

Is the OSCE Sliding into Irrelevance?

Engaging with human rights defenders to address the rollback of the rule of law in the European Union



HUMAN RIGHTS



OSCE Network of Think Tanks and Academic Institutions

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Background and acknowledgements

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This OSCE-focused project ran in parallel to the ongoing two-year programme [*Recharging Advocacy for Rights in Europe \(RARE\)*](#) that connects 25 human rights defenders and their NGOs in 13 EU Member States, organised by the Hertie School, the Hungarian and Netherlands Helsinki Committees and funded by the Stiftung Mercator and the ERSTE Foundation. This report also aims to inform and guide these human rights defenders in their endeavours to increase the protection of civic space and the rule of law in Europe.

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Executive Summary

The situation of human rights defenders (HRDs)¹ in a growing number of OSCE participating States is becoming increasingly difficult. In recent years, this has also become particularly true for HRDs working in countries in Central Eastern and Southern Europe, where the protection for human rights and the rule of law is deteriorating.² Governments there have begun to shrink space for civil society through a variety of legal and policy measures, leading to a lack of meaningful and effective participation by civil society in public life. Human rights advocacy and watchdog organisations active in Bulgaria, Greece, Hungary, Malta, Poland, Romania, Croatia or Slovenia have become subject to restrictive laws, unnecessary bureaucratic burdens, verbal and physical assaults and smear campaigns, and they have also become subject to the weaponisation of laws that aim to directly curtail or end their practice as advocates for human rights.³ Moreover, they have often been accused of being “enemies of the nation” or “extremists”, with an aim to delegitimize them, using spurious claims against defenders to justify violent actions against them. A number of OSCE participating States and OSCE institutions such as OSCE/ODIHR and the OSCE Representative on Freedom of the Media (RFoM) have raised particular concerns regarding Poland and Hungary. HRDs currently involved in advocating at the local or national levels in many EU countries in Central and Eastern and South-Eastern Europe rarely engage transnationally or at the level of multilateral organisations, particularly with the political pillars of these organisations.

Understanding the implications of shrinking civic space within the European Union⁴ is significant for the ability of the OSCE and its participating States to continue working towards the fulfilment of rights captured within its human dimension. This OSCE Network report addresses the following three question clusters:

- What is the impact of sliding rule of law standards in a number of EU Member States (EUMS) on the OSCE’s human dimension agenda, particularly in regard to their commitments to rules-based good governance and the fulfilment of fundamental rights? How could OSCE institutions and participating States better respond to this development?
- What are the OSCE’s diplomatic barriers that currently prevent HRDs based in EUMS from co-operating more closely and effectively with the OSCE, its mechanisms and resources? How could HRDs use the OSCE better as an additional forum of advocacy?

- How can rule of law backsliding in some EUMS be addressed by using the OSCE as a framework, and what can be done to anchor the concept of civic space more deeply within the OSCE human dimension acquis?

These three clusters are essentially concerned with the relevance of the OSCE’s human dimension to those who strive to protect and expand the values and norms developed by their states following the Helsinki Final Act of 1975. Should human rights defenders in EUMS who confront the shrinking of their space direct their multilateral advocacy efforts towards Vienna? Or may it be more promising for them to focus on Brussels, Luxemburg, Strasbourg and Geneva? If, say, a Slovenian NGO was to face designation as a foreign agent for entirely spurious reasons, could it seek effective protection through the OSCE human dimension framework commitments, as well as the fora and diplomatic machinery the OSCE provides? Addressing these questions can be a key indicator as to how well the OSCE works for one of its key constituencies.

The answer is more complex than a plain Yes or No. The report will discuss three themes related to – as it claims – the concern of the OSCE’s fading relevance in its human dimension. First, it argues that human rights defenders should be able to rely on OSCE commitments, standards and guidelines to evidence regional customary law, and apply them both in their litigation and advocacy work to counter civic space restrictions. The use of human dimension commitments by courts would fortify their nature as norms in the legal and not just the political sense. Second, in reviewing the EU’s diplomatic practice within the OSCE, the report concludes that in its quest for unity, the EU has grown into a cartel of silence, effectively weakening the OSCE’s foundational logic of peer review as it is unwilling to deal with problems in a forum that was created for this very purpose. Finally, the report recommends a number of ways in which ODIHR could better fulfil its mandate if it developed its working methods to take advantage of civil society expertise while also being open to civil society’s calls for OSCE action. Its cursory analytical engagement with developments in EUMS may confirm perceptions that the OSCE’s institutions are somewhat biased in favour of “the West”. Similarly, the OSCE’s participating States and political bodies could utilise more consistently the information and reporting done by its expert institutions in order to meet their commitments, which have arguably evolved into norms of customary law.

1 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (known as the Declaration on Human Rights Defenders), A/RES/53/144 (8 March 1999) serves to define, recognize and outline the rights and responsibilities of human rights defenders who act alone or in association with others to defend universally recognized fundamental rights and freedoms.

2 *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic* (Chapter II.1.E on NHRIs and human rights defenders), 2020, p. 86.

3 Małgorzata Szuleka, *First victims or last guardians? The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland*, CEPS Paper on Liberty and Security in Europe, No. 2018-06, April 2018.

4 EU Fundamental Rights Agency, *Protecting Civic Space in the EU* (2021).

Introduction

“The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.”

“They confirm the right of the individual to know and act upon his rights and duties in this field.”⁵

The Helsinki Final Act of 1975 is one of the key defining documents of post-World War II multilateralism. It established a new multilateral framework for Europe, the US and the Soviet Union for managing conflict and developing mutual rules; regarding democracy, rule of law and human rights, it made respective concerns an essential element for mutual engagement and set down a process for engaging each other and elaborating these rules further. Such concerns would henceforth be treated as part of a comprehensive security concept and therefore no longer as “internal affairs” only in the OSCE region. For this process, it is critical to ensure that human rights defenders have the right to monitor and report on their observances of human dimension commitments and can act freely in solidarity with each other across borders to advance these commitments.

Since Helsinki, States have made numerous commitments in the human dimension field setting out a detailed and progressive framework to safeguard human rights, democracy and the rule of law as well as protecting individuals and organisations who strive to defend them. Key OSCE documents⁶ insist on the vital role of civil society and human rights defenders in ensuring full respect for human rights and fundamental freedoms, democracy and the rule of law. It is notable that OSCE commitments provide a significantly broader scope of recognition and a greater number of tools to protect the work of human rights defenders than are available at the EU level. For the EU, extending support to human rights defenders is only a priority in its external policies, and it does so mainly through the EU Guidelines on Human Rights Defenders⁷ or the funding instrument European Initiative for Democracy and Human Rights. Even with the growing evidence of challenges to the work of human rights defenders within the EU region, as documented also by the EU Fundamental Rights Agency,⁸ there is no EU legal instrument other than the Charter of Fundamental Rights to recognise or protect human rights defenders within EUMS.

More than 30 years after the fall of the Berlin Wall, and as the 50th anniversary of the Helsinki Final Act approaches, we are witnessing severe backsliding with respect to commitments to democracy, rule of law and human rights, which have since the early 1990s

been commitments across the OSCE space.⁹ The courageous human rights defenders who formed the Moscow Helsinki Group in 1976 and their allies in the West feel an upsetting sense of *déjà vu*. Bringing attention to the dangers of autocratisation is paramount. There have been devastating consequences for democracy and human rights in fully authoritarian systems such as Russia, Azerbaijan or Belarus and in electoral autocracies such as Turkey, to name the most notorious examples. Even though the current general state of democracy and human rights in the EU region is not as grave a risk as in the mentioned countries, the spill-over effect of these to the EU region and mimicry potential by neighbouring states should not be underestimated. The recent decision of Poland’s Constitutional Tribunal – that parts of the ECHR were incompatible with the Polish constitution¹⁰ – parrots an earlier ruling of the Constitutional Court of the Russian Federation, which held that it was “impossible” to enforce the ECtHR’s judgment in Russia, as this would contradict the Russian Constitution.¹¹

Like the import of bad practices from abroad, the deliberate weakening of meaningful and effective participation in public life of organised civil society¹² has become a key feature of this trend in a number of OSCE participating States. This trend impacts a number of EUMS where democratic standards are being significantly degraded. Debates over attempts to address democratic erosion in the EU, a key component of which has been rule of law backsliding, are now dominating news headlines in Europe. Amid an increased use of illiberal practices by EUMS, the EU region can in 2022 no longer be assumed to be a safe space for rule of law and human rights defenders. Not surprisingly, Freedom House has downgraded a number of EUMS in its 2020 Nations in Transit scoring, commenting in particular on Poland’s “war against the judiciary” and referring to PM Orbán’s government as having “dropped any pretense of respecting democratic institutions”¹³

Part of a larger set of concerns about deteriorating protection for human rights and the rule of law in the EU are civic space challenges. In 2014, ODIHR published *Guidelines on the Protection of Human Rights Defenders* offering comprehensive guidance to OSCE participating States in the implementation of international standards and OSCE commitments in this sphere.¹⁴ In 2015, ODIHR together with the Venice Commission published *Guidelines on Freedom of Association*, which are used to assess laws that concern civic space.¹⁵ Assessing the situation of human rights defenders based on these Guidelines, ODIHR documented threats to HRDs in several OSCE participating States which are also member states of the EU, such as Hungary, already in 2017.¹⁶

5 Helsinki Final Act (1975).

6 See the textbox on p.8, in particular the 1990 OSCE Copenhagen Document.

7 *EU Guidelines on Human Rights Defenders* (2016).

8 EU Fundamental Rights Agency, *Challenges facing civil society organisations working on human rights in the EU* (2018).

9 Freedom House, *Thirty Years: The Changing State of Freedom in Central Europe*, 7 November 2019.

10 Constitutional Court of the Republic of Poland, Decision K 6/21 (*Sygn. akt K 6/21*), 24 November 2021.

11 For the 2016 justification of the Russian Constitutional Court as it denied the ECtHR judgement’s application in the case of *Anchugov and Gladkov v. Russia* (Applications nos. 11157/04 & 15162/05), 4 July 2013, see [here](#).

12 A right protected by Article 25 of the ICCPR.

13 Freedom House, *Nations in Transit 2020: Dropping the Democratic Facade*, 2021.

14 ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014).

15 OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2015).

16 ODIHR, *The Responsibility of States: Protection of Human Rights Defenders in the OSCE Region (2014–2016)* (2017).

In 2018, ODIHR launched its first country-specific assessment cycle focusing on the situation of human rights defenders in, among others, the Czech Republic and Italy. The ensuing 2021 report on the *Situation of Human Rights Defenders in Selected OSCE Participating States* documented that

“[c]ases of human rights defenders facing threats, attacks and intimidation by both state and non-state actors because of their work were reported in all [the selected] countries. Recurrent smear campaigns against activists and NGOs, often involving the discrediting of their work or their overall role in society, were flagged as matters of significant concern. In particular, negative portrayals and stigmatization of particular groups of human rights defenders, including women defenders, lesbian, gay, bisexual, transgender and intersex (LGBTI) activists, defenders of migrants’ rights, environmental activists, defenders working on anti-corruption issues and journalists, further expose them to online attacks and threats.”¹⁷

In close parallel, the EU Fundamental Rights Agency (FRA) found in its first report on civic space in the EU, published in 2018, that civil society organisations working on human rights had begun to face increasing challenges in carrying out their work.¹⁸ Having recognised a growing problem across the EU space, the FRA continued to document civic space challenges, finding in its latest report (2021) that “evidence shows that in 2020 it became harder for CSOs to operate and contribute to the implementation of EU policy, despite positive developments at both EU and national levels, partly but not only because of the pandemic situation.”¹⁹

Human rights NGOs are encountering difficulties of a similar nature all over the EU, albeit at different levels of intensity. “Shrinking civic space” has many meanings for individuals and organisations defending human rights and the rule of law. It encompasses threats, attacks and abuses against the physical integrity, liberty or dignity of HRDs, administrative or judicial harassment, criminalisation, retaliation, arbitrary application of legislation and the formulation of legislation aimed at curtailing rights, or hampering a safe and enabling environment conducive to human rights work by imposing restrictions on freedom of association, freedom of assembly, access to information and the right to participate in public affairs.²⁰

It is striking how many human rights organisations and activists must endure smear campaigns in traditional, online or social media (e.g., in **Romania, Bulgaria, Poland, Italy, Hungary, Slovenia**) from either their fellow citizens or at times at the

behest of public officials.²¹ Proposed or adopted legislation that restricts the ability to work on certain themes, most often in the field of migration (**Italy, Greece, Hungary, France**), by policing humanitarianism²² with criminal or financial consequences hinders human rights defenders’ ability to monitor, report on and protect the rights of others.

Regulatory changes to the operating environments of civic organisations, including excessive reporting obligations, may inflict lasting damage and stifle activities. In fact, the European Commission has found that in **Romania** “civil society space continues to be considered as narrowed”²³ **Croatia** has recently experienced a period of illiberalism during which the semi-authoritarian regime accused human rights NGOs of treason against the nation and its interests. Unfortunately, this trend has not ceased, with similar rhetoric against liberal NGOs still being used by some political actors. There is also a pervasive negative attitude among certain categories of the population toward these NGOs which reportedly has lasting effects.²⁴ All this negatively affects the ability of civil society to hold the government to account for its human rights obligations.

The use of anti-terrorism legislation to criminalise HRDs and delegitimise their activities is documented as a dangerous trend in many states around the world.²⁵ In a number of traditionally progressive Western European countries, policies aimed at countering terrorism and the financing of organised crime are also increasingly applied in ways that potentially hamper the proper functioning of NGOs. In **France** and **Spain**, public security legislation hinders the work of civil society organisations and the freedom of expression and information and the right to protest.²⁶ During **Bulgaria’s** Universal Periodic Review in May 2020, the EU FRA noted that civil society organizations had expressed concerns about the effect on civil society of the Counter-Terrorism Act.²⁷

This tactic by the state can, or is meant to, intimidate HRDs and their organisations. The effects may stigmatise them, weaken their credibility, turn their supporters and clients away, demoralise

21 The EU Fundamental Rights Agency found that in 2020, online verbal threats or harassment were the most frequently reported incidents. In total, 40% of all CSOs that responded to FRA’s civic space consultation 2020 reported such attacks. No less than 26% of the organisations reported offline verbal threats or harassment (e.g., via telephone calls). More than 7% reported vandalism of their premises or property, and as many as 4% of respondents said that an employee or volunteer had experienced a physical attack in 2020. EU Fundamental Rights Agency, *Protecting Civic Space in the EU* (2021), p. 53-54.

22 S. Carrera, V. Mitsilegas, J. Allsopp, L. Vosyliute, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society*, Hart Publishing (2019).

23 Commission Staff Working Document: *2021 Rule of Law Report, country chapter on the rule of law situation in Romania* (Brussels, 2021), SWD(2021) 724 final, p. 24.

24 G. Bezovan, J. Matancevic, D. Baturina, “Croatia”, in: *Civil Society in Central and Eastern Europe: Challenges and Opportunities* (ed. by P. Vandro, N. Traxler, R. Millner, M. Meyer); Erste Foundation, 2017.

25 OECD Observatory on Civic Space, *The impact of national and global security measures on civic space* (Summary report, 2021); UN Special Rapporteur Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Chapter IV.D (“Protecting and Promoting Civic Space and Civil Society while Countering Terrorism”), A/72/43280 (2017), §33; K. Bennett, D. Ingleton, A. Nah, J. Savage, *Critical Perspectives on the Security and Protection of Human Rights Defenders*, 19:7 International Journal of Human Rights 883-897 (2015), p. 887.

26 European Commission, *Communication on the 2021 Rule of Law Report: The Rule of Law Situation in the European Union*, COM(2021) 700 final (20 July 2021) p. 23.

27 Human Rights Council, Working Group on the Universal Periodic Review, 36th session (4–15 May 2020), *Summary of Stakeholders’ submissions on Bulgaria. Report of the Office of the United Nations High Commissioner for Human Rights* (A/HRC/WG.6/36/BGR/3), §20.

17 ODIHR, *The Situation of Human Rights Defenders in Selected OSCE Participating States: Final Report of the First Assessment Cycle* (July 2021), §12.

18 EU Fundamental Rights Agency, *Challenges facing civil society organisations working on human rights in the EU* (2018).

19 EU Fundamental Rights Agency, *Protecting Civic Space in the EU* (2021), p. 60.

20 U. Pape & F. Pazderski, *Navigating through Uncertain Times: Civil Society in Central and Eastern Europe*, EU-Russia Civil Society Forum (June 2021).

and burn out their staff, strongarm HRDs into shifting their organisational focus to reactive mode and force them to direct their resources towards fighting for their own survival, which can result in less time, motivation and energy being used for initiatives that foster cooperation with their counterparts within and beyond their national setting.

An alarming consequence of the proliferation of measures that shrink civil society space is that they inhibit the ability of civic organisations to effectively engage in public debates on protecting and promoting human dimension commitments and values themselves. Threats to judicial independence, media pluralism, democratic institutions and fundamental rights as well as widespread corruption need to be countered in the EU through political and legal action based on common policies and standards. Many civil society organisations active in the field of human rights protection are well placed to engage in the development of these policies, as well as in monitoring and supporting their implementation. Hence, their work should be regarded as indispensable in the efforts to make our democracies more robust and resilient.

In a parallel development, many civil society organisations are facing challenges both internally and in their cooperation with others. Many CSOs have lacked the capacity or failed to see the need to professionalise in terms of governance and communication towards their constituencies, coupled with a dependency on a limited number of donors and lack of public fundraising. Sometimes, a lack of cooperation or mutual solidarity has added to the sector's vulnerability.²⁸

What we are witnessing, overall, is the exponential growth of a European "single market" for regressive policies.²⁹ Worst practices of desecrating human rights protections are increasingly being embraced across borders and copied into domestic jurisdictions. In the face of this growth and mimicry, more must be done to safeguard the rule of law while defending CSOs and enabling their civil society space. Responses need to be quicker with aim and focus, using the tools of multilateral institutions and their norms to end the phenomenon of shrinking space in Europe.

The following chapter aims to examine whether the Helsinki process, which was instrumental in strengthening the political commitments to human rights and their defenders during the Cold War and thereafter, can still deliver for human rights defenders in the EU today, and whether the OSCE can be a useful forum to advance the dual causes of both protecting and expanding civic space.

²⁸ See, for example, EU-Russia Civil Society Forum, *Report on the State of Civil Society in the EU and Russia 2020* (2021).

²⁹ See, for example, work done by the Foreign Policy Centre's *Exporting Regression* programme.

1

Chapter I: Norms

From a substantive point of view, the commitments made by the OSCE participating States can be listed in chronological order (see textbox on *Civic space commitments in the OSCE*) as they have developed since the Helsinki Final Act, but primarily since 1990. The OSCE commitments in these relevant areas are in most cases complemented by human rights law. Each OSCE participating EUMS has additionally adopted the legal standards of the European Convention on Human Rights (ECHR) as well as those contained in the International Covenant on Civil and Political Rights (ICCPR) and is also bound by the EU Charter of Fundamental Rights.

I.1. Norms without Review Forum

From an institutional point of view, the most important commitment for OSCE participating States is their commitment to hold each other to account. To aid them in this endeavour, another key commitment obliges them to engage with CSOs directly through the annual OSCE Human Dimension Implementation Meeting (HDIM).³⁰ During the time that the HDIM was operational, it brought together representatives of participating States and civil society to discuss the implementation of human rights commitments. This was particularly important because the Permanent Council (PC) is largely inaccessible to civil society except for its online publications. The fact that the HDIM has now been cancelled for two years in a row³¹ is a conspicuous loss in terms of civic space commitments. Having governments and the civil society sector sit at one table and state their views was a feature that few other international fora were able to offer. Indeed, the HDIM hosted an abundance of side events and meetings between NGOs on issues that were not raised at the plenary, the format of which – in and of itself – has been considered outdated for a decade as a result of not being conducive to dynamic exchange. Furthermore, while the COVID-19 pandemic has shown the value of communication technology and its ability to connect people virtually, it has also demonstrated the limitations of social media as a forum for exchanging views and discussing the design of democracy and civic space.

³⁰ “An important feature of OSCE human dimension meetings is that they are open to the active participation of [NGOs]. Thus, NGOs can and do participate in addressing concerns about the actual implementation of OSCE human dimension commitments and make suggestions on how to solve problems.” (OSCE/ODIHR: OSCE *Human Dimension Commitments, Volume 1, Thematic Compilation*, Section on “The Human Dimension – An Introduction”, p. XX, 2011).

³¹ See, e.g., “Russia blocks holding of OSCE human rights conference, diplomats say”, Security and Human Rights Monitor (9 September 2021).

In the last years, the OSCE’s consensus principle has increasingly been abused by some participating States with complete impunity.³² As such, it led to a failure of political accountability, with civil society deprived of the OSCE’s main avenue of facilitating dialogue. Not only has civil society been shut out as a result, but the peer review mechanism among participating States, which is the basis on which the HDIM and the OSCE operate, suffers, as it is less directly informed by civil society representatives and does not necessarily consider matters such as the treatment of civil society.

With regard to **Supplementary Human Dimension Meetings** (SHDMs), which provide a forum for discussing thematic human rights and rule of law issues, civil society participation in public decision-making processes has received some attention³³ in the past ten years, but the meetings have not focused on the increasing restrictions on civil society participation in EUMS.

Finally, in the **Human Dimension Committee** (HDC), a subsidiary body of the OSCE Permanent Council that meets periodically to discuss specific human dimension issues, civil society representation is limited to a few individuals invited by the chair as experts. Voluntary reporting by States has been introduced as a regular feature in these meetings but has only been picked up by a few, most often as an occasion for praising their own achievements.

I.2. OSCE Commitments as Emerging Customary Rules

The OSCE takes decisions based on consensus; there is no other “voting system” and decisions are arrived at when all States agree to take a decision or make a new commitment, or more typically reaffirm an existing one. This buttresses the argument that OSCE commitments are more than simply political tools, but carry the status of norms – after 30 years of continual reaffirmation of political commitments, which are based on “hard norms” from the ICCPR and ECHR and other international instruments. The long parade of decisions and declarations undertaken by States have arguably created a uniform practice and displayed State behaviour as they accept the norms they created as binding – that is *opinio iuris* (subjective sense that by fulfilling these obligations, they comply with existing “hard” norms, thus

³² Intervention of Ambassador C. Strohal at the online “*Call for Action – Helsinki +50 meeting*” hosted by the OSCE Parliamentary Assembly (20 October 2021).

³³ SHDM on *Ensuring Participation in Democratic Law-Making* (April 2021); SHDM on *Freedoms of Peaceful Assembly and Association, with Emphasis on Freedom of Association* (April 2015).

Civic space commitments in the OSCE

The civic space commitments of the OSCE participating States include the following:

- **Vienna 1989:** “Respect the right of their citizens to contribute actively, individually or in association with others, to the promotion and protection of human rights and fundamental freedoms;”
- **Copenhagen 1990:** “Ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in nongovernmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups.”
- **Copenhagen 1990:** “full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress.”
- **Copenhagen 1990:** “the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government”
- **Paris 1990:** “democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.”
- **Moscow 1991:** “recognize as NGOs those which declare themselves as such, according to existing national procedures, and will facilitate the ability of such organizations to conduct their national activities freely on their territories”
- **Helsinki 1992:** “(respect) the democratic rights of citizens to demand from their governments respect for these values and standards.”
- **Budapest 1994:** “emphasize (...) the need for protection of human rights defenders.”
- **Istanbul 1999:** “NGOs can perform a vital role in the promotion of human rights, democracy and the rule of law. They are an integral component of a strong civil society. We pledge ourselves to enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms.”
- **Helsinki 2008:** “We recognize that human rights are best respected in democratic societies, where decisions are taken with maximum transparency and broad participation. We support a pluralistic civil society and encourage partnerships between different stakeholders in the promotion and protection of human rights.”
- **Astana 2010:** “We value the important role played by civil society and free media in helping us to ensure full respect for human rights.”
- **Tirana 2020:** “Recognizing the importance of the participation of the private sector, civil society and media, as well as academia, in efforts to prevent and combat corruption and enhance good governance, including the realization of the principles of transparency and accountability.”

establishing regional customary law.)³⁴ Already in 1986, the International Court of Justice, in the *Nicaragua* case, referred to the Helsinki Final Act (twice) as evidencing *opinio iuris*.³⁵ Given that consensus is a necessary precondition for adopting commitments, there is equally no room to raise the question of so-called “persistent objectors”,³⁶ who in any other voting system may claim that the norms do not apply to them. The only exception to this rule is the “consensus minus one” principle, in place since 1991, in cases of “clear, gross and uncorrected” violations of OSCE commitments.³⁷

Accepting resolutions and referring to international treaties is considered evidence of state practice.³⁸ Indeed, OSCE commitments reaffirm and encourage states to adopt and adhere to international treaties such as the ECHR and the ICCPR, in

particular.³⁹ OSCE Action Plans, which are rarely used nowadays, often called for the adoption of, or adherence to, a specific UN Convention or Council of Europe Conventions.⁴⁰ OSCE Ministerial Council declarations and decisions regularly invoke, recall or otherwise refer to treaty law.⁴¹

The provisions found in the ICCPR and ECHR governing the freedom of association, for instance, provide the legal foundations to respond and adapt to changing conditions of shrinking space through appropriate mechanisms of redress. These fundamental documents must be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose”.⁴² Instead, what we have witnessed in some countries is that various national laws (taxation, lobbying, reporting, registration, anti-corruption

34 Statute of the International Court of Justice, Article 38(1)(b). See, inter alia, E. Manton, *The OSCE Human Dimension and Customary International Law Formation*, in: *OSCE Yearbook 2005* (ed. by IFSH, Baden-Baden: Nomos Verlagsgesellschaft, 2006), pp. 195-214.

35 *Military and Paramilitary Activity in and Against Nicaragua* (ICJ Report 1986), §§189 and 204 (on non-intervention).

36 Draft conclusions on the identification of customary international law, with commentaries 2018, adopted by the International Law Commission at its 70th session (2018) (A/73/10), pp. 152-156.

37 *“Consensus Denied? Challenges for OSCE Decision Making in 2017”*, Helsinki Commission Report (27 March 2017).

38 Cf. Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford University Press, 1994), pp. 22-25.

39 Copenhagen 1990: “in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.” (5.21).

40 2004 OSCE *Action Plan for the Promotion of Gender Equality*, adopted by Permanent Council Decision No. 638 of 2 December 2004, calling for the observance of UN CEDAW.

41 Cf. the most recent case, *Declaration on Strengthening Co-operation in Countering Transnational Organized Crime* (MC.DOC/1 (4 December 2020), §1 of which recalls the United Nations Convention against Transnational Organized Crime (2000).

42 *Vienna Convention on the Law of the Treaties*, (1969 / 1980), Article 31 General Rules of Interpretation.

measures, anti-terrorism measures etc.) have been weaponised to disproportionately constrain civic space.

In any case, a consistent reiteration of the commitments, even if made within an organisation without a clear status in international law,⁴³ may create a reasonable (or legitimate) expectation⁴⁴ that the affirming states will adhere to their commitments – even if they continue to argue these norms are only “political”. That OSCE documents and the commitments contained therein are politically binding has been continually repeated by participating States and is recognized.⁴⁵ The argumentation is usually followed by claims that the norms and principles created are not legally binding, but are rather political commitments; however, the absence of a legal character of these commitments only tells us merely that they are not treaties; the claim could not affect their supposed quality of regional customary law. Simply put, States consider commitments as binding as per obligation, thus fulfilling the key criterion of *opinio iuris*.⁴⁶ When the criteria of *opinio iuris* have been satisfied, customary law is created and may be called upon instead of, or in addition to, treaty law.

It should be feasible to use OSCE commitments as additional legal bases in statements of claim in national or supranational courts to seek redress for violated rights as additional evidence. Human rights defenders should be able to rely on OSCE commitments, standards and guidelines to evidence regional customary law, in particular as they are already being cited as *obiter dicta*⁴⁷ by the European Court of Human Rights.⁴⁸ They must be encouraged to apply these commitments not only in their litigation, but also in their advocacy work to counter civic space restrictions. In turn, should a court – in a particular EUMS – rely on an OSCE commitment in assessing restrictive laws, it would fortify their nature as norms that are binding in the legal and not merely the political sense.

43 Cf. *The Legal Framework of the OSCE* (ed. by M. Steinbrück Platise, C. Moser, A. Peters), Part II The Quest for International Legal Personality (pp. 22-132), Cambridge University Press, 2019.

44 *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 (1995) 183 CLR 273 (1995), High Court (Australia), judgment of Mason CJ and Dean J, §33. See also: E. Manton, *supra* note 34, pp. 195-214.

45 A. Bloed and P. van Dijk (eds.), *Protection of Minority Rights Through Bilateral Treaties* (The Hague, 1999), p. 5, in Manton, *supra*, p. 199.

46 *Ibid.*, p. 199.

47 “*Obiter dictum*” literally translates to “that which is said in passing”. In a judicial opinion, it refers to a passage (or reference) that is not necessary for the decision of the case before the court (and in common law participating States lacks the force of precedent) but may nevertheless be a significant consideration leading to the decision. In other words, it constitutes an additional supporting argument for consideration.

48 Most recently: ECtHR, *Dincer v. Turquie* (Ref 17843/11, 16 January 2018), §14; *Pentikäinen v. Finland* (Ref 11882/10 (20 October 2015), §54 (referring - among many others - to the ODIHR-VC Guidelines on Freedom of Assembly); see also *Yabloko Russian United Democratic Party a.O. v. Russia* (Ref 18860/07, 24 April 2017), §42 (referring to the ODIHR-VC Guidelines on Political Parties).

2

Chapter II: The EU in the OSCE

Having pointed to litigation avenues for EU rule of law defenders to potentially rely on OSCE commitments as regional customary law in addition to domestic and other international norms, could the EU – or some of its member states be helpful for European rule of law defenders seeking support from within the OSCE as they advocate vis-à-vis damaging developments in their jurisdictions? An attempt at answering this question requires a more granular look at the pattern of EUMS' behaviour within the organisation, the constraints they face in maintaining unity in the face of adversity, and how the process of finding common positions works in practice.

II.1: Arriving at Common Positions

EUMS often coordinate their positions and, in particular, their statements made in all OSCE fora. The importance of EU coordination within OSCE manifests itself not only through these joint statements, reducing the number of those made by individual delegations “in their national capacity” to a few, but increasingly also through the role of the EU Delegation to the OSCE, which grew out of an ad-hoc moderating role to assuming some agenda-setting functions. This significantly greater role was seeded in 2006 when the EU started to formally participate as a single entity in the OSCE framework.⁴⁹ Since then, the Delegation of the EU to the International Organizations in Vienna, as it is formally known, has assumed final responsibility for coordinating EU statements read out in the Permanent Council every Thursday morning; going into the next week, it suggests themes and coordinates with EEAS as well as with EU representations globally should a statement target a particular geography.

At its core, the coordination system involves a joint drafting process, often relying as a first instance on antennas – called *chefs de file* (CdF) – in EUMS delegations who have volunteered to serve as focal points for thematic areas (such as freedom of expression or tolerance and non-discrimination) or geographical situations (to coordinate EU statements vis-à-vis third country contexts, say, Belarus, Kosovo or Georgia), or in response to visiting dignitaries. Interestingly, there is no CdF for rule of law.⁵⁰ The EU Delegation will, on any given Thursday, activate

one or more antennas as it sets the agenda for EU positions at the next meeting of the PC the following Thursday. CdF will, by Friday, have submitted back to the EU Delegation the first outline of a statement, having themselves consulted with OSCE Departments in their respective Ministries of Foreign Affairs. The EU Delegation in Vienna, in turn, will by Friday also have sourced existing language – on thematic areas or geographies – from EU Council conclusions or statements released by the EU High Representative for Foreign Affairs.

Each week, the EU Delegation's stated ambition is to raise the standard of a given statement beyond existing EU positions on a given matter, rather than merely regurgitating agreed Brussels language. It will upload a zero draft (the initial draft) at the end of the week on the server of the PC Group on AGORA that serves EU coordination purposes. The following Monday, EUMS Heads of Missions (HoMs) meet (online or in person in the EU Delegation) to discuss the zero drafts presented to them by the respective CdF. On average, the EU releases up to half a dozen statements each week in Vienna; Monday is the crucial day when ambitious language will be fact-checked, tested and eventually strengthened or – more frequently – watered down by EU HoMs. Statements on geographies or visiting dignitaries usually invite more discussion among EU HoMs than those on human dimension themes. “Intra-EU affairs are never the subject of discussion within EU HoMs”, contemplates an EUMS diplomat, “this is an unwritten rule.”

Throughout Monday, the EU Delegation will work towards a draft version (DV) 1 that will reflect the adjustments made following HoMs' stated preferences. DV1 is then uploaded to the shared server on Tuesday morning, and it will by then include additional comments from EUMS received, via email, throughout the previous day. DV1 will show (in comment form, highlighting proposals from individual EUMS) where divergences remain in positions that will have to be resolved within DV2. The objective, clearly, is to find a way through the labyrinth of proposed amendments and introduce balancing text modules that have the potential to bridge different and sometimes contradictory positions.

Tuesday is also the day when the EU Delegation, sensing that consensus on a DV1 is within reach, consults again with the European External Action Service (EEAS) as well as – should the statement concern a geography – with the EU representation in that country. EUMS have time for written comments until Wednesday morning before a DV2 is uploaded to the server and subjected to a three-hour long silence procedure. “Lately, Slovenia, Hungary, Poland or Bulgaria never contribute to drafting statements on rule of law, or say, human right defenders”, comments one diplomat. “It's really as if they don't care at all.” If the silence is broken, EUMS deputies meet again on Wednesday

49 A. Cobaleda, *Case Study of the European Security Architecture: NATO and the OSCE*, GLOBE-The European Union and the Future of Global Governance Report (2020), p. 82.

50 Most human dimension topics within ODIHR's purview, including the rule of law, have in the past years been managed by the country that has seen the fastest rollback of the rule of law in the EU - ODIHR's host country, Poland.

afternoon for a final attempt at bridging differing positions. A final version, sometimes in the form of a DV3, is then agreed and sent out to other countries – usually EU candidates – with the offer of alignment. They have the opportunity to do so until the following day, when their alignment will be reflected in the written final version of the statement that finds its way onto the EU Delegation’s website following the PC on Thursday morning. There, the EU Permanent Representative will read out the various statements after having been passed the floor by the incumbent EU Presidency.

A similar process is in place for coordinating EU27 positions prior to every Human Dimension Committee (HDC), which, in addition to the discussion of specific issues mentioned above, also negotiates decisions for adoption at the Ministerial Council. Guided by the OSCE Chair, the HDC meets, under a separately chosen chair, each month (and more frequently informally), also with the EU Delegation participating, and the coordination process mirrors the work undertaken to prepare PC statements.

Over the last decade, the EU has been speaking with its serene “one voice”, which has brought benefits and inflicted costs at the same time. On the advantageous side, invoking unity around a common baseline has intrinsic value in times when the bloc is torn into multiple directions and can enhance the impact of its common positions. When considering costs, however, the weekly search for the lowest common denominator has often resulted in bland and watered-down statements that risk undermining the authenticity of the political dialogue within the organisation. When the EU makes pronouncements on, say, the issue of civic space, it will do so only in relation to contexts in its eastern neighbourhood and other “third countries,” using worn and tired language such as “[t]he EU will continue to call on all participating States to live up to their international human rights obligations and OSCE commitments, as well to speak up against the shrinking space, intimidation and reprisals against civil society and human rights defenders.”⁵¹

This has had three distinct consequences for human rights (and the space for defenders): one is relevant to the overall functioning of the organisation and the polarisation of human rights positioning of EUMS that has befallen it; the second relates to the EU’s ambition to lead on human rights policy globally, and its credibility in this respect; the third concerns European civil society organisations that have at times found in the OSCE a promising sounding board for their advocacy efforts in the EU space.

II.2: Cartel of Silence

As OSCE States confirmed at the Ministerial Meeting in Maastricht in 2003, “the prime responsibility for providing security for their citizens lies with individual States. They are accountable to their citizens and responsible to each other for implementing their OSCE commitments.”⁵² The core of implementation review is

therefore contained in what is often referred to as the peer-review concept, which puts the focus of implementation review (as well as determining the consequences of persisting non-compliance) on the participating States themselves. Aware that commitments without sanctions would be of little value, States have also agreed that non-compliance would “impair relations between them and hinder the development of co-operation among them.”⁵³

Keeping their eyes and lips tightly shut in the OSCE when it comes to what goes on in the EU, the EU27 (as the EU28 before) have de facto removed themselves from the process of critical self-reflection, which – as an obligation of all participating States towards each other – is indispensable for collaborating on, and thus progress in, the OSCE’s human dimension. States have also decided that human dimension issues would be regularly dealt with by the PC. Collective action can, according to the organisation’s foundational logic, only be credible if all States subject themselves to scrutiny, a principle which is incompatible with the establishment of a cartel where a legitimate critique of EUMS towards each other is silenced under the rubric of this being “better taken care of in Brussels.” Never, for example, has the EU commented in the OSCE Permanent Council on an ODIHR report detailing abuses and violations of human dimension commitments in an EUMS. ODIHR regularly implores friendly EUMS to explicitly “welcome” expert critique of their executive branches in the PC in order to set an example for others that constructive criticism, taken seriously, can put in motion policy reform and innovation. No EUMS would, however, comment upon another’s violations of, say, the right to freely associate. Within the OSCE, the EU’s silence as Hungary passed the infamous Stop Soros package of laws in 2018, recently found to be in violation of European law,⁵⁴ was deafening.

Recalling an HDIM years ago, one Minister Counsellor in an OSCE delegation remembers that Romania had spoken out against Hungary on an issue of national minorities’ participation in public life: “This was not well received within the EU. It was an affront that can never be repeated. If you want to make a critical point within the family, you may raise it bilaterally but never in the open.” The reason for syndicate action, explains another Western OSCE diplomat, is that “criticism of EUMS performance on civic space, human rights or rule of law issues will never be made in good faith from outside of Europe. We cannot name and shame each other in front of others; if we did, we would reify Belarusian and Russian narratives.” However, with respect for democratic and rule of law standards rapidly declining in a number of EUMS – some of the cases having been adjudicated by the EU Court of Justice, others subjected to Art. 7 TEU proceedings – it becomes harder to both defend this line of argumentation and maintain a unified front. What will be the breaking point when EUMS can no longer ignore the rule of law backsliding within their own ranks?

⁵¹ EU Statement on the Current Issue Raised by the US on Civil Society, OSCE Permanent Council (No. 1337, 30 September 2021), §6.

⁵² OSCE Strategy to Address Threats to Security and Stability in the 21st Century (MC. Doc/1/03, Maastricht, 2 December 2003), at §18.

⁵³ Art. 25 of the Vienna Document (1989). See also the wording of the Budapest Declaration (1994), where States confirmed that “issues of implementation of CSCE commitments are of legitimate and common concern to all participating States, and that the raising of these problems in the cooperative and result-oriented spirit of the CSCE was therefore a positive exercise.”

⁵⁴ Court of Justice of the European Union, *Commission v. Hungary* (judgment in case C-821/19), 16 November 2021.

With the EU having effectively shielded itself from critical voices from within its ranks at the OSCE, it can no longer claim to engage in a genuine political dialogue – a fact that has over the decades been the battle cry (“double standards!”) of distractors between Ankara and Moscow, who themselves, of course, have long departed from their intentions of engaging with human dimension commitments. The quest for unity within this cartel of silence threatens to neutralise the EU’s authority in organisations beyond the OSCE as it is unwilling to deal with problems in its midst, in a forum that was *created for this specific purpose*.

Worse, the EU’s self-proclaimed leadership on vital issues of rule of law and democratic participation globally is thus revealed as hollow and, in fact, as deploying a double standard. While the EU remains one of the most generous donors worldwide to promote universal values in its external sphere,⁵⁵ inadvertently, and tragically so, its diplomatic self-shielding practice within the OSCE has contributed to the polarisation within the organisation that it has so often decried, thus unnecessarily lending credence to the double standard charge raised east of Vilnius. This double standard for human rights violations also has consequences in the long run for civil society outside the EU – such as in Belarus, Canada, Central Asia, Mongolia and the United States, which are not members of the Council of Europe for whom the OSCE provides an important discussion forum. The OSCE’s human dimension is losing its credibility and thus relevance through EUMS collective choices.

The reach of the cartel appears to go beyond the borders of the EU. In the past years, in the PC, the United States has not once criticised an EU member state’s malign practices in the sphere of rule of law, despite ongoing violations.⁵⁶ EU member states – and by extension the EU Delegation in Vienna – return the favour and will, with the exception of routine references regarding individual cases of the death penalty, and the principle of capital punishment itself, not make reference to human dimension violations occurring within the United States. Even more worryingly, instances of rolling back civic space in EUMS do not feature in bilateral discussions among EUMS in Vienna either. Family affairs, officials there argue, should be dealt with “in Brussels”, while the OSCE should be led by a rotating Chair, who takes the lead on promoting implementation throughout the region while setting an example at home. As Poland assumes the OSCE Chairpersonship in 2022 without having undergone the examination that previous Chairs of the organisation (such as Kazakhstan, Serbia or Albania) had to face as a condition for assuming office,⁵⁷ EU human rights defenders seeking a forum for criticising the damage wreaked within Polish judicial institutions, and soliciting support from other EUMS to this effect, will find the ears of the OSCE closed.

We saw that – as they refuse to take a long hard look in the collective mirror at the Permanent Council (PC) in Vienna – EUMS pay a price for pretending to be blind towards each others’ violations of human dimension commitments. With no HDIMs held in 2020 and 2021, the OSCE lacks the forum to review performance in this realm by receiving reports from civil society itself, especially in cases where the EU, or rather its member states, are unable or unwilling to engage in self-critique on the shrinking space for civil society within its own group of countries within the OSCE’s diplomatic HQ in Vienna’s Hofburg.

With the traditional avenue for human dimension implementation review, the HDIM, already having been cancelled twice and instruments such as the Vienna and Moscow Mechanisms⁵⁸ unlikely to ever be activated against an EU member state, EU-based civil society organisations invariably conclude that the organisation has nothing to offer to support their cause as far as EUMS are concerned.

Are they right?

⁵⁵ On 10 December 2021, the EU launched a €1.5 billion plan to promote universal human rights values, called the [Global Europe Human Rights and Democracy Programme](#) (2021-2027).

⁵⁶ The United States and Canada (also speaking on behalf of Norway and Iceland) have, however, pointed to Poland’s and Hungary’s discriminatory treatment of LGBTQI+ persons. For the latest statements, see [In Observance of Pride Month](#), OSCE Permanent Council No. 1321, Vienna, 24 June 2021.

⁵⁷ Civil society organisations have encouraged the practice of self-evaluation of incoming OSCE Chairpersonships and have recommended strengthening the process and its impact. See [Strengthening OSCE Instruments in the Human Dimension – Reflections and Recommendations](#), Report on the Civic Solidarity Platform expert roundtables (2017-2018), ed. by Y. Dzhibladze and O. Zakharov (Netherlands Helsinki Committee, 2019), p. 29.

⁵⁸ For the OSCE’s human dimension mechanisms, see <https://www.osce.org/odihr/human-dimension-mechanisms>.

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Chapter III: OSCE Institutions and Structures

The unclear future of the HDIM represents a clear failure of OSCE participating States to engage with civil society within the OSCE framework. Even if, in their own way, all of the institutions and missions which make up the OSCE engage regularly with civil society, none of these types of engagement can be considered systematic or compulsory. They often happen in an ad-hoc manner and are usually not publicly and transparently recorded. While they may inform some of the analysis underpinning the work of institutions or missions, the disconnect with the Permanent Council is so grave that aside from the annual speech of the ODIHR director and the RFoM to the PC, and those of the other heads of institutions and missions, little outside information directly reaches the forum where discussions take place every Thursday.

III.1: Failure to Engage with EU Civil Society?

On an institutional level, engagement with civil society takes many forms; to be effective, it needs at a minimum to be systematic and visible – a multilateral forum such as the OSCE was precisely set up to provide an appropriate venue. The OSCE's engagement with the EU's civil society has, however, been sporadic if not absent *in toto* due to the above-described diplomatic practice of maintaining common positions. It has been particularly absent at the norm-building level, with repeated worn-out statements that do not reflect the realities of CSOs operating within the EU, but also outside it. EU States' practices of passing laws and regulations constricting civil society organisations have seeped through the borders of the EU⁵⁹ across the OSCE space, where less adherence to rule of law commitments has meant that CSOs suffer even more dire consequences. Like a virus, bad practices have in some cases re-infected EU States themselves.

A number of EU members do take an interest in the state of the rule of law within other EU states and often fund ODIHR activities seeking to halt or reverse the negative trend (such as the German government's €2m contribution for a democratisation project led by ODIHR). Recently, certain EUMS delegations have convened meetings with ODIHR and legal experts on matters

related to the dismantling of the judiciary in Poland. Such acts, however important, do not translate into a strong political stance within the PC, reflected in PC statements or decisions. Overall, however, most EUMS have in place national regulations regarding their financial assistance to OSCE institutions that effectively eliminate the possibility of funding activities focused on the EU, because funding is restricted to countries that fall within the development assistance cooperation criteria. Unless this changes, the EUMS' financial support to the OSCE institutions to address human dimension issues within the EU will always be negligible.

Weak, centralised and selective outreach to CSOs further limits civil society engagement within the OSCE. Its institutions – guided by a well thought-out methodology of engagement – could reach out to smaller and non-traditional civil society actors, increasing the space for new voices and fresh ideas. Systematic practices should be put in place to ensure that programmes designed for CSOs or with their involvement are discussed and tabled for their consideration before pressing ahead with business as usual.

III.2 Using the OSCE: A Manual

ODIHR and RFoM need to respond better to threats to the rule of law throughout the OSCE geography, including the EU, with public analysis and recommendations ideally presented as part of situational reporting.

Monitoring and reporting are key functions of the OSCE's institutions and missions, in particular through public reporting.⁶⁰ Election observation and reporting, for instance, have become signature activities of the OSCE ever since ODIHR sent its first mission to Albania in 1996. The OSCE has developed its own observation methodology and advocates for and manages annual resources towards deploying observers in various formats to respond to participating States' invitations in this sphere. A look at the election observation reports on ODIHR's website demonstrates how its overall geographic scope extends across the entire OSCE area today. It should be added at this juncture that the ODIHR Institutional core budget and budgets for OSCE Election Observation Missions are a source of systematic contention and undermine the effectiveness and independence of the institution. The oftentimes massive delays in allocating budgets to institutions such as ODIHR, caused by PC dynamics, increases the emphasis of fierce engagement

⁵⁹ E.g., the adoption of foreign agent laws and their prohibitions on foreign funding for CSOs, the re-nationalisation of broadcasting and the introduction of discriminatory practices (such as the establishment of LGBTI-free zones in Poland).

⁶⁰ For a summary of ODIHR's monitoring, reporting and assistance tasks, see ODIHR, *Common Responsibility: Commitments and Implementation*. ODIHR Report submitted to the OSCE Ministerial Council in response to MC Decision No. 17/05 on Strengthening the Effectiveness of the OSCE (2006), §153.

with participating States in this realm, thereby diverting and reducing the scope for proactive, multi-year and strategic civil society engagement.

Methodologies for assessing whether public assemblies are being conducted in line with OSCE human dimension commitments have been developed as well,⁶¹ although ODIHR has only monitored them on a case-by-case basis. Efforts have likewise been undertaken to deploy field visits to assess the level of implementation with regard to the 2003 OSCE Roma and Sinti Action Plan.⁶² Only in a few countries have monitoring and analysis activities been undertaken in this field, and they have always depended on the provision of extra-budgetary resources – as opposed to stable annual funding through the OSCE’s unified budget. These extra-budgetary grants are provided on a cursory basis and depend primarily on the policy aims and restraints of the donor State, not on an institution’s practical expertise in a certain area, such as opening up the space for civil society. In the monitoring and reporting of human rights activity, there is still no coherent long-term vision on how to breathe new life into the cycle of “monitoring – recommendation – follow-up” in the interest of engaging the OSCE’s Permanent Council or its subsidiary organ, the HDC, in its review.

Similarly, on the situation of human rights defenders, ODIHR has spearheaded a reporting effort since 2007 culminating in the publication of a report on five countries in 2021.⁶³ However, unlike in the case of election observation, the fact that this work is funded through extra-budgetary contributions entails geographic restrictions of contributions and the unpredictability of medium-run funding. What is visible in these reports is the intention to identify “trends” throughout a geography that spans 8,000 kilometres and 57 states between Canada and Mongolia, and practices that could not possibly be reduced to one or more “trends”. Given the desire to provide balanced coverage of participating States, this type of geographic cross-cut is only marginally meaningful for civil society actors focused on their own jurisdiction and their desire to take advantage of OSCE norms.

What distinguishes OSCE institutions from the EU FRA, for instance, is that the mandate of the former allows for a focus on country situations, geographically balanced though they may need to be, without the requirement to engage in cross-country comparisons – as the ODIHR election observation reports regularly do. On rule of law-related matters, which form the legal infrastructure of human rights protection, ODIHR has disappointingly not only folded on its human rights defenders focal point but also withdrawn from situational monitoring. For reasons of budgetary constraints, it rarely engages in field assessments, focusing solely on reviewing draft laws (it occasionally does so, in coordination or jointly with the CoE’s

Venice Commission) upon the request of national authorities, NHRIs or OSCE field operations.

Given the new threat scenario within EUMS, ODIHR should redirect political and technical capacities to develop a methodology that enables independent thematic missions or field visits to be deployed with the specific task of analysing developments from the viewpoint of OSCE commitments in the area of rule of law, and report on its findings publicly, accounting also for civil society input. Those thematic reports with a country focus – on issues such as the appointment of judges,⁶⁴ judicial case allocation, emergency laws or restrictions on civil society space – obviously cannot be a mere duplication of the new rule-of-law monitoring report exercise launched by the European Commission in 2020.⁶⁵ They need to respond to a concrete urgent development within a participating State that raises concerns as to the legality and quality of state regulation and risk of breaching the participating States’ OSCE HD commitments. This is also entirely consistent with ODIHR’s election observation methodology, which considers rule of law decay as the most important switch to open the floodgates for clientelism and patronage networks that render the election playing field uneven and hence undemocratic.

Similarly as with its well-established cooperation with the CoE’s Venice Commission, ODIHR could elaborate on a regular exchange with the CoE’s European Commission for the Efficiency of Justice (CEPEJ), whose reports and findings might help to justify some fine-tuned programmes related to the functioning of judicial systems in EUMS (and other CoE members inside the OSCE, of course). The collaboration between ODIHR and the Venice Commission proves that such forms of cooperation function well and bring lasting value.

Returning to ODIHR’s monitoring role, and even considering resource limitations, it is hard to understand why there has been no public ODIHR rule-of-law field analysis specifically describing the decay of judicial independence in Poland. This would have appeared obvious, given how rapidly the situation worsened in ODIHR’s host country and also accounting for the numerous legal opinions documenting the demise of the rule of law, regarding not only the judiciary but also the funding of CSOs and the Ombudsperson’s mandate. It has also been disappointing to see that ODIHR’s analytical engagement has not reached the debate in Vienna, neither in the OSCE’s Permanent Council nor in its Human Dimension Committee. From the perspective of EU rule of law defenders, the Representative on Freedom of the Media (RFoM) attracts similar criticism as its engagement in publicly accessible analysis on the state capture of public media in Poland has remained out of sight after 2015.⁶⁶

Both the RFoM and ODIHR are among the primary institutions endowed with an independent mandate to engage in public monitoring and analysis regarding the level of implementation of

61 ODIHR, *Handbook on Monitoring Freedom of Peaceful Assembly* (2nd ed. 2020).

62 See, e.g., ODIHR, *Housing Rights of Roma in Miskolc, Hungary. Report on the ODIHR Field Assessment Visit to Hungary* (2015); ODIHR, *Situation Assessment Report on Roma in Ukraine and the Impact of the Current Crisis* (2014); ODIHR, *Equal Access to Quality Education for Roma Children: Field Assessment Visit to the Czech Republic* (2012).

63 ODIHR, *Human Rights Defenders in the OSCE Region: Our Collective Conscience* (2007); *The Responsibility of States: Protection of Human Rights Defenders in the OSCE Region (2014–2016)* (2017); *The Situation of Human Rights Defenders in Selected OSCE Participating States (2017–2019): Final Report of the First Assessment Cycle* (2021).

64 For example, see ODIHR, *Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia* (July 2021).

65 European Commission, *2021 Rule of Law Report, Communication and Country Chapters*.

66 RFoM, “OSCE media freedom representative urges Poland’s government to withdraw proposed changes to the selection of management in public service broadcasters”, 30 December 2015.

human dimension commitments (while the High Commissioner on National Minorities (HCNM) is not). Their lack of analytical engagements with developments in EUMS may confirm perceptions that these institutions are somewhat biased in favour of “the West”.

Like the absence of public reporting and analysis by the RFoM on the wholesale takeover of nearly the entire media sector by the Hungarian state and government cronies, ODIHR’s silence was deafening when it came to the 2017 Hungarian law restricting the freedom of association in the fashion of the Russian foreign agent law. A country report on this specific sector under the ODIHR mandate could have helped civil society actors reference violations as they took place. Thematic rule of law reports from ODIHR could offer advocacy support and opportunities to rule of law defenders – to the same extent that domestic observers gain inspiration for their own observation and follow-up activities as they rely on ODIHR reports in the sphere of democratic elections.

In the delivery of their mandates, the OSCE’s Chairpersonship, its Parliamentary Assembly and institutions need to engage better with civil society

It is worth considering giving CSOs a permanent voice in the OSCE institutional structure. In the OSCE’s architecture, it is rather perplexing that Personal Representatives (PR) on the three Abrahamic religions are appointed by every Chair, yet no political or operational resources are allocated when certain types of organised civil society are maltreated. Future OSCE Chairpersonships should therefore consider the appointment of a PR on Civil Society to monitor and assess, together with ODIHR, the state of civic space in the OSCE region, including in EUMS. Based on this monitoring effort, the Chairperson would then develop recommendations and instruments of cooperation with NGOs, lending a political voice to CSOs.

The OSCE Parliamentary Assembly is another body through which MPs from EUMS can be mobilised to exert pressure on OSCE institutions to start caring about EU constituencies. A new Special Representative (SR) on Civil Society Engagement was appointed in 2021 with a mandate to serve as a “focal point for engagement between the OSCE PA and representatives of civil society and non-governmental organizations”⁶⁷ While the SR operates with low visibility and does not maintain active linkages with prominent CSOs in EUMS, CSOs could actively use this institution as an additional international forum to raise awareness of their situation. For example, they could request a report on shrinking space in EU countries as a subgroup among OSCE participating States. This arrangement would be particularly beneficial since the OSCE PA – which operates separately from the PC – could take on the Special Representative’s recommendations regarding civic space and rule of law. Since the OSCE PA’s budget and operational dependence is not linked to PC decision-making and is thus not politically constrained, it can be more outspoken and proactive on issues concerning civil society space.

With regard to ODIHR and its signature election observation activity in EUMS, organised civil society and especially domestic observers should be far more engaged. Engagement with civil society in the electoral sphere is necessary not only in the run-up to elections in the course of a Needs Assessment Mission, but during the entirety of the electoral cycle when legislation and administrative directions affecting the right to vote are being passed. ODIHR’s follow-up missions, which were a welcome development after 2004, have at times degenerated into conversations with government authorities without allowing civil society actors to give input or be debriefed on follow-up commitments for which they could advocate.

Legislative review by ODIHR can serve as a further important source of support for the work of human rights defenders. However, pursuant to ODIHR’s interpretation of its mandate, NGOs cannot request such engagement (that is, legal reviews) themselves and must rely on the initiative of their authorities, who may at times be quite disinterested or oppressive. ODIHR legal reviews are only sporadically preceded by fact-finding missions that would include information and reports from civil society and are often reduced to desk studies of laws. As the NGO network Civic Solidarity Platform (CSP) recommended, “it would help if ODIHR’s legal opinion could be requested with assistance of delegations of States in Vienna, as well as the OSCE PA.”⁶⁸ At a bare minimum, OSCE institutions should be in a position to request reviews.⁶⁹

While CSP’s recommendation is useful, it does not cut to the core of the problem. Beyond considerations of available resources, there is no inherent limitation to ODIHR’s mandate that would bar it from responding, with its signature monitoring and analysis capacity, to specific civil society requests and invitations where grave violations have been recorded or are in progress. In this regard, it is instructive to compare the working method of the UN’s Universal Periodic Review, where CSOs are able to provide valuable input; in the final published version, their shadow reporting stands side by side with national reports of States. While elements of this are seen in parallel civil society events/conferences at OSCE Ministerials, Summits and HDIMs, this working method does not carry equivalent weight and does not allow discussions of the conclusions and recommendations from these fora at the PC.

The OSCE’s Human Dimension Committee (HDC) needs to embrace, own and activate more fully the mandate it was given

The HDC, created in 2006 as an informal subsidiary body of the Permanent Council, has been tasked to “[d]iscuss human dimension issues, including implementation of the commitments of the participating States.”⁷⁰ As ODIHR suggested in 2006,

⁶⁸ *Strengthening OSCE Instruments in the Human Dimension - Reflections and Recommendations*, Report on the Civic Solidarity Platform expert roundtables (2017-2018), ed. by Y. Dzhibladze and O. Zakharov (Netherlands Helsinki Committee, 2019).

⁶⁹ OSCE Field Operations can already request reviews from ODIHR. While they are released as “Comments” (and not “Opinions”), they are the same in substance.

⁷⁰ Decision No. 17/06 Improvement of the Consultative Process ([MC.DEC/17/06](#), 5 December 2006).

⁶⁷ For the mandate of the PA Special Representative, see [here](#).

“[e]ffective peer review and collective follow-up to the ODIHR’s work are indispensable for its work in the human dimension. In this respect, the [...HDC] could allow for a more standardized manner of monitoring, reviewing implementation, preparing and following up on human dimension meetings.”⁷¹

The Committee, however, which was conceived by OSCE Ministers as an informal body closed to the public,⁷² has convened in secrecy without accessible agendas or summary reports for the past 15 years. It has not grasped the opportunities provided by the broad mandate it had been furnished with. It should use existing reports of ODIHR, discuss the recommendations that emanate from it and inform the Permanent Council of its debates. The HDC should reach out systematically to OSCE institutions and field operations which, albeit not in a consistent manner, remain engaged with civil society, in order to raise the difficulties and attacks faced by the civic sector, at the political level. The chair of the HDC could even hold regular consultations with civil society.

New commitments in the OSCE’s human dimension should embrace civic space as an integral part of a healthy democracy. At present, beyond guidelines of OSCE institutions and the commitments specified above,⁷³ no specific OSCE commitment emphasises the value of a thriving civic space as an integral element of democracy, even though this has long been recognized in democratisation research as well as by key organisations that measure the state of democracy worldwide. A commitment by the OSCE to foster an enabling environment for civil society as part of a pluralistic, healthy democratic ecosystem would lend support to many human rights defenders in their quest to see the EU *acquis communautaire* on civic space evolve. The joint OSCE/ODIHR and Venice Commission *Guidelines on Freedom of Association*⁷⁴ can be a useful resource in this quest.

71 ODIHR, *Common Responsibility*, *supra* note 60, p. 8.

72 “There shall be no official records kept for the meetings of [informal subsidiary bodies]”; “The meetings of the ISBs shall be closed to the press and the public” (V.A.§§4 and 9), *OSCE Rules of Procedure*, *MC.DOC/1/06* (1 November 2006).

73 *Supra*, p. 8, text box *Civic space commitments in the OSCE*.

74 OSCE/ODIHR *Guidelines on Freedom of Association* (2015), *supra* note 15.

Conclusions and recommendations

Human rights defenders in EUMS will only draw upon the work of, and become interested in, the OSCE and its promises if it proves to be useful to them – simply put, if it adds value to their purpose and mission. At this point, the OSCE, in most of its output, is not. Now that the HDIM, their principal avenue to speak truth to power to state officials, is closed for the time being, a number of EU-based rule of law defending organisations could argue that the OSCE has outlived its usefulness beyond providing a forum for Vienna-based diplomats to engage with each other in a vacuum devoid of a reality check and civil society input. Many civil society organisations active in the field of human rights protection are well placed to engage in developing these policies, as well as in monitoring and supporting their implementation.

In discussing the set of commitments that OSCE participating States have entered into, this report has focused on whether EU human rights and rule of law defenders could potentially use OSCE norms in their strategic litigation efforts, as regional customary rules. It has also critiqued the ways in which EUMS – as a community, the self-appointed standard-bearer of human rights policy globally – have been derelict in discharging their responsibility, as it puts into question the foundational logic of the OSCE that has always been a collective process of peer review.

The following recommendations indicate a way in which the OSCE can recover relevance in Europe's human rights space. These recommendations challenge the OSCE – its participating States, its structures and its institutions – to reconsider how they can best work to support one of their key constituencies, civil society organisations in EUMS, which are fundamental to securing human rights.

a. To ODIHR

- ODIHR should develop a methodology for deploying thematic missions / field assessments to monitor and analyse situations from the viewpoint of OSCE commitments in the area of rule of law, taking into account information from civil society sources as well, and report on them publicly. These public reports need to respond to a concrete urgent development within a participating State that raises concerns as to the legality and quality of state regulation and should be discussed in the Human Dimension Committee and at the HDIM.

b. To ODIHR, RFoM and the OSCE Parliamentary Assembly

- OSCE institutions should consult and utilise civil society contributions in their various activities and in different settings. NGOs should be involved in all stages of the OSCE's

human dimension activities and not be limited to human dimension events and ad-hoc programmatic engagement.

- All OSCE institutions, units and field presences should designate focal points for civil society. These should not only disseminate information about their work to civil society, but also collect information, network and consult with civil society in a regular and consistent manner. However, engaging with civil society should be part and parcel of every single activity, programme or event. Meetings with independent civil society groups should be a standard part of country visits by heads of OSCE institutions and their staff, including during investigation and fact-finding missions.
- ODIHR needs to develop a consistent methodology of responding to civil society organisations' and NHRI requests to undertake fact-finding and analysis where grave violations may have occurred or are in progress. ODIHR's work would profit from the inclusion of more diverse civil society voices and bottom-up initiatives.
- The OSCE Parliamentary Assembly could, similarly to the Council of Europe Conference of INGOs, set up a civil society forum that is institutionally linked with it through its Special Representative on Civil Society Engagement. This SR should suggest a meaningful CSO forum focused on civic space to be included in the OSCE PA Rules of Procedure.

c. To the OSCE's Human Dimension Committee

- Under OSCE rules, the HDC operates in opacity without a publicly accessible agenda or summary reports. To become a useful, genuine forum for human rights dialogue, it needs to embrace, own and activate the mandate given to the HDC under MC.DEC/19/06. This would include holding consultations with CSOs and systematically reviewing and discussing reports by OSCE institutions, be they in the sphere of election observation, trial monitoring or in a newly conceived form of thematic rule of law reports and indeed any reports by ODIHR, including ad-hoc reports.

d. To incoming OSCE Chairpersonships

- While the likelihood of adopting new commitments in the OSCE's human dimension remains zero, incoming Chairs should consolidate existing commitments under the rubric of protecting and promoting civic space as an integral part of a healthy and resilient democracy, as per OSCE Human Dimension commitments, and promoting the OSCE Guidelines on the Protection of Human Rights Defenders.
- OSCE Chairs should volunteer to submit to a process of review and scrutiny on the implementation of the human dimension commitments in the field of civic space and rule of law in their own country prior to undertaking the Chairpersonship, which should also include consultations with and scrutiny by civil society.
- OSCE Chairpersonships should establish the position of a Personal Representative on Civil Society whose mandate should include assisting the protection and expansion of civil society space and the security of human rights defenders

in the OSCE region. This position should be mandated to develop instruments of cooperation with CSOs and facilitate their engagement in OSCE activities and fora.

e. To EU Member States

- EUMS and the EU Delegation to the OSCE must redouble their diplomatic efforts to reinstate the HDIM. Beyond preserving the status quo, the HDIM needs an improved framework based on innovative technical tools fit for the 21st century, which provides a more systematic approach to CSO involvement, expands CSOs' effective participation and is accessible and open to a broader group of civil society organisations.
- EUMS should abandon the cartel of silence they have formed within the OSCE when it comes to significant breaches of human dimension commitments in other EUMS. Sweeping rule of law and human rights violations in the EU under the carpet effectively encourages further backsliding in several EUMS and reinforces the allegation of double standards as it invites bad practices from outside of the EU.
- In case ODIHR recommends that a (Limited) Election Observation Mission be deployed in an EUMS, other EUMS should commit to seconding both long- and short-term observers in much greater numbers to allow ODIHR to implement its suggested observation format.
- EUMS should expand their financial contributions and remove geographical limitations on funding to include all participating States, including EUMS themselves. This would allow ODIHR to assess the state of civil society space and the rule of law in any participating State, in publicly accessible reports that can be used by CSOs to push for full adherence to commitments.

f. To human rights defenders in EUMS

- HRDs should utilise OSCE norms as additional arguments in their claims against breaches of human dimension commitments by states. They should also invest efforts in acting and advocating at the OSCE level, thereby holding their governments to account in this forum as well. This would include EU defenders calling on ODIHR for training resources and additional support.
- Work with Members of Parliaments to exert pressure on respective MFAs and Permanent Delegations in Vienna to abandon the cartel of silence when situations of rapid rollback of rule of law guarantees in EUMS require intervention in the PC and at other human dimension events.
- Advocate and support institutionally linking a CSO forum (primarily on civic space and its defenders) with the OSCE PA Special Representative on Civil Society Engagement.
- Human rights defenders in the EU region should provide useful critique as to how OSCE institutions can better provide enabling environments for human rights and advance human dimension commitments. They should insist on the reinstatement of the HDIM.
- Domestic civil society election observers in EUMS should be far more engaged with ODIHR during the entirety of the electoral cycle when legislation and administrative directions affecting the right to vote are being passed.

Annex 1: Authors and contributors

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Annex 2: Abbreviations

CdF	Chef de File
CJEU	Court of Justice of the European Union
CSO	Civil society organisation
ECHR	European Convention on Human Right
ECtHR	European Court of Human Rights
EU	European Union
EU FRA	European Union Agency for Fundamental Rights
EUMS	European Union Member States
HCNM	OSCE High Commissioner on National Minorities
HDC	OSCE Human Dimension Committee
HDIM	Human Dimension Implementation Meeting
HoM	Head of Mission
HRD	Human rights defender
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
INGOs	International Non-Governmental Organisations
MFA	Ministry for Foreign Affairs
NHRI	National Human Rights Institution
ODIHR	OSCE Office for Democratic Institutions and Human Rights
PA	OSCE Parliamentary Assembly
PC	Permanent Council of the OSCE
PR	Personal Representative
RFoM	OSCE Representative on Freedom of the Media
SHDIM	Supplementary Human Dimension Implementation Meeting
SR	Special Representative
VC	Venice Commission

The OSCE Network of Think Tanks and Academic Institutions (<https://osce-network.net/>) is a Track II initiative. Its members are research institutions from across the OSCE area engaged in academic and policy research on OSCE-relevant issues. Network members exchange information, provide expertise, stimulate debate, and raise awareness of the OSCE, thereby contributing to comprehensive and cooperative security. The Network is based on a proposal made by OSCE Secretary General Lamberto Zannier in July 2011. It was created by 16 research institutions on 18 June 2013 at Vienna Hofburg. Neither the Network nor its members represent the OSCE, and the views expressed by Network members are their personal opinions.