Protecting and Engaging with Civil Society: A Challenge for the Council of Europe

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Abstract

This article focuses on certain steps that the Council of Europe and bodies within it should take to reverse the shrinkage of space for civil society and to ensure that this space is more effectively safeguarded. They involve: according priority to cases affecting the rights of civil society in proceedings before the European Court of Human Rights; taking a more proactive approach to implementing judgments in which violations of those rights have been found; ensuring that the implementation of standards concerned with terrorist financing and money laundering are not exploited to impose unjustified restrictions on civil society; and deepening engagement with it at the highest levels of the organisation.

The High-Level Reflection Group of the Council of Europe in its report[1] rightly drew attention to the shrinking space for civil society. It also recommended pursuing the follow-up to the decisions adopted at the Ministerial Sessions in Helsinki[2] and Turin[3] related to strengthening the protection and promotion of the civil society space in Europe. Unfortunately, the focus of those decisions was particularly on civil society's participation within the Council of Europe which, while welcome, is not sufficient to afford it the protection clearly needed.

Of course, enabling greater participation within Council of Europe processes could still make some contribution, albeit indirect, to the protection of civil society and is discussed further below. However, any enhancement of such participation within the organisation should not be seen as a substitute for real efforts to reverse the shrinkage in the space for civil society within its member States and to ensure that the space that it really should enjoy is effectively safeguarded.

The only concrete suggestion in the report relating to the protection of civil society concerns the possibility of strengthening the role of the Council of Europe Commissioner for Human Rights by establishing an alert mechanism for non-governmental organisations (NGOs) concerning allegations of human rights violations in Russia. This might be expected to be a more visible arrangement than the existing procedure[4] within the Secretary General's Private Office for investigating alleged reprisals against human rights defenders as a consequence of their interaction with the Council of Europe since there do not appear to have been any publicly available reports to the Committee of Ministers as to its operation and impact.

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[1] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[2] 129th Session of the Committee of Ministers (Helsinki, 17 May 2019, CM/Del/Dec(2019)129/2).

[3] 132nd Session of the Committee of Ministers (Turin, 20 May 2022, CG-BUR(2022)46-67).

[4] "Private Office procedure on human rights defenders interacting with the Council of Europe", Council of Europe, *https://www.coe.int/en/web/secretary-general/procedure-human-rights-defenders* [Accessed 2 March 2023].

However, while concern about the pressures on civil society in the Russian Federation is understandable and should certainly not be disregarded, it is surprising that particular attention is not also being given to the need for a more concrete response to the similar pressures being faced by civil society organisations within some Council of Europe Member States and the more general shrinking of civil society space noted in the report.

Indeed, the failure of those states and the Council of Europe itself to give an effective response to the relentless erosion of civil society space in the Russian Federation must be regarded as a major factor in not just the democratic backsliding in that former member State but also in its total disregard of the values which the organisation was established to uphold, culminating in the aggression that it launched against Ukraine.

The Council of Europe standards that should be observed with respect to civil society are already extensive and generally appropriate. They include not only the right to freedom of association under art.11 of the European Convention on Human Rights (European Convention) and the case law[5] of the European Court of Human Rights (European Court) but also Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe,[6] Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe[7] and the Joint Guidelines on Freedom of Association[8] adopted by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights.

There may have been a serious failure to observe these standards in the Russian Federation but, as is clear from the Expert Council on NGO Law's study on the Legal Space for Non-Governmental Organisations in Europe,[9] some member States are also not giving sufficient effect to them and indeed are putting in place measures that similarly seek to constrain the ability of civil society to function.

An alert mechanism—as proposed in respect of the Russian Federation—is, of course, a relatively weak approach to achieving compliance with Council of Europe standards. Moreover, although there is no reason to exclude such an arrangement in respect of its member States, it is doubtful whether it would really add much of substance to the existing activities of the Council of Europe Commissioner for Human Rights in respect of human rights defenders.[10]

More benefit might instead be derived from building on the report's proposals concerning the coherence and effectiveness of the Council of Europe's human rights protection system. However, none of these proposals—which concern in a non-specific way the strengthening of its effectiveness and implementation of recommendations of the Venice Commission, as well as with greater detail implementation of the judgments of the European Court—expressly relate to the role of this system in protecting civil society.

While these proposals might ultimately have some beneficial effects for civil society, there seems to be a need both for this system to direct its efforts much more specifically and effectively at the problems which it faces and to ensure that it does not inadvertently add to them.

In particular, the focus should be on the handling by the European Court of cases that concern issues involving civil society as much as on the full execution of the resulting judgments. In addition, there is a

[5] See "Case-Law Guide on Article 11" (31 August 2022), European Court of Human Rights, *https://ks.echr.coe.int/web/echr-ks/article-11* [Accessed 2 March 2023].

[6] Council of Europe, Recommendation CM/Rec(2007)14, *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d* [Accessed 2 March 2023].

[7] Council of Europe, Recommendation CM/Rec(2018)11, *https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9* [Accessed 2 March 2023].

[8] Council of Europe, Joint Guidelines on Freedom of Association, *https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e* [Accessed 2 March 2023].

[9] J. McBride, "The Legal Space for Non-Governmental Organisations in Europe: Civil Society's Perception of the Implementation of Council of Europe CM Recommendation (2007)14 to Member States on the Legal Status of Non-Governmental Organisations in Europe" (December 2021), Council of Europe, *https://rm.coe.int/the-legal-space-ngo-text-a4-web-final/1680a4cd01* [Accessed 2 March 2023].

[10] See Council of Europe, Human Rights Defenders, *https://www.coe.int/en/web/commissioner/human-rights-defenders* [Accessed 2 March 2023].

need for the Council of Europe to do more to ensure that its soft law standards are not only implemented by member States but also not exploited as a means of making it difficult for civil society to pursue legitimate objectives.

As regards the handling of cases relating to civil society, the European Court's judgment in *Ecodefence v Russia*[11] is a good instance of this mechanism seemingly unable to respond with sufficient urgency to behaviour of states that has a cancerous effect on democracy. The judgment confirmed that the restrictions and burdens imposed on NGOs by the "foreign agents" legislation were totally inconsistent with the rights to freedom of expression and of assembly under arts 10 and 11 of the European Convention.

However, the only real surprise about the ruling—the findings of which had been foreshadowed eight years earlier in an opinion of the Venice Commission[12]—was the time taken before being handed down, namely, more than eight years after the submission of the application and over five years after being communicated to the Russian Federation. That lapse of time meant that the applicant NGOs and their directors faced serious constraints on their operation and, in the case of two of the NGOs, their non-compliance with requirements in legislation that were fundamentally inconsistent with rights under the European Convention provided the pretext for liquidating them. Moreover, during the period in which the case was considered by the European Court, the legislation impugned in this case had been—as highlighted in another opinion of the Venice Commission[13]—further strengthened and become even more draconian in its effect.

Undoubtedly, resource constraints and the volume of cases are factors in the ability of the European Court to deal with all the issues brought before it. However, it is regrettable that neither the right to freedom of association—the essential legal bedrock on which civil society is founded—nor the potential consequences of particular restrictions for the functioning of civil society and the maintenance of a healthy democracy feature either in the priority policy[14] of the European Court or in its enhancement in the strategy[15] adopted for "impact" cases.

There is thus an urgent need to reconsider the approach that the European Court takes to cases in which such issues are raised so that attempts by other states to follow the path of Russian Federation in the restrictions to which civil society is subjected—something already seen in legislation that has been adopted or is under consideration which treats NGOs in a comparable manner to "foreign agents" on account of the source of their funding or criminalises their pursuit of "unpopular" but entirely legitimate activities as criminal—are quickly ruled to be inadmissible and are not allowed to lead to the disastrous consequences seen in that former member State.

However, greater promptness in the determination of cases relating to civil society is not enough; those judgments must also be implemented in a timely manner. This is something that a study for the Expert Council on NGO Law has shown not to be occurring, at least in respect of that freedom.[16]

Thus, for some of the judgments examined, states have failed to adopt adequate or effective individual measures to put an end to the violation and to redress, as far as possible, its effects. Moreover, possibly even more significantly, there were also states which have failed to adopt the general measures needed to put an end to similar violations or prevent them.

Furthermore, this shortcoming has been exacerbated by the numerous repetitive cases involving violations of freedom of association, with applicants experiencing the same or similar violations after the issuance

[11] *Ecodefence v Russia* (App. No.9988/13 and 60 others), judgment of 14 June 2022.
[12] Venice Commission Opinion No.716-717/2013 (Strasbourg, 27 June 2014, CDL-AD(2014)025).
[13] Venice Commission Opinion No.1014/2020 (Strasbourg, 6 July 2021, CDL-AD(2021)027).
[14] European Court of Human Rights, The Courts Priority Policy, *https://www.echr.coe.int/documents/priority_policy_eng.pdf* [Accessed 2 March 2023].
[15] See Speech by President Robert Spano (Strasbourg, 25 January 2022), *https://www.echr.coe.int/Documents/Speech_20220125_Spano_JY_PC_ENG.pdf* [Accessed 2 March 2023].
[16] Expert Council on NGO Law, *The Execution of Judgments Involving Freedom of Association: The Impact on Human Rights Organisations and Defenders* (15 March 2022, CONF/EXP(2022)1), *https://rm.coe.int/the-execution-of-judgments-involving-freedom-of-association-15-march-2/1680a5db86* [Accessed 2 March 2023].

of the judgment finding a violation, and with the same or similar violations being experienced by new, different applicants. This is despite the repeated engagement of the Committee of Ministers and the Department for the Execution of Judgments of the Court with the member States concerned in the process for supervising the relevant judgments.

As the study concluded, the failure to execute and the delayed execution of judgments of the European Court involving freedom of association constitutes a continuation and exacerbation of the violations of freedom of association that the applicants in the cases concerned had already experienced and contravenes the standards undertaken by member States, showing "a disregard for the essential contribution made by civil society in all their diversity to the cultural life and social well-being of democratic societies, and undermines the adherence to principles of democratic pluralism".[17]

Particularly stark examples of the failure to execute can be seen in the cases of *Bekir-Ousta v Greece*[18] and *UMO Ilinden v Bulgaria (No.2)*.[19] In both cases, violations of art.11 of the European Convention were found by the European Court on account of the unjustified refusal to register certain associations. Although over 16 years have elapsed since the two judgments, there continues to be a refusal to register the associations, invoking arguments which the European Court has already found to be contrary to the right to freedom of association.

The Committee of Ministers most recently has both expressed its utmost concern about the lapse of time since the judgment in *Bekir-Ousta* and stated that there should be no refusal of registration on grounds contradicting the European Court's judgment in the *Umo Ilinden* case. However, the response of the member States concerned with execution continues to be one of prevarication that does not seem consistent with the obligation under art.46 of the European Convention to execute judgments, which—as the European Court indicated in *Emre v Switzerland (No.2)*[20]—should involve good faith on the part of the High Contracting Party and take place in a manner compatible with the "conclusions and spirit" of the judgment.

In cases such as these, where there is a repeated failure to give effect to a clear ruling by the European Court that the reasons for refusing registration are contrary to the European Convention, the Committee of Ministers ought to be taking a more proactive approach to execution. This would entail ceasing to allow itself to continue being strung along by the member States concerned and making it clear that these are cases that leave them no real choice as to the measures required for the execution of the judgments concerned, ideally indicating a deadline within which this should be achieved. Non-compliance with that deadline might then give rise to the need for infringement proceedings under art.46(4) as in the cases of *Mammadov v Azerbaijan*[21] and *Kavala v Turkey*.[22]

Such an approach should not really be required where the obligations under art.46 of the European Convention are fulfilled in a timely manner. Nonetheless, not only is it crucial for member States to be confronted directly and unambiguously in those instances where they have repeatedly failed to take those obligations seriously but also that approach is especially needed where such a failure means that they are preventing the associations concerned from playing their part in the important contribution that the Committee of Ministers in Recommendation CM/Rec(2007)14[23] recognised NGOs make to the cultural life and social well-being of democratic societies.

[17] Expert Council on NGO Law, *The Execution of Judgments Involving Freedom of Association: The Impact on Human Rights Organisations and Defenders* (15 March 2022, CONF/EXP(2022)1), *https://rm.coe.int/the-execution-of-judgments-involving-freedom-of-association-15-march-2/1680a5db86* [Accessed 2 March 2023].

[18] *Bekir-Ousta v Greece* (App. No.35151/05), judgment of 11 October 2007.

[19] *UMO Ilinden v Bulgaria (No.2)* (App. No.59491/00), judgment of 19 January 2006.

[20] *Emre v Switzerland (No.2)* (App. No.5056/10), judgment of 11 October 2011; (2014) 59 E.H.R.R. 11.

[21] *Mammadov v Azerbaijan* [GC] (App. No.15172/13), judgment of 29 May 2019; (2020) 70 E.H.R.R. 8.

[22] *Kavala v Turkey* [GC] (App. No.28749/18), judgment of 11 July 2022; (2023) 76 E.H.R.R. 13.

[23] Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies).

Without a more assertive approach to ensuring the effective execution of cases that affect civil society, one of the key foundations of a democratic society risks being seriously weakened, with disastrous consequences for the latter in the long term.

Although restrictions on civil society always stem from measures adopted by states, in some instances these measures will be inspired by or reflect an exploitation of certain requirements that have been adopted at the international and regional level, with the consequent—and possibly disingenuous—suggestion that they had no choice but to adopt them. This is, therefore, something that the Council of Europe needs to be alerted to where it has a role in supervising the implementation of such requirements, as well as in elaborating or revising them.

The potential for the legitimate activities of NGOs to be inappropriately constrained in this way can be seen in a study prepared for the Expert Council on NGO Law in respect of the elaboration and oversight of the implementation of certain European and international requirements with respect to activities that might support or act as a cover for money laundering and terrorist financing.[24] These requirements concern the laws and regulations applicable to certain non-profit organisations (NPOs) and the disclosure of beneficial ownership of all legal persons. They have been particularly well elaborated by the Financial Action Task Force (FATF) and are being implemented through measures adopted by the states under the supervision of FATF and, for the majority of its member States, the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).

The study found that the way in which the relevant requirements are being applied is leading, or will lead, to significant burdens for NGOs that are not at risk of being implicated in money laundering or terrorist financing and thus doing so without making any useful contribution to tackling such activities. This is seen to be a situation which stems in part from the fact that the requirements themselves have been developed and elaborated without really taking sufficient account of the diverse nature of NGOs and the need for improved guidance on implementation that deals much more specifically with the particular character of NGOs.

However, oversight of implementation of the standards by Member States should also be used as an opportunity to show that there has been a misapplication of the requirements and that there is a need for this to be rectified. Although the evaluations prepared by FATF and MONEYVAL—which follow a common procedure for this purpose—do include some criticisms of the approach taken by member States when implementing FATF standards (the standards), this process could emphasise much more that the measures adopted do not always respect the limits on applying them to NGOs and could focus more on the use actually made of the implementing measures and their impact on NGOs. Certainly, the importance of risk assessment seen in the standards is not being taken sufficiently seriously by all member States, a shortcoming that is especially evident in the fact that the implementation of the requirements with respect to NGOs tends to be universal, disregarding their nature and size. Some of these problems now seem to be beginning to be recognised, with concern being expressed by FATF for the unintended consequences[25] of implementing the requirements. However, it is also important to see the consequences resulting from the supposed implementation of the standards being described as not just unintentional but also intentional where that is clearly the case.

In this connection, it should be noted that no reference is ever made in evaluation reports to the legislation and other measures restricting the ability of NGOs in some member States to operate and even exist, as disclosed particularly in the judgments of the European Court, the annual reports of the Secretary General

[24] Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Money Laundering and Terrorist Financing* (17 May 2022, CONF/EXP(2022)2), *https://rm.coe.int/expert-council-moneyval-study-17-05-2022-en/1680a68923* [Accessed 2 March 2022].

[25] FATF, "High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards" (27 October 2021), *https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf* [Accessed 2 March 2023].

of the Council of Europe and the work of the Council of Europe Commissioner for Human Rights. Specific reference to this material is not, of course, essential. Nonetheless, it would be desirable for it still to be taken into account since such restrictions ought to be part of the context in which measures purporting to implement the standards are being evaluated. Moreover, this will not be of any benefit unless the misapplication of the standards is both called out systematically in the evaluation of measures and their application by member States and there is effective pressure to rectify the measures and the abuses which they facilitate.

In particular, it needs to be underlined that not only are most NGOs not NPOs within the definition found in the standards but also that those NGOs that do fall within that definition should not automatically be regarded as a high risk for involvement in money laundering and terrorist financing. Implementation of the standards will necessarily be abusive—whether intended or otherwise—in the absence of a genuine and transparent risk assessment exercise. NGOs do not seem in the past to have had any significant input into the process of evaluating the implementation of the standards despite being affected by them. It is welcome, therefore, that FATF has now drawn attention to such a possibility, even if this remains rather limited. It would be particularly desirable for MONEYVAL to follow FATF's lead as regards encouraging NGO input, even though there are instances of this occurring in the course of evaluations conducted by it. In addition, it would be desirable for such input to occur not only before evaluation reports are prepared but also afterwards, particularly in plenary meetings and follow-up activities, as well as the provision of technical assistance.

In this connection, it would also be useful if FATF and MONEYVAL took into account in their scoping exercise any measures which, when implemented, could impact negatively on NPOs. This could be facilitated by some arrangement whereby these bodies could be "alerted" by NGOs as to existing and potential problems. This would only be really useful if FATF and MONEYVAL then made sure that their evaluators were aware of these aspects and that they were appropriately trained to take them into account when making assessments. In addition, the assessment procedures being followed in evaluations ought to be amended so that there is more effective engagement with NGO representatives during on-site visits and that recommendations concerned with any adverse impact on NGOs are properly pursued in the follow-up processes.

Finally, the question of the Council of Europe's existing engagement with NGOs is something that could be strengthened, as is recognised in the Helsinki and Turin decisions already mentioned, despite this already being seen in the existence of its Conference of International Non-Governmental Organisations, whose procedures have substantially overhauled to facilitate more constructive input, and in various aspects of the organisation's own activities relating to cooperation, execution of judgments and monitoring.

However, as underlined in the two decisions, the deepening of this engagement would be particularly desirable at the commanding heights of the organisation, namely, at the level of the Committee of Ministers and the Secretary General. The Deputies—particularly through their Rapporteur Groups—have already held a series of exchanges with civil society. However, although the Turin decisions refer to these exchanges as being "based on openness, inclusiveness and transparency", they have involved only limited participants and publicly available information about them seems restricted to the conclusions of the chairpersons, with no indication as to any follow-up having occurred. Moreover, efforts to enable the exchanges to be followed by representatives of civil society other than those invited to take part in them have been frustrated by the insistence of some member States on adherence to the requirement in art.21 of the Statute of the Council of Europe[26] that meetings of the Committee of Ministers shall be held in private unless it decides otherwise.

The Turin decisions also supported the organisation by the Secretary General of an annual meeting with the participation of civil society together with all stakeholders concerned, something first suggested in

[26] Statute of the Council of Europe, *https://rm.coe.int/1680935bd0* [Accessed 2 March 2023].

the Helsinki decisions. However, the prospect of such a meeting has yet to occur despite the possibility of one being held having been mooted in the Secretary General's final report on the Helsinki decisions on civil society.[27] Undoubtedly the aggression by the Russian Federation against Ukraine and the demands of organising the summit have created difficulties for organising such a meeting, although this could have been a useful way of gathering input for consideration at the summit.

It is to be hoped that the Secretary General's first exchange with civil society is not deferred for too long and that those with the Committee of Ministers can be much more open and inclusive. Certainly, the Council of Europe needs to work closely not just with its member States but also with the people within them. It can only benefit from nurturing its ties to civil society in Europe and this can be best achieved through the organisation strengthening its own openness to civil society input in all its procedures and institutions. Thus, there is considerable scope for the Council of Europe to do more to ensure the protection of civil society, as well as to enhance its engagement with NGOs in the course of fulfilling its own objectives. It is vital that the challenge of doing so is fully met.

[27] Secretary General's Information Document SG/Inf(2022)13 on Follow-up to the Helsinki decisions on civil society.