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Assessing the strategic use of the EU fundamental and human rights toolbox

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All errors remain the authors' own.

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Executive Summary

The report on 'Assessing the strategic use of the EU fundamental and human rights toolbox', which includes case studies on Hungary and Poland, Turkey, and Ukraine, evaluates the strategic use of the EU internal fundamental and external human rights toolbox. It builds on the previous report (FRAME Deliverable 14.1, forthcoming) which mapped the EU fundamental and human rights toolbox by identifying the concrete tools and providing different categorisations for them. The present report goes a step further and analyses what it means to use these tools in a strategic way.

As objects of analysis, three case studies were chosen focusing on three crisis situations affecting human rights in EU policies: the Polish-Hungarian constitutional crisis, the refugee crisis and the Ukrainian crisis.

The report starts with an introductory chapter describing the concept of 'strategy' and the related 'strategic use of tools' which the guides the analysis of the subsequent three chapters focusing on the three separate case studies. The 'strategic use of tools' is the use of policy tools that follows the EU strategic documents affecting human rights. Thus, the analysis of the 'strategic use' of the EU's fundamental and human rights toolbox would involve effectively implementing strategic/programmatic documents. The analysis of the three case studies builds around the concept of crisis understood as an extraordinary change of circumstances. Each analysis starts off with determining the toolbox that accompanies the relevant 'strategic document' prior to crisis. This may be referred to as long-term strategies. Then, upon the radical change of circumstances, this long-term toolbox must be adjusted if not completely changed. In the analysis offered by the three case studies, an attempt is made to determine whether the long-term tools have been implemented and what was the impact of the crisis on the use of tools.

The first case study of the report analyses the strategic use of the recently introduced 'Rule of Law Framework' (RoL Framework) addressing the internal violations of the values of the European Union by Member States. The constitutional crisis which broke out first in Hungary, and more recently in Poland, and the EU's responses thereto gave a good opportunity to examine and evaluate whether this particular tool in connection with others is capable of making a difference. By operating fundamental rights safeguard procedures, the EU's strategic objective is to protect the common fundamental values established by Article 2 TEU. So far, the protection of EU values has been guaranteed through existing mechanisms, such as Article 7 TEU and Article 258, 259, and 260 TFEU procedures, accompanied by remedies before the CJEU and the ECtHR. Nevertheless, the EU is reluctant to activate especially the so called 'nuclear option' of Article 7 TEU. The non- or rare use of the above mechanisms raises the question whether the re-thinking and/or a more strategic use of these existing tools is needed, or whether the toolbox needs to be enriched with new instruments. Faced with the Hungarian case, the EU chose for a new instrument and developed the RoL Framework in 2014. The Hungarian situation thus provided the impulse for the adoption of the new RoL Framework, but is is on 13 January 2016 that the European Commission decided for the first time to activate the Framework in relation to the situation in Poland, more in particular regarding the questions of the powers of the Constitutional Tribunal and the management of media. It remains to be

seen whether the RoL Framework will bring any actual change, for the procedure is currently on-going. The analysis conducted in the case study leads to the following conclusions: it is doubtful that the RoL Framework on its own is capable of bringing about change. In fact, this seems to be one of these instances where multiplication of tools, rather than exploitation to the fullest of the existing ones acts to the disadvantage of the fundamental rights toolbox as a whole. The case study emphasised also the lack of a comprehensive framework and that of preventive tools, which would help the EU to keep its Member States on the path of the three values enshrined in Article 2 TEU.

The second case study deals with the EU's response to the refugee crisis, with special regard to the EU-Turkey agreement. 2014 and 2015 have witnessed the unprecedented struggle of the European Union to provide an appropriate response to the arrival of hundreds of thousands of refugees from the areas of the Middle East (and beyond) affected by long standing conflicts. Whilst the statistics point to the fact that in fact only about 4% of the refugees displaced by the conflicts in the Middle East reached EU borders, the EU's response seems to be not only untimely but also insufficient. The response to be adopted started a heated debate both between the governments and at the level of international organisations. Importantly, the EU's response involved measures of internal and external policy – both of a much contested nature. The aim of this report's contribution is to assess the modalities through which the human rights concerns have been addressed in the EU's response to the refugee crisis and whether the corresponding tools at the EU's disposal have been used in a strategic manner. The focus is placed on external dimension of the EU migration policy, more particularly by the EU-Turkey arrangement. The chapter concludes that these measures reflect the long standing EU approach to the management of migration and refugees in particular. The short-term crisis response (as opposed to the possible long-term implementation of migration strategies), as this report finds, ended up neglecting the human rights of persons concerned. In the EU's response to the migration crisis, human rights are clearly the first items to be scrapped from the agenda. It seems that the refugee crisis reflects a lack of political will within the EU to hold strong to the human rights commitment but also a general lack of vision and willingness to pursue it as in the case of migration strategies which are on the table since the early 2000s.

The third case study of the report discusses the EU's actions in relation to the crisis in Ukraine. The challenges that Ukraine has faced over the last three years have generated a crisis impacting its internal political and economic stability as well as the peace, stability and security in Europe. A deteriorating human rights situation along with serious humanitarian implications characterizes the unstable Ukrainian context. The human rights at stake have basically been those affected by either the events in Kyiv from November 2013 to February 2014 and by subsequent developments in Ukraine which led up to the illegal annexation and occupation of the Crimean peninsula by the Russian Federation as well as the armed conflict affecting parts of the Donetsk and Lugansk regions. In addition, the human rights at stake concern the standards to be promoted and enhanced in Ukraine more generally, in line with the existing long-term domestic reforms. The multiple repercussions of this unstable context for the evolving relations between the EU and Ukraine entail the necessity to address the effects of the crisis on the existing body of EU human rights related policies in its external action. In this vein, the evolving crisis situation in Ukraine and the EU's responses thereto provided a

good opportunity to investigate and assess the complementary use of tools at its disposal to foster human rights and democracy throughout all its external actions.

The aim of this contribution is to evaluate whether the EU has strategically used its human rights policy tools to face the concrete crisis situation in Ukraine, either by taking a proactive stance or a reactive stance, in line with the programmatic policy documents that determine long-term EU objectives, specific priorities, and short-term actions in this policy area. The current EU engagement in Ukraine is analysed in view of the evolution of the EU-Ukraine relations within the Eastern Partnership and its main tool for bringing them closer together, namely the Association Agreement signed in 2014. The multi-faceted response of the EU to the on-going Ukrainian crisis from the perspective of its human rights implications is then examined in the context of the 'Maidan revolution' and the events in Crimea and Eastern Ukraine. Accordingly, the adoption of CFSP restrictive measures, the EU support to high-level diplomatic channels and further EU institutions' political initiatives are considered. Additionally, the EU's support of the Ukrainian reform process is taken into account, especially the implementation of the EU-Ukraine 'European Agenda for Reform'. The use of diplomatic tools available within the Eastern Partnership (EaP) and in multilateral forums is also evaluated, in particular by questioning whether the cooperation, interaction and synergy with other partners and institutions (e.g. OSCE, Council of Europe, United Nations) have been crucial (and inevitable) dimensions of the EU human rights policy agenda in the Ukrainian case. The relevance of the financial tools of this agenda is specifically considered as well. Within the framework of the EU's CSDP, attention is paid to the EU Advisory Mission for Civilian Security Reform Ukraine (EUAM Ukraine).

The case study highlights the insufficiency of diplomatic measures, which are effective only if followed by strong operational action. The EU has been, to a certain extent, an inapt actor due to its slow decision making and long reaction time. At the same time, the EU has developed strong bonds with other actors of the international community, seeking to exploit their established potential (see, for instance, the cooperation with the OSCE and the Council of Europe) and supporting them through its financial instruments. Nonetheless, in the context at hand (i.e. the economic and political crisis, the Russian intervention and annexation of Crimea, the armed conflict in the Donbass region), the EU struggles to assume a role as a leader in part because these situations coexist and must be addressed in differentiated manner whilst, at the same time, the EU must continue its long term support for the Ukrainian reforms agenda. The case study also highlights a number of shortcomings of the EU's toolbox, such as the sequencing of crisis response, or the inflexibility of tools which rarely allow for involving civil society – one of the strongest allies of the EU in Ukraine.

The overall conclusions to this analysis of the EU's strategic use of tools is guided by the following themes: European added value, consistency of strategies elements, coherence with the policy context, resources and efficiency, and implementability and effectiveness. All of the three case studies demonstrate how instrumental, on the one hand, the collaboration of the EU with other international organisations (and third countries) is, as is the coordinating role on the part of the EU. If the EU wants to keep consistency among the elements of its strategies, it should consider the policy field to which the strategy applies, the tools it is going to employ, the sequence in which these tools will be used

(sequencing), differentiation of the EU's action from other actors working in the field, and the economic return the strategy was to bring.

The three case studies also highlight the need for enhanced awareness of cross-dependencies and the inter-relations between the uses of various tools. From this perspective, a strategy in itself is a tool that fulfils numerous functions. As confirmed by all three case studies, the actual capability of the EU to protect and promote human rights in crisis situations hinges on the prior existence of the framework. Yet, this framework can be only created if there exists (1) the clear knowledge of both exigencies of a given context and human rights implications thereof, (2) awareness of cross-fertilizations between various policy areas and finally (3) the ability to bring coherence to the picture (which is the purpose of adopting a strategy). Coherence means in this context that the European Union acts together with its Member States regardless of whether the latter act within the scope of EU law or not.

The discussion of the allocation of resources brought up an observation in relation to the realisation of strategies. Especially in the crisis context, what comes to the forefront is the need for a quick response to the human rights challenges. This consists in ready deployment of resources in the field. In this regard, the case study on migration indicates that the facilitation of the use of resources comes too often too late.

In relation to the strategies' implementability, the misunderstandings regarding the form and use of instruments and a lack of willingness to collaborate for their implementation could be observed. The widely publicised lack of solidarity between the Member States to provide a response to a refugee crisis is the first example. The RoL Framework, on the on the hand, encountered political opposition from within the EU as the Council heavily criticised the enhanced role it assigns to the Commission. The Dutch referendum rejecting the EU-Ukraine agreement voiced the opposition to the further integration of the two entities, including with regard human rights promotion in Ukraine.

The general conclusions echo the preliminary conclusions drawn by FRAME Deliverable 15.1 (forthcoming) in relation to coherence, implementation, and effectiveness. It is clear that the existence of strategy matters, and could be considered as a guardian of coherence. Yet, its content will be nothing more than declaratory if not duly implemented and its effectiveness evaluated. In this sense, the present report adds to the understanding of what makes a strategy implementable and effective. The EU human and fundamental rights policy would benefit greatly from increased coherence, effectiveness and enhanced implementation of the policy tools. In particular, there exists a gap between the strategies concerning human rights and their implementation by the European Union, and those of the Member States. An important issue with regard to the EU's commitment to human rights is the lack of clear, visible and accountable leadership at the top of the European Union institutions. It is not surprising that human rights leadership is hardly visible at Member States' level. This means that no matter how many strategic documents exist, the tools will tend not to be used in strategic terms but rather on an ad hoc basis.

The case studies are not good examples of the strategic use of fundamental and human rights tools for preventive purposes. They show that the EU tools deal with consequences more than they prevent fundamental and human rights violations. It is admittedly difficult to foresee crisis situations, nevertheless, this report evidences the EU's tendency to adopt a reactive attitude even in situations that have been similarly experienced in the past, such as for example the Hungarian and the Polish constitutional crisis.

If the strategic use of human rights tools by the EU must be such that it follows the objectives set out in strategic documents, the research included in this report and the conclusions of the workshop on the topic that took place in Venice on 5 and 6 May 2016 point to a rather wide gap between what the strategy sets out to accomplish and the actual results delivered through the use of the tools. It must be recognised that, whilst one can desire strategic use of tools for human rights, the actual delivery is patchy and sometimes involves unpleasant choices. Likewise, it is difficult to have complete knowledge of all the stakes associated with a crisis situation, which makes the recommendations as to strategic use of tools difficult if not impossible to make. This report has evidenced that the EU was not able to fully implement its strategies, at least not without some negative collateral effects. At the same time, it is a positive thing that the strategies and the toolbox are available, even if implemented to a larger or smaller degree.

List of abbreviations

AFSJ	Area of freedom, security and justice
CSOs	Civil Society Organizations
CFR	Charter of Fundamental Rights of the European Union
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
CHR	Commission on Human Rights
CJEU	Court of Justice of the European Union
COHOM	Human Rights Working Group
CSDP	Common Security and Defence Policy
CSR	Corporate social responsibility
CoE	Council of Europe
DCI	Development Cooperation Instrument
DG	Directorate General
DROI	European Parliament's Subcommittee on Human Rights
EASO	European Asylum Support Office
EaP	Eastern Partnership
EC	European Community
EEM	Electoral Expert Mission
EDF	European Development Fund
EEAS	European External Action Service
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
EOM	Election Observation Mission
EU	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIDHR	European Instrument for Democracy and Human Rights
ESCRs	Economic, Social and Cultural Rights
FAC	Foreign Affairs Council
FRA	Fundamental Rights Agency
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GSP	Generalised System of Preferences
HR	High Representative for Foreign Affairs and Security Policy
HRBA	Human rights-based approach
HRC	Human Rights Council
HRD	Human Rights Defender
ICT	Information and Communication Technologies

ICRC	International Committee of the Red Cross and Red Crescent
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
IHL	International Humanitarian Law
ILO	International Labour Organization
IHRB	Institute for Human Rights and Business
LAS	League of Arab States
LGBT	Lesbian, Gay, Bisexual, and Transgender
NAP	National Action Plan
NHRI	National Human Rights Institution
OHCHR	Office of the High Commissioner of Human Rights
OECD	Organisation for Economic Cooperation in Europe
OSCE	Organization for Security and Cooperation in Europe
OIC	Organization of the Islamic Conference
PCA	Partnership and Cooperation Agreement
SAA	Stabilisation and Association Agreement
SIS	Schengen Information System
TEU	Treaty on European Union
TFPC	European Police Chiefs Operational Task Force
TFTP	Terrorist Financing Tracking Programme
TFUE	Treaty on the Functioning of the European Union
UN	Organisation of United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNGP	United Nations Guiding Principles on Business and Human Rights
UNGA	United Nations General Assembly
UPR	Universal Periodic Review
WP	Work Package

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I. Introduction

A. The EU values in a time of crisis

This report focuses on three case studies, which illustrate three different crisis situations. In each of these long term fundamental and human rights policies have had to be adjusted in order to respond to the pressure resulting from a radical change of circumstances. Both long-term policies and the short-term 'crisis' response take place in a context governed by the strategies, formally embedded in strategic political documents. These are subsequently implemented with the use of tools at the disposal of the EU institutions that are either specified in the strategic action plans or had belonged to the toolbox.

The three case studies addressed in this report confirm that the answer to the question as to whether the European Union is dealing well with human rights concerns in crisis situations cannot be answered in detachment from the more profound and abstract understanding of the intrinsic design and construction of the European project. If the EU is to be treated as a home to many – both citizens and non-citizens - then what kind of a home is it to be? How should it be constructed? Should it be a wooden and light made up of modules or a solid concrete monument? And then, in both cases, is the European Union to be an open house truly welcoming everybody with their diversity and potential? Or is it on its way to becoming a real Fortress Europe with a protective eye turned outwards and preserving inward attitude? Are the existing strategies sufficiently reflecting the approaches? And is the European Union following the paths indicated by the strategic documents?

These questions become very valid when the crisis appear because every single one of such radical change of circumstances shatters the foundations of the European Union which are, at least in Treaty terms, the EU's very values consisting of human rights, democracy and the rule of law. In responding to crisis situations one central question emerges: does the EU treat human rights as a side issue or as the central piece of its actions? Which tools are most apt to fix the problem? Would such intervention require groundwork, or less profound intervention?

In general, the tools are used for two purposes: either to induce compliance or to promote the EU values. FRAME research confirmed vast overlaps in the use of the tools leading to the lack of transparency and coherence. On the other hand, a number of gaps have been identified predominantly with reference to the knowledge based both on human rights situations as well as to the actual impact of the planned and the use of tools on human rights abusive situations.

The first case study discussed in this report analyses the strategic use of the recently introduced Rule of Law Framework (RoL Framework) addressing the internal violations of the values of the European Union. Despite the fact that the EU has had tools at its disposal before for the promotion of fundamental rights values and the rule of law, it opted for the adoption of this new tool to complement others. In this way, the EU has been fine-tuning its fundamental rights safeguarding toolbox. The constitutional crisis first in Hungary, and recently in Poland, and the EU's responses

thereto give a good opportunity to examine and evaluate whether this particular tool in connection with others has made a difference.

In the second case study we examine the impact of the mass influx of refugees (from Syria in particular) on the EU migration policy, examining the EU-Turkey political arrangement. In this context the nexus between the migration policy understood broadly (unlike treating it as a purely internal matter) as both internal and external comes to a forefront. At its core stands the use of EU tools to balance the security concerns with human rights and migrants' hardship.

The final case study examines the imminent EU neighbourhood setting where a long standing policy towards Ukraine has suffered from a backlash in the wake of the violence committed during the Maidan protests, or the subsequent developments and events which led up to the annexation and occupation of Crimea by the Russian Federation as well as the armed conflict affecting the Donbass region. Accordingly, the EU's multi-faceted response to the on-going crisis in Ukraine is questioned from the perspective of the basic need to deal with EU's growing human rights and humanitarian implications as well as to support democracy and the rule of law in this torn state.

Each of the case studies presents the crisis and examines the response from the perspective of centrality of values in the use of tools used to address the rapid changes of circumstances. The focus in the analysis is placed on tools and the extent to which they correspond to strategic assumptions of the EU policy as formally embedded in the programmatic documents of the EU.

B. Addressing the crises – tools and strategies

The EU is in possession of a vast number of tools designed for use in its fundamental and human rights policies.[1] These can be classified as legal, political, diplomatic, financial, and operational. Together they make up a toolbox from which the EU institutions and leaders can draw to address human and fundamental rights challenges. There will be many tools used at a given time – some in more purposeful manner than the others. Yet, as is frequently the case, it is not the quantity of tools but their quality that will decide on the success of the whole endeavour.

The actual force of the toolbox depends to an extent on the awareness of how it is to serve the attainment of policy objectives. In this context the tools are considered as the chief vehicles for delivery of policy objectives to be used in a conscious manner following the pre-set ideas. This conscious use of tools follows a plan of action. Both the manner the objectives are operationalized and the way tools are to serve their attainment are usually gathered in programmatic documents epitomising the strategy for human and fundamental rights of the European Union.

Secondly, the strength of the toolbox will be reflected by its capacity to respond to pressures from within the European Union and to advance (if not attain) the short and long term objectives.

[1] Karolina Podstawa, Veronika Haasz and Viorica Vita, 'Report Analysing the Findings of the Research of the Other Work Packages on Policy Tools' FRAME Project Work Package No. 14 – Deliverable No. 1 <http://www/fp7/frame.eu/reports/>.

Simultaneously, the toolbox should allow sufficient flexibility to respond to the radically changed external circumstances that will be here denoted as 'crisis'. In other words (and somewhat paradoxically): if the toolbox constitutes the chief means through which the EU is to realise the 'plan', there must be also space to accommodate the human and fundamental rights challenges when things do not go according to this plan. In the ideal setting, the strategy behind the use of tools should foresee both of the above situations.

In order to render the complex image simpler, yet as complete as possible, we will perform two types of analysis. We shall first focus on three case studies illustrating the three areas of crises of the EU human rights policies: the Polish and Hungarian constitutional crisis, the refugee crises, and the Ukrainian crisis. In each of them we will focus on the use of the EU fundamental and human rights toolbox prior to the change of circumstances, the human rights implications of the altered setting and the manner in which thus formulated challenges are addressed by the EU fundamental and human rights tools. We will examine both the situation 'according to the plan' and the situation once the crisis has kicked in. We will analyse the crisis implications forcing the EU to take a more nuanced stance, sometimes loosing also the political momentum or will to attain the previously set objectives, or quite the opposite: regaining the impetus and starting to act. In both scenarios one would expect the EU to have its tools oiled and sharpened – ready for use.

C. Note on methodology and structure

The three case studies in this report are based on common foundations: the conceptual framework we set in the first substantive chapter below. This conceptual framework introduces our analysis by identifying the sources of the EU's strategic choices and modalities of action. In doing so, it considers the importance of the need for a strategy and the added value of its presence. At the same time, the initial chapter should be considered as an intellectual map of the subsequent analysis rather than a strict framework within which the analysis must fit. Its purpose is to identify the form of strategies, and questions relevant when addressing the strategic use of tools.

Secondly, we will focus on the three main pillars of our analysis: the three case studies. Inasmuch as possible we attempt at conducting the analysis in all the three case studies following the analogous steps. In each of the case studies the investigation is initiated by identifying strategic human rights objectives that had been (and sometimes have been) pursued prior to the beginning of the critical crisis situation. The tools adopted to address the human rights concerned are identified and evaluated. Subsequently, the circumstances of the crisis are described and their human rights implications. The tools available for use in response to the crisis are identified as the next step. Their strategic use value is examined and evaluated. Finally, conclusions are drawn with recommendations for the future.

As the base of this project, each of the authors conducted desk research which subsequently was complemented, if possible, by information obtained through interviews with policy makers. The interviews have always been semi-structured, usually in the conditions of the Chatham House rules thus permitting only for a very basic identification of public officials.

It must be emphasised that the three case studies in this report undertook to follow the very rapidly evolving situations. The authors have assumed as a final date for their research 15 May 2016, yet are fully aware that many observations presented would greatly benefit from the update following the most recent developments.

II. 'Strategic use of tools' - setting the conceptual framework*

A. Introduction

The word 'strategy' has become a buzzword across the European Union policies – it ornaments a vast number of policy documents that contain the basic assumptions and plans of actions to be undertaken in a given policy field.[2] These partly political and partly technocratic[3] declarations constitute a direct impetus for subsequent legislative and operational initiatives of EU institutions. As such they are the foundations for policy-making processes and attract vivid attention of various stakeholders, scholars included.

Whilst there is no doubt that awareness and adoption of strategy brings a significant added value to a polity,[4] there seems to be little reflection going on as to what a strategy actually means as a concept. From a technical point of view: what components should a strategy have? And then: will that understanding affect the use of tools? Can one determine what strategic use of human and fundamental rights tools imply?

In this section we set out to unpack the concepts of 'strategy' and the connected 'strategic use of tools'. We will consider whether strategy should be considered just as a mere plan of action for the attainment of a defined set of objectives or whether mitigating between human rights and other objectives requires some other considerations. Can one distinguish categories of tools that can better serve better the 'strategic use'? Does adopting a strategy alter the actual policy making and implementation? Finally, does an adoption of strategy add value to a mere performance of the European Union institutions 'according to the plan'?

Posing of the above questions constitutes the first step in the analysis of the strategic use of tools in the EU human rights policies. We shall proceed in three steps. Having revisited the discussion of the

* This chapter was written by Dr. Karolina Podstawa.

[2] See, examples from the vast majority of fields: Beata Faracik, 'Human Rights and Democracy at the Heart of EU Actions, I. E. 'EU Strategy for Human Rights in External Action'; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', 25 October 2011, COM(2011) 681 final. European Commission and European External Action Service, 'New EU Global Strategy', <http://www.globalstrategy.eu/> 15 March 2016.

[3] As focused on a specific policy field determining sometimes very minute details of actions to be undertaken.

[4] For a discussion of benefits of strategy and its form, see for instance:
Pascal Vennesson, 'Competing Visions for the European Union Grand Strategy' (2010) 57 European Foreign Affairs Review 57.

toolbox as performed in Report 14.1[5], we will examine the concept of strategy. Finally, we shall explore what it means to use the tools in a strategic manner. The following theoretical considerations will form the common ground for the subsequent case studies analyses.

B. Tools

1. The toolbox

The analysis of this study builds on the findings of FRAME report 14.1 entitled 'Report analysing the findings of the research of the other work packages on policy tools'[6] which offers the mapping of tools available to the EU in its internal and external human rights policies. In this report, we consider tools to be 'the actual means and/or devices at the disposal of the government to advance governance goals/policy agenda'.[7]

In FRAME report 14.1 we resorted to a number of classifications, which can prove useful when analysing how specific tasks as set by programmatic documents have been fulfilled. Some of these classifications – especially the division between internal and external policy tools will be maintained in the subsequent analysis. The below table presents the collective presentation of the tools used in FRAME report 14.1[8] (for the sake of simplification the column referring to various categorisations of the tools has been deleted).

Table 1: Organisational Logic of Toolbox Presentation[9]

Internal	External	Function
Policy documents (e.g. Stockholm Programme)	**Policy Documents** (e.g. Strategic Framework and Action Plan)	**Objective-setting**

[5] Podstawa, Haasz and Vita.
[6] Ibid.
[7] Michael Howlett, Michael M. Ramesh and Anthony Perl, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Oxford University Press 2003) 87, as cited in: FRAME Deliverable 12.1, op. cit. 1-2.
[8] Ibid, 40.
[9] Ibid.

Sources of law (distinction according to form and content; focus on human rights specific and non-specific tools, accompanied by the soft law instruments)	**Sources of law** (multi- and bilateral international agreements, unilateral instruments adopted by the EU accompanied by the soft law instruments)[10]	**Concretisation of the objective through documents**
Specific implementation/operational instruments characteristic for internal fundamental rights policy Open Method of Coordination	**Specific implementation/operational instruments characteristic for external human rights policy** (e.g. tools available on international forums)	**Process towards objective attainment**
Judicial and other remedies – the EU Fundamental Rights Protection System (courts and other remedies)	**Treaty enforcement mechanisms** (i. e. CARIFORUM Dispute Settlement)	**Enforcement**
Tools used to measure or evaluate progress on human rights (qualitative reports, indicators, impact assessments)	**Tools used to measure or evaluate progress on human rights** (qualitative reports, indicators, impact assessments)	**Checking against the advancement of policy objectives**

From the perspective of this report, the objective setting policy documents are of importance as these are formally strategies and as such always serve as a starting point of analysis of any policy field. Given the limited number of policy areas dealing solely with fundamental or human rights, one relies on these documents to position human rights in a given, non-human rights, policy field. The table points to policy documents as the instruments giving the initial impetus for working on conceptualisation and operationalisation tools. It is on the basis of these policy documents that the remaining instruments are adopted or adjusted in fulfilment of strategic objectives.

In this analysis the policy documents containing strategies for fundamental and human rights are to be the first points of reference. The indication as to how other tools are to be used on the basis of these documents permit us to pose first notions for further considerations – that of the basic function of tools in relation to a human rights policy challenges.

[10] Whilst the soft law instruments (arguably with the exception of the guidelines and recommendations mentioned in Art. 288 TFEU) cannot be classified as sources of law, they often accompany the legislative measures in particular directives. As such they should be considered together with such measure if only for the assessment of the EU's attempt at providing guidance for the Member States in their implementation of the EU instruments.

2. Classifications according to the use of tools

Human rights challenges require essentially two types of actions: those which set the ground for the implementation of a right, and those which provide responses to the abuse, be it on systematic or individual basis. In other words, the tools can be of a proactive or reactive nature.

If we are to keep the metaphor of the 'toolbox' as the organizing feature, the use of tools can involve:

- 'construction' tools used for the realisation 'from scratch' of a specific policy objective (for instance negotiation of a new international treaty) [proactive],
- 'adjustment' tools used to fine tune the existing solutions and to enhance the effectiveness of the existing ones (for instance, the constant improvement of the implementation record of non-discrimination directives) [reactive and proactive]
- 'reparation' tools used to react to a crisis situation where human rights standards are threatened or have been violated (for instance adoption of sanctions) [reactive].

This brings us to the consideration as to what it means to use such tools in a strategic manner. The question is whether the strategic use of tools in proactive and reactive settings may require, in fact, different strategic approaches. One could claim that the long-term strategy would be by definition proactive. The short term strategy will include the response to the current events and challenges. Furthermore, the proactive tools may set the foundations of a framework, which will be subsequently used in reaction to human rights violations' inducing events. The table below represents the above considerations and relations.

Table 2: Proactive vs. reactive tools[11]

	Function	Types of objectives	Examples
Proactive tools	Construction, Adjustment	Long term	Continuous collaboration, financial support, creating governance tools permitting to attain specific objectives (*i.e.* Strategy for the effective implementation of the Charter of Fundamental Rights[12], Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments[13]), etc.
Reactive tools	Reparation	Short term	Implementation of previously existing framework (such as activating conditionalities), tools designed specifically to exert pressure

[11] Ibid.
[12] 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573 final.
[13] European Commission, 'Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 Final' <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST 10034 2011 INIT>.

	(especially restrictive measures), providing humanitarian relief assistance, etc.

Against the background of this additional classification one cannot help but wonder as to what happens when external circumstances change the approach from proactive to reactive or *vice versa?*

The three case studies collected in this volume focus on extra-ordinary events that because of their negative human rights impact put specific policy measures and policy fields in the spotlight. These events affect the use of tools, sometimes altering the logic from proactive to reactive, or simply exerting political pressure to implement the existing proactive tools. Which implications does the change of setting and thus enhanced use of tools in a given logic have for human rights? How does this change affect the implementation of various measures? These are further questions to guide us in the analysis below.

C. The EU strategies for human and fundamental rights

a) Defining 'strategy'

'Strategy', as with any other concept, does not have clearly determined contours. On the contrary, depending on the study area the signified can include various aspects altering the 'density' of the concept – *i.e.* the number of components of formal and substantive nature. This section presents the 'strategy' at its core and builds on its basic understanding it to take into consideration aspects that come to the forefront in literature dealing with the subject in broader terms.

The concept of 'strategy' as described in this chapter is informed by observations coming from various disciplines. Strategy in relation to the EU has been described vastly *inter alia* in the context of security, where the European Union's position is weighed *vis-à-vis* other major powers.[14] These accounts shed light on the activities of the European Union in its external relations; however, they do not provide information as to what – in crude and down-to-earth terms – constitutes strategy. Here the management literature offered recourse by outlining the basics of strategy-making and the constituent conceptions and simple technical steps that should be taken when designing and implementing strategies.[15] Finally, certain insights as to the understanding of strategy can be found in legal theory and in its law and economics branch in particular.[16] For instance, game theory is based on the premise that strategic considerations are necessary because of the essentially competitive nature of social interactions. Similarly, public choice theory may add a certain layer of understanding of what could constitute strategy from the point of view of legislative processes and by adopting specific measures.[17] Beyond this threshold the utility of law and economics is limited for our purposes.

For the above reasons, we started an inquiry as to what constitutes a strategy from the very basics trying to draw from the mentioned disciplines elements that can prove useful from the perspective of the evaluation of the use of tools. It must be noted that especially in the context of management studies, there exist also authors who dispute the utility of the top-down approach to strategy as a "theory about how to gain competitive advantage". These authors, in turn, emphasise the importance

[14] Vennesson; Michael E Smith, 'A Liberal Grand Strategy in a Realist World? Power, Purpose and the EU's Changing Global Role' (2011) 18 Journal of European Public Policy 144 <http://dx.doi.org/10.1080/13501763.2011.544487>. In this context the IR scholars discussed the aspects of EU power also from the human rights point of view: Ian Manners and Københavns universitet. Center for Freds-og Konfliktforskning., *Normative Power Europe : A Contradiction in Terms?* (COPRI 2000) <http://www.diis.dk/graphics/COPRI_publications/COPRI_publications/publications/workingpapers.htm>; Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 International Affairs 45; Sonia Lucarelli and Ian Manners, *Values and Principles in European Union Foreign Policy* ([1st edn, Routledge 2006).

[15] In line with the managerial approaches school of thought.

[16] Baird Douglas, Robert Gertner and Randal Picker, *Game Theory and the Law* (Harvard University Press 1994); Thomas f Cotter, 'Legal Pragmatism and the Law and Economics Movement' [1996] Georgetown Law Journal; Richard Posner, *Economic Analysis of Law* (5th ed, Aspen 1998).

[17] Daniel Farber and Philip Frickey, *Law and Public Choice* (Chicago University Press 1991).

of individual managers whose punctual high and mid-level managerial decisions constitute "pixels of managerial influence" engaged in the continuous reflexive process of strategic development.[18]

(1) Introductory Observations

The Oxford Dictionary Online defines the term 'strategy' as 'a plan of action designed to achieve a long-term or overall goal'.[19] In its basic format strategy consists, therefore, of the identification of long-term objectives and the drafting of a plan of action that permits to attain these objectives. Still, 'plan' as a concept does not account for the context, resources or possible obstacles to be overcome when pursuing specific objectives. The working definition used by Freedman in his 'Strategy – A History' incorporates these other aspects covered by the term. Freedman recalls a 'contemporary definition', which 'describes [strategy] as being about maintaining a balance between ends, ways, and means; about identifying objectives; and about the resources and methods available for meeting such objectives'.[20] Again, whilst the objectives and means remain unchanged, further notions appear: resources and methods as well as the need to balance them out in pursuit of pre-determined goals.

Before we focus on the multitude of components of strategy, let us stop for the moment to consider the recurrent theme in the concept of 'strategy' – the objectives. Strategies are drafted to address a long-term or a general goal. This means that this goal must be already clearly identified prior to the drafting of the strategy or that it is made more precise through the designing of strategy. In other words, the strategy may address a pre-defined objective, or determine a priority on the basis of the existing range of objectives. This, in the context of our analysis brings to the forefront the importance of Treaty objectives for the EU fundamental and human rights policies. Internally these are defined in articles 3 TEU whereby the EU's values are to be promoted (section 1) and the fundamental rights of EU citizens are observed within the delivered Area of Freedom, Security and Justice (section 2 in connection with Article 67(1) TFEU). Externally the EU is to uphold and promote its values (section 5) and adopt policies and actions in order to 'safeguard its values, fundamental interests, security, independence and integrity' (Article 21(2a) TEU) and 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (Article 21(2b)TEU).

Secondly, strategy is about creating a plan of action that will lead to the attainment of the identified objectives. Even though a notion of 'an action' seems straightforward there are a number of questions that must be considered. Setting a plan of action implies that the strategy-maker' prior to setting the strategy, did consider what already had been done and what still should be done. From the

[18] Yusaf H Akbar and Maciej Kisilowski, 'Non-Market Strategy in Eastern Europe and Central Asia' in Thomas C Lawton and Tazeeb S Rajwani (eds), *The Routledge Companion to Non-Market Strategy* (2015).

[19] Oxford Dictionary Online <http://www.oxforddictionaries.com/it/definizione/inglese/strategy> accessed 12 February 2016. For the history of the concept see: Lawrence Freedman, *Strategy - A History* (Oxford University Press 2013). The term was used for the first time in Ancient Greece around 508 BC with reference to *strategos* who was a person with the army or entrusted to lead an army and it was used by ten generals on the war council. Similarly, in the Asian context, the Chinese general Sun Tzu credited with the authorship of the Art of War used the similar concept and diffused the ideas as to the effective leadership, see: Sun Tzu, *The Art of War* (Oxford University Press 1971). The diffusion of the concept took place in the Enlightenment period reflecting the belief that any form of human activity can be shaped by use of reason (see: Freedman op. cit. Preface xii).

[20] ibid Preface xi.

perspective of the toolbox, in other words, the strategy-maker must have evaluated the prior use of the instruments and, secondly, the available tools which may help to attain the identified objectives in the future. Thirdly, the strategy-maker must have taken into consideration the limited resources that are usually at her or his disposal. Fourthly, the time factor must be considered – in other words, both the resources are limited at a given point in time, and the need for a strategy is also limited in time.

(2) Objectives

Strategy is adopted in order to determine the means and methods to achieve long-term objectives. In the EU context the objectives of the EU are outlined in the Treaties[21] and subsequently concretised through the work of the European Council and the Council of the European Union who in collaboration with the European Commission adopt the conclusions serving further determination and specification of strategic instruments.[22] In particular, the strategies serve as instruments to bring to the surface considerations of a horizontal nature, such as those concerning the attainment of coherence, as discussed elsewhere within the FRAME project.[23]

One must remember that adoption of strategic instruments is not only about outlining the basic steps for reaching of goals. In the words of Freedman, strategy 'is about getting more out of a situation than the starting balance of power would suggest. It is the art of creating power'.[24] Viewed in this way, the multiplication of EU strategies mirrors the EU's own self-reflection about what type of an entity it aspires to become, as well as the role it is to take *vis-à-vis* other international actors and its own Member States. In other words, when speaking of the importance of objectives for the determination of strategy, we should consider two aspects: the formal rooting of policy making in the constitutional documents of the European Union, and the capacity, on the part of the EU, to move beyond the formal legal structure and to create meaning beyond legalistic constraints. These two considerations are reflected in the discussions of the value of objectives for the constitutional structure of the EU and of their impact on the EU's activities and the call for the clear expression of the role of the EU in international affairs.

The EU objectives build on values, which have fundamental significance and precede objectives. In fact, the former are embedded in article 2 TEU whilst the latter are embedded in Article 3 TEU.[25] In the words of Larik '(t)he order of provisions, of course, has no bearing as such on their legal weight.

[21] Article 3 TEU for general EU internal and external dealings, Article 21 TEU for the EU Common Foreign and Security Policy (CFSP). 'Consolidated Version of the Treaty on European Union [2012] OJ C 326/13' <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>.

[22] Podstawa, Haasz and Vita., op. cit. 40-43.

[23] Tamara Lewis and others, 'Report on Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies' [2014] FRAME Project Work Package No. 8 - Deliverable No. 1 <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>.

[24] Freedman. Op. Cit. Preface xii.

[25] Joris Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' [2014] International and Comparative Law Quarterly 1, 11.

Nonetheless, it symbolises a paradigm shift from a legal entity that, in the first place, exists to strive for certain goals to one which, above all, expounds what it stands for'.[26]

In fact, the objectives refer us back to the principles of *Kompetenz-Kompetenz* of international organisations and the *Zielbedarf* of Hans Peter Ipsen as pointed out by Larik.[27] In Larik's analysis he also evokes Pescatore's traditional approach to Treaties as being entirely imbued by teleology, and he links it to Weiler's observation about the EUs nascent 'thick constitutionalism'[28]

> As the legal order of the Union 'thickens' into one with more complex features, objectives have come to coexist with a variety of other 'constitutional principles' in the law of the EU. […] (T)he objectives have lost their original function. […] Today the objectives of the Union no longer determine the limits of the powers of the Union or call for self-perpetuating deeper integration. Instead, they oblige the institutions to continuously pursue these objectives in the exercise of their powers and may serve as an interpretative lens favouring legal arguments pushing for the marginal extension of power, the limit of which were not entirely clear and need judicial clarification.[29]

This observation is very valid from the perspective of our attempt to understand the way strategy builds on the existing legal and political framework. It follows from this observation that objectives should be simply realised but in themselves they should not be considered a threat to the EU's by now established constitutional structure. The objectives should not be perceived as pertaining to establishing the ultimate goals of the EU project.[30] Against this background, distinction must be made

[26] Ibid 17. This discourse counters the usual approach to values as portrayed in literature. See, for instance Morten Varju's account on the perception of EU human rights policy which is clear in the reading of scholars: 'Human rights as general principles of EU law have, using an expression coined by Miguel Maduro a 'double constitutional life' in the EU. They contributed to the consolidation of the EU constitutional order by offering stability and restraint, in particular, by introducing a rights language and an avenue of control of EU legislative and administrative action. They filled the gaps in the EU constitutional framework and offered solutions when common principles were needed to be developed for EU governance and administration. Their flexibility, however, also enabled human rights to contribute to the construction and development of the EU polity and accommodate demands arising in the process of European integration. [...] The right to effective judicial protection as a general principle of law is linked both to the narrower constitutional role of human rights in the EU and to considerations arising from the context of effective EU governance and the effective participation of national courts in the application of EU law.' Marton Varju, *European Unioin Human Rights* (Edward Elgar 2014), 11–12.

[27] Larik, 3.

[28] Ibid, 4.

[29] Ibid.

[30] See, in particular, Larik's discussion of flexibility clause Article 352 TFUE: 'It would be misguided, however, to consider this as evidence that the Union's objectives, in their own right, today still serve as the outer limits of its powers. It is not the objectives that create competences here by virtue of their own legal force, but the special procedure established in the Treaties by virtue of the flexibility clause. While used generously in the past, at a time when there were no comprehensive competence catalogues, both the case law of the Court of Justice and the Lisbon reform have endeavoured to circumscribe its use. In Opinion 2/94, the ECJ stressed that this clause 'is designed to fill in the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. It cannot, at any

between the pursuit of objectives and the of some 'final' future form of the shape of the Union.[31] Integration is not an aim in itself, but the achievement of specific goals through integration is. Integration in this view should be understood as one of many ways of pursuing certain objectives.[32]

Transferring this summarised discussion into the realm of the EU human rights policies, one must ask: where are the human rights objectives to be found in the treaties? Surely, if an objective is to promote the EU values, they can be found there. In fact, whilst article 2 TEU stipulates that

> [t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In addition, we must recall Article 6(1) TEU, which constitutes the chief reference point for the establishment of the content of the core values inasmuch as the EU fundamental rights are concerned. In line with its provisions, these values are further concretised in the Charter of Fundamental Rights and to be interpreted in line with the provisions of Title VII of the Charter and thus adequately taking into consideration the European Convention of Human Rights and the constitutional traditions of the Member States (Article 52 CFR).

It seems, however, that the maintenance of the EU, founded itself on these values is also a precondition for the fulfilment of other objectives. Clearly, the Treaty pronouncements are somewhat detached from the EU's realisation of human rights policies and do not evoke in any ways the means through which the pursuit of objectives is to ensue within constitutionally established limits of conferred powers (to use the language of Article 5(1)TEU which delimits the list of EU competence thus modalities of attaining specific objectives). Still, as it was mentioned above, there is space for the EU's added value beyond the predetermined limits. This space lies both in the means or tools through which the EU pursues its objectives and in the focus it places on specific areas.

This space can be even more meaningfully filled in the realm of EU international relations. There, scholars have devoted a fair amount of attention to the concept of a 'grand strategy'. In the words of Michael E. Smith 'grand strategy' should be thus understood from the point of view of international relations:

> [i]t involves co-ordinating all of the goals and assets of a given polity (Gray 1999: 54), such as a state. The concept of grand strategy also addresses both peacetime and wartime activities to protect a state's vital interests (Kennedy 1991: 2–3). At a minimum, these

rate, serve to effect a disguised amendment of the Treaties or upset any of its features deemed 'of constitutional significance.' ibid 22.

[31] ibid 24–26.

[32] ibid 26.

> core or vital interests would include physical security, economic prosperity and some degree of value projection (Deibel 1992).[33]

Grand strategy denotes, therefore, a comprehensive vision of what the EU should be setting the threshold for compliance assessment of EU actions. The determination of EU's approach to values in this context resonates the general understanding of the role values should play vis-à-vis other interests. Ideally, the remaining policy documents should follow grand strategy in this respect.

It is pertinent in the context of discussions of grand strategy that the control of the interests lies with the actors involved. In classical accounts these would be states. The European Union, however, is an extra-ordinary actor in this context as it was delegated vast areas of state sovereignty. At the same time, it maintains strong characteristics of an international organisation with autonomous legal order making it a unique entity against comparable ones in international legal setting as emphasised repeatedly by the Court of Justice of the European Union.[34]

In the fields of conferred power the EU can act either fully independently (area of exclusive competence) or together with the Member States (area of shared and coordinating competence, depending on the conferral of competence). Somewhat counter-intuitively, however, these are not the areas in the EU context where the term strategy was first used. On the contrary, the first conscious and broader discussion[35] of the EU's strategy took place in relation to the 2003 Security Strategy, and thus outside of the EU core powers.[36]

> Moreover, the EU's attempt to redefine (or broaden) the notion of 'security' well beyond traditional territorial defence […] means that a military-centred approach to grand strategy will be lacking in terms of serving as a blueprint for joint action among EU member states. In a broader sense, one might also argue that grand strategy is really about remaking the world in accordance with the EU's own values: to make war not just unlikely but unnecessary, and to make the world safe for European values and interests.[37]

The counter-intuitivism disappears if one considers that it has been the EU's conventional manner to broaden its powers by colonizing the notions, which, according to the black letter, would not have belonged to its realm of actions. This is one of the examples of how the EU uses the space between the black letter basis and the means it has at its disposal.

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[33] Michael E Smith, 'A Liberal Grand Strategy in a Realist World? Power, Purpose and the EU's Changing Global Role' (2011) 18 Journal of European Public Policy 144 <http://www.tandfonline.com.ezproxy.eui.eu/doi/abs/10.1080/13501763.2011.544487#aHR0cDovL3d3dy50YW5kZm9ubGluZS5jb20uZXpwcm94eS5ldWkuZXUvZG9pL3BkZi8xMC4xMDgwLzEzNTAxNzYzLjIwMTEuNTQ0NDg3QEBAMA==> accessed 18 March 2016. 145.

[34] See: Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351.

[35] Which is not to say that the EU did not possess strategies prior to these date.

[36] European Security Strategy. A Secure Europe in a Better World. The European Council reported on the implementation of the strategy in 2008: Report on the Implementation of the European Security Strategy: Providing Security in the Changing World.

[37] Ibid, 146.

In fact, the discussion of the EU's strategy in general terms started with the need to in the first place determine what power the EU has at its disposal in international relations, whether what it can represent is comparable to the United States' presence on the international stage.[38] According to Smith, the choice lies between whether the EU is a normative actor, or whether it is a 'normal' strategic one.[39] As a normative actor, the EU would lead by example exporting its *modus operandi* to its international partners using soft, civilian or normative power.[40] As a strategic actor, on the other hand, the EU would exploit other modalities of exerting influence including the coercive power of economic and military power.

As mentioned above, the possible development of the EU grand strategy was considered in view of the value it may add to the understanding of the EU's presence and role in international relations. Somehow the discussion is similar to that of coherence in it the EU's policies.[41] The EU should employ the grand strategy because, amongst other things, it is about making sure that the efforts of the EU and its Member States are complementary.

> Moreover, this process is not necessarily 'zero sum' in the sense that strategic efforts on the part of the collective prevent or undermine such behaviours on the part of its constituent units; if the units retain some degree of sovereignty over their foreign policies, yet still attempt to support the interests of the collective, then a more 'positive sum' approach to the generation of a collective grand strategy is possible. In this view the collective grand strategy would be greater than the sum of its parts (EU member states) and would provide some clear 'value-added' to the (normal) process of grand strategy conducted by EU member states. [42]

Such a strategy will reflect various 'vital' interests of the EU and its Member States. These range from security concerns to exporting the EU norms or even full regulatory settings abroad. The ultimate objective is to ensure the economic wellbeing of the people of the European Union meaning that this aspect will necessarily be a part of the grand strategy. The means through which the EU delivers upon this commitment are in themselves described as strategies (Newman and Posner for example distinguish the following strategic approaches in the international relations strategy: regulatory export, first-mover agenda setting, mutual recognition and coalition building).[43]

[38] Importantly, the power manifests itself in the manner in which the EU exports its normative setting abroad. See, for instance, the discussion of the EU as a possible regulatory hegemon in relation to the civilian and normative power it displays in such contexts: Abraham L Newman and Elliot Posner, 'Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context' (2015) 22 Journal of European Public Policy 1319.
[39] Smith, 144-145.
[40] Manners; Manners and Københavns universitet. Center for Freds-og Konfliktforskning.
[41] See: Tamara Lewis and others, 'Report on Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies' [2014] FRAME Project Work Package No. 8 - Deliverable No. 1 <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>.
[42] Smith, 146.
[43] Newman and Posner, 1318.

As we can see, in the discussion of both internal and external policies, the adoption of strategies is above all the means through which EU's objectives are realised and vital interests of the European Union are protected. From this perspective, the mere focus of the strategy is how to employ its tools and the extent to which it can be considered casual and *ad hoc* or planned.

(3) Plan of action

If what determines the strategic approach is the grand vision and general objectives it entails, it will not lead anywhere until the vision becomes operationalized. The strategy needs a plan of action, which clearly determines which tool should be employed at which point and in what way.

How can such a plan of action be evaluated? What makes it good and which considerations should be made when it is made to embrace the balancing of means and ends for the attainment of a specific set of objectives? The design of an action plan seems rather straight-forward and, in fact, the existing documents usually simply list more or less concretised initiatives which are to be undertaken by European institutions in the execution of strategies.[44] The reasoning behind the list of the actions and their relationship with the overall strategic design remain, however, obscure.

b) The Concept of 'Strategy' for the EU Human and Fundamental Rights Policies

In the recent years the European Union has started to adopt more and more of comprehensive strategic policy documents. This trend was visible first in the external relations area and was marked with the initial 2003 Xavier Solana's EU Security Strategy.[45] Since then, the European Union has adopted multiple strategies for almost each area of its activity.

The strategies share one common characteristic – they have a horizontal impact affecting various initiatives of the European Union and reach beyond the limits of competence of various organisational units within the EU institutions. Clearly they aim at improving the coherence in activities between various organisational units in the European Union.[46] In these respect, the EU human rights strategies stand out. Importantly, as it seems, there exists no uniform way of drafting strategy within the European Union, even though some common elements can be identified (see, the analysis below).

It is beyond the scope of the study to analyse the overlaps of the strategic documents in all of the policy areas. The below analysis will, therefore, focus only on this particular type of strategies mapping the ones focusing solely on human rights and those which affect human rights and are important for the three case studies addressed below in the course of our discussions.

The analysis of the current human rights strategy starts off with the identification of the chief documents, which are truly comprehensive and address the totality of the human rights policies within the European Union and its external dealings. On top of these, there are 'subject specific' instruments

[44] See, for instance, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12.
[45] European Security Strategy. A Secure Europe in a Better World.
[46] See for instance the complex energy package and framework where strategy and roadmap are delivered in separate documents: Communication from the Commission EUROPE 2020 A strategy for smart, sustainable and inclusive growth 2010 and Communication from the Commission Energy Roadmap 2050 2011.

frequently predating the comprehensive ones and addressing challenges within specific human rights policy areas. In addition, where needed, we are identifying instruments, which have human rights implications, but affect predominantly another policy field such as migration or security. The last two groups are presented in the context of case studies discussed in this report.

Building in part on the findings of the FRAME project research, the below tables illustrate the human and fundamental rights specific strategies.

Table 3: The EU general human rights strategic documents

Document	**Timeline**	**Chief characteristics**
EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).[47]	2012-2014	- divided into the strategic framework which is of unlimited duration and the action plan which was to be implemented in the specified time frame; - builds on four following assumptions: (1) human rights are universally applicable legal norms, (2) democracy is a universal aspiration, (3) sustainable peace, development, and prosperity are possible only when grounded upon respect for human rights, democracy and the rule of law; - identifies the general objectives of the document which are then translated into specific objectives. The following have been named as general objectives: (1) pursuing coherent objectives in internal and external areas of the EU's action, (2) promoting human rights in ALL EU external policies, (3) implementing EU priorities on human rights, and reinforcing the EU's commitment to the promotion of these priorities, (4) working with bilateral partners, (5) working through multilateral institutions which can monitor impartially the implementation of human rights standards and ensure accountability of violating states, and (6) working together as EU institutions and Member States. - Importantly, not all the general objectives have been translated into actions (*i.e.* omission of freedom of expression, assembly and association both online and offline, limitation of the fighting of non-discrimination to the fighting of rights of LGBTs, no action with reference to the rights of refugees and migrants etc.).[48]

[47] 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12. The strategic framework and action plan builds on the 2011 Communication: Joint Communication to the European Parliament and the Council. Human Rights and Democracy at the Heart of EU External Action - towards a more effective approach COM (2011) 886 final.

[48] Cristina Churruca Muguruza and others, 'Report Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support' FRAME Project Work Package No. 12 - Deliverable No. 1, 11–12.

		- The strategic framework and action plan was reviewed internally by the EEAS and the European Commission[49] and prior to adoption to its heir, broad consultations have been held. The general conclusion was that many actions have not been realised, whilst the EU should attempt to define better its priorities and ensure continuity with the previous ones.[50]
Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 (20 July 2015), ST 10897 2015 INIT.[51]	2015-2019	- adopted in July 2015, the new action plan is organised around five priorities: (1) Boosting the ownership of the local actors, (2) Addressing human rights challenges, (3) Ensuring a comprehensive human rights approach to conflicts and crisis, (4) Fostering better coherence and consistency, (5) A more effective human rights and democracy support policy. It features 115 actions to be undertaken until 2019 with a mid-term review in 2017. - The Action Plan is supposed to be realised in accordance with the following principles: (1) enhanced cooperation with the variety of actors in order to ensure full mobilisation for human rights, (2) combating double standards and lack of coherence in general, (3) ensuring the consistency in internal and external addressing of challenges relating to discrimination, the respect for freedom of expression and privacy as well as in migration, trade or counter-terrorism policies, (4) smart and strategic use of tools as the way of empowering the EU itself, (5) better communication and openness to devise alternative approaches.[52] - The Action Plan builds on the existing strategic framework and the evaluation leading to the overall positive conclusions about over 97 initiatives and heralded policy improvements.[53]

[49] See the reference in the EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015) <eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf> accessed 26 April 2016.

[50] See for instance: FIDH, 'FIDH's Recommendations for a New EU Action Plan for Human Rights and Democracy' (*November 2014*) <https://www.fidh.org/en/international-advocacy/european-union/16483-fidh-s-recommendations-for-a-new-eu-action-plan-for-human-rights-and> accessed 10 April 2016. Anna-Luise Chané and others, 'Policy Brief: The Post-2014 EU Action Plan on Human Rights and Democracy' (*FRAME Project*, 2014) <http://www.fp7-frame.eu/policy-brief-the-post-2014-eu-action-plan-on-human-rights-and-democracy/> accessed 10 April 2016. 'EPD's Contribution to Revision of EU Action Plan on Human Rights and Democracy' (*Democracy, European Partnership for*) <Democracy, European Partnership for> accessed 10 April 2016.

[51] Council of the European Union, 'Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 (20 July 2015), ST 10897 2015 INIT.'

[52] Joint Communication to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda' JOIN(2015) 16 final 2015, 11.

[53] Joint Communication to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda' JOIN(2015) 16 final.

		- The new Action Plan upon adoption has already gathered a substantive criticism but it remains to be seen how the institutions will approach its implementation.[54]

Table 4: The EU general fundamental rights strategic documents

Document	Timeline	Chief characteristics
The Stockholm Programme – An open and secure Europe serving and protecting citizens[55]	2010-2014 2015-2020 (on the basis of the Strategic Guidelines for JHA adopted by the 26/27 Council the implementation of the Stockholm Programme is to be continued.[56]	- The first of the comprehensive and programmatic documents in the area of fundamental rights – apart from setting priorities for the Area of Freedom, Security and Justice, it also addresses the Europe's position in the globalised world and speaks of the external dimension of the European Union activities and the importance of human rights.[57] - It is accompanied by an extensive Action Plan setting out the activities which were to be implemented by the end of 2014. - The discussions as to the aftermath of Stockholm Programme started way before the elapse of the time of its implementation with the European Commission conducting mid-term reviews of specific areas.[58] As the result, the follow up took for of Strategic Guidelines for the Area of Freedom, Security and Justice (see below).[59]
Conclusions of	2015 – 2020	- The political follow up on the Stockholm Programme has so far

[54] For preliminary assessment, see, for instance: Richard Youngs, 'Assessing the EU's New Democracy and Human Rights Action Plan' (*Carnegie Europe*) <http://carnegieeurope.eu/strategiceurope/?fa=60822> accessed 10 April 2016. Peter Sorensen, 'Reflections on the New EU Action Plan on Human Rights and Democracy' (*Universal Rights Group*) <http://www.universal-rights.org/blog/reflections-on-the-new-eu-action-plan-on-human-rights-and-democracy/> accessed 10 April 2016.

[55] The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115.

[56] 'Strategic Guidelines for Justice and Home Affairs' (*Consillium*) <http://www.consilium.europa.eu/en/policies/strategic-guidelines-jha/> accessed 25 April 2016.

[57] The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115.

[58] For an overview of discussions, see the overview of stakeholders' opinions including the European Commission prepared by the European Parliamentary Research Service: 'Justice and Home Affairs After The Stockholm Programme' (*European Parliamentary Research Service*) <https://epthinktank.eu/2014/06/25/justice-and-home-affairs-after-the-stockholm-programme/> accessed 24 April 2016.

[59] 'Conclusion of the Council of the European Union – Strategic Guidelines for the Area of Freedom, Security and Justice, EUCO 79/14, 27 June 2014.' Contributed to prior by the European Commission: 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union' (Communication) COM(2014) 144 final; and supported subsequently by the JHA agencies: 'From Strategic Guidelines to Actions: The Contribution of the JHA Agencies to the Practical Development of the Area of Freedom, Security and Justice in the EU' <www.eurojust.europa.eu/.../JHA Agencies Joint Statement.pdf> accessed 10 April 2016.

the Council of the European Union – Strategic Guidelines for the Area of Freedom, Security and Justice[60]		taken the form of Strategic Guidelines to be followed up by a new Programme. In the meantime, the EU is to realise the priorities fished out from the earlier programme and follow the strategic path determined by the Strategic Agenda for the Union in Times of Change.[61] - In the Strategic Guidelines, fundamental rights are an object of attention with relation to the fair trial rights (of accused and suspects, children and victims).[62] - The Strategic Agenda for the Union in Times of Change builds on five overarching priorities: stronger economies with more jobs, societies enabled to empower and protect, a secure energy and climate future, a trusted area of fundamental freedoms, effective joint action in the world. - From the point of view of fundamental rights protection, the strategy refers to 'A Union of freedom, security and justice' for which the following priorities have been established: (1) better management of migration in all its aspects, (2) preventing and combating crime and terrorism, (3) improvement of judicial cooperation among the EU countries.[63] - In addition, the Agenda refers to the Union as a stronger global actor. There, human rights appear in relation to what Agenda calls as 'maximising our clout' where consistency is ensured 'between member states' and EU foreign policy goals' as well as 'coordination and coherence between the main fields of EU external action, such as trade, energy, justice and home affairs, development and economic policies'.[64] Finally this is to be done through engagement with the global strategic partners on a wide range of issues – 'from trade and cyber security to human rights and conflict prevention, to non-proliferation and crisis management – bilaterally and in multilateral fora'.[65]

[60] 'Conclusion of the Council of the European Union – Strategic Guidelines for the Area of Freedom, Security and Justice, EUCO 79/14, 27 June 2014.' Contributed to prior by the European Commission: 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union' (Communication) COM(2014) 144 final. These were supported subsequently by the JHA agencies: 'From Strategic Guidelines to Actions: The Contribution of the JHA Agencies to the Practical Development of the Area of Freedom, Security and Justice in the EU.'
[61] 'Conclusion of the Council of the European Union – Strategic Guidelines for the Area of Freedom, Security and Justice, EUCO 79/14, 27 June 2014', 14–19.
[62] Ibid, 6.
[63] Ibid, 19.
[64] Ibid, 20.
[65] Ibid.

		- The Strategic Guidelines are not accompanied by an action plan. Their realisation will be subject to mid-term review in 2017.[66]
Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union[67]	2010 -	- The strategy builds on Article 6 TEU and the need for the EU to stand by its values. The EU is supposed to be exemplary from this point of view and ensure the compliance in its internal processes (from proposing legislative proposal, through inter-institutional dealings to evaluation and impact assessments[68]), vis-à-vis Member States and through informing the public. - The implementation of the Charter is to be continuously monitored through the annual reports.[69]

[66] It is interesting to observe the discrepancy between the content of the Strategic Guidelines and the Strategic Agenda for the Union in Times of Change as it is presented on the website of the Consillium: 'Strategic Guidelines for Justice and Home Affairs.' There, fundamental rights are considered as a number one priority whilst in the actual document they feature only in relation to some specific issues.

[67] 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573 final.

[68] Commission, 'Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 Final.'

[69] European Commission, '2014 Report on the Applicatoin of the EU Charter of Fundamental Rights' (2015) <http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf> accessed 11 November 2015.

D. Strategic use of human rights tools – mitigating between different objectives

By identifying the content of the toolbox and further categorisations and the notion of strategy and the way it is formally embedded in concrete policy documents we have conducted a ground work for further analysis in this report. In short, the fundamental and human rights tools will be used in implementation of fundamental and human rights strategies. Yet, if the image was really that simple, we would just speak of implementation of strategic documents through the use of tools rather than their strategic use. At the same time, it must be emphasised that the tools, aside from being implemented, reflect the choices between different strategic objectives and mitigating between various interests.

At this point it may be useful to recall Frieden's definition of 'strategy' which puts the emphasis on the tactics in policy making. In line with this approach, strategy is considered as:

> [w]ays to obtain … goals, paths to [actors'] preferences. These paths must take into account the environment – other actors and their expected behaviour, available information, power disparities. Given this strategic setting, strategies are tools the agent uses to get as close to its preferences as possible.[70]

Strategy is, therefore, a preliminary tool for the attainment of actors' preferences (the above discussed, albeit more concretised, policy objectives). Using the public policy lens, the strategy will set the policy process or cycle in motion. But what of the environment where the machinery operates? And then, once the machinery is in motion, what happens?

Whilst in many aspects the realisation of fundamental rights objectives will hinge on implementation of specific instruments, their strategic use actually brings in the balancing activity. This balancing activity will involve the choice between realisation of different objectives as well as streamlining of scarce resources. It will also reflect the political choices as to what the policy makers will deem doable and what they hope to be effective. Finally, it will reflect the belief in the European added value in a particular area.

The starting point for this is recollection that the documents define (i) objectives, (ii) concrete actions that need to be taken that concern either evolution of existing tools or development of new ones, as well as the creation of new actors or reorganisation of their work.

Table 5: Attaining an objective with the 'strategic' use of tools[71]

Objective	Action	Assessment
Choice of a priority in the policy areas as for	Concrete initiative involving evolution of a	1. Whether the action has been undertaken 1. The actions are taken with positive effect

[70] J Frieden, 'Actors and Preferences in International Relations' in D Lake and R Powell (eds), *Strategic Choice and International Relations* (Princeton University Press 1999) 45 as cited in: Newman and Posner 1321.
[71] Podstawa, Haasz and Vita, op. cit., 40.

instance included in the 2012 Strategic Framework for Human Rights and Democracy.	specific tool, development of a new one, establishment of new bodies etc.	according to the description included in a strategic document. 2. The actions are taken but do not lead to the attainment of objectives. 3. The actions are not taken (because documents have not been implemented etc.). 2. If and how the realisation of the action contributes to the attainment of a general objective (or identification of missing tools for conducting such assessment)

As illustrated by the table, the actions often may be simply not taken in implementation of the strategy, which may indicate that other interests take precedence over the policy objectives at stake, or are simply mitigated with the others. The question is in this context which are the considerations made when various interests are weighed, balanced leading to a strategic use of tools? What affects the use of tools and the prior decision making process of the policy makers?

Many clues permitting for answering these questions have been delivered already in the definitions of strategy as quoted above. At the same time, none of these definitions did fully represent the wide array of considerations to be made. For the comprehensive overview of such considerations we shall resort to models developed in the field of management studies. Whilst one may question the applicability of such models to the area of fundamental rights, we believe that the managerial logic reflects to a large extent demands of leadership towards policy makers at large and permits for rendering at least the analysis of 'decision-making' process a bit more orderly and ultimately more permeable from the academic perspective. At the same time, the economic logic of winning profit resonates to the extent with the wellbeing of peoples of Europe especially once one takes into consideration contemporary approaches to management. Enterprises just as international organisations or states have complex agendas, part of which is promotion of and adherence to social and human rights standards visible in their mission statements and appeal to the customer base.

The monumental study of strategy by Gandellini, Pezzi, and Venanzi[72] and of the ways in which it should be translated into action draws, for instance, from the 2001 work by Hambrick and Fredrickson[73] who devised a 'strategy diamond'. The diamond depicts the interrelated components of strategy and offers an analytical lens through which the strategy can be evaluated. In this approach strategy precedes the plan of action understood as steps to be taken by responsible actors in a given time frame. This must be done whilst taking into consideration both: the mission and objectives as well as organizational setting into consideration. The model devised by Hambrick and Fredrickson also

[72] Giorgio Gandellini, Alberto Pezzi and Daniela Venanzi, *Strategy for Action - II* (Springer, 2013), 4.
[73] Donald C Hambrick and James W Fredrickson, 'Are You Sure You Have a Strategy?' (2001) 15 Academy of Management Executive.

foresees strategic analysis and control, which resembles the policy making's evaluation side. This model is by no means perfect, yet it offers a systematic insight into the types of considerations that must be made before the strategy is drafted.

It can be summarised in the following terms:

1. In the first place, strategy is not only about planning. Instead, as observed by the authors of the diamond model, it is about 'intentional, informed and integrated choices'[74] of decision makers. Informing choices of policy makers is the core of analysis in this study, thus the model itself offers the lens through which the decision making process is deconstructed.

2. The strategy is not set in stone for longer time periods – in fact many strategies foresee multiple options and maintain flexibility. In particular, the authors observe that there is a tendency to reduce the time for which a given strategy is drafted from 5-10 year to 2-3 year periods.[75] These indications may serve as a starting point for the building of a strategy.

3. The strategy should be built in a way that reflects five dimensions of a 'diamond' defined in the following terms[76]:

- arenas ('where will an entity be active?'),

- vehicles ('how will we get there?'),

- differentiators ('how will we win in the market-place?'),

- staging (what will be our speed and sequence of moves?'),

- economic logic ('how will we obtain our results?').[77]

[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.

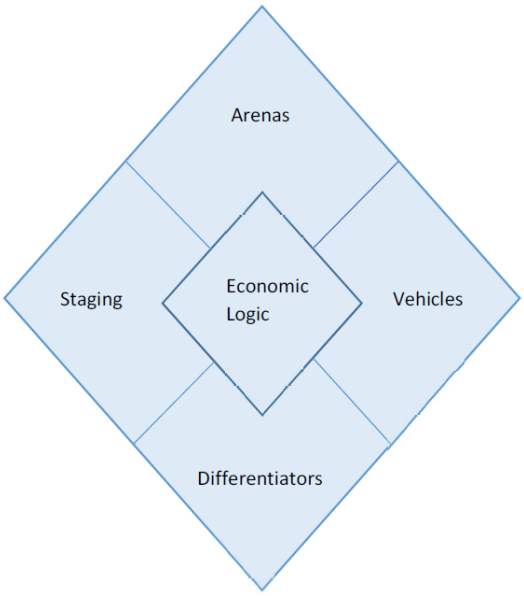

Figure 1: The five major elements of strategy[78]

The above graph represents the diamond model of strategy that takes into consideration each of the outlined above elements. This can be reproduced in relation to specific enterprises in a given moment of time.[79]

The determination of the arenas where an entity will be active is where the identification of priorities comes to the forefront.

Vehicles, on the other hand, are modes through which a presence in a specific arena is devised and draw from the set of toolbox adjusted to the needs of this particular arena. Importantly 'selection of vehicles should not be an afterthought or viewed as a mere implementation detail'[80]. In this respect, lessons may be learnt inasmuch as the well-planned coherent use of vehicles is concerned. Hambrick and Fredrickson observe:

> Research has found, for instance, that companies can develop highly advantageous, well-honoured capabilities in making acquisitions or in managing joint ventures. The company that uses various vehicles on an ad hoc or patchwork basis, without and overarching logic and programmatic approach, will be at a severe disadvantage compared with companies that have such coherence.[81]

The third pillar – differentiators - is about differentiation of a given entity from the others. Here one needs 'conscious choices about which weapons will be assembled, honed, and deployed to beat

[78] Ibid, 51.
[79] See, strategies of IKEA and Brake Products International: Ibid.
[80] Ibid.
[81] Ibid.

competitors in the fight for customers, revenues and profits.'[82] These choices are not exclusive inasmuch as one type of 'weaponry' does not preclude the use of other types. Instead, the entity that is more likely to win is the one that offers a combination of differentiators at various levels of value for price attractiveness. At the same time it is important to recognise the interdependencies between various types of differentiators; such that are 'consistent with the firm's resources and capabilities, and, of course, highly valued in the arenas the company has targeted'[83].

The fourth pillar of the strategy consists of the so-called 'staging' – in other words, the sequence of initiatives, which must follow one another. Staging is dependent on resources, urgency, drive to achieve credibility, and acceptance of long term rather than early wins.[84] The final pillar, which constitutes a successful strategy, is that of economic logic which will generate profit creation. Such economic logic may stem from economies of scale, experience and knowledge sharing.[85]

Clearly, the various aspects of the diamond model must be translated in the realities of the general case study addressed in this analysis – the case of the EU human and fundamental rights strategies. The arena of the European Union is that of the concrete human and fundamental rights policy, but also that of other policy fields where human rights are mainstreamed. Importantly, with the caveats concerning the scope of the objectives and the competence of the European Union[86], its actions encompass both internal and external spheres of EU policies.

Following the provisions of the Treaties (see the above discussion of the Objectives), these considerations must find its way to all the internal and external policies. Already this necessity renders the creation of the strategy a very difficult exercise for *in abstracto* it should address the vast number of issues, and when it does so *in concreto,* the criticism is inevitable.[87] The notion of vehicles is to be translated into the tools we have discussed above. When analysing the strategic use of tools, our interest lies in determination as to how these tools are used in a specific manner and whether this is done in a strategically informed manner. Having accepted the inter-dependency between the five facades of the diamond, we must search for the answer in the remaining three ones.

The third aspect of the strategy is that of differentiator. Translating it into the EU human and fundamental rights policy terms is fairly challenging. For, what distinguishes the EU from other actors

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Veronika Haasz, Karolina Podstawa and Viorica Vita, 'Report Analysing the Findings of the Research of the Other Work Packages on Policy Tools' [2016] FRAME Project Work Package No. 14 - Deliverable No. 1. For an extensive discussion of the EU competence, see: Tamara Lewis and others, 'EU and Member State Competences in Human Rights' [2015] FRAME Project Work Package No. 8 - Deliverable No. 2 <http://www.fp7-frame.eu/reports/>.
[87] See for instance the broad strategic framework extensive lists of actions to be implemented as the follow up to the 2012 Strategic Framework and Action Plan and the 2015-2019 Action Plan on Human Rights and Democracy: 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12; Council of the European Union, 'Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 (20 July 2015), ST 10897 2015 INIT.'

that may wish to have strategy in this area? Where does the EU's leverage in this area lie? In part, the EU's policies concerning three values rely on the 'acquired wisdom' of years of experience in ensuring the well-being of its people and maintaining peace and prosperity. Yet, as we learnt, the EU has been a largely incoherent actor not necessarily praising what it preaches (see, the subsequent chapters).[88] Undoubtedly, however, it remains the organisation with the most complex and advanced system of human rights protection and represents a block of 28 states whose collective interests in part reflect human rights. Can this be considered sufficient for the strategic approach to the pursuit of fundamental and human rights objectives? Even if the answer to this question is negative, the awareness of 'differentiative' influence of the EU contains the information as to its modalities of action and the choices of tools, which exploit the strength and the power of the block such as conditionality or multilateralism. These modalities, however, are used in many policy fields and are not particular for the pursuit of fundamental and human rights objectives. So what it is that makes the EU strategy for human rights more convincing?

If the understanding of the EU differentiator appeal is a challenge, the idea of staging the use of tools is even more difficult. Staging is about sequencing the use of tools with the awareness of what exact effect they have and how they work. The real trial comes with the understanding that many of the tools operate in a simultaneous manner and are conditional. This means that they award progress on human rights and, at least in theory, sanction the deterioration of human rights situation and guarantees. The real question refers to when the awarding and the sanctioning should start, and what happens in the space between the two.

The final element of the strategy is the understanding of its economic logic. In other words it is about the return (usually of monetary value) of a given policy field. Would this consideration be applicable to the EU strategy for human rights? Can one consider whether there is a measurable benefit linked to the pursuit of human policy goals? In particular, can the pursuit of such objectives be competitive with other objectives?

The five elements of strategy in the original Hambrick and Fredrickson's account are complemented by the set of questions designed to evaluate the strategy of an organisation. Such analysis is conducted on the basis of the set of six questions corresponding to the following themes which will further guide our considerations here[89]:

[88] Consider the discussion of internal-external incoherence in the EU's actions in: Lewis and others, [2015] 'Report on Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies'; Hachez.

[89] Hambrick and Fredrickson. 1. Does the strategy fit with what's going on in the environment? (a)Is there healthy profit potential where you're headed? (b) Does your strategy align with the key success factors of your chosen environment?, 2. Does your strategy exploit the key resources? With your particular mix of resources, does this strategy give you a good head start on competitors? Can you pursue this strategy more economically than competitors? 3. Will your envisioned differentiators be sustainable? (a) Will competitors have difficulty matching you? (b) If not, does your strategy explicitly include a ceaseless regimen of innovation and opportunity creation? 4. Are the elements of your strategy internally consistent? Have you made choices of arenas, vehicles

1. The European added value

The first question concerns the awareness on the part of the EU as to why its own actions would carry the added value in a given context. In a sense it is about a type of output legitimacy where one evaluates potential (as opposed to actual efficiency considerations) impact of actions undertaken on a given field. In this context one must evaluate whether there are any other stakeholders and whether their actions are complementary or stand in competition to these of the EU. Basing on this initial evaluation the EU should determine whether the new tools and methodologies should be introduced. The final aspect of the European added value that must be considered is that of the sustainability of the strategy, and in particular the existence of leadership which can lead the required changes.

If one considers, following for instance Helen and William Wallace's classification of EU policy models, we will see that policy objectives of the EU takes place across five arenas: (1) community (supranational) method, (2) the EU regulatory mode, (3) the EU distributional mode, (4) policy coordination, (5) intensive trans-governmentalism. The authors claim that eventually in any case the EU policy making does not function in one specific form – on the contrary, it takes various forms and the European Union continues developing according to the parallel paths.[90] Now, human rights policies of the EU are 'of general application' and so clearly they will appear and re-appear in various formats across the five modalities of the EU policy-making. The question is – how? Should one consider a sixth modality – that of mainstreaming where considerations of horizontal character must be included in the five remaining policy models? How should it be pursued given the fact that the above outlined models of EU policy making are tightly knit with the EU's and its Member States power distribution? How sustainable are these solutions and can they offer alternatives to the modalities of actions as undertaken by other entities in the field?

One must in keep in mind against this background that the European added value must imply to an extent the ability on the part of the EU to adjust the strategy to changing circumstances. Freedman in this context rightly observes that

> [t]he process evolves through a series of states, each one not quite what was anticipated or hoped for, requiring a reappraisal and modification of the original strategy, including

and differentiators and staging, and economic logic? Do they all fit and mutually reinforce each other? 5. Do you have enough resources to pursue this strategy? (a) Do you have money, managerial time and talent, and other capabilities to do all you envision? (b) Are you sure you're not spreading your resources too thinly, only to be left with a collection of feeble positions? 6. Is your strategy implementable? (a) Will your key constituencies allow you to pursue this strategy? (b) Can your organization make it through the transition? (c) Are you and your management team able and willing to lead the required changes?

[90] Helen Wallace and William Wallace, 'Overview: The European Union, Politics and Policy-Making' in Knud Jørgensen, Mark Pollack and Ben Rosamond (eds), *Handbook of European Union's Politics* (Sage Publications, Inc 2007), 341.

> ultimate objectives. The picture of strategy that should emerge from this book is one that is fluid and flexible, governed by the starting point and not the end point.[91]

From this point of view even the, ideally, strategic use of tools for the benefit of EU human rights policies starts off with the adoption of a strategy, the follow up and the implementation must include some sort of modification. If this is the case, then what are the frames of such flexibility? To what extent must the organisation be equipped with tools capable of responding to the alteration of circumstances?

2. Consistency within the strategy elements

The second question is a type of 'reality check' for the design of the strategy in line with the five elements structure elaborated above. The concern here lies chiefly with the clear cut choices made with reference to policy and geographic areas, tools and carriers of its added value, staging, and possible (economic) returns. The real challenge lies there in the anticipation and awareness that these elements fit and mutually reinforce one another. Whilst the use of specific tools will be determined, to an extent, by a policy area the EU is moving in, the staging, added value and prioritisation remain all too often implicit in the strategies and their implementation.

3. Coherence with the policy context

Another issue that must be taken into consideration when drafting strategic documents is the importance of the context where the strategy will be realized. In particular this forces the policy makers to consider the benefit to be drawn from a strategic action both for horizontal and vertical coherence as well as possibility of applying analogous solutions learning from horizontal experiences in a broader setting – *i.e.* between two policy fields.

In the words of Frieden, this is where issues such as expected behaviour, available information, power disparities come to be considered.[92] It seems that expected behaviour of actors comes in hand with power disparities and will, therefore, be presented as first in this brief section.

For instance, externally, the EU must respond to the altering circumstances in global politics, which have changed the chief assumptions underlying the EU foreign policy. According to some authors, the global political awakening[93] has challenged the belief that the EU possesses soft power, or that it has a very strong power of attraction which makes third countries want adopt the EU standards, including these pertaining to human rights and democracy. In addition, the EU standard setting takes place

[91] Freedman, *op. cit.,* Preface xi.
[92] Frieden.
[93] Susi Dennison and others, 'Policy Brief: Why Europe Needs a New Global Strategy' (*European Council on Foreign Relations*, 2013), 2,3 <http://www.ecfr.eu/publications/summary/why_europe_needs_a_new_global_strategy302> accessed 2 April 2016.

within a more and more competitive environment – both in terms of appeal of values and the possible leverage its funding may have over third countries.[94] Because of this

> European soft power is a wasting asset in a world in which other regions and powers are increasingly self-confident and less willing to base their policies on relations with the West. This is a fundamental obstacle to any strategy based on the "comprehensive" export of European values and models in the EU's neighbourhood or further afield. The EU should not give up its values. But it does need to rethink how they can best be promoted at a time when ideological, financial and political competition in both Europe's eastern and southern neighbourhoods is liable to remain high, and even grow, in the years ahead.[95]

Thus the pursuit of the EU human rights in the EU foreign policy is dependent on the EU capacity to 'adjust to changing circumstances and at the same time [to] give greater precision to its own policies'.[96] Viewed from this perspective, the ability to define the EU's involvement in the world human rights affairs requires strategy – the ability to define precise policy areas and foresee the reactions when scenarios change. In this respect, the creation and adoption of strategies in this context is a literal response to calls for transparency of EU action, on the one hand with the maintenance of the necessary flexibility to adjust EU action to changed circumstances.

Yet, the success of the EU will depend very much on the ability to influence other actors. With reference to external relations Posner and Newman's analysis of the EU's impact and regulatory capacity proves of interest for the study here. Their analysis was performed in relation to the Union's capacity to export market standards. They refer to it as the Union's regulatory capacity[97] which in turn is affected by the institutional density[98]. Apparently,

> [d]epending on the particular theoretical perspective, the institutional environment is seen to channel, structure, reconstitute or constrain the behaviour of powerful actors, offering in return the benefits of ensuring commitment, reducing uncertainty and informational asymmetries, and changing preferences and strategies, as well as the contours of internal political contests.[99]

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[94] 'The weakening of European soft power is also a consequence of the "soft power competition" that Europe increasingly faces across its neighbourhood. In the Middle East, a struggle for influence between Saudi Arabia, Qatar, Turkey and Iran has broken out. While in Syria, this emerging cold war has become a proxy battle, elsewhere it is being fought through offers of financial aid, sometimes reaching into the billions of dollars, and sectarian religious politics. In the eastern neighbourhood, the EU faces geopolitical competition from Russia. Elsewhere around the world, Europe increasingly faces competition from China.' ibid 3.

[95] ibid.

[96] Susi Dennison and Anthony Dworkin, 'Policy Brief: Towards an EU Human Rights Strategy for a Post-Western World' (*European Council on Foreign Relations*, 2011), 2 <http://www.ecfr.eu/publications/summary/towards_an_eu_human_rights_strategy_for_a_post_western_world>.

[97] Newman and Posner, *op. cit.,* 1323.

[98] Ibid, 1324-1325.

[99] Ibid.

The regulatory capacity thus affected by power dynamics and institutional setting, in the eyes of the authors can take on the following facets: the regulatory export,[100] mutual recognition,[101] first-mover strategy[102], and coalition building[103]. The four approaches are not exclusive and in a given policy area may be pursued in a complementary manner. Against this setting[104] the authors form four hypotheses:

> H1: The lower the density of international institutions and the larger the gap of relative regulatory capacity among great powers, the more likely the EU adopts a strategy of regulatory export.
>
> H2: The lower the density of international institutions and the smaller the gap of relative regulatory capacity among great powers, the more likely the EU adopts a strategy of mutual recognition.
>
> H3: The higher the density of international institutions and the larger the gap of relative regulatory capacity among great powers, the more likely the EU adopts a first-mover strategy.
>
> H4: The higher the density of international institutions and the smaller the gap of relative regulatory capacity among great powers, the more likely the EU adopts a strategy of coalition building.[105]

[100] 'In cases where there exists a large gap in regulatory capacities between two regulatory authorities and the international regulatory environment is less densely institutionalized, then the actor with greater regulatory capacity is well positioned to follow a strategy of regulatory export. Given the lack of another actor capable of defining, extending and defending an alternative approach and the lack of an international institutional environment to serve as a constraint, the better endowed regulator is likely to see itself well positioned to promote its own domestic standards globally (Lavenex and Schimmelfennig 2009; Newman 2008)'. Ibid, 1326.

[101] 'In those regulatory domains, which are lightly institutionalized and characterized by relative parity between the regulatory capacity of the two major jurisdictions, the EU is likely to find itself in a much weaker position to influence the behavior of the other power and thus to shape global standards created by transnational bodies. In this context, market actors face conflicting rules of the two most important regulators, both of which are equally capable of exerting their jurisdictional authority.' Ibid, 1328.

[102] 'When authorities believe future transnational standards, codes and guidelines are potentially salient and sticky (that is, once rules are in place, actors have disincentives to change them), they will want to minimize domestic adjustment costs and thereby have incentive to shape them and the organizations and processes that create them (Lall 2014).' Ibid, 1326-1327.

[103] '[I]n domains characterized by parity in regulatory capacity, powerful jurisdictions may use densely institutionalized arenas to advance their interests through strategies more frequently associated with domestic political arenas. As in the first-mover strategy, regulators hope to leverage international institutions to lock-in transnational standards that reflect their interests. In contrast to the first-mover quadrant, however, regulatory powers are not able to shape the agenda by using their asymmetrical regulatory capacity to out maneuver other great powers.' Ibid, 1329.

[104] Assuming two simplifying premises of the EU acting in opposition to another actor such as the US and the divergence preference. The former reflects the origins of the concept 'strategy' and its roots in military setting where the binary of interests was represented on the battlefield. In addition, the contemporary portrayal of strategy frequently makes a recourse to the game theory modelling which depicts conflicts always in binary ways. See: Freedman, *op. cit.,* Preface xi.

[105] Ibid, 1325-1326.

If one considers these hypotheses as indication of the EU's actions and potential for the success in achievement of the objectives, then in relation to human rights the EU will take the wide array of approaches depending on the actors it is dealing with. One may expect mutual recognition in relation to the US, coalition building in the UN forum and the regulatory export in relation to smaller states such as the Cotonu ones. Mutual recognition is also visible in the EU's approach towards its own Member States where the burden is clearly shared between the EU institutions and the Member States in implementing both the Charter of Fundamental Rights (CFR) and the constitutional bills of rights in respective jurisdictions (with limitations stemming from Title VII of the CFR).

Externally, however, whilst the setting could be considered as predominantly inductive for coalition building, the EU assumes frequently the regulation exporter hat, or at least is perceived as such. This possibly leaves an impression of the human rights standards being EU's standards external to other institutions and actors working towards the attainment of a similar goal. Yet, this approach of the EU might be induced by reason and the awareness that what projects the EU as a leader internationally is its ability to export norms. Posner and Newman in conclusive remarks to framework they propose observe:

> We would expect that in cases of strong normative consensus, the EU may either play a relatively inconsequential role as one of many regulatory followers or as part of the leading coalition among like-minded regulators. In either case, we would expect the context to be a strong determinant of the result, as there would be less space for political contestation. […] Our argument makes clear that power resources alone do not correspond directly to outcomes. Rather, such resources must be filtered through global policy strategies that serve as the means to achieve particular goals. […] EU power resources are expected to be less effective when conditions give rise to coalition-building strategies.[106]

The importance of the context thus brings the considerations of this study to making the connection between the strategy adopted by the EU and its (uncertain) success.

4. Resources and efficiency

The next set of questions reflects the role of the strategy in distributing scarce resources for the attainment of multiple goals. As observed by Michael E. Smith, in international relations, strategy 'typically refers to the application of specific power resources or assets of a polity (i.e., military or political or economic strategy) to serve specific goals or interests, such as victory in wartime (Baylis and Wirtz 2007)'[107]. These are clearly not only financial resources, but also human ones. The majority of EU institutions and actors dealing with human rights issues are heavily understaffed and, in particular, in the delegations the human rights relating issues are charged to junior personnel.[108]

[106] Ibid, 1330.
[107] Michael E Smith, 'A Liberal Grand Strategy in a Realist World? Power, Purpose and the EU's Changing Global Role' (2011) 18 Journal of European Public Policy, 144, <http://dx.doi.org/10.1080/13501763.2011.544487> 145.
[108] Informal conversations with the EEAS staff, November 2015 – April 2016.

For this reason the awareness of priorities and sequencing of the use of tools is important. There are two sets of questions to be explored in this analysis: the first one refers to the availability of resources whilst the second one with their efficient use.

The first set of questions starts with a general consideration that is rather a straightforward one: does the EU have money, managerial time and talent, and other capabilities to do all that is envisioned? And are these resources in a clear manner bound with the accomplishment of specific objectives? This question reflects also a concern over the EU's institutional design where all too often fundamental rights issues are pursued a small unit within organisation with the mandate to coordinate a broad activities of the remaining units.[109]

The second set of questions refers to the efficiency of the use of resources for the attainment of specific objectives. How does one deal with the obvious limitation of resources? Here not only the awareness of the use of resources is questioned but also the modalities through which certain methods such as mainstreaming are realised. Does it dilute them by introducing general obligations without the possibility of tracing their actual impact?

5. Implementability and effectiveness

The final set of questions deals with the feasibility of implementing a strategy. These reflect the commitment of the chief constituencies to deliver on the strategy. In case of the EU these chief constituencies are institutions, Member States and the civil society at large which must mutually reinforce each other's actions in order to be able to deliver on strategy. In this context another question emerges – namely whether the EU as an organisation can make it through the transition.

This section, though very brief, is, in fact of vital importance for the case studies included in this report. In many aspects it addresses in fact the issues of implementability and effectiveness of the EU's use of its tools in pursuit of strategic objectives. In this context the testing ground for the analysis emerges – namely this of the radical negative change of circumstances (crisis) and the way it may affect implementation of strategies and the strategic use of tools.

a) The notion of 'crisis'

The notion of crisis has been monopolised by the security studies and in the EU official context it is usually used in relation to the possible crisis management understood narrowly as military or civilian emergency. However, as emphasised by commentators, it is still possible to find such definition of crisis, which is of general application. Let us follow the one suggested by Boris Porfiriev[110], following the research agenda of LSE based Crisis States Research Centre[111], as fitting many contexts:

[109] See for instance, Human Rights and Democracy Directorate for EEAS, sole Fundamental Rights Officer at FRONTEX etc.

[110] Boris Porfiriev, 'Managing Crises in the EU: Some Reflections of a Non-EU Scholar' (2005) 13 Journal of Contingencies and Crisis Management, 145.

[111] LSE Crisis States Research Centre, < http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/Home.aspx> accessed 30 March 2016.

> A "crisis" […] is a situation where the political, economic or social system is confronted with challenges with which reigning institutions (or rule systems) are potentially unable to cope. In other words, crisis is a condition of disruption severe enough to threaten the continued existence of established systems.[112]

It seems that this definition could resonate in the contemporary literature pertaining to many areas of European Union activity. Scholars have vastly commented on the EU's capacity to manage crisis: in the context of financial crisis, refugee crisis, crisis management or just addressing the general crisis condition of the European Union[113].

b) Crises in the European Union context

In fact, Ekengren and Groenleer in their early 2006 work claim that the European security, with time became somewhat different than a security conceived of in the premises of a nation state. The EU's notion of security is broad and spans from international peace and stability to food safety and consumer protection. In this context, crisis must be also understood differently: as a threat to the core EU values – and these are also defined in subjective terms.[114] And so, since the 1990s the EU has had to face many crises in numerous policy areas: from the Balkan wars in the early 1990s and Kosovo 1999 refugees crisis, through the 1996 mad cows disease and ACTA international protests, to terrorist attacks in 2004 (Madrid), 2005 (London), 2015 (Paris), and 2016 (Brussels); from financial crisis following 2008 through the Maidan violence to the death of thousands at the EU Southern borders in attempt to reach the European mainland… In fact, Luedtke in his contemporary historical take on the current refugee crisis observes that the European Union owes its shaped to a series of self-perceived crises that could be traced back to its very creation (the 1970s oil crisis, De Gaulle's empty chair etc.):

> Immigration gained new salience in the early 1990s, given the immense geopolitical transformations of the time. Ethnic conflict, regional separatism, the breakup of the Soviet Union and Yugoslavia (and accompanying refugee flows), and an increasingly competitive global economy all combined to push European leaders to expand their ongoing experiment in supranational governance. Despite such dangers as the Balkan wars, neo-Nazi violence in eastern Germany (often against the refugees from those wars), restive postcolonial minorities in France, and a British retreat into recession and anti-continentalism, the EU moved forward, as it typically does in "crises." It does this by giving national governments (at least temporarily) discretion and leeway, even as EU institutions like the European Commission seek to convince national leaders of the benefits each country reaps through common policies.[115]

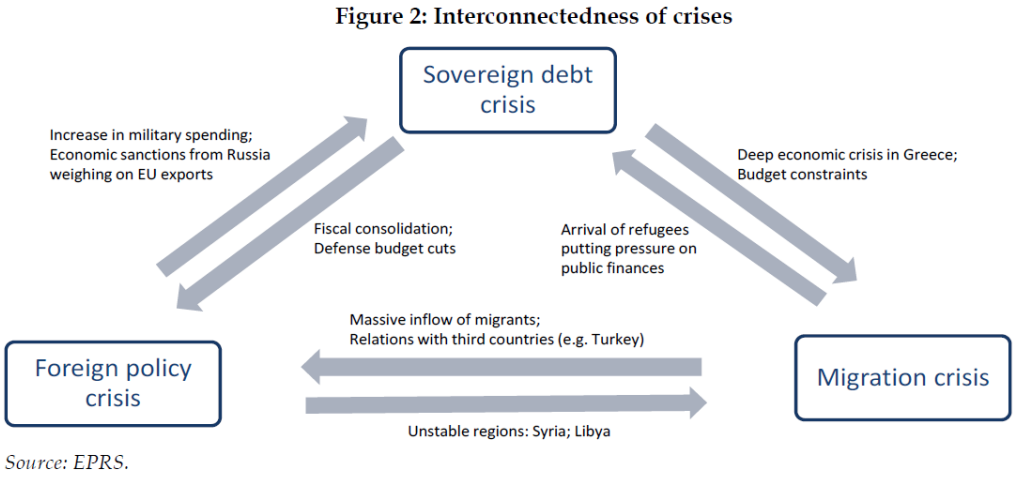
[112] ibid.
[113] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity 2012).
[114] Magnus Ekengren and Martijn Groenleer, 'European Union Crisis Management: Challenges for Research and Practice' (2006) 3 International Journal of Emergency Management, 83, 85.
[115] Adam Luedtke, '"Crisis" and Reality in European Immigration Policy' (2015) 114 Current History, 89, 90.

The self-perception of crisis goes back to the notion of subjectivity and appropriation of crisis Ekengren and Groenleer refer to as well. The response on the part of the European Union does not only, therefore, depend on objective occurrence of events, but also subjective understanding of a crisis as a 'European' and not national or international matter.

If one adds to this subjective approach to crisis the sweeping understanding of its content as pertaining to European values, we will arrive at a conclusion that every single time the triad human rights, rule of law and democracy are at stake, the crises will amount to a European matter in need of being addressed through the European means. In this context geographical aspect is very important as the closer to Europe the threat to values is positioned, the more will the European aspect of the crisis come to the forefront.

Some attention was also given to the various forms of crises being interconnected. The researchers from the European Parliament Research Service have in particular pointed to the causal connections between sovereign debt crisis, migration crisis and foreign policy crisis when studying the role of the European Council in responding to each of the three ruptures.[116]

Figure 2: The Interconnectedness of crises[117]



In this perspective the crisis gains an additional facet to it, for the causality implies the ability to recognise the connections prior to the moment when the crisis appears. If the above approach to crisis was to be true, this means that every single European Union crisis had been preceded by warnings.

[116] Suzana Elena Anghel, Ralf Drachenberg and Stanislas de Finance, 'The European Council and Crisis Management' (2016) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282016%29573283>.
[117] Ibid, 5.

The EU's position has become so established in its capacity to address crisis that some refer to it as a crisis manager.[118] Whilst it seems rather counter-productive to analyse whether the EU in occasions when the system is shattered has developed sufficiently strong toolbox, from the perspective of this study it is a valid question to ask whether the long-term strategies of the European Union foresee the crisis response of some sorts. Are they sufficiently flexible to accommodate also the drastic change of circumstances? And in general terms, does the EU have a capacity to address crisis situations? Again in this context Ekengren and Gorenleer pose a series of questions which in fact focuses on these capacities, whilst observing:

> The EU has responded to crises by developing a broad range of crisis management capacities. These capacities include systems monitoring societal vulnerabilities and preparing for emergencies as well as military and civil crisis management structures within the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). The EU also adopted a security strategy and a solidarity clause under which 'the Union shall mobilise all instruments at its disposal, including the military resources made available by the member states in case of terrorist attacks or natural or a man-made disaster.[119]

The strength of these crisis management capacities lies within the EU perceived role as a 'clearing house in which member states coordinate amongst themselves (the Council), as a coordinating centre in which the Commission links member states and their capacities together, or as an independently acting crisis manager'.[120]

c) Crisis as a testing ground for strategies

The Preface to the Freedman's monumental 'Strategy – A History' starts with the quote from Mike Tyson: 'Everyone has a plan 'till they get punched in the mouth'.[121] This statement reflects the reality in which execution of a plan frequently gets interrupted by an extraordinary event. One would expect that an extraordinary change of circumstances would force the policy makers to reconsider their initial planning and adjust their long-term strategic approach. One would also expect, in reflection of the earlier introduced division into proactive and reactive tools, that the extra-ordinary event will change the logic of the use of instruments from the proactive to reactive one (and subsequently also yet again to the reactive one).

[118] Arjen Boin, Magnus Ekengren and Mark Rhinard, *The European Union as Crisis Manager: Patterns and Prospects* (Cambridge University Press 2013) <https://books.google.com/books?hl=en&lr=&id=6YYYAAAAQBAJ&pgis=1> accessed 24 April 2016.
[119] Ekengren and Groenleer, op. cit., 85.
[120] Ibid, 87.
[121] Freedman, op. cit., Preface ix.

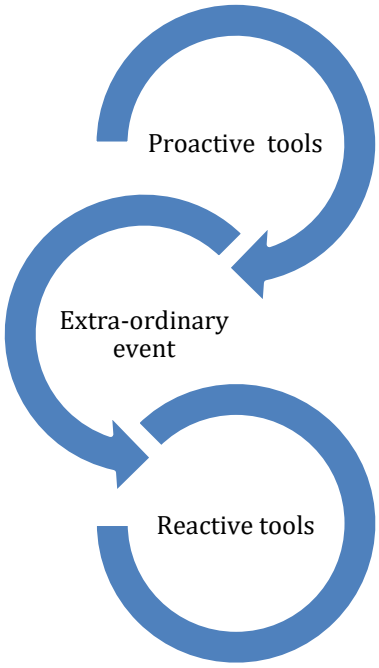


Figure 3: Impact of an extra-ordinary event on the use of tools

The notion of 'crisis' is useful in this context as it denotes the radical negative change of circumstances. In this respect it the observation by Ekengren and Gorenleer that 'EU institutions were not built for short term crisis management, but for long term conflict prevention' brings to the surface the central problem of missing capacities (to introduce or implement specific measures) on the part of the EU and the actual challenge of the strategic use of tools.[122] In essence, one can plan and implement selected measures long term, yet the actual test for an institution and its ability to mitigate the objectives appears when objective circumstances change radically challenging the capacity of an organisation, but above all its commitment to the mission.

For the purposes of this study we will treat the notion of a crisis as an organising feature rather than the actual object of a study. In particular we will scrutinise what impact an extra-ordinary change of circumstances had on strategies and the relevant use of tools. The purpose is to examine whether the crisis interrupted the implementation of strategies or possibly induced a strategic approach to the use of tools.

[122] Ekengren and Groenleer, 85.

E. Concluding remarks and how to recognise a good strategy

In the course of this chapter we have focused on the notion of strategy as a conceptual point of reference for the strategic use of EU fundamental and human rights toolbox addressed in this study. Our goal was to bring to the surface benchmarks on the basis of which the use of particular instruments can be evaluated.

We have found that there is a common core to the notion of 'strategy' as demonstrated in literature. This common core places a spotlight on two aspects of strategies – clearly identified objectives and a plan of action, which is to lead to their realisation. We have concluded that the existing strategies usually are made of the two.

Simultaneously, we found this very basic definition unsatisfactory, as it does not provide sufficient information with regard to the manners in which the strategies aim to mitigate between various objectives leading to strategic use of tools. In order to better understand this process, on the basis of the management studies model by Hambrick and Fredrickson, we have identified five aspects shedding light on what the strategic use of tools may imply. These are the awareness of the role and added value of the European Union in realising strategic objectives in a given field, consistency in the various elements of strategies, coherence with the policy field, efficiency and allocation of resources, and implementability and effectiveness of a strategy. The last consideration brings to the forefront the testing ground common in the three case studies presented in this report – that of a crisis as an organising feature for the subsequent analysis.

The perspective taken emphasises the need for flexibility innate in the strategy process and the depiction of the use of tools conducted on the basis of the strategy.[123] The other of the two features closely bound with flexibility is the fact that strategy reflects the moment of its making rather than the future when objectives will have been attained. Therefore, the strategic use of tools cannot simply amount to the realisation of the plan, as the plan only reflects the moment of its making and might need to be as well adjusted on the course. Here one must wonder whether, in the first place, the European Union in its human rights strategic planning has foreseen the broadly understood 'crisis' response and management. Secondly, is there a mechanism, which would permit for flexible addressing the volatile changing circumstances?

Having set the conceptual framework, in the remaining chapters we will focus on three human rights crisis situations in Europe: that of its two Member States – Poland and Hungary, the refugee crisis at the EU borders and the crisis management in Ukraine.

[123] Freedman, op. cit., Preface xi.

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III. Repairing fundamental rights at home – the Rule of Law Framework, Polish and Hungarian constitutional crises

Quote: 'the rule of law, the question of checks and balances, is not a question of procedure but one that is central to our European democracy and society' (Martin Schulz, President of the European Parliament, 19 January 2016)

The first case study of the report analyses the EU's fundamental rights toolbox and the use of its tools as a response to concrete constitutional crisis situations in the Member States. The EU does not have a comprehensive fundamental rights or rule of law strategy. The Stockholm Programme[124] and the Action Plan Implementing the Stockholm Programme[125] are programmatic documents in the area of freedom, security and justice and therefore not applicable to situations when fundamental rights values are in danger. Despite the absence of a comprehensive fundamental rights strategy, there are several tools within the EU fundamental rights toolbox that can be activated, if the secondary EU law is violated. However, where standards fall outside of the scope of EU law – such as in the case of constitutional crisis, only a limited number of tools can be used. Furthermore, even if a tool can be activated, in most mechanisms available under the EU legal framework political actors play a considerable role in both launching the procedure and deciding on the outcome.

The recent Rule of Law Framework (RoL Framework)[126] clarifies the principles and standards that stem from the Rule of Law, and we can easily argue for the overlap between the RoL, democracy and human rights, but the framework is rather a tool than a strategy.

The EU is devoted to the protection of common fundamental values established by Article 2 TEU. Hence, so far, the protection of EU values has been guaranteed through existing mechanisms, such as Article 7 TEU and Article 258, 259, and 260 TFEU procedures, accompanied by remedies before the CJEU and the ECtHR. Nevertheless, the EU is somehow reluctant to activate especially the so called 'nuclear option' of Article 7 TEU. The non- or rare use of the above mechanisms raises the question whether merely the re-thinking and a more strategic use of these existing tools is needed or the toolbox needs to be enriched with new instruments. Some scholars advocate for a richer set of (legal)

[124] The Stockholm Programme – An open and secure Europe serving and protecting citizens, 2010/C 11/01.
[125] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, COM(2010) 171 final.
[126] European Commission, Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 Final.

tools to address systematic violations of the EU values committed by Member States at the national level,[127] others call for the better use of the existing tools.[128]

The constitutional crisis first in Hungary, and recently in Poland, and the EU's reaction thereto give a good opportunity to examine and evaluate whether the EU uses its tools, with special regard to the RoL Framework in a strategic manner.

While the Hungarian situation provided for an impulse for adoption of the new RoL Framework; on 13 January 2016, the European Commission decided for the first time to activate the Framework and initiated the assessment of the situation in Poland in relation to the powers of the Constitutional Tribunal and the management of media. The procedure is currently on-going. These examples show that the EU policy makers rethought and enriched the EU fundamental rights toolbox and adopted and used a new tool.

This chapter aims to analyse what is the added value of this new instrument to the EU fundamental rights toolbox, and whether it was exploited in a strategic manner regarding concrete constitutional crisis situations.

The chapter starts with explaining why the EU should care about a constitutional crises in the Member States, with due attention given to the EU fundamental values. This is followed by a brief history of constitutional crises in the Member States, with special regard to the events in Hungary. The second section describes the most recent constitutional crisis taking place in Poland. The third section analyses the policy and legal tools at the disposal of the EU for reacting to such constitutional crisis situations and evaluates their use. The fourth section presents the adoption and the activation of the new RoL Framework. The chapter concludes in observations and recommendations.

[127] Dimitry Kochenov and Laurent Pech, Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction (April 2015), RSCAS 2015/24 Robert Schuman Centre for Advanced Studies Global Governance Programme-164, 4.
[128] Conclusions, FRAME WP14 Workshop, Venice, 5-6 May 2016.

A. Why should the EU care? The EU's constitutional fundamental rights values and their protection

1. The importance of the European Union values

The European Union is based on values shared by all Member States. These values summarised in Article 2 of the Treaty on European Union (TEU) are the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[129]

Under Article 49 TEU, any country wishing to join the EU must sign up to those values: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. […]'[130] Hence, these values are constitutional fundamental rights standards of the EU and their respect and promotion are a precondition for membership of the Union. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities is not only one of the Copenhagen criteria but also forms pre-accession conditionality as satisfying this criterion is a requirement for launching the EU accession negotiations.

Regarding the sources of these values, Article 6 TEU also recalls two documents that are bill of rights in the European legal culture, namely the Charter of Fundamental Rights of the European Union (CFR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[131] While the EU recognises the rights, freedoms and principles set out in the CFR,[132] it also states that fundamental rights as guaranteed by the ECHR shall constitute general principles of the Union's law.[133] As an additional third source, the TEU refers to the constitutional traditions common to the Member States, which are also sources of fundamental rights.[134]

Considering the scope of application, there is a difference between these legal sources. While the application of the CFR is limited as it can be evoked only when Member States are implementing Union law,[135] the values defined in Article 2 TEU go beyond the scope EU law. Article 52 of the CFR stipulates, however, that 'the meaning and scope of those rights' contained by the CFR and corresponding to rights guaranteed by the ECHR shall be the same as those laid down by the ECHR.[136]

[129] Article 2 TEU.
[130] Article 49 TEU.
[131] Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 297; Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rigts* (Oxford University Press 2010); Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007).
[132] Article 6(1) TEU.
[133] Article 6(3) TEU.
[134] Article 6(3) TEU.
[135] Article 51 CFR.
[136] Article 52 CFR.

By operating fundamental rights safeguard procedures, the EU's strategic objective is to protect the common fundamental values established by Article 2 TEU. According to the European Commission, these values constitute the concept of the RoL, along with legality (implying a transparent, accountable, democratic and pluralistic process for enacting laws), legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.[137] Protection of fundamental rights and upholding all rights and obligations deriving from the Treaties and from international law are not possible without respecting the RoL.[138] Hence, the EU has its own constitutional fundamental values and standards within and beyond EU law.

One of the basic presumptions of the EU as a 'law community'[139] is that 'all institutions are law-binding'[140] both in the EU and the Member States. It is also in the EU's interest to uphold the RoL in the Member States as it ensures the credibility of the EU both internally and externally.[141] Internally, the implementation of RoL contributes to mutual trust between the Member States – especially regarding the requirement of mutual recognition of judicial decisions. Furthermore, if a Member State disregards RoL, it might cause a real threat to the rights of persons residing in these MSs be it their actual nationals or EU citizens. Externally, the EU is one of the largest promoters of upholding democracy, rule of law and fundamental rights. The failure to guarantee compliance with its values internally could undermine the EU's legitimacy and credibility in its external relations.[142]

The EU has recognised the importance of promoting fundamental values and has taken steps towards mainstreaming fundamental rights and values throughout the policy cycle, from inception to implementation.[143] Coherence is one of the challenges and needs of a successful EU strategy for promoting human rights that FRAME research has identified.[144] As the LIBE Committee stated recently

[137] Op. cit. at 126.
[138] European Parliament Report on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)), A8-0230/2015 (2015), para U.
[139] Armin von Bogdandy, 'How to Protect European Values in the Polish Constitutional Crisis', on file with the author.
[140] Ibid.
[141] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and Promotion of the Values on Which the Union is based, COM(2003) 606 Final; European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the Human Rights Situation in the European Union (2001), A5-0451/2002 (2002).
[142] Dimitry Kochenov and Laurent Pech, Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction (April 2015), RSCAS 2015/24 Robert Schuman Centre for Advanced Studies Global Governance Programme-164, 5; See also: Alexandra Timmer, 'Concepts of human rights, democracy, and the rule of law: a literature review' [2013] FRAME Project Work Package No. 3 – Deliverable No. 1 < http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 10 June 2016.
[143] Speech of First Vice-President Frans Timmermans to the European Commission, Commission Statement: EU Framework for Democracy, Rule of Law and Fundamental Rights, SPEECH/15/4402 (2015).
[144] See reports published within FRAME Project Work Package 8.

> [c]onsistency is key in ensuring an effective approach to better legislation. Better legislation with more preparation, planning, impact assessments, and coherence between institutions and Member States will provide obvious benefits; such as less costly court cases; better clarity for EU citizens and their rights; less uncertainty for Member States in terms of implementation; and less need to repeat poorly drafted legislation at great time, effort and cost.[145]

The EU keeps working on a coherent fundamental rights strategy, as it will be discussed in the last section of this chapter. This is a long process that has its roots in the history. In the past, several constitutional crisis situations urged the EU to respond either by implementing its fundamental rights tool(s) or adopting a new one.

2. The history of Member States' constitutional crisis

As it was stressed by the European Parliament in its latest report on fundamental rights, 'the rule of law is the backbone of European liberal democracy'.[146] But what if the Member States do not want to follow this liberal model?

The debate about the EU's role in the promotion and protection of fundamental and human rights has a long history. The idea received stronger support in the second half of the '90s, which is well indicated by initial debates about a Charter of Fundamental Rights. Undoubtedly, the eastern enlargement also drew attention to the importance of promoting universal fundamental right values in the (candidate) countries. In parallel to that, events in the Member States made the EU aware of the need of an enhanced role and action in this field.[147] The history clearly shows the EU responsive manner that is illustrated by the table below.

Table 6: Rule of law crises in the EU Member States and the EU's response thereto

Rule of law crisis in a Member State			The EU's response (adopting or implementing a tool)		
2000	Austria	Inclusion of an extreme right-wing party in the government	2009	adopting	preventive mechanism, Article 7 (Treaty of Nice and Lisbon Treaty)
2010	France	Implementing a collective deportation policy aimed at EU citizens of Romani ethnicity despite contrary assurances given to the	2010	envisaging	infringement procedure

[145] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Democracy, Rule of Law and Fundamental Rights in Impact Assessment or Screening Procedures (2016), 4.

[146] European Parliament Report on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)), para. S.

[147] Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria' (2001) 39 Journal of Common Market Studies 59.

		Commission that Roma people were not being singled out[148]			
2011	Hungary	Implementing an early mandatory retirement policy in the judiciary	2012	implementing	infringement procedure[149]
			2014	adopting	new Rule of Law Framework
2012	Romania	Failure to comply with key judgments of the national constitutional court[150]	2006 Dec	(prior) adoption	Co-operation and Verification Mechanism[151]
2015	Hungary	Adopting new legislation on asylum law	2015	implementing	infringement procedure[152]
2015	Poland	Adopting new legislation on the Constitutional Tribunal and media law	2016 March	implementing	new Rule of Law Framework

A first occurrence of sanctions against a Member State were the restrictions (including freezing of bilateral contacts) imposed on Austria by the 14 other EU Member States in February 2000, following parliamentary elections and the forming of a governing coalition between a conservative party (ÖVP) and a controversial far-right party (FPÖ).[153] The collective will of the 14 Member States was strongly motivated by the fact that the EU established concerns about human rights and democratic principles 'as an EU norm'.[154] The European Parliament declared that

> [r]espect for fundamental rights within the European Union has become a major political issue, not only owing to the Charter of Fundamental Rights, but also because of the concern to which the inclusion of an extreme right-wing party in the government of one of the Member States has given rise. The political responses to that event have included

[148] Op. cit. at 137.
[149] European Commission, Infringement decisions, <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 10 June 2016.
[150] Op. cit at 137.
[151] European Commission, Mechanism for cooperation and verification for Bulgaria and Romania, <http://ec.europa.eu/cvm/progress_reports_en.htm> accessed 10 June 2016.
[152] European Commission, Infringement decisions, <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 10 June 2016.
[153] Sergio Carrera, Elspeth Guild and Nicholas Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU Towards an EU Copenhagen Mechanism* (Centre for European Policy Studies 2013) <www.europarl.europa.eu/studies>, 7.; Jan-Werner Müller, 'Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order'; Carlos Closa, Dimitry Kochenov and JHH Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) RSCAS 2014/25.
[154] Wojciech Sadurski, 'Adding bite to a bark: The story of Article 7, EU enlargement, and Jörg Haider' (2009-2010) 16 CJEL 385; De Witte B, Toggenburg G, 'Human Rights and Membership of the European Union' in Steve Peers and Angela Ward (eds) The EU Charter of Fundamental Rights (Oxford Hart Publisher 2004).

> proposals from many quarters to strengthen the measures provided for in Article 7 of the Treaty on European Union.[155]

As a result, the preventive mechanism of Article 7 was introduced in the Treaty of Nice and by the Treaty of Lisbon in 2009.

3. Hungary – the brother nation of Poland

In 2010, new government came into power in Hungary. From May 2010, the governing party obtained more than two thirds of the seats in the National Assembly of the Republic of Hungary. This majority enabled the new legislature to touch upon cardinal laws that require a two-third majority for amendment, including the Constitution. On 18 April 2011, the Hungarian Parliament passed Hungary's new constitution, entitled the Fundamental Law,[156] which entered into force on 1 January 2012. The legislation was characterised by introduction of rapid legal changes, for instance, the Fundamental Law itself was amended five times shortly after its adoption. Both the fact that a government obtained two-third majority in the parliament, and the legislative procedures, with special regard to the fourth amendment of the Fundamental Law acquired broad international attention. The critique focused on several aspects of the Fundamental Law, such as its national avowal, and introductory provisions, called 'Foundations'. The most controversial changes affected the functioning of institutions that play a crucial role in a democratic state. The fourth amendment adopted in 2013 annulled all decisions of the Constitutional Court prior to the entry into force of the Fundamental Law.[157] The powers of the Hungarian Constitutional Court to review budget-related laws have been substantially diminished. Furthermore, the Constitutional Court can review the Fundamental Law or its amendment only in relation to procedural requirements that are laid down in the Fundamental Law itself.[158]

The Fundamental Law lowers the judges' retirement age from 70 years to 62 years.[159] This resulted in the retirement of 274 judges that was challenged later on before the European Court of Justice.[160] Similarly, the changes affecting one of the ombudspersons, namely the data protection commissioner's dismissal was found in violation of EU law. These actions will be discussed in detail under section C. A more detailed analysis on the Hungarian constitutional changes is presented as 'Case study: the EU and the Hungarian 'National Cooperation System' in FRAME Deliverable 3.2.[161]

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[155] European Parliament, Report on the constitutionalisation of the Treaties, (2000/2160(INI)), FINAL A5-0289/2000, 12 October 2000, para 10.

[156] The Fundamental Law of Hungary (25 April 2011), <http://mkab.hu/rules/fundamental-law> accessed 30 April 2016.

[157] Closing and miscellaneous provisions of the Fundamental Law.

[158] The Fundamental Law of Hungary, Article 24(5).

[159] Ibid, Article 26(2).

[160] Katalin Kelemen, 'The final Blow to the Hungarian Law Lowering Judges' Retirement Age Struck By the European Court of Justice' (2012) <http://www.diritticomparati.it/2012/11/the-final-blow-to-the-hungarian-law-lowering-judges-retirement-age-struck-by-the-european-court-of-j.html> accessed 30 April 2016.

[161] Timmer Alexandra, Majtényi Balázs, Häusler Katharina and Salát Orsolya, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' (2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf> accessed 30 April 2016.

Here, it is important to note that many of the new cardinal laws and the above provisions of the new Constitution raised concerns in relation to the RoL. Furthermore, a clear parallel can be made with the recent Polish case that will be presented in the next section. The rapid adoption of new constitutions, accelerated legislative procedures, the apparent weakening of checks and balances, such as undermining the position of the constitutional court and the data protection authority, changes relating to national judicial systems and the media law resulted in assumptions that the separation of state powers, the freedom of press and media, as well as the independence of the judiciary are in danger.

The EU Institutions reacted. In its resolution of 16 February 2012, the European Parliament called the Commission as a guardian of the Treaties to monitor closely the above legislative changes 'and conduct a thorough study', as well as to request an opinion of the Venice Commission. Furthermore, the Parliament instructed the Committee on Civil Liberties, Justice and Home Affairs (LIBE), in cooperation with the European Commission, the Council of Europe and the Venice Commission, to follow up whether and how the recommendations set out in the Parliament's resolution have been implemented, and to present its findings in a report. In the light of that report, the Parliament also instructed the Conference of Presidents to consider whether to activate necessary measures, including Article 7(1) TEU.[162] As a result, the Venice Commission issued several opinions on the Hungarian legislative changes,[163] and the LIBE Committee carried out the so called 'Tavares Report'.[164] The report concluded

> that the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU, Article 3(1), and Article 6 TEU, and deviate from the principles referred to in Article 4(3) TEU.[165]

[162] European Parliament, European Parliament Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP)), P7_TA(2012)0053.

[163] CoE Venice Commission, Opinion on the New Constitution of Hungary (2011); CoE Venice Commission, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career of Hungary (2012); CoE and ESCE/ODIHR Venice Commission, Joint Opinion on the Act on the Elections of Members of Parliament of Hungary (2012); CoE Venice Commission, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary (2012); CoE Venice Commission, Opinion on the Cardinal Acts on the Judiciary That Were Amended Following the Adoption of Opinion CDL-AD (2012)001 on Hungary (2012); CoE Venice Commission, Opinion on the Act on the Rights of Nationalities of Hungary (2012); CoE Venice Commission, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary (2012); CoE Venice Commission, Opinion on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary (2012).

[164] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), A7-0229/2013.

[165] Ibid, para 57.

The Committee noted that unless this trend was corrected in a timely and adequate manner, it will result in a clear risk of a serious breach of the values referred to in Article 2 TEU. This means that the Tavares Report envisaged the necessity of activation of the Article 7 TEU procedure. At the same time, the Committee called on the Commission to start infringement proceedings and to respond appropriately to the systemic change in the constitutional and legal system and practice. These multiple and recurrent infringements resulted in a state of legal uncertainty, which means a threat to Article 2 TEU. The report also emphasizes the need for a more effective method of safeguarding fundamental values.[166]

Hungary gained the EU's attention again in 2015, when on 28 April 2015 the Prime Minister made a statement concerning the need for a public debate on death penalty and when in May 2015, the Hungarian Government launched a public consultation on migration.[167] The content of the consultation was criticised because of its 'leading and rhetorical nature, establishing a direct link between migratory phenomena and security threats'.[168] Despite the European Parliament's concerns regarding the content and language of the planned consultations on migration, the consultation took place.[169] The European Parliament urged the Council of the European Union and the European Council 'to hold a discussion and adopt conclusions on the situation in Hungary'.[170]

Although, the Commission was ready to use all the means at its disposal to ensure that Hungary respects the values of the EU enshrined in Article 2, it considered that the conditions to activate the RoL Framework were not met.[171] During the European Parliament debate on 2 December 2015, Věra Jourová, Commissioner for Justice, Consumers and Gender Equality gave an explanation why the Commission had not activated the Rule of Law Framework in the case of Hungary. She stressed that the Commission had been actively monitoring the situation in Hungary and was ready to use all means at its disposal to ensure that Hungary – as well as any other Member State – complies with the obligations under EU law and respects the EU values enshrined in Article 2 TEU. She added that this includes using infringement procedures in case of violations of EU law as well as the EU RoL Framework when this is necessary.[172]

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[166] Ibid.

[167] The Hungarian Government, National consultation on immigration to begin, 24 April 2015, <http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin> accessed 8 June 2016.

[168] European Parliament, European Parliament Resolution of 10 June 2015 on the Situation in Hungary (2015/2700(RSP)), P8_TA-PROV(2015)0227, para G.

[169] National Consultation on Migration and Terrorism, April 2015, <http://nemzetikonzultacio.kormany.hu> accessed 12 May 2016.

[170] Op. cit. at 168, para 9.

[171] European Parliament, 'Situation in Hungary: Follow-up to the European Parliament Resolution of 10 June 2015, P8_TA-PROV(2015)0461 Situation', para H.

[172] European Parliament, Debate, 2 December 2015, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20151202&secondRef=ITEM-017&language=EN> accessed 2 May 2016.

She said that the Commission's intention to evoke the Framework provides for those situations 'which cannot be effectively addressed by infringement procedures' and if the national safeguards cannot effectively remedy them. Since, the RoL concerns in Hungary have been 'addressed by a range of infringement procedures and pre-infringement procedures' and 'also the Hungarian justice system has a role to play', the Commission is of the view that the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met'.[173]

It took less than a year before the Polish constitutional crisis started and made the Commission activate the RoL Framework.

[173] Ibid.

B. Constitutional crisis in Poland

1. The main issue: The Constitutional Tribunal

The current constitutional crisis in Poland started with the premature appointment of judges of the Constitutional Tribunal by the soon-to-depart government. On 25 June 2015, the Sejm (lower chamber of the Polish Parliament) adopted the Act on the Constitutional Tribunal entering into force on 30 August 2015.[174] Article 137 of this Act stipulates for the terms of election of all judges whose mandate would end in 2015. Accordingly, on 8 October 2015, during its last session the outgoing legislature 'selected five judges – three to replace judges outgoing on 6 November 2015, two to replace those outgoing on 2 and 8 December 2015 respectively',[175] the last two have taken their seats during the incoming legislature. On 19 November, the new legislature, which came into office on 12 November 2015, amended the Act on the Constitutional Tribunal,[176] stipulating that 'the term of office of a constitutional judge starts from the moment of taking the oath before the President'.[177] The amendment also shortened the terms of office of the President and Vice-President of the Tribunal from nine to three years, renewable once, and terminated the tenure of the incumbent President and Vice-President. Based on this amendment, on 25 November 2015, the new legislature adopted five resolutions declaring lack of legal force of the five nominations of the previous legislature,[178] and nominated five new judges on 2 December 2015.[179] At that moment, there were three judges in office appointed without the president refusing to take the oath and two judges appointed under the law adopted by the new legislature.

Meanwhile, the Constitutional Tribunal was seized by a group of representatives concerning the decisions of both the previous legislature and the new legislature.[180] The Tribunal delivered two judgements. On 3 December 2015, the Court held[181] that

> the legal basis for the election of the three judges replacing those judges whose mandate expired before the end of the term of the previous Sejm, was valid and the President was

[174] The Constitutional Tribunal Act of 25 June 2015, Published in the Journal of Laws of the Republic of Poland on 30 July 2015, item 1064, <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act> accessed 26 April 2016.
[175] Op. cit. at 175, para 14.
[176] The Act of 19 November 2015 amending the Constitutional Tribunal Act, Published in the Journal of Laws of the Republic of Poland on 20 November 2015, item 1928, <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/#19November> accessed 26 April 2016.
[177] Op. cit. at 175, para 18.
[178] See: Monitor Polski – The official Gazette of the Republic of Poland, items 1131-1135, <http://monitorpolski.gov.pl/MP/2015> accessed 26 April 2016.
[179] See: Monitor Polski – The official Gazette of the Republic of Poland, items 1182-1186, <http://monitorpolski.gov.pl/MP/2015> accessed 26 April 2016.
[180] Case K 29/15 and Case 34/15.
[181] 185/11/A/2015 Judgment of 3 December 2015, Ref. No. K 34/15, <http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym> accessed 26 April 2016.

under the obligation to accept their oath. The legal basis for the election of the other two judges was, on the contrary, found to be unconstitutional.[182]

On 9 December 2015, the Court held that 'the election of the three judges replacing judges whose term ended on 6 November 2015' was unconstitutional. Furthermore, '[t]he period of 30 days set for the President to take the oath from the judges elected by the Sejm was found unconstitutional', as well as 'the early termination of the term of office of the Tribunal's President and the Vice-President's'.[183] Nevertheless, 'the Tribunal held that the introduction of a three-year tenure for the President and Vice-President of the Tribunal was constitutional', however, their re-election violated the Constitution.[184] The judgments of the Constitutional Tribunal have not been implemented and the President of the Republic did not take the oath of the judges elected by the previous legislature, but the ones elected by the new one.[185]

On 22 December 2015, the Sejm adopted an amendment to the Act on the Constitutional Tribunal, which was published on 28 December 2015 and entered into force without *vacatio legis*, i.e. without leaving time between its promulgation and actual entering into force.[186] The amendment stipulates the following. The Tribunal shall hear cases as a full bench in a composition of 13 out of 15 judges and decide with two-thirds majority, instead of a simple majority as so far. Individual complaints and preliminary requests require the presence of seven judges. The Tribunal has to consider motions in the sequence in which they were filed. Instead of the General Assembly of the Constitutional Tribunal, the Sejm will declare the 'expiry' of judges' mandate. The amendments introduce the right for the President of Poland and the Minister of Justice to launch disciplinary proceedings against a judge of the Tribunal. Finally, the amendment removes certain provisions from the Act, for instance Article 16 (independence of judges), Article 17(1) (composition of the Tribunal), Article 17(2) (impossibility of a re-election to the Tribunal) or the whole of Chapter 10 (proceedings in the event the President is deemed incapable of exercising office).[187]

Seeing these constitutional changes, a group of non-governmental actors submitted a motion to the Council of Europe (CoE) asking the European Commission for Democracy through Law (Venice Commission) to prepare an opinion on the legislative changes in Poland. They have stressed – inter alia – that adopting the Act amending the foundations of the system of independent judiciary within 3

[182] Op. cit. at 175, para 26.

[183] 186/11/A/2015 Judgment of 9 December 2015, Ref. No. K 35/15, <http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym> accessed 26 April 2016.

[184] Op. cit. at 175, para 28.

[185] European Commission, College Orientation Debate on Recent Developments in Poland and the Rule of Law Framework: Questions & Answers, Fact sheet, 13 January 2016.

[186] The Act of 22 December 2015 amending the Constitutional Tribunal Act, Journal of Laws of the Republic of Poland, 28 December 2015, item 2217, <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/#22December> accessed 26 April 2016.

[187] CoE Venice Commission, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (2016), para 30.

days and without any public discourse, 'undermines the basic principles of a democratic state, in particular the rule of law'.[188]

The European Commission reacted to the above happenings in a swift manner. Frans Timmermans, First Vice-President of the European Commission addressed the Minister of Foreign Affairs, as well as the Minister of Justice of the Republic of Poland in an official letter on 23 December 2015. His concerns related to the selection of the judges to the Constitutional Tribunal on the one, and to the new law amending the Law on the Constitutional Tribunal on the other hand, in particular the impact of this new law on the independence and the functioning of the Tribunal. The Commissioner stressed that the rule of law is one of the common values of the EU, hence, the Commission 'attaches great importance to preventing the emergence of situations whereby the rule of law in a Member State could be called into question'.[189] Therefore, the Commissioner requested information on the constitutional situation in Poland, and recommended to the Polish Government to cooperate with the Venice Commission.

In its immediate reaction from 24 December 2015, the Minister of Foreign Affairs informed the Commissioner that the Polish Government had already submitted request to the Venice Commission asking for its opinion.[190] On 2 and 15 December 2015, two groups of MPs submitted two proposals for the legislature amending the Act on the Constitutional Court of 25 June 2015.[191] On 23 December 2015, the Minister of Foreign Affairs of Poland on behalf of the Polish Government requested the Venice Commission's opinion on 'the constitutional issues addressed in the two proposals'.

Elaborated replies from the Polish Government followed on 7 January 2016 regarding the media law, and on 11 January 2016 regarding the Constitutional Tribunal. In the second letter, the Polish Government stressed that it had taken remedial actions 'to reinstate pluralism in the Constitutional Court' and this had been achieved 'in conformity with the position expressed in numerous documents by the Venice Commission'.[192]

On 9 March 2016, the Constitutional Tribunal held that the amendments of the Law on the Constitutional Tribunal which had been adopted on 22 December 2015 and promulgated on 28 December 2015 are unconstitutional. The Polish Government did not publish this judgment because it was of the view that the Tribunal had not followed the procedure foreseen in the amendments. In its

[188] Helsinki Foundation et al., Letter to the President of the European Commission for Democracy through Law (Venice Commission), Warsaw, 2 December 2015, <http://www.hfhr.pl/wp-content/uploads/2015/11/HFHR_venice_comission_2122015.pdf> accessed 26 April 2016.

[189] Frans Timmermans, Letter, 23 December 2015, <https://www.tagesschau.de/polen-brief-101~_origin-e1d68138-93cc-40a9-ba6f-50f0c9bfa43d.pdf> accessed 26 April 2016.

[190] Request for opinion – Poland, 24 December 2015, <http://www.venice.coe.int/webforms/events/?v=2015> accessed 27 April 2016.

[191] Council of Europe, Request for opinion – Poland, Strasbourg, Warsaw, 23/12/2015, <http://www.venice.coe.int/webforms/events/?v=2015> accessed 30 April 2016.

[192] Zbigniew Ziobro, Tweet of 12 January 2016, <https://twitter.com/ZiobroPL> accessed 28 April 2016.

opinion on the above amendments, the Venice Commission could not examine in detail this judgment but the finding of unconstitutionality of the amendments is in line with its opinion.[193]

2. Additional issues

a) The Public Service Broadcasters

On 31 December 2015, the Polish Senate adopted the 'small media law' concerning the management and supervisory boards of the Polish Public Television Broadcaster (TVP) and Public Radio Broadcaster (PR). The new law modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Minister of Finance. The new law also provided for the immediate dismissal of the existing Supervisory and Management Boards.

Frans Timmermans addressed the Polish Government on 30 December 2015, and asked for information about the draft law on the governance of the Polish media law and its compliance with the relevant EU law. In his letter, the Commissioner referred to the connection between a Member State respectful of the EU's common values (Article 2 TEU), pluralist society and freedom and pluralism of the media. He also called for the importance of the fundamental right of freedom of expression (Article 11 CFR, Article 10 ECHR). Pointing out Protocol No. 29 to the Treaties, he linked the system of public broadcasting in the Member States to the democratic, social and cultural needs of societies and to the need of preserving media pluralism. He also recalled the Audiovisual Media Services Directive[194], as well as the Commission's Communication on the application of State aid rules to public service broadcasting[195] that underlines the importance of independence of broadcasting.

In relation to the amendments on the Public Media Broadcaster, the Polish Government referred to the fact that the Act of 30 December 2015 amending the Broadcasting Act is not an implementing instrument to the Directive referred to by the Commissioner. Furthermore, it stated that media pluralism and freedom of communication 'stay untouched by the amending statute'.[196]

b) Changes in relation to criminal procedures: prosecutor, police

The EU Member States are free to determine their constitutional structure, including which democratic bodies they entrust with which competences to be guards of the values established in the constitution. Nevertheless, there are certain rules in organising a democratic state, and one of the founding principles is the separation of powers. Therefore, when the new legislature appointed the Minister of Justice as chief prosecutor, by the law of 28 January 2016 adopted by the Sejm and

[193] Op. cit. at 175, para 43.
[194] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
[195] European Commission, Communication on the application of State aid rules to public service broadcasting, 2009/C 257/01.
[196] MFA's reply to Frans Timmermans' letter, 7 January 2016, <http://blogs.ft.com/brusselsblog/files/2016/01/polish-letter.pdf> accessed 28 April 2016.

approved by the Senate,[197] this created some concerns on the lack of proper division of tasks of the executive and the judiciary.

On 5 February 2016, the President signed the so called Act of Surveillance or Police Bill that grants the government greater access to digital data and broader use of surveillance for law enforcement.[198] On 28-29 April 2016, the Venice Commission went for a country visit[199] – also in order to gather information about this new law relating to police rights and collecting data.[200]

The Polish Commissioner for Human Rights lodged an application to the Constitutional Tribunal asking for constitutional conformity check both in relation to the law on the police[201] and the one on the prosecutor's office[202].

3. Threat for democracy, RoL, and human rights

Whilst the RoL Framework refers to RoL standards and principles, the constitutional changes in Poland do threaten democracy as well. The values listed in Article 2 TEU involve three main components: democracy, the RoL, and human rights. These three components are strongly related and overlap.[203] In case of Poland, the governing party does not have the necessary majority to be able to change freely the constitution, still weakening checks and balances, can endanger the democratic system. Namely, the changes in relation to the Constitutional Tribunal, the Public Service Broadcasters, the prosecutor and the police have happened suddenly and at the same time. Human rights are strongly affected by

[197] Act of 28 January 2016 - Prosecution Service Act, Journal of Laws of the Republic of Poland, Item 177.

[198] Amnesty International Public Statement, Poland: New surveillance law a major blow to human rights, AI Index: EUR 37/3357/2016, 29 January 2016, <https://www.amnesty.org/download/Documents/EUR3733572016ENGLISH.pdf> accessed 12 May 2016.

[199] CoE Venice Commission, Poland – forthcoming opinion - country visit, 28/04/2016-29/04=2016, <http://www.venice.coe.int/webforms/events/?id=2216> accessed 12 May 2016.

[200] Radio Poland, Venice Commission in Poland to probe 'police bill', 29.04.2016 09:17, <http://www.thenews.pl/1/9/Artykul/250746,Venice-Commission-in-Poland-to-probe-police-bill#sthash.oVHj8fHJ.dpuf> accessed 12 May 2016.

[201] Commissioner for Human Rights, Application to the Constitutional Tribunal on the amendment to the Act on the Police, 18 February 2016, <https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal%20on%20the%20amendment%20to%20the%20Act%20on%20the%20Police.pdf > accessed 12 May 2016.

[202] Commissioner for Human Rights, Application of the Commissioner for Human Rights to the Constitutional Tribunal, 18 April 2016, II.501.5.2016.ST/KŁS, <https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal.pdf> accessed 12 May 2016.

[203] EU Agency for Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information, Vienna, 8 April 2016, < http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-rule-of-law-art-2-02-2016_en.pdf> accessed 10 June 2016, 7; See also: Alexandra Timmer and others, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' [2014] FRAME Project Work PackageNo. 3 – Deliverable No. 2 < http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf> accessed 10 June 2016.

changes in relation to collecting personal data, and undermining the Constitutional Tribunal that is the main guardian of the bill of rights in the constitution.

C. Tools at the disposal of the EU

1. Article 7 TEU

Article 7 TEU provides legal basis for action by the EU against a Member State in breach of Article 2 of the TEU in relation to actions and/or measures that lie outside the scope of EU law. It is a comprehensive tool that includes preventive and penalty mechanisms. The preventive mechanism of Article 7(1) TEU can be activated only in case of a 'clear risk of a serious breach'. It allows the Council to give the EU Member State concerned a warning before a 'serious breach' has actually materialised. The sanctioning mechanism of Article 7(2) TEU can be activated only in case of a 'serious and persistent breach by a Member State' of the values set out in Article 2 TEU. It allows the Council to suspend certain rights deriving from the application of the Treaties to the EU country in question, including the voting rights of that country in the Council.[204]

This tool widely considered as 'nuclear option'[205] has never been used. As Closa, Dimitrov and Weiler point out, the majority of scholars agree that Article 7 TEU can only be used in the most outrageous and acute cases.[206] The activation requires high thresholds: 4/5th majority in the Council to determine that there is a 'clear risk of a serious breach' and the requirement for the European Council to decide by unanimity whether there is 'a serious and persistent breach' of the EU values. In both cases, the European Parliament's consent is required, by a two-thirds majority of the votes cast, representing an absolute majority of all Members (Art. 354(4) TFEU).

Another possible reason for not using this procedure is the Member States' fear that this procedure might also be applied against them. EU Member States expect other States to comply with EU values, but they are reluctant to be judged on their domestic affairs.[207]

The procedure is also considered to be of counter-productive political nature, namely increasing Euroscepticism in the population. Scholars formulated critiques or scepticism towards this mechanism pointing to procedural (responsibility for taking decision) and substantial (interpreting 'serious and persistent breach') obstacles.[208] The reality reflects that these obstacles were sufficient to hinder the evoking of Article 7 mechanisms.

At the same time, the Commission is of the view that it is unnecessary to create new definitions as the various international instruments offer guidance for the interpretation of the concept of 'serious and

[204] Promoting and safeguarding the EU's values, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33500&from=EN> accessed 19 April 2016.
[205] José Manuel Durão Barroso, President of the European Commission, 'State of the Union 2012 Address', Plenary session of the European Parliament/Strasbourg, 12 September 2012, Speech/12/596.
[206] Op. cit. at 153, 7.
[207] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Scoreboard on Democracy, Rule of Law and Fundamental Rights' (2016), DT\1086158EN.doc.
[208] Democracy Reporting International, 'Towards a new deal for democracy in Europe, Making the EU's role in protecting fundamental values effective', Briefing Paper 49, June 2014, <http://democracy-reporting.org/files/bp_49_16_june_1.pdf> accessed 2 May 2016; ibid.

persistent breach'. It refers to the rules of public international law, such as Article 6 of the UN Charter, or Article 8 of the Charter of the CoE.[209]

According to the Commission, Article 7 'aims to remedy the breach through a comprehensive political approach'. Article 7 operates with a political nature, without any doubt, leaving 'room for a diplomatic solution'.[210] This means that implementing of Article 7 requires a mixture of soft and hard law powers.

Others consider Article 7 as an instrument like any other, legal and legitimate that needs to be deployed wisely.[211] According to von Bogdandy, states should not be reluctant to use this tool for more reasons. The determination itself that a Member State's action reached the 'clear risk of a serious breach' means a sanction following the naming and shaming logic. Other Member States are not likely to support (at least officially) a non RoL-conform attitude of a fellow Member State, since the Member States understand that the EU is a community of law and common values.[212]

Beyond the EU Institutions and policy makers, the constitutional crises evoke strong reactions of the broader public including citizens, civil society, academia etc. As the result of the European Citizens' Initiative, the European Commission has been requested to refer the situation in Hungary to the Council – in accordance with Article 7 TEU. The main objective of the 'Wake up Europe! Taking action to safeguard the European democratic project' is to prevent measures on the sides of governments 'that run counter to the founding principles of the rule of law'. The project was registered on 30 November 2015, the signature collection is on-going and will terminate on 30 November 2016.[213]

Even though, the EU policy makers' intention with Article 7(1) TEU was to prevent breaches of values,[214] they do not use this tool for prevention. In the course of the FRAME WP14 Workshop held in Venice on 5-6 May 2016, the participants representing academia expressed their view on the better use of the Article 7 TEU procedures. Some of them argued the 'nuclear option' nature of this tool, or considered it in its positive sense as a real threat that Member States must face if they do not respect the fundamental right values of the EU. The majority of the participants considered it as a failure on the side of the EU that neither in the case of Hungary, nor in the case of Poland the Article 7 TEU procedure was not evoked.

In the case of Hungary, despite the European Parliament's request to the Commission to undertake an in-depth monitoring process of the situation of democracy, the rule of law and fundamental rights in Hungary, and the Commission's own promise to use all means at its disposal,[215] no Article 7 TEU procedure was employed.

[209] Op. cit. at 141.
[210] Ibid.
[211] Op. cit. at 139.
[212] Ibid.
[213] The European Citizens' Initiative <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2015/000005/en?lg=en> accessed 10 May 2016.
[214] Op. cit. at 141.
[215] European Parliament, Plenary debate of 2 December 2015.

2. Infringement procedure (Article 258 and 260 TFEU)

The infringement procedure (Article 258 and 260 TFEU) is seen as an alternative to the mechanisms provided for in Article 7 TEU. These articles cover failures by Member States to meet Treaty obligations, thus, in practice they apply to breaches within the scope of EU law. Breaches must be real and specific and also limit the scope of protection of fundamental rights and values, including the RoL that are rather ambiguous.[216]

The European Commission stressed that its approach to infringements 'pays special attention to 'rule of law-related cases', where implementation of EU legislation raises problems of compatibility with certain aspects of the rule of law'.[217]

Indeed, the infringement procedure (Article 259 TFEU) has been used – either by raising the possibility of evoking it or by evoking it – with success in the past in relation to fundamental rights related issues, e.g. resulting in amendments in national policy legislation in France (2010), Hungary (2012, 2014, and 2015) and Romania (2014).[218]

On 17 January 2012, the European Commission started infringement procedures against Hungary on three subjects: the independence of the Hungarian Central Bank, the lowering of the mandatory retirement age of judges enshrined in the Basic Law of Hungary, and the independence of the data protection authority.[219] The CJEU declared a violation of European Law on grounds of age discrimination violating Directive 2000/78/EC on equal treatment in employment and occupation, which led to a compensation of judges, but only a few judges resumed their office.[220] In the Data Protection Commissioner's case, the CJEU decided that the method of abolishing the position of the specialised ombudsperson for data protection breached EU law.[221]

The main critique from the RoL perspective is that even if the cases were successful, the awarded compensation cannot substitute a ruling on the violation of Article 2 TEU. Some authors consider this as a missed opportunity on the side of the CJEU.[222]

On 10 December 2015, the Commission opened an infringement procedure against Hungary concerning its asylum law.[223] According to the Commission, the new Hungarian legislation is not in

[216] CoE Venice Commission, 'Report on the Rule of Law' (2011).
[217] Speech of First Vice-President Frans Timmermans to the European Commission, 'Commission Statement: EU Framework for Democracy, Rule of Law and Fundamental Rights', SPEECH/15/4402 (2015).
[218] European Commission, Infringement decisions, <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 10 June 2016.
[219] Op. cit. at 162, para. O.
[220] Case C-286/12, European Commission v Hungary [2012] ECR I-0000.
[221] Case C-288/12 Commission v Hungary [2014] ECR I-237.
[222] Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 11/15, 19.
[223] European Commission, Press Release of 10 December 2015, <http://europa.eu/rapid/press-release_IP-15-6228_en.htm> accessed 30 April 2016.

compliance with EU law, in particular with the Asylum Procedures Directive[224] and the Directive on the right to interpretation and translation in criminal proceedings[225].

The background of the procedure is that in July and September 2015 the Hungarian legislature adopted a number of amendments relating in particular to the law on asylum, the penal code, the law on criminal procedure, the law on the border protection, the law on the police and the law on national defence. The Commission's preliminary assessment highlighted concerns in relation to the substance and implementation of those amendments. On 6 October 2015 the Commission sent an administrative letter to the Hungarian Government that responded in November 2015.[226] The content of the letter is not known for the public. Since then, no information on the on-going infringement procedure has been made available to the public.

3. Procedures before the ECtHR

Individuals affected by a concrete action or omission of a Member State can challenge the unconstitutional attitude of the country resulting in human rights violations before the ECtHR in Strasbourg.

In relation to the Hungarian events, the President of the Supreme Court in Hungary submitted an application with the ECtHR as his mandate was terminated ahead of time. In its Chamber judgment of 27 May 2014,[227] the ECtHR held that there had been a violation of Article 6(1) (right to fair trial) and Article 10 (freedom of expression) of the ECHR. On 27 August 2014, the Hungarian Government requested that the case be referred to the Grand Chamber of the Court. The Grand Chamber held its hearing on 17 June 2015.[228] The hearing is available online but the case is still pending before the Grand Chamber.[229]

It is questionable whether the use of procedures outside of the EU can be considered as an effective tool. The Council of Europe observed that at the EU level the ECtHR judgments against Member States are not properly followed up.[230]

[224] EU Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.
[225] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.
[226] European Parliament, Motion for a Resolution further to Question for Oral Answer B8-1110/2015 pursuant to Rule 128(5) of the Rules of Procedure on the situation in Hungary: follow-up to the European Parliament resolution of 10 June 2015, (2015/2935(RSP)), B8-1358/2015, para H.
[227] Application no. 20261/12, András Baka against Hungary (12 March 2012).
[228] European Court of Human Rights, Grand Chamber hearing concerning premature termination of the President of the Hungarian Supreme Court's mandate Press Release, 17 June 2015, ECHR 208 (2015).
[229] Op. cit. at 227.
[230] CoE Parliamentary Assembly, 'Resolution 2075 (2015), Implementation of Judgments of the European Court of Human Rights'.

4. Direct action by a Member State (Article 259 and 260 TFEU)

The TFEU enables the Member States themselves to initiate an infringement procedure against other Member States. Article 259 TFEU says that '[a] Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union'.[231] The Member State initiating such procedure must approach the Commission first, which takes over the action if it agrees to the presented arguments.

The provision is based on the presumption that the Member States have 'a vivid interest in ensuring sustained compliance with EU law by their peers' because they are all in 'in the same boat'.[232] Still so far, only a limited number of cases were brought before the CJEU based on Article 259 TFEU.[233] The procedure is even more disputable in cases when the values are in danger and not concrete provisions of secondary law.

5. Preliminary ruling by the Court of Justice (Article 267 TFEU)

The 'lack of popularity of values arguments'[234] in the CJEU's jurisdiction is also perceivable in the preliminary ruling procedures based on Article 267 TFEU. The Court does not refer to the EU values even in those cases in which allegedly Article 2 TEU was violated.[235]

6. Allocation of resources – Financial instruments

Beyond policy and legal tools, financial instruments can also serve the goal of sanctioning of EU law or non EU values conformity. This is a recent achievement of European law that conditionality finds its place in financial instruments supporting Member States.[236] Depending on the level of seriousness of the breach and the degree of cooperation, EU funds can be frozen or the CJEU can impose a fine or a lump sum on the Member State.[237] The Council Implementing Decision 2012/156/EU suspended for the first time since the establishment of the European Cohesion Fund in 1994 the financial commitments for Hungary, which failed to redress the excessive deficit.[238]

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[231] Article 259 TFEU.
[232] Op. cit. at 222, 12.
[233] Case 141/78 France v UK [1979] ECR 2923; Case C-388/95 Belgium v Spain [2000] ECR I-3123; Case C-145/04 Spain v UK [2006] ECR I-7917; C-364/10 Hungary v Slovakia [2012] ECLI:EUC:2012:630.
[234] Op. cit. at 222, 14.
[235] Frank Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in Armin von Bogdandy and Pál Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford Hart Publishing 2015), 206-208.
[236] Viorica Viță, Ex ante fundamental rights conditionalities – a novel fundamental rights tool in the European Structural and Investment Funds architecture, Locating it in the broader EU fundamental rights conditionality landscape, LLM Thesis, 2014, on file with the author.
[237] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Scoreboard on Democracy, Rule of Law and Fundamental Rights, DT\1086158EN.doc.
[238] Council of the European Union, Council Implementing Decision of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L 78, 17.3.2012, 19–20; 2012/323/EU:

The main critiques against the use of financial instrument as sanctioning non EU values conform conduct of a Member State is that it hits the people instead of the government. Financial sanctions may directly affect people's everyday lives, which may increase Euroscepticism. Some might say that in a democracy, people can still punish their government for financial sanctions from the EU, when they vote in elections.[239] Nevertheless, recent voting trends in Europe show rather a right-wing radicalisation and increasing Euroscepticism (Poland – 2015, Austria – 2016).

7. Further soft law and monitoring tools

Beyond the treaty-based mechanisms, there are further soft law instruments that promote and safeguard the Rule of Law concept in the EU. These are by their nature rather monitoring mechanisms which is not of less importance as it will be discussed later in the chapter. These tools are not analysed in depth only listed here, nevertheless, a comprehensive comparative table (Table No 9) as an annex to the chapter describes their legal basis, the issues that the mechanisms deal with, as well as the initiator and decision maker and the possible results of their use.

- A dialogue within the Council to promote and safeguard the rule of law (Conclusions of the Council and the MSs meeting within the Council on ensuring respect for the rule of law of 16 December 2014)
- Annual report on the situation of fundamental rights by the European Parliament (Annex I to Decision of the Conference of Presidents of 12 December 2012)
- Annual report on application of the Charter of Fundamental Rights by the Commission (Communication from the Commission - Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM(2010)0573 final of 19 October 2010)
- Justice Scoreboard (Communication from the Commission - The EU Justice Scoreboard A tool to promote effective justice and growth (COM(2013)0160 final of 27 March 2013)
- Petition to the European Parliament (Article 227 TFEU)
- Conclusions and opinions by the Agency for Fundamental Rights

Council Implementing Decision of 22 June 2012 lifting the suspension of commitments from the Cohesion Fund for Hungary, OJ L 165, 26.6.2012, p. 46–47.

[239] Conclusions, FRAME WP14 Workshop, Venice, 5-6 May 2016.

D. The need for a strategy – The new Rule of Law Framework

The above examples have shown that there are tools at the EU's disposal that are either not used at all, or not in reference to the fundamental values. The question is whether this is due to the non-suitability of these tools and therefore new tools are needed, or there are other reasons for the non-use or non-strategic use. Before the EU embarks on a long discussion on enriching the fundamental rights toolbox with new tools, it should be aware of the existing tools and the problems with their use.

Apparently, treaty based legal instruments with the exception of the infringement procedure, whose applicability is specific and limited, have not been activated (this observation applies especially to Article 7 TEU). Policy instruments could not reach any swift and effective intervention. Recent political events in the Member States, such as the elections in Austria, are warning signss that there might be more and more situations 'which do not fall under the scope of EU law, and cannot be said to meet the threshold of Article 7, but which do raise concern regarding the respect of the rule of law in a particular Member State'.[240] In order to establish the modalities of how the Commission shall react when there is an emerging systematic threat to the rule of law, the new Rule of Law Framework was adopted.

1. Adoption of the Rule of Law Framework

On 11 March 2014, the European Commission adopted a new Framework for addressing systemic threats to the Rule of Law in any of the EU's 28 Member States. The purpose of the Framework is to enable the Commission to enter into a (political) dialogue with the Member State concerned in order to find a solution with the Member State and to prevent the emergence of a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' and in this way to avoid having to trigger the mechanisms of Article 7.[241]

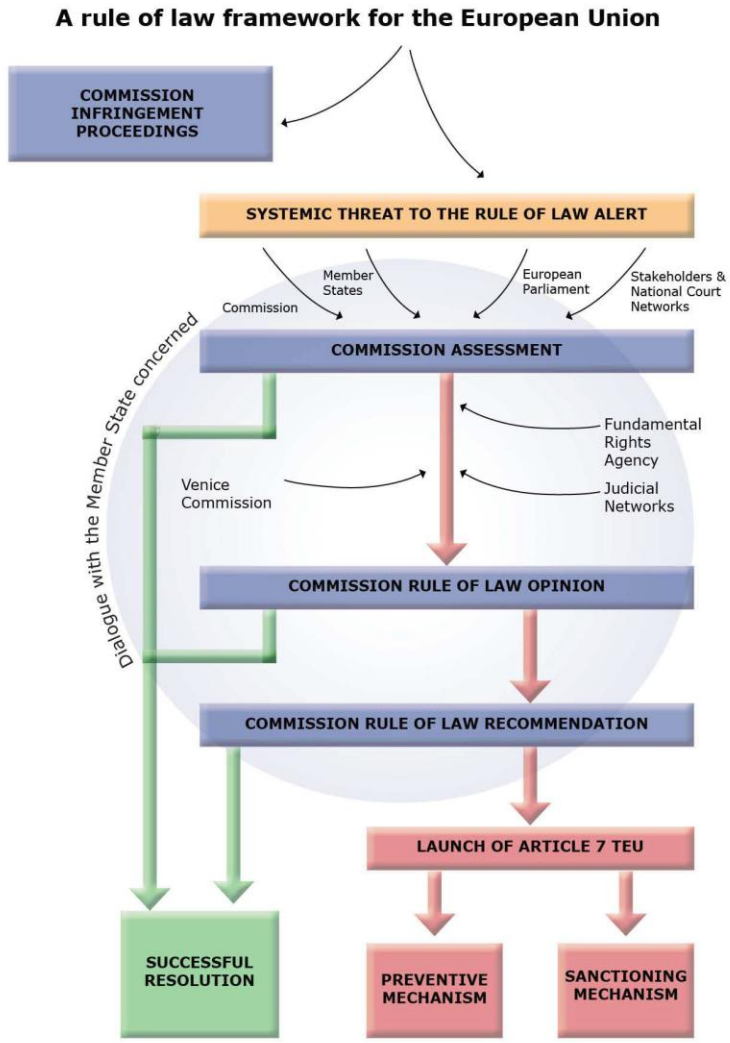
The Rule of Law Framework brings to the light how the Commission exercises its role under the Treaties, and aims at reducing the need for recourse to the Article 7 Procedure. The RoL Framework has three stages. First, the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. Following an objective assessment of the situation, the Framework allows the Commission to react swiftly. If the assessment results in the belief of a systemic threat to the rule of law, the Commission initiates a dialogue with the Member State, by sending a 'rule of law opinion'. If the first step cannot resolve the situation, the Commission can issue a 'rule of law recommendation' addressed to the Member State as a next step. In a third stage, the Commission shall monitor the follow-up given by the Member State to the recommendation.[242]

Launching the RoL procedure is considered as a pre-Article 7 procedure because if there is no satisfactory follow-up within the time limit set, the Commission can resort to the Article 7 TEU

[240] Speech of First Vice-President Frans Timmermans to the European Commission, 'Commission Statement: EU Framework for Democracy, Rule of Law and Fundamental Rights', SPEECH/15/4402 (2015).
[241] Ibid.
[242] Op. cit. at 126.

procedure. The entire process is based on a continuous dialogue between the Commission and the Member State under scrutiny, and the Commission shall keep the European Parliament and Council regularly and closely informed.[243]

Figure 4: The Rule of Law framework for the European Union[244]



a) Notions

The RoL Framework clarifies the principles and standards that stem from the Rule of Law. 'The Framework is an important reference point, although the principles and standards may vary according to the constitutional systems within the Member States. These principles include legality, which

[243] Op. cit. at 185.
[244] European Commission, Annexes to the Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Annex II.

implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[245]

Academic scholars raise the issue of unclear terms in the Framework, such as 'systematic nature' that is defined as 'the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress.'[246] Another critique relates to the terms of 'systematic threat' and 'systematic violation', namely that no distinction was drawn between them.[247] The confusion is escalated by the fact that Article 7 operates with the notion of 'serious and persistent breach'.

The Commission tries to dissolve the possible ambiguity by referring to the case law of the CJEU and of the ECtHR, as well as documents drawn up by the CoE, building notably on the expertise of the Venice Commission. It states that these sources provide a non-exhaustive list of the above-mentioned principles and hence define the core meaning of RoL as a common value of the EU in accordance with Article 2 TEU.[248]

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.[249] So the Framework operates on the basis of accountability and subsidiarity.

The Framework relies on the notion of equality between the Member States, as it recalls Article 4(2) TEU, according to which the EU must respect the equality of Member States before the Treaties.

The sincere cooperation belongs also to the notions of the Framework, which is based on Article 4(3) TEU, according to what the EU and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The cooperation has an external dimension as well, as the Framework enables, or rather requires the Commission to seek external expertise. This is not a new notion, though, as it has already been stressed regarding the Article 7 procedure that beyond the European Parliament's report on the fundamental rights situation in the Member States, reports of international organisations (UN, OSCE, CoE), NGO reports, and decisions of regional and international courts (ECtHR, ICJ, ICC) are important sources of information.[250]

The Framework explicitly refers to the Venice Commission as it helps CoE Member States to bring their legal and institutional structures into line with European standards and international experience in the

[245] Op. cit. at 126, 4.
[246] Ibid, 7.
[247] Op. cit. at 208.
[248] Op. cit. at 126.
[249] Ibid, 4.1.
[250] Op. cit. at 141.

fields of democracy, human rights and the rule of law. The Framework gives the role to the Venice Commission to set the substantive standards that will be the bases of the Commission's rule of law opinion.[251] By relying on and referring to expert opinions of the Venice Commission, there is no need for the EU to define itself what is required from a Member State under Article 2 TEU. It will be sufficient to 'rely on what the Venice Commission asks for, in particular to respect the rule of law'.[252] The Venice Commission adopted the Rule of Law Checklist. The Checklist aims at enabling various actors wishing to assess the respect of the Rule of Law in a country in an objective, thorough, transparent and equal way. According to the Venice Commission's announcement, 'the Checklist is intended for, in addition to the Council of Europe, in particular, the European Union, when it uses the mechanism provided for by Article 7 of the Treaty on European Union: prevention of the risk of a serious breach by a Member State of the values common to the Member States and sanctioning of such breaches'. [253]

The achievement of the new RoL Framework are that it clarifies the concept of RoL and foresees greater cooperation with the CoE Venice Commission and relies on the observations of international monitoring mechanisms, as well as jurisdiction of regional and international courts. An important feature of the Framework is its monitoring nature by regular assessment of the compliance of Member States with EU common values and respect for fundamental rights. Considering scholars' suggestions,[254] the new Framework aims to involve individual human rights protection in as much as enable EU citizens to make use of their rights established by the CFR. At the same time, scholars and practitioners consider the new tool as 'insufficiently revolutionary'.[255] The European Commission emphasises that it does not mean to create a new mechanism but to complement the existing toolbox and create a comprehensive framework for protection. Through this, the policy-makers aim to solve the remaining challenges related to fundamental rights in Europe and Article 7 TEU in particular. Furthermore, they hope to overcome the issue of 'double standards' in the Member States.[256]

b) Risks

Since the RoL Framework is a new tool that has not been used yet, there are uncertainties around the content and the modalities of the Framework. The Commission Communication 'does not specify when the framework must be activated'.[257]

The cooperative nature of the procedure is elementary. The Framework builds on the presumption that a dialogue between the Commission and the Member State will work. Furthermore, it is assumed that a Member State trusts and follows the conclusions of independent expertise.

[251] Op. cit. at 139.
[252] Ibid.
[253] CoE Venice Commission, Rule of Law Checklist, Strasbourg, 18 March 2016, Study No. 711 / 2013, CDL-AD(2016)007.
[254] Op. cit. at 139.
[255] Op. cit. at 142; Conclusions, FRAME WP14 Workshop, Venice, 5-6 May 2016.
[256] Op. cit. at 126.
[257] Op. cit. at 138, para 8.

The RoL procedure might remind us of the procedure of ombudsman institutions in as much as the recommendations of the Commission are legally non-binding.[258] There is a significant difference, however, namely that at the end of the procedure there is the probability of evoking Article 7 procedure.

The above concerns or at least some of them can be clarified in a satisfying manner once the Commission activates the RoL Framework. This did not happen in the case of Hungary, despite the fact that the European Parliament called and then recalled the Commission to activate the first stage of the EU framework to strengthen the rule of law and undertake an in-depth monitoring process on the situation of democracy, the rule of law and fundamental rights in Hungary.[259]

2. Activating the Rule of Law Framework in the Polish case

On 13 January 2016, the European Commission held a College Orientation Debate on the developments in Poland and the RoL Framework having rising concerns regarding the respect of the RoL. The aim of the orientation debate was to assess the situation in Poland under the RoL mechanism. The college mandated the Vice-President of the Commission, Frans Timmermans, to send a letter to the Polish Government as a first step of starting a structured dialogue under the RoL Framework.[260]

On the same day, Timmermans stressed repeatedly in his answer to the Polish Government's letter of 11 January 2016 that the EU 'is founded on a set of common values enshrined in Article 2 TEU, which include in particular the respect for the rule of law'.[261] The Vice-President elaborated on the concept of RoL referring to mutual trust among the Member States based on the confidence that RoL works in each of them. The Vice-President also referred to the Framework on the Rule of Law, adopted in March 2014. Considering the fact that the judgments of the Constitutional Tribunal have not been implemented, Timmermans stressed that 'compliance with final judgments is an essential requirement inherent the rule of law'. In relation to freedom and pluralism of the media, Timmermans recalled that the rule of law requires respect for democracy and fundamental rights, and without this there is no democracy. The Vice-President informed the Polish Government that the Commission is examining the situation under the RoL Framework and therefore, asked for a meeting with the Minister of Justice, who is an addressee of the letter.

On 19 January 2016, the European Parliament held a debate with the Polish Prime Minister on rule of law. Frans Timmermans took the lead and described the Commission's cognition in relation to the situation in Poland relating to the dispute on the nomination of judges, as well as the shortening of the mandate of the president and the vice-president of the Constitutional Tribunal, and the new media law. He stressed that when national RoL safeguards seem to come under threat, the EU needs to act

[258] Ibid.
[259] European Parliament, 'Joint Motion for a Resolution on the Situation in Hungary (2015/2935(RSP)), B8-1351/2015 } B8-1358/2015 } B8-1359/2015 } B8-1361/2015 } RC1' (2015), para 9.
[260] Op. cit. at 185.
[261] Frans Timmermans, 'Letter, 13 January 2016' <http://im.ft-static.com/content/images/ae55b6c0-b9f7-11e5-bf7e-8a339b6f2164.pdf> accessed 27 April 2016.

'as a matter of urgency'.[262] Since the replies of the Polish Government (of 7 and 11 January 2016) are not complete and sufficient to dispel the European Commission's concerns, the Commission decided to start a constructive and facts based dialogue with the Polish Government in order to prevent the emergence of a systematic threat to the RoL. In his speech, the Timmermans described the spirit of the planned dialogue as open, constructive, cooperative, non-confronting, impartial, evidence-based and preventive.[263]

On 4 April 2016, the second college meeting took place where Frans Timmermans reported on his visit to Warsaw where he had met the Minister of Justice, the Deputy Prime Minister and the president of the Constitutional Tribunal on 3 April. On 6 April, the Commission puts forward that a national dialogue has been started and the Commission needs to support this dialogue. Therefore, the Commissioner envisages an imminent visit to Warsaw in order to continue this dialogue with Polish authorities and other stakeholders – including non-governmental organisations, academia etc.[264]

Meanwhile, on 13 April 2016, the European Parliament adopted its first resolution on the situation in Poland, similarly as it was the case with Hungary. The European Parliament is especially concerned with the ability of the Constitutional Tribunal to uphold the constitution and guarantee respect for the RoL. Therefore, the European Parliament urges the Polish Government to publish and fully implement without further delay the Constitutional Tribunal's judgment of 9 March 2016 and to implement the judgments of 3 and 9 December 2015.[265] It also calls on the Polish Government to implement the recommendations of the Venice Commission. The European Parliament addresses the Commission and calls on it that if the Polish Government fails to comply with the Venice Commission's recommendations in the course of the structured dialogue, the Commission should activate the second stage of the rule of law procedure by issuing its 'rule of law recommendation' and to offer its support to Poland in developing solutions to strengthen the rule of law.[266] The Parliament encourages the Commission to monitor all Member States in the same way in order to avoid double standards across the European Union.

[262] European Parliament, Plenary session: Situation in Poland - Council and Commission statements: Statement Frans Timmermans, First Vice-President of the EC (2 - 17:05 - 17:12), <http://audiovisual.europarl.europa.eu/Assetdetail.aspx?id=6a552588-80fc-496b-9043-a5910118572d> accessed 19 April 2016.

[263] European Parliament, Plenary session: Situation in Poland - Council and Commission statements: Statement Frans Timmermans, First Vice-President of the EC (2 - 17:05 - 17:12), <http://audiovisual.europarl.europa.eu/Assetdetail.aspx?id=6a552588-80fc-496b-9043-a5910118572d> accessed 19 April 2016.

[264] European Commission, Statement, 6 April 2016, Readout by First Vice President Timmermans of the College meeting of 6 April 2016 – introductory remarks, <https://ec.europa.eu/commission/2014-2019/timmermans/announcements/readout-first-vice-president-timmermans-college-meeting-6-april-2016-introductory-remarks_en> accessed 28 April 2016.

[265] European Parliament, 'European Parliament Resolution of 13 April 2016 on the Situation in Poland (2015/3031(RSP)), P8_TA-PROV(2016)00123', para 4.

[266] Ibid, para 7.

In its report on the situation of fundamental rights in the EU, the Parliament has emphasised the necessity of 'monitoring of the compliance of all EU Member States with regard to fundamental rights'.[267] Inter alia, it mentions a scoreboard for measurement, annual country assessment, broader monitoring mandate for FRA, the Commission's obligation to issue a formal warning, and improved coordination between the EU institutions and agencies, the Council of Europe, the United Nations and civil society organisations.[268]

In 2015, the Commission started to work on these improving elements. The following section will present these new developments.

3. If the strategic framework is not enough… establishing an EU mechanism on democracy, rule of law and fundamental rights

The resolution of 10 June 2015 adopted by the European Parliament on the situation in Hungary called on the Commission 'to present a proposal for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States, [...]'.[269]

It also instructed the European Parliament's 'Committee on Civil Liberties, Justice and Home Affairs to contribute to the development and elaboration of this proposal in the form of a legislative own-initiative report to be adopted by the end of the year; [...]'.[270] Pursuant to Article 225 TFEU, the Parliament may request the Commission, 'to submit to it any appropriate proposal for the adoption of a new act or the amendment of an existing act, by adopting a resolution on the basis of an own-initiative report drawn up by the committee responsible in accordance with Rule 52'.[271] The legislative initiative reports contain a detailed draft of the text expected from the Commission.[272]

In preparation of its legislative own-initiative report, the Committee on Civil Liberties, Justice and Home Affairs started to draft a set of 7 working documents to the following topics:

1. An Annual Pan-EU debate on Democracy, Rule of Law and Fundamental Rights,
2. Scoreboard on Democracy, Rule of Law and Fundamental Rights,
3. Using article 2 and the Charter as a basis for infringement procedures,
4. Democracy, Rule of Law and Fundamental Rights in impact assessment or screening procedures,

[267] European Parliament, 'Report on the Situation of Fundamental Rights in the European Union (2013-2014) (2014/2254(INI)), A8-0230/2015' (2015), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0230+0+DOC+PDF+V0//EN>).
[268] Ibid, para 10.
[269] Op. cit. at 168, para 12.
[270] Ibid.
[271] European Parliament, Rules of Procedure, July 2014, Rule 46(1).
[272] European Parliament, Completing the Legislative Cycle: Agenda Setting. Legislative Own Initiative Reports. <http://www.europarl.europa.eu/the-secretary-general/resource/static/files/Documents%20section/SPforEP/Legislative_Own-Initiative_reports.pdf> acessed 9 June 2016.

5. Individual enforcement/litigation by citizens as a tool,
6. Methods and existing mechanisms,
7. European logic of governance.

The purpose of the Annual Pan-EU debate would be 'to bring together representatives from the European Parliament and Member States National Parliaments to exchange experiences on the situation of Democracy, Rule of law and Fundamental Rights in the EU and share identified difficulties as well as best practices from Member States'.[273] As an outcome, the participants should formulate and adopt recommendations.[274]

The new Scoreboard on Democracy, Rule of Law and Fundamental Rights will be an 'evaluation, monitoring and alerting tool' that would provide an overview of Member States compliance with Article 2 TEU and the CFR. The Scoreboard would rely on annual country assessments and on EU fundamental rights indicators. The in-built early warning system would alert the EU Institutions if there is the risk of a breach of the common values by one of the Member States. This new tool should be used by a new independent monitoring body, a permanent Committee of Independent Experts.[275]

The Working Document analysing the use of Article 2 and the CFR as a basis for infringement procedures, makes a recommendation to setting up a 'politically independent' monitoring body of experts. It would draw on the experiences of the Network of Independent Experts on Fundamental Rights that monitors the fundamental rights situation in the EU and the Member States on the basis of the CFR.[276] The document also emphasises the importance of keeping the European and the national parliaments informed. Furthermore, it suggests making the CFR 'the principle yardstick' and a reference point for the interpretation of the TEU, including Article 2 and 6.[277]

The fourth Working Document collects all the existing RoL safeguard mechanisms within the EU law framework.[278] These are illustrated in Table No 9.

The fifth Working Documents discusses the litigations initiated by EU citizens as a toll for private enforcement. These include litigations before judicial bodies both in the Member States and at the EU level, including individual redress under the ECHR.[279]

[273] European Parliament, Committee on Constitutional Affairs European Parliament, 'Working Document on an Annual Pan-EU Debate in the Framework of the Legislative Own-Initiative Report on the Establishment on an EU Mechanism for Democracy, the Rule of Law and Fundamental Rights' (2016), 4.
[274] Ibid, 5.
[275] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Scoreboard on Democracy, Rule of Law and Fundamental Rights' (2016), DT\1086158EN.doc.
[276] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Working Document, Using Article 2 and the Charter as a Basis for Infringement Procedures' (2016), 4.
[277] Ibid, 5.
[278] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Methods and Existing Mechanisms' (2016).

The sixth Working Document analyses whether and to what extent impact assessments and screening procedures consider democracy, rule of law and fundamental rights.[280] It refers to the Commission's latest Better Regulation Guidelines (2015)[281] containing a toolbox[282] as guidance for Commission staff.

On 13 April 2016, the European Parliament, the Council of the EU and the European Commission signed a new Inter-institutional Agreement (IIA) on Better Law-Making to improve the quality and the results of European legislation.[283] In accordance with this document, the sixth Working Document formulates four key recommendations: need for consultation with national experts and authorities; need for post negotiation but pre adopted impact assessment; impact assessment should cover all kind of legislation; need for inter-institution cooperation through an inter-institutional impact assessment working group.

The seventh Working Document lists the guarantees of a democratic functioning state. These are the impartial nature of the state; the reversibility of political decisions after elections; the existence of institutional checks and balances; the permanence of the state and institutions, based on the immutability of the constitution; and the existence of a free media landscape.[284]

It is interesting to note that there is no mentioning of these initiatives in the European Parliament's follow-up resolution.[285]

[279] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Litigation by Citizens as a Tool for Private Enforcement' (2016).

[280] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Democracy, Rule of Law and Fundamental Rights in Impact Assessment or Screening Procedures' (2016).

[281] European Commission, Better Regulation, Guidelines, <http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm> accessed 13 May 2016.

[282] European Commission, Better Regulation, Toolbox, <http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm> accessed 13 May 2016.

[283] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, <http://ec.europa.eu/smart-regulation/better_regulation/documents/iia_blm_final_en.pdf> accessed 10 June 2016.

[284] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - A European Pattern of Governance' (2016).

[285] Op. cit. at 171.

E. Conclusion

The recent constitutional crisis situations in Hungary and Poland have showed that the EU inadequately operationalizes the concepts human rights, democracy and rule of law. One of the reasons might be that there is no systematic strategic document for these concepts for internal use. The European Parliament admitted that a comprehensive framework is needed that brings together all procedures available.[286]

The introduction of a new instrument assumes that the EU is aware of it that its current toolbox is not adequate to address all fundamental rights challenges occur in the EU Member States. However, apparently, the new RoL Framework is considered to be too weak due to its soft law and dialogue based character, the Article 7 procedures are not explored as much as they should and could be, and the potentials lying in the infringement procedure (Article 258, 259, and 260 TFEU) are not used either. The EU realised the lack of a complex mechanism that includes a system for ex ante monitoring in order to identify breaches committed and an effective ex post system for addressing those breaches.[287] The wish for 'better developed set of instruments'[288] is slowly coming true.

The Council argues the added value of the RoL Framework. In the opinion of its Legal Service, it formulates harsh critiques on this tool arguing its limited scope of application, non-binding nature, undermining effect to Article 7 TEU, and the legal basis of the Commission's possible actions. The Council Legal Service concludes that 'the new Framework for the Rule of Law as set out in the Commission's communication is not compatible with the principle of conferral, which governs the competences of the institutions of the Union'.[289] This leads us to the question of political leadership. While the Article 7 TEU procedures give role to the Council, the Rule of Law Framework mandates the Commission with acting. Rivalry between the EU Institutions do not help the strategic use of the tools either. Apparently, the Council compete with the Commission on the development of the toolbox. In December 2014, the Council and the Member States meeting within the Council committed themselves to 'establishing a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties'.[290] However, the Conclusions emphasise 'complementarity' with other EU Institutions and International Organisations in order to avoid duplication and take into account existing instruments and expertise in this area.[291]

[286] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Scoreboard on Democracy, Rule of Law and Fundamental Rights, DT\1086158EN.doc.
[287] Op. cit. at 276.
[288] Barroso, José Manuel Durão, President of the European Commission, 'State of the Union 2013 Address', Plenary session of the European Parliament/Strasbourg, 11 September 2013, Speech/13/684.
[289] Council of the European Union, 'Commission's Communication on a New EU Framework to Strengthen the Rule of Law: - Compatibility with the Treaties, 126109/4'.
[290] Council of the European Union, 'Conclusions of the Council of the European Union and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law', 16 December 2014.
[291] Ibid.

Scholars and practitioners agree that there is not much need for new reporting or monitoring mechanisms,[292] but rather for the improvement of the European Union's capacity to act and intervene in certain types of crisis situations relating to the rule of law. Numerous actors – including Union institutions and agencies, in particular the Fundamental Rights Agency, but also the Council of Europe and its Venice Commission, as well as many NGOs – perform regular monitoring activities and make important assessments. Efforts to make this information more accessible and easier to use must certainly be encouraged.[293]

Considering all the experiences, the concerns of EU Institutions and the scholarly literature analysing them, the following recommendations can be formulated:

- the dialogue in course of the RoL Framework procedure 'has to aim for something other than making the national government see what the applicable European constitutional standard is'[294] and more arguments are needed, such as mutual trust etc.
- in order to avoid wrong references to EU secondary law, the Commission must be more vigilant in checking better the connection between national law and EU law;
- better use of the expertise of the Council of Europe is needed;
- defining in clear terms the criteria for the application of the RoL Framework, in particular, defining the criteria for 'clear risk of breach' and 'serious and persistent breach', building inter alia on the case-law of the CJEU and the ECtHR;
- 'specifying which rights deriving from the application of the Treaties to the Member State in question apart from voting rights in Council, can be suspended, so as to consider the possibility of imposing further penalties that would ensure the effective functioning of the framework in keeping with European law and fundamental rights';[295]
- 'stipulating that all EU legislative proposals, policies and actions, including in the economic sphere and in the field of external relations and all EU-funded measures, must comply with the Charter and undergo a detailed ex ante and ex post assessment of their impact on fundamental rights, as well as including a proactive plan of action that ensures the efficient application of existing standards and identifies areas in which reforms are necessary; in this regard, believes that the external independent expertise of the FRA should be fully used by the Commission, the Council and Parliament when legislating and developing policies';[296]
- 'developing, in cooperation with the FRA and national human rights bodies in the Member States, as well as with input from the broadest civil society representation, a database that

[292] Conclusions, FRAME WP14 Workshop, Venice, 5-6 May 2016; Interview with Michael O'Flaherty, Director of the EU Agency for Fundamental Rights, 25 February 2016.
[293] Interview with Michael O'Flaherty, Director of the EU Agency for Fundamental Rights, 25 February 2016.
[294] Uitz, Renáta: Poland, Hungary and Europe: Pre-Article 7 Hopes and Concerns, VerfBlog, 2016/3/14, <http://verfassungsblog.de/poland-hungary-and-europe-pre-article-7-hopes-and-concerns> accessed 2 May 2016.
[295] Op. cit. at 138, para. 9(e).
[296] Ibid, para. 9(f).

collates and publishes all available data and reports on the situation regarding fundamental rights in the EU and in individual Member States',[297]

- any new EU mechanism put in place to monitor the respect of the values of Article 2 TEU should build on the existing data and information from various mechanisms and institutions at the national and EU levels, as well as from international human rights monitoring mechanisms.[298]

More radical views suggest a revision of the EU Treaties[299] and introduce 'a graduated corrective mechanism' so as bridge the gap between political dialogue and the 'nuclear option' of Article 7 TEU and to address the 'Copenhagen dilemma' within the current Treaties'.[300]

At the moment, the EU values, in particular fundamental rights, are the cornerstone of the integration process. If the Member States and the EU itself still agree that these values are still shared among the Member States and the constitutional traditions are still common – as Article 6(3) TEU declares, the EU not only needs to establish instruments that will ensure that all actions of Member States and policies of EU Institutions are in keeping with these principles, but has a duty to do so.[301]

[297] Ibid, para. 9(g).
[298] EU Agency for Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information, Vienna, 8 April 2016, < http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-rule-of-law-art-2-02-2016_en.pdf> accessed 10 June 2016, 24.
[299] Op. cit. at 138, para. F.
[300] Ibid, para. Ah.
[301] Op. cit. at 276, 4.

Table 7: Methods and existing mechanisms[302]

	Legal basis of action	Issues dealt with	Who launches	Who decides	Possible result
Preventive mechanism	Article 7(1) TEU	a clear risk of a serious breach by a MS of the values referred to in Article 2 TEU	• 1/3 of the MSs • the EP, acting by a 2/3 majority of the votes cast, representing the majority of its component Members • the Commission	the Council, acting by a majority of 4/5 of its members, after obtaining the consent of the EP, acting by a 2/3 majority of the votes cast, representing the majority of its component Members	✓ recommendations and monitoring ✓ application of the sanctioning mechanism
Sanctioning mechanism	Article 7(2) TEU	the existence of a serious and persistent breach by a MS of the values referred to in Article 2 TEU	• 1/3 of the MSs • the Commission	the European Council, acting by unanimity on a proposal by 1/3 of the MSs or by the Commission and after obtaining the consent	possibility for the Council, acting by a qualified majority, to decide to suspend certain rights deriving from the application of

[302] Committee on Civil Liberties, Justice and Home Affairs, 'Working Document on Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Methods and Existing Mechanisms.'

				of the EP, acting by a 2/3 majority of the votes cast, representing the majority of its component Members	the Treaties to the MS in question, including the voting rights of the representative of the government of that MS in the Council
Rule of law framework	Communication from the Commission - A new EU Framework to strengthen the Rule of Law (COM(2014)0158 final of 11 March 2014)	systemic threat to the rule of law in a MS	the Commission	the Commission	✓ Commission assessment ✓ Commission recommendation ✓ follow-up to the Commission recommendation - in particular, application of Article 7 TEU mechanisms
Infringement proceedings	Article 258 and 260 TFEU	failure to fulfil an obligation under the Treaties by a MS	the Commission	the CJEU	✓ Commission letter of formal notice ✓ Commission reasoned opinion ✓ judgment of the

					CJEU ✓ imposition of a lump sum or penalty payment on the MS concerned by the CJEU
Direct action by a Member State	Article 259 and 260 TFEU	failure to fulfil an obligation under the Treaties by a MS	a MS	the CJEU	✓ Commission letter of formal notice ✓ Commission reasoned opinion ✓ judgment of the CJEU
A dialogue within the Council to promote and safeguard the rule of law	Conclusions of the Council and the MSs meeting within the Council on ensuring respect for the rule of law of 16 December 2014	respect for the rule of law	the Presidency	the Council	debates on thematic subject matters once a year
Annual report on the situation of	Annex I to Decision of the Conference of	respect for fundamental rights	the EP	the EP	overview of thematic subject matters once a

fundamental rights by the EP	Presidents of 12 December 2012				year (customarily without naming particular MSs)
Annual report on application of the Charter of Fundamental Rights by the Commission	Communication from the Commission - Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM(2010)0573 final of 19 October 2010)	application of the Charter	the Commission	the Commission	overview of thematic subject matters once a year (MSs are sometimes mentioned)
Justice Scoreboard	Communication from the Commission - The EU Justice Scoreboard A tool to promote effective justice and growth (COM(2013)0160 final	parameters of non-criminal justice systems	the Commission	the Commission	overview of thematic subject matters once a year (MSs are sometimes mentioned)

	of 27 March 2013)				
Petition to the EP	Article 227 TFEU	matter which comes within the EU's fields of activity and which affects the petitioner directly	any citizen of the EU any natural or legal person residing or having its registered office in a MS	the EP	opinion or recommendation own-initiative report resolution
Preliminary ruling by the Court of Justice	Article 267 TFEU	the interpretation of the Treaties; the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;	court or tribunal of a Member State;	the CJEU	preliminary ruling by the Court of Justice
Conclusions and opinions by the Agency for Fundamental Rights	Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights	fundamental rights issues (normally within the thematic areas mentioned in the Multiannual Framework)	the Agency for Fundamental Rights, the EP, the Council or the Commission	the Agency for Fundamental Rights	conclusions and opinions on specific thematic topics, for the EU institutions and the Member States when implementing EU law

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IV. On the EU response to the refugee crisis

A. Introduction

The development of the EU migration policy has been a long and painful process.[303] As such, it is reminiscent of the EU's stages of evolution and, therefore, 'governance of migration is part and parcel of the EU experiment's transformation of the very nature of Westphalian sovereignty.'[304] In fact, whilst 'immigration at the negotiations for the EU's 1992 Maastricht Treaty was considered too critical to national sovereignty to ever be Europeanized'[305], since the entry into force of the Lisbon Treaty, the EU has had a significant say in determining the overall shape of the overall migration governance, and asylum policy in particular. The refugee crisis that looms over Europe since the beginning of the Syrian war has put a significant strain on this relatively freshly acquired power of the European Union. It is undeniable that the migration crisis is one of the most pressing issues on the EU agenda – the urgency of which is confirmed by the numbers:

> Since the beginning of the Syrian conflict, almost three million first-time [asylum] applications have been registered in EU states (plus Norway and Switzerland), of which 650,250 and 199,205 are, respectively, Syrians and Iraqis. In the same period, 1.6 million migrants arrived on the southern borders of Europe by boat, while 13,179 people died in the waters of the Mediterranean.[306]

These grim numbers, however, are just a beginning of the story. In fact many scholars have pointed to the deficiencies of the current migration governance. Most recently for instance, Betts and Collier in their call 'Help Refugees Help Themselves - Let Displaced Syrians Join the Labour Market'[307] observe that these numbers are only a tip of an iceberg in terms of how many people are in need of help and international protection:

> As European countries struggle with what to do about the influx of people displaced by violence in the Middle East who have arrived in Europe in recent months, they should work harder to address the refugee crisis closer to its main source: Syria. Indeed, only around four per cent of displaced Syrians have attempted to reach Europe; around 60 per cent of

[303] Steve Peers, 'From Black Market to Constitution: The Development of the Institutional Framework for EC Immigration and Asylum Law', *EU Immigration and Asylum Law* (2006).

[304] Adam Luedtke, '"Crisis" and Reality in European Immigration Policy' (2015) 114 Current History 89, 90.

[305] ibid.

[306] Anna Di Bartolomeo, 'EU Migration Crisis Actions with a Focus on the EU-Turkey Agreement' <http://cadmus.eui.eu//handle/1814/40925> accessed 27 April 2016.

[307] Betts and Collier called for establishment of special economic zones in the areas where they are gathered. In their view this would induce the self-sufficiency of displaced persons and contribute both to the well-being of the host state as well as prepare them for their return to the country of origin. The call apparently has been heard as King Abdullah of Jordan picked up on the idea during the February 3, 2016 conference in London aimed at gathering funds to alleviate the situation of Syrian refugees. The pilot project is to start in the summer 2016. Nayla Rush, 'Refugee Resettlement Is Not the Answer' (*Center for Immigration Studies*) <http://cis.org/rush/refugee-resettlement-not-answer> accessed 25 April 2016.

> the displaced, or more than six million people, remain in Syria, many unwillingly—because since 2014, Jordan and Lebanon have effectively kept their borders closed. Of those refugees who have left Syria, a large majority have gone not to refugee camps or to Europe but to Amman, Beirut, and other Middle Eastern cities to work, often illegally and for low pay. Some 83 per cent of Jordan's refugees live in cities—around 170,000 in Amman alone.[308]

Simultaneously Amnesty International in its eight point plan to solve the migration crisis[309] advocates taking both the immediate measures by the states (ensuring safe routes, saving lives at high seas, not pushing the migrants back), combating crimes sustaining irregular migration (human trafficking), and finally long term solutions above all ensuring the 'strong asylum system' capable of sustaining refugees long term until the conflict that induced forced displacement comes to an end.

Thus the migration crisis is by no means affecting the EU alone. It is definitely a regional, if not a global problem. And as such should be tackled both internally – inducing both the internal solidarity amongst the Member States as well as the regional one involving partner countries. In this respect a strategy to deal with the crisis itself as well as the accompanying human rights one becomes much weightier and involves a gradual alteration to immigration management at large as well as the change of an approach to development and the link it has to migration. Somehow it is difficult to think of the migration crisis as an opportunity: both to manage 'migration in a way that respects human rights law and economic imperatives'[310] and that both internally and externally. This opportunity weighs in on issues such as the role of dedicated institutions – Frontex, the European Refugee Fund, the European Support Asylum Office and mechanisms they use to address the human rights issues that surface when tackling the issues of forced migration.

The 2014 Annual EU Report on Human Rights and Democracy thus reports on the migration and human rights nexus maintained by the European Union:

> The respect and protection of human rights are at the core of the EU Justice and Home Affairs related policies. In this context, human rights are a cross cutting element of the EU Migration policy, and thus will be reflected in the upcoming EU Agenda on Migration, of the Global Approach to Migration and Mobility (GAMM), the overarching framework of the EU external migration policy and a key element of the EU return and readmission policy. Hence, the protection of human rights is systematically included in all GAMM frameworks, in particular in dialogues on migration and mobility with third countries and regions as well as in the Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility

[308] Alexander Betts and Paul Collier, 'Help Refugees Help Themselves - Let Displaced Syrians Join the Labor Market' Foreign Affairs <https://www.foreignaffairs.com/print/1115581>.

[309] '8 Ways to Solve the World Refugee Crisis' (*Amnesty International*, 2016) <https://www.amnesty.org/en/latest/campaigns/2015/10/eight-solutions-world-refugee-crisis/> accessed 17 April 2016.

[310] Luedtke 94.

> (CAMMs) concluded with third countries, visa dialogues and in the implementation of EU Readmission Agreements. Furthermore, the EU has advocated for stepping up the protection of the human rights of the migrants in the global fora. This was also the case during the Summit of the Global Forum for Migration and Development, which took place in Stockholm on 14-16 May 2014.
>
> The protection of migrant's rights is also a cross cutting element of the work of the Task Force Mediterranean. In the framework of the GAMM, the Task Force has given new impetus to the EU's efforts to strengthen dialogue and cooperation with countries of transit and origin in the Southern Mediterranean. In May 2014, the Commission issued a Staff Working Document on the implementation of the Communication on the Task Force Mediterranean, which identified a series of actions undertaken by the EU and its Member States to protect the rights of migrants and refugees in countries of transit and origin.[311]

In addition, the EU emphasizes the work of EU delegations in the field of preventing trafficking in human beings and assistance to victims. [312] The 2014 report (even if published in July 2015) does not account for the realities of July 2015 and the perceived immense influx of refugees to the European continent. What ensued from its text is a rather a lack of anticipation that there might be a need for the altered approach to migration, such that would ensure human rights protection across the policy issues addressed.

At the same time, it is not that the crisis has altered radically the human rights aspects of the reception system of forced displaced persons. It definitely put it under strain, yet through the short-lived solutions it made the escape to the European countries more dangerous.

The response of the European Union to the refugee crisis has amassed violent criticism. Member States, public opinion, NGOs, third countries and international organisations have called for better, more efficient measures to 'address' the situation.[313]

The investigation in this report is primarily concerned with testing whether the strategy adopted by the European Union to address specific human rights challenges lead to the adequately strategic – use of tools. We assumed that whilst the evaluation should start with the analysis of whether the EU's actions followed the adopted strategy, many other aspects (context, flexibility, crisis and its form) should be taken into consideration. We have taken as our point of departure the 2010 Global Approach to Migration and Mobility as the first strategic document adopted by the European Union after the entry into forces of the Treaty of Lisbon. We emphasised as well, that whilst strategy marks the road towards

[311] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015).

[312] This involves the training activities for the EU delegations as well as raising the issue in the context of EU- third countries human rights dialogues and the use of international fora for advocating for the combating of trafficking in human beings: ibid.

[313] Dallal Stevens, 'The Humaneness of EU Asylum Law and Policy' (2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560269>.

certain outcomes or attainment of objectives, it much more reflects the situation of its adoption.[314] It is our intuition that whilst there seems to be an inherent progress and building on previously introduced solutions, the strategies adopted in the field of migration tend to reflect the needs of the EU at a given point in time rather than advocating new future avenues. In this respect their value presents itself for the evaluation of the current context rather than looking forward.

In the context of the EU's response to the refugee crisis these observations resonate more loudly. This is, on the one hand, because the unwinding of the crisis has been accompanied by the development of the strategic measures. On the other, the strategic approaches presented by the European Union institutions when presented separately are very much prone to the criticism, as they did not offer the type of a comprehensive solution a general strategy would imply. Somehow, the development of each of the measures on each of the stages would in the end constitute the strategy to be followed. That phenomenon at its culminating point saw the publication on 26 April 2016 of the Communication from the Commission entitled Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development which presents the general vision of the EU's approach to forced displacement, yet limitedly taking into account the internal aspect of dealing with the crisis.[315]

The building up the response has definitely two internal and external aspects to it, both internal and external. The purpose of this chapter is to examine the extent to which the response to the refugee crises and its human rights aspects required coordination of measures in line with the pre-existing programmatic documents which in itself proves strategic approach to the toolbox. This cannot be said about the whole policy field, as despite basing it on the strategic documents, the ideas and implementation remain constant thus making the implementation gap more blatant and broader.

The structure of the chapter will follow the following steps: First, we shall reconstruct the refugee crisis from the perspective of the EU human rights commitments following the specific strategic documents that address the rights of migrants. Then we shall examine the EU external action response and in particular the EU-Turkey deal. Finally, we shall discuss the impact of the deal on the strategic use of tools in the internal EU setting. The final section will comment on the use of tools from the perspective of strategy and in light of the previously set analysis of components of the strategy and impact they may have on what 'strategic use of tools' entails in the specific context of the EU reply to human rights crisis at its borders.

[314] See: Chapter II above: 'Strategic use of tools' - setting the conceptual framework'.

[315] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development) COM(2016)2.The Communication is accompanied by the Staff Working Document: Commission Staff Working Document Accompanying the Communication from the Commission: Lives in Dignity: from Aid-dependence to Self-reliance. Forced Displacement and Development COM(2016) 234 final, SWD(2016) 142 final.

B. Reconstruction of the human rights refugees crisis through the lens of EU migration strategies

The references to refugees and asylum seekers in the EU human rights strategies have appeared gradually. The current enhanced attention was induced by the increasing numbers of the refugees arriving at the EU's shores, dying at the attempt to cross over and gathered in camps in third countries. And so were the deficiencies of the asylum system and protection of persons on the way to safe sanctuaries exposed and gradually addressed in subsequent policy documents of strategic significance. The below sections presents the gradual incorporation of the human rights concerns to the EU migration agenda with a more and more subject specific focus.

1. The EU Global Approach to Migration and Mobility[316]

The EU's Global Approach to Migration and Mobility (GAMM) is the first of the programmatic comprehensive and strategic documents the EU has issued in order to address the variety of aspects of migration together with third countries. It was adopted in 2005 as Global Approach to Migration[317] and subsequently reviewed in 2011[318] following an extensive consultation process[319] with the conclusion about the positive value added it brought to the EU migration policy. Subsequently, the strategic paper was issued in relation to the Thematic Programme "Cooperation with Third Countries in the areas of Migration and Asylum" 2011-2013 Multi-Annual Strategy Paper".[320] The implementation of the reviewed GAMM was yet again evaluated in the Report of the European Commission of 21 February 2014. [321]

The GAMM focuses on migration and development. In terms of rights of refugees, the 2011 GAMM names supporting international protection and external dimension of asylum as one of its four

[316] 'Global Approach to Migration and Mobility' (*European Commission, DG Migration and Home Affairs*) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm> accessed 24 April 2016.

[317] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Commitee and the Committee of the Regions: Migration and Development: Some Concrete Orientations COM(2005) 390 final 2005.

[318] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Global Approach to Migration and Mobility COM(2011) 743 final 2011.

[319] 'Consultation on the Global Approach to Migration' (*European Commission*, 2011) <http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2011/consulting_0021_en.htm> accessed 24 April 2016.

[320] European Commission, 'Thematic Programme "Cooperation with Third Countries in the Areas of Migration and Asylum" 2011-2013 Multi-Annual Strategy Paper' (2011).

[321] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Report on the implementation of the Global Approach to Migration and Mobility 2012-2013 COM(2014) 96 final 2014.

priorities.[322] Whilst the approach is to be global, the chief implementation should take place on the basis of the principle of geographic differentiation adjusted to global, regional and bilateral interests. [323]

In reference to tools that are to be used, apart from emphasising the creation of the two tailor-made GAMM specific frameworks (bilateral Mobility Partnerships and the Common Agenda on Migration and Mobility) the Communication points to the fact that:

> the EU's external migration policy also builds on EU legislation and **legal instruments** (so far, nine visa facilitation and thirteen EU readmission agreements, plus seven Directives on legal and irregular migration), **political instruments** (a large number of policy dialogues, often backed up by action plans), **operational support** and **capacity-building** (including via the EU agencies such as FRONTEX, the EASO and the ETF and technical assistance facilities such as MIEUX and TAIEX)[324] and the wide range of **programme** and **project support** that is made available to numerous stakeholders, including civil society, migrant associations and international organisations.[325]

In terms of undertaking concrete actions within the third pillar of GAMM entitled 'Promoting international protection and enhancing the external dimension of asylum policy'[326] the Communication envisages a number of initiatives of both internal and external character. In particular, these should include:

- in the first place it is about an increased cooperation with third countries to assist them in strengthening of their asylum systems and national asylum legislation.
- The Regional Protection Programmes should be strengthened.
- The EASO was to become more active in building asylum capacity in non-EU countries and provide support for resettlement activities. In this respect the 'Joint EU Resettlement Programme' was to facilitate resettlement also to European Union Member States.

In parallel, the strategy paper of 2011[327] relating to the Thematic Programme based on Regulation (EC) No 1905/2006 establishing a financing instrument for development cooperation (DCI Regulation)

[322] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Global Approach to Migration and Mobility COM(2011) 743 final. 7.

[323] ibid.

[324] 'FRONTEX is the European Agency for operational cooperation at the external borders. EASO is the European Asylum Support Office. ETF is the European Training Foundation. TAIEX is the Technical Assistance and Information Exchange instrument managed by the European Commission. MIEUX (Migration EU Expertise) is a Joint EC-ICMPD initiative that aims at enhancing the migration management capacity of partner countries.'

[325] ibid.

[326] ibid.

[327] European Commission, 'Thematic Programme "Cooperation with Third Countries in the Areas of Migration and Asylum" 2011-2013 Multi-Annual Strategy Paper'.

summarised the achievements which related to this particular area of GAMM. It assured amongst strategic priorities the insurance of:

> protection of migrants' human rights, notably through support to legislative development, support to civil society organisations, awareness-raising and capacity building for the authorities; action against racism, xenophobia and discrimination, and relief and assistance to vulnerable categories of migrants and to victims of trafficking; measures addressing the challenge posed by unaccompanied minors, namely awareness-raising programmes for children at risk and training of specialised personnel, as well as activities concerning return and reintegration in the country of origin.[328]

In relation to the international protection of asylum seekers, the strategy paper emphasized the importance of the Regional Protection Programmes and the three pillars they foresee: repatriation, integration and relocation.[329]

These endeavours were thus summarised in the 2014 report in the following terms.[330] Firstly,[331] it emphasises that more work is needed to ensure that the sound asylum systems are instated in third country partners (the report cites Morocco as an example of a country where more dialogues and frameworks are needed). In this respect the role of the agencies should be enhanced – in particular of the EASO. The international protection was to be ensured through the Regional Development and Protection Programme for the Middle East (of € 16 million including Jordan, Iraq, Lebanon) that was to be launched in the near future (which never happened due to the lack of political impetus and funding on the part of the Member States). The Regional Protection Programmes in fact, as it was emphasised in the Commission Communication on the work of the Task Force Mediterranean of 4 December 2013, would need much more funding in order to prove a successful tool ensuring efficient response to the possible refugee crisis. The report speaks also about resettlement efforts concentrating on resettlement into third countries whilst citing that, following EUROSTAT, 4930 refugees were resettled to the European Union in 2012. [332]

The report considers human rights of migrants as a 'cross cutting priority in the EU's cooperation with third countries'[333], however, comments on developments in this area are made in a very superficial manner providing examples and state simply that there are

> numerous projects carried out under the GAMM focusing on protecting migrants, including

[328] ibid.
[329] ibid.
[330] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Report on the implementation of the Global Approach to Migration and Mobility 2012-2013 COM(2014) 96 final.
[331] ibid.
[332] ibid.
[333] ibid.

> children and vulnerable groups like asylum seekers, from abuse and human rights violations such as trafficking in human beings, and empowering them through effective integration policies and promoting access to basic services such as healthcare.[334]

The report concludes its human rights section with the literal reference to observations of the UN High Commissioners on Refugees and the fact of adoption by the EU of the 2012 Strategic Framework and Action Plan on Human Rights and Democracy[335] and the June 2012 Communication on "The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016"[336].[337]

Finally, some attention must be paid to the implementation modalities – or in other words – mechanisms and instruments through which the GAMM priorities and objectives should become reality. Here one should bring to the forefront the engagement and full participation of the Member States that should be ensured all along.[338] There the report emphasised that the majority of the Member States did not participate in the realisation of the GAMM objectives. The authors of the report observe diplomatically:

> The non-binding and flexible nature of the GAMM is one of the advantages of the framework, allowing particular MS to cooperate (to various degrees) on work in countries or regions where they have particular expertise. However, this flexibility is also the Achilles heel of the approach, as it in some cases makes it difficult to secure a balanced and complete EU offer to third countries, e.g. in connection with a MP. Furthermore, there are significant differences between the levels of participation of MS in the various cooperation frameworks. For example five MS do not participate in any of the MPs concluded so far. The majority of MS participating in the MPs have not yet made any financial contribution to their implementation.[339]

It must be noted that the 2005 and 2011 versions of the GAMM Communication do not differ substantively in terms of their approach to asylum and international protection and foresee the same tools and recommendations. In the light of the above description of the GAMM's evolution, one can't help but wonder as to the strong detachment of the EU external migration policy from the EU internal affairs, and more importantly, the Member States. It is as if these issues did not concern them, this impression confirmed by the observations of the quoted Report sections.

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[334] ibid.

[335] Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and Action Plan' 11855/12.

[336] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: The EU Strategy towards the Eradication of Trafficking in Human Beings 2012 - 2016 COM(2012) 286 final 2016.

[337] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, ibid.

[338] ibid.

[339] ibid.

In addition, the approach to human rights related issues seems to be rather superficial throughout the lifespan of the GAMM and focuses on ensuring that there is an institutional framework in place to tackle migration issues and ensure rights, if necessary. At the end, the 2014 report emphasises that 'the external migration and asylum policy gaining even more importance, reinforcing cooperation between MS, EEAS, EU agencies and the Commission will be fundamental to the successful implementation of our policies.'[340] The truth of this statement resonates soundly to-date.

2. The Stockholm Programme and Guiding Principles for the JHA

Alongside the Global Approach to Migration and Mobility, the European Union has been developing its internal legal and policy framework for asylum and international protection, which, in turn has a very strong external aspect. The Stockholm Programme[341] was adopted for the period of 2010-2014 and subsequently a new strategic framework for the EU Area of Freedom, Security and Justice was to be adopted. Yet, the on-going crises – sovereign debt, Ukrainian, Arab Spring induced migration ones – have not permitted the Member States and the EU institutions to follow up on the initial document. As the result, during the meeting of European Council on 26 and 27 June 2014, Strategic Guidelines for Justice and Home Affairs including the Strategic Agenda for the Union in Times of Change were adopted.[342] Because Strategic Guidelines remain in close connection to the Stockholm Programme which remains still not fully implemented, in this section we will devote further attention to it.

When referring to the external policy elements, the Stockholm Programme reaffirmed the commitment of the EU to GAMM, and in particular Mobility Partnerships, Circular Migration schemes, Migration Profiles, Readmission Agreements and Regional Protection Programmes in the section dedicated to a dynamic and comprehensive migration policy.[343] In the Report on the implementation of the GAMM,[344] the following Stockholm Programme thematic priorities for cooperation with third countries are emphasised: more effective actions against irregular migration; further promotion of efficient, secure and low-cost remittance transfers; promotion of Diaspora networks and the participation of migrants communities in the development of their countries of origin; increased attention to the link between climate change, migration and development; measures aiming at improving skills recognition and labour matching between EU MS and third countries; and refugee and asylum seekers protection in third countries. Furthermore, the Report emphasised the Programme's commitment to building a strategic partnership with the UNHCR and launching and developing Regional Protection Programs.

[340] ibid.

[341] The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115.

[342] 'Conclusion of the Council of the European Union – Strategic Guidelines for the Area of Freedom, Security and Justice, EUCO 79/14, 27 June 2014.'

[343] The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115. 28-32.

[344] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Report on the implementation of the Global Approach to Migration and Mobility 2012-2013 COM(2014) 96 final.

The Stockholm Programme was accompanied by the extensive Action Plan, which with reference to the above outlined priorities mentioned the following initiatives:

Table 8: A dynamic and comprehensive migration policy according to the Stockholm Programme Action Plan[345]

A dynamic and comprehensive migration policy		
Consolidating, developing and implementing the EU Global Approach to Migration		
Actions	**Responsible party**	**Timetable**
Communication on the evaluation and future development of the Global Approach to Migration	Commission	2011
Pursuing EU political dialogue missions on migration as a way to engage dialogue on this issue with third countries falling under the Global Approach	Commission Member States	Ongoing
Launching of migration profile processes (including capacity building and the use of the migration profile as a tool for policy definition, cooperation programming, evaluation) with key countries	Commission	Ongoing
Further development of mobility partnerships	Commission	Ongoing
Further establishment of cooperation platforms facilitating the coordination among relevant actors	Commission	Ongoing
Enhancing migration dialogue within the Eastern Partnership	Commission	Ongoing
Pursuing and improving the implementation of the EU/Africa Partnership on migration, mobility and employment and the preparation of a EU-Africa Senior Official Meeting on this partnership during the second semester 2010	Commission	Ongoing
Concretising the follow-up of the Rabat/Paris Process through the implementation of the Paris Cooperation programme and the preparation of the Dakar Conference in 2011	Commission	2010-2011
Developing the EU/LAC dialogue on migration	Commission	Ongoing
Enhancing cooperation with India, Afghanistan and Pakistan on migration issues, as well as with Central Asia, on a regional basis.	Commission	Ongoing

[345] Communication from the to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm 2010 49–51.

Migration and development		
Actions	**Responsible party**	**Timetable**
Communication on the effects of climate change on international migration, including its potential effects on immigration to the European Union	Commission	2011
Communication on maximising the positive and minimising the negative aspects of immigration on Development (circular migration, remittances including the feasibility of creating a common EU portal on remittances; development of Diaspora networks and promoting the participation of migrant communities to development projects in the countries of origin, Migrants' rights, Brain drain)	Commission	2010
Support the establishment of a migration observatory network in ACP countries	Commission	Ongoing
Supporting third countries in defining and implementing their migration policy through our cooperation in particular within sub-Saharan Africa, namely through the strengthening of institutional capacities for improved migration management and governance, as well as the possible opening of new migration Centre in key African countries	Commission	Ongoing

The external aspects of the EU migration policy are there to sustain the chief concern of the Stockholm Programme – the Area of Freedom, Security, and Justice. Of particular importance for the present study is section 6.2 'Asylum: a common area of protection and solidarity'[346]. There, the Programme addresses the following priorities: creation of a common area of protection, sharing of responsibilities and solidarity between the Member States, and the external dimension of asylum.

Table 9: Asylum: a common area of protection and solidarity according to the Stockholm Programme[347]

Priority & Objectives	**Actions**
A common area of protection[348]	- Intensification of efforts to establish a common asylum

[346] The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115. 32-33.

[347] Adapted from Stockholm Programme, Sections 6.2.1 – 6.2.3, The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115.

	procedure and a uniform status in accordance with Article 78 TFEU for those who are granted asylum or subsidiary protection by 2012 at the latest, - Evaluation of the above legislation and of the EASO, the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law, - A feasibility study on the Eurodac system as a supporting tool for the entire CEAS, while fully respecting data protection rules, - Possible proposal of new legislative instruments for CEAS on the basis of an evaluation, - to finalization of study on the feasibility and legal and practical implications to establish joint processing of asylum applications.
Sharing of responsibilities and solidarity between the Member States[349]	- 'Developing of the mechanism for sharing responsibility between the Member States while assuring that asylum systems are not abused, and the principles of the CEAS are not undermined, - creating instruments and coordinating mechanisms which will enable Member States to support each other in building capacity, building on Member States own efforts to increase their capacity with regard to their national asylum systems, - using, in a more effective way, existing Union financial systems aiming at reinforcing internal solidarity, - evaluation and development by EASO of procedures that will facilitate the secondment of officials in order to help those Member States facing particular pressures of asylum seekers.

[348] Objective: 'The development of a Common Policy on Asylum should be based on a full and inclusive application of the 1951 Geneva Convention relating to the Status of Refugees and other relevant international treaties. Such a policy is necessary in order to maintain the long-term sustainability of the asylum system and to promote solidarity within the Union. Subject to a report from the Commission on the legal and practical consequences, the Union should seek accession to the Geneva Convention and its 1967 Protocol. […]The Dublin System remains a cornerstone in building the CEAS, as it clearly allocates responsibility for the examination of asylum application.'

[349] 'This should be achieved through a broad and balanced approach. Mechanisms for the voluntary and coordinated sharing of responsibility between the Member States should therefore be further analyzed and developed. In particular as one of the keys to a credible and sustainable CEAS is for Member States to build sufficient capacity in the national asylum systems, the European Council urges the Member States to support each other in building sufficient capacity in their national asylum systems. The EASO should have a central role in coordinating these capacity-building measures.'

The external dimension of asylum	- Enhancing capacity building in third countries, in particular, their capacity to provide effective protection, and to further develop and expand the idea of Regional Protection Programmes, on the basis of the forthcoming evaluations. To be incorporated with the GAMM and to be reflected in national poverty reduction strategies. - Encouragement of the voluntary participation of Member States in the joint Union resettlement scheme – working towards an increase in the total number of resettled refugees. - Annual Report on resettlement efforts. - Strengthening of the Union support for the UNHCR, - Elaboration of new approaches concerning access to asylum procedures targeting main countries of transit, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a voluntary basis.

Table 10: Asylum According to the Stockholm Programme Action Plan

Asylum: a common area of protection and solidarity		
A common area of protection		
Actions	**Responsible party**	**Timetable**
Further develop a common educational platform for national asylum officials, building on in particular the European Asylum Curriculum	EASO	2011
Communication on Eurodac development, namely on the feasibility on its development into a supporting tool for the entire Common European Asylum System (CEAS)	Commission	2012
Communication on the appropriateness, the possibilities and the difficulties as well as the legal and practical implications of joint processing of asylum applications within the Union	Commission	2014
Report of the Commission on the legal and practical consequences of the EU's accession to the Geneva Convention and its 1967 Protocol	Commission	2013
First evaluation report on the EASO's impact on practical cooperation and on the Common European Asylum System	Commission	2013

Commission's communication on a framework for the transfer of protection of beneficiaries of international protection and mutual recognition of asylum decisions	Commission	2014
Development of a common methodology with a view to reducing disparities of asylum decisions	EASO	

Sharing of responsibilities and solidarity between the Member States		
Actions	**Responsible party**	**Timetable**
Establishing a mechanism to review the Member States' national asylum systems and identify the issues related to capacities which will enable Member States to support each other in building capacity	Commission	2011
Communication on enhanced intra-EU solidarity	Commission	2011
Evaluation and development of procedures for facilitation of the secondment of officials in order to help those Member States facing particular pressures of asylum seekers	EASO	2011

The external dimension of asylum		
Actions	**Responsible party**	**Timetable**

Establish strategic partnership with UNHCR (Office of the United Nations High Commissioner for Refugees)	Commission	2011
Mid-term evaluation of the EU Resettlement Programme	Commission	2012
Communication on new approaches concerning access to asylum procedures targeting main transit countries	Commission	2013
Proposal on how to improve the EU Resettlement Programme	Commission	2014
Annual Reports on EU resettlement efforts	Commission	Ongoing
Launching and developing new Regional Protection Programmes, including in the horn of Africa	Commission	Ongoing

The asylum challenge has also been taken up by the 2014 Strategic Agenda for the Union in Times of Change that was to follow the Stockholm Programme. The European Council agreed to five priorities to be achieved until 2020. These are: stronger economies with more jobs, societies enabled to empower and protect a secure energy and climate future, a trusted area of fundamental freedoms, effective joint action in the world. Asylum and migration appear in this context under the heading 'A Union of freedom, security and justice' which contains the commitment to:

> better manage migration in all its aspects: by addressing shortages of specific skills and attracting talent, by dealing more robustly with irregular migration, also through better cooperation with third countries, including on readmission; by protecting those in need through a strong asylum policy; with a strengthened, modern management of Union's external borders.[350]

With the view of the unchanged circumstances at the earlier stages of the development of the post-Stockholm agenda, the actual action on migration is very thin on substance.

3. The 2015-2019 Action Plan for Human Rights and Democracy

Following the lack of migration related issues in 2012 Strategic framework and Action Plan[351], its successor, the 2015-2019 Action Plan had no choice but to address the migration related issues. Importantly, the internal and external aspects are linked. Firstly, the link refers to fostering better coherence and consistency with human rights considerations, which are to be mainstreamed in ALL the external aspects of EU policies, and migration in particular. [352] Coherence and consistency in relation to migration/trafficking (point 23) in human beings is to involve:

> 'a. In line with the Global Approach to Migration and Mobility (GAMM) and the upcoming European Agenda on Migration, enhance HR safeguards in all migration and mobility dialogues and cooperation frameworks with third countries, including Mobility Partnerships and Common Agendas on Migration and Mobility, as well as in migration-related agreements and programmes, including through the analysis of human rights impacts; ensure the introduction of human rights training elements in capacity-building projects with immigration and border agencies. (ONGOING)
>
> b. Building on the steps already taken in the implementation of the EU Anti-Trafficking Strategy, fully integrate human rights and victim protection into discussions on Trafficking in Human Beings (THB) in political, migration and mobility, security and human rights

[350] 'Strategic Guidelines for Justice and Home Affairs' (*Consillium*) 14 <http://www.consilium.europa.eu/en/policies/strategic-guidelines-jha/> accessed 25 April 2016.

[351] There it appears only in reference to Outcome 14, where the objective is defined as: 'd) In line with the Communication on the Global Approach to Migration and Mobility, develop a joint framework between Commission and EEAS for raising issues of statelessness and arbitrary detention of migrants with third countries.' Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and Action Plan' 11855/12.

[352] Joint Communication to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda' JOIN(2015) 16 final 2015. 5.

dialogues with the identified priority countries, and in discussions on THB with international organisations and donors operating in those priority countries; EU DELs in the priority countries will make full use of their appointed contact person for THB, and raise human rights-related issues when addressing THB in local EU coordination meetings, as well as in discussions on THB with the host- country authorities; support the ratification and implementation of key international conventions relating to THB, including ILO conventions concerning forced labour and domestic workers. (ONGOING)

c. Address HR issues associated with people smuggling through political, HR and other dialogues in priority countries; encourage EU DELs in priority countries to make full use of their resources to ensure that people smuggling and its HR dimension are consistently addressed in their cooperation with the host country authorities as well as with civil society, international organisations and other donors. (BY 2017)

d. Support partner countries to promote and protect the rights of refugees and internally displaced persons (IDPs), including through capacity building. (ONGOING)

e. Support improved access to justice and health for migrants in countries of transit; promote improved conditions of detention for detained migrants and alternatives to the use of detention for irregular migrants in third countries. (BY 2017)

f. Engage with the diaspora communities both inside the EU and in non-EU destination countries to promote awareness of HR abuses faced by migrants and refugees in countries of transit, as well as of HR issues in their countries of origin. (BY 2016)

g. Identify countries of origin where HR violations act as a key push factor, and better target political dialogue and other dialogues and programmes so as to address these violations. (ONGOING)

h. Continue to address the issue of statelessness in relations with priority countries; focus efforts on preventing the emergence of new stateless populations as a result of conflict, displacement and the break-up of states.[353]

From the point of view of the human rights of refugees and asylum seekers the 2015-2019 Action Plan brings to the forefront capacity building in terms of ensuring rights of refugees and internally displaced persons as well as access to justice and health in countries of transit, promote improved conditions of detained refugees and alternatives to detention.

4. The 2015 European Agenda on Migration

The European Agenda on Migration was adopted at a time of increased influx of migrants to Europe resulting in many deaths both at sea and on land routes. It was preceded by the statement by the European Council of 23 April 2015 and a resolution of the European Parliament of 29 April 2015[354] illustrating the inter-institutional political consensus for the adoption of the new Agenda.

353

354 European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)).

The 2015 European Agenda on Migration consists of three sets of action with different levels of urgency: the immediate action,[355] he mid-term 'Four Pillars to Manage Migration Better'[356], and finally, the long term 'Moving Beyond' section[357]. The immediate action involves four areas of activities: (1) Saving lives at sea, (2) Targeting criminal smuggling networks, (3) Responding to high-volumes of arrivals within the EU: Relocation, (4) A common approach to granting protection to displaced persons in need of protection: Resettlement, (5) Working in partnership with third countries to tackle migration upstream, (6) Using the EU tools to help frontline Member States.

By the end of 2015 the following actions were supposed to be fulfilled:

- a funding package to triple the allocation for Triton and Poseidon in 2015-2016 and to finance the EU-wide resettlement scheme;
- immediate support to a possible CSDP mission on smuggling migrants;
- a legislative proposal to activate the emergency scheme under Article 78(3) TFEU by the end of May, on the basis of distribution key included in the Annex;
- a proposal for a permanent common EU system for relocation for emergency situation by the end of 2015;
- a Recommendation for an EU resettlement scheme by the end of May followed if required by a proposal for more permanent approach beyond 2016;
- EUR 30 million for Regional Development and Protection Programmes;
- Pilot multi-purpose centre established in Niger by the end of 2015.[358]

Simultaneously the longer-term objectives were to be realised connected with the third pillar of the EU action in migration field: the strong common asylum policy. This should consist of the coherent implementation of the Common European Asylum System and enhancing the responsibility sharing across the Member States. Human rights of refugees and asylum seekers appear in this context in reference to standards on reception conditions, as well as provision to the Member States of well-defined and simple quality indicators, and reinforcement of –'protection of the fundamental rights of asylum-seekers paying particular attention to the needs of vulnerable groups such as children'.[359] In connection to the Dublin system, fundamental rights are evoked in relation to the systematic

[355] Communication from the to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration COM(2015) 240 final 3.
[356] ibid 3–17.
[357] ibid 17.
[358] ibid 6.
[359] ibid 12.

fingerprinting which should be conducted in full respect of rights of asylum-seekers.[360] The only action point referring to fundamental rights concerns precisely the new measures relating to this aspect of Dublin system.

Notably, the section on Dublin system pertaining to its 2016 review states: '[w]hen the Dublin system was designed, Europe was at a different stage of cooperation in the field of asylum. The inflows it was facing were of a different nature and scale'. This is undoubtedly true – the question is: would it have been possible to predict the changes and fine-tune the system? Will be it be possible in the future?

In the 'Moving Beyond' section, the European Agenda on Migration foresees 'launching parallel reflections on a number of areas' one of them notably being the completion of the Common European Asylum System.

> The EU Treaties look forward to a uniform asylum status valid throughout the Union. The Commission will launch a broad debate on the next steps in the development of Common European Asylum System, including issues like a common Asylum Code and the mutual recognition of asylum decisions.[361] A longer term reflection towards establishing a single asylum decision process will also be part of the debate, aiming to guarantee equal treatment of asylum seekers throughout Europe.[362]

There the agenda again does not refer to fundamental rights.

5. The 2016 Communication Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development)[363]

The Communication of 26 April 2016 'Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development) concludes the policy cycle started with the 2005 GAM. It is a direct response to a refugee crisis and a follow up to the 2015 Migration Agenda (the earlier policy documents would refer to migration and development). The European Commission in the accompanying Staff Working Paper thus defines the addressees of this comprehensive policy:

> For the purposes of this document, forced displacement refers to the situation of people who are forced to leave their homes due to armed conflict, generalised violence, persecution, and human rights violations.
>
> According to the Geneva Refugee Convention of 1951 and the Protocol of 1967, a refugee is an individual seeking protection outside of the country of his/her nationality due to

[360] ibid 13.

[361] 'Mutual recognition of positive asylum decisions mends the recognition by a Member State of the positive asylum decisions taken by another Member State.'

[362] ibid 17.

[363] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development) COM(2016)2.

> persecution on the basis of religion, race, political opinion, nationality or membership in a particular social group. A recognised refugee has the right to international protection especially through the "non refoulement" principle.[364]

At its core it is a response to the Agenda on Migration which called for 'strategic reflection on 'how to maximise the impact of the EU's development and humanitarian support in order to appropriately tackle the magnitude, multi-dimensional drivers and impact of forced displacement at local level'.[365] The paper asserts that forced displacement is not only a humanitarian challenge: it is also a political, human rights, developmental and economic challenge, in addition to its inevitable links with the broader phenomenon of migration'.[366] It further goes on to determine that:

> [t]he ongoing political and diplomatic commitment of the EU and its Member States to resolve existing conflicts and promote respect for human rights worldwide is therefore a key aspect of this agenda. So is saving lives and helping meet immediate humanitarian needs. However, beyond legal and physical protection, food and shelter, forcibly displaced people also need access to jobs and to services such as healthcare, education and housing. The EU *acquis* and good practices developed since 1999 to create a Common European Asylum System and harmonise common minimum standards for asylum can constitute a good example of how partner countries can receive large refugee populations.[367]

Yet apart from these initial assertions, nowhere in the Communication may one find references to human rights. Somehow, the human rights language gave way to the development and humanitarian one. Should one be concerned about this development? After all, the Communication foresees the approach of flexibility to vulnerable groups in what it refers to as 'effective, full-cycle, multi-actor approach to tackle forced displacement'.[368] The new policy framework is to be based on (1) a stronger humanitarian and development nexus, (2) strategic engagement with partners (both partner countries and the private sector, (3) sectoral focus (education, access to labour markets, and access to services). Clearly each of the areas has inherent human rights aspects, and it is hardly possible to separate them from the three priority areas and actions described in the Communication.

The silence on asylum rights is disconcerting however, as this document seems to be of operational nature. Somehow the legal aspects (and human rights in particular) tend to get forgotten in the daily

[364] Commission Staff Working Document accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Lives in Dignity: from Aid-dependence to Self-Reliance 2016.

[365] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development) COM(2016)2.

[366] ibid 3.

[367] ibid.

[368] ibid 5.

policy making and implementation struggle. For this reason, leaving out the rights of displaced persons from the picture seems to be a black hole in this, otherwise comprehensive document.

6. Conclusions on EU programmatic documents

The purpose of this section was to determine the objectives the EU has identified as most pressing in the area of ensuring human rights of asylum seekers and refugees. It seems that in 2016 the policy arrived at the ending point of the cycle. It started with the 2005 Global Approach to Migration presenting the comprehensive view of EU external migration policy (albeit with some hints to the internal areas) and it finished in April 2016 with the comprehensive approach to the forced displacement and development[369] focalising the chief concerns the EU external migration policy previously spelled out in 2015 Agenda on Migration. In this context the protection of rights of refugees and asylum seekers has also undergone a substantive transformation.

There are four general conclusions that can be drawn from this background analysis of the strategic use of tools in this particular crisis area.

Firstly, it is striking how the internal and external strategies continued to develop in a parallel manner. First GAMM and Stockholm programme struggled to make links between one another despite hinting at relative internal and external aspects of the respective policy responses

Secondly, and in connection with the previous observation, the position of the Member States in the process of the development of both internal and external migration policy is incomprehensible. It is as if they were not concerned about what happens outside of 'Fortress Europe' as long as the walls are thick enough and the guards at gates can screen any dubious arrivals (and that would include arrivals from the EU Member States). The review of the EU strategic documents in the area of asylum reveals that it is not the European Union that failed to prepare the timely response for the aftermath of the Arab Spring. It is the Member States that failed to take interest and develop vision, which reached beyond their own courtyard. In such setting, there is no wonder that the link between migration and development has been neglected for over 10 years, and for instance the GAMM suggested Regional Development and Protection Programs took eight years to take shape.[370]

Thirdly, in relation to the actual human rights of asylum seekers and refugees, the strategy spectacle has been impressive. The broad and - as unfortunate as it may sound – meaningless references to international protection of asylum seekers, with particular focus placed on them being a vulnerable group with time gave way to concrete concerns: ensuring life, access to health service, fair trial rights or

[369] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Lives in Dignity: from Aid-dependence to Self-reliance (Forced Displacement and Development) COM(2016)2.

[370] See the 2004 and 2005 Commission Communications and the final 2012 one bringing the said programmes to life: Communication from the Commission to the European Parliament: On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin 'Improving Access to Durable Solutions' COM 2004; Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes COM(2005)388 final 2005.

ensuring of human rights when scanning finger prints. This in itself should be considered as a very good development for it reflects the pending legal problems that lead to court proceedings, and voices of refugees themselves as well as NGOs working with them. The concrete right-related approach to protection of asylum seekers reflects also the knowledge of both violations (potential and actual) ones and the common pool of best practices, which can be shared by frontline institutions. Against this image the return to development as opposed to rights language in 2016 Communication 'Lives in Dignity: from Aid-dependence to Self-reliance' should be considered as step backwards in the overall development of strategies for human rights objectives.

Finally, the above outlined observations have strong implications for what it is means to use tools strategically. In the first place, it seems that flexibility in the use of tools is reduced. After all a concrete case of not ensuring of human rights may be responded to in a limited number of ways. That is again reduced in modalities when one considers the initial limited participation of the Member States.

Beyond the above human rights related comments, there is much to say from the point of view of strategic accomplishments, which will be subsequently taken on in the discussion of the adoption of specific tools. First of all, the European Union institutions since 2004 have been pursuing a clear policy line in which the internal aspect of the development of the Common Asylum System is paralleled by the forging of partnerships with third countries. The accomplishments in both areas varied and were subject of severe criticisms.[371] Yet, the modalities of pursuing the EU's migration policy objectives have remained consistent. From this perspective one can only express regret that neither the European Common Asylum System, nor the external partnerships were forged in time to respond to the current migration crisis. Clearly, these would have not ensured a totally satisfactory response, but would have for sure made the discussions within the EU easier…. Or would they? The mere analysis of the strategic documents permits for a bold statement according to which the EU asylum policy at large and inasmuch as it touches on the human rights of asylum seekers and refugees needed a crisis to be completed. Without the current turmoil at the EU borders, asylum would have remained a low priority on the EU agenda.

[371] For the critique of the off-shore refugees camps, see for instance: Maarten den Heijer, *Europe and Extraterritorial Asylum* (Bloomsbury Publishing 2012).

C. Intermediate Conclusions: Strategy from the Perspective of the 'Diamond' Model[372]

As one could see in the above descriptive analysis of the EU strategies in the field of the asylum, human rights rarely appear as specific objectives of EU actions. When they do, this is done in line with what could be referred to as 'mainstreaming' clause thus confirming the commitment on the part of the EU to the general human rights obligations. This means that whatever initiative is undertaken it must both take the form which is human rights compliant and it should actively promote human rights. From this perspective both the internal and external endeavours remain in the spotlight albeit ruled by different legal frameworks.

From the angle of the formulation of the strategy one can try and comprehend its logic applying the diamond model described in the chapter entitled 'Strategic use of tools'. The adoption of a strategy follows a mission of an institution. In the context at stake, the mission is envisaged in the values of the Union combined with the general objectives of the Union, which are basically to ensure 'well-being' of peoples of Europe.

The mission of the EU in the context of the asylum policy is to be realised through addressing the two policy areas (venues): the internal Common European Asylum System and through external measures. The latter initially was to take form through the Mobility Partnerships that, possibly, could lead to the extraterritorial asylum policy and offshore camps. As we saw the two arms of the policy have been developed in parallel over more than the past ten years. Now, whilst human rights standards, starting off with the right to asylum recognised by the EU Charter of Fundamental Rights, have been at the heart of the whole endeavour, they were not perceived as such and drowned in the rule of law capacity building and implementation measures and language. The tools (vehicles) of action from the outset have been varied and involved the complex network of the legal and non-legal, conceptual and operationalization measures involving the vast majority of actors. Yet in their development the EU has faced a severe opposition of its own Member States on the one hand, criticism of the international community on the other and opportunism on the part of partner third states.[373]

Possibly the explanation of the *status quo* lies in the lack of strategic reflection as to the staging (and thus planning of initiatives in time), differentiation (elaborating the value-added and comparative advantage logic as to why the EU is best suited to pursue migration policy objectives as defined by its strategies) and economic logic (in other words – the return that the policy solutions offer from the EU and its Member States perspective).

Staging is possibly the easiest of the three aspects to address. The EU has been strongly criticised for its inability to set short term priorities. In fact, the above outlined strategies prove very much this point.

[372] Donald C Hambrick and James W Fredrickson, 'Are You Sure You Have a Strategy?' (2001) 15 Academy of Management Executive. op. cit.

[373] For instance, the officials of Morocco have admitted in private conversations that upon the signature of the Mobility Partnership the initiatives on the part of the Moroccan state have been not undertaken even though the funds have been flowing (conversations during the meetings in September 2015).

Possibly only the 2015 European Agenda on Migration by determining the immediate actions has recognised the need to prioritise certain endeavours. But even these, effectively, correspond to a large degree to the mid-term goals, which are determined. From this point of view one can only observe that strategies seem to resemble a point in time when they are made. The unfavourable conclusion that one must draw at this point is that the objectives set in 2004 have simply not been attained.

The differentiation and economic logic aspects of the EU asylum strategies and their human rights components can be addressed together. If differentiation is about the value-added of the European Union solution then the first question that appears in this context is that about who could be the potential 'competitor' of the EU in this context. Member States? The international community? The declining world super powers or what remained of them: US, Russia? Or the rising ones: China, Brazil or India? It seems that favouring any of these answers would amount to the lack of contact with reality. It must be said clearly that there is no alternative to the EU based solution to the human rights crisis at the borders of the European continent. Thus the European value added is as far as it gets – both internally with relocation and resettlement schemes, and externally, with playing possibly a risky game, which is, however, coherent as far as the historical and substantive policy development is concerned.

What will get the EU in return? In the first place – as Obama's recent words on the Europe's response to refugee crisis confirm[374] – the EU engages deeply to provide answers to the crisis which is more than one can say about other global players. Secondly, if it manages to address the whole issue in a wise manner, it can solve its internal economic problems amounting to staff shortages in certain sectors. Finally, if human rights of refugees can be ensured at the minimal threshold then the EU's mission seizes to be rhetorical. Having said all this, there seems to be one problem that the EU fails to address in terms of economic logic – it fails to convince its own Member States and the public opinion that this logic is not only reasonable but also beneficial. This image does not resonate in the Member States' limited and continuously populist and largely nationalistic optic.

The above commentary is based on the five pillars constitutive of the strategy as proposed by Hambrick and Fredrickson. The model was complemented by six questions aiding the evaluation of a strategy as a good one.[375] Some of the questions in the light of the above comments on the European value added do not stand, however, others should be considered briefly. The first question relates to consistency of the strategy and by that Hambrick and Fredrickson refer to the internal consistency between the five pillars of strategy – these should mutually reinforce one another. Clearly, the failure to communicate the economic logic and thus accumulate strategic partnership with stakeholders concerned has proven so far to be an Achilles's heel making the whole construction rather wobbly. The second question that should be considered is about sufficiency of resources to pursue the strategy. Hambrick and Fredrickson ask: Do you have money, managerial time and talent, and other capabilities to do all you envision? Are

[374] Philip Oltermann and Patrick Wintour, 'Barack Obama Hails Angela Merkel over Handling of Refugees' *The Guardian* (24 April 2016) <http://www.theguardian.com/world/2016/apr/24/migration-crisis-obama-and-eu-leaders-to-discuss-naval-patrols-in-libya>.

[375] See, Section IIDIID above: Concluding remarks and how to recognise a good strategy.

you sure you're not spreading your resources too thinly, only to be left with a collection of feeble positions? The answer to this question is clearly again dependent on the coalition the EU is capable of building with various Member States and the funding will depend on it.

Having made these interim observations dedicated to whether the strategy for response to the refugee (human rights) crisis matches the five strategic pillars proposed by Hambrick and Fredrickson, we are going to briefly analyse the modalities of implementation of these strategies in external policy area. The scope of this second exercise is to make an attempt at evaluation of whether the strategy at its core, once implemented, can be considered as a successful one. In other words, we shall examine the sixth of the questions as to whether the strategy is good or not: is it implementable? This big question breaks down to the following three ones: a. Will the key constituencies allow the EU to pursue the strategy? b. Can the EU make it through the transition? c. Are the EU stakeholders able and willing to adopt the required changes?

D. The strategic use of tools in response to the EU human rights refugees crisis

The below section focuses on the EU external policy response to the EU human rights refugee crisis. When analysing the measures and their 'life' we shall focus on the notions of 'implementability' of a strategy as explained above.

In the below section we shall consider the hugely advertised the EU-Turkey deal, but also a less known Regional Protection Models which have been on the table since 2004. Finally, we shall focus on the involvement of FRONTEX and the measures it has at stake in addressing the human rights concerns resulting in creating the two response mechanisms.

1. The EU Response in the Region: The EU Regional Protection Models

In the meantime, however, in line with the EU Regional Protection Models, the EU has been developing another tool. The EU Regional Protection Programmes in line with the proposal initially linked to GAM.[376] These are the programmes to be based on AENEAS and TACIS financial programmes designed to build capacity of host countries in the vicinity of regions of origins to protect refugees. The programmes are to create conditions for one of the three durable solutions – repatriation, local integration, or resettlement.

In line with the original 2005 Communication of the Commission,

> the development of Regional Protection Programmes, in cooperation with UNHCR, in line with the Memorandum of Understanding between the Commission and UNHCR of 15 February 2005, and third countries in regions of origin, will necessitate the coordination of EU, refugee, humanitarian and development policies to address the full range of protection needs as well as the impacts of refugee populations on local communities to ensure that benefits are maximised for all.[377]

So far, the Regional Protection Programmes were launched in relation to Eastern Europe, Great Lakes Region (Tanzania), Eastern North Africa (Egypt, Libya and Tunisia), Middle East.

In fact, it is the last of the programmes that call for enhanced attention. Launched in 2013 as the direct response to refugees crisis it was named as a Regional Development and Protection Programme. Its aim is to support Jordan, Lebanon, and Iraq to develop sustainable capacities focusing on local integration and resettlement. The programme is financed chiefly by the EU with participation from the Foreign Affairs Ministries of Denmark, Ireland, Czech Republic, the Netherlands, and the UK Home Office.

> The main activities supported by the new programme will include market-based support for creating employment opportunities, micro-enterprise finance, skills development training,

[376] Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes COM(2005)388 final.
[377] ibid.

> and vocational training, as well as appropriate social infrastructure development, including education, water and sanitation and improved energy supply. It will also aim to strengthen the protection of refugees in the region through promoting improved access to basic rights and appropriate legal assistance, as well as to provide training to local and national authorities and civil society groups who are active in the field of asylum and refugees.[378]

Little is known about actual impact of the Regional Protection Programmes. Apart from the initial study conducted by ECRE in 2012-2013 there is virtually no other information available on the matter.[379] In line with their findings the program is managed by Denmark and started on 1st July 2014. This particular programme combines humanitarian and development funds in order to ensure great coherence. As such it is based more on GAMM than the initial 2005 Communication.

> 'The RDPP has been designed on the basis of a baseline study, commissioned by the Danish government, which provided a mapping and meta-analysis of existing studies of costs, impacts and protection issues in the region. The programme has an impact analysis and assessments component, aimed at understanding the Syria displacement both as a protection and a development challenge. Research includes an assessment of current protection challenges and the capacities to address them. […] Resettlement is already covered through on-going UNHCR operations and will not be included in the RDPP.' [380]

This programme resembles in its design what the European Union has been trying to do with Turkey and should be considered in connection with the EU-Turkey deal.

2. The European Union response involving Turkey

The EU response to the refugee crisis which involves Turkey has given rise to multiple human rights and legal concerns alike. As for the former, it is clear that Turkey, regardless of its participation in the accession negotiation is not a human rights champion. In the 2014 Annual EU Report on Human Rights the human rights progress in Turkey has thus been summarised:

> Reform and capacity -building needs under the rule of law and fundamental rights have been identified as major priorities for Turkey in the Country Strategy Paper for 2014-2020 (IPA II assistance). Under the 108 IPA 2014 programme, action regarding judiciary is aimed at strengthening its independence, impartiality, efficiency and administration. As regards fundamental rights, the IPA 2014- related action deals with support to key institutions (parliament, the bar of lawyers, the Turkish National Human Rights Institution), as well as strengthening of the civilian oversight of internal security forces.

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[378] European Commission, 'The European Union's Cooperation with Africa on Migration' <http://europa.eu/rapid/press-release_MEMO-15-6026_en.htm> accessed 26 April 2016.

[379] ECRE, 'Dialogue on Migration and Asylum in Development (Domaid)' (2014) <Dialogue on Migration and Asylum in Development (Domaid)> accessed 25 April 2016.

[380] ECRE, 'Dialogue on Migration and Asylum in Development (Domaid)' (2014).

> In addition to the IPA support, the EIDHR instrument supported 55 projects in 2014 aimed at strengthening civil society in its work on human rights, including the protection of human rights defenders; rights of LGBTI persons; women's rights (including women's political participation and preventing violence against women); refugees and asylum seekers; protection of minorities; freedom of religion; and freedom of expression and cultural rights.[381]

Regardless of the focused interventon on the part of the European Union, it seems hardly unlikely that the Turkish human rights record will improve in a forseeable future. So, to begin with at the moment of the eruption of the refugee crisis the Turks had already been subject to severe human rights criticism.

At the moment of the eruption of the crisis, Turkey became the hub for the arrivals from all over the region and until April 2016 it did not close its borders. Since it is a gateway to Europe, it was also the first country to be taken into consideration as an actual partner in dealing with the migration pressure. The critique of EU's dealings seems to be stemming predominantly from two sources: in the first place it is about the critical and strategic assessment of Turkey as a reliable partner, the relation with whom does not diminish the EU's credibility. Interestingly, the coordination of measures under the EU Turkey arrangement has been perceived in negative terms, whilst the continuous collaboration within the framework of the neighbourhood policy goes unnoticed. Secondly, the lack of cooperation of the Member States in relocation of refugees was another problematic issue *de facto* limiting the EU's credibility in dealing with the crisis at large. The two observations unveil the two classical critiques of the EU dealings with the third countries – and eternal dilemma: when does the non-observance of human rights standards become problematic?

In the present case study the problematic aspect of this relationship lies in the actual implementation of the EU-Turkey deal which is below presented as it stands for 15 May 2016.

a) The EU-Turkey Relations

The history of the EU-Turkey relationship goes back to 1959 when Turkey applied for the associated membership with the European Economic Community. Since 1963 the EU- Turkey relations have been governed since 1963 by the Ankara Association Agreement[382] and the subsequently signed 1970 Additional Protocol[383]. Together they provided for a timed establishment of the customs union, established ultimately on 1 January 1996 through the EU-Turkey Association Council Decision 1/95.[384] Subsequently, in December 1999 Turkey was officially recognised as an EU accession country and

[381] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015) 100 <eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf>.

[382] Agreement establishing Association between the European Economic Community and Turkey signed on 12 September 1963, OJ 1973 C 113/2.

[383] Additional Protocol to the Agreement establishing Association between the European Economic Community and Turkey on 23 November 1970, OJ 1973 C 113/17.

[384] Decision 1/95 of the the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ 1996 L 035/1, < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213(01):EN:HTML> accessed 6 June 2016.

accession negotiations officially started in October 2005. Importantly, the customs union established under the Ankara Agreement entails only the trade in manufactured products and alignment of Turkish technical regulation of products, competition and intellectual property laws with the EU ones. Simultaneously, the trade in agricultural and steel products is regulated by separate agreements. The EU is the biggest trading partner with Turkey with trade being almost balanced.[385]

The Turkey human rights situation has been addressed in the process of the EU accession to Turkey negotiations. In part it led to the adoption of the 2012 Law on Immigration and Temporary Protection. For the comprehensive evaluation of the EU see the forthcoming Report 6.2 'Report on Case study: European Enlargement Policy, with a focus on the Western Balkans and Turkey' and in particular the section on EU-Turkey relations authored by Susanne Fraczek.[386]

b) The EU-Turkey Deal

The EU-Turkey deal reaches back in time to the deep concerns the EU and Turkey have shared over the refugees crisis following the Arab Spring events, and more recently the Syrian civil war. The concerns were prompted also by the fact that due to its geographic position Turkey is a most prominent gateway to Europe. As a gateway to Europe, it has continued to receive a flow of migrants fleeing from various countries of origins, amounting to 2.7 million of Syrians[387] and ca 200 000 of other nationalities.[388] The response to the crisis took initially form of a Joint Action Plan of 15 October 2015[389], statement of 7 March 2016[390] and the 'proper' EU-Turkey deal of 18 March 2016.

The 15 October 2015 Action Plan was based on the reciprocal initiative on the part of Turkey and EU whereby Turkey is to contain refugees within its borders or at least hinder their passage to Europe. The refugees staying in Turkey are to be offered secondary protection. In return, the EU is to dispatch dedicated funding and permit a certain visa liberalisation. The EU has been criticised immediately for the way the Action Plan is constructed. Allegedly it treats migrants as in need of secondary protection when on Turkish territory, upon the attempt to reach European shores, they become irregular

[385] European External Action Service, 'EU Relations with Turkey' (*European External Action Service*) <http://eeas.europa.eu/turkey/> accessed 6 June 2016.

[386] So far, the report has been submitted to the FRAME internal review.

[387] According to the UNHCR hosted website 'Syrian Regional Refugee Response' updated on 2 May 2016 there are 4'835'909 registered refugees amongst which 2,7 million have been registered in Turkey. UNHCR, 'Syrian Regional Refugees Response - Inter-Agency Information Sharing Portal' <http://data.unhcr.org/syrianrefugees/regional.php> accessed 6 May 2016.

[388] See, for the predictions for the period between January 2015 and December 2015 by the UNHCR: UNHCR, '2015 UNHCR Country Operations Profile - Turkey' <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48e0fa7f&submit=GO> accessed 6 May 2016. For the overview of available statistics, see: Refugee Rights Turkey, 'Statistics - Turkey' (*Asylum Information Database*, 2016) <http://www.asylumineurope.org/reports/country/turkey/statistics> accessed 10 May 2016.

[389] EU Turkey joint action plan.

[390] European Council, 'Statement of the EU Heads of State or Government' <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/> accessed 26 April 2016.

migrants.[391] This shows EU's willingness to manipulate the position of the crisis in Europe swaying it from migration and security to refugee problems. Apparently, the Action Plan at its core had waiving of EU Member States' international obligations. The criticism in this context targets the Member States and their unwillingness to participate in the relocation scheme adopted by the European Commission.[392] Indeed, the Action Plan consists of two parts: The first one is about supporting the Syrians under temporary protection and their Turkish hosting communities. The EU will mobilise funds through the EU Trust Fund for the Syrian crisis. In dispatching funds, the priority

> will be given to actions providing immediate humanitarian assistance; provision of legal, administrative and psychological support; support for community centres; the enhancement of self-sufficiency and participation in economy and their social inclusion during their stay in Turkey; improved access to education at all levels; but also actions supporting host communities in areas such as infrastructures and services.[393]

In addition, the EU will continue in close cooperation with Turkish authorities to dispatch funding for meeting the humanitarian needs of Syrian communities, as well as provision of assistance to contribute to 'weakening of push factors forcing them to move towards Turkey'.[394] Finally the support the existing Member State and EU resettlement schemes and programmes are mentioned. On the other side Turkey is to:

> 1. Continue to ensure that migrants are registered and provided with appropriate documents on a compulsory basis to enable to build a stronger migration management strategy and system.
>
> 2. Continue efforts to adopt and implement policies, legislation and programmes facilitating for Syrians under temporary protection to have access, for the duration of their stay in Turkey, to public services including education for pupils, to health services and participation in economy.
>
> 3. Ensure that vulnerable people continue to be identified and taken care of.[395]

The second part focuses on strengthening cooperation to prevent irregular migration. Here the obligations concern mutually the two partners in order to strengthen the capacity of Turkish Coast Guard for patrolling and surveillance and step up cooperation with the EU and its Member States (Greece and Bulgaria in particular and implementation of the tri-partite agreement whose objective was

[391] Idil Atak, 'A Look at the EU-Turkey Action Plan' (*Blog of François Crépeau Chaire Oppenheimer en droit international public*) <http://francoiscrepeau.com/fr/a-look-at-the-eu-turkey-action-plan/> accessed 26 April 2016.

[392] Idil Atak, 'A Look at the EU-Turkey Action Plan' (*Blog of François Crépeau Chaire Oppenheimer en droit international public*).

[393] EU Turkey joint action plan.

[394] Ibid.

[395] ibid.

to set up a common centre in Capitan Andreevo), as well as to continue the dialogue and development of measures to combat irregular migration. On top of this the EU is to provide funding to the Turkey in order to ensure its meeting the requirement of the Visa Liberalisation Dialogue and enhancing the 'capacities and developing a well-functioning asylum, migration, visa, and integrated border management system in line with the EU-Turkey visa dialogue'.[396] FRONTEX is to assist the efforts and respective liaison officers are to be deployed. Turkish obligations (aside for fighting smugglers and approximation of the Turkish provisions to the EU visa legislation) in relation to the asylum policy involve ensuring smooth readmission procedures and the quick conclusion of asylum procedures, 'so that the status or refugee is granted without delay to those whose asylum requests are positively assessed'[397].

The Joint statement of 7 March 2016 builds on the earlier determined course of action connecting it with the Turkish proposals, and should entail:

- to return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU;
- to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the EU Member States, within the framework of the existing commitments;
- to accelerate the implementation of the visa liberalization roadmap with all Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016;
- to speed up the disbursement of the initially allocated 3 billion euros to ensure funding of a first set of projects before the end of March and decide on additional funding for the Refugee Facility for Syrians;
- to prepare for the decision on the opening of new chapters in the accession negotiations as soon as possible, building on the October 2015 European Council conclusions;
- to work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria which would allow for the local population and refugees to live in areas which will be more safe.[398]

Finally, on 18 March 2016 the actual EU-Turkey agreement was made, yet again in the form of the statement between the heads of EU and Turkish governments.[399] The agreement involved the nine point action plan which is to be monitored on monthly basis:

[396] ibid.
[397] ibid.
[398] European Council, 'Statement of the EU Heads of State or Government.'

1. The agreement establishes the (temporary) principle of readmission to Turkey of the migrants crossing in an irregular mode from Turkey to Greek islands – the principle of no blanket expulsion is confirmed. Importantly, migrants who will reach Greece and claim asylum will be dully registered in line with the Asylum Procedures Directive. The remaining ones (either not applying for asylum or eligible for secondary protection) will be returned to Turkey at EU's expense.

2. 'For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.' The EU will subsequently dispatch the migrants according to the commitments made by the Member States.

3. Turkey is to take all the measures to block all the possibilities of opening new routes for illegal migration from Turkey to Europe and that in cooperation with its neighbouring countries and the EU itself.

4. Once the first step of the agreement (the unwanted arrivals are limited) is reached, a Voluntary Humanitarian Admission Scheme will be activated (with the EU Member States receiving refugees on voluntary basis).

5. The EU is to liberalise the visa requirements for Turkish citizens by the end of June 2016 (provided that all the benchmarks are met).

6. The EU is to dispatch the allocated funding of 3 billion euros under the Facility for Refugees in Turkey. That will be followed by identification of further projects to be funded and approved. Further 3 billion Euros will be dispatched up to the end of 2018.

7. Upgrading of the Customs Union has been welcome.

8. Accession project is to be reinvigorated with Chapter 33 project to be opened during the Dutch Presidency.

9. The EU and Turkey will work together towards the improvement of humanitarian situation.

From the legal point of view the action plan is a political statement, which involves the use of existing instruments by both the European Union and Turkey.

On the part of the European Union, it involves the procedural modification and acceleration of the inadmissibility procedure that is based on the EU Asylum Directive. The return of the migrants is based on the EU-Turkey Readmission agreement, the protection granted in Turkey on the basis of existing laws, whilst the cooperation of the border guards is to take place within the existing framework for cooperation.

[399] European Council, 'EU-Turkey Statement' <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> accessed 26 March 2016.

In general, the political statement between the EU and Turkey gives rise to serious doubts as to the fulfilment of procedural democratic guarantees under the EU law.[400] It is claimed that general fair trial guarantees of EU law and general human rights protection safeguards are not fulfilled.[401] Luedtke in this context reminded that:

> the offshoring or outsourcing of immigration control lacks oversight. The nascent EU border-control regime—which delegates powers to countries with less robust court systems or nongovernmental organizations— faces little scrutiny from courts or other bodies that could step in to block human rights violations. Judicial remedies for immigrants are still often stronger at the national level.[402]

In addition, several concerns are raised from the perspective of the it seems that the determination that Turkey is a safe third country, it would be able to state that any application stemming from a person passing through Turkey is inadmissible under Articles 33, 34 and 38 of the Asylum Procedures Directive[403] – and that merely after a simple interview.

Above all, from the perspective of human rights of asylum seekers, the EU-Turkey statement has encountered severe criticism because of the Turkish asylum system, which seems inapt and abusive.[404] Peers pointed to the fact that Turkey was not committed to monitor its asylum obligations.[405] And as it seems the situation is in no ways positive at the moment as is reported by Gatti:

> More generally, one may expect that the statement may contribute to worsen the already difficult situation of asylum-seekers. The UN Refugee Agency (UNHCR) has alleged that the asylum-seekers and migrants who arrived in Greece after the entry into force of the EU-Turkey deal (20 March) are being detained, to be subject to the new return policy. A number of international organisations and non-governmental organisations have consequently suspended at least part of their operations in Greek 'hotspots', ostensibly to avoid being 'instrumentalised for a mass expulsion operation' (Médecins sans Frontières;

[400] Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)' (*EJIL: Talk!*) <http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/> accessed 26 April 2016; Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)' (*EJIL: Talk!*) <http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/> accessed 26 April 2016.

[401] 'EU:Turkey Mass-Return Deal Threatens Rights' (*Human Rights Watch*) <https://www.hrw.org/news/2016/03/15/eu-turkey-mass-return-deal-threatens-rights> accessed 26 April 2016.

[402] Luedtke 92.

[403] 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee — Refugee Studies Centre' <http://www.rsc.ox.ac.uk/publications/the-recast-asylum-procedures-directive-2013-32-eu-caught-between-the-stereotypes-of-the-abusive-asylum-seeker-and-the-vulnerable-refugee> accessed 18 March 2016.

[404] Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2).'

[405] Steve Peers, 'The Final EU/Turkey Deal: A Legal Assessment' (*EU Law Analysis*).

see also UNHCR, International Rescue Committee, Oxfam, Norwegian Refugee Council and Save the Children). The deportation of migrants began on 4 April 2016.[406]

It is clear, therefore, that well prior to making the EU-Turkey deal, addressing the issue of asylum guarantees or the rights of refugees at large in the context of Turkey has been off the table.

In the meantime the European Commission issued the first report on the implementation of the EU-Turkey deal. It does not mention refugees' rights, yet we learn that according to the 1:1 principle, 103 Syrian refugees have been resettled, whilst in the meantime Greece has set up the accelerated asylum procedure.[407] It remains to be seen whether the threat to rights as proclaimed by NGOs will have materialised in the future.

[406] Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2).'

[407] European Commission, 'Managing the Refugee Crisis: Commission Reports on Implementation of EU-Turkey Statement' <http://europa.eu/rapid/press-release_IP-16-1444_en.htm> accessed 26 April 2016.

E. Conclusions: On Strategy, Coherence and Implementation

Frequently, the commentators observe that the EU does not address specific human rights issues in its strategic documents.[408] Such observation on the part of the commentators is not flawed as it points to the extremely complex structure of the EU governance. At the same time, it is exactly the positioning of the EU strategies in the broad context permits for the conclusion that they seem to interplay very well with broader international considerations and initiatives.[409]

The above considerations presented the use of tools in line with its initial ideas and commitments to rights as outlined through the EU strategic/programmatic documents. It is striking that the foundations for the so much criticised EU-Turkey deal have been present in policy discussions for a very long time – virtually since the beginnings of the attempted introduction of the coherent policy for migration. As observed by Luedtke:

> Although the camps idea was scrapped, the Lisbon Treaty enabled the offshoring of immigration and asylum policy by other means: through patrols by Frontex, agreements with third countries over returning deportees, and most notably the full implementation in 2013 of the Dublin Convention, which requires that asylum seekers be processed in the first EU country they arrive in (ending the practice of "asylum shopping," whereby ostensible refugees could lodge claims in multiple EU countries). A European fingerprint database for asylum seekers allows national politicians to cede sovereignty over refugee law to the EU without looking "weak" on controlling immigration.[410]

It is also striking, that similarly rights approach to migration has never really materialised either on the policy planning level, nor in its implementation. In many aspects, the very tools have been the source of the problems chiefly because of their focus on 'tackling' the problem rather than addressing the rights concerns. What is more, and very visible in the story of the development of the asylum policy is the lack of participation of the Member States, which clearly has impeded in the long terms the creation of a sustainable system of asylum seekers protection in Europe. In many instances one could get an impression that the EU finds itself between Scylla and Charybdis with rights playing the least of roles whilst the EU manoeuvres on the rocky waters between demands of its Member States and their public opinion on the one side and that of international community at large and the EU's closest vicinity. The clear implementation gap proves only that the mere existence of tools is not enough – one needs above all the political will to implement them.

Because of this, the answer to the earlier posed question as to the implementability of the EU strategy, must be negative, yet for reasons chiefly associated with lack of political will and detachment of the Member States from the collective management of the asylum and refugees policy.

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[408] See, for instance in reference to the EU-Turkey action plan: Atak, 'A Look at the EU-Turkey Action Plan.'

[409] The best example is probably the relationship between the EU 2015 Agenda on Migration and the nascent UN Post-2015 Development agenda.

[410] Luedtke 91.

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V. Promoting Human Rights and Supporting Democracy outside the EU Borders – On the EU Response to the Ukrainian Crisis

A. Introduction

The several challenges confronting Ukraine over the last three years have generated a crisis impacting its internal political and economic stability as well as the peace, stability and security in Europe. Remarkably, a deteriorating human rights situation along with serious humanitarian implications characterise the unstable Ukrainian context.[411] The human rights at stake are basically those affected by the events in Kyiv from November 2013 to February 2014 and by the subsequent developments, which led to the illegal annexation and occupation of the Crimean peninsula by the Russian Federation as well as the armed conflict affecting parts of the Donetsk and Lugansk regions. In addition, the human rights at stake concern the standards to be promoted and enhanced in Ukraine more generally, in line with the existing long-term domestic reforms.

The multiple repercussions of this unstable context for the evolving relations between the EU and its biggest direct Eastern neighbour entail the must to address the effects of the crisis on the existing body of EU human rights related policies in its external action. In this vein, the evolving crisis situation in Ukraine and the EU's responses thereto provide a good opportunity to investigate and assess the complementary use of tools at EU's disposal to foster human rights and democracy throughout all its external actions.

From the point of view of EU competence, it is worth highlighting that, in line with the Treaty provisions, the external sphere of the EU action encompasses two complementary and closely related areas, *i.e.* the Common Foreign and Security Policy (CFSP) (as regulated in Title V TEU) and the European External Action (as regulated in Articles 3-5 and Title V TFEU – and the associated doctrine of implied powers), which cover two different competence regimes.[412] On the one hand, there exists a general competence for the EU to act under Article 21 TEU (in particular the ones connected with human rights and democracy) within the CFSP area.[413] Nonetheless, Article 24 TEU defines the implementation dimension,[414] while Article 25 TEU determines the limited toolbox the EU has at its disposal in this

[411] See Office of the High Commissioner for Human Rights (OHCHR), Reports on the human rights situation in Ukraine, available at http://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx. In particular, OHCHR, 'Report on the human rights situation in Ukraine, 16 November 2015 to 15 February 2016' (3 March 2016); OHCHR, 'Report on the human rights situation in Ukraine, 16 August to 15 November 2015' (9 December 2015); OHCHR, 'Report on the human rights situation in Ukraine, 16 May – 15 August 2015' (15 August 2015). See also EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 161-166.

[412] The potential range of available instruments in the external relations is already highlighted in FRAME Deliverable 12.1, 2.

[413] See Article 3(5) TEU and Article 21(1) TEU.

[414] Article 24 TEU: the Common Foreign and Security Policy 'shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High

area.[415] On the other hand, as for the competence granting provisions of the TFEU, Article 216 TFEU codifies the 'doctrine of implied powers' permitting the EU to adopt external measures as an extension of internal policy competences.[416]

From the point of view of the tools at disposal in the EU human rights policy, it is worth mentioning that the EU can adopt unilateral measures under Title V TEU and Parts 4 and 5 TFEU or it can enter into international agreements as per Article 218 TFEU and related.[417] Thus, as already addressed in FRAME Deliverable 14.1, EU external human rights tools consist of sources of law (*i.e.* binding legal measures adopted in line with the competence provisions of the EU Treaties and including multi- and bilateral international agreements as well as unilateral (non-reciprocal) instruments), diplomatic measures adopted within the CFSP, and evaluative tools.

Against this background, the case of Ukraine stimulates rethinking of the EU external human rights and democracy toolbox. The aim of the present contribution is to evaluate whether the EU has strategically used these tools to face the concrete crisis situation in Ukraine, either taking a proactive stance or a reactive stance, in line with the programmatic policy documents that have progressively determined long-term objectives, specific priorities, and short-term actions in this policy area. In other words, the main research question arises as to whether and to what extent different EU legal, political, financial, diplomatic tools have been used in order to achieve human rights and democracy objectives in the EU-Ukraine relations either prior or after the outbreak of the crisis.

In particular, this contribution aims to assess how the EU implemented its external human rights and democracy policy agenda within the unstable Ukrainian and the wider geopolitical context where the EU has been perceived as almost a party to the conflict. Accordingly, the EU commitment to effective multilateralism in its external action entails questioning whether diplomatic tools available for use in

Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.'

[415] According to Article 25 TEU, the limited toolbox at the EU's disposal under the CFSP includes: '(a) defining the general guidelines; (b) adopting decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and (c) strengthening systematic cooperation between Member States in the conduct of policy'.

[416] Article 216 TFEU: '1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' This provision introduces the three conditions within which the EU can act in external relations field, yet as such has been criticised as being a simplifying codification of the EU implied powers doctrine'.

[417] As highlighted in FRAME Deliverable 14.1, 20, 'In order to conclude any agreement, the EU legislators must refer to a concrete provision providing for the legal basis and thus authorization of such action, or on the basis of the EU provisions permitting for the internal action be it in explicit or implied manner'.

multilateral forums have complemented the ones at disposal of the EU under its own policies such as the ENP, the CFSP, and the CSDP. Have the cooperation, interaction and synergy with other partners and institutions been crucial (and inevitable) dimensions of the EU human rights policy agenda in the Ukrainian case? Or maybe has the EU lacked a concrete strategy to address the human rights violations in the European neighbourhood?

This chapter starts with describing the main events that led to the outbreak of the crisis taking place in Ukraine and highlighting its impact on the respect of human rights. The second section looks at the Ukrainian crisis through the lens of strategies, thus focusing on the progressive formulation of the EU human rights and democracy agenda in its external action. The third section analyses the historical background and development of EU-Ukraine relations in the realm of the emerging EU external human rights and democracy policy agenda. In particular, the EU existing engagement in Ukraine is analysed in view of the evolution of the EU-Ukraine relations within the Eastern Partnership and its main tool for bringing them closer together, namely the Association Agreement signed in 2014. The fourth section examines the EU multi-faceted response to the evolving crisis in Ukraine from the perspective of the basic need to deal with its growing human rights and humanitarian implications as well as to support democracy and the rule of law in this torn state. The final section concludes with some general observations and comments.

B. The outbreak of the crisis in Ukraine and its human rights implications

The decision by the Cabinet of Ministers of Ukraine to suspend, for the benefit of national security, the preparations for the signing of the long-awaited EU-Ukraine Association Agreement triggered an exceptional chain of events affecting the internal situation in Ukraine as well as the stability, peace and security in Europe.

The Ukrainian government's resolution of 21 November 2013[418] sparked massive protests on the Independence Square (Maidan Nezalezhnosti) of Kyiv in support of Ukraine's political association and economic integration with the European Union. Following the violent repression of the protesters on 30 November (when the authorities attempted to forcefully disperse them from the Maidan Square by deploying Berkut Special Police Forces), the scope of their demands gradually expanded and called for the resignation of President Viktor Yanukovych. Tensions further intensified on 16 January 2014 following the Parliament adoption of a package of laws placing severe restrictions on, *inter alia*, freedoms of assembly, association and expression.[419] Attacks on journalists and activists as well as cases of enforced disappearance and ill-treatment of the participants of assemblies were reported. Until February 2014 a number of violent clashes between pro-European demonstrators, security forces and street fighters resulted in more than 100 protest-related deaths and more than 1,000 injuries of civilians and law enforcement officers. Several casualties were due to the excessive use of police force and the engagement of snipers. The violence downgraded in late February when a compromise solution to the political crisis was reached, numerous high-ranking individuals (including President Viktor Yanukovych) fled or resigned, and a new government led by Prime Minister Arseniy Yatsenyuk was appointed by the Parliament.[420] This context saw the emergence of a vibrant, frustrated, civil society committed to

[418] See statement by Ukrainian Department of Information and Communication of the Secretariat of the CMU, 'Government adopted resolution on suspension of preparation process to conclude Association Agreement with EU', 21 November 2013, http://www.kmu.gov.ua/control/en/publish/article?art_id=246866213. In particular, it is stated that the Resolution was adopted 'with a view to study and work out a complex of measures in details, which Ukraine has to take in order to restore the lost production output and areas of trade and economic relations with Russia and other CIS members states, form an appropriate level of domestic market, which would provide equal relations between Ukraine and EU member states that is the fundamental principle of the international law and the basis of economic security of the state'.

[419] For details, see OSCE/ODIHR, 'Opinion on Amendments to Certain Laws of Ukraine passed on 16 January 2014' (Warsaw, 10 February 2014), http://www.osce.org/odihr/111370?download=true

[420] In particular, on 21 February 2014 an 'agreement on the settlement of crisis in Ukraine' was signed by President Yanukovych and the parliamentary opposition's representatives, and witnessed by the foreign ministers of Poland, France and Germany, as well as the special envoy of the Russian Federation. Yanukovych agreed to immediate constitutional changes giving a parliamentary majority the power to form a new government. More specifically, the agreement provided for the restoration of the Constitution of 2004, the creation of a government of national unity, the calling of presidential elections in the course of the year, the investigation into recent acts of violence and the refraining from the use of violence. On 23 February the Ukrainian Parliament voted to appoint Oleksandr Turchynov as acting President until the elections of May. Then, Pedro Poroshenko was elected President of Ukraine on 25 May 2014. Following Parliamentary elections of 26 October 2014, a new government headed by Prime Minister Tatsenyuk was formed on 3 December 2014. For details on these events, see

addressing the need for serious reforms and determined to draw closer to Europe and implement a change.

In addition, the renamed 'Maidan revolution' triggered a political and military conflict in Eastern Ukraine. Following the demise of Yanukovych's regime, a series of events reinforced Russian perceptions of a government in Kiev hostile to Russian interests. For instance, the swift abolition of the 2012 law on 'State Language Policy' (allowing the country's regions to make Russian a second official language) prompted violent clashes in the south-eastern part of Ukraine between pro and anti-Kiev protesters.[421] In spring 2014, groups of protesters either opposed Yatsenyuk's government or claimed the federalization of Ukraine or even the secession of certain regions (Donetsk and Lugansk) and their annexation to the Russian Federation.[422] Euro-Maidan activists counter-demonstrated in support of a united Ukraine. On this occasion, tragic events occurred in Odessa on 2 May, during which six persons were killed, many others were injured during the streets mass disorder, some 42 persons died following a fire in the city Trade Union Building.[423]

This further escalation of insecurity took place as a result of Russian intervention in Eastern Ukraine. On 27-28 February 2014, pro-Russian separatists seized key buildings in the Crimean capital, Simferopol. On 1 March, Russia's parliament approved President Vladimir Putin's request to use force in Ukraine to protect Russian interests; on 16 March, a referendum (not authorized by Ukraine) was held in the Autonomous Republic of Crimea and the city of Sevastopol on the issue of the re-unification with the Russian Federation; the next day the Crimean parliament declared independence and formally applied to join the Russian Federation; two days later President Putin signed a bill with the Crimean *de facto* authorities to annex the peninsula.[424] Since the referendum and subsequent declaration of independence were held without the authorization and agreement of Ukraine, both were widely condemned internationally as violations of international law.[425] In particular, the actions undertaken by Russia were deemed in breach of the Charter of the United Nations of 1945 and the CSCE/OSCE Helsinki Final Act of 1975, as well as of Russia's specific commitments to respect Ukraine's sovereignty and territorial integrity under the Budapest Memorandum of 1994[426] and the bilateral Treaty on Friendship,

International Advisory Panel, 'Report of the International Advisory Panel on its review of the Maidan Investigations' (31 March 2015), paras. 1-124.

[421] See the European Parliament resolution on Ukraine, in which it called on the country's MPs and the new government to respect the rights of minorities, particularly when it comes to the use of languages.

[422] See note 8.

[423] For details on these events, see 'Report of the Temporary Investigation Commission of the Verkhovna Rada on its Inquiry into the Facts of Citizens' Deaths in Odesa, Mariupol and Other Cities in the Donetsk and Lugansk Regions' (2 September 2014); OHCHR, 'Report on the Human Rights Situation in Ukraine' (15 June 2014); OHCHR, 'Report on the Human Rights Situation in Ukraine' (17 August 2014).

[424] It is worth noting that this annexation (beginning on 21 March 2014) refers to the integration of Crimean institutions into the Russian Federation under the imposition of its domestic legal framework.

[425] On the status of Crimes, see UN Doc. A/RES/68/262, 'Territorial integrity of Ukraine', 27 March 2014.

[426] Budapest Memorandum on Security Assurances, signed on 5 December 1994 (original signatories: Ukraine, Belarus, Kazakhstan, Russia, the US and the UK).

Cooperation and Partnership of 1997.[427] Following the occupation and annexation of the Crimean peninsula in March 2014, Russia-backed armed insurgents seized control of several towns and cities in the Lugansk and Donetsk regions in April 2014, resulting in armed conflict with Ukrainian forces.

As a result of the illegal annexation of the Crimea peninsula and the involvement in the destabilization of Ukraine, the delicate relations between the Russian Federation and the European Union have deteriorated and 'hit rock bottom', and sanctions against each other have been adopted.

On 5 September 2014, a peace plan for Eastern Ukraine (the Minsk Protocol) was signed. Due to related immediate violations, a follow-up agreement was negotiated and signed on 19 September 2014. As fighting escalated again in January 2015, a Package of Measures for the Implementation of the Minsk Agreements (the 'Minsk II' agreement) was agreed by the Trilateral Contact Group[428] at the Summit in Minsk on 12 February 2015. It was supported by the Quadrilateral Declaration of Heads of State and Government, and was endorsed by the United Nation Security Council Resolution 2202 of 17 February 2015. *Inter alia*, they include the following:

- an immediate and comprehensive ceasefire in certain areas of the Donetsk and Lugansk regions;
- the withdrawal of all heavy weapons by both sides to create a security zone;
- pardon and amnesty of figures involved in the conflict (by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of such regions);
- the release and exchange of all hostages and unlawfully detained persons based on the principle 'all for all';
- safe access, delivery, storage, and distribution of humanitarian assistance to those in need (on the basis of an international mechanism);
- the definition of modalities of full resumption of socio-economic ties with affected areas, including social transfers such as pension payments and other payments (incomes and revenues, timely payments of all utility bills, reinstating taxation within the legal framework of Ukraine);
- the withdrawal of all foreign armed formations, military equipment, as well as mercenaries from the territory of Ukraine under monitoring of the OSCE (with the disarmament of all illegal groups);
- constitutional reform to be carried out in Ukraine with a new constitution providing for decentralization (including a reference to the specificities of certain areas in the Donetsk and Lugansk

[427] Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, signed on 31 May 1997.

[428] The Trilateral Contact Group on Ukraine is composed my representatives from Ukraine, the Russian Federation and the OSCE.

regions, agreed with the representatives of these areas), as well as adopting permanent legislation on the special status of certain areas of such regions;

- local elections in Donetsk and Lugansk regions to be held in line with OSCE standards;
- intensifying of the work of the Trilateral Contact Group.

However, Ukraine's path to peace with neighbouring Russia has remained quite complicated and fragile.[429] Due to recurrent waves of increased violence, a new 'ceasefire within the ceasefire' was agreed on 26 August 2015. Following the worsening situation of subsequent months, the implementation of the Minsk II peace agreement was extended beyond the 31 December 2015 deadline into 2016.[430] The continuing failure to fully implement the aforementioned Package of Measures has highlighted the crucial need to make progress toward a political settlement of the conflict.[431]

From the perspective of the human rights implications of all these events affecting Ukraine since late 2013, the deteriorating situation has been monitored and serious concerns about several human rights violations have been reported.

In particular, the events that took place from November 2013 to February 2014 led to violations of the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, freedom of peaceful assembly and freedom of expression.[432] Furthermore, assessments of the human rights and minority rights situation in Ukraine during March and April 2014 reported allegations of abuses committed by Ukrainian authorities as well as Crimean authorities exercising *de facto* control on the peninsula. These abuses involved: attacks against journalists and activists; failures by law enforcement agents to protect the freedom of peaceful assembly; the existence of propaganda and biased reporting of events affecting the freedom of the media and the freedom of expression; concerns over the freedom of movement of internally displaced persons (particularly Crimean Tatars) wishing to

[429] See Naja Bentzen, European Parliamentary Research Service, 'Ukraine and the Minsk II agreement. On a frozen path to peace?', PE 573.951, Briefing January 2016, http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573951/EPRS_BRI(2016)573951_EN.pdf

[430] http://www.elysee.fr/communiques-de-presse/article/entretien-format-normandie-2/

[431] See Security Council Briefing on the situation in Ukraine (28 April 2016), http://www.un.org/undpa/speeches-statements/28042016/ukraine

[432] See Ukrainian Parliament Commissioner for Human Rights, Special Report, 'Infringement of human rights and freedoms in Ukraine. The events of November 2013-February 2014' (2014); OHCHR, 'Report on the human rights situation in Ukraine' (15 April 2014); Council of Europe Parliamentary Assembly, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), 'Recent developments in Ukraine: threats to the functioning of democratic institutions' (08 April 2014); Council of Europe, 'Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Ukraine from 4 to 10 February 2014', CommDH(2014)7 (4 March 2014).

return to Crimea and their ability to enter Crimea from the territory controlled by the Ukrainian government; concerns over the freedom from arbitrary arrest and detention.[433]

As far as the situation in the illegally annexed Crimea is concerned, the Russian Federation and the Crimean *de facto* authorities have started to exercise *de facto* control and jurisdiction therein. The changes in government and the legal framework applied in the peninsula have severely impacted the enjoyment of the full range of fundamental freedoms and human rights by the residents concerned. The worsening situation has been denounced and closely monitored from the outset (critical shortage of reliable information has indeed resulted from Russia´s restrictive information and policing measures).[434] In particular, the following trends have been denounced over the last three years.

Firstly, the annexation has negatively affected the access of victims of human rights violations to a fair trial and justice in view of the highly restrictive Russian laws and regulations applied in Crimea. The victims are mainly members of the Crimean Tatar minority as well as pro-Ukraine activists. In this regard, the Ukrainian institutional system of human rights protection has ceased to function in Crimea. Remarkably, the regional Crimean office of the Ombudsman of Ukraine was forcibly closed down on 7 April 2014. Thanks to NGOs and local activists the Ombudsman has continued to receive human rights-related information from the peninsula, but the ability to administer justice impartially has been seriously weakened.[435]

The right to life of Ukrainian citizens living in the occupied and annexed Crimea has been reportedly violated in several cases, including abductions, killings, and disappearances. In particular, local paramilitary security forces have harassed journalists and political activists. Most victims of disappearances belong to the minority group of Crimean Tatars. Remarkably, lack of pro-active investigations by the *de facto* authorities along with fully or partially restricted access to Crimea for international human rights monitoring organisations have been frequently reported.[436]

A wide variety of activities, assemblies and speeches have been charged of 'extremism' and 'separatism' by the Crimean *de facto* authorities under Russian criminal law, but many of these criminal warnings, investigations and prosecutions have reportedly been 'politically motivated' (*i.e.* directed at journalists,

[433] See OSCE Human Rights Assessment Mission in Ukraine, 'Human Rights and Minority Rights Situation (ODIHR HRAM: 6 March – 11 April 2014, HCNM HRAM: 8 March – 17 April 2014)', (The Hague/Warsaw, 12 May 2014).

[434] For a detailed account, see, *inter alia*, OSCE-OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015)', 17 September 2015, http://www.osce.org/odihr/180596?download=true

[435] See OHCHR, 'Report on the human rights situation in Ukraine' (15 May 2014), 27.

[436] See Human Rights Watch, 'Crimea: Attacks, 'Disappearances' by Illegal Forces' (2014), https://www.hrw.org/news/2014/03/14/crimea-attacks-disappearances-illegal-forces; Human Rights Watch, 'Crimea: Enforced Disappearances' (2014), https://www.hrw.org/news/2014/10/07/crimea-enforced-disappearances. See also Parliamentary Assembly of the Council of Europe, 'Missing persons during the conflict in Ukraine', 13808 (December 2015), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21795&lang=en. On the suspension of the investigations concerned, even without providing proper grounds, see Crimean Field Mission on Human Rights, 'Brief Review on the Situation in Crimea' (2016), 3, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/Crimea_Field_Mission_Report_January_2015_Eng.pdf.

pro-Ukrainian activists, minority community members), without due process guarantees for the accused as well as without effective remedies for claimed procedural violations. In particular, concerns over the right to political representation have been raised in relation to the self-representative body of Crimean Tatars (the Mejlis). Expulsions, intimidations and incarcerations of prominent Mejlis leaders or other leading Tatar figures have been detrimental for the exercise of civil and political rights by the local Tatars community.[437]

Fundamental freedoms of movement, association, assembly, expression and access to information have been reportedly restricted and abused in Crimea, either through formal administrative measures or the regulatory targeting of individuals and communities representing dissenting socio-political structures or expressing opposing views or cultural identities.[438]

Moreover, re-registration requirements under new Russian regulations for non-governmental organizations, media and religious organizations have reportedly been leveraged against those pro-Ukrainian organizations, thus reducing the independent voices in the media landscape, restricting freedom of association and constricting civil society's space.[439] In particular, the earlier pluralistic media environment of Crimea has been critically affected via bans of several Tatar and Ukrainian newspapers, raids and vandalism against editorial offices, replacement of transmissions of Ukrainian channels with Russian broadcasts.[440]

In the area of economic, social and cultural rights, the imposition of Russian Federation laws and citizenship on residents of Crimea has been problematic for those Ukrainian citizens who have not sought Russian passport (notwithstanding Russian citizenship is nominally imposed upon them). Without such passport, difficulties indeed emerge in every aspect of their lives: retaining or gaining employment; re-registering and/or selling private properties and businesses; accessing health care, education, or additional social benefits and services. Moreover, schools and universities throughout the Crimean peninsula have reportedly reduced the language studies and native-tongue education in the Crimean Tatar and Ukrainian languages, thus limiting the enjoyment by those communities of their

[437] See OSCE-OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea', *op. cit*., 83-86. See also Kharkhiv Human Rights Protection Group, 'Elected to Crimean Tatar Mejlis – expect repression under Russian occupation' (2015), http://khpg.org/en/index.php?id=1427495177. Kharkhiv Human Rights Protection Group, 'See who you recognize, we'll arrest them (Crimean 'Feb. 26' arrests continue)' (2015), http://khpg.org/en/index.php?id=1429301332. Radio Free Europe/Radio Liberty, 'Kremlin-backed Prosecutor in Crimea Seeks Closure to Tatar Mejlis' (2016), http://www.rferl.org/content/crimea-russian-prosecutor-looks-to-shut-tatars-mejlis/27553626.html.

[438] See OSCE-OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea', *op. cit*., 41-66.

[439] See also OSCE-OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea', *op. cit*., 25- 39.

[440] Freedom House, 'Freedom of the press 2015, Crimea' (2016), https://freedomhouse.org/report/freedom-press/2015/crimea.

cultural rights. This notwithstanding the fact that the Russian law on the status of Crimea prescribes both as 'state languages' alongside Russian.[441]

All these serious concerns over the human rights situation in Crimea are exacerbated by the existence of two conflicting and overlapping legal and regulatory systems, since neither Ukraine nor Russia acknowledges the official documentation issued by the other in relation to Crimea. Therefore, Crimean residents and displaced persons are caught between dual and parallel citizenship records, two cadastral records, two civil registries, two pension systems, and two justice systems exercising jurisdiction over the same properties and persons. This complex situation has subsequent detrimental effects on the exercise of the full range of their rights.

It is worth highlighting that since early June 2014 the number of IDPs has dramatically increased, with displacement from Lugansk and Donetsk regions accounting for the vast majority. In view of the inadequate resources and capacities of the Ukrainian Government to address this situation, the international community has been thus urged to provide assistance with 'immediate support for humanitarian responses' as well as 'longer-term development assistance for reconstruction efforts'.[442]

Significantly, the armed conflict in Eastern Ukraine has also affected people residing in the conflict area and their human rights. The absence of effective control by Ukraine over considerable parts of the border with the Russian Federation (in certain areas of Donetsk and Lugansk regions) has facilitated an inflow of weaponry, ammunition, and fighters from this country to the territories controlled by the armed groups, with latent risks of a resurgence of hostilities and civilian casualties.[443] Special concern has been raised for the human rights violations committed by foreign armed actors who have joined all sides to the conflict and whose impunity remained unquestioned.[444]

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[441] OSCE-OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea', *op. cit*., 68-81. Those who decided not to take up Russian citizenship have been approximately 3500 people, out of which 500 Crimean Tatars, see OHCHR, 'Report on the human rights situation in Ukraine, 16 August to 15 November 2015', *op. cit*., 4.

[442] Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, on his mission to Ukraine (16-25 September 2014)', UN Doc. A/HRC/29/34/Add.3, 2 April 2015, 5. Reportedly, UNHCR data (as released by the State Emergency Service of 2 October 2014) officially showed 310,264 IDPs in Ukraine; IDPs from the Autonomous Republic of Crimea accounted for 17,308, and IDPs from the East were 292,956.

[443] Around 178 civilian casualties were recorded between August and November 2015, while 413 civilian casualties were recorded between May and August 2015; the fifty-two per cent of them were caused by explosive remnants of war and improvised explosive devices. See OHCHR, 'Report on the human rights situation in Ukraine, 16 August to 15 November 2015' (9 December 2015), 2.

[444] See 'Ukraine: UN experts urge accountability for human rights violations by foreign fighters' (Geneva, 22 March 2016), http://www.un.org/apps/news/story.asp?NewsID=53518#.VzS4vxZFtUQ. It is reported that the Ukraine authorities informed the United Nations Working Group on mercenaries that 'at least 176 identified foreigners were serving in armed groups of the self-proclaimed Donetsk and Lugansk people's republics, which reportedly include large numbers from Russia, Serbia, Belarus, France and Italy, among others'. The Working Group underlined provision 10 of the 2014 Minsk Protocol, which obliges all sides of the conflict to withdraw illegal armed formations, military equipment and mercenaries. It also urged 'all parties to the conflict to fulfil their

obligations under international human rights law and ensure respect for all civil, political, economic, social and cultural rights with respect to the activities of foreigners in armed groups'.

C. Looking at the Ukrainian crisis through the lens of strategies: testing the developing EU external human rights and democracy policy agenda

Forming the core of the EU values underpinning all aspects of its policies as per Article 2 TEU, human rights and democracy are promoted and upheld in the EU's relations with the wider world as per Article 3(5) TEU. They are among the guiding principles which inspired the EU's creation, development and enlargement, and which the EU is determined to foster through all its external actions as per Article 21 (1) TEU.

Over the years, several programmatic EU policy documents have contributed to determine broad long-term objectives and short-term actions, foreseeing the complementary use of various tools at its disposal, in order to advance the EU external action on human rights and democracy. Some of them were adopted as earliest 2001.

In this regard, specific tools have been developed for human rights promotion and democracy support (*e.g.*, human rights clauses in EU agreements,[445] human rights and democracy focal points across EU delegations worldwide, the EU Special Representative for human rights, human rights dialogues and consultations, election support, the financial instrument of EIDHR). Besides, other instruments have contributed to such promotion and support (*e.g.*, bilateral political dialogues; demarches and declarations; CFSP joint actions, common positions and strategies, CSDP missions, restrictive measures; action in multilateral fora; thematic financial instruments such as the 'Instrument contributing to Stability and Peace' (IcSP) and the 'Development Cooperation Instrument' (DCI); geographical financial instruments such as the Instrument for pre-accession (IPA II) set out in Regulation 231/2014 on the basis of Art. 49 TEU, the European Neighbourhood Instrument (ENI) set out in Regulation 232/2014 on the basis of Art. 8 TEU, the European Development Fund (EDF), the Development Cooperation Instrument (DCI) set out in Regulation 233/2014 establishing the funding of geographic programmes and Pan-African programme).

It is worth highlighting that the first time the EU has had a unified strategic document for its human rights and democracy agenda coincided with the adoption of the Strategic Framework on Human Rights and Democracy of 25 June 2012 along with the 2012-2014 Action Plan in Human Rights and Democracy

[445] Since early nineties, most EU international agreements contain an 'essential element clause' defining the common values of the parties' relationship, along with a 'suspension clause' providing a procedure to suspend the agreement in case of violation of such essential elements. The practice to refer to respect of human rights and fundamental freedoms as an 'essential element' and to cases of 'special urgency' originated from the Council Declaration of 11 May 1992 which foresaw such a clause in the cooperation agreements between the Community and its partners in the Conference on Security and Cooperation in Europe (CSCE); this practice was then extended to other agreements. See European Commission, 'On the inclusion of respect for democratic principles and human rights in agreements between the Community and third Countries' COM (95)216 final (23 May 1995), 6. For analysis, see L. Bartels, *Human Rights conditionality in the EU's International Agreements* (Oxford University Press, Oxford, 2005), 23.

for putting it into practice.[446] Nonetheless, this 'backbone' builds on various backgrounds documents and it also draws on pre-existing policies as developed in various areas, seeking to coherently organize related human rights considerations and democracy components. These policies include, *inter alia,* the Common Foreign and Security Policy, the European Enlargement Policy, the European Neighbourhood Policy, the Common Security and Defence Policy, the development policy, the trade policy, the external dimensions of the Area of Freedom, Security and Justice (such as migration and mobility, human trafficking, border management, employment and social policy, counter-terrorism policy[447]).

Nonetheless, the subsequent review of the 2012 Strategic Framework and the adoption of the new Action Plan for the period 2015 – 2019 have further determined the policies and objectives to guide the EU's engagement in years to come, confirming the centrality of human rights and democracy in the EU external relations.[448]

Additional policy documents that have contributed to formulate the human rights and democracy agenda of the EU comprise the Council conclusions identifying human rights priorities for the cooperation with other multilateral forums: for instance, the Council conclusions on EU priorities at UN Human Rights Fora in 2015 and 2016,[449] and the EU priorities for cooperation with the Council of Europe in 2016-2017.[450] In the same vein, various EU Guidelines on key human rights issues have been adopted since 1998 and some of them even revised between 2008 and 2014.

The below sub-sections present the background programmatic policy documents relevant for the 2012 Strategic Framework on Human Rights and Democracy and consider the latter along with the two related Action Plans adopted by the Foreign Affair Council in June 2012 and in July 2015. This analysis will allow us to highlight more clearly the potential of this developing policy area in respect to the evolving crisis in Ukraine. In particular, a basic question arises as to how the change of circumstances that led to the growing critical human rights situation in Ukraine has impacted the EU tools and approaches to its external 'human rights and democracy agenda' and *vice versa*.

1. Background policy documents of the 2012 Strategic Framework

a) On the adoption of a 'human rights-based approach' to development

In relation to development policy, the first call for adopting a 'human rights-based approach' to development came from the 2001 Council Conclusions on the Commission's Communication entitled

[446] 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (25 June 2012), 11855/12.

[447] See FRAME Deliverable 12.1, 16.

[448] Council of the European Union, 'Council conclusions on the Action Plan on Human Rights and Democracy 2015-2019' (20 July 2015), ST 10897 2015 INIT.

[449] Council of the European Union, 'Council conclusions on EU priorities at UN Human Rights Fora in 2015' (9 February 2015) 5927/15; Council of the European Union, 'Council conclusions on EU priorities at UN Human Rights Fora in 2016' (15 February 2016).

[450] Council of the European Union, 'EU priorities for cooperation with the Council of Europe in 2016-2017' (18 January 2016) 5339/16.

'The European Union's role in promoting human rights and democratisation in third countries'.[451] Then, the mainstreaming of cross-cutting issues such as human rights and democracy in the EU's development cooperation policy constituted one of the objectives of the 2005 European Consensus on Development.[452] The Human Rights-Based Approach for the whole EU cooperation process was also highlighted in the 2012 European Parliament resolution 'Agenda for Change: the future of EU development policy'.[453]

b) On the envisioning of human rights in the holistic approach to security

A human rights component was also envisioned in the holistic approach to security formulated by the EU in the 2003 European Security Strategy (ESS) which featured human rights in the framework of its objectives, linking them with international stability. In this vein, 'spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights' were seen as 'the best means of strengthening international order'.[454] This view was confirmed in the 2008 Report on the Implementation of the European Security Strategy: Providing Security in a Changing World, which emphasized the need to mainstream human rights issues in all activities of this field, including CSDP missions, through 'a people-based approach' coherent with the concept of human security.[455] Similarly, in 2010 the Council's Report entitled 'Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions'.[456]

c) On the mainstreaming of human rights across CFSP and other policies

Already in 2006 the Council's paper entitled 'Mainstreaming human rights across CFSP and other policies' recommended key actions in line with the EU's commitment 'to mainstreaming human rights

[451] Council of the European Union, 'Draft Council conclusions on the European Union's Role in Promoting Human Rights and Democratisation in Third Countries' 9547/01 [2001].

[452] European Parliament, Council, Commission, 'Joint statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus"' 2006/C 46/01 [2006].

[453] See European Parliament, 'Report on an Agenda for Change: the future of EU development policy (2012/2002(INI))', 07-0234/2012 (16 July 2012); European Parliament resolution of 23 October 2012 on an Agenda for Change: the future of EU development policy 2012/2002(INI).

[454] European Council, 'European Security Strategy. A Secure Europe in a Better World' (12 December 2003), 10. Indeed, acknowledging the need to respond to complex threats (such as terrorism, failed states, proliferations and regional conflicts) with a 'mixture of instruments', the ESS highlighted that the EU 'is particularly well equipped to respond to such multi-faceted situations', *Ibid*., 7.

[455] European Council, 'Report on the Implementation of the European Security Strategy: Providing Security in a Changing World' (11 December 2008) S407/08 [2008], 10. Indeed, according to this report, the EU, 'drawing on a unique range of instruments', has 'worked to build human security, by reducing poverty and inequality, promoting good governance and human rights, assisting development, and addressing the root causes of conflict and insecurity', Ibid., 2.

[456] European Council, 'Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions' (30 November 2010) 17138/1/10 REV 1 [2010].

and democratization into EU policies and choices, in order to achieve a more informed, credible, coherent, consistent and effective EU human rights policy'.[457] As for the relevant tools, it must be noted that the document called for the inclusion of human rights provisions, where applicable, in all the CFSP instruments (*e.g.* political dialogue; demarches and declarations on individual cases or developments of concern; Joint Actions/Common Positions/Common Strategies and mandates for ESDP (now called CSDP) missions and operations), assistance agreements, so as to raise the status of human rights issues in the EU's relations with third countries. According to this paper, 'the protection of human rights should be systematically addressed in all phases of [CSDP] missions', including the planning and the implementation phase; recommended measures in this regard comprised (i) human rights reporting in the operational duties of the missions, (ii) implementing human rights policy in the missions, in particular regarding women and children, and (iii) including human rights experts in the missions and operations where appropriate. The Council also highlighted the need to establish a link between all EU policies (counting technical cooperation and development and the external dimension of AFSJ) and the promotion and defence of human rights.[458] A compilation of EU instruments regarding mainstreaming of human rights and gender in ESDP was also published in 2008.[459]

d) Towards a coherent and effective democracy support in the EU's external relations

A basic step in the development of the aforementioned EU strategy was the 'Council Conclusions on Democracy Support in the EU's External Relations – Towards Increased Coherence and Effectiveness' of 17 November 2009. The annexed EU Agenda for Action on Democracy Support in EU external relations set forth the 'common values, norms and central principles' guiding the EU's action in this area.[460] They *inter alia* include the inextricable connection between human rights and democracy, the fundamental relevance of 'progress in the protection of human rights, good governance and democratisation' for poverty reduction and sustainable development, the principle of non-discrimination as common feature shared in democracies, the interdependency and mutual reinforcement of 'democracy, democratic governance, development and respect for all human rights', the 'vital role' played by NGOs and other non-state actors of partner countries 'as promoters of democracy, social justice and human rights'.[461] The strategy outlined in this Agenda for Action entails to support democracy by means of 'a country-

[457] Council of the European Union, 'Mainstreaming human rights across CFSP and other policies', 10076/06 [2006].
[458] Ibid, 2-6.
[459] General Secretariat of the Council, 'Mainstreaming human rights and gender into European Security and Defence Policy. Compilation of relevant documents' (2008).
[460] Council of the European Union, 'Council Conclusions on Democracy Support in the EU's External Relations - Towards increased Coherence and Effectiveness' 16081/09 [2009], 11. These conclusions were not included in the 2012 Strategic Framework.
[461] *Ibid*., 14.

specific approach', greater coherence between different actors and instruments and the involvement of all stakeholders.[462]

e) Towards a more effective approach of human rights and democracy at the heart of EU's external action

A fundamental contribution towards the development of the abovementioned EU strategy was the Joint Communication entitled 'Human Rights and Democracy at the heart of EU external action – Towards a more effective approach' of 12 December 2011. It aimed at opening a dialogue between the European institutions on the modalities for a more coherent, active and effective external policy on human rights and democracy.[463] It identified four areas for further action. Firstly, it proposed to overhaul delivery mechanisms through the following actions: developing tailor-made approaches to maximise the impact on the ground; identifying cross-cutting themes; promoting the new approach towards neighbours based on mutual accountability and commitment to the universal values of human rights, democracy and the rule of law; and reinforcing the partnership with civil society. Secondly, it proposed to integrate EU policies, by means of developing 'a joined-up approach to policy', so as to ensure that all EU external policies relevant to human rights and democracy and the actions developed in its framework remain entirely compatible with the respect, protection and promotion of human rights. Thirdly, it proposed to build strong partnerships through the following actions: reinforcing multilateral and regional cooperation; promoting international justice; improving the effectiveness of human rights dialogues and consultations; and responding to serious human rights violations through the adoption of targeted restrictive measures. Fourthly, it proposed to harness EU's collective weight and strengthen the way that it deals with human rights and democracy in its external action.

f) Towards a 'coherent, transparent, predictable, feasible and effective' EU's trade and human rights agenda

In relation to trade policy, the just cited 2011 Joint Communication entitled 'Human Rights and Democracy at the Heart of EU External Action' called for a 'coherent, transparent, predictable, feasible and effective' EU's trade and human rights agenda, emphasizing the challenge to 'make trade work in a way that helps rather than hinders human rights concerns'.[464] According to the same policy document, the EU approach to trade policy entails positive incentives and uses trade preferences for promoting

[462] Subsequently the Commission's 2011 'Agenda for Change for EU Development Policy' emphasized the significance of supporting human rights and democracy as key elements of good governance within the EU's development policy.

[463] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council. Human Rights and Democracy at the heart of EU external Action - Towards a more effective approach' COM (2011) 886 final. This document was based on the Communication from the Commission to the Council and the European Parliament, 'The European Union's role in promoting human rights and democratisation in third countries' COM (2001) 252 final. For a comment on both these documents, see FRAME Deliverable 12.1, *op. cit*., 11-13.

[464] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council. Human Rights and Democracy at the heart of EU external Action - Towards a more effective approach' COM (2011) 886 final, 11.

human rights.[465] Subsequent Regulation No. 978/2012 applying a scheme of generalized tariff preferences (GSP+) strengthened the mechanism for monitoring compliance by its beneficiaries with international conventions, including human rights treaties.[466]

g) On the EU's comprehensive approach to external conflicts and crisis

Another very important policy document was the Joint Communication to the European Parliament and the Council entitled 'The EU's comprehensive approach to external conflicts and crisis' of 11 December 2013.[467] It sets out the High Representative and European Commission's common understanding of the EU's comprehensive approach to external conflict and crisis, with a full commitment to its joint application in the EU's external policy and action. This understanding covers all stages of the cycle of conflict and other external crisis (*i.e.* early warning and preparedness, conflict prevention, crisis response and management to early recovery, stabilisation and peace-building). It identified eight measures for a comprehensive approach to conflicts or crisis situations (1. Develop a shared analysis; 2. Define a common strategic vision; 3. Focus on prevention; 4. Mobilise the different strengths and capacities of the EU; 5. Commit to the long term; 6. Linking policies and internal and external action; 7. Make better use of the EU Delegations; 8. Work in partnership) as well as twenty-eight related actions to be promoted for further enhancing the coherence and effectiveness of EU external policy in conflict or crisis situations.

According to this policy document, the concept of 'comprehensiveness' referred both 'to the joined-up deployment of EU instruments and resources' as well as 'to the shared responsibility of EU-level actors and Member States'.[468] In this vein a unique network at EU disposal is highlighted, namely '139 in-country EU Delegations, diplomatic expertise in the EEAS including through EU Special Representatives, and operational engagement through Common Security and Defence Policy (CSDP) missions and operations'. Accordingly, the EU approach of bringing all these together 'to work in a joined-up and strategic manner' is deemed to be functional to 'better define and defend its fundamental interests and values, promote its key political objectives and prevent crises or help to restore stability'.[469]

Key underlying principles of this 'comprehensive approach' included the following: the connection between security and development; context-specific responses; common and shared responsibility of all

[465] *Ibid*., 12.

[466] Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October of 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303/1. See also EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2012' (2013), 58.

[467] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council. The EU's comprehensive approach to external conflicts and crisis', (11 December 2013) JOIN(2013) 30 final.

[468] Ibid., ….

[469] Ibid., 3.

EU actors; full respect of the different competences and respective added value of the EU's institutions and services, as well as of the Member States.[470]

2. The 2012 EU Strategic Framework on Human Rights and Democracy

The aforementioned programmatic policy document adopted in June 2012 set out how the EU has intended to honour its Treaty obligation to 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (Article 21 TEU). In particular, the ambitious strategic framework for the EU action established guiding principles, general and specific objectives as well as certain priorities. General objectives included the promotion of the universality of human rights as well as the promotion of human rights and democracy in EU external relations. *Specific objectives* were framed in terms of areas of further action that in turn included particular priorities:

1. **The pursuit of coherent objectives in the external areas of the EU's action**. This is conceived as entailing the prevention of violations of human rights throughout the world and, where violations occur, the assurance that victims have access to justice and redress and that those responsible are held to account. To this end, (i) the EU will 'step up its efforts to promote human rights, democracy and the rule of law across all aspects of external action'; (ii) the EU will 'strengthen its capability and mechanisms for early warning and prevention of crises that are liable to entail human rights violations'; (iii) the EU will 'deepen its cooperation with partner countries, international organisations and civil society, and build new partnerships to adapt to changing circumstances'; (iv) the EU will 'strengthen its work with partners worldwide to support democracy, notably the development of genuine and credible electoral processes and representative and transparent democratic institutions at the service of the citizen.'.[471]

2. **The promotion of human rights in all EU external policies**. This mainstreaming is explicitly framed according to different lines. On the one hand, the EU will 'integrate the promotion of human rights in trade, investment, technology and telecommunications, Internet, energy, environment, corporate social responsibility and development policy as well as in Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy.' On the other hand, 'in the area of development cooperation, a human rights-based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations.'.[472]

3. **The implementation of EU priorities on human rights, and the reinforcement of the EU's commitment to the promotion of these priorities**. In particular, it is explicitly stated that the EU will: (a) 'promote freedom of expression, opinion, assembly and association, both on-line and offline; democracy cannot exist without these rights'; (b) 'promote freedom of religion or belief'; (c) 'fight discrimination in all its forms through combating discrimination on grounds of race, ethnicity, age, gender or sexual orientation'; (d) 'advocating for the rights of children, persons belonging to minorities,

[470] Ibid., 4.
[471] 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12.
[472] Ibid., 2.

indigenous peoples, refugees, migrants and persons with disabilities'; (e) 'continue to campaign for the rights and empowerment of women in all contexts through fighting discriminatory legislation, gender-based violence and marginalization'; (f) 'intensify its efforts to promote economic, social and cultural rights'; (g) 'strengthen its efforts to ensure universal and non-discriminatory access to basic services with a particular focus on poor and vulnerable groups'; (h) 'encourage and contribute to implementation of the UN Guiding Principles on Business and Human Rights'; (i) campaign against the death penalty and torture; (j) promote the right to a fair and impartial administration of justice, 'essential to safeguard human rights'; (k) 'promote observance of international humanitarian law (IHL)'; (l) fight against impunity for 'serious crimes of concern to the international community, including sexual violence committed in connection with armed conflict, and through its commitment to the International Criminal Court'; (m) support human rights defenders and 'step up its efforts against all forms of reprisals'; (n) effectively engage with civil society.[473]

4. **Working with bilateral partners**.[474] In particular: (a) 'the EU will place human rights at the centre of its relations with all third countries, including its strategic partners'; (b) the EU's policy on human rights will be tailor-made for the circumstances of each country, including the development of a country's human rights strategies; (c) 'the EU will always seek constructive engagement with third countries' and in this light (i) it 'will continue to deepen its human rights dialogues and consultations with partner countries and will aim to ensure that these dialogues lead to results', (ii) it 'will raise human rights issues vigorously in all appropriate forms of bilateral political dialogue, including at the highest level', (iii) it 'will work with partner countries to identify areas where EU geographic funding instruments can be used to support projects which bolster human rights, including support for human rights education and training'; (d) 'when faced with violations of human rights, the EU will make use of the full range of instruments at its disposal, including sanctions or condemnation'; (e) 'the EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries'; (f) 'human rights will remain at the heart of the EU's enlargement policy'.[475]

5. **Working through multilateral institutions that can monitor impartially the implementation of human rights standards and ensure accountability of violating States**. In particular, (a) 'the EU will 'speak out in the United Nations General Assembly, the UN Human Rights Council and the International Labour Organisation against human rights violations; (b) the EU will 'contribute vigorously to the effective functioning of the Human Rights Council' and will cooperate with countries from all regions to this end; (c) 'the EU and its Member States are committed to raising Universal Periodic Review (UPR) recommendations which have been accepted as well as recommendations of treaty monitoring bodies and UN Special Procedures, in bilateral relations with all third countries' and to 'ensure implementation

[473] Ibid, 2-3.

[474] Concerning this specific objective, the Council updated in 2014 the 'EU guidelines on human rights dialogues with non-EU countries', which had been initially adopted in 2001 and already updated in 2008. Such dialogues aim to mainstream human rights issues into all areas of EU external policy. See http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf

[475] 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12, 3.

of such recommendations within their own frontiers'; (d) the EU will continue its engagement with the Council of Europe and the OSCE; (e) it will work in partnership with regional organisations such as the African Union, ASEAN, SAARC, the Organisation of American States, the Arab League, the Organisation of Islamic Cooperation and the Pacific Islands Forum, with a view of encouraging the consolidation of regional human rights mechanisms.'.[476]

6. **The EU working together**. In particular, 'while respecting their distinct institutional roles, it is important that the European Parliament, the Council, the Member States, the European Commission and the European External Action Service (EEAS) commit themselves to working together ever more closely to realise their common goal of improving respect for human rights.'[477]

3. The 2012-2014 Action Plan

Translating the objectives of the 2012 Strategic Framework into actions, the 2012-2014 Action Plan identified thirty-six specific outcomes under seven general outcomes:

I. Human rights and democracy throughout EU policy;
II. Promoting the universality of human rights;
III. Pursuing coherent policy objectives;
IV. Human rights in all EU external policies;
V. Implementing EU priorities on human rights;
VI. Working with bilateral partners;
VII. Working through multilateral institutions;

and it listed ninety-seven actions to be undertaken by the EU and its Member States in order to implement the said Strategic Framework by the end of 2014. This roadmap was expected to be valuable for assuring the EU policy on human rights and democracy in external action according to a precise sense of direction.

4. The 2015-2019 Action Plan

Welcoming the Joint Communication 'Keeping human rights at the heart of the EU agenda' (as presented by the High Representative of the European Union for Foreign Affairs and Security Policy and the European Commission), the Foreign Affairs Council adopted in July 2015 a new Action Plan to continue implementing the 2012 Strategic Framework. It covers the period until 31 December 2019 and will be reviewed in 2017. Five general objectives have been selected, covering thirty-four types of specific objectives:

I. **Boosting the ownership of the local actors**. This is about empowering local actors as 'agents of change' in EU partner countries, supporting endogenous democratic forces, supporting human rights defenders and civil society at large, building the capacity of National Human Rights Institutions (NHRIs)

[476] Ibid., 3-4.
[477] Ibid., 4.

and of parliamentary institutions, strengthening the integrity of electoral processes, and targeting supporting to judicial systems.

II. **Addressing human rights challenges**. This is about promoting key thematic priorities such as freedom of expression, freedom of religion and belief, combatting torture and the death penalty, promoting gender equality, women's and children's rights, cultivating an environment of non-discrimination, promoting economic, social and cultural rights, and advancing the business and human rights agenda.

III. **Ensuring a comprehensive human rights approach to conflicts and crisis**. This is about improving EU 'preventive diplomacy', adjusting EU tools for addressing massive human rights violation to the changing nature of conflicts involving non-state actors, and also increasing the effectiveness of mechanisms for tackling impunity.

IV. **Fostering better coherence and consistency**. This is about enhancing internal-external coherence of the EU's policies from a human rights perspective, especially in relation to development cooperation, migration/asylum, counter-terrorism and trade/investment.

V. **A more effective human rights and democracy support policy**. This is about further improving existing EU tools such as human rights dialogues, country strategies and guidelines, all of which are founded on the principle of creating partnerships with governments and other actors the world over.

This Action Plan identifies 115 actions to be undertaken until 2019 with a mid-term review in 2017. This is supposed to enable the EU to face relevant challenges through 'more focused action', 'systematic and co-ordinated use of instruments at its disposal', 'enhanced impact of its policies and tools on the ground'. Special emphasis has been put on 'ownership by, and co-operation with, local institutions and mechanisms, including NHRI, as well as civil society'. Promotion of the principles of non-discrimination, gender equality and women's empowerment has been expressively highlighted. In order to ensure 'better policy coherence' (particularly in the fields of migration, trade and investment, development cooperation and counter terrorism), a 'comprehensive human rights approach to preventing and addressing conflicts and crisis' as well as a further mainstreaming of human rights in the external aspects of EU policies have been explicitly referred to. Built on the EU Strategic Framework, this Action Plan is aimed at continuing its implementation 'with sufficient flexibility so as to respond to new challenges as they arise'. [478]

The review of the 2012 Strategic Framework and the adoption of the Action Plan on Human Rights and Democracy 2015 – 2019 occurred during the years in which the Ukrainian crisis arose and evolved. Accordingly, some of its objectives and related concrete actions acquire more relevance than others in the present research. For instance, the aforementioned General Objective I deserves attention as it aims at delivering a comprehensive support to public institutions as well as invigorating civil society. The aforementioned General Objective III is also quite relevant in view of its sub-objectives: making better

[478] Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019', 10897/15, Annex, 5.

use of the EU's Conflict Early Warning System to prevent serious human rights violations; enhancing the EU's capacity to address conflicts at multilateral level; supporting compliance with international humanitarian law; putting an end to impunity and strengthening accountability; and mainstreaming human rights into all phases of EU Common Security and Defence Policy (CSDP) missions. In particular:

Table 11: Objective III of the Action Plan on Human Rights and Democracy 2015 – 2019

Objective	Action	Timeline	Responsibility
III. ENSURING A COMPRHENSIVE HUMAN RIGHTS APPROACH TO CONFLICTS AND CRISES			
19. Moving from early-warning to preventive action	a. Promote and make best use of the new EU Conflict Early Warning System as a tool for the prevention of serious human rights violations.	Ongoing	EEAS, Council, MS
	b. Ensure greater coherence in the fields of human rights reporting and early warning/conflict analysis, including by addressing relevant conflict risks in human rights dialogues and consultations and through increased co-operation with international and regional organisations.	By 2016	EEAS, MS
	c. Support activities to monitor and counter incitement that could lead to serious violations or abuses of human rights, notably atrocity crimes; support activities in the fight against hate speech and violent extremism, through the identification of root causes, the development of counter-narratives, human rights education, and peace building initiatives targeting in particular children and youth.	Ongoing	EEAS, COM, MS
	d. Support the role of women in conflict prevention, mediation and peace-building.	Ongoing	EEAS, COM, MS
	e. Support the establishment of prevention, response and (long-term) reintegration programmes for children affected by armed conflict in co-operation with local communities, affected children and parents (e.g. psycho-social support, socioeconomic reintegration, education and life-skills training as well as	By 2017	EEAS, COM, MS

	family tracing and reunification).		
20. Enhancing the capacity to address conflicts and crises at multilateral and regional level	a. Enhance co-operation with and support for the UN Special Adviser on the Prevention of Genocide and the UN Special Adviser on the Responsibility to Protect, as well as other international and regional actors and CSOs engaged in preventive action.	Ongoing	EEAS, COM, MS
	b. Support the work of the UN Special Representative for Children and Armed Conflict and notably support the development, implementation and monitoring of Action Plans to end and prevent grave violations against children affected by armed conflict, including through advocacy and programming activities.	Ongoing	EEAS, COM, MS
	c. Support the work of UN Special Representative on Sexual Violence in Conflict, the UN team of experts and UN Action to enhance co-ordination of international efforts against sexual violence and the effective investigation and prosecution of sexual violence crimes.	Ongoing	EEAS, COM, MS
21. Supporting compliance with International Humanitarian Law (IHL)	a. Assess and as necessary enhance the implementation of the EU Guidelines on promoting compliance with IHL in light of the ongoing discussions on an IHL compliance mechanism.	By 2016	EEAS, COM, Council, MS
	b. Take stock of the implementation of the EU's pledges at the 31st Red Cross Movement conference, prepare for the 32nd conference (December 2015) and follow up until the 33rd conference in 2019.	Ongoing	EEAS. Council, MS
	c. Develop and implement a due diligence policy to ensure that EU support to security forces, in particular in the context of CSDP missions and operations, is in compliance with and contributes to the implementation of the EU human rights policy and is consistent with the promotion, protection and enforcement of international human rights law and international humanitarian law, as may be	By 2017	EEAS, COM, Council,

	applicable.		
	d. Whenever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed; where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU.	By 2017	COM, EEAS, Council, MS
22. Ending impunity, strengthening accountability and promoting and supporting transitional justice (TJ)	a. Conduct a comprehensive evaluation of the implementation of Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court (ICC) and the Action Plan on its implementation; formalise the establishment of an EU/ICC Roundtable, allowing relevant staff to identify common areas of interest, exchange information on relevant activities and ensure better co-operation between the two organisations.	By 2016	EEAS, COM, Council, MS.
	b. Develop and Implement an EU policy on Transitional Justice including through a mapping exercise to identify the EU's experiences, challenges and lessons learned in its support to TJ; provide concrete guidance and training to EU mission staff working on TJ, establish a network of staff across the Commission services and EEAS and EU Member States, as appropriate, to exchange best practices and foster coherence and consistency; increase monitoring and reporting (including through the Human Rights Country Strategies) and promote inter-regional dialogue on transitional justice to improve co-operation between regional organisations.	Ongoing	EEAS, COM, Council, MS
23. Mainstreaming Human Rights into all phases of CSDP planning, review and conduct	a. Develop sector-specific operational guidance for staff in CSDP missions working with the police, military, prison services and the judiciary, to provide practical orientation on the	By 2017	EEAS, Council, MS

	mainstreaming of human rights and international humanitarian law, where applicable, with emphasis on the protection of civilians in particular children, and the empowerment and participation of women and girls.		
	b. Develop and implement the new common code of conduct for CSDP civilian missions, including through: pre-deployment and induction training for staff, mission-specific training to deployed staff, specialised training for senior staff, awareness-raising in missions and for local populations, and the compilation of statistics on breaches of the code; take similar steps to ensure greater awareness of standards of conduct among personnel deployed in military operations, and to raise awareness in local communities where missions/operations are deployed.	By 2017	EEAS, Council, MS
	c. Strengthen the implementation of the Comprehensive approach to the EU implementation of the UNSCR 1325 & 1820 and follow up resolutions on women, peace and security by taking into account the UN High Level Review and emerging issues (including counter terrorism, countering violent extremism, trafficking of human beings) as well as improving the reporting of progress on the Comprehensive Approach, adopting a strategic plan for integrating UNSCR 1325 principles into the planning, implementation and review cycle of CSDP missions and operations and improving involvement and coordination with all EU Member States.	By 2016	EEAS, COM, Council, MS,

Against this background of various programmatic policy documents addressing long-term objectives, determining specific priorities, and setting short-term actions to advance an EU human rights and democratization strategy throughout its external action, the use of the EU human rights and democracy toolbox in the EU-Ukraine relations, either prior or subsequently to the outbreak of the Ukrainian crisis, will be investigated in the next sections. In particular, in light of the human rights implications of the altered setting, the manner in which thus formulated challenges have been addressed by the said toolbox will be examined.

A basic question arises as to how the change of circumstances that led to a growing critical situation in Ukraine has impacted the EU approach to its developing human rights and democratization strategy and *vice versa*.

Accordingly, a more specific question arises as to whether the efforts by EU institutions and Member States to implement the 2012 Strategic Framework and the two Action Plans on human rights and democracy have positively impacted the EU's 'comprehensive human rights approach' to the conflict and crisis situation in Ukraine.

Another important question arises as to whether the concrete actions undertaken by the EU in response to the Ukrainian crisis have involved the evolution of specific tools or the establishment of new ones.

D. Historical background and development of EU-Ukraine relations in the realm of the EU external human rights and democracy policy agenda

Following the proclamation of Ukraine's independence on 24 August 1991, further confirmed by a *referendum* on 1st December 1991 and by the formal dissolution of the Soviet Union on 26 December 1991, the EU's external actions towards Ukraine emerged mainly in reaction to the fragile political context behind its Eastern border. Denuclearization of Ukraine was the main factor driving the very beginning of such actions and Ukraine's ratification of non-proliferation treaty (which occurred in 1994) was acknowledged as a condition for further cooperation.

1. The Partnership and Cooperation Agreement and the Human Rights Clause

The first legal framework for EU-Ukraine relations was the Partnership and Cooperation Agreement (PCA) whose negotiations started in April 1992 but which was signed on 14 June 1994 and entered into force only on 1st March 1998.[479] During the first meeting of the Council on Cooperation between Ukraine and the EU in June 1998 Ukraine officially announced its intention to become an EU associate member, and its membership aspirations were acknowledged by the 'Strategy of Ukraine's integration to the EU' presidential decree on 11 June 1998. However, the EU avoided any appreciation or counterproposal on such association or accession perspective. Similarly to other 'New Independent States' (NIS),[480] Ukraine was only offered a PCA under the specific programme of financial assistance known as TACIS (*i.e.* Technical Assistance to the Commonwealth of Independent States).[481] In the words of a commentator, this aspect 'has largely determined the subsequent development of EU policy towards Ukraine and in a way shaped the course of Ukraine's transformation', and 'contributed to shaping Ukraine's ambiguous self-perception of itself as a country between the East and the West'.[482]

Nonetheless, this first partnership between Ukraine and the Community (and its Member States) envisaged the establishment of a political and economic cooperation and the Ukrainian integration 'into the open international trading system'.[483] This is illustrated by the four key objectives of the PCA:

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[479] Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] OJ L 49/3.

[480] Iryna Solonenko, 'External democracy promotion in Ukraine: the role of the European Union' in Susan Stewart (ed.) *Democracy promotion and the 'Colour revolutions'* (Routledge, 2012), 69; Delegation of the European Union to Ukraine, 'Chronology of bilateral relations', http://eeas.europa.eu/delegations/ukraine/eu_ukraine/chronology/index_en.htm

[481] Marc Maresceau, *Bilateral Agreements concluded by the European Community* (Recueil des cours, Vol. 309/2004, Hague Academy of International Law, Martinus Nijhoff Publishers), 423 ff.; Iryna Solonenko, *op.cit.,* 69 ; Peter Van Elsuwege, 'Variable Geometry in the European Neighbourhood Policy. The Principle of Differentiation and its Consequences' in Erwan Lannon (ed.) *The European Neighbourhood Policy's Challenges* (P.I.E. Peter Lang, 2012), 60.

[482] Iryna Solonenko, *op. cit.*, 69-70.

[483] Preamble of the PCA Ukraine.

> (i) 'to provide an appropriate framework for the political dialogue between the Parties allowing the development of close political relations', (ii) 'to promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable development', (iii) 'to provide a basis for mutually advantageous economic, social, financial, civil scientific technological and cultural cooperation', (iv) 'to support Ukrainian efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy'.[484]

It must be noted that most emphasis was put on the economic and trade aspects of the PCA, and it was oriented towards a future accession of Ukraine to the WTO (which was approved in February 2008) and the granting of the 'market economy status' required for the establishment of a free trade area.[485] Conversely, only four provisions were dedicated to the political dialogue objective, which remained limited in spite of institutional meetings and summits. Positively, the 'respect for democratic principles and human rights' was referred as 'essential element' of the Agreement under Article 2. According to this essential element clause, respect for the democratic principles and human rights defined in the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of a market economy (comprising those stated in the CSCE Bonn conference), underpin the internal and external policies of the Parties and constitute an 'essential element' of the Agreement. As stated in the Joint Declaration concerning Article 102, annexed to the PCA, a violation of such elements is a 'material breach' of the Agreement and a 'case of special urgency' which can lead to its immediate suspension (in derogation from the dispute settlement mechanism of Article 102).

It must be noted that the suspension of the 1994 PCA, on the basis of this *essential element clause,* was never considered, neither early in the context 'of missing democratic reforms under the regime of Leonid Kuchma, or later in the context of 'selective justice' (*e.g.* the Tymoshenko case[486]) under the Yanukovych administration and the harsh repression of the Maidan demonstrations in Kiev in February 2014. In this regard, the EU has formally suspended cooperation agreements in very limited circumstances, such as in the case of the Cooperation Agreement with Yugoslavia.[487] Indeed, in cases of a required response of the EU to address human rights and democracy issues in the territory of a contracting party, other options have been preferred. On the one hand, the CFSP range of restrictive

[484] Article 1 of the PCA Ukraine.

[485] Jérémy Fortier, 'L'Ukraine après 20 ans de construction nationale, entre transformations internes et politiques de voisinage' in Gilles Rouet and Peter Terem (eds.), *L'Ukraine, entre intègration et paternariat* (Bruylant, 2009, 23; Rosa Balfour, *Human rights and democracy in EU foreign policy: the cases of Ukraine and Egypt* (Routledge Advances in European Politics, Routledge, London, 2012), 52. See Article 4 of the PCA.

[486] On 5 August 2011 former Prime Minister Tymoshenko was arrested, following criminal charges for 'abuse of power' when she struck a gas deal with Russia in 2009. On 11 October 2011 she was found guilty and sentenced to 7 years imprisonment, excluding her from the 2012 parliamentary elections. Criminal charges regarded several other members of her 2007–2010 government.

[487] For an analysis, see M. Maresceau, 'Unilateral Termination and Suspension of Bilateral Agreements concluded by the EC' in M. Bulterman *et al.* (eds.) *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Kluwer Law International, Alphen aan den Rijn, 2009), 462-464.

measures based on Article 215 TFEU (*e.g.* freezing assets, arms embargo, visa bans) have been used. On the other hand, withholding the signature or ratification of an envisaged agreement has been preferred to the suspension or denouncement of existing agreements that constitute the legal framework of the relations with the country concerned. As will be detailed below, the recent developments of the EU-Ukraine relations illustrate this approach. In a first stage, the EU 'threatened' to suspend the signature of the envisaged EU-Ukraine Association Agreement until the Tymoshenko case and further cases of 'selective justice' were duly addressed.[488] In a second stage, in response to the Ukrainian Government's brutal use of force against the Maidan protestors and Russia's violation of sovereignty and territorial integrity of Ukraine, the EU adopted sanctions against Ukraine as well as Russian persons and entities engaged. Furthermore, the EU suspended the negotiations with Russia on the 'New Agreement'.[489]

Confirming the policy options laid down in the aforementioned PCA, the Common Strategy on Ukraine adopted at the December 1999 Helsinki European Council did not seriously consider Ukraine's membership expectations.[490] Indeed, the principal objectives identified by the European Council included 'support for the democratic and economic transition process in Ukraine' and 'support for strengthened cooperation between the EU and Ukraine within the context of EU enlargement'.[491]

Nevertheless, it is noteworthy that the early cautious approach undertaken by the EU towards Ukraine was shaped by a still strong Russian influence over the former Soviet Republics. It resulted in an attenuation of the initial enthusiasm for Europeanization by the Ukrainian authorities and even in a certain disappointment amongst them, which partly explains the lack of concrete implementation of the partnership.

2. The Joint EU-Ukraine Action Plan under the ENP setting

Events in 2004 accelerated a rapprochement between the European Union and Ukraine, creating an opportunity to move beyond co-operation towards gradual economic integration and deepening political association. On the one hand, following the undemocratic presidential election (nominally won by pro-Russian candidate Viktor Yanukovych) of November and the revote ordered by the Supreme Court a month later, the Orange Revolution saw the rise of two pro-European leaders (Victor Yushchenko and Yulia Tymoshenko) and supported Ukraine's determination to deepen the process of domestic democratic reforms. On the other hand, with the round of EU's enlargement on 1 May,

[488] 3209th Foreign Affairs Council Meeting, 'Council conclusion on Ukraine' (Brussels, 10 December 2012).

[489] 3305th Foreign Affairs Council Meeting 7196/14 (Brussels, 3 March 2014).

[490] Marc Maresceau, *op. cit.,* 439.

[491] European Council Common Strategy on Ukraine of 11 December 1999, 1999/877/CFSP, OJ, 1999, L 331/1. Introduced by the Treaty of Amsterdam (former Article 13 TEU), this instrument of the CFSP was supposed to advance the effectiveness and coherence of EU external action, but it lacked specific objectives and benchmarks, see Elena Korosteleva, *The European Union and its Eastern Neighbours: towards a more ambitious partnership?* (Routledge series on Russian and East European studies, Elena Korosteleva, Routledge, 2012), 84.

Ukraine became a direct EU neighbour. Accordingly, the European Neighbourhood Policy (ENP) was launched and its first Strategy Paper was presented.[492] As stated in the latter,

> the objective of the ENP is to share the benefits of the EU's 2004 enlargement with neighbouring countries in strengthening stability, security and well-being for all concerned. It is designed to prevent the emergence of new dividing lines between the enlarged EU and its neighbours and to offer them the chance to participate in various EU activities, through greater political, security, economic and cultural co-operation.

Indeed, the ENP was understood as a way to constitute a 'ring of friends' around the Union[493] by building partnerships around shared values and common interests, prioritizing conditionality to foster necessary reforms as well as differentiating the partner countries by setting up 'country-specific' and 'tailor-made' bilateral Action Plans.[494] Thus, the ENP methodologies and instruments were inspired by the (pre-)accession policy of the EU (conditionality, monitoring and differentiation).[495] The lack of a membership perspective, however, still remained.

In this regard, from the toolbox point of view, the 2005 Joint EU-Ukraine Action Plan adopted for a period of three years and based on the 1994 PCA,[496] set up political and economic priorities, falling into two broad subjects: firstly shared values and foreign and security policy, secondly actions aimed at bringing Ukraine closer in key areas (*e.g.* 'political dialogue and reform'; 'economic and social reform and development'; 'trade, market and regulatory reform'; 'co-operation in justice and home affairs'; 'transport, energy, information society, and environment'; 'people-to-people contacts'). In addition, a list of 'priorities for action' requiring 'particular attention' was provided. It mainly aimed at strengthening the democratization process in Ukraine and deepening trade and economic relations. Accordingly, it prescribed a gradual approximation of Ukrainian legislation, norms and standards with those of the EU and enunciated measures for preparing the ground for Ukraine's WTO membership (especially proposing its alignment with the EU's internal market laws and policies). Despite a positive

[492] European Commission, 'Communication from the Commission to the Council and the European Parliament, European Neighbourhood Policy Strategy Paper' COM(2004) 373 (12 May 2004). This was the follow-up to two previous communications entitled 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' COM(2003) 104 final (11 March 2003) and 'Paving the Way for a New Neighbourhood Instrument' COM(2003) 393 final (1 July 2003).

[493] European Commission, 'Communication from the Commission to the Council and the European Parliament, Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' COM(2003) 104 final, 4.

[494] See FRAME Deliverable 14.1, 96-97, which explains that 'these documents are of non-binding character and set out agendas for the partner countries as to the reforms they need to undergo before the further step of association with the EU can be reached. The logic behind the Action Plans is similar to the accession conditionality used in the enlargement policy. The difference is comprised of the stick and the carrot being thinner. The interesting part of the Action Plans is that they arguably induce compliance'.

[495] For an overview of the ENP objectives, methodologies and instruments, see Marise Cremona, 'The European Neighbourhood Policy. More than a Partnership?' in Marise Cremona (ed.) *Developments in EU External Relation Law* (Oxford University Press, Oxford, 2008), 244-299.

[496] EU-Ukraine Cooperation Council, 'EU-Ukraine Action Plan', Recommendation No. 1/2005, 21 February 2005.

evaluation of this Action Plan,[497] it must be noted that the EU promotion of democracy in Ukraine was criticized for lack of diversification of approaches, scarce bottom-up engagement, and bad coordination.[498]

In particular, the EU's approach to democratization in Ukraine was addressed according to two different tracks in the EU-Ukraine Action Plan.[499] A first track reflected the promotion of 'formal or procedural' elements of democracy (aimed at establishing a democratic institutional framework based on the separation of powers and free and fair election processes). A second track reflected the promotion of elements of 'substantive' democracy (the accountability and transparency of the administration, the fight against corruption, the active participation of citizens in the decision-making process, the development of civil society). Clearly, several 'priorities for action' referred in this Action Plan denote that the emphasis was put on formal democratization: 'Further strengthening the stability and effectiveness of institutions guaranteeing democracy and the rule of law'; 'Ensuring the democratic conduct of presidential (2004) and parliamentary (2006) elections in Ukraine in accordance with OSCE standards'; 'Ensuring respect for the freedom of the media and freedom of expression'; 'Develop possibilities for enhancing EU – Ukraine consultations on crisis management'.[500] Moreover, elements of formal democracy were referred in the 'Democracy' chapter of this Action Plan (*e.g.*, 'guaranteeing democracy and the rule of law', 'human rights and the reform of the judicial apparatus', along with clear benchmarks such as 'international standards', 'OSCE standards and OSCE/ODIHR recommendations'). Conversely, references to elements of substantive democracy were dispersed throughout the text of the Action Plan. Similar emphasis is found in the subsequent EU-Ukraine Association Agenda of 2009, whose section on 'Political dialogue' prioritized the following issues: 'inclusive constitutional reform', 'checks and balances', 'independence of the judiciary', 'human rights and fundamental freedoms'; conversely, the respect for the principles of transparency, accountability and participation were referenced without clear benchmarks.

The EU has more actively promoted substantive democracy through programmes of financial assistance and specific projects of training or twinning of civil servants. In particular, before the launch of the ENP, under the Technical Assistance to the Commonwealth of Independent States and under the European Initiative for Democracy and Human Rights, the EU had at its disposal limited funds for promoting substantial democracy. The budget for supporting democratization and good governance has been enhanced through the ENP Instrument.[501] Institution-building instruments, namely Twinning as well as

[497] Joint Evaluation Report EU-Ukraine Action Plan (Brussels/Kyiv, March 2008), http://www.enpi-info.eu/library/content/joint-evaluation-report-eu-ukraine-action-plan

[498] Andrea Gawrich, Inna Melnykovska, Rainer Schweickert, 'Neighbourhood Europeanization through EN: The Case of Ukraine', 48 Journal of Common Market Studies (2010), 1209-1235.

[499] See Tom Casier, 'The EU's two track approach to democracy promotion: the case of Ukraine' 18 *Democratization* (2011), 956-977.

[500] EU-Ukraine Cooperation Council, 'EU-Ukraine Action Plan', Recommendation No. 1/2005 (21 February 2005).

[501] On this point, see Irina Solenko and Balazs Jarabik, 'Ukraine' in Richard Youngs (ed.) *Is the European Union Supporting Democracy in its Neighbourhood?* (Madrid, FRIDE, 2008), 93.

Technical Assistance and Information Exchange (TAIEX) of the European Commission, have been provided to Ukraine.

3. The bilateral and multilateral tracks of the Eastern Partnership

The evolution of EU-Ukraine partnership proceeded in the framework of the Eastern dimension within the ENP. The two regional partnerships (*i.e.* the Eastern Partnership and the Barcelona Process now Union for the Mediterranean) proposed by the Commission in 2008 were a logical evolution of its identification of three conceptual areas to be reinforced for a more effective EU control and coordination in the neighbourhood: differentiation, ownership and regional focus. Launched by the Prague Joint Declaration of May 2009, the EaP envisaged a new two-track approach of bilateral and multilateral relations with six neighbours (*i.e.* Ukraine, Belarus, Moldova and countries from the Southern Caucasus, namely Georgia, Armenia and Azerbaijan) to ensure their closer approximation with the EU. Significantly, they agreed that the EaP would 'be based on commitments to the principles of international law and to fundamental values, including democracy, the rule of law, and the respect for human rights and fundamental freedoms, as well as to market economy, sustainable development and good governance'.[502] As well as promoting these fundamental values, the EaP was 'designed to promote good governance, to encourage public sector reform, and to foster contacts between the EU and people of the six partner countries'. They also highlighted that 'the Eastern partnership will go ahead without prejudice to individual participating countries' aspirations for their future relationship with the European Union. It will be governed by the principles of differentiation and conditionality'.[503] The key goal of this EaP was 'to accelerate political association and further economic integration' between the EU and interested partner countries.[504]

From the toolbox point of view, several instruments identified in the bilateral and multilateral tracks of the EaP (*e.g.*, new set of association agreements, joint policy platforms, specific 'flagship initiatives', supportive technical and financial instruments) deserve attention in the analysis of the EU-Ukraine relations either prior or subsequently to the outbreak of the Ukrainian crisis.

a) Tools of the EaP bilateral track

This track of the EaP has provided the foundation for upgrading the 1994 PCA to a more inclusive Association Agreement (AA), to be operationalised through annual Association Agendas that are of non-binding character. This upgrade has also entailed the establishment of a Deep and Comprehensive Free Trade Area (DCFTA) in which 'the positive effects of trade and investment liberalization will be strengthened by regulatory approximation leading to convergence with EU laws and standards'.[505]

[502] Council of the European Union, 'Joint Declaration of the Prague Eastern Partnership Summit' (Prague, 7 May 2009) 8435709 (Presse 78), para. 1.
[503] Ibid.
[504] Ibid, para. 2. See also 'Communication from the Commission to the European Parliament and the Council. Eastern Partnership' (3 December 2008) COM(2008) 823 final.
[505] Ibid., para. 5.

(i) EU-Ukraine Association Agendas

In order to prepare and facilitate the entry into force of the envisaged EU-Ukraine AA, a first version of 'EU-Ukraine Association Agenda' was adopted as a recommendation of the EU-Ukraine Cooperation Council on 23 November 2009 and entered into effect on 24 November 2009.[506] Its operational part defined 'those priorities on a sector by sector basis which require action in anticipation of the entry into force of the Agreement'. Key sectors encompassed: 'Political dialogue', 'Co-operation on Justice, Freedom and Security issues', 'Economic cooperation', 'Trade and trade related matters', 'Energy co-operation including nuclear issues', 'Other co-operation issues'.

Within the 'Political Dialogue' area, its four sections and related priorities deserve attention; they have been confirmed and even expanded in subsequent versions of the Association Agendas of 2013 and 2015. The first section on 'Democracy, rule of law, human rights and fundamental freedoms' included the following three priorities: (i) 'Strengthen the stability, independence and effectiveness of institutions guaranteeing democracy and the rule of law', (ii) 'Ensure the independence of the judiciary and the effectiveness of the courts and of the prosecution as well as of law enforcement agencies', (iii) 'Ensure respect for human rights and fundamental freedoms by comprehensive cooperation on the protection of human rights and fundamental freedoms, covering international law instruments on human rights'. The latter priority also included relevant sub-priorities: (a) 'Promoting the implementation of international and regional human right standards'; (b) 'Freedom of Expression, Assembly and Association', (c) 'Ensuring respect for the rights of persons belonging to minorities', (d) 'Combating torture and inhuman and degrading treatment', (e) 'Ensuring equal treatment', (f) Ensuring respect for children's rights, (g) 'Ensuring respect for trade union rights and core labour standards'. The second section focused on 'Combating Corruption'. The third section dealt with 'Foreign and Security Policy', including the following two priorities: (i) 'Further strengthen convergence on regional and interregional issues, conflict prevention and crisis management; work jointly to make multilateral institutions and conventions more effective, so as to reinforce global governance, strengthen coordination in combating security threats and address development related issues': (ii) 'Further develop co-operation in addressing common security threats, including combatting terrorism, non-proliferation of WMD and illegal arms exports'. The fourth section concerned the International Criminal Court, aiming to enhance cooperation to promote international justice and fight impunity.

What is remarkable is that the 2009 Association Agenda also established an enhanced monitoring procedure to be conducted jointly with the Ukrainian authorities by a 'Joint Committee at senior officials' level'. The Committee's annual review of the implementation of the Association Agenda was additional to the monitoring carried out by the European Commission in the annual ENP progress reports.[507] Nevertheless, with the provisional application of the institutional part of the AA since

[506] EU-Ukraine Cooperation Council, 'Recommendation on the implementation of the EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement' (23 November 2009) EU-UA 1057/0923.

[507] Once a year, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy publish reports assessing the progress made towards the objectives of the Action Plans and the

November 2014, a new Association Committee (set up under Article 461 of the AA) revises the implementation of the Association Agenda and defines the priorities and amendments to it.

Focusing on the Joint Committee's task of prioritizing key actions for a specific period of time, two lists of EU-Ukraine Association Agenda priorities were adopted for 2010 and for 2011-2012. Focusing on the Joint Committee's task of updating the Association Agenda, revisions and amendments were adopted three times.[508] A number of minor novel priorities were defined in May 2011; after the initialling of the EU-Ukraine AA in 2012, substantial priorities were introduced in June 2013. For instance, in view of the Tymoshenko case, the updated Association Agenda expanded the specific priorities concerning 'the independence of the judiciary and the effectiveness of the courts and of the prosecution as well as of law enforcement agencies'.[509]

In order to prepare and facilitate the implementation and monitoring of the EU-Ukraine AA, an updated Association Agenda was agreed between the Ukrainian Government and the EU and its Member States and was endorsed by the EU-Ukraine Association Council on 16 March 2015. Viewed as 'instrumental in guiding the process of enhanced reforms and economic modernization in Ukraine', this updated agenda echoed an enhanced level of association in EU-Ukraine bilateral relations. On the one hand, it was supposed to create 'a practical framework through which the overall objectives of political association and economic integration can be realised', providing a list of reforms priorities and concrete measures as well as relevant EU support on the areas covered by the AA. On the other hand, it outlined ten 'short-term reform actions' to be addressed by Ukraine as a matter of priority in the areas of constitution, elections, anti-corruption, judiciary, public administration, deregulation, energy, taxation, public procurement, and external audit.[510]

Focusing on the aforementioned 'Political Dialogue' sector included in the operational part of this association agenda, as already noticed, its four sections have been confirmed also in the 2015 version, but a further remarkable point concerns its third section ('2.3. Foreign and Security Policy'). More precisely, a specific priority ('i. Enhancing the cooperation within the CFSP area') has been introduced, expressively entailing the two following actions: firstly, 'consult and coordinate on actions taken at bilateral and multilateral levels in the framework of international efforts with the joint aim of finding a sustainable political solution to the situation in some regions of Donetsk and Lugansk Oblasts of Ukraine, caused by the illegal activities of the Russian Federation'; secondly, 'support the work of the

Association Agendas. The report about the implementation of the ENP in Ukraine in 2013 was adopted on 27 March 2014, the report about the implementation of the ENP in Ukraine in 2014 was adopted on 25 March 2015.

[508] The first review was adopted on 20 May 2011 by the Joint Committee of the Association Agenda at Senior level and then it was endorsed in 2012 by the EU-Ukraine Cooperation Council (15th Meeting of the EU-Ukraine Cooperation Council, Brussels, 15 May 2012, 9993/12 (Presse 206). The second review was endorsed in 2013 by the EU-Ukraine Cooperation Council (16th Meeting of the EU-Ukraine Cooperation Council, Brussels, 24 June 2013, 11471/13 (Presse 289). A third comprehensive revision of the Association Agenda was adopted in March 2015.

[509] EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, *as endorsed by the EU-Ukraine Cooperation Council (Luxemburg, 24 June 2013),* 2-3.

[510] EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, *as endorsed by the EU-Ukraine Association Council on 16 March 2015*.

OSCE Special Monitoring Mission, the OSCE Observer Mission and any other OSCE mission with a view to support cease-fire and border monitoring'.[511]

(ii) Relevant aspects of the difficult process of conclusion of the EU-Ukraine AA

The EU-Ukraine AA is one of the few EU international agreements negotiated before and after the entry into force of the Lisbon Treaty, with inevitable impacts on the distribution of competences and institutional framework of EU external action.

Furthermore, between the beginning of the negotiations in 2007 and the signing in 2014, a number of political and legal issues put at risk its conclusion. On the one hand, both these phases were more complex in light of domestic issues such as 'selective justice' cases (*e.g.* the Tymoshenko case) and the Maidan revolution. On the other hand, the EU-Ukraine AA was challenged from the pressure exercised by Russia on Ukraine to induce the latter to drop the envisaged agreement with the EU and to join its new geopolitical project, namely the Euroasian Economic Customs Union, along with Kazakhstan and Belarus. Apparently Russia's threats, pressure or attractive (gas) promises also challenged the conclusion of the bilateral agreement. Nonetheless, Ukrainian authorities' playing both sides so as to benefit as much as possible exposed any conclusion to further risk.[512]

Since March 2007 the negotiations were conducted within four negotiating groups: (i) political dialogue and foreign and security policy, (ii) justice, freedom and security, (iii) economic and sectoral cooperation and, after the approval of Ukraine's WTO accession in February 2008, (iv) the DCFTA. During the first year of the negotiations, an understanding on the overall objectives, values and principles of the 'New Enhanced Agreement' was reached by the parties.[513] Between 2008 and 2009, the leaders of the EU and Ukraine agreed that it would be an association agreement (without deciding on the EU Membership perspective) and on related preamble, objectives, general principles and institutional provisions.[514] In particular, in the area of 'political dialogue and foreign and security policy' the negotiations were provisionally closed on most matters (except for the respect for the principles of independence, sovereignty, territorial integrity and inviolability of borders). In the area of 'justice, freedom and security' an accord was reached on most matters (except or the provisions on movement of persons, visa-free travel, and judicial cooperation in civil matters). Between 2010 and 2013, the negotiations of the envisaged AA were finalized; the 'political' part of the AA progressed rapidly (except of few sensitive issues such as the duration of the agreement, the reference to the International Criminal Court, and the

[511] Ibid., 15.

[512] In this regard, see the contribution by Elena Gnedina, 'Multi-Vector Foreign Policies in Europe: Balancing, Bandwagoing or bargaining?' (2015), 67:7 Europe-Asia Studies, 1007-1029.

[513] First Joint Progress Report, 'Negotiations on the EU-Ukraine New Enhanced Agreement', September 2007.

[514] Second Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 2008; Third Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 26 November 2009.

provisions on movement of persons and visa-free travel); the DCFTA negotiations were more complex and difficult.[515]

The AA negotiations were launched under the Presidency of the pro-European Viktor Yyshchenko, but the fear of a potential stall followed the election of pro-Russian Viktor Yanukovych in February 2010, in view of possible closer relations with Russia and its Customs Union with Kazakhstan and Belarus. This alternative appeared reinforced by the prompt signature of an agreement with Russia allowing the Russian Black Sea Fleet to stay in Ukraine for at least additional 32 years in exchange for lower gas prices. Nonetheless, European integration was confirmed as a key priority for Ukraine during Yanukovych's first official visit to Brussels in March 2010.[516] This view was proclaimed during subsequent AA negotiations, along with declaring Ukraine would not bend for the Russian pressure to join the Eurasian Customs Union.

In November 2011 an agreement was reached on the non-DCFTA part of the AA, including a compromise on the duration[517] and the reference to the ICC.[518] Negotiations were finalised at the December 2011 EU-Ukraine Summit. However, cases of 'politically motivated justice' in Ukraine complicated their relations. In particular, the 'Tymoshenko trial'[519] was addressed as a 'perceived deterioration of the quality of democracy' in Ukraine.[520] Expressing deep disappointment with the verdict, the EU declared that this trial 'did not respect the international standards as regards fair, transparent and independent legal process' and that it proved that 'justice is being applied selectively in politically motivated prosecutions of the leaders of the opposition and members of the former government'. Accordingly, the EU called for an impartial and fair process in any appeal case and warned that Ukraine's respect 'for universal values and rule of law, and specifically how they will handle these cases, risk having profound implications [on the] conclusion of the Association Agreement'.[521] In the

[515] Fourth Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 8 November 2010.

[516] EU-Ukraine Summit, 22 November 2010, Joint Press Statement, Brussels, 16691/10 (Presse 312).

[517] The UE-Ukraine AA was concluded for an unlimited period, but the parties shall provide for a comprehensive review of the achievement of objectives under this AA within five years of its entry into force, and at any other time by mutual consent of the parties (Article 481 of the EU-Ukraine AA).

[518] Under Article 8 of the EU-Ukraine AA, the parties 'shall cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments'. For Ukraine, this was a delicate issue as in a judgment of 11 July 2001, the Constitutional Court of Ukraine concluded that several provisions of the Rome Statute were not in conformity with the national Constitution.

[519] As already highlighted, on 5 August 2011 former Prime Minister Tymoshenko was arrested, following criminal charges for 'abuse of power' when she struck a gas deal with Russia in 2009. On 11 October 2011 she was found guilty and sentenced to 7 years imprisonment, excluding her from the 2012 parliamentary elections. Criminal charges regarded several other members of her 2007–2010 government.

[520] 'Remarks of President Herman Van Rompuy following the 15th EU-Ukraine Summit' (19 December 2011) EUCO 166/11 (Presse 511).

[521] 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on the verdict in case of Ms. Yulia Tymoshenko' (Brussels, 11 October 2011) 15394/11 (Presse 364).

same vein, a deterioration in the area of human rights and democracy was addressed in the report on the implementation of the ENP in Ukraine and its progress reached in 2011.[522]

Therefore, the remaining technical procedural steps for concluding the EU-Ukraine AA (*i.e.* the installing and the signing) were strongly 'politicised'.[523] Finally, this agreement was initialled on 30 March 2012, while the part concerning the DCFTA on 19 July 2012.[524] Interestingly, in the Council Conclusions on Ukraine adopted on 10 December 2012 the EU's commitment to signing the agreement (possibly by November 2013 at the EaP Summit in Vilnius) was made conditional on Ukraine's 'determined action and made tangible progress' in three areas: (i) compliance of the 2012 parliamentary elections with international standards, (ii) progress in addressing the issue of 'selective justice' and (iii) implementation of the reforms defined in the jointly agreed Association Agenda.[525] A request for 'more and concrete progress' was re-affirmed at the EU-Ukraine Summit of 25 February 2013.[526] A special European Parliament monitoring mission to Ukraine concluded in October 2013 that progress were not made to fulfil the conditions for the signature of the AA.[527]

However, on 21 November 2013, the Ukrainian government adopted a resolution on suspension of the preparation process to conclude the AA in order '*to ensure the national security of Ukraine and to recover trade and economic relations with the Russian Federation*'.[528] This resolution called for measures '*to restore the lost production output and areas of trade and economic relations with Russia and other CIS member states*' and a new EU-Russia-Ukraine trade commission to promote economic

[522] According to this report, '[I]n the area of democracy and human rights there was further deterioration. Several leading opposition figures, including former Prime Minister Tymoshenko, were subjected to selective justice, characterized by un-transparent judicial processes. This attracted substantial criticism both at home and abroad. Ukraine's performance, notably in relation to respect for common values and the rule of law, will be of crucial importance for the speed of its political association and economic integration with the EU, inter alia with regard to conclusion of the Association Agreement and its subsequent implementation.' See European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Joint Staffa Working Document, Implementation of the European Neighbourhood Policy in Ukraine. Progress in 2011 and recommendations for action' (15 May 2012) SWD(2012) 124 final, 2.

[523] No EU-Ukraine Summit was held in 2012. Several EU leaders also boycotted the 2012 Euro football championships in Ukraine. As for the positions of EU Member States, Eastern Member States such as Poland and Lithuania were still willing to sign the AA so as to compensate the Russian pressure on Ukraine to join the aforementioned customs union; other Member States such as the Netherlands and France were in favour to postpone the signature of the AA.

[524] See European Parliament resolution of 1 December 2011 containing the European Parliament's recommendation to the Council, the Commission and the EEAS on the negotiations of the EU-Ukraine Association Agreement, P7_TA(2011)0545 (*OJ*, 2013, C 165/48).

[525] 3209th Foreign Affairs Council Meeting, 'Council conclusions on Ukraine' (10 December 2012).

[526] 16th EU-Ukraine Summit, 25 February 2013, Joint Statement, 6811/13 (Presse 72); Press remarks by Herman Van Rompuy, President of the European Council, following the EU-Ukraine Summit, 25 February 2013, EUCO 48/13 (Presse 74).

[527] European Parliament, Conference of Presidents, Draft Minutes of the extraordinary meeting of 15 October 2013, PE-7/CPG/PV/2013-extra 02.

[528] Government of Ukraine, 'Government adopted resolution on suspension of preparation process to conclude Association Agreement with EU', Press release (21 November 2013).

ties. Conversely, according to a joint statement of the President of the European Council and of the European Commission of 25 November 2013, 'the European Union's position remains clear', the signing of 'the most ambitious agreement the European Union has ever offered [...] is still on the table', but this 'requires the necessary political will by the Ukrainian leadership, determined action and tangible progress on the conditions set out in December 2012'.[529] Curiously, in a joint declaration adopted during the EaP Vilnius Summit, both parties reiterated their commitment to the signing of the AA on the basis of determined action and tangible progress in the aforementioned three areas.[530]

In a subsequent meeting between the Commissioner for Enlargement and ENP Füle and the Ukrainian deputy Prime Minister in December 2013 'to discuss ways towards the signature and implementation of the AA', both parties agreed to prepare a roadmap for the AA/DCFTA and to arrive at a mutual understanding on the expected benefits of the agreement.[531] However, the tragic developments of the Maidan demonstrations (temporarily) overshadowed these efforts. Remarkably, during the instable days when the use of excessive force against the civilian protesters and serious violations of fundamental freedoms and human rights were reported, the EU reiterated its commitment to signing the AA 'as soon as Ukraine [was] ready'.[532] These violations were in sharp contrast with the 'shared values' enshrined in this agreement. Apparently the option of postponing such signature in light of those violations was deemed to reduce too intensely the EU's influence on this neighbouring country, but the 'flexible' approach undertaken by the EU surely contributed to undermine its role as a promoter of democratic norms and values.

During an extraordinary European Council meeting on 6 March 2014, the EU Heads of State or Government agreed to sign 'all the political chapters' of the AA as soon as possible and to adopt unilateral measures 'which would allow Ukraine to benefit substantially from the advantages offered in the [DCFTA]'.[533] The 'political' chapters of the AA were finally signed on 21 March 2014.[534] Following the

[529] Joint Statement by President of the European Council Herman Van Rompuy and President of the European Commission José Manual Barroso on Ukraine, 25 November 2013, EUCO 245/13, Presse 245/13.

[530] Joint Declaration of the Eastern Partnership Summit, Vilnius, 28-29 November 2013, 17130/13 (Presse 516).

[531] European Commission, 'Association Agreement is an offer to the country and its people', MEMO 13/1146, 12 December 2013.

[532] 3291th Foreign Affairs Council meeting, 'Council conclusions on Ukraine' (10 February 2014) and 3300th Council meeting, Foreign Affairs, 'Council conclusions on Ukraine' (20 February 2014).

[533] European Council, 'States of the Heads of State or Government on Ukraine' (Brussels, 6 March 2014). On 14 April 2014 the European Parliament and the Council adopted a 'Regulation on the reduction or elimination of customs duties on goods originating in Ukraine' (Regulation (EU) No. 374/2014).

[534] They included the Preamble, Article 1 (Objectives), Title I (General Principles), Title II (Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy) and Title VII (Institutional, General and Final Provisions). See Final Act of the Summit between the EU and its Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement, attached to Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Title I, II and VII thereof (OJ, 2014, L 161/1).

presidential elections of 25 May 2014 which were won by the pro-European businessman Petro Poroshenko, the remaining sections of the AA (including the DCFTA) were signed on 27 June 2014. On 16 September 2014 the Ukrainian Parliament ratified it and the European Parliament gave its consent, enabling the provisional application of Titles III, V, VI and VII, and the related Annexes and Protocols, as of 1 November 2014. Instead, the provisional application of Title IV: Trade and Trade-related Matters, and the related Annexes and Protocols, was postponed until 31 December 2015.

(iii) Relevant aspects of the EU-Ukraine Association Agreement

Setting up the ambition for a close and lasting relationship, the Preamble of the AA reflects basic references to common values and is deemed a 'scene-setter' for the AA, despite its non-binding nature. In particular, it references to the common values on which the EU is built – 'namely respect for democratic principles, rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, human dignity and commitment to the principles of a free market economy' – and to which the parties are committed. Another basic reference concerns the recognition of Ukraine as a European country that shares a common history and common values with the Member States of the EU. Moreover, the Preamble significantly refers to the welcomed European aspirations of Ukraine, including its commitment to build deep and sustainable democracy and a market economy. Furthermore, it is importantly acknowledged that the economic integration and political association of Ukraine with the EU will depend on progress in the implementation of this AA as well as Ukraine's track record in ensuring respect for common values, and progress in convergence with the EU in political, economic and legal areas.

The basic objectives of this new association are enunciated in Article 1:

> '(a) to promote gradual rapprochement between the Parties based on common values and close and privileged links, and increasing Ukraine's association with EU policies and participation in programmes and agencies; (b) to provide an appropriate framework for enhanced political dialogue in all areas of mutual interest; (c) to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with the principles of the United Nations Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990; (d) to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union; (e) to enhance cooperation in the field of Justice, Freedom and Security with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms; (f) to establish conditions for increasingly close cooperation in other areas of mutual interest.'

Focusing on the promotion of the 'common values' on which the relationship between the EU and Ukraine is based, it must be highlighted that conditionality has played a prominent role as an instrument and a methodology of the EU approach. Indeed, the launch of AA negotiations was made conditional upon Ukraine's fulfilment of the political and economic priorities of the 2005 Action Plan. Then, the Preamble of the AA explicitly includes two different forms of conditionality, stating that 'the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of the current Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas.' In this regard, the so-called 'common values conditionality' has a negative nature.[535] These values are listed in the AA in line with Article 2 TEU.[536] In line with the practice of EU international agreements, the 'common values conditionality' is connected to the essential element and suspension clause (Article 2 in conjunction with Article 478 of the AA).

As for the definition of the 'essential elements' of the EU-Ukraine AA, it is a point of importance that the referred general principles which will form the basis for the domestic and external policies of this association between the Parties include not only the respect for democratic principles, human rights and fundamental freedoms as defined by international legal sources (*i.e.* the Helsinki Final Act, the Charter of Paris for a new Europe, the UN Universal Declaration on Human Rights and the European Convention on Human Rights and Fundamental Freedoms) but also the 'respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destructions, related materials and their means of delivery' (Article 2). Conversely, other general principles are not deemed to be 'essential elements' of the EU-Ukraine AA, entailing that their violation cannot trigger the suspension clause.[537] This consideration concerns the principle of free market economy that 'underpins' the parties' relationship (Article 3). It also concerns the rule of law, good governance, the fight against corruption, the fight against different forms of trans-national organized crime and terrorism, the promotion of sustainable development and effective multilateralism, which are deemed 'central' to enhancing the parties' relationship (Article 3). Nonetheless, these 'general principles' remain crucial for developing closer relations among them (according to the Preamble, the common values on which the EU is built are 'also essential elements' of this agreement).

As for the suspension clause in the EU-Ukraine AA, in line with other EU international agreements, a party has the exceptional right to *immediately* take 'appropriate measures' in case of violation of an

[535] Conversely, the DCFTA part of the AA relies on an explicit *market access conditionality*, which has a positive nature, entailing that (additional) access to parts of the EU Internal Market will be granted to Ukraine only if the EU determines, following a monitoring procedure, that Ukraine has positively implemented its legislative approximation commitments based on the EU Internal Market *acquis*. For the difference between positive and negative conditionality, see K.E. Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' (1998) 3 European Foreign Affairs Review, 253-274.

[536] See Article 1(2)(a) and the Preamble of the EU-Ukraine AA.

[537] Article 478(3) of the EU-Ukraine AA.

essential element of the agreement.[538] It is worth noting that the violation of essential elements can also lead, by derogation, to the suspension of rights or obligations provided for under the DCFTA. In such a case, 'common values conditionality' would overlap with 'market access conditionality': violations of fundamental freedoms and human rights by Ukraine could lead the EU to suspend certain trade benefits granted under the DCFTA (despite the DCFTA dispute settlement mechanisms).

A further positive innovation concerning the 'common values conditionality' is contained in Article 6 providing a 'dialogue and cooperation on domestic reform'. According to this provision, the EU and Ukraine shall cooperate 'in order to ensure that their internal policies are based on principles common to the Parties, in particular stability and effectiveness of democratic institutions and the rule of law, and on respect for human rights and fundamental freedoms'.

An additional aspect of the EU-Ukraine AA deserves attention in view of the advocated mainstreaming of human rights in all EU external policies and instruments (IV outcome of Action Plane 2012-2014), in particular in relation to the specific objective of 'ensuring the promotion of human rights in the external dimension of employment and social policy' (outcome n. 14). In 2014 the need for further efforts to ratify and effectively implement the ILO fundamental conventions was underlined under the ENP framework. Accordingly, the EU-Ukraine AA signed in 2014 and provisionally applied in November 2014 included in its DCFTA part (the entry into force of which was postponed by a year) the parties' commitments to effective implementation of the ratified ILO fundamental Conventions. More precisely, the DCFTA Chapter on Trade and Sustainable Development contains a minimum obligation to 'implement in their laws and practices' internationally recognised core labour standards and the ratified ILO Conventions, including the ILO 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up.[539] Nonetheless, it must be highlighted that, as a consequence of the conflict in the East and its spill-over negative effect on the whole socio-economic situation, in Ukraine respect for labour standards and labour rights severely deteriorated throughout 2014 as well as in the following years.[540]

(iv) Concluding remarks

Against this background concerning the bilateral track, a basic question arises as to whether and how the evolving role of partnership in the ENP/EaP has been affected by the necessity to face the crisis situation in Ukraine. Has the EU-Ukraine Association Agendas been effectively set in this regard? Has the EU calculated the impact of the Association Agreement with Ukraine on both regional peace and security and on latent and acute internal conflict drivers?

It is indeed difficult to specify what changes are due to the situation and Ukraine and how other political situations affect the EU policies concerned. It is worth mentioning that, following the Arab Spring, the

[538] In normal circumstances, only three months after the notification of a formal request for dispute settlement a party may take appropriate measures. An additional exception to this rule is the denunciation of the Agreement not sanctioned by the general ruled of international law (Article 478 of the EU-Ukraine AA).

[539] The parties will additionally 'consider' ratification and implementation of other ILO Conventions (Article 291 of the EU-Ukraine AA).

[540] See EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 55.

EU revised the ENP by proposing to provide for 'greater support in building deep democracy' as well as cooperation based on a 'more-for-more' approach which would have rewarded countries that make the most progress.[541]

Remarkably, in the review of the European Neighbourhood Policy in late 2015, the EU has highlighted the need to increase its engagement with partners in the security sector. As in other areas, the revised ENP is deemed to 'offer a tailor-made approach to cooperating on security-related matters' and to 'actively ensure that [the EU's] overall engagement is conflict-sensitive, and fully compliant with international law, including international human rights law'.[542] It is also stipulated that 'the new ENP aims to work on conflict prevention through early warning, coupled with early preventive measures, and enhance partners' capacity in this regard'. Accordingly, in order to strengthen their resilience in the face of external pressures and their ability to make their own sovereign choices, a number of measures have been set out concerning whether and in what form the ENP should continue.[543] From the toolbox perspective, the following addressed points are noteworthy: (1) the ENP should reflect both EU and partners' interests, with greater involvement of Member States; (2) the EU should uphold and promote universal values (good governance, democracy, rule of law and human rights) through the ENP and the methods currently used are 'ineffective' or even 'obstacles to equal partnership'; (3) the ENP will seek more effective ways to promote reforms with each partners in mutually agreed formats; (4) the ENP will do more to support civil society; (5) the new focus of security will open up new areas of cooperation under the ENP, including security sector reform, border protection, tackling terrorism and radicalisation, crisis management and response.

b) Tools of the EaP multilateral track

The multilateral dimension of the Eastern Partnership has operated on various levels: summits of Heads of State and Government of the EU Member States and partner countries; meetings of Foreign Ministers of the EU and Eastern European partners; activities undertaken within the framework of thematic platforms of the EaP; and a number of flagship initiatives and expert panels to support the activities of the thematic platforms in particular spheres.

As far as the thematic platforms are concerned, they cover four areas: (1) democracy, good governance and stability; (2) economic integration and converge with EU policies; (3) energy security; (4) contacts between people. They were launched in June 2009 with an aim to facilitate an exchange of information and experiences between the partner countries in the context of implementation of reforms. Direct

[541] See European Commission and High Representative of the EU for Foreign Affairs and Security Policy, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the Committee of Regions, A new response to a changing Neighbourhood' Brussels COM (2011) 303, 25 May 2011, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0303&from=EN

[542] European Commission and High Representative of the EU for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Review of the European Neighbourhood Policy' JOIN(2015) 50 final (Brussels, 18 November 2015), 4.

[543] *Ibid*., 4-21.

links between the country experts and the EU Member States have been promoted in this context. The four platforms are accountable to the annual meetings of Foreign Ministers. Related biannual meetings are attended by senior officials from the ministries responsible for reforms in the specific areas. The particular activities are developed on the basis of respective work programs.

Ukrainian delegations have participated in activities of these four thematic platforms. From the toolbox point of view, the most relevant one is the first platform addressing issues of democracy and human rights, justice and home affairs, security and stability. For instance, this thematic platform met on 5 June and 7 October 2009. In addition, the Eastern Partnership Civil Society Forum (16-17 November 2009) produced recommendations, including on human rights and good governance, which were presented to the Foreign Ministers of the Eastern Partnership countries at their annual meeting on 8 December 2009.[544]

At the EaP Summit in May 2015, the importance of the continued intensification of result-oriented multilateral cooperation within the Eastern Partnership at all levels, including the four multilateral platforms as well as the flagship initiatives (such as the one on integrated border management) was stressed.

[544] EEAS, 'EU Annual Report on Human Rights and Democracy in 2009'.

E. The EU response to the evolving crisis in Ukraine: a strategic use of tools for tackling its human rights implications?

According to the 2014 EU Annual Report on Human Rights and Democracy, 'the main EU policy priorities in relation to Ukraine' concerned judicial reform, respect for fundamental freedoms, the right to free and fair elections, measures to combat arbitrary detention and torture and discrimination. Nonetheless, it was also stressed that the EU's attention in the area of respect for human rights and fundamental freedoms shifted to the violence committed in the context of the 'Maidan revolution', in the situation of illegal annexation of the Crimean peninsula and in the armed conflict affecting parts of the Donetsk and Lugansk regions.[545]

The below sub-sections focus on the EU multi-faceted response to the ongoing crisis in Ukraine from the perspective of the human rights implications that have affected its neighbouring country since the end of 2013. When analysing the various tools used by the EU and which have directly or indirectly tackled the human rights and democracy challenges emerged in the unstable Ukrainian context we shall focus on the notion on 'implementability' of a strategy (as explained in the first part of the present report). In particular, the following questions deserve attention: will the key constiTEUncies (EU institutions, Member States, civil-society) allow the EU to pursue the strategy concerned? Can the EU make it through the transition? Is there sufficient leadership in the EU ranks to lead the required changes?

1. The EU response in the context of the 'Maidan revolution'

As far as the violent crackdown on peaceful demonstrators of November 2013 is concerned, the EU Delegation and EU Member States intensified their activities in the human rights field.[546] A 'flexible coordination channel' was established between the EU Delegation and the staff of Member States' Embassies 'to coordinate spot-checks and share information in real time about alleged human rights violations'.[547] Throughout the period of protests, bilateral contacts with Ukrainian authorities and public statements were used by EU leaders and representatives of EU Member States to voice concerns about respect for human rights and the rule of law. In this vein, the EU proclaimed its support for the protesters 'who expressed in a strong and unprecedented manner their support for Ukraine's political association and economic integration with the EU'.[548] In the words of the President of the European Commission 'the European Union has the right and the duty to stand by the people of Ukraine in this

[545] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 161.

[546] According to the 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 162, 'the main activities included monitoring of demonstrations and peaceful gatherings; observation of court hearings involving detained demonstrators, focusing in particular on cases of arbitrary detention and torture; contacts with lawyers and families of persons subject to arbitrary detention; and visits to hospitals where injured demonstrators were receiving medical treatment, as well as to hospitals and other venues where detained demonstrators were receiving treatment'. 'All visits of HR/VP Ashton and Commissioner Füle included meetings with civil society, including human rights activists, as well as with injured demonstrators and policemen in hospitals'.

[547] Ibid.

[548] Statement by High Representative Catherine Ashton and Commissioner Füle, MEMO/13/1077 (Brussels, 30 November 2013).

very difficult moment, because they are giving to Europe one of the greatest contributions that can be given'.[549] The Council conclusions of January 2014 strongly condemned also the Ukrainian Parliament's legislative package that restricted the Ukrainian citizens' fundamental rights of association, media and press in order to curtail the demonstrations.[550]

The deteriorating situation and violent repression originated from the Maidan protests also led the Foreign Affairs Council, in an extraordinary meeting on 20 February 2014, to condemn 'in the strongest terms all use of violence' and to call for 'an immediate end to the violence, full respect of human rights and fundamental freedoms, including the right of access to medical assistance, and for urgent independent investigations into human rights violations, notably through the Council of Europe International Advisory Panel'; it also called on all sides 'to engage, without further delay, in a meaningful dialogue, to fulfil the legitimate democratic aspirations of the Ukrainian people'.[551] As will be detailed below, the engagement of the EU with the Council of Europe in the wake of the Ukrainian crisis has confirmed its objective of working through multilateral institutions and in particular strengthening regional mechanisms for human rights.

In the same extraordinary meeting of February 2014, the Foreign Affairs Council decided as a matter of urgency to introduce targeted sanctions (asset freeze and visa ban) against those responsible for human rights violations, violence and use of excessive force.[552] In particular, in March 2014 the Council decided to freeze and recover the assets of 18 individuals; in April they were extended to four other individuals.[553] In addition, Member States agreed to suspend export licenses on equipment that might be used for internal repression Ukraine (and also reassess export licences for equipment covered by Common Position 2008/944/CFSP).

It is worth also noting that the EU took positive note of the declaration lodged by the Government of Ukraine on 17 April 2014 (pursuant to Article 12(3) of the Rome Statute) to accept the jurisdiction of the International Criminal Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.[554] In this regard the EU also encouraged Ukraine to conclude internal procedures allowing for the ratification of the Statute of Rome (as provided for in the EU-Ukraine AA signed in June 2014 and provisionally in force). On 25 April 2014, the ICC Prosecutor opened a preliminary examination

[549] Statement of President Barroso on the current situation in Ukraine, MEMO/13/1116 (9 December 2013).

[550] 3288th Foreign Affairs Council Meeting, 'Council conclusions on Ukraine' (20 January 2014).

[551] 3300th Foreign Affairs Council Meeting (20 February 2014) 6767/14, paras. 1-2.

[552] 3300th Foreign Affairs Council Meeting (20 February 2014) 6767/14, para. 4.

[553] Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, *OJ*, 2014, L 66/26; Council Implementing Decision 2014/216/CFSP of 14 April 2014; OJ, 2014, L 111/91. Several individuals targeted by such sanctions (including former President Yanukovych) launched proceedings before the ECJ to seek annulment of EU sanctions decisions.

[554] Declaration by Ukraine lodged under Article 12(3) of the Statute, 9 April 2014; Note Verbale of the Acting Minister for Foreign Affairs of Ukraine, Mr. Andrii Deshchytsia, 16 April 2014.

into the situation in Ukraine.[555] Accordingly, the Office has engaged with representatives of Ukrainian civil society to gather relevant information and has requested information from the Government of Ukraine, subsequently receiving two submissions from the Ukrainian authorities. In November 2014, the ICC Prosecutor reported that, on the basis of the available information, the abuses committed in the period concerned did not amount to crimes against humanity, although this could be reconsidered in light of any additional information. Following the lodging of a second declaration by the Ukrainian Government on 8 September 2015, the Office decided to extend the temporal scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.[556]

2. The EU response in the context of Russia's annexation of Crimea and the armed conflict in Eastern Ukraine

The EU's engagement in supporting the efforts to come to a sustainable political solution of the conflict has occurred through different instruments at its disposal. Apparently this has had a limited impact on the worsening human rights situation in the Crimean peninsula. In particular, the EU approach of pushing for a peaceful resolution of the crisis has combined exercising pressure through restrictive measures with sustaining diplomatic networks and continuing dialogue with the parties to the conflict. In official words, the EU has focused on de-escalating the Ukrainian crisis and assisting this neighbouring country in ensuring 'a stable, prosperous and democratic future for all its citizens'.[557]

a) Adoption of CFSP restrictive measures

The EU condemned the violations of Ukraine's sovereignty, independence and territorial integrity by acts of aggression undertaken by Russian armed forces, urging the Russian Federation to immediately withdraw them to the areas of their permanent stationing and calling for dialogue between Ukraine and Russia.[558] The subsequent annexation of Crimea and Sevastopol was condemned as illegal by the European Council of 20 March 2014, highlighting the EU leaders' intention not to recognize it. The commitment to fully implement its non-recognition policy was subsequently reaffirmed in the Council conclusions of March 2015.[559]

This non-recognition policy has led the EU to impose substantial restrictions on economic exchanges with the territory.[560] Initially, diplomatic restrictions in response to the Russian action were imposed at

[555] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76. The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014.

[556] https://www.icc-cpi.int/ukraine?ln=en

[557] See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[558] 3305th Foreign Affairs Council meeting (4 March 2014) 7196/14.

[559] European Council conclusions on Ukraine (19 March 2015), para. 11.

[560] Restrictions for Crimea and Sevastopol have included: 1. 'A ban on imports of goods originating in Crimea or Sevastopol unless they have Ukrainian certificates'; 2. 'A prohibition to invest in Crimea. Europeans and EU-based companies can no longer buy real estate or entities in Crimea, finance Crimean companies or supply related services. In addition, they may not invest in infrastructure projects in six sectors'; 3. 'A ban on providing tourism services in Crimea or Sevastopol. European cruise ships may not call at ports in the Crimean peninsula, except in

an extraordinary meeting of EU leaders on 6 March 2014.[561] Then, in the absence of de-escalatory steps by the Russian Federation, the EU has intensified its restrictive measures, starting on 17 March 2014, with targeted sanctions (travel bans and assets freeze) against persons responsible for actions against Ukraine's territorial integrity, sovereignty and independence.[562]

In view of Russia's actions destabilising the situation in Eastern Ukraine, the EU agreed on a first package of significant 'economic sanctions' targeting sectoral cooperation and exchanges with Russia on 29 July 2014.[563] In March 2015, the duration of restrictive measures against the Russian Federation, adopted on 31 July 2014 and enhanced on 8 September 2014, was aligned to the complete implementation of the Minsk agreements, which was foreseen for the end of December 2015.[564] In view of their partial implementation, on 22 June 2015 the economic sanctions were extended for six months, namely until 31 January 2016.[565]

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case of emergency. This applies to all ships owned or controlled by a European or flying the flag of an EU Member State'; 4. 'Goods and technology for the transport, telecommunications and energy sectors or the exploration of oil, gas and mineral resources may not be exported to Crimean companies or for use in Crimea'; 5. 'Technical assistance, brokering, construction or engineering services related to infrastructure in the same sectors must not be provided'. See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[561] Extraordinary meeting of EU Heads of State or Government on Ukraine (6 March 2014). Concrete diplomatic measures have included the following: 1. 'Instead of the G8 summit in Sochi, a G7 meeting was held in Brussels on 4/5 June 2014'; 2. 'EU member states supported the suspension of negotiations over Russia's joining the OECD and the International Energy Agency'; 3. 'The EU-Russia summit was cancelled and EU Member States decided not to hold regular bilateral summits'; 4. 'Bilateral talks with Russia on visa matters as well as on the New Agreement between the EU and Russia were suspended'. See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[562] Asset freezes and visa bans have applied to 149 persons while 37 entities have been subject to a freeze of their assets in the EU. This regards persons and entities responsible for action against Ukraine's territorial integrity, persons providing support to or benefitting Russian decision-makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law. See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en. For the consolidated list of persons, groups and entities subject to EU financial sanctions, see http://eeas.europa.eu/cfsp/sanctions/consol-list/index_en.htm

[563] See Statement by President Barroso and President Van Rompuy in the name of the European Union on the agreed additional restrictive measures against Russia (Brussels, 29 July 2014). In particular, he stated that 'The package responds to directions given by the European Council of 16 July. It is meant as a strong warning: illegal annexation of territory and deliberate destabilisation of a neighbouring sovereign country cannot be accepted in 21st century Europe. Furthermore, when the violence created spirals out of control and leads to the killing of almost 300 innocent civilians in their flight from the Netherlands to Malaysia, the situation requires urgent and determined response. The European Union will fulfil its obligations to protect and ensure the security of its citizens. And the European Union will stand by its neighbours and partners.' See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[564] European Council conclusions on Ukraine (19 March 2015), para. 10.

[565] Economic sanctions have entailed the following: 1. 'EU nationals and companies may no longer buy or sell new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued by five major state-owned Russian banks, three major Russian energy companies, three major Russian defence companies, subsidiaries outside the EU of the entities above, and those acting on their behalf or at their direction'; 2. 'Assistance in relation to the issuing of such financial instruments is also prohibited'; 3. 'EU nationals and companies may also

Overall, the several measures that EU has imposed in the context of the Ukrainian crisis include diplomatic measures, sanctions targeting certain individuals and entities (asset freezes and visa bans), restrictions for Crimea and Sevastopol,[566] measures targeting sectoral cooperation and exchanges with Russia ('economic sanctions', including banking and financial activities),[567] measures concerning the suspension of economic cooperation,[568] measures focused on freezing and recovery of misappropriated Ukrainian state funds.

b) Support to high-level diplomatic channels and formats

At the level of relevant diplomatic networks, the EU directly participated in negotiating the Geneva Joint Statement of 17 April 2014, along with the US, Ukraine and the Russian Federation.[569] Relevant meetings were held in Milan in October 2014, in Minsk in August 2014 and in February 2015. The EU welcomed the subsequent agreements for a ceasefire and further steps to stabilise the situation and end the conflict, reached in Minsk in September 2014 and in February 2015. Further EU efforts for a political solution of the conflict have included its assistance to the OSCE, the trilateral talks conducted on trade- and energy-related issues with Russia, and its support of political engagement including through discussions in the 'Normandy Format' (*i.e.* the diplomatic group of senior representatives of Russia, Ukraine, France and Germany). In this last regard, however, it must be noted the role of EU Member States: while they have internally shown a critical heterogeneity of interests in relation to Ukraine, they have externally proven a certain ability to mediate within high-level diplomatic initiatives. This aspect is also relevant when assessing the EU's impact on the human rights situation in Ukraine.

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not provide loans with a maturity exceeding 30 days to the entities described above'; 4. 'Embargo on the import and export of arms and related material from/to Russia, covering all items on the EU common military list, with some exceptions'; 5. 'Prohibition on exports of dual use goods and technology for military use in Russia or to Russian military end-users, including all items in the EU list of dual use goods. Export of dual use goods to nine mixed end-users is also banned'; 6. 'Exports of certain energy-related equipment and technology to Russia are subject to prior authorisation by competent authorities of Member States. Export licenses will be denied if products are destined for oil exploration and production in waters deeper than 150 meters or in the offshore area north of the Arctic Circle, and projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing'; 7. 'The following services necessary for the abovementioned projects may not be supplied: drilling, well testing, logging and completion services and supply of specialised floating vessels'. See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[566] See Consolidated version of Council regulation (EU) No. 692/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol. See also European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Staff Working Document, 'Information Note to EU business operating and/or investing in Crimea/Sevastopol' SWD(2014) 300 final/2 (11 August 2014), http://eeas.europa.eu/ukraine/pdf/swd_2014_300_f2_joint_staff_working_paper_en_v8_p1_776932.pdf

[567] See Commission Notice of 25 September 2015, 'Commission Guidance note on the implementation of certain provisions of Regulation (EU) No 833/2014' C(2015) 6477 final.

[568] For instance, they have included the following: 'the European Council requested the EIB to suspend the signature of new financing operations in the Russian Federation' (16 July 2015) (EU Member States have coordinated their positions within the EBRD Board of Directors with a view to also suspending financing of new operations); 'the implementation of EU-Russia bilateral and regional cooperation programmes has been largely suspended'. Projects dealing exclusively with cross-border cooperation and civil society are maintained. See http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en

[569] See http://eeas.europa.eu/statements/docs/2014/140417_01_en.pdf.

An in-depth discussion on the escalation of violence in Ukraine and the EU's reaction to it was held in January 2015.[570] Stressing the EU commitment to 'actively support all diplomatic efforts conducive to creating a new political impetus', the Foreign Affairs Council stated that the focus of such talks remain the full implementation of the Minsk agreements and the respect for Ukraine's independence, sovereignty and territorial integrity. It also called for necessary progress 'on the withdrawal of illegal and foreign armed groups, military equipment, fighters and mercenaries, freeing of all hostages, securing the Ukrainian-Russian border with permanent monitoring by the OSCE' as well as 'on issues such as constitutional reform and decentralisation'.[571]

In the Council conclusions of 19 and 20 March 2015, all parties were called 'to swiftly and fully implement the Minsk agreements and honour their commitments', underlining 'the Russian authorities' responsibility in this regard'. It was stressed that the EU 'stands ready to support the process' concerning the OSCE's ability and capacity to monitor and verify the implementation of the Minsk agreements. Conversely, it was underlined that the EU 'will continue efforts in the trilateral processes on energy and EU-Ukraine DCFTA implementation'.[572]

c) EU institutions' political initiatives on the human rights situation in Crimea

As far as the European Parliament (EP) is concerned, two days after Russian-led separatists proclaimed the 'independence' of the region on 11 March 2014, an EP resolution condemned Russia's military aggression against Crimea and urged the European Council to adopt sanctions in the event of annexation.[573] The EP also decided to suspend its inter-parliamentary cooperation with the Russian Duma in the framework of the Parliamentary Cooperation Committee.[574] Consistent with this approach was the subsequent EP's resolution on the human rights situation in Crimea of 4 February 2016. In detailing the violations concerned it made the resumption of cooperation with the Russian Federation as well as the lifting of sanctions conditional upon the return of Crimea to Ukrainian control.[575] In this regard, Russian lawmakers expected 'a more compromise-ready attitude'.[576]

Regarding the instrument of inter-parliamentary cooperation, the EU-Ukraine Parliamentary Association Committee held two sessions in February and in November 2015, during which some relevant recommendations were made regarding the human rights situation in Crimea. The parties drew attention to the massive violations committed in Crimea and in Eastern Ukraine, and called for holding

[570] Foreign Affairs Council conclusions on Ukraine (29 January 2015).
[571] Ibid., para. 2.
[572] European Council conclusions on Ukraine (19 March 2015), para. 9.
[573] European Parliament, 'Resolution of 13 March 2014 on the invasion of Ukraine by Russia', P7_TA(2014)0248.
[574] European Parliament, 'Resolution of 13 March 2014 on the invasion of Ukraine by Russia', P7_TA(2014)0248.
[575] European Parliament, 'Resolution on the human rights situation in Crimea, in particular of the Crimean Tatars', 2016/2556(RSP).
[576] TASS, Russian News Agency, 'European Parliament's resolution on Crimea leaving no space for dialogue – lawmaker' (5 February 2016), http://tass.ru/en/politics/854691.

regular sessions to record and monitor human rights therein.[577] This call was reiterated at the second meeting[578] and has been implemented since then.

A further outcome of the European Parliament's initiatives related to Crimea comes from its references to the findings of international human rights organisations: the visibility of their work and agenda has increased, consolidating the synergies between them. For instance, the aforementioned EP resolution of 4 February 2016 referred to the findings of the OSCE Mission of July 2015 as well as to the work of Freedom House.[579] The Subcommittee on Human Rights (DROI) has also provided the EP with actual and up-to-date information concerning the human rights situation in the eastern neighbourhood, including Crimea.

As far as the European Council is specifically concerned, in its conclusions on Ukraine of 20 October 2014, the worsening of the human rights situation in the Crimean peninsula following the Russian Federation's occupation and illegal annexation was condemned with particular regard for 'the persecution and intimidation of the Crimean Tatar community, including the cases of kidnapping, torturing and killing of young male Crimean Tatars, the eviction of the Mejlis from its premises in Simferopol and interrogations of its activists'.[580]

The intimidation campaign and acts of violence against journalists as a result of the activities of the illegal armed groups in Donetsk and Lugansk were condemned by the spokesperson of HR/VP Ashton on 3 July 2014. In addition, concern was expressed at the kidnapping and imprisonment in Russia of Ukrainian military pilot Nadiya Savchenko on 17 July 2014.

3. The EU support of the Ukraine's reform process

An additional dimension of the EU approach to the evolving crisis situation has concerned its support of the Ukraine's reform process, together with other donors and in line with IMF conditionality. In its conclusions of 19 and 20 March 2015, the European Council 'called for the third Macro-Financial Assistance package for Ukraine to be adopted as a matter of urgency', acknowledging the Ukrainian government's reform efforts so far and calling on it to further intensify its work.[581] Indeed, it must be noted that 'a reinvigorated reform process' has been always deemed 'crucial' in view of Ukraine's political association and economic integration with the EU.

[577] European Union – Ukraine Parliamentary Association Committee, 'First meeting, 24-25 February 2015, Final Statement and Recommendations' (2015), https://polcms.secure.europarl.europa.eu/cmsdata/upload/0362441a-816f-490e-b36e- 8857721c369b/Final%20Statement%20and%20Recommendations.pdf

[578] European Union – Ukraine Parliamentary Association Committee, 'Second meeting, 4-5 November 2015, Final Statement and Recommendations' (2015), http://rada.gov.ua/uploads/documents/34799.pdf

[579] European Parliament, 'Resolution on the human rights situation in Crimea, in particular of the Crimean Tatars', 2016/2556(RSP), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0043+0+DOC+XML+V0//EN

[580] European Council conclusions on Ukraine (20 October 2014), para. 9.

[581] European Council conclusions on Ukraine (19 March 2015), para. 12.

In the same vein, in January 2015 the Foreign Affairs Council called on 'the Government of Ukraine to accelerate the implementation of political and economic reforms', urging it 'to deliver concrete results in key reform areas to reply to the population's aspirations of a democratic and modernised Ukraine, respecting the rights of persons belonging to national minorities'. In particular, it underlined that 'these reforms should stabilize the economic, financial and political situation and anchor the support of the international community, including by developing a climate suitable for investment'. A welcomed reform step was the adoption of the fiscal decentralisation laws.[582]

a) The EU-Ukraine European Agenda for Reform

A new instrument, namely the EU-Ukraine European Agenda for Reform, was adopted in Mid-2014.[583] Its contents was drafted since late March, on the occasion of the visit to Kyiv of a high level delegation from the European Commission and the EEAS. Then, it has been developed jointly by the Ukrainian Government, on one side, and the European Commission and the European External Action Service, on the other side. This programmatic document aims at matching Ukraine's short- and medium-term needs with EU's short- and mid-term support action. It is officially deemed to be 'a comprehensive road map' of the EU's contribution to the chief task of the development and basic transformation of Ukraine. In particular, this agenda concerns the smooth delivery of the EU support package as well as encompassing an inclusive set of measures which echoes 'the priorities of the Ukrainian Government and the expectations of the Ukrainian people'. Indeed, these measures cover assistance, constitutional reform, cooperation on energy matters, financial assistance by the EU, unilateral opening of its markets for Ukrainian products, reform of the judiciary, and visa liberalisation process.

What is remarkable is that it has been made public so as to enable 'an open discussion' with the representatives of the Ukrainian civil society on the major direction and the specific actions foreseen. Its nature as 'a living document that should take stock of progress and reflect evolving priorities' could positively impact the implementation of the objectives concerned.

The implementation of this agenda is supposed to be 'a joint effort' of both sides, under the coordination of the Support Group for Ukraine set up by the European Commission (on 9 April 2014) along with a national governmental institution dealing with the process of political association and economic integration with the EU.

Specific actions that have been deemed 'milestones' in the implementation of the European Agenda for Reform include:

- The EU's broad support to the OSCE in Ukraine through financial contribution to the OSCE Sustainability Fund for Ukrainian elections 2014-2015 and the OSCE Special Monitoring Mission.

[582] Foreign Affairs Council conclusions on Ukraine (29 January 2015), para 9.

[583] EU-Ukraine European Agenda for Reform, 4 July 2014.

- The Foreign Affairs Council's agreement of 23 June 2014 to establish a Common Security and Defence Policy mission to assist Ukraine in the field of civilian security sector reform, including police and rule of law.

- The 'State Building Contract' programme signed on 13 May 2014, worth EUR 355 million, plus EUR 10 million to support civil society, which will help the government of Ukraine to address short-term economic stabilisation needs and implement governance reforms in order to promote inclusive socio-economic development.

- The approval of an emergency Macro-Financial Assistance (MFA) loan programme for Ukraine of up to EUR 1 billion. It complemented an existing MFA package of up to EUR 610 million, bringing the total EU assistance under this financial instrument to EUR 1.61 billion. The disbursements under the two MFA programmes totalled EUR 600 million as of 17 June 2014.

- Autonomous trade measures granted by the EU to Ukraine on the elimination or reduction of customs duties on a large number of goods originating in Ukraine – which is in force since 23 April 2014, worth nearly EUR 500 million per year in tariff reductions.

- The signature of the Memorandum of Understanding enabling gas flows from Slovakia to Ukraine (as an important first step to diversify Ukraine's sources of gas supply).

4. Diplomatic tools of the EU's external human rights agenda

a) The use of diplomatic tools available within the EaP

1. Human rights dialogues

In the context of a deepening relationship between the EU and Ukraine under the EaP, in the wake of the signature of the AA in which they express mutual commitment to 'common values', an annual EU-Ukraine Human Rights Dialogue is scheduled.

In 2014 this dialogue was held in the framework of the EU-Ukraine Sub-Committee on Justice, Freedom and Security.[584] It allowed for an exchange of views on various issues affecting human rights: the investigations into crimes committed during the Maidan protests, the human rights situation in Eastern Ukraine and in Crimea, elections and electoral framework, freedom of assembly expression, antidiscrimination policy and rights of national minorities. Accordingly, Ukraine was *inter alia* encouraged to conduct effective and thorough investigations into the human rights abuses during the Maidan demonstrations, to adopt a legal framework governing freedom of assembly consistent with international standards, to enhance media ownership transparency and to complete the work on comprehensive anti-discrimination legislation. Prior to the said human rights dialogue, the EU met with representatives of international NGS and Ukrainian NGOs, in line with a developing practice of incorporating civil society's opinion into EU meetings on human rights with third countries.

[584] Press Release, 'EU-Ukraine Human Rights Dialogue' 140704/02 (Kyiv, 4 July 2014).

In the 2015 the EU-Ukraine Human Rights Dialogue, the range of issues of mutual interest which were discussed concerned the following: the deteriorating human rights situation in the illegally annexed Crimean peninsula and non-government controlled areas in Eastern Ukraine to ensuring accountability; the reform of the electoral framework; freedom of media; peaceful assembly in the country; non-discrimination policy (including rights of LGBTI persons and persons belonging to ethnic, linguistic, religious and national minorities), the rights of the child, gender equality and women's rights.[585]

Interestingly, during the same meeting, the EU placed emphasis on the importance of Ukraine's ratification of the Rome Statute of the International Criminal Court. This was done by stressing the need to investigate and ensure accountability for all reported human rights violations (including allegations of possible war crimes) committed in the context of the ongoing armed conflict, and to ensure full compliance with international humanitarian law by all sides.

The next Human Rights Dialogue meeting between the EU and Ukraine is scheduled to take place in summer 2016.

2. Joint Declaration of the EaP Summit

In a Joint Declaration by the participants to the EaP Summit held in Riga in May 2015, the strong support was expressed for 'all efforts aimed at de-escalation and a political solution based on respect for Ukraine's independence, sovereignty and territorial integrity'.[586] Participants called on all parties to the conflict 'to swiftly and fully implement' the Minsk Agreements and the related package of measures for their implementation. Moreover they called 'for the urgent release of all hostages and unlawfully detained persons'. They expressed full support for both the OSCE (and its efforts through the Special Monitoring Mission and the Trilateral Contact Group) and the Normandy format. They called upon all parties 'to fully cooperate with the international investigations and criminal proceedings to hold to account those who are responsible for the downing of MH17'.[587] They also reaffirmed their positions in relation to the UN General Assembly Resolution 68/262 on the territorial integrity of Ukraine.[588]

It must be noted that in the context of that Summit, emphasis was put on 'the need for the earliest peaceful settlement of the conflicts in the region on the basis of the principles and norms of international law', also underlining that 'the resolution of conflicts, building trust and good neighbourly relations are essential to economic and social development and cooperation'. In this vein, the

[585] Press Release, 'EU-Ukraine Human Rights Dialogue' 150725/01 (Kyiv, 25 July 2015).

[586] Participants included the Heads of State or Government and the representatives of the Republic of Armenia, the Republic of Azerbaijan, the Republic of Belarus, Georgia, the Republic of Moldova and Ukraine, the representatives of the European Union and the Heads of State or Government and representatives of its Member States. See Joint Declaration of the Eastern Partnership Summit (Riga, 21-22 May 2015).

[587] Ibid., para. 4.

[588] UN Doc. A/RES/68/262, Territorial integrity of Ukraine, 27 March 2014.

participants stressed the need for stronger EU engagement in the contribution to further promoting stability and confidence building.[589]

b) The use of diplomatic tools available in multilateral forums

The EU engagement with both the OSCE and the Council of Europe (CoE) in the wake of the Ukrainian crisis has been recurrent since its outbreak in late 2013. However, the cooperation with OSCE has not been that formalised and systematic as in the case of the CoE.

In any case, it is worth underlining that the EU's work through multilateral institutions constitutes the VII outcome of the 2012-2014 Action-Plan on Human Rights and Democracy, and that the specific objective concerning 'strengthened regional mechanisms for human rights' is the outcome n. 36. Also the 2015-2019 Action Plan requires, in relation to one of its general objective (*i.e.* 'A more effective EU human rights and democracy support policy'), the concrete action to 'engage systematically with the UN and with the regional organisations (*e.g.* AU, OAS, LAS, CoE, OSCE, ASEAN, SAARC, PIF) on best practices for human rights and the strengthening of democracy in all regions'.

Nonetheless, basic questions arise as follows. To what extent has the EU commitment to effective multilateralism in its external action impacted the EU tools and approaches to the Ukrainian crisis? To what extent have diplomatic tools available for use in multilateral forums complemented the ones at disposal of the EU under its own policies such as the ENP, the CFSP, and the CSDP? Has the EU been able to work with the OSCE and the CoE presence both on the ground and in Vienna/Strasburg, in the pursuit of its external human rights and democracy agenda? Has the basic need for systematic independent monitoring of the human rights situation in Crimea by impartial international bodies impacted the EU cooperation with other relevant actors?

1. OSCE

By the time the Ukraine crisis deepened in spring 2014, the OSCE agenda mostly focused on providing response to it, so reviving its political weight. This organization appeared a good available framework for managing the crisis and avoiding further escalation. Indeed, Russia's annexation of Crimea and its involvement in asymmetric warfare in Ukraine's Eastern Donbas region had violated some of the core principles of the OSCE documents. In particular, its dual function (*i.e.* posing a standard of international behaviour as well as proposing means to reduce tensions arising from the violation of such standard) has favoured its role as a legitimate forum for dialogue and cooperation. In this vein, the OSCE has assumed a significant role in the Trilateral Contact Group as well as in facilitating negotiations on implementing the Minsk agreements and the related Package of Measures. For instance, regular meetings of the OSCE Trilateral Contact Group and its four Working Groups on political, security, humanitarian and economic matters, continue to be central also in 2016.

The EU has supported the steps undertaken by OSCE on different levels and in different settings to address the crisis 'in and around Ukraine', including the OSCE mechanisms, specialised agencies and autonomous institutions (ODIHR, RFOM, HCNM) dealing directly or indirectly with the human rights

[589] Joint Declaration of the Eastern Partnership Summit (Riga, 21-22 May 2015), para. 5.

situation concerned. Nonetheless, the EU ability to cooperate with this regional actor has been inevitably affected by the presence of the Russian Federation as one of the OSCE participating States. In this vein, the legitimacy of this organization as a security actor has been put into question.

On the one hand, an OSCE Special Monitoring Mission (SMM) was established by the Permanent Council of the fifty-seven OSCE participating States on 21 March 2014, at the Ukrainian government's request following the Russian annexation of Crimea and the outbreak of open conflict in Eastern Ukraine.[590] It is noteworthy that a certain 'irrelevance' of the EU (at least on paper) emerged in this regard, as it was stipulated that 'the aim of the said mission will be to contribute, throughout the country and in co-operation with the concerned OSCE executive structures and relevant actors of the international community (such as the United Nations and the Council of Europe), to reducing tensions and fostering peace, stability and security (…)'.[591] Nonetheless, the EU has provided political, financial and material support to this OSCE crisis management and conflict resolution effort, such as donating 24 armoured vehicles to the SMM in 2015 as well as 20 armoured vehicles in 2016, or providing humanitarian aid.[592]

Remarkably, this unarmed civilian SMM is deployed throughout Ukraine, including in the conflict area, and several tasks are included in its mandate: gathering information on the situation in Ukraine in an impartial and transparent manner; documenting incidents as well as violations of OSCE principles and commitments; reporting on its observations on a daily basis; helping to promote respect for human rights including respect for the rights of minorities; coming up with solutions to emergency humanitarian situations (such as the establishment of humanitarian corridors to evacuate people from areas under siege) and enabling prisoner exchanges by providing the various parties with lists of relevant names; facilitating dialogue between the opposing sides and helping reduce tensions. According to the Minsk Protocol and Minsk Memorandum of September 2014 and the February 2015 Package of Measures for the Implementation of the Minsk Agreements, the SMM is also charged with monitoring the cease-fire agreements and the withdrawal of heavy weapons, as well as observing the withdrawal of all foreign armed forces, military equipment and mercenaries from Ukraine.

On the other hand, since 2014 the EU has put emphasis on the need for independent and transparent investigations of all human rights violations in Ukraine and for their perpetrators to be brought to justice.[593] In this vein, in addition to the OSCE SMM, the EU supported the OSCE Office for Democratic

[590] OSCE Decision No. 1117, 'Deployment of an OSCE Special Monitoring Mission to Ukraine' and attached interpretative statements, PC.DEC/1117, 21 March 2014. As for its prolongation, see OSCE Decision No. 1129 and attached interpretative statements, PC.DEC/1129; OSCE Decision No. 1162 and attached interpretative statements, PC.DEC/1162. The mandate of the SMM was initially for three months, but it has been extended twice, most recently until the end of March 2016. As for the size of the mission, it is headquartered in Kyiv and in operation throughout Ukraine with the exception of Crimea. The majority of observers are stationed in the Eastern Ukrainian regions of Donetsk and Lugansk. It consists of around 600 unarmed experts from more than forty OSCE participating States, and of local staff either for administrative and advisory purposes or translation. If necessary the Chief Monitor can deploy up to 1,000 international observers.

[591] *Ibid*.

[592] See http://eeas.europa.eu/ukraine/about/financial-technical_assistance_en.htm

[593] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015).

Institutions and Human Rights (ODIHR) and the OSCE High Commissioner on National Minorities (HCNM) joint Human Rights Assessment Mission (HRAM) to Ukraine, which was deployed in early March 2014, in response to the invitation on behalf of the Government of Ukraine.[594] Furthermore, the EU supported the OSCE-OIDHR/HCNM joint Human Rights Assessment Mission (HRAM) on Crimea deployed in July 2015, following the invitation by the Government of Ukraine.[595] In this respect, the indirect contribution of the EU to upholding human rights has been channelled via the OSCE field presence by means of the financial resources devoted to its various missions to Ukraine (as will be detailed below).

However, strong difficulties were faced by OSCE to monitor the situation through an on-the-spot presence in Crimea. Indeed, this presence was discontinued early (after a meeting between OSCE Representative on Freedom of Speech Dunja Mijatovic with local journalists in Simferopol on 5 March 2014 was obstructed by armed members of the Russia-backed 'Crimean self-defence militia'). From then on, the OSCE was unable to access the peninsula, either via the OSCE SMM or through the OSCE representation in Kyiv. Accordingly, in the Helsinki Declaration of July 2015 the OSCE Parliamentary Assembly condemned the Russian Federation's actions in Ukraine, including Crimea.[596] Sentsov and Kolchenko cases and abductions were specifically mentioned in this document. The unhindered access by the OSCE SMM to all areas of Ukraine was also demanded. Like other monitoring organisations (*e.g.* UN, CoE), this basic issue also affected the aforementioned OSCE-OIDHR/HCNM HRAM on Crimea between 6 and 18 July 2015: without access onto the peninsula, it could only conduct fact-finding and research in the territory of mainland Ukraine as well as through remote interviews with relevant local contacts.[597]

As far as the protection of national minorities is concerned, the EU has provided political support to the OSCE High Commissioner on National Minorities, who has been very active in conflict-torn areas where minority issues are still crucial. Reportedly, the High Commissioner's stand on the situation in Ukraine, especially concerning the Tatar minority in Crimea, has been fully aligned with the EU's position.[598] It must be noted that the promotion of 'the respect for the rights of persons belonging to minorities (including the prevention of racism and xenophobia)' constituted the outcome n. 28 of the 2012-2014 Action Plan, within the V outcome (*i.e.* 'Implementation of EU priorities on human rights').

The EU-OSCE cooperation in the Ukrainian context relates to an additional relevant field, namely the OSCE Election Observation Missions deployed for both the presidential and parliamentary elections in

[594] OSCE-OIDHR/HRAM, Report on 'Human Rights and Minority Rights Situation (ODIHR HRAM: 6 March – 11 April 2014, HCNM HRAM: 8 March – 17 April 2014', (The Hague/Warsaw 12 May 2014), http://www.osce.org/odihr/118476

[595] See OSCE OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015)', 17 September 2015, http://www.osce.org/odihr/180596?download=true

[596] OSCE Parliamentary Assembly, 'Helsinki Declaration', 5-9 July 2015, 22, http://www.oscepa.org/documents/all-documents/annual-sessions/2015-helsinki/declaration-3/2977- 2015-helsinki-declaration-eng/file

[597] OSCE OIDHR and HCNM, 'Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015)', 17 September 2015, 4-5.

[598] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 110.

Ukraine (25 May and 26 October 2014). In particular, in line with its commitment to the advancement of human rights and democratic principles, the European Parliament sent delegations to observe both elections, which were fully integrated in the OSCE missions. According to the new 'Comprehensive Democracy Support Approach', elections are not deemed 'one-off' events, and the European Parliament is supposed to monitor carefully 'the implementation of the recommendations of the international missions in a broader democracy-building approach'.[599]

These efforts actually followed the EP's election observation activities of 2012, when it sent a delegation to Ukraine and a preparatory mission to Ukraine. The primary objective was to assess whether electoral procedures were conducted in agreement with the national legislation of the host country and its international commitments for democratic elections. Even in that occasion the EP delegation was integrated within the framework of the joint International Election Observation Missions (IEOM) with the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in charge of the long-term missions.

An additional aspect to be considered in relation to the EU-OSCE cooperation in the Ukrainian context is the role of the EU Delegation to the International Organisations in Vienna. Its diplomatic activism has been characterised by regular support to the OSCE SMM to Ukraine, to the OSCE Observer Mission at the Russian Checkpoints Donetsk and Gukovo, to the OSCE autonomous institutions, to the initiatives of OSCE CiO, along with increased EU statements concerning the crisis at the weekly OSCE Permanent Councils.[600] In this vein, the EU Delegation's statements delivered at the yearly Human Dimension Implementation Meeting of 2015 also emphasised the issues of the human rights violations occurring in the unstable Ukraine, their connection with the security threats faced by this neighbouring State, and the unimpeded access of the OSCE to the destabilised areas.[601]

In relation to further efforts by the EU to maintain a certain level of political representation, the attendance by the HR/VP of the OSCE Ministerial Council in 2014 (in Basel) and in 2015 (in Belgrade) has been characterised by a focus on the Ukrainian crisis. Remarkable were her references to OSCE/ODHIR and HCNM as a source of information and evaluation concerning human rights violations in the Crimean peninsula, thanks to their established basic networks of local contacts with several sectors of the Ukrainian authorities and society, and despite their limited 'genuine' access to Crimea.[602]

Therefore, the EU-OSCE engagement in Ukrainian has apparently resulted in a certain 'division of labour' between a more bureaucratic and political EU and an OSCE equipped with local contacts and technical expertise in some human rights-related-issues (such as elections, national minorities, Roma,

[599] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 127.

[600] For details on the diplomatic activism of the EU Delegation in Vienna and the EU efforts to raise its voice, see FRAME Deliverable 5.2, 191-194, in particular see Table 11.

[601] See 'EU Statement – Opening Session' and 'EU Statement – Closing Session', OSCE Human Dimension Implementation Meeting (Warsaw, 21 September – 2 October 2015).

[602] 'Statement by Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy', MC/DEL/64/15, 22 Meeting of the OSCE Ministerial Council (Belgrade, 3 December 2015).

freedom of religion). A related basic aspect of such cooperation within the Ukrainian context has been informality. This has apparently played a crucial role, with the EU frequently asking for advice in view of the OSCE human resources as well as the OSCE ability to get local contacts and to exchange/share information in the sensitive and challenging Ukrainian environment.[603]

2. Council of Europe

In the wake of the Ukrainian crisis, the cooperation between the EU and the CoE has been systematic, as it has actually been since 2002).[604] In particular, an intensive cooperation between them has been developed in the field of judiciary, starting with the launch of a joint program ('Ukraine V: Strengthening Democratic Stability in Ukraine) in 2003. Another relevant joint programme was implemented between 2008 and 2011 ('Transparency, independence and efficiency of the judicial system and increased access to justice for all citizens in Ukraine') with a total budget of EUR 6 million. However, as already highlighted in previous sections, a primary obstacle in EU-Ukraine relations since 2010 as been the ineffective and selective domestic justice, thus becoming of great importance for the EU to support the reform of the judicial system in the country. In this vein, the projects launched under the 2015-2017 CoE Action Plan on Ukraine are coordinated with the EU Delegation in Kiev.[605] In this context, the EU project ('Support to Justice Sector Reforms in Ukraine') supported the Ukrainian government to design 'the Ukraine Judiciary Development Strategy 2015-2020', which was approved by the Council of Judges of Ukraine in December 2014.

In June 2015 a new project between the EU and the CoE on 'Strengthening the Implementation of European Human Rights Standards in Ukraine' has started to be implemented within the Programmatic Co-operation Framework between the EU and CoE for the countries of the EaP (whose total budget is of EUR 33.8 million for 2015-2017). It aims at supporting 'the alignment of human rights policies and practices' by ensuring compliance of legislative and regulatory frameworks with European standards and capacity-building activities for legal professionals and NHRIs. In particular, it is supposed to cover three directions: (a) support to police reform and fight against ill-treatment and impunity; (b) strengthening the Ombudsperson's Office operational activities in Ukraine; (c) implementation of European Convention on Human Rights via trainings.[606]

In the field of information society in Ukraine, a current Joint Programme between the EU and the CoE contributes to the implementation of obligations and commitments of Ukraine before the Council of Europe, of the Association Agreement with the European Union and of the Visa Liberalisation Action

[603] For further details, see FRAME Deliverable 5.2.

[604] See full list: CoE-EU, Joint Programmes - Logframes and Activities, http://www.jp.coe.int/CEAD/JP/Default.asp?TransID=55; CoE-EU, Joint Programmes - Activities by Country, http://www.jp.coe.int/CEAD/Countries.asp?CID=47

[605] The five priorities of the 2015-2017 CoE Action Plan include: Constitutional Reform and Functioning of Democratic Institutions, Reform of Judiciary, Democratic Governance, Economic Crimes, Human Rights.

[606] See EU-CoE, 'Note for the Press', 'Strengthening the Implementation of European Human Rights Standards in Ukraine', available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048457a

Plan with the European Union. [607] This programme aims at strengthening the protection of human rights and fundamental freedoms through: (I) greater freedom, diversity and pluralism in the media; (II) an open, inclusive, sustainable, people-centred and human rights-based approach to the Internet; (III) an effective system of protection of individuals with regard to their right to privacy and right to control their personal data.[608]

Against this background, it seems that in the EU-CoE cooperation in the unstable Ukrainian context, the format of 'joint programmes' has a certain potential to contribute to the democratization of this neighbouring partner. Furthermore, in the EU external human rights agenda and action, the approach of 'borrowing' standards of formal democracy from the CoE[609] (including the Venice Commission's opinions[610]) has the potential to produce a synergy effect and enrich the joint programmes concerned.

Concerning the specific need for systematic independent monitoring of the human rights situation in Ukraine by impartial international bodies, some considerations may be articulated in the context of the EU cooperation with the CoE.

Firstly, in relation to the outbreak of the Ukrainian crisis, the EU has welcomed the early initiative concerning the establishment of an International Advisory Panel of the Council of Europe in 2014 to monitor the investigations by Ukrainian authorities of the violent incidents that took place between 30 November 2013 and 21 February 2014 as well as of the Odessa events of 2 May 2014.

Secondly, the Parliamentary Assembly of the CoE (PACE) was able to publish a very detailed report on missing persons in Ukraine, including the situation in Crimea, in June 2015.[611]

Thirdly, in late January 2016 a delegation was sent by the Secretary General of the Council of Europe to Crimea and gained access to the peninsula, with the purpose to assess the human rights and rule of law situation therein and to prepare a report containing recommendations in a number of key areas within

[607] It is funded by the European Union and the Council of Europe and implemented by the Council of Europe.

[608] The beneficiaries and partners of the programme include: State TV and Radio Committee of Ukraine, National Broadcasting Council of Ukraine, Ombudsperson (Parliament Commissioner for Human Rights), Verkhovna Rada of Ukraine (Parliamentary Committee on Freedom of Speech and Information, Parliamentary Committee on human rights, national minorities and interethnic relations, Parliamentary Committee on informatisation and information technologies), National Commission for the regulation of state communications and informatisation, Presidential Administration, Secretariat of the Cabinet of Ministers, training institutions, professional associations, judicial authorities, civil society organisations, journalists, bloggers, private sector.

[609] See Tom Casier. 'The EU's two-track approach to democracy promotion: the case of Ukraine' (2011) 18, *Democratization*, 956-77.

[610] See Venice Commission, 'Opinions for Ukraine', available at http://www.venice.coe.int/webforms/documents/?country=47&year=all.

[611] Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons, 'Missing persons during the conflict in Ukraine' Report Doc. No. 13808 (8 June 2015), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21795&lang=en

the CoE mandate.[612] In particular, the CoE mission's mandate covered all major human rights issues, including freedom of expression and media freedom, freedom of association and of assembly, minority rights and prison conditions. Remarkably, since the beginning of the armed conflict in April 2014 this was the first time of a human rights monitoring presence of an international organisation on the Crimean peninsula. The EU should not underestimate this significant achievement.

In the same vein, it is noteworthy that two co-rapporteurs of the PACE Monitoring Committees (*i.e.* Committee on Legal Affairs and Human Rights; Committee on Political Affairs and Democracy) made a joint fact-finding mission to Kyiv, Mariupol and Dnipropetrovsk, from 4 to 7 April 2016, in order to gather information for the preparation of their reports on the 'Legal remedies to human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities' and on the 'Political consequences of the crisis in Ukraine'.[613]

3. United Nations

a) Supporting Resolutions of the Human Rights Council

The EU supported a UN Human Rights Council resolution on 'cooperation and assistance to Ukraine in the field of human rights', which was adopted on 27 June 2014, under the Agenda Item on Technical Assistance and Capacity Building.[614] In particular, the UN body called upon all concerned parties to

[612] See 'Report presented to the Secretary General of the Council of Europe by Ambassador Gérard Stoudmann on his human rights visit to Crimea (25-31 January 2016)', 11 April 2016, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064211f

[613] See 'Reports under preparation in the Committees of the Parliamentary Assembly of the Council of Europe', AS/Inf (2016) 05, 23 May 2016, available at http://website-pace.net/documents/10643/59254/RepPrepAll-E.pdf/716ad616-261a-46fe-a280-9a530f9ddf28. The two PACE delegates were Marieluise Beck (Germany, ALDE) and Kristýna Zelienková (Czech Republic, ALDE). In Kiev, meetings were scheduled with the Speaker of the Verkhovna Rada, the Ministers for Foreign Affairs and Internal Affairs, as well as heads of political factions and members of the Ukrainian delegation to PACE. They also met representatives of the Mejlis of the Crimean Tatar People, and representatives of civil society and the media. In Mariupol and in Dnipropetrovsk they met representatives of local authorities and leaders of international organisations and local NGOs, people living in the occupied territories, victims and witnesses of human rights violations. See Parliamentary Assembly News, 'Human rights violations in Eastern Ukraine and political consequences of the conflict: rapporteurs to visit Ukraine', 1 April 2016, http://reliefweb.int/report/ukraine/human-rights-violations-eastern-ukraine-and-political-consequences-conflict

[614] A/HRC/26/L.15/Rev.1, 25 June 2014, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.15/Rev.1. The following 23 countries voted in favour: Austria, Benin, Botswana, Chile, Costa Rica, Côte d'Ivoire, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Maldives, Mexico, Montenegro, Philippines, Republic of Korea, Romania, Sierra Leone, The former Yugoslav Republic of Macedonia, United Kingdom, and United States of America. The following 4 countries voted against: China, Cuba, Russian Federation, and Venezuela. The following 19 countries abstained: Algeria, Argentina, Brazil, Burkina Faso, Congo, Ethiopia, Gabon, India, Indonesia, Kazakhstan, Kenya, Kuwait, Namibia, Pakistan, Peru, Saudi Arabia, South Africa, United Arab Emirates, and Viet Nam. It is noteworthy that, on behalf of the EU, in a general comment Italy underlined that it was right and appropriate for the Human Rights Council to support a country seeking assistance with a view to promoting and protecting human rights on its own territory. The EU strongly supported the initiative of Ukraine seeking such assistance. It welcomed that the draft resolution addressed human rights concerns in all of Ukraine and applicable international law. The EU regretted that ongoing activities of illegal armed groups had caused a worsening of the

cooperate fully with, provide access to and allow deployment of independent human rights monitors (para. 4), and to implement recommendations contained in the reports of the Office of the High Commissioner for Human Rights (para. 5). It also called on the Government of Ukraine to continue its reform efforts aimed at strengthening the human rights protection of all citizens, the rule of law and democracy (para. 6). It called upon all concerned to respect freedom of expression and safe space for work of journalists (para. 14). The Council also strongly condemned the violence and abuses committed by illegal armed groups (para. 15); it urged the Government of Ukraine to conduct security and law enforcement operations in accordance with applicable international law (para. 16). This resolution also called for protection of all human rights in Ukraine, in particular in Crimea for issues related to citizenship, right of residence, property and land rights, labour rights, access to health and education, freedoms of expression, association, religion and belief, peaceful assembly (para. 13).

b) Supporting the OHCHR Human Rights Monitoring Mission to Ukraine

In relation to the emphasized need for independent and transparent investigations of all human rights violations and for their perpetrators to be brought to justice, the EU has consistently lent 'full support' to the work of the UN OHCHR Human Rights Monitoring Mission to Ukraine (HRMMU). This was deployed on 14 March 2014 to monitor and report on the human rights situation throughout Ukraine, including on the territories illegally annexed by Russia or under the control of illegal armed groups, and to propose recommendations to the Government and other actors to address human rights concerns.[615]

c) Council conclusions on the EU priorities at UN Human Rights Fora

In the Council conclusions on EU priorities at UN Human Rights Fora of 9 February 2015, the EU expressed its intention to bring to the fore 'the human rights impact of the conflict in Eastern Ukraine and of the illegal annexation of Crimea by the Russian Federation'. A concern was also raised for 'the growing number of victims and serious human rights violations and abuses in Eastern Ukraine and further deterioration of the human rights situation in Crimea, particularly the continuing persecution and intimidation of the Crimean Tatars'. Furthermore, the EU confirmed its recurrent call on all parties to the crisis in eastern Ukraine 'to respect international humanitarian law and principles to protect civilians'.[616]

A year later, in the Council conclusions on the EU priorities at UN Human Rights Fora of 15 February 2016, adopted in the 10th anniversary year of the UN Human Rights Council, the Ukrainian situation was referred to by the EU as well. Again, emphasis was put on the need to address 'serious human rights

overall human rights situation, which the draft text also addressed, http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/0854BDE3BFCC2FFCC1257D040057E35B?OpenDocument. See http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14796&LangID=E

[615] For more details, see OHCHR, 'Report on the situation of human rights in Ukraine' (19 September 2014), UN Doc. A/HRC/27/75, paras. 7-8.

[616] Council of the European Union, 'Council conclusions on EU priorities at UN Human Rights Fora in 2015' 5927/15, 9 February 2015, para. 6.

violations and abuses linked to the conflict in eastern Ukraine and the deeply concerning human rights situation on the Crimean peninsula, the illegal annexation of which by the Russian Federation the EU does not recognise and continues to condemn'.[617] Accordingly, the EU expressed 'full support to the UN Human Rights Monitoring Mission in Ukraine' and called on 'all actors involved to respect international humanitarian and human rights law'. Moreover, 'the overall strengthening of the rule of law' was deemed basically important 'for the observance of human rights and fundamental freedoms in Ukraine'.

However, a certain criticism has emerged in relation to such 'limited engagement' of the EU on Ukraine at the United Nation level. In view of the second anniversary of the 'Maidan revolution', several civil society organizations addressed that not a word was said by the EU about the deaths of those demonstrators (often having the European flag in their hands) as well as about the Kyiv government's inability to contest a sense of impunity for such acts, or about the Ukrainian government's lack of engagement in implementing the recommendations to the UN OHCHR Human Rights Monitoring Mission in Ukraine. In this vein, silence appeared not a credible strategy. Conversely, two years after the 'Maidan revolution' and the beginning of the Russia's occupation of Crimea, the EU was expected to announce a more concrete action at the United Nations (in particular the Security Council as well as the Human Rights Council) to hold the Ukrainian government to its human rights commitments, to secure 'credible steps' to implement the UN recommendations concerned, and to take further detail at the United Nation not only 'what progress is expected from Kyiv', but also 'what will await illegal armed groups' and 'what the occupying force in Crimea must know about its responsibility for human rights abuses'.

In other words, the 2016 Council Conclusions have been criticised for denoting 'a human rights strategy of silence' which does not hold States accountable to their universal commitments, does not raise their wrongdoings publicly and avoids (in any case) the EU raising its voice against the worsening situation in its neighbourhood. In this vein, emphasis is put on the need for an EU strategy that treats countries equally, that holds the States leaders to their commitments by engaging with the international community, and that clarifies that the EU's external political agenda is indeed nurtured by the promotion and protection of its underpinning values.

5. Operational tools

EU humanitarian assistance in Ukraine is delivered through the European Commission's humanitarian partner organisations, which include People In Need (PIN), ICRC, Danish Refugee Council, ACF, UNHCR, WHO, IOM, Save the Children, PU-AMI, Caritas, NRC, WFP, UNICEF and OCHA. The Commission is also assisting Ukrainian refugees in Belarus and Russia through the national Red Cross Societies in the respective countries.

EU's assistance is intended to 'address the basic needs of those most affected by the conflict, including in areas not controlled by the government'. The assistance covers shelter, food, water, health care,

[617] Council of the European Union, 'Council conclusions on EU priorities at UN Human Rights Fora in 2016', 15 February 2016, para. 7.

sanitation and other emergency aid. 'If the right conditions are in place, assistance is delivered through cash and vouchers'.

6. Financial tools of the EU's external human rights agenda

In view of the difficult human rights situation caused by the conflict in Eastern Ukraine, in 2014 financial support was provided by the EU through the Civil Society Organisations and Local Authorities Programme (EUR 2 million to be used for actions in 2015) and the Neighbourhood Civil Society Facility (EUR 2 million out of the 2013 budget of the European Neighbourhood and Partnership Instrument).

During the same year, in response to the economic and political crisis, the EU adopted a Special Measure for Ukraine worth EUR 365 million, of which EUR 10 million was intended for supporting civil society's role in monitoring the reform process (bilateral assistance funds). The EU has coordinated its actions with the European Endowment for Democracy.

Some 20 EIDHR projects (dealing with issues encompassing free legal aid delivery reform, voting rights, the fight against discrimination, measures to combat torture and ill-treatment) have been carried out throughout Ukraine. In March 2014 a top-up of EUR 630 000 enabled 4 additional projects to be financed. These projects covered independent exit polling and media outreach during the May and October elections, monitoring of the human rights situation in the Crimea and Lugansk regions and legal assistance to victims of human rights abuses and IDPs. Through the Instrument contributing to Stability and Peace (IcSP), the EU has supported the deployment of both ODIHR supplementary observers and the ENEMO international observation mission for the presidential and parliamentary elections, which have contributed to a more transparent electoral process in Ukraine.[618]

In response to the challenging situation in Ukraine, the European Commission agreed on international economic support package for Ukraine in March 2014, worth EUR 11.1 billion over the coming years. This package set up a number of concrete measures to assist economically and financially Ukraine.[619] Key elements of this package included: EUR 3 billion from the EU budget in the coming years; EUR 1.6 billion in macro financial assistance (MFA) loans and an assistance package of grants of EUR 1.4 billion; up to EUR 8 billion from the European Investment Bank and the European Bank for Reconstruction and Development; potential EUR 3.5 billion leveraged through the Neighbourhood Investment Facility; setting up of a donor coordination platform; provisional application of the DCFTA Deep is signed and, if need be, by autonomous frontloading of trade measures; Organisation of a High Level Investment Forum/Task Force; modernisation of the Ukraine Gas Transit System and work on reverse flows, notably via Slovakia; acceleration of Visa Liberalisation Action Plan within the established framework; offer of a Mobility Partnership; technical assistance on a number of areas from constitutional to judicial reform and preparation of elections.

In relation to the key element of decentralization within the aforementioned constitutional reform negotiated under Minsk II, it is worth underling that, in the margins of the EU-Ukraine Association

[618] EEAS, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015), 166.

[619] http://europa.eu/rapid/press-release_IP-14-219_en.htm

Council of 7 December 2015, the European Commission adopted a major set of measures to support decentralisation reform and re-enforcement of local governance in Ukraine. In particular, a EUR 97 million programme jointly funded by the EU (EUR 90 million), Germany (EUR 6 million) and Poland (EUR 1 million) was announced to 'strengthen governance and accountability at local, regional and central levels to better respond to the needs of the population'.[620]

In 2015 EUR 10 million of additional support funded by the Instrument contributing to Stability and Peace (IcSP) were also allocated 'for the restoration of governance, reconciliation and peace-building in the Eastern part of Ukraine, most affected by war and displacement'.[621]

On 15 April 2015, the European Parliament and the Council of the Europe Union adopted a decision to provide macro-financial assistance to Ukraine of up to EUR 1.8 billion in the form of a loan. The objective of this measure is 'to ease Ukraine's urgent external financing constraints, alleviate its balance of payment and budgetary needs and strengthen its foreign exchange reserve position.' [622] This MFA from the EU complements the resources provided to Ukraine by International Financial Institutions and bilateral donors in support of the economic stabilization and reform programme recently launched by the Ukrainian authorities.[623] The MFA is thus intended to help the new reform-orientated government strengthen the country and deal with economic and political challenges. This is the third MFA programme for Ukraine since 2010. Indeed, the European Commission has already disbursed EUR 1.61 billion in support of Ukraine under two previous MFA programmes.

As far as humanitarian assistance in Ukraine is concerned, the EU (European Commission and Member States combined) has provided financial aid for both humanitarian and early recovery operations for a total around EUR 260 million.[624] EUR 100 million of this has been provided since February 2015. Around 55% of the Commission's humanitarian assistance goes to the non-government controlled areas in the Donetsk and Lugansk regions (EUR 42.4 million so far). Projects implemented in the first half of 2015

[620] European Commission - Press release (Brussels, 7 December 2015), http://europa.eu/rapid/press-release_IP-15-6263_en.htm

[621] In force since 2014, the IcSP is the main tool to support security initiatives and peace-building activities. It replaced the Instrument for Stability IfS.

[622] Decision (EU) 2015/601 of the European Parliament and the Council, providing macro-financial assistance to Ukraine, OJ L 100/1 17 April 2015. It is worth highlighting that the Macro-Financial Assistance (MFA) is an exceptional EU crisis-response instrument available to its neighbouring partner countries experiencing severe balance of payments issues. The assistance is aimed at reducing the economy's short-term balance of payments and fiscal vulnerabilities. The disbursement of the planned tranches under the MFA programmes is conditional on the implementation of the specific economic policy and financial conditions outlined in the Memoranda of Understanding (MoU) for the MFA for Ukraine and on the continuous satisfactory track record of implementing the economic adjustment programme supported by the IMF Stand-By Arrangement with Ukraine that was approved on 30 April 2015. The policy conditions specified in the MoU fall into the following four thematic areas: public finance management and anti-corruption, trade and taxation, energy sector and financial sector reforms. See http://eeas.europa.eu/ukraine/about/financial-technical_assistance_en.htm

[623] For details of the MoU between EU and Ukraine (2015), see http://ec.europa.eu/economy_finance/international/neighbourhood_policy/doc/mou_eu_ukraine_en.pdf

[624] See http://ec.europa.eu/echo/where/europe-and-central-asia/ukraine_en, accessed in June 2016

from the Commission's humanitarian funding have directly helped over 460,000 Ukrainians. The humanitarian assistance from EU Member States amounts to EUR 78 million. The early recovery assistance for internally displaced persons in Ukraine amounts to EUR 31 million from the Commission and EUR 91 from Member States. In early 2015, the EU and Austria, Denmark, Estonia, Finland, France, Germany, Latvia, Poland and Slovenia also jointly delivered 85 tonnes of emergency supplies by air and road, including tents, blankets and sleeping bags for the harsh winter conditions.

Under the European Neighbourhood Instrument (ENI), planned EU grant assistance for Ukraine may total up to EUR 1 billion in the period 2014-2020. This amount is indicative: as for all Neighbourhood countries, final allocations will depend on the country's needs and its commitment to reform. Moreover, Ukraine may benefit from additional financial assistance granted through the multi-country 'umbrella programme', which is the incentive-based mechanism that rewards progress towards building deep and sustainable democracy by supplementary financial allocations ('more for more').[625]

Ongoing programmes under the European Neighbourhood and Partnership Instrument (ENPI) focus on support for the EU-Ukraine AA, on reforms in energy, environment, transport, regional and rural development and migration. Support for public institutions and promotion of EU best practice are significant elements of ongoing and future cooperation across all sectors.

Overall, it is worth highlighting the range of support the EU has provided to strengthen institutions in Ukraine:

- Memorandum of Understanding and Loan Agreement related to the Macro-Financial assistance programme of EUR 1.8 billion

- Macro-Financial Assistance (MFA) under the conditions agreed between the Ukrainian authorities and the EU and linked to Ukraine's sustained implementation of the IMF programme

- extension of autonomous trade preferences

- development grants to support state-building and stabilise the economy

- humanitarian aid

- expert advice across all areas of governance overseen by a specially created Support Group for Ukraine

- deployment of an Advisory Mission (EUAM) to advise on civilian security sector reform

7. CSDP tools: EUAM Ukraine

The EU Advisory Mission for Civilian Security Reform Ukraine (EUAM Ukraine) was established on 22 July 2014 as an unarmed, non-executive civilian mission under the EU's CSDP; the EU advisers have initially focused on supporting the elaboration of revised security strategies and the rapid implementation of reforms, in coordination and coherence with other EU efforts, with the OSCE and other international

[625] See http://ec.europa.eu/enlargement/neighbourhood/countries/ukraine/index_en.htm

partners'.[626] EUAM is intended to provide strategic advice for the development of sustainable, accountable and efficient security services that contribute to strengthening the rule of law in Ukraine.

In line with the 2013 Crisis Management Procedures,[627] human rights and gender considerations were addressed during the planning process for the new CSDP mission to Ukraine, and an analysis of the human rights and gender situation was integrated into the planning documents of the EU Advisory Mission for Civilian Security Sector Reform Ukraine.[628] This aspect is in line with the objective of 'reflecting human rights in crisis management activities' (outcome n. 12 in the Action Plan 2012-2014), as part of the more general objective of mainstreaming human rights in all EU external policies and instruments (IV outcome in the Action Plan 2012-2014).

Alongside its support to civilian security-sector ministries and the reform process in Ukraine, EUAM is encouraging the improvement of human-rights standards by all of its partners, including the Ministry of Justice, law-enforcement and other judicial bodies. These partners are required to report back to the Ukraine's Cabinet of Ministers on their progress in implementing a new Human Rights Action Plan every quarter, under the Cabinet of Ministers' Decree that formally endorsed this Human Rights Action Plan for the implementation of the country's National Human Rights Strategy over the period 2016-2020. It is noteworthy that EUAM advisors played an important role in the process of devising and fine-tuning this Action Plan, by participating in four out of five working groups that were created by the Ministry of Justice to deal with specific thematic areas and by submitting more than sixty recommendations. In particular, key inputs delivered by EUAM included advice on combating torture and inhumane treatment, on protecting prisoners' rights, on core reforms of the penitentiary system, on ensuring the right to a fair trial, right to privacy, and freedom of peaceful assembly. EUAM advocated for gender equality, the ratification of the Istanbul Convention (to combat domestic violence and violence against women), and the adoption of a national action plan for the implementation of the UN Security Council Resolution 1325 (which addresses the impact of war on women, and the role women can play in conflict management).[629]

In this context, basic questions arise as follows:

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[626] Council Decision 2014/486/CFSP of 22 July 2014. OJ L217, 23 July 23 2014, 42. EU High Representative Federica Mogherini and Ukrainian Foreign Minister Pavlo Klimkin signed the EU-Ukraine Status of Mission Agreement on 17 November 2014.

[627] Council of the European Union, 'Suggestions for crisis management procedures for CSDP crisis management operations' 7660/2/13 REV 2 (18 June 2013), http://data.consilium.europa.eu/doc/document/ST-7660-2013-REV-2/en/pdf

[628] See http://www.eeas.europa.eu/csdp/missions-and-operations/euam-ukraine/index_en.htm

[629] In the words of the EUAM Human Rights/Minorities Advisor, Maura Morandi, '*The Action Plan, together with the Strategy, are important tools to address human-rights issues, in accordance with European and international standards. EUAM stands ready to support the Ukrainian authorities in implementing the Action Plan. We have a variety of experts who can assist the introduction of systemic changes to boost the rule of law and protection of human rights in Ukraine*', see 'EUAM Ukraine experts welcome human rights boost for Ukraine', 29 January 2016, http://www.euam-ukraine.eu/en/public_information/news/887/

- Do the 2014 events in Ukraine show that is impossible to build a well-functioning democratic state without deep reform of the security sector? Is the police and security sector reform to be regarded as a crucial component in the stabilization of Ukraine and as a conflict prevention measure in the longer term? Has this view impacted the EU's response to the security challenges faced by Ukraine?

In light of the 2014 Revised Crisis Management Concept for the EUAM Ukraine, does this unarmed, non-executive civilian mission constitute a 'unique chance' to provide strategic advice for the development of 'sustainable, accountable and efficient security services' that strengthen the rule of law in Ukraine? Or is this civilian mission a strategic choice to support the empowerment of Ukraine in order to avoid potential claims of limited efficiency or scarce impact on the security situation on the ground?

- Could the focus of the mandate of EUAM Ukraine (*i.e.* supporting local constiTEUncies through training, mentoring and advising activities) along with the financial packages of the European Commission become a special feature of the EU's crisis management model and its added value in comparison with other security actors?

In more general term, has the EU supported the pursuit of conflict sensitive reforms in various sectors (including governance, administrative reform, security sector reform, etc.)? Should conflict sensitivity and conflict risk assessment be incorporated into all EU assistance programmes?

F. Conclusions

From the perspective of the content of the EU toolbox, the EU has used a vast array of tools that have directly or indirectly tackled the human rights implications and democracy challenges emerged in the unstable Ukrainian context.

Policy tools (*e.g.* Council conclusions, EP resolutions, Commission initiatives, Reports) have been adopted in the context of the Maidan protests as well as in the context of Russia's annexation of Crimea and the armed conflict in Eastern Ukraine. However, the EU's engagement in supporting the efforts to come to a 'sustainable political solution' has had a limited impact on the worsening human rights situation in the Crimean peninsula. In particular, the EU approach of pushing for a peaceful resolution of the crisis has combined exercising pressure through several restrictive measures with sustaining high-level diplomatic networks and continuing dialogue with the parties to the conflict. In this regard, the EU has firmly and consistently maintained the full implementation of the Minsk agreements and the respect for Ukraine's independence, sovereignty and territorial integrity, in line with the core values and principles of the EU. Additional political initiatives undertaken by the European Parliament as well as by the European Council have contributed to sustain public awareness of the human rights situations in Crimea.

Financial tools (*e.g.* structural/regional ones as well as EIDHR) have been instrumental in supporting a de-escalation of the Ukrainian crisis as well as assisting this country in warranting a stable and democratic future for all its citizens. A basic issue to be raised is how the EU budget is spent on human rights monitoring and protection in the unstable and volatile Ukrainian context. Should the EU push for a special tool or programme to support human rights monitoring and human rights organisations in areas where these are missing?

Regarding the use of diplomatic tools, the human rights dialogues in the EU-Ukraine bilateral relations, the EU engagement with other actors of the international community (in particular other regional organisations such as OSCE and CoE) as well as the EU support of high-level diplomatic networks have resulted instrumental to pursue specific human rights and democracy objectives.

However, the case study has highlighted various shortcomings.

Firstly, two basic requirements that have been not clearly implemented in the response to the Ukrainian crisis are the prioritisation of the tools and the sequencing of crisis response. What should be used first or secondly to face the crisis? Is there any logic in sequencing? The EU toolbox does not seem to help in this regard.

Secondly, the case study highlighted insufficiency of diplomatic measures, which are good enough only if followed by strong operational action. The EU has been, to a certain extent, an inapt actor due to its slow decision-making and long reactions. The process of implementation of relevant tools has often resulted quite slow, such as in the case of the Support Group which was early announced in 2014 but which became operational too late. In this regard, the application of EU tools within months rather than weeks constitutes a weak way to react to serious crisis.

In this regard, it must be underlined that the Ukrainian crisis has showed the complexity of the EU in acting as an effective and prompt decision-maker in view of the different interests of its Member States. Critical aspects of the EU response have been identified in the following: a certain level of ambiguity of the EU in respect to the violence that determined the outbreak and development of the crisis; the unclear goals of the EU policies in the Ukrainian context; the Russian key factor in making the EU almost unable to act (and react), even nearly perceived as a party to the conflict from the wider geopolitical perspective. In this vein, the frequent lack of clarity in the EU approach to the Ukrainian crisis should lead more room for flexibility.

Thirdly, EU tools have not been used with sufficient flexibility. This issue has particularly regarded the allocation for support of the Ukrainian civil society. Once the political analysis is in place, a mechanism for transforming or restructuring a certain tool to allow a change in the allocation of support has not been considered (and it should be). Conversely, inflexible tools rarely permit for involvement of the civil society – one of the strongest allies of the EU on Ukrainian soil.

In this regard, following 'a State-to-State logic' makes it difficult to develop a direct genuine cooperation with the civil society in general and with human rights defenders in particular. The EU should take this basic point into serious account. Indeed, it must be underlined that the most important aspect of the Ukrainian unstable context has been the strong civil society that has developed and reacted to critical governmental policies. In this vein, the EU should consider that several actors in the Ukrainian society constitute drivers for reforms. In view of the fragile and transitional state of affairs in Ukraine, non-state actors as well as international support are deemed more relevant than other existing tools. The case of the European Endowment for Democracy (EED) is emblematic in this regard and has a certain potential 'to fill the gap' in the EU toolbox for supporting civil society more concretely.[630]

Promoting efficiently human rights in the volatile Ukrainian context requires coordinated, concerted and flexible actions from the various actors involved, including governments, international and local civil society organisations, international and regional human rights organisations.

Fourthly, the EU has developed stronger bonds with other actors of the international community, seeking to exploit their established potential (see, for instance, the cooperation with the OSCE and the Council of Europe) and supporting them through its financial instruments. However, in light of the addressed differences between EU-OSCE and EU-CoE cooperative relationships, a basic question arises as to whether a vague legitimation is better than a formal one in view of the existing different positions undertaken by Member States to shape cooperation on the ground.

[630] The EED is a grant-giving organisation that supports local actors of democratic change in the European Neighbourhood and beyond, see https://www.democracyendowment.eu. For instance, in order to support civic dialogue after the 'Maidan revolution', the EED supported ALL-Ukrainian Civic Platform Nova Kraina (a civic organization born out of the Maidan protests) 'to continue its work on reforms and broaden the society's support for Ukraine's democratic transformation and modernisation'. The EED is supporting also the Crimean Tatar Resource Center in Ukraine, which provides legal assistance, funding information and capacity building for all interested individuals and partners.

In this regard, the armed conflict in the Donbass region has determined a more intense involvement of the EU in the unstable Ukrainian context, but there is still a strong need to define better the role of the EU as a cooperative partner of OSCE at both levels (operational and financial) in the area of crisis management. Indeed, in the EU-OSCE cooperative relationship, the EU remains more a political and bureaucratic actor, whereas the OSCE diplomatic track fits more the crisis challenges. The Ukraine case has shown a certain involvement of the EU at the diplomatic level, but this has to be better articulated. Considering the EU direct/indirect contribution to upholding human rights as channelled via the OSCE field presence by means of the financial resources devoted to its various missions to Ukraine, basic questions arise as to whether the former's engagement should be seen as a model for this kind of situations and what are the limits of such engagement in crisis management. More generally, in light of the Ukraine case, is there a need to revitalise the EU-OSCE relations?

Limited or no direct access to the conflict-torn territory has been (and is likely to remain in the long run) a basic issue. Enabling systematic monitoring of the human rights situation as well as providing victims of human rights violations with legal and further assistance are basic priorities. This raises the need for the EU (in particular the EP together with the European Council and the European Commission/EEAS) to strengthen the cooperation with those 'interlocutors' who are capable to conduct efficiently on-site human rights monitoring and assistance either via fact-finding missions (*e.g*. the recent CoE mission that gained access to Crimea) or via continuous presence (*e.g.* Ukrainian NGOs active in Crimea).

A key partner of the EU in protecting human rights in the Ukrainian context remains indeed the CoE, as it represents the single organisation through which opportunities of 'istitutionalised' cooperation with Russia in this area may arise and should be undertaken. In light of the Ukraine case, is there a need to strive for higher degree of cooperation with the CoE?

Fifthly, all the used tools have been guided by different political motives and different logics. It must be highlighted that in the context at stake (of the economic and political crisis, the Russian intervention and annexation of Crimea, the armed conflict in the Donbass region), the EU struggles to assume a role as a leader in part because these situations coexist and must be addressed in differentiated manner whilst, at the same time, the EU must continue its long term support for the Ukraine reforms' agenda.

Finally, the three main issues regarding the EU toolbox (i.e. how to implement the existing tools, how to guarantee coherence between different policies, how to ensure effectiveness and impact of the tools) have arisen in the EU response to the Ukrainian crisis. In the same vein, open issues for the EU in the use of the toolbox concern its leadership, its political will as well as maintaining human rights 'high' in its agenda.

In raising a problem of credibility and legitimacy for the EU external policies, the crisis situation in Ukraine makes also basically important for the EU to rely on independent evidence base, so grounding its policies on more proves and databases.

A unique factor to be taken into serious account by the EU and its Member States in dealing with the evolving Ukrainian crisis concerns the position of the European society towards this crisis; so far EU citizens have not showed a real interest. Where human rights play a role in this crisis from the

perspective of EU citizens? Can human rights issues be properly dealt within the Ukrainian society? And in the conflict-torn area?

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VI. An elephant in a porcelain store – EU's use of its toolbox in crisis situations

The three case studies addressed in this report confirm that the answer to the question as to whether the European Union is using its human and fundamental rights toolbox in a strategic manner is not a simple one. Above all, it cannot be answered in detachment from the more profound and abstract understanding as to the character and purpose of the European project – its mission as pronounced in the strategic documents. The European construction is based on a foundation of values (Article 2 TEU) which seem to be a given. Yet, as we have learnt, the means through which the values are ensured will also need to be sometimes adjusted when crisis shatters the whole construction to its base (see: Chapter III).

As we observed in introduction to this report, the tools used will depend on a specific material of which the construction has been made. The tools will differ if the foundations are made of clay, wood, brick or solid rock. It seems – in line with the overall FRAME research - that there exists a vast toolbox that could help out to create, reinforce each of the types of the construction based on foundations made of values. In fact, the content of the toolbox seems to be overflowing leading to a situation where no one wishes to dig into it and with satisfaction uses and sees only the tools lying at hand – on the very top of the box.

When analysing the strategic use of tools, we started off with the assumption that the 'strategic' use of tools would imply such use of tools as was foreseen in strategic documents of the European Union targeting the use of specific tools. This simple point of departure does not, however, take sufficiently into the decisions where the EU must mitigate human rights with other interests.

We started our observations with the determination as to what constitutes a strategic use of the EU human rights and fundamental rights toolbox. We assumed that whilst strategy is adopted mainly as a proactive intervention of the Union, it is put to test when circumstances radically change. In this context the strategic use of tools comes to the picture, which can either reflect the strategic plan of action or depart from it in search of new solutions.

We adopted as the guidance in the search for the benchmarking of a strategic use of tools themes that have been identified in the context of the comprehensive model of strategy devised by Hambrick and Frederickson. The themes: the European added value, consistency of strategies elements, coherence with the policy context, resources and efficiency and implementability and effectiveness correspond to a set of evaluative questions will constitute a core of these conclusions

We shall address each of these questions bringing to the surface more general conclusions that became visible as the result of the analysis of the respective case studies. The below concluding observations are also informed by the discussions of the participants of the workshop 'The strategic use of the EU fundamental and human rights toolbox' which took place in Venice on 5 and 6 May 2016.

A. The EU Value-Added

The theme of the EU added value reflects the understanding on the part of the policy makers the position of the EU vis-à-vis other international and European actors in relation to the pursuit of the EU human rights objectives. It is also about comprehensive addressing of the problem with the full awareness of the modalities and the tools the EU has at its disposal and may need in a longer-term perspective.

There are two general conclusions flowing from the analysis of the EU toolbox in this aspect: Firstly, the value of the EU interventions is more frequently indispensable than added. In particular, in the context of migration crisis the EU controlling its borders and proclaiming the possession of a common asylum policy found itself in the first line to respond to the loss of life at see and the demand to ensure international protection of the thousands trying to enter its territory. The Polish and Hungarian constitutional crisis brought to the surface a forgotten unfulfilled conditionality question of the enlargement policy, which did not have a follow up past the accession process. The political risks associated with implementing Article 7 TEU created a demand for the alternative mechanism – the Rule of Law Framework. Yet in both cases the implementation was driven by the need for the EU to act.

In terms of the broader context, all three case studies confirmed that the EU plays a vital role in gathering support for human rights in three policy areas. In fact, all of the three case studies demonstrate how instrumental, on the one hand, the collaboration of the EU with other international organisations (and third countries) is, as is the coordinating role on the part of the EU.

The case study on the Polish and Hungarian Constitutional crisis has clearly shown that the CoE plays an important role in promoting democracy, rule of law and human rights in the EU Member States. It does not compete with the EU, rather supplements its activity towards protecting EU values. At the same time, it is the EU that has much more of a bargaining power than the CoE which makes the former a natural enforcer of latter's standards. In this context the EU has a strong role to play and contributes a visible value to the field. Similarly, the EU must collaborate with OSCE and CoE in providing the humanitarian response to the crisis connected with the Ukrainian civil war.

B. Consistency amongst elements of strategy

The creation of the strategy should involve prior understanding of its five aspects. The European Union when drafting its strategy for human and fundamental rights policies should consider the policy field to which the strategy applies, the tools it is going to employ, the sequence in which these tools will be used (sequencing), differentiation of the EU's action from other actors working in the field, and the economic return the strategy was to bring.

Whilst it may seem counter-intuitive, the economic logic of the pursuit of the human rights objectives by the European Union is rather implicit and can be explained by the principles behind the EU's creation. The mere inclusion of human rights into the content of EU's policies has been considered a complementary measure to the integration of the markets. The strategy implementing the human rights objectives has had a clear market logic connotations. The relative success of the EU's forging of the connection between market freedoms and fundamental rights is in general considered as a satisfactory

explanation as to why the EU should promote its values beyond the strictly considered scope of the EU action. Well-being of its peoples, circle of friends ensuring stability and prosperity in the region, global security – these are the recurrent themes connecting the human and fundamental rights policies with the broader areas of EU action.

As for the remaining three components of the strategy, the following can be stated in the light of the conclusions of the three case studies:

The EU human rights policies are made of two sets of policies – these directly dealing with human rights and these of horizontal application. In the second case, human rights are to be incorporated across the human rights policies of the EU and this is where all of our case studies are positioned. The general attention to human rights did result in specific references to human rights in particular policies – be it internal ones, migration, neighbourhood or conflict management. It is difficult to determine, whether these pronouncements have not been too grand promising way more than the EU could have ever delivered. This general conclusion can be voiced in reference to the three case studies discussed above.

Similarly, the implementation of specific tools has been foreseen by the European Union, however, in general too frequently staging of the use of particular tools seems confused and unclear – even to the policy makers. Here as the example of best practices one can refer to the Rule of Law framework which foresees a sequence of specific steps to be followed by the institutions in addressing systemic threats to the EU values. Such tools' coordination should be considered as a best practice. From the point of view of adding value through the coordination to the staging aspect of strategies, the EU-Turkey deal offers an interesting (albeit clearly controversial) example of how things could be done.

C. Coherence with the policy context

The reflection on the coherence of the EU action in the policy context refers to the general contribution of the specific strategy and thus foreseen initiatives to the broader policy field. This can include modalities of acting, which have been implemented in analogous cases. Clearly, the analytical take on these two issues reflects the problems of a general context of the policy field within the EU functions understood from both internal and external perspectives as well as from the point of view of substance and geographical relevance.

It must be asserted, therefore, that context matters. This may mean that one in the analysis must take into consideration the range of issues including theoretical and legally informed policy model (such as neighbourhood policy or exerting influence over the Member States beyond the scope of EU law) or the global shifts in power between major international players (resulting in their enhanced 'presence' in the neighbourhood as in the Ukrainian case study above).

For example, as it was presented in the first case study, the EU does have tools at its disposal for protecting values established by Article 2 TEU. Article 7 TEU does theoretically fit the EU's aim, however, in practice it does not so because of procedural obstacles and notions that were discussed in Chapter III. The new Rule of Law Framework was introduced because the EU policy makers realised the lack of will to evoke Article 7 procedures. In this regard, the EU has definitely taken account of which tools did not lead to success and supplemented its existing toolbox.

Above all, the three above case studies highlighted the need for enhanced awareness of the cross-dependencies and the inter-relations between the uses of various tools. From this perspective, a strategy in itself is a tool that fulfils numerous – mainly proactive - functions. As confirmed by all three case studies, the actual capability of the EU to ensure human rights in the crisis situation hinges on the prior existence of the framework. Yet, this framework can be only created if there exists (1) the clear knowledge of both exigencies of a given context and human rights implications thereof, (2) awareness of cross-fertilizations between various policy areas and finally (3) the ability to bring coherence to the picture which is exactly the purpose of adopting a strategy. Coherence means in this context that the European Union acts together with its Member States regardless of whether they act within or without the scope of EU law.

When speaking of coherence, one must also reflect about the role of prioritization of the use of specific instruments or staging (which was discussed in the section above). This closely ties in with the strategy in practice, which involves the understanding of the internal functioning of an organization with clearly distributed roles and tasks as well as deadlines attributed to specific activities. The allocation of tasks carries with itself the allocation of power and resources. Would the actors involved need to act in a predetermined order? And what if a given situation requires that it be changed? In this context the role of the European Commission and infringement procedures comes to the forefront. Only recently did the European Commission venture to base the first infringement procedure on fundamental rights grounds evoking article 47 CFR in the case against Hungary non-implementation of the Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings.[631]

D. Resources and efficiency

The penultimate theme resonating in the analysis is that of availability and efficiency of resources. In other words: Does the EU have money, managerial time and talent, and other capability to do all that is envisioned? Are the resources dedicated to the accomplishment of a specific objective in an adequate manner? It is common sense that a well-planned coherent use of various resources (money, managerial time, talent and other capabilities), with an overarching logic and programmatic approach, is required.

Allocating resources is not always the question of having enough resources. For example, in the case of the RoL Framework, it is partly outsourcing and exploiting other than EU resources on purpose. The new RoL Framework gives the leading role for the Commission. At the same time, it requires additional monitoring tasks that are dedicated partly to the CoE Venice Commission and FRA, as well as to a new future monitoring body. While the establishment of a new monitoring body shows that the EU does not have the necessary resources at the moment, reaching out to the CoE Venice Commission reflects the better cooperation between the EU and the CoE.

Similarly, in the context of the EU response to the refugees crisis the long term strategy has not brought much of the change in the initial years. It remained underfinanced until the migration crisis came about.

[631] European Commission, 'Commission Opens Infringement Procedure against Hungary Concerning Its Asylum Law' (*European Commission Press Release*) <http://europa.eu/rapid/press-release_IP-15-6228_en.htm> accessed 8 May 2016.

Human rights of migrants had remained low on the agenda with the priority given on the way to other concerns. Only in 2014 and 2015 was there a strong push and increase in money dedicated to ensuring response to refugees and effective implementation of the initial initiatives took place. Yet again, a balancing activity has taken place all too often giving way to ensuring security in Europe. This type of balancing takes place all too often and induces a rather cutting question as to the role of strategic documents that form the basis of the EU human rights policy and this study.

Finally, the case study of Ukraine reveals that coordination of the use of resources is of highest importance when the EU acts in third country context working alongside other organisations such as CoE or OSCE.

The discussion of the allocation of resources brings up an observation in relation to the realisation of strategies. Especially in the crisis context, what comes to the forefront is the need for a quick response to the human rights challenges. This consists in ready deployment of resources in the field. Visibly, especially the case study of migration mobilisation proves that the facilitation of the use of resources comes too often too late.

E. Implementability and Effectiveness

The notion of Implementability reflects the extent to which key constituencies (institutions, Member States, civil society) will permit the EU to pursue a given strategy and whether within the EU there is a strong enough leader capable of bringing the EU through the desired change. This notion brings the focus back on the existence of political will to deliver on the commitment to human rights by the European Union leaders. The observers of 5-6 May 2016 workshop observed, *inter alia*, that there seems to be a general estrangement from human rights visible in the ranks of the EU bureaucrats and politicians of all levels. One can observe also the general misunderstanding of the form and use of instruments and willingness to collaborate for their implementation. The widely publicised lack of solidarity between the Member States to provide a response to a refugee crisis is the first example. The Rule of Law framework, on the on the hand encountered political opposition from within of the EU as the Council heavily criticised the enhanced role it devotes to the Commission. The Dutch referendum dismissing the EU-Ukraine agreement voiced the opposition to the further integration of the two entities – and that with implications for human rights promotion in Ukraine.

The transition to implementation the EU's strategies for human rights seems to be lacking not only the political leadership, but also popular support. In part this is also the case due to either lack of access to information (as in the case of 3rd country human rights strategies), or multidimensionality, which makes the policy field too complex and impermeable. The analysis of the mitigation of objectives in this context becomes rather impeded.

F. To conclude

Regardless of the exigencies both the construction of the EU human and fundamental rights toolbox and the framework of its use drafted by the strategic document, the analysis of the strategic use of tools confirms the hitherto made conclusions of the FRAME project. The EU human and fundamental rights policy would benefit greatly from increased coherence, effectiveness and enhanced implementation of

the policy tools. In particular, there exists a great rift between the strategies concerning human rights and their implementation by political elites of the European Union and those of the Member States. The so called commitment issue on the part of the European Union lies in the lack of clear, visible and accountable leadership within the European Union institutions – at the very peak of the system. It is hardly surprising that human rights leadership is hardly visible on the Member States level. This means that no matter how many strategic documents there exist, the tools will continue not to be used in strategic terms but on an ad hoc basis.

The case studies hardly demonstrated any examples of the strategic use of fundamental and human rights tools for preventive purposes. They show that the EU tools deal with consequences, rather than the causes of fundamental and human rights violations. This is beyond doubt, as it is difficult if not impossible to foresee crisis situations, nevertheless, we witness the EU's reactive attitude even in such situations when it has already experienced similar crisis situations, see for example the Hungarian and the Polish constitutional crisis.

To conclude, if strategic use of tools is such that it follows the objectives set out in the strategic documents, the research included in this report and the conclusions of the workshop that took place in Venice on 5 and 6 May 2016 point to a rather vast gap between what the strategy sets out to accomplish and the actual implementation and enforcement of the tools. In this perspective it can be concluded, that whilst one can desire strategic use of tools for human rights, the actual delivery is patchy and sometimes involves unpleasant choices. Still, few, if any, are aware of the complete stakes in the game, which makes the recommendations as to what strategic use of tools should be very difficult if not impossible to make. [632] At times one can have an impression that the EU moves around as an elephant in a porcelain store – it tries hard, but inevitably something will get broken. At the same time, the whole toolbox is out there – implemented to a larger or smaller degree, yet undeniably employed. Time will tell what impact it brings.

[632] See, the observations of Freedman regarding the ways through which the long term strategic objectives may be brought about: 'Fighting against superior force may score high on nobility and heroism but normally low on discretion and effectiveness. This is why underdog strategies, in situations where the starting balance of power would predict defeat, provide the real tests of creativity. Such strategies often look to the possibility of success through the application of a superior intelligence, which takes advantage of the boring, ponderous, muscle-bound approach adopted by those who take their superior resources for granted. The exemplars of such an approach are Odysseus but not Achilles, Sun Tzu and Liddell Hart but not Clausewitz and Jomini. They would seek victory at a reasonable cost by means of deceits, ruses, feints, maneuvers, speed, and a quicker wit. There is an undoubted satisfaction by winning through wit rather than brute force. The problems come when opponents turn out to be not only better resourced but also as alert, brave, and clever.' Freedman Preface xii.