

EUROPEAN YEARBOOK ON HUMAN RIGHTS 2018

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Ludwig Boltzmann Institute
Human Rights

EUROPEAN YEARBOOK
ON HUMAN RIGHTS 2018

Edited by
Wolfgang BENEDEK
Philip CZECH
Lisa HESCHL
Karin LUKAS
Manfred NOWAK



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Vienna

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 |
Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

NWV Verlag GmbH
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Tel.: +43 1 796 35 62-24 |
Fax: +43 1 796 35 62-25
Email: office@nvw.at
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Distribution for all other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

European Yearbook on Human Rights 2018

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EDITORS' PREFACE

Dear readers,

The year 2017 has been a difficult one for regional human rights protection in Europe. The Council of Europe (CoE) was put under financial stress by the suspension of the Russian financial contributions and the reduction of those from Turkey; the European Union (EU) was struggling with reforming its migration policy and proceeding with the crisis concerning the rule of law in Poland; and the Organization for Security and Cooperation in Europe (OSCE) under Austrian chairmanship, only after very difficult political negotiations, appointed three key positions, among them the director of the Office of Democratic Institutions and Human Rights (ODIHR) and the Representative on Freedom of the Media.

All this and much more is analysed in the new *European Yearbook on Human Rights 2018* (EYHR). While the struggle for human rights and the critical review of topical human rights challenges have been at the core of the EYHR from its inception, the Yearbook itself underwent some important changes last year. From 2018 onwards, the EYHR will be published by Intersentia, which means that all contributions are now subject to a double-blind review procedure. This allows us not only to ensure the high academic standard of the EYHR, but to improve it still further. It should be noted that we, the editorial team, when selecting the final contributions pay attention not only to the highest academic standard and gender balance, we also believe in 'academic diversity', encouraging, in particular, excellent young scholars to submit their contributions and publish them alongside renowned academics in the field of human rights. Additionally, we consider the mutual informing between academia and practice as crucial to reflect in a comprehensive way on human rights developments in Europe. Accordingly, as in previous years and complementary to academic debates, the EYHR 2018 provides the reader with first-hand information from the inside of relevant institutions on the developments in the field of human rights protection in Europe in 2017.

As in past years, the *European Yearbook* remains structured around current human rights challenges that the European institutions, namely EU, the CoE and the OSCE have been particularly confronted with in the year 2017. Additionally, there is one 'Topic of the Year' and a part on 'Other issues'. Finally, the EYHR 2018 includes nine book reviews of recent publications in fields relevant to human rights developments in Europe 2017.

As 'Topic of the Year' we, the editors, chose the ongoing rule of law, democratic and fundamental rights crisis in Poland. Coinciding with the EU Commission launching an infringement procedure against Poland regarding the Polish Law on the Supreme Court, Professor Mirosław Wyrzykowski, a renowned former judge of the Polish constitutional tribunal and academic, describes in his contribution, 'The Vanishing Constitution', the three acts of the dramatic constitutional crisis in Poland and provides a detailed and insightful account of the legal changes introduced which challenge the rule of law and the protection of fundamental human rights principles in Poland.

The next part of the book on human and fundamental rights developments in the EU is introduced by a review of the relevant jurisprudence of the Court of Justice of the European Union (CJEU) by Eva Radlgruber and Hans-Peter Folz. While the CJEU has dealt with a variety of important fundamental rights issues, its approach in 2017 seemed to remain ambivalent, leaving room for improvements, *inter alia*, in the field of asylum.

Migration and asylum have clearly been decisive topics in Europe 2017. Hence, the EYHR 2018 includes in total six related contributions, three of them in the EU section. First, Danaé Coquelet's contribution on resettlement and human rights is dedicated to the specific case of Syrian refugees resettled from Lebanon to Belgium. In her contribution, Coquelet not only analyses the findings from her field study on the expectations of Syrian refugees in Lebanon vis-à-vis Belgium as a resettlement country; she also analyses the Belgian resettlement scheme from a human rights perspective, touching upon crucial issues that might undermine the integration progress of resettled refugees.

Resettlement is considered one of the last remaining legal channels for people in need of protection to reach the EU where the closing of migratory routes, the establishment of extraterritorial asylum centres and the enhanced migration control cooperation with third states dominate the discussions about the future direction of the Common European Asylum System (CEAS). In light of thousands of people losing their lives in the Mediterranean, the physical access to protection and the meaning of the latter has been a topic of concern not only for the Member States (MS) and the European Commission. In 2017, the CJEU in *X and X v Belgium* and *A.S. v Slovenian Republic* and *Khadija Jafari and Zainab Jafari* had the opportunity to rule on the humanitarian visa for refugees and the deviation of common rules of the CEAS under extreme circumstances. However, as Lisa Heschl and Alma Stankovic find in their contribution, 'The Decline of Fundamental Rights in CJEU Jurisprudence after the 2015 "Refugee Crisis"', the Court missed opportunities in 2017 to provide a basis for changing the rules of the CEAS but rather contributed to the continuance of fundamental right breaches people seeking protection face on their dangerous journeys to the EU. The CJEU's judgments are thereby in line with the securitisation approach dominating the discourse on migration and asylum in the EU.

As already mentioned, the physical access to the territory of the EU and its MS was a major topic of discussion in 2017 and still ranks high on the European agenda. In its Conclusions of 28 June 2018 the European Council reaffirmed the need to increase cooperation with third states and called on the Commission and the Council to explore the concept of regional disembarkation platforms.¹ The Council Conclusions support the externalisation strategies the EU and its Member States promoted in recent years. Hence, Mathilde Duhaà's contribution 'The EU Migration Crisis and the Human Rights Implications of the Externalisation of Border Control', could not be more topical, providing the reader with an analysis of the human rights problems accompanying the EU-Turkey 'deal' and the operations of the European Coast Guard Agency.

While migration and asylum clearly shaped the discussion in the EU, other important fundamental and human rights developments in the EU in 2017 require our attention. In 2017 the Commission's mid-term review of the 'Framework for National Roma Integration Strategies up to 2020' took place. Gregor Fischer in his contribution asks 'Does the EU Framework for Roma Integration Promote the Human Rights of Romani Persons in the Union?'. In order to provide answers, Fischer supplements his analysis of the state of the implementation of the Framework with a case study on Austria to reveal factual and legal shortcomings of the European and national strategies for enhancing Romani equality at the local level.

While the results of the mid-term evaluation of the Framework for National Roma Integration Strategies were published in early 2018, no comparable document has been made publicly available for the evaluation of the EU Guidelines on the promotion and protection of freedom of religion or belief adopted in 2013. Adina Portaru thus dedicates her contribution to the question whether in the dawn of its 5th anniversary the implementation of the Guidelines is lagging behind and whether the EU itself is respecting its commitments in the area of freedom of religion and belief.

In the last contribution of the EU section, Theodor Rathgeber shifts the perspective and analyses the stabilising role of the EU within the UN Human Rights Council (HRC), which finds itself in 'troubled waters'. Not only did the US in June 2018 withdraw from the Council, the latter is also confronted with severe financial constraints and ongoing criticism of its political bias. The EU in 2017 has played a substantial and stabilising role in the activities of the HRC as Rathgeber shows by using the case of Syria as an example.

From the EU level, the EYHR now turns to relevant human rights developments at the CoE level. As in the previous Part, the CoE Part begins

¹ European Council Conclusions, 28 June 2018, Press Release, 421/18, 29.06.2018, available at <http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>, last accessed 18.07.2018.

with a review of the jurisprudence of the European Court of Human Rights (ECtHR) 2017 by Stefan Kieber. Although 2017 saw a reduction of the number of pending applications to the lowest level since 2004, the Court is still confronted with a massive workload, challenging its effective functioning. In order to prevent a deadlock hanging like the sword of Damocles over the Court, David Reichel and Jonas Grimheden suggest a better understanding of the structural issues contributing to the Court's situation by examining human rights violations found by the Court from a statistical perspective. While statistical records of the case law of the Court are accessible through the HUDOC database, Reichel and Grimheden focus on repetitive cases deriving from structural and common problems at the national level and the techniques the Court has developed to address them.

One approach to reduce the workload of the Court is to increase and deepen the dialogue between the highest national courts and the ECtHR since dialogue will smooth the cooperation between the ECtHR and domestic judges, thus enhancing mutual understanding and eventually reducing future cases. Lize R. Glas in her contribution, however, analyses the legal boundaries of such a deepened dialogue about a Strasbourg judgment from different perspectives, namely the perspective of the Court and the domestic perspective of eleven domestic legal orders.

The *Yukos* case is the best example that there is a need to strengthen the dialogue between the ECtHR and national highest courts. Kanstantsin Dzehtsiarou's and Filippo Fontanelli's contribution deals with the finding of the Russian Constitutional Court that the implementation of the *Yukos* judgment of the ECtHR was incompatible with the Russian Constitution and the judgment impossible to execute.

Whereas the relationship between the ECtHR and national courts is of crucial importance, its relationship with the CJEU is decisive for the unity of human rights protection in Europe since both may have to deal with comparable human and fundamental rights violations. In order to ensure the coherence and consistency between the CJEU and the ECtHR, Article 52(3) Charter of Fundamental Rights of the European Union (CFREU) foresees that the CJEU is bound by the interpretation of case law by the ECtHR for corresponding rights in the ECtHR. Joyce De Coninck in her contribution 'The Impact of ECtHR and CJEU Judgments on the Rights of Asylum Seekers in the European Union: Adversaries or Allies in Asylum?' argues, however, that in the highly politicised field of migration, a lack of coherence in the judgments of the two Courts can be found. Ultimately, the divergencies could detrimentally affect the principles of legal certainty and legitimate expectations of those seeking relief before either of the Courts, as well as the effectiveness of protection and ultimately, the institutional legitimacy of both Courts.

Elsbeth Guild and Vladislava Stoyanova also dedicate their contribution to the field of migration. However, they approach current discussions about the

arrival of migrants through a different human rights lens, namely from the perspective of the right to leave any country. More concretely, they examine the right to leave a state under international and European human rights law and question the legality of various efforts to make the right to leave any country dependent on a right of entry to another country.

The next contribution, by Mathieu Leloup, shifts the focus in the field of migration to the most vulnerable: children. In times where children are separated from their parents and detained in special facilities, Leloup's approach to revitalise the principle of the best interests of the child in expulsion cases is of crucial importance. Of similar topicality is the contribution of Claudia V. Elion dealing with the relationship between religious extremism and human rights in the case law of the ECtHR and the tensions between counter-terrorism measures and human rights.

The last contribution in the CoE part, by Agnieszka Szklanna, concerns questions related to the delays in implementation of ECtHR judgments. While CoE members have an obligation to execute the judgments of the ECtHR and the Committee of Ministers is in charge of supervising this execution, there are still some 7,500 cases that the Committee of Ministers is currently supervising. Szklanna in her contribution focuses on the implementation of ECtHR judgments related to electoral issues due to their political and legal importance.

While before 2014 the OSCE's death was proclaimed on a regular basis, in particular, its Special Monitoring Mission (SMM) to Ukraine and its election monitoring missions worldwide contributed to the recovery of its reputation and weight at the international level. Nevertheless, despite this general revival of the OSCE, in the area of fundamental freedoms and human rights, its human dimension is still struggling to maintain its relevance. Jean P. Froehly in his contribution reviews the reform process of the human dimension mechanism and recommends a comprehensive reform proposal including a new 'OSCE Human Dimension Implementation Review Mechanism' (IRM).

As has been mentioned above, the EYHR aims to bring together academics with experts from the field. The subsequent contribution by Christian Strohal complements the article by Froehly providing an insight to the developments of the human dimension in 2017 from the view of the Austrian chairmanship. When Austria took over the chairmanship from Germany in 2017, the OSCE participating states had been unable to agree on human dimension decisions for three years in a row. Strohal in his contribution provides an overview of the challenges the Austrian chairmanship faced and the results that have been achieved, allowing for a rather more positive outlook and better prospects for the human dimension of the OSCE than for calls proclaiming the 'end of human rights'.

One of the achievements of the Austrian chairmanship was the appointment of a new director of ODHIR after lengthy political negotiations. ODHIR

provides support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights, tolerance and non-discrimination. However, new communication technologies and techniques challenge the way international institutions and organisations communicate about human rights and fundamental freedoms. Katarzyna Gardapkhadze and Gareth Davies in their contribution discuss the urgent need and possible ways for international organisations to communicate more effectively, to be able to show to ordinary people that human rights and fundamental freedoms are indispensable in their lives, and thereby to strengthen public support for those rights and freedoms.

Modern technologies and new ways of communications were also crucial for the topics of the subsequent two articles on the rise of populism and the #MeToo movement. Ajla van Heel and Jacopo Leone in their contribution use four case studies on Italy, France, Poland and the Netherlands to assess the impact populist parties and their agendas have on gender equality and women's rights across the OSCE region. They compare the political agendas and narratives of populist parties in the selected countries on gender equality and women's rights issues, with the aim of identifying consistent patterns, possibly highlighting concerns and recommendations to be taken into consideration in future efforts to promote more inclusive and equal democratic societies. Ewa Sapiezynska and Johanna Pruessing subsequently dedicate their contribution to #MeToo and how a digital social movement can give agency to the victims and impact the structural level. Their focus is thereby on the impact the #MeToo campaign has had on women's human rights in the OSCE region, both *de facto* and *de jure*.

The EYHR deals with human rights developments within the major European institutions. However, room is also given to human rights protection at the national level. In the final part dedicated to 'Other Issues', Monika Mayerhofer sheds light on the national human rights protection framework in Ukraine, by focusing on the role of the Ukrainian Parliament Commissioner for Human Rights as a complementary instrument to foster human rights at the national level.

The editors of the Yearbook representing the three Austrian human rights centres and the European Inter-University Centre for Human Rights and Democratisation (EIUC) in Venice would like to acknowledge the crucial financial support of EIUC to this publication. We further would like to thank the ODIHR and the EU Fundamental Rights Agency for the excellent cooperation and the submission of contributions by their collaborators. A double-blind review process requires a lot of commitment; accordingly, we would like to express our gratitude to all reviewers within and beyond the Scientific Advisory Board for their valuable work. The review process was organised by Lisa Heschl and Philip Czech, who deserve special thanks. Many thanks go further to Reinmar Nindler, who was in charge of the book reviews and to Manuela Rusz,

who took care of the formatting and harmonisation of the articles. Without their precious help, the EYHR 2018 would not have been possible in the same form. Finally, particular thanks go to Tom Scheirs and Rebecca Moffat from Intersentia for their cooperation in publishing this volume.

We hope that reading this Yearbook, which is unique in its focus and vocation, will not only help to better understand the rich landscape of the European regional human rights system but will also stimulate discussion and critical thinking about human rights developments, eventually encouraging some readers to submit contributions to the next edition of the European Yearbook on Human Rights.

Graz, Salzburg, Venice, Vienna – June 2018
Wolfgang Benedek, Philip Czech, Lisa Heschl,
Karin Lukas and Manfred Nowak

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LIST OF ABBREVIATIONS

ACPO	Association of Chief Police Officers
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CCJE	Consultative Council of European Judges
CDA	Christian Democratic Appeal
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CETA	Comprehensive Economic and Trade Agreement
CFR/CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CGRS	Commissioner General for Refugees and Stateless Persons
CJEU	Court of Justice of the European Union
CLAHR	Committee on Legal Affairs and Human Rights
CM	Committee of Ministers
CoE	Council of Europe
CoI	Commission of Inquiry
CoM	Committee of Ministers
COMECE	Catholic Church in the EU
ComRC	Committee on the Rights of the Child
CORE	IFSH's Centre for OSCE Research
COREPER	Committee of the Permanent Representatives of the Governments of the Member States to the EU
CPRSI	Contact Point for Roma and Sinti Issues
CRC	UN Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Co-operation in Europe
CSO	Civil Society Organisation
CSW	Commission on the Status of Women
CT	Constitutional Tribunal
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body

EASO	European Asylum Support Office
EAW	European Arrest Warrant
EBCG	European Border and Coast Guard
EC	European Commission
ECHR	European Convention on Human Rights
ECI	European Citizens Initiative
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENCJ	European Network of Councils for the Judiciary
ENNHRI	European Network of National Human Rights Institutions
ENF	Europe of Nations and Freedom Group
EO's	European Ombudsman's
EP	European Parliament
EPHA	European Public Health Alliance
ERRC	European Roma Rights Centre
EU	European Union
EUNAVFOR MED	European Union Naval Force Mediterranean
FN	Front National
FoRB	Freedom of Religion or Belief
FRA	European Union Agency for Fundamental Rights
FSM	Five Star Movement
FTFs	Foreign Terrorist Fighters
GA	General Assembly
GANHRI	Global Alliance of National Human Rights Institutions
GATT	General Agreement on Tariffs and Trade
GBV	Gender Based Violence
GCRS	Office of the Commissioner General for Refugees and Stateless Persons
GL	Greenleft
GNA	Government of National Accord
GRC	Geneva Convention relating to the Status of Refugees
GRECO	Group of States Against Corruption
HCNM	High Commissioner on National Minorities
HDIM	Human Dimension Implementation Meeting
HDS	Human Dimension Seminar
HIV	Human Immunodeficiency Virus
HJIL	Heidelberg Journal of International Law
HRA	Human Rights Act
HRVP	High Representative of the Union for Foreign Affairs and Security Policy

HRC	UN Human Rights Council
HRW	Human Rights Watch
ICTJ	International Center for Transitional Justice
IDP	Internally Displaced Person
IEI	Inter-Ethnic Initiative for Human Rights
IFSH	Institute for Peace Research and Security Policy at the University of Hamburg
IOM	International Organisation for Migration
IRM	OSCE Human Dimension Implementation Review Mechanism
IS/ISIS	Islamic State
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer
LIBE Committee	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
LNA	Libyan National Army
LRI	Local reception initiative
LTV visa	Visa with limited territorial validity
MOAS	Migrant Offshore Aid Station
MoU	Memorandums of Understanding
MS	Member States
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NRCP(s)	National Roma Contact Point(s)
NRISs	National Roma Integration Strategies
OCF	Occupational Health Psychology
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PC	Permanent Council
PEP	Protected Entry Procedures
PKK	Kurdistan Workers' Party
PNR	Passenger Name Record
PSWC	Public Social Welfare Centre
PvdA	Labour Party (PvdA)
PVV	Party for Freedom
RAINN	Rape, Abuse and Incest National Network
RCC	Russian Constitutional Court
RCD	Reception Conditions Directive
RFOM	Representative on the Freedom of the Media
RLDC	Revue Lamy de Droit Civil

SBC	Schengen Border Code
SHDIM	Supplementary Human Dimension Implementation Meetings
SMM	Special Monitoring Mission in Ukraine
SP	Socialist Party
SRL	Syrian refugees in Lebanon
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office for Drugs and Crime
UNOG	United Nations Office at Geneva
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
UPR	Universal Periodic Review
US(A)	United States of America
VCLT	Vienna Convention on the Law of Treaties
VLAP	Action Plan on Visa Liberalisation
VVD	People's Party for Freedom and Democracy
WHO	World Health Organization
WTO	World Trade Organization

LIST OF CONTRIBUTORS

Wolfgang BENEDEK

Wolfgang Benedek is Professor Emeritus at the Institute of International Law and International Relations and former Director of the European Training and Research Centre for Human Rights and Democracy of the University of Graz (UNI-ETC). He is a regular lecturer at the Vienna Diplomatic Academy and the European Master Programmes on Human Rights and Democratisation in Venice and Sarajevo. His main research interests include human rights, human development and human security, on which he has published substantially. He is the managing co-editor of this Yearbook.

Danaé COQUELET

Danaé Coquelet works as an attaché for the Belgian Federal Agency for the Reception of Asylum Seekers (Fedasil). She obtained a master's degree from the European Inter-University Centre for Human Rights and Democratisation (EIUC) and specialised in migration and gender. She previously collaborated with UNHCR and OHCHR and worked on topics such as female leadership, gender-based violence and refugee resettlement. In 2017, she joined the Saint Joseph University of Beirut to conduct extensive research on the resettlement in Belgium of Syrian refugees from Lebanon.

Philip CZECH

Philip Czech holds a Dr iur and a Dr phil degree. Since 2002, he has been a researcher at the Austrian Institute for Human Rights, which became a department of the University of Salzburg in 2014. He is the editor of the *Newsletter Menschenrechte*, a periodical reporting in German on the current case law of the European Court of Human Rights. He is mainly engaged with publishing and teaching in the field of fundamental rights, especially with the case law of the ECtHR and its transposition in Austria.

Gareth DAVIES

Gareth Davies is the editor at the OSCE Office for Democratic Institutions and Human Rights (ODIHR). He was previously the editor at the European Council on Foreign Relations (ECFR). He holds an M. phil in Race, Ethnicity and Conflict from Trinity College Dublin and a BA (hons) in English Literature from the University of York.

Joyce DE CONINCK

Joyce De Coninck is an academic assistant and PhD candidate at the Ghent European Law Institute at Ghent University. Prior to her current position, Joyce conducted research at the Department of Criminology, Criminal Law and Social Law at Ghent University for FreSsco – an EU mandated project concerning free movement of persons and social security coordination. In addition, Joyce was a junior associate at Pappas and Associates in Brussels. Her PhD research focuses on the responsibility of the European Union for human rights violations in the field of asylum and migration, particularly in view of the parallel applicability of (international) human rights regimes.

Mathilde DUHAÛ

Mathilde DuhaÛ currently works as a human rights trainee at the Delegation of the European Union to the United Nations in New York. She holds a master's degree in International Relations and Crisis Management from the Institut d'Etudes Politiques de Toulouse and a European master's degree in Human Rights and Democratisation (EMA) from the European Inter-University Centre for Human Rights and Democratisation (EIUC) in Venice. Prior to completing her EMA, she worked as an advocacy assistant with Amnesty International and undertook internships with several other NGOs. Her research interests include migration and border control, human security and the EU governance system.

Kanstantsin DZEHTSIAROU

Kanstantsin Dzehtsiarou is a senior lecturer in law at the University of Liverpool. His research interests are spread between interpretation of the European Convention on Human Rights, reform of the European Court of Human Rights, administration of international justice, comparative and constitutional law. As an expert he collaborates with the Council of Europe, the United Nations Development Programme, OSCE and others.

Claudia V. ELION

Claudia V. Elion works at the Council of Europe on the topics of financing of terrorism and money laundering. She obtained her master's degree in Human Rights and Democratisation at the European Inter-University Centre of Human Rights and Democratisation in Venice, Italy and the Université de Strasbourg in France. For her interdisciplinary master's thesis she concentrated on the issue of Salafism in Europe.

Gregor FISCHER

Gregor Fischer earned his law degree at the University of Graz in 2016 and is a legal researcher at the European Training and Research Centre for Human Rights and Democracy of the University of Graz (UNI-ETC). In his research, he focuses on non-state actors' human rights obligations, human rights and sports, the human rights situations of Romani communities in Europe and the (de-)radicalisation of societies.

Hans-Peter FOLZ

Hans-Peter Folz is Professor of European Law and International Law and Head of the Institute of European Law at the University of Graz. His main research interests include the legal framework for human rights protection in Europe through the ECHR and the EU Charter of Fundamental Rights, the relationship between different instruments of human rights protection in Europe, as well as questions relating to the institutional law of the European Union. He has published extensively on these topics. He recently authored the commentary on the EU Charter of Fundamental Rights and Article 6 TEU for the second, revised edition of C. Vedder and W. Heintschel von Heinegg (eds.), *Europäisches Unionsrecht* (Nomos Publishing House 2018).

Filippo FONTANELLI

Filippo Fontanelli is a senior lecturer in international law at the Law School of the University of Edinburgh. He is a co-rapporteur of the ILA Committee on the procedural reform of international courts and tribunals, a consultant for the Italian Government on investment arbitration and a fellow of the Scottish Parliament information centre on matters of international trade.

Jean P. FROEHLI

Jean P. Froehly is Head of the Economic Section at the German Embassy in Moscow. He was previously Head of the Director's Office and Senior Political Advisor to Director Michael Georg Link at the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw from 2014 to 2017 and continued as a policy advisor in ODIHR until June 2018. Before joining the German Federal Foreign Service in 2002, he was a senior research fellow at the German Council on Foreign Relations (DGAP). He graduated from the Institut d'Etudes Politiques de Paris (Sciences Po).

Katarzyna GARDAPKHADZE

Katarzyna Gardapkhadze is First Deputy Director at the OSCE Office for Democratic Institutions and Human Rights (ODIHR). She was previously Head of the Human Rights Department at ODIHR. She has a university education in psychology (University of Gdansk, Faculty of Social Science), 30 years of professional experience from across the OSCE region, and expertise in strategic and change management.

Lize R. GLAS

Lize R. Glas is Assistant Professor of European Law at Radboud University, the Netherlands. Her research centres on how the European Court of Human Rights functions through its procedure and in combination with other actors (for example, the Committee of Ministers and the CJEU) and how (procedural) reform affects the applicant.

Jonas GRIMHEDEN

Jonas Grimheden holds a PhD and is Senior Policy Manager at the European Union's human rights advisory body for human rights within the EU, the Agency for Fundamental Rights (FRA) in Vienna, Austria. Previously heading FRA's access to justice work, he has been with the Agency since 2009. He is a specialist in international human rights law with focus of work placed on justice, business and human rights, indicators, and monitoring mechanisms.

Elsbeth GUILD

Elsbeth Guild is Jean Monnet Professor ad personam at Queen Mary University of London and Radboud University, the Netherlands. She is co-author of E. Guild, S. Grant, and C.A. Groenendijk (eds.) *Human Rights of Migrants in the 21st Century* (Routledge 2017). Her research on the human right to leave a country was carried out for the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe conference February 2018.

Lisa HESCHL

Lisa Heschl is a post-doctoral research and teaching fellow at the European Training and Research Centre on Human Rights and Democracy at the University of Graz (UNI-ETC). She received her PhD in law from the University of Graz and holds a European master's degree in human rights and democratisation (EMA). Her research focuses on the European migration and asylum policy and legislation, the extraterritorial application of international and European refugee and human rights law and its relation to European border policies. Her most recent publication is, L. Heschl, *Protecting the Rights of Refugees beyond European Borders: Establishing Extraterritorial Responsibilities* (Intersentia 2018).

Stefan KIEBER

Stefan Kieber is Senior Scientist at the Austria Institute for Human Rights at the University of Salzburg. His main research fields are human rights in general, the case law of the ECtHR and the implementation of international (human rights) obligations in national law. He is also Chief Editor of the academic journal *Newsletter Menschenrechte*.

Mathieu LELOUP

Mathieu Leloup is a PhD candidate at the University of Antwerp and an assistant in administrative and constitutional law. He holds a master's degree in law from the University of Antwerp and a master's degree in human rights and democratisation from the European Inter-University Centre. His main areas of interest are human rights law, constitutional law and administrative law.

Jacopo LEONE

Jacopo Leone holds an MSc in International and European Politics from the University of Edinburgh. He has been working as a political analyst for

over eight years in the field of democracy assistance and governance, with a strong focus on parliamentary strengthening, political party assistance, anti-corruption, public integrity, and civil society development. He is currently working as a Democratic Governance Officer at the OSCE Office for Democratic Institutions and Human Rights (ODIHR), providing analyses of political developments and delivering assistance to OSCE participating States on democratic governance issues. Before joining ODIHR, he worked, among others, for the OSCE Mission in Kosovo, NATO, the European Union Institute for Security Studies (EUISS) and the European Parliament.

Karin LUKAS

Karin Lukas holds an LLM in Gender and the Law (American University), an EMA in human rights and democratisation (University of Padova) and a PhD in Legal Studies (University of Vienna). She is a senior researcher and Head of Department at the Ludwig Boltzmann Institute of Human Rights. In January 2011 she joined the European Committee of Social Rights (ECSR) of the Council of Europe and has been Vice-President since 2017. She has been a consultant for various national and international organisations. Her work in the field of human rights has particularly centred on women's rights, development cooperation and business and economic, social and cultural rights. Her most recent publication, *Corporate Accountability*, explored the effectiveness of non-judicial grievance mechanisms. She currently works on the issue of economic, social and cultural rights in Europe.

Monika MAYRHOFER

Monika Mayrhofer holds a PhD and is a senior researcher at the Department Asylum, Anti-Discrimination and Diversity at the Ludwig Boltzmann Institute of Human Rights in Vienna, Austria. Her research focuses on equality and anti-discrimination, the European human rights system and mobility in the context of climate change.

Manfred NOWAK

Manfred Nowak is Professor for International Human Rights at the University of Vienna, where he is the Scientific Director of the Vienna Master of Arts in Human Rights and Co-Director of the Ludwig Boltzmann Institute of Human Rights. Since 2016, he also serves as Secretary General of the European Inter-University Center for Human Rights and Democratisation (EIUC) in Venice. In October 2016, he was appointed as an independent expert leading the UN Global Study on Children Deprived of Liberty. He formerly taught at various prestigious universities, such as Utrecht, Lund, Stanford and the Graduate Institute in Geneva, and has published more than 600 books and articles in this field. He has carried out various expert functions for the UN, the Council of Europe, the EU and other intergovernmental organisations. Most importantly, he served for many years in various functions as UN Expert on Enforced

Disappearances (1993–2006), as one of eight international judges in the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo (1996–2003), and as UN Special Rapporteur on Torture (2004–2010).

Adina PORTARU

Adina Portaru works as Legal Counsel for ADF International in Brussels, a legal organisation defending religious freedom at the international institutions. Prior to joining ADF International, Adina worked in academic research at Maastricht University in the Netherlands and at the European Training and Research Centre for Human Rights and Democracy in Austria. Adina earned an LLM in law and globalisation from Maastricht University, and a doctorate in law at Karl Franzens University in Austria. Her thesis assesses how the European Court of Human Rights and the UN Human Rights Committee interpret freedom of religion and belief.

Johanna PRUESSING

Johanna Pruessing works as a project assistant in the human rights defenders programme at the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw. She is a trained anthropologist and holds a master's degree in politics and security from the School of Slavonic and East European Studies of University College London (UCL) and a master's degree from the Higher School of Economics (HSE) in Moscow. Johanna has a long-standing professional and academic interest in women's rights and gender equality.

Eva RADLGRUBER

Eva Radlgruber is a lawyer at the office of records of the Regional Administrative Court of Styria, Austria. Prior to that, she was a teaching and research assistant at the Institute of European Law at the University of Graz. Her research focuses, *inter alia*, on the framework of human rights protection in Europe, as well as on institutional questions of the European Union. She is a PhD candidate at the University of Graz and currently completing her dissertation on secessionist movements in the European Union.

Theodor RATHGEBER

Theodor Rathgeber is a political scientist and holds a PhD from the Free University of Berlin. He is a lecturer at the Universities of Kassel and Düsseldorf, Germany, on human rights, international law and development policies, with a focus on indigenous and minority rights, and is a freelance consultant on the same subjects. He is observer to the HRC assigned by the German NGO network Forum Human Rights. He has published a series of articles on the Human Rights Council and contributed to the EYHR since its inception.

David REICHEL

David Reichel holds a PhD and is a researcher at the European Union Agency for Fundamental Rights (FRA). He works on statistics and surveys and is

responsible for managing FRA's work concerning artificial intelligence, big data and fundamental rights. He is a specialist in the analysis of international statistics and has published numerous articles, working papers and book chapters on issues related to migration and integration, citizenship and human rights.

Ewa SAPIEZYNSKA

Ewa Sapiezynska holds a PhD in social science from Universidad de Chile and works as Human Rights Officer at the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The ODIHR's programme she represents, 'Human Rights, Gender and Security', has gender-based violence in the OSCE region as one of its main topics. Sapiezynska has published on media sociology and has worked extensively on gender issues in Norway and Poland as well as in Chile, Colombia, Guatemala, Mexico and Nicaragua.

Alma STANKOVIC

Alma Stankovic is a project researcher and PhD candidate at the Institute of International Law and International Relations and University of Graz, where her work focuses on transnational governance, human rights, migration, and refugee law. She previously worked as a practising attorney for high level NGOs, including the Clinton Foundation in New York and Public Counsel Law Center in Los Angeles, where she conducted legal advocacy, policy development, and litigation on behalf of immigrants and persons living in poverty.

Vladislava STOYANOVA

Vladislava Stoyanova holds a PhD and is Ragnar Söderberg Associate Senior Lecturer at the Faculty of Law, Lund University, Sweden. Her research interests are in the area of international public law, human rights law, migration and refugee law. She is the author of *Human Trafficking and Slavery Considered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017). Research for her article in this book was partially conducted while Dr. Stoyanova was a visiting scholar at the Bonavero Institute of Human Rights, University of Oxford. She would like to thank Cathryn Costello, Annelen Micus, Kate O'Reagan, Stefan Theil and Zoe Davis-Heaney for their support during her stay in Oxford.

Christian STROHAL

Ambassador Christian Strohal is an Austrian diplomat with a long career in multilateral work, including Permanent Representative to the Organization for Security and Cooperation in Europe (OSCE) in Vienna and the UN Office in Geneva where he held, *inter alia*, the positions of Chairman of the Governing Bodies of the IOM and Vice-President of the Human Rights Council. Previously, he was Director of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE. Earlier functions include Ambassador for the 1993 Vienna World Conference on Human Rights, Director for Human Rights at the

Austrian Ministry for Foreign Affairs and Ambassador to Luxembourg. He was educated at the universities of Vienna and Geneva and the LSE, holding a Dr iur from Vienna, lecturing regularly at different institutions.

Agnieszka SZKLANNA

Agnieszka Szklanna, Dr, adwokat, MA (College of Europe-Natolin), is Secretary to the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe. Agnieszka studied law and applied linguistics at the Warsaw University. Since 2003, she has been a staff member of the Council of Europe (previously as a legal officer in the Registry of the European Court of Human Rights and then in the Department for the Execution of ECtHR Judgments). She lectured at Warsaw University, Faculty of Law (1999–2003), and at the Strasbourg University, Political Studies Institute (2012–2015), and regularly publishes on issues of ECtHR system, legal protection of aliens, relations between the European Union and the Council of Europe.

Ajla VAN HEEL

Ajla van Heel's work focuses on advancing gender equality and women's political participation. She led and contributed to the development of a number of publications and practical knowledge tools on gender equality in parliaments, political parties, and national human rights institutions. Prior to joining the OSCE, she worked with the International Organisation for Migration (IOM) and United Nations Development Programme (UNDP), mainly on combating trafficking in women and girls in the Western Balkans. Ms. van Heel holds a bachelor degree in international affairs from Princeton University and a master's degree in human rights from the University of Bologna.

Mirosław WYRZYKOWSKI

Mirosław Wyrzykowski is Professor of the University of Warsaw (ret.) and Human Rights Chair of the Faculty of Law and Administration. He was a judge of the Polish Constitutional Tribunal from 2001–2010. Furthermore, from 2011–2015, he was President of the Legal Sciences Committee of the Polish Academy of Science.