under Article 52 ECHR on “inquiries by the Secretary General” to open an inquiry in the case of any state derogating from the Convention.<sup>74</sup> This recommendation has been taken up in the literature in the COVID-19 crises when several states notified a state of emergency.<sup>75</sup> However, this issue cannot be further pursued in the context of this contribution.

---

<sup>69</sup> See Kushtrim Istrefi, Stefan Salomon, Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations, Vol. 22 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 7-28 (2017)2019.

<sup>70</sup> See Vassilis P. Tzevelekos, The United Kingdom’s Presumption of Derogation from the ECHR Regarding Future Military Operations Overseas: Abuse of Rights, Articles 17 and 18 ECHR, and à la carte Human Rights Protection, Vol. 22 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 137-190, (2017).

<sup>71</sup> See Parliamentary Assembly, Resolution 2209 (2018) of 24 April 2018 on State of emergency: proportionality issues concerning derogations under Article 15 of the ECHR, para. 4.

<sup>72</sup> Id., para. 16.2.

<sup>73</sup> See Istrefi, Salomon, *supra* note 69, at 13.

<sup>74</sup> Parliamentary Assembly, Resolution 2209 (2018), para. 20.2.

<sup>75</sup> See Kushtrim Istrefi, Supervision of Derogations in the Wake of CVOVID-19: a litmus test for the Secretary General of the Council of Europe, EJIL:TALK!, Apr. 6, 2020.

In the “Greek case”, the European Commission on Human Rights took an active position in reviewing the state of emergency and found that it was not justified. This was also the position of the Assembly at the time. This case could serve as guidance for a more active role of Council of Europe bodies today, including a review of the justification of a state of emergency and the proportionality of the measures taken as suggested by PACE.

## V. General Conclusions and Recommendations

What are the lessons learned, what is the message of the “Greek case” – that member states devoted to human rights make full use of existing remedies? The system of human rights protection knows strong elements of “peer review”, in the UN since 2006 in the form of the recurrent Universal Periodic Review and in OSCE since 1989 and 1991 respectively in form of the Vienna and Moscow Mechanisms, to be employed by concerned participating states. But a comparison between the judicial inter-state complaint of the Council of Europe and the non-judicial Moscow Mechanism shows large differences: the decisions of a judicial mechanism cannot be so easily ignored; could an increased use of inter-state cases lead to self-suspension like in the “Greek case”? Is there a danger that the threats of withdrawal of the Russian Federation or the UK being unhappy with certain decisions will be realized? There are several interstate-cases before the Court as much as the Russian Federation is concerned, like *Ukraine v. Russia* and *Georgia v. Russia* but they are not of the same nature as the Greek case because they all pursue specific state interests. It is also of great importance that hundreds of individual cases every year are decided against the RF and Turkey providing their citizens with some relief and sending a message to the governments how to avoid future violations. The same is true for the findings and recommendations of the other human rights bodies of the Council of Europe.

However, while the “Greek case” belongs to a period of relatively frequent inter-state applications, which is also due to the fact that individual communications and the European Court of Human Rights were not as yet generally accepted, since the merger of 1998 and the general existence of a right to individual applications, the emphasis has definitely moved to the latter. But individual applications are not best suited to deal with democratic backsliding and the preparedness of member states to use the inter-state application for the common interest of safeguarding European democratic standards is low.

Generally, the impact of the system also depends on whether the state in question cares about its reputation. Otherwise, blaming and shaming has little effect. For example, the Russian Federation does compensate individuals as requested by the Court, but hardly takes the necessary legislative or other structural measures in order to prevent the same cases to come up again. The RF thus does not seem to care about the number of cases generated by this practice. With regard to Turkey, the government until about 2014 was very keen on claiming that there were no journalists in prison in Turkey. However, since late 2014, well before the attempted coup it seems not to care anymore about its reputation in this respect and since has one of the highest numbers of journalists in prison worldwide.<sup>76</sup>

---

<sup>76</sup> According to the Committee to Protect Journalists, the number was 68 for 2018; see Committee to Protect Journalists, Hundreds of journalists jailed globally becomes the new normal, at <https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia/> (last visited 02.12.2020).

Regarding Turkey, as in the “Greek case” at the time, there is also the argument that its status of a NATO ally should be taken into account although Turkey is not an easy one. Typically, from the perspective of a state government other political – and economic – considerations may outweigh the human rights ones.

Does the size of the country matter? In the case of the Russian Federation this might be the case. The Council of Europe suffered a lot from the withholding of the Russian contribution, which with EUR 32.6 Mio in 2019 was one of the largest of its members. In the case of Russia, this country has annexed a part of another member state and went away with it, an unprecedented case in spite of the creation of breakaway regimes in Georgia (Abkhazia, South Ossetia) and Moldavia (Transnistria), also with Russian involvement.<sup>77</sup>

The “toolbox” of the Council of Europe for the protection of human rights in its member states has significantly increased over time. But this could not prevent or remedy major backlashes of human rights and democracy as described. This raises the question whether the tools of the Council are not strong enough to prevent backsliding or whether they have not been used strongly enough?

The Council of Europe is sometimes called the democratic conscience of Europe. In the recent years, the Council has come under pressure to live up to its mandate, also because it lacked full support from its member states. There is a common accountability towards history. What would have been the reputation of the Council with the Greek, but also many other peoples if it had given in to pressures not to act at the time? Any dictatorship, but also every authoritarian government ends some time and then those who betrayed their principles will be held accountable. Therefore, the maintenance of a principled position in line with the mandate is key even if it cannot be enforced at the moment. The Council of Europe and its institutions are constantly put to the test by regressive forces and can only grow in meeting those challenges. They might have lost appeal, in particular for authoritarian states, but they still are needed to provide some legitimacy to governments.

It is also important to insist on fact-finding, on investigations on the spot. Countries like the Russian Federation have refused to allow PACE rapporteurs and even the European Commissioner for Human Rights to visit the country in response to measures taken against them. Only after the face-saving agreement between the Council and Russia was concluded, such visits became possible again. Today there is an increasing practice of “joint responses” – several bodies act together within their mandates. A more coordinated response can increase its efficiency. Like in the United Nations, where there is an growing practice of joint action, such as joint visits and statements by several special rapporteurs could Council of Europe bodies join forces, at least the non-judicial ones.

The Parliamentary Assembly recommended to strengthen the authority of the Council by a “joint response procedure” of a more structured coordination between PACE, the Committee of Ministers and the Secretary General in cases of violations of the statutory obligations by member states.<sup>78</sup> It shows that there is an urgent need to preserve the legitimacy of the Council through

---

<sup>77</sup> Benedikt Harzl, *The Law and Politics of Engaging De facto States: Injecting New Ideas for an Enhanced EU Role* (Brookings Institution Press 2018).

<sup>78</sup> Parliamentary Assembly, Resolution 2277 (2019) of Apr. 10, 2019 on Role and mission of the Parliamentary Assembly: main challenges for the future, Para. 15.3 and 15.4.

reacting to major challenges to its key values and obligations. Accordingly, the tools exist, but a more courageous approach is needed.

The argument that the Council of Europe can only preserve its influence and also provide its services – such as the ECtHR – for the benefit of the citizen if it does not suspend rights of a member state has the potential of limiting possible choices. In the case of the RF and also Turkey this argument makes sense as long as these countries remain within certain red lines which also means that the Council can still have an impact. The reintroduction of the death penalty, a general denial of implementation of ECtHR judgments or a practice of systematic torture could be considered such red lines. Beyond them the credibility and legitimacy of the European human rights system would be at stake. To use the possibility of suspension or expulsion as a last resort may be justified. As previous cases show this would not necessarily mean that the country in question will withdraw forever, because as the European geography cannot be changed it will have to come back in particular when a new government takes over.

With regard to the responsibility of member states as guardians of European values no state complaints have been made since the Greek and Turkish cases to protect the system from backsliding in Council of Europe member states. This ultimate tool of peer review remains unused although according to Article 33 of the Convention it can be used in the case of any alleged breach of the Convention and not only for the most serious breaches like a change of the political system by force. Member states today are using the inter-state complaint mainly for their own interest in relations among themselves like in the recent case of *Slovenia v. Croatia*.<sup>79</sup> The question is whether they should not make more use of this remedy again for preserving the common interest,<sup>80</sup> for dealing with major cases of democratic backsliding. This would not be just idealistic, but serve the European public interest common to all member states. There are few cases outside the protection system of the Council of Europe like *Gambia v. Myanmar* where such a public interest approach has been pursued.<sup>81</sup> The use of inter-state complaints presently is increasing, but not as regards cases of common interest.<sup>82</sup> The Greek case provides an example how this tool could be used in the public interest of the European protection system.

Today, there are more actors and better structures, but also a lack of personalities, in particular also on the side of governments to push for using the tools of the Council of Europe for the common interest. There is a need for more courageous personalities, who show leadership.

Summing up, the Council of Europe is still fighting for democracy as it did 50 years ago, but the challenges are different: they are not as deep as the dictatorship at the time, but they are wider as there are a larger number of problematic member states and situations, which provide different challenges to the European human rights system. Will the Council of Europe, which recently has celebrated 70 years of its existence, be prepared to meet the wider challenges and make full use of its variety of tools and will the member states be ready to support the Council of Europe in this

---

<sup>79</sup> *Slovenia vs. Croatia*, Application no. 54155/16.

<sup>80</sup> Wolfgang Benedek, *Humanization of International law, Human Rights and the Common Interest*, in, THE COMMON INTEREST IN INTERNATIONAL LAW 185-196 (Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt eds., Intersentia 2014).

<sup>81</sup> International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gambia v. Myanmar*) – provisional measures, Order of Jan. 23, 2020, at <https://www.icj-cij.org/en/case/178/orders> (last visited 02.12.2020).

<sup>82</sup> See ISABELLA RISINI, THE INTER-STATE APPLICATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Brill/Nijhoff 2018); see also Geir Ulfstein, Isabella Risini, *Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges*, at <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/#comments> (last visited 02.12.2020).

effort and also use their own possibilities like the inter-state complaint? It remains to be seen how the human enterprise of a Europe based on pluralist democracy and human rights will continue.<sup>83</sup>

---

<sup>83</sup> Europe: A Human Enterprise, 30 Stories for 70 Years of European History 1949 – 2019 (Denis Huber ed., Council of Europe 2019).