

## **Submission by the International Commission of Jurists to the European Commission’s Consultation on “Further Strengthening the Rule of Law Within the Union”**

**June 2019**

### **1. Introduction**

The International Commission of Jurists (ICJ) welcomes the opportunity to submit its observations on the European Commission’s Communication on “Further Strengthening the Rule of Law Within the Union”.<sup>1</sup> The ICJ welcomes the Commission’s initiation of a dialogue and consultation on protection of the Rule of Law within the European Union. Recent years have shown that this founding value of the EU under Article 2 TEU cannot be taken for granted and requires increased and concerted efforts to promote understanding of its content, prevent violations and ensure consistent and strong measures that hold Member States accountable for rule of law violations.

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

The ICJ has worked to develop, promote and protect the rule of law since its establishment in 1952. In 1955, the ICJ’s Global Congress agreed its “Act of Athens” that linked the Rule of Law to the protection of human rights. In 1959, the ICJ’s Declaration of Delhi affirmed that:

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<sup>1</sup> European Commission, *Further Strengthening the Rule of Law within the Union, State of play and possible next steps*, Brussels, 3/4/2019, COM(2019)163 final  
[https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_communication\\_en.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_communication_en.pdf)

"... the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."<sup>2</sup>

Throughout the subsequent years, the ICJ engaged many jurists from all regions and legal systems of the world to develop a series of declarative materials that helped to define the rule of law in the contemporary age.<sup>3</sup>

Most recently, at its global Congress in March 2019, these principles were reaffirmed in ICJ Tunis Declaration on Reinforcing the Rule of Law and Human Rights, which responds to current global challenges to the promotion and protection of the rule of law.<sup>4</sup>

The declaration emphasises that the rule of law "is inextricably linked to and interdependent with the protection of human rights, as guaranteed in international law and there can be no full realization of human rights without the operation of the Rule of Law, just as there can be no fully operational Rule of Law that does not accord with international human rights law and standards."<sup>5</sup>

Within this framework, the ICJ, as it has affirmed in the Tunis Declaration, views the core principles of the Rule of Law as including:

- a) the separation of powers in governance,
- b) law made by democratic institutions applying democratic processes,
- c) the right to participation in decision-making and governance,
- d) the presence of a pluralistic system of political parties and organizations and the holding of periodic free and fair elections based on secret balloting and universal and equal suffrage,
- e) the independence of judges and lawyers, as well as their accountability,
- f) the right to a fair trial by a competent, independent, and impartial tribunal established by law,
- g) the accountability of the military to civilian authorities,

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<sup>2</sup> The founding documents of the ICJ, including the Act of Athens and the Declaration of Delhi, can be found here: <https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf>

<sup>3</sup> For a compilation of ICJ Declarations on the Rule of Law from 1955-1966, see : *Rule of Law and Human Rights : principles and definitions* : <https://www.icj.org/imperio-del-derecho-y-derechos-humanos-principios-y-definiciones-elaborados-en-los-congresos-y-conferencias-celebrados-bajo-los-auspicios-de-la-comision-internacional-de-juristas-1955-1967/> For further documents from ICJ Congresses, 1955-2012, see : <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-Congresses-Publications-Reports-2019-ENG.pdf>

<sup>4</sup> Tunis Declaration on Reinforcing the Rule of Law and Human Rights, 2019, article 2, <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>

<sup>5</sup> ICJ Tunis Declaration 2019, op cit, article 4.

- h) the principle of legality and legal certainty, including that law must be stated with clarity and intelligible to those whom it concerns,
- i) the principle of transparency in governance and the administration of justice,
- j) the functioning of a free, independent, and pluralistic media,
- k) the right to recognition as a person before the law,
- l) the principle of equality, equal protection of the law, and non-discrimination on the grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status,
- m) the principle of accountability and intolerance of impunity, particularly for serious crimes under international law, and
- n) the right to an effective remedy and reparation for human rights and international humanitarian law violations.”<sup>6</sup>

In parallel to its efforts to define and set standards for rule of law protection, the ICJ has worked for many decades to advance and maintain rule of law protections in diverse national systems and in the international administration of justice. This experience has shown how vital institutional and procedural safeguards – such as judicial appointment and disciplinary proceedings, or an independent bar association or council for the judiciary – are not only for the effective and fair operation of the legal system but also for protection of all human rights.

The ICJ’s work has also shown however, that legal and institutional safeguards for the rule of law amount to little without people who are committed to making their protection a reality. A culture of the rule of law – within which judges, lawyers, politicians, officials and civil society have a deep personal commitment to principles such as the independence of the judiciary or freedom of the media, is the essential ingredient for the alchemy of a rule of law based society.<sup>7</sup>

At the outset, the ICJ wishes to draw attention to two overarching issues to be borne in mind in the development of rule of law strategies by the EU.

First, the EU does not of course act alone in this field: the Council of Europe and the United Nations and its constituent agencies and organs, amongst others, have developed standards and mechanisms that have significant value and potential to further advance protection of the rule of law within, as well as

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<sup>6</sup> ICJ, Tunis Declaration on Reinforcing the Rule of Law and Human Rights, 2019, op cit article 9.

<sup>7</sup> See for example, Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) para.42: “*The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law. ...*”

outside, the EU. The EU's work on rule of law should be carefully positioned to take account these standards and mechanisms, in the interests of the most effective possible strategies to protect the rule of law in EU Member States. It should also be borne in mind that in terms of external action, the EU has an interest in strong global (and wider regional) standards and procedures that advance the rule of law.

The Council of Europe should be integral to the EU's efforts to strengthen the rule of law in Europe, particularly given that all EU Member States are also Member States of the Council of Europe. Its expert institutions have developed valuable standards, and its review mechanisms are already crucial to maintaining the rule of law in EU Member States. Any new EU measures should be designed to be complementary to those of the Council of Europe and to this end, should be developed in consultation with the Council of Europe institutions. In particular, the EU should strive to co-ordinate with and build on the work of the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (GRECO), the Committee for the Prevention of Torture (CPT), the Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE) and the European Committee for the Efficiency of Justice (CEPEJ) amongst others.

United Nations standards and procedures are also valuable tools for the promotion of the rule of law within the EU. The UN Human Rights Council, for instance, in 2012 adopted a resolution on Human Rights, Democracy, and the rule of law setting out an itemized list of universal standards connecting the rule of law, democracy and human rights.<sup>8</sup> In regard to standard setting, benchmarks and assessment of national situations, the EU's work should take account of global standards including the UN Basic Principles on the Independence of the Judiciary<sup>9</sup> and UN Basic Principles on the Role of Lawyers.<sup>10</sup> UN mechanisms, including human rights mechanisms that also regularly address rule of law issues, should also be taken into account. These include UN treaty bodies, in particular the UN Human Rights Committee, which in its periodic review of state reports under the International Covenant on Civil and Political Rights (ICCPR) regularly reviews matters including the independence and accountability of the judiciary; accountability for crimes amounting to violations of human rights; fairness and effectiveness of the court system; access to justice; equality, non-discrimination and equal protection of the law; and the independence of lawyers. The UN Human Rights Council's Universal Periodic

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<sup>8</sup> Human Rights Council, Resolution 19/36 on Human Rights, Democracy and the Rule of Law, UN Doc A/HRC/RES/19/36 (19 April 2012), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/131/66/PDF/G1213166.pdf?OpenElement>

<sup>9</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also, Guidelines on the role of Prosecutors, Adopted at the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and the UN Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, 2002.

<sup>10</sup> UN Basic Principles on the Role of Lawyers, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. For further relevant standards see ICJ, Practitioners' Guide No.1, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>

Review (UPR) process also encompasses these issues. Furthermore, rule of law concerns cut across all human rights issues and are addressed by most of the Human Rights Council special procedures. Certain mandates, such as the Special Rapporteur on the independence of judges and lawyers, and the Working Group on Arbitrary Detention, have considered rule of law matters extensively.<sup>11</sup>

EU co-ordination with all of these bodies can not only strengthen its rule of law work within the EU, it can help to ensure that internal EU rule of law measures have global influence as examples of good practice.

Second, for the EU to be credible in the action it takes to promote the rule of law, to prevent its violation and to hold accountable Member States that infringe it, the EU institutions themselves must be above reproach in their compliance with rule of law principles. Amongst other measures, EU institutions must enhance transparency and stakeholder participation, including in legislative proceedings and access to information.<sup>12</sup> They must also ensure that all EU institutions and agencies are fully accountable, including against the same human rights standards that apply to the Member States, and that individuals can effectively access justice where they allege that their rights have been violated by actions of EU institutions or agencies.

It is therefore important that the EU should accede to the European Convention on Human Rights (ECHR), as it is required to do by Article 6.2 TEU, thereby bringing it within the jurisdiction of the European Court of Human Rights.<sup>13</sup> This should be enabled by addressing the shortcomings identified by the Court of Justice of the European Union (CJEU),<sup>14</sup> even through modification of the Treaties if necessary. Consideration could also be given to enhancing access to justice for individuals through the CJEU, by amending Articles 258 and 259 TFEU to allow individuals to bring actions alleging breaches of their fundamental rights against EU institutions as well as Member States on matters within the jurisdiction of the Court. In terms of current proposals to enhance monitoring and assessment of the rule of law within the EU, the mandate of any new mechanism on the rule of law should be extended to cover not only the situation in the Member States, but also protection of the rule of law within EU institutions and processes (see further section 3 below).

## **2. Promoting the Rule of Law in the EU**

A shared understanding and commitment to the rule of law is a crucial underpinning of its protection. As has been evident in many rule of law crisis situations both in Europe and beyond, it is when legal and political communities, as well as the media and the general public, grasp the significance of the rule of law and of measures to erode it and take action accordingly, that the rule of law

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<sup>11</sup> See OHCHR Special Procedures, <https://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>

<sup>12</sup> See for example, CJEU, Case T-540/15, Emilio de Capitani v European Parliament

<sup>13</sup> See ICJ, Amnesty International and the AIRE Centre, *Briefing Note on EU Accession to the ECHR*, 6 September 2013 <https://www.icj.org/wp-content/uploads/2013/09/EuropeanUnion-AccessionECHR-Statement-2013.pdf>

<sup>14</sup> CJEU Opinion 2/13 on accession to the ECHR

has the best chance of surviving challenge.<sup>15</sup> Even where damage to the rule of law cannot be prevented, a strong rule of law culture will ensure its resilience and resurgence in the longer term. As the Venice Commission has pointed out: "*The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.*"<sup>16</sup>

This understanding and commitment to the rule of law cannot be taken for granted. To many, the idea of the rule of law may seem abstract and amorphous, and its practical manifestations technical and far removed from everyday life. Education, awareness raising and promotion of the rule of law, both to the responsible institutions and professional communities, and to the general public, are therefore crucial.

The EU can make a significant contribution in this regard. With the rule of law at the heart of the EU's values, enshrined in Article 2 of the treaty, the EU has the authority to lead in the promotion of the rule of law in the Member States. It is also well placed to facilitate the kind of exchanges between Member States – including amongst professionals and civil society – which would help to inform national rule of law debates with comparative understanding.

The EU's engagement in rule of law promotion has the added benefit of enhancing cohesion between national understandings of the rule of law, and of the systems and institutions needed to protect it. National and even sub-national understandings of the rule of law and of the institutions and procedures needed to uphold it vary to some extent, as they must given the variety of national legal, constitutional and political cultures. Nonetheless, common understandings of minimum standards and underlying principles can be strengthened by EU wide discussion and information exchange, as well as by promotion of international standards, and CJEU and ECtHR jurisprudence. Such discussions and exchanges will also assist in the development of benchmarks to assess respect for the rule of law (see next section).

#### *Civil society and grassroots discussions on rule of law issues*

Civil society, which informally represent constituencies from a wide range of sectors, needs to be integral to efforts to promote the rule of law. First, because an informed, active, skilled civil society is a vital safeguard to protect the rule of law where it is threatened, as has been seen in the rule of law crises in several EU Member States and accession countries. In times of crisis, civil society organisations and actors, along with National Human Rights Institutions (NHRIs), are often the most ready and able to inform public opinion, and advocate for the rule of law in national and international fora. Related to this, civil society, in particular human rights defenders, are themselves often one of the first targets in efforts to undermine the rule of law, and need to be equipped to defend their

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<sup>15</sup> On defence of the rule of law in times of crisis, see ICJ, *Legal Commentary to the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, 2011, <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf> .

<sup>16</sup> Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) para.43

role, and to provide support and solidarity to civil society in other Member States.

Second, even in the most stable societies where the rule of law is generally respected, there is a need for civic education on the rule of law to be continuously renewed, and CSOs can play an important role in promotion of rule of law to the general public, and in fostering a pluralistic debate on rule of law that is grounded in national culture. Civil society work is needed to increase popular understanding of what the rule of law is and why it matters, including the meaning and consequences of key principles: universality of human rights, legal certainty, equality before the law, freedom of expression, association and assembly and the role of the media and of civil society itself.

EU funding in this field should therefore be directed towards education, training and awareness raising. It should also give space to research and analysis, including comparative analysis of the rule of law situations in EU Member States, as a means to support well informed and pluralistic national and EU-wide debate on rule of law issues.

With regard to acceding countries and funding streams linked to the European External Action Service, resources dedicated to the rule of law should fund civil society projects of national NGOs, active professional associations, NHRIs and/or universities. Over-reliance on tendering and twinning programmes runs the risk of entrusting such important means of rule of law promotion to private sector companies disconnected from civil society and not necessarily tethered to public interest objectives, or to public institutions whose expertise and aim would be the promotion of their own national models.

#### *Engagement with legal professionals*

As repeated ICJ Declarations have made clear since the 1950s, legal professionals, judges, prosecutors and lawyers are amongst those with responsibility to uphold and promote the rule of law through the exercise of their professional functions.<sup>17</sup> Promotion of the rule of law amongst legal professionals, fostering their sense of responsibility as guardians of the rule of law, and deepening their understanding of its content, is crucial to strengthening rule of law protection in the long term.

The EU can contribute significantly to this work through engagement as well as funding for capacity building work with lawyers, bar associations and law societies, and professional associations of judges and prosecutors, specifically on rule of law education. Such programmes are already in place under DG Justice funding streams but can be further developed specifically with rule of law education in mind. They could include exchanges with other Member States to broaden outlook and exchange ideas for good practices, and to learn from experiences in how to respond to threats to rule of law.

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<sup>17</sup> op cit fn.3

### *Engagement with national Parliaments*

The ICJ welcomes the suggestion by the European Commission that more work should be done to increase the capacity of Parliaments and Parliamentarians to understand and work to protect the rule of law. Parliaments, like the executive, including administrative authorities, and the judiciary, have a responsibility to uphold the rule of law. To discharge this responsibility, parliamentarians need to understand what the rule of law and each of its core elements mean and to recognise measures that may endanger it. They need to understand their responsibility, independent of narrow political interests, to respect and advance the rule of law, both as lawmakers and as watchdogs for threats to the rule of law from government or other interests.

Concerted EU action, in co-operation with Member States and with civil society, to promote the rule of law amongst parliamentarians and build their capacity to defend it, would be highly beneficial in the long term. In particular, action could be supported to convene discussions, both national and trans-European, on the rule of law and the role of parliament in its protection. Such discussions could include members of parliament, political parties and parliamentary officials. This would serve as an opportunity to increase the understanding of parliamentarians of rule of law standards and principles, including relevant EU law and standards, CJEU jurisprudence and international law and standards.

Encouragement could be given to dedicated debates, annually or in each parliamentary session, on the rule of law; or to establish parliamentary committees, hearings or regular parliamentary reports assessing rule of law compliance, depending on the mechanisms available within each national parliament. Models for regular, mainstreamed scrutiny of legislation by Parliament against key rule of law principles, facilitated through checklists, toolkits or guides made available and accessible to members of national parliaments, could also be promoted.

Finally engagement between members of parliament and civil society on rule of law issues should be encouraged, so that civil society expertise and advocacy informs political debate. This could be done through funding to civil society to work with MPs on rule of law issues, as well as to promote cooperation with the European Parliament and the Parliamentary Assembly of the Council of Europe.

### **3. Preventing Threats to the Rule of Law**

There is a clear need for regular, uniform rule of law reviews, and a mechanism to conduct them, by which Member States' laws and practices are measured against objective standards by independent experts. First and foremost, such an EU rule of law assessment mechanism should be sufficiently uniform, in terms of standards and procedures applied, and should be independent, so as to eliminate any potential biases or perception of bias.

At present, the EU, and in particular the Commission, have at their disposal a wealth of instruments to assess the rule of law situation of EU Member States and acceding countries, many of which produce assessments of high quality.



However, they are currently scattered or applied differently to different States. It is clear, as noted in the Commission's Communication, that this risks giving rise to criticism of double standards in rule of law assessment by the EU institutions. Eastern European or acceding countries have been the main focus of detailed assessments. This ignores the reality that other EU Member States, although they may have long established cultures of rule of law which have functioned well in practice in recent times, for this very reason, may lack the formal safeguards, institutions and procedures, which newer Member States have been required to introduce. The protection of the rule of law in these systems cannot be taken for granted and would bear deeper, independent scrutiny, on a par with that applying to newer Member States.

The reporting system under the Assistance Programme to Bulgaria and Romania under the Co-operation and Verification Mechanism (CVM) as well as the Reports of the NEAR Directorate of the Commission on acceding countries' compliance with Chapter 23 of the acquis<sup>18</sup> provide to date good examples of a rule of law assessment by the EU institutions and their methodology may be used to inform the development of periodic assessment of the rule of law situation of all EU Member States.

On the other hand, the EU Justice Scoreboard, while a useful tool, is insufficient in itself for a thorough assessment of the rule of law situation in a given country as it is narrowly focused on assessing efficiency of courts and perceptions of independence of the judiciary and does not give a full, nuanced picture of the protection of the rule of law in practice, which spans a much wider area of public law and administration.

The Recommendations for the Semester of the Council of the EU are likewise a useful tool with capacity to press a Member State to undergo certain reforms.<sup>19</sup> However, they suffer from the shortcoming of the Semester assessment rationale, i.e. ensuring respect for the Stability and Growth Pact. Most of the recommendations concern efficiency of courts and court proceedings and rarely address wider issues such as judicial independence. Finally, they suffer from the same embedded fault of all instruments at the Council's disposal, that they are not free of political considerations in decision-making.

The current Rule of Law Framework has been a welcome first step towards a more effective response to threats to the rule of law within the EU. As a relatively new mechanism however, which has so far only been applied to one country, Poland, it is vulnerable to allegations of bias. Furthermore, it has been criticised for its slow pace, possibly delaying the invocation of Article 7.<sup>20</sup> The establishment of a more regular and universal rule of law assessment system for

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<sup>18</sup> Chapter 23 of the acquis outlining conditions for EU membership, [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en) , <https://www.consilium.europa.eu/en/press/press-releases/2018/07/13/2018-country-specific-recommendations-on-economic-employment-and-fiscal-policies/>

<sup>19</sup> Council of the EU, *2018 country-specific recommendations on economic, employment and fiscal policies*, [https://ec.europa.eu/info/publications/2018-european-semester-country-specific-recommendations-commission-recommendations\\_en](https://ec.europa.eu/info/publications/2018-european-semester-country-specific-recommendations-commission-recommendations_en)

<sup>20</sup> See for example, Petra Bárd and Anna Śledzińska-Simon, *Rule of law infringement procedures , A proposal to extend the EU's rule of law toolbox*, CEPS paper no 2019-09, May 2019, [https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09\\_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf](https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf)

all Member States would provide a stronger basis for response to violations of the rule of law.

In order to avoid accusations of politicisation of any new rule of law assessment system, the ICJ considers that a model of peer-review by Member State representatives should not be adopted as the main means of assessment of the rule of law. Although political follow up in the Council to any rule of law assessment would be important, the assessment itself should be clearly independent and non political, and be seen to be so. Furthermore, to strengthen the EU's credibility and demonstrate the good faith of its commitment to the rule of law, the assessments should also include an assessment of the compliance with rule of law principles in the work of each of the EU institutions.

As to the scope of the assessments, in the view of the ICJ, these would add most value to current mechanisms if they did not attempt to address all of the founding values of the EU as set out in Article 2 TEU<sup>21</sup> but were centred on the core principles of the rule of law, as set out in the introductory section above. A mechanism covering all issues of fundamental rights, democracy and rule of law would run the risk of losing focus by addressing such a wide range of issues. A broad mandate to address all questions of fundamental rights could also risk duplication of existing periodic reviews already in place for EU Member States on human rights matters through the Council of Europe and the United Nations. Nevertheless, as highlighted in the introductory section above, fundamental rights are inextricably linked with the rule of law and any rule of law review would need to address issues including equal access to justice for the protection of fundamental rights, accountability for violations of fundamental rights, freedom of expression including of the media and freedom of association, amongst others.

The scope of and criteria for the assessments should be clearly set out and should draw on and be consistent with existing international and European standards. In particular, they should rely on the Venice Commission's rule of law checklist, as well as relevant UN standards including the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers, with broader human rights standards, the jurisprudence of the CJEU and ECtHR on rule of law issues, and relevant reports of the Fundamental Rights Agency (FRA) also being used as reference tools. The reviews should in particular be informed by jurisprudence.

The assessment should not be based primarily on statistics of quantitative measures or legal reforms undertaken, without a full assessment of their quality. While applying a common framework, the review needs to be sufficiently nuanced to take full account of both law and practice, within the particular legal political and constitutional traditions of each Member State.

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<sup>21</sup> As proposed for example in the EP Resolution of 25 October 2106 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, P8\_TA (2016) 0409

In reviewing preventive rule of law mechanisms at EU level therefore, the primary aims should be:

- To establish regular, uniform assessments of the rule of law in all member states as well as for EU institutions.
- To define a clear normative basis and thematic focus for such assessments, on principles of the rule of law, based in EU law and on established and authoritative international standards, including those of the Council of Europe and the UN.
- To establish an objective assessment process, removed from political influence, led by an independent, expert body outside of either the Commission or the Council.
- To conduct assessments through a transparent and open process, with full consultation with all concerned stakeholders including civil society and NHRIs.
- To provide assessments and recommendations that are coherent with and build on existing initiatives of EU institutions.
- To ensure that assessments are linked with and build on existing Council of Europe and United Nations systems and standards.

Two options for such assessments could be considered:

1. Establish an independent, specialised Agency or Committee with the mission to research and review compliance with rule of law standards across the EU, by Member States and EU institutions. Such an Agency's management should include judges, representatives of the legal professions, scholars, a member of the Venice Commission, and civil society. It would carry out a periodic assessment of the situation of the rule of law in all Member States and assist Member States in the implementation of recommendations identified during the periodic assessment. The Agency would need to co-operate closely with Council of Europe institutions, including the Venice Commission, the Committee of Ministers, the CCJE, as well as UN treaty bodies and special procedures.

2. Establish a system of rule of law review and assessment for EU Member States and EU institutions in co-operation with the institutions of the Council of Europe, in particular the Venice Commission, which is the most qualified European body on the issue of rule of law protection. This would have the benefit of avoiding duplication of functions, and would deepen EU co-operation with the Council of Europe in the rule of law field. Possible models, subject to the availability of additional resources for the Venice Commission, could include an agreement of a mechanism with the Venice Commission by which the EU could request it to prepare periodic reports; or agreement with Member States to request assessment by the Venice Commission at regular intervals.

Whichever model is adopted should be supported by programmes of technical assistance and capacity building and grant-making programmes to civil society, academic institutions or other experts to carry out research and analysis on issues of rule of law protection, to inform EU action and ensure a well-informed, pluralistic debate on rule of law both at national and EU levels.

#### 4. Responding to Threats to the Rule of Law

The need for effective mechanisms to respond to violations of the rule of law has become clear from recent rule of law crises in EU Member States. Where national courts and other checks and balances are undermined to the point where the rule of law cannot be upheld within the national system, there must be both a strong political response at EU level, as well as effective judicial means to hold the State responsible for its obligations under EU and international law.

As regards the judicial response, both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) are essential institutions in upholding and enforcing rule of law standards in Europe. However, for those courts to be credible and effective, there must be prompt and thorough execution of judgments, including through systemic legislative or constitutional change where necessary. Supporting and strengthening the role of both courts and the execution of their judgments should be central to the EU's strategy for the protection of the rule of law.

The ECtHR in particular has developed a rich jurisprudence on rule of law matters including the independence of the judiciary, access to justice, the principle of legality, accountability, freedom of the media and the role of civil society, and has ruled in significant rule of law cases both in EU and non-EU Member States. The high degree of authority which the ECtHR enjoys across the region, the binding nature of its judgments, its power to issue binding interim measures, and the enforcement mechanism available through the Committee of Ministers of the Council of Europe together make it one of the strongest guarantors of the rule of law in Europe. However, these strengths also mean that it attracts political criticism and pressure and the risk of undue influence from external actors. Increasing political criticism of the Court as "illegitimate" or anti-democratic has been a worrying trend in recent years,<sup>22</sup> and has also been linked to shortfalls in financial support for the Court.

As part of its rule of law strategy therefore, the EU should provide and encourage strong political support for the Court, and help to ensure that the Court and the Council of Europe Department for the Execution of Judgments have the financial resources necessary to provide effective judicial recourse in cases of ECHR violations relating to the rule of law. EU accession to the ECHR would of course be one important means of support in this regard.

Infringement proceedings before the CJEU under Article 258 TFEU can provide a strong and reliable response to violations of the rule of law by Member States, Crucially, they are a means for EU-level decision-making on rule of law violations by an independent judicial body, the Court of Justice, without political involvement. It is also significant that the Court has the power to indicate interim measures,<sup>23</sup> which as has been seen in the case of *Commission v*

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<sup>22</sup> See for example, Róisín Pillay, *The European Convention on Human Rights: the Draft Copenhagen Declaration and the Threat to the European Court*, 2 March 2018, <http://opiniojuris.org/2018/03/02/33469/>; ICJ and others, *Joint NGO response to the draft Copenhagen Declaration*, 13 February 2018, <https://www.icj.org/wp-content/uploads/2018/02/Europe-JointNGO-Response-Copenhagen-Declaration-Advocacy-2018-ENG.pdf>

<sup>23</sup> Article 279 TFEU

*Poland*<sup>24</sup> can be a powerful tool to prevent irreparable harm to the independence of the judiciary – or other crucial institutions or systems - in a rule of law crisis. Following the Court’s decision, infringement proceedings also provide an objective structure for compliance with the decision and sanctions for failure to implement the necessary reforms.<sup>25</sup>

Infringement proceedings should therefore be initiated regularly and promptly by the Commission where it identifies violations of the rule of law, including in cases of violation of basic principles of the rule of law under Article 2 TEU or the right to legal protection under Article 19.1 TEU, or where violations of rule of law principles affect the application of EU legislation.

A regular mechanism of independent rule of law assessments for all Member States would have the advantage of informing the reasoned opinion of the Commission as a basis for infringement proceedings, and allow for them to be used more regularly and consistently in rule of law cases, free from any implication of political or other bias or undue influence.

Institution in appropriate cases of proceedings to determine a serious and persistent breach of the founding values of the EU, under Article 7 TEU is important to ensure that any rule of law assessment mechanism has credibility and an ultimate purpose in the most serious rule of law crises. As a matter of principle, since the rule of law is a founding value of the EU, serious violations of core rule of law protections should lead to the suspending of the voting rights of Member State. The ICJ agrees that such a sanction mechanism should not be lightly used. However, it must be recognised that, in rule of law crises in Poland and Hungary, decisions to resort to article 7 have been tardy and the pace of subsequent proceedings has been slow given the vital matters at stake. This casts some doubt on the real potential of Article 7 TEU as a sanction mechanism for serious rule of law breaches.

It is no secret that, in Article 7 proceedings, the highly political nature of the Council of the EU makes it virtually impossible to reach the unanimous vote required for stripping the concerned Member State of its voting powers. This makes Article 7 a blunt instrument. Such fundamental problems with the Article 7 mechanism can only be fully dealt with through amendment of the treaty.

In the long term, therefore, consideration should be given to amending the TEU to reduce the scope for political influence on the Article 7 process. Such an amendment could assign the determination of a serious and persistent breach under Article 7.2 as well as the decision on sanctions under Article 7.3 to the Court of Justice, thereby providing further judicialization of the procedure.

In the shorter term and within the current legal framework, the working methods of the Council should be amended to provide for greater transparency in the Article 7 process, including through increased consultation with civil society.

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<sup>24</sup> C/619/18 R

<sup>25</sup> Article 260 TFEU

In summary, to strengthen European level responses to violations of the rule of law, the European Union should:

- Step up its support, both political and financial, for the European Court of Human Rights and its enforcement mechanism.
- Institute infringement proceedings regularly and consistently in cases of failure to uphold the rule of law, relying on objective and expert assessments, and seek interim measures from the CJEU in such proceedings where necessary.
- Work to ensure that the rule of law framework and Article 7 can provide a prompt response in the most serious cases of rule of law violations.
- In the long term, consider amendment of the treaty to judicialise the Article 7 process.
- Increase transparency of the Article 7 process.