



In-depth studies of selected factors which enable or hinder the protection of human rights in the context of globalisation

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Executive Summary

Under the auspices of the FP7 project Fostering Human Rights among European Policies (FRAME), this publication is a follow-up on the first report (D 2.1) on ‘factors which enable or hinder the protection of human rights’. The first report assesses a wide range of factors – historical, political, legal, economic, social, cultural, religious, ethnic and technological – and their impact on the protection of human rights in EU internal and external policies, particularly in light of the challenges brought about by globalisation. The purpose of this second report is to provide an in-depth and thorough examination of some of the challenges and factors that were identified in the first report as most in need of further scholarly exploration and study.

Dealing with EU efforts to address social factors that hinder the realisation of human rights for many people around the globe, Chapter II focuses on anti-discrimination and the European External Action Service (EEAS). Based on an outline of the legal and policy framework concerning anti-discrimination in EU external action, the chapter analyses gaps and challenges in the integration of anti-discrimination principles in activities and policies of the EEAS. The analysis finds that recent measures to promote equality and anti-discrimination have reportedly had a positive effect on the anti-discrimination work of the EEAS. However, incoherence in various forms – between anti-discrimination standards used by EU- and Member States’ delegations, between different policy areas and between the EU’s internal and external activities – is identified as a key challenge.

Along similar lines, Chapter III focuses on ethnic and other factors related to EU internal policies on non-discrimination and equality. The chapter argues that despite potentially strong drivers for the promotion and protection of ethnic minorities’ rights in the EU and among EU Member States, the initial excitement about the Union’s anti-discrimination directives has morphed into reluctance by Member States to take actual measures to realise substantive equality. An amalgamation of historical, legal, economic and political factors contributes to Member States’ unwillingness to further develop and mainstream the core values of non-discrimination and equal treatment.

Chapter IV concerns religious minorities under pressure. The issue of religious and cultural diversity and tolerance as well as the protection of religious minorities are among the biggest challenges facing the EU in the area of religion, both internally and externally. Yet, due to a range of religious, historical, cultural and political factors, including the diversity in the organisation of state-religion relations across Member States, the EU has generally steered away from a common line on religious affairs within the EU. As result of this, the protection of religious minorities is uneven across Europe. Interestingly, internal reluctance contrasts with external ambitions in the form of progressive policies. This incoherence poses a challenge to the EU’s efficiency in its internal and external endeavours to promote the protection of religious minorities.

Chapter V examines the nature and consistency of the integration of human rights into EU development programming, with a particular focus on the envisaged synergy between economic factors and the protection of human rights. In recent years, the EU has confirmed its commitment to integrate a human rights-based approach throughout its development activities. However, the chapter demonstrates that the application of human rights standards and principles in EU development programming suffers from a

strong ‘governance bias’. In socioeconomic interventions, and in particular in the sectors with the most important economic implications, i.e. agriculture, energy, and infrastructure, human rights are vaguely integrated. Thus, the chapter concludes that economic factors are hardly fostering strong human rights concerns in the EU external development action and planning.

Drawing attention to the EU’s relations to the wider world, Chapter VI zooms in on the legal factors that influence the protection of international human rights and international humanitarian law in EU’s Common Security and Defence Policy (CSDP) missions. The EU has adopted a large number of operational policy documents on the protection of human rights in CSDP operations and missions. However, the chapter identifies two legal factors that undermine these policy-level commitments. Firstly, uncertainty about which obligations EU-led military forces shall respect and protect hinders the effective protection of human rights. Secondly, EU human rights policy documents have mainly focused on the promotion of human rights in third states – by third States themselves – rather than on the EU’s and EU-led military forces’ own compliance with human rights standards when involved in CSDP missions and operations in third States. Such incoherence between the policy towards third states and EU/Member States is a legal factor that might hinder the effectiveness of EU human rights policies.

The selected challenges and factors put under scrutiny in this report are in many respects inter-related. The in-depth studies have further drawn attention to the inconsistent and incoherent implementation of the EU’s human rights policies as a crosscutting challenge – a challenge that can potentially compromise the effective protection of human rights, both within the EU and in the Union’s external relations to third States.

List of abbreviations

BiH	Bosnia and Herzegovina
CAR	Central African Republic
CEDAW	International Convention on the Elimination of all forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CIVCOM	Committee of Civilian Aspects of Crisis Management
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoEU	Council of the European Union
COHOM	Council of the European Union Working Party on Human Rights
CONOPS	The draft Concept of Operations
CRPD	Convention on the Rights of Persons with Disabilities
CSDP	Common Security and Defence Policy
CSO	Civil Society Organisations
CW	Chemical Weapons
CWC	Chemical Weapons Convention
DARIO	Draft Articles on the Responsibility of International Organisations.
DCI	Development Cooperation Instrument
DG DEVCO	Directorate-General for International Cooperation and Development
DG RELEX	Directorate-General for External Relations
DG	Directorate-General
DG-Justice	Directorate-General Justice
EBA	Equality-based approach
ECHR	European Convention on Human Rights and Fundamental Freedoms

ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EDA	European Defence Agency
EDF	European Development Fund
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENAR	European Network against Racism
ENI	European Neighbourhood Instrument
EP	European Parliament
EPWG	European Parliament Working Group
Equinet	European Network of Equality Bodies
ERIO	European Roma Information Office
ESCR	International Covenant on Economic, Social and Cultural Rights
ESDP	European Security and Defence Policy
EU	European Union
EUFOR	European Union Force
EUMAM RCA	European Union Military Advisory Mission in the Central African Republic
EUMAM	European Union Military Advisory Mission
EUNAVFOR	European Union Naval Force
EUPM BiH	European Union Police Mission in Bosnia and Herzegovina
EUPM	European Union Police Mission
EUTM	European Union Training Mission
ForB	Freedom of Religion or Belief
FRA	European Union Agency for Fundamental Rights

HLG	Military Headline Goals
HR	High Representative for Foreign Affairs and Security Policy (Chap VI)
HRBA	Human Rights-Based Approach
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	UN Covenant of Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organisation
IRL	International Refugee Law
LGBT	Lesbian, Gay, Bisexual and Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MIP	Multi-annual Indicative Programme
NEB	National Equality Body
NGO	Non-Governmental Organisation
NHRI	National Human Right Institution
NIP	National Indicative Programme
NLC	Non-Lethal Capabilities
OIC	Organisation of Islamic Cooperation
OPLAN	Operation Plan
OSCE	Organisation for Security and Cooperation in Europe
PET	Danish Security and Intelligence Service

PSC	Political and Security Committee
RBA	Rights-Based Approach
ROE	Rules of Engagement
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN DKPO	UN Department for Peacekeeping Operations
UN HRC	UN Human Rights Committee
UN OHCHR	UN Office of the High Commissioner for Human Rights
UNSCR	United Nations Security Council Resolution
WEU	Western European Union

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I. Introduction

A. The background

Under the auspices of FRAME, the present report is closely linked to the [D 2.1 Report on factors which enable or hinder the protection of human rights](#) (Lassen et al., 2014, hereinafter ‘report D 2.1’).

The aim of the report D 2.1 was to provide a mapping of the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that facilitate or hinder human rights protection in the EU, and its internal and external policies. With a focus on access to fundamental rights, and taking into account the challenges brought about by globalisation, the report contains an assessment of the current knowledge about each factor, the internal and external dimensions of factor policies, and the impact of each factor on human rights protection. The report showed a picture of a diverse, multi-faceted and multi-layered complexity. With a focus on this complexity, the report pointed to challenges and gaps in EU policies, instruments, and implementation strategies that, in the context of the factors, needed further exploration and analysis.

The present report (report D 2.2) is an in-depth study of some of these challenges and factors singled out as in need of additional investigation and analysis.

B. In-depth studies of selected factors

The present report explores how a number of key factors in a dynamic interaction with EU policies and instruments hinder or enable these policies; their creation, efficacy and impact. Reversely, the report will also show how policies and instruments have a bearing on the factors in concrete contexts, whether in the EU or outside the EU.

Each chapter of the report studies a particular set of factors and a topic related to these factors (for instance, ethnic factors and EU’s internal policies on non-discrimination and equality). However, as will become clear throughout the report, a series of factors are often involved in a particular topic. Therefore each chapter, although most often taking its point of departure in one particular factor (for instance the religious factor), touch upon several other factors (for instance political, cultural and historical factors) in the course of the analysis.

Amongst the most important policy-relevant findings of the mapping of factors in report D 2.1 were the following: First, gaps between progressive human rights policies and implementation in practice existed to a marked degree in relation to the factors studied. Second, the issue of coherence, in terms of how human rights are incorporated into various sectors and areas, as well as between internal and external EU actions, loomed large throughout the report. In the present report, the authors of each chapter have looked into these particular challenges.

In many areas, the selected factors and topics have been influenced by globalisation. The chapters provide a contextualisation of these factors at the global level, identifying issues which, in the context of globalisation, hinder or enable the protection of human rights in the EU’s external and internal policies.

C. Methodology

In view of the recommendations for further studies stipulated in report D 2.1, the present report contains in-depth desk studies of selected factors in need of examination. The studies have been based on relevant EU, national, and international human rights sources, for instance EU and international human rights treaties, EU policy documents, case law, opinions, reports from monitoring bodies, and documentation from international and national institutions, for instance the UN and National Human Rights Institutions. Studies have, for instance, been conducted in view of the policies and practices of the EEAS and of the most relevant DGs of the European Commission. Depending on the topics and factors under scrutiny, the use of these types of sources vary considerably from chapter to chapter. Therefore, the method used in relation to the different factors is explained in the introduction of each chapter.

In some chapters, the study has been supplemented with interviews with key experts. In such cases, the method used is explained in the chapter in question.

D. Contents of the report

Chapter I, the Introduction, contains the main preface to the reading of the report.

Chapter II on Anti-Discrimination and the European External Action Service (EEAS) contains a case study on how an EU body addresses social factors that hinder the protection of human rights. The chapter builds on, and further develops, chapter VI on social factors of report D 2.1 on factors which enable or hinder the protection of human rights by specifically focusing on the anti-discrimination and equality policies and actions of the EEAS in this field. It analyses how a specific EU body, the EEAS, addresses social factors that hinder the protection and respect for human rights by incorporating equality and anti-discrimination issues in its actions and further investigates what are the gaps and challenges in this regard.

In Chapter III, such ethnic factors that enable and hinder human rights in juxtaposition with historical, legal, social, political and economic factors are considered. More particularly, by identifying drivers and barriers for anti-discrimination policies implemented through binding directives, the chapter explores whether the EU's internal policies have had the desired impact of protecting and promoting human rights of ethnic minorities on a Member State level. A case study on Roma illustrates which factors are drivers and barriers to the promotion and protection of human rights irrespective of race and ethnic origin.

Chapter IV zooms in on religious minorities under pressure, focusing on how religious, historical, and political factors have influenced the ways in which the EU promotes the protection of religious minorities and their right to enjoy freedom of religion as well as other rights. The issue of religious and cultural diversity and tolerance as well as the protection of religious minorities are among the biggest challenges facing the EU in the area of religion, both in relation to the EU Member States and globally in dealing with third countries, as are religiously motivated acts of radicalism and hate crime.

Chapter V derives from one subject identified for selected studies in the report D 2.1., the chapter on economic factors, namely 'the consistency with which human rights elements are integrated into

external policies'. This issue is particularly challenging when it relates to how human rights are integrated in economic development policies. Three main questions are raised in the analysis: First, to which degree does the EU pursue a rights-based approach in its country strategies in the global South and how is the balance between economic and social rights and civil and political rights put into effect in efforts to influence economic factors? Second, to which degree are the two basic pillars of economic growth, on the one hand, and democratisation and human rights, on the other hand, envisaged to create synergy with each other in the global South? This question is pursued in the case analysis primarily. Third, in which sectors are human rights elements integrated with the most vigour and what does the nature of human rights integration indicate about the overall implementation of a human rights-based approach?

Chapter VI concerns legal factors, more particularly those legal factors that may enable or hinder the protection of international human rights law (IHRL) and international humanitarian law (IHL) during Common Security and Defence Policy (CSDP) military missions and operations in third States. Since the launch in 2003 of the first CSDP mission, the EU has launched around 30 civilian and military missions and the CSDP might play an increasingly more important role in the future. The EU is currently involved in five military operations. Through a case study on the CSDP, the chapter explores the nature of CSDP military missions and operations and illustrates how IHRL and IHL protection are much more integrated in, and stronger promoted through, CSDP policy documents *vis-à-vis* third States as opposed to CSDP policy documents *vis-à-vis* the EU itself. Furthermore, it elaborates on the incoherence between policy directives and legal obligations when it explores to what extent EU-led military forces are bound by IHRL and IHL during CSDP military operations and missions in third States.

Chapter VII, Conclusions, contains a summary of the chapters and the most important insights to be gained from each of the factors, reflections on cross-cutting issues, and an overarching recommendation.

The authors of the chapters are credited at the beginning of each chapter. Chapter I was written by Eva Maria Lassen, in collaboration with the group of authors. Chapter VII was written by Peter Vedel Kessing, in collaboration with the group of authors. Lynn Kathleen Pasterny and Eva Krogsgård Nielsen contributed to the editing of the report.

II. Anti-discrimination and the European External Action Service – Case study on how an EU body addresses social factors that hinder the protection of human rights*

A. Introduction

As already indicated in D 2.1 Report on factors which enable or hinder the protection of human rights (Lassen et al., 2014), the term social factor refers to the composition and structure of the society which hierarchically positions individuals and persons belonging to certain social groups and which influences social, political and economic participation and distribution of wealth, reputation and resources. Thus, societies are shaped by inequalities along the lines of gender, age, sexual orientation, (dis)ability, religion, ethnic origin, class, property and other categories, which are important factors that hinder the protection of and access to human rights and cause discrimination in various ways. To address these obstacles, human and fundamental rights law does not only contain provisions that define equality as one of its basic principles, it also includes provisions (or even develops specific separate human rights treaties) that prohibit the discrimination of certain groups¹ (such as LGBTI people, women, elderly people, persons with disabilities, people belonging to ethnic minorities or religious groups) and, thus, enable their enjoyment of and access to human rights protection.

The EU's equality and anti-discrimination law and policies have seen a remarkable proliferation over the last decades. Already the Treaty establishing the European Coal and Steel Community signed in Paris on 18 April 1951 contained a stipulation to remove limitations on employment with regard to nationality. The 1957 Treaty establishing the European Economic Community introduced the principle of equal remuneration for equal work between male and female workers. Since then, a growing number of provisions on equality and anti-discrimination have been included in primary law and, subsequently, a considerable amount of secondary law on these issues has been adopted at the EU level. Concomitantly, a broad range of EU policies promoting equality and combating discrimination have been passed, implemented and further developed. Principles of equality and non-discrimination have also gradually and increasingly been incorporated into the external dimension of EU politics and policies, and thus also into the work and instruments of the European External Action Service (EEAS).

The EEAS was created by the Treaty of Lisbon (adopted 2007, entry into force in 2009). On 25 March 2010, the High Representative for Foreign Affairs and Security Policy Council submitted a proposal for a Council decision for the establishment of the organisation and functioning of the EEAS to the Council of the European Union. The proposal was approved by the Council Decision of 26 July 2010 establishing the

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¹ One of the most important international treaties in this regard is the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979. A more recent one is the Convention on the Rights of Persons with Disabilities (signed in 2007). The anti-discrimination clauses in European human rights instrument rather refer to grounds than to groups, for example the CFREU says 'any ground based on any ground such as' or Article 19 of the TFEU says 'discrimination based on'.

organisation and functioning of the European External Action Service. The EEAS was officially established on 1 January 2011.

Chapter VI on social factors of the Report on factors which enable or hinder the protection of human rights (Mayrhofer and García San José, 2014) elaborated on different dimensions of social factors (gender, sexual orientation, disability and age) by defining the respective factor and discussing in what way this factor is interrelated with human rights in terms of its enabling or hindering effects. It furthermore outlined the EU's policies and legal responses to the factor in question, including the EU's policies and practices, especially with regard to external action, and shortly summarised gaps and challenges for each of the sub-factors. The present chapter will further explore this issue by specifically focussing on anti-discrimination and equality policies and actions of the EEAS in this field. It will analyse how a specific EU body, the EEAS, addresses social factors that hinder the protection and respect of human rights by incorporating equality and anti-discrimination issues in its actions and will further explore the gaps and challenges in this regard. Although being established quite recently, the EEAS has already undertaken a broad range of action in this field and combating discrimination is said to be one of its key human rights priorities.

B. Structure and methodology

In order to contextualise the EEAS' policies on anti-discrimination, the present report first briefly elaborates on specific features and characteristics with regard to the internal dimension of EU anti-discrimination law and policies in order to be able to compare it with the external dimension. It then delineates the legal and policy framework concerning anti-discrimination in EU external action with a specific focus on the EEAS. The second part of the present chapter is dedicated to analysing gaps and challenges concerning the integration of anti-discrimination principles in the EEAS. Firstly, there will be an analysis of process-related aspects, which, secondly, is followed by a discussion on the anti-discrimination concepts used in the so-called 'Human Rights Guidelines'. This is the core instrument when it comes to implementing anti-discrimination policies in the EEAS. Thirdly, the issue of coherence is analysed in the context of EEAS anti-discrimination policies and, fourthly, the chapter concludes with elaborating on the effectiveness of these policies.

The research carried out in the context of the present chapter draws not only on an extensive review of literature and from an analysis of available policy documents, but also from interviews conducted with representatives from the EEAS² and the European Commission.³ In total, eleven qualitative interviews were conducted in September 2014 and in January 2015. Issues covered in the interviews included, for example, the role of anti-discrimination in EEAS policies, evaluation of the effectiveness, impact, implementation and significance of the Guidelines, the collaboration with other EU bodies as well as Member States and other stakeholders (such as NGOs) and questions concerning gaps and challenges as well as potential room for improvement of the anti-discrimination policies and instruments of the EEAS.

² Policy and legal officers working on a specific human rights/anti-discrimination portfolio. Two interviewees were also former EEAS officers that are now working for another EU body.

³ Interview partners were officers (Head of Unit, (Human Rights) Policy and Legal Officers, Programme Manager) from DG DEVCO, DG JUST and DG ECHO.

The interviewees were guaranteed confidentiality, thus, there will be no direct reference to any persons interviewed. The analysis follows the evaluation procedure designed by Meuser and Nagel (2005, pp. 71-93). Thus, a direct reference is not necessary in any case as the analysis presented below aims at filtering out condensed insights that are observable in several interviews.

C. The EU anti-discrimination regime

1. Specific characteristics of the internal dimension of anti-discrimination law and policies

As indicated above, the issues of anti-discrimination and equality entered EU-law right from the start of the European integration process. The objective of this chapter is to highlight some of the main features of EU anti-discrimination laws and policies and the specific characteristics of the internal dimension in this context in order to be able to identify distinctive features in comparison to the external dimension. However, the chapter will outline only the most important features on a meta-level. Firstly, it will briefly discuss the different types of instruments used within the EU and, secondly, it will summarise some of the specific features and characteristics of EU anti-discrimination law and the EU anti-discrimination regime as such.

a) EU anti-discrimination instruments

The EU has developed a broad range of equality and anti-discrimination instruments applicable to the internal dimension, including hard law, soft law, and specific action programmes:

(1) The principles of anti-discrimination and equality in EU primary and secondary law

EU primary law has incorporated many stipulations on equality and anti-discrimination over time (see also Mayrhofer and García San José, 2014). The Treaty on European Union (TEU), for example, states in Art. 2 that the Union is founded on the values of respect for, *inter alia*, equality and further states in Art. 3(3) that the EU shall combat social exclusion and discrimination and promote equality between women and men. The Treaty on the Functioning of the European Union (TFEU) contains several provisions on equality and anti-discrimination, amongst others, the objective to eliminate inequalities and to promote equality between men and women in Art. 8, the competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in Art. 19, and the principle of equal remuneration between men and women in Art. 157, which goes back to the founding treaty of the European Economic Community (Treaty establishing the European Economic Community, Art. 119). The most important milestone concerning the incorporation of anti-discrimination in EU primary law constitutes the Treaty of Amsterdam. The Treaty of Amsterdam marks the inclusion of Art. 13 (today Art. 19 of the TFEU), which conferred on the EU the power to take appropriate action to combat discrimination based on gender, racial or ethnic origin, religion or belief, age or sexual orientation:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take

appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (TFEU, Art. 19).

Another crucial provision can be found in the Charter of Fundamental Rights of the European Union (CFREU). The CFREU is applicable to all EU institutions and bodies and, thus, 'it also applies to its external action' (European Commission, 2010a, p. 4), i.e. the EEAS. Art. 21 of the CFREU lays down that '[a]ny discrimination based on any ground such as sex, race colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

In addition and on basis of these legal foundations provided by EU primary law, a broad range of secondary law (see also Mayrhofer and García San José, 2014) has been adopted over the years. The most important instruments are:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

(2) *Soft law and specific action programmes*

Another important category of instruments is that consisting of soft law and action programmes. Soft law is a kind of declaration of intent or lays down essential fields of action. It has not only profoundly influenced the discourse on anti-discrimination and equality, it has also repeatedly been a precursor of anchoring certain issues in primary law. Together with action programmes, which often include financial tools to promote certain actions and measures such as 'research, awareness raising and building NGO capacity at European level', these categories constitute quite powerful instruments (Bell, 2008, p. 36). They include, amongst others, recommendations, reports, resolutions, policy strategies, roadmaps, communication, working documents, Commission Staff Working Documents etc., and are often not only aiming at supporting public institutions but also civil society organisations such as NGOs or others.

b) Specific characteristics of the internal EU anti-discrimination legal and policy regime

EU anti-discrimination law and policies are operating through many different instruments and are characterised by a diversity of sources, which mirror different stages in the development of the law. In addition, 'EU law contains many free-standing and specific non-discrimination provisions, i.e. provisions

that grant a right to non-discrimination on their own, though usually within a limited field of application' (Tobler, 2014, p. 530). According to Tobler, other specific characteristics are a closed list of grounds of discrimination laid down by Art. 19 of the TFEU and the material scope of the EU anti-discrimination regime, which is often limited and uneven (Tobler, 2014, pp. 531-532). The CFREU, in contrast, does not contain a closed list, however, its scope is limited to EU institutions or Member States in regard to their implementation of EU law. The equality directives define different forms of discrimination: direct and indirect discrimination, harassment, instruction to discriminate, and victimisation.

The development of the EU anti-discrimination and equality regime was fragmentary and uneven. It evolved in several phases which found its repercussion in the structure of EU equality law. De Búrca distinguishes several distinctive features of the EU anti-discrimination regime: Firstly, it designates particular roles for non-state actors, where 'transnational advocacy groups and networks worked over the years to lobby for the enforcement, expansion and development of EU anti-discrimination law' (De Búrca, 2010, p. 221). The second important feature is the creation and financing of transnational networks by the European Commission, such as the European Network of Equality Bodies. The third characteristic is the importance of informational approaches and mechanisms, alternative remedies, and alternative dispute-resolution processes. Fourthly, the EU has gradually widened its initially narrow focus on equal pay and has continually broadened its anti-discrimination concepts and introduced a growing number of diverse instruments. Finally, the EU anti-discrimination regime can be distinguished by shifting 'from a focused negative obligation to broad set of positive requirements including the general requirement of "mainstreaming" (i.e. the systematic incorporation of equality goals into all public policies), as well as more specific requirements which trigger broader positive obligations' (De Búrca, 2010, p. 225).

2. Legal and policy framework concerning anti-discrimination in EU external action with a specific focus on the EEAS

Human rights as an integral part of external action was given a new impetus by the Treaty of Lisbon. This treaty not only provided for the establishment of the EEAS headed by the High Representative for Foreign Affairs and Security Policy (HR), it also marked a considerable step forward in terms of further anchoring human rights, including equality and anti-discrimination principles, in the EU legal framework.

a) The external dimension of equality and anti-discrimination in EU primary law

Since the entry into force of the Treaty of Lisbon, human rights play a key role in the EU's external relations. The TEU states in Art. 21 that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity'. Closely related to the concept of equality is the principle of non-discrimination, which is laid down in Art. 2 of the TEU, positing that the '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'.

Furthermore, Art. 3 of the TEU stipulates that the EU ‘shall combat social exclusion and discrimination and shall promote social justice and protection’. A clear instruction to enhance these principles in external relations can be found in Art. 3(5), which states that ‘[i]n its relations with the wider world, the Union shall uphold and promote its values’.

b) Specific instruments and measures to promote equality and anti-discrimination in external action

(1) Policies and instruments concerning equality and anti-discrimination in EU external action in general

The EU has integrated anti-discrimination and equality considerations into its external action for a long time. Essentially, external action partly uses different instruments and tools than internal policies as it very often follows different decision-making procedures. This is the case especially with reference to the Common Foreign and Security Policy (CFSP), which is still subject to inter-governmental cooperation in accordance to the principle of unanimity. Keukeleire and Delreux (2014) distinguish between four sets of instruments the EU uses for promoting the principles of democracy, human rights and the rule of law in its foreign policy: Firstly, the CFSP has a broad range of tools and instruments at its disposal, including declarations and diplomatic activities, human rights dialogues as well as other actions. Of specific importance in this context are the Human Rights Guidelines, which ‘provide EU representatives in the field with operational goals and tools to intensify initiatives in multilateral fora and in bilateral contacts, resulting in some intensive lobbying campaigns to promote specific human rights goals’ (Keukeleire and Delreux, 2014, p. 136). These Guidelines also play a significant role in terms of implementing anti-discrimination policies and, thus, will be analysed in detail later in this chapter. Secondly, political framework agreements with third countries and the corresponding financial instruments usually include human rights clauses and provide for regular political dialogue on human rights issues. Thirdly, the European Instrument for Democracy and Human Rights (EIDHR), which aims at providing (financial) support for the promotion of democracy and human rights in non-EU countries, allows ‘the EU to work directly with NGOs and international organizations rather than with governmental actors’ (ibid., p. 137). A considerable part of the measures is dedicated to projects with an anti-discrimination dimension. Para. iii of Art. 2b of Regulation No. 1889/2006, which defines the scope of the EIDHR, lays down that the Community assistance shall relate to

the promotion and protection of human rights and fundamental freedoms, [...] the fight against racism and xenophobia, and discrimination based on any ground including sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

Internal policies with an external dimension constitute the fourth category of tools, such as in the field of combating trafficking in human beings (Keukeleire and Delreux, 2014, pp. 137-138).

In 2012, the Council of the European Union (CoEU) adopted the EU Strategic Framework and Action Plan on Human Rights and Democracy. The Strategic Framework defines key areas and priorities of EU’s external human rights action. It states that the EU ‘is founded on a shared determination to promote peace and stability and to build a world founded on respect for human rights, democracy and the rule of

law. These principles underpin all aspects of the internal and external policies of the European Union' (CoEU, 2012, p. 1). The document emphasises the EU's commitment to the universality of human rights and stresses the need for more coherent objectives. It underlines the EU's commitment to human rights in all spheres and in all EU external policies. Anti-discrimination is considered as being an EU human rights priority by stipulating:

The EU (...) will promote freedom of religion or belief and to fight discrimination in all its forms through combating discrimination on grounds of race, ethnicity, age, gender or sexual orientation and advocating for the rights of children, persons belonging to minorities, indigenous peoples, refugees, migrants and persons with disabilities. The EU will continue to campaign for the rights and empowerment of women in all contexts through fighting discriminatory legislation, gender-based violence and marginalisation.

The EU will intensify its efforts to promote economic, social and cultural rights; the EU will strengthen its efforts to ensure universal and non-discriminatory access to basic services, with a particular focus on poor and vulnerable groups. The EU will encourage and contribute to implementation of the UN Guiding Principles on Business and Human Rights (CoEU, 2012, pp. 1-2).

The Action Plan aims at implementing the EU Strategic Framework and lists a broad range of intended outcomes and respective actions, including action on gender equality, women's rights, protection against gender-based violence, child protection, the promotion of non-discrimination in ILO labour standards, the rights of LGBT persons, rights with reference to freedom of religion or belief, rights of persons belonging to minorities, indigenous rights, and rights of persons with disabilities.

On 28 April 2015, a new Action Plan on Human Rights and Democracy with the title 'Keeping human rights at the heart of the EU agenda' was adopted. The action plan contains three specific actions on anti-discrimination: Action 8 aims at empowering CSOs defending women and girls' rights, action 12 at cultivating an environment of non-discrimination and action 13 at promoting gender equality, empowerment and participation of women.⁴

(2) Specific measures and instrument to promote and incorporate anti-discrimination in the work of the EEAS

The EEAS can resort to a broad range of different instruments when it comes to integrating equality and non-discrimination dimensions within its work:

The eight so-called "Guidelines" form the backbone of EU human rights policy. Though they are not legally binding, they are adopted unanimously by the Council of the EU, and therefore represent a strong political expression of the EU's priorities. They also provide practical tools to help EU representatives around the world advance our human rights policy. Thus the Guidelines reinforce the coherence and consistency of EU human rights policy (EEAS, 2012, p. 15).

⁴ As the research to this chapter was concluded in April 2015 a detailed analysis of the new Action plan will not be included in this chapter. All references concerning the Action Plan in this chapter refer to the first Action Plan.

There are three Guidelines, focussing on anti-discrimination or containing a passage on anti-discrimination:

- Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons (24 June 2013)
- EU Guidelines on the promotion and protection of freedom of religion or belief (24 June 2013)
- EU Guidelines on violence against women and girls and combating all forms of discrimination against them (8 December 2008).

The Strategic Framework/Action Plan as well as the Guidelines are also important in another sense, that is, they changed the approach of the EEAS. The EEAS used to pursue a rather reactive approach, meaning it acted in response to issues coming up or brought forward by other institutions. According to statements made by the interview partners, the Strategic Framework/Action Plan, as well as the Guidelines, have given the work of the EEAS a more proactive turn.

The process of implementing anti-discrimination issues into the work of the EEAS is quite complex and includes many approaches and instruments. The Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, for example, contain a long list of different operational tools regarding third countries and concerning the EU's work in multilateral fora.

With regard to third countries, the list includes measures and operational tools such as:

- Addressing the situation of LGBTI persons in human rights country strategies;
- Monitoring the human rights of LGBTI persons according to a human rights checklist provided in the annex of the Guidelines;
- Including LGBTI issues and violations of the rights of LGBTI persons and human rights defenders in EU Heads of Mission reports;
- Making demarches and public statements on LGBTI issues, but also responding to positive developments concerning the rights of LGBTI persons;
- Proposing specific action on individual cases of human rights violations of LGBTI persons,
- Attending and observing court hearings and paying prison visits;
- Including LGBTI issues in political dialogues;
- Supporting efforts by civil society;
- Influencing international mechanisms in order to make them take into consideration LGBTI issues;
- Including information on LGBTI issues in briefing materials for visiting EU and Member state missions.

In multilateral fora the suggested approaches include:

- Promoting anti-discrimination issues concerning LGBTI persons in international organisations, namely the UN, OSCE, and CoE but also other relevant fora;

- Raising the issue in all bodies and work for the development and/or implementation of international instruments in this respect;
- Raising the issue during the Universal Periodic Review processes at the Human Rights Council;
- Incorporate LGBTI issues in statements and questions during interactive dialogues at the UN, OSCE, CoE and other international organisations.

The EU Guidelines on the promotion and protection of freedom of religion or belief list similar tools, including the topic of freedom of religion or belief in monitoring, assessing and reporting activities, raising the issue in demarches and in the context of public diplomacy as well as within political dialogues, briefing EU and Members States visiting third countries on the situation of freedom of religion or belief, using external financial instruments such as the EIDHR to this effect, promoting freedom of religion and belief in multilateral fora such as the United Nations, the Organisation for Security and Cooperation in Europe or the Council of Europe, and providing training for EEAS staff in the field and in headquarters.

The EU Guidelines on violence against women and girls and combating all forms of discrimination against them suggests similar approaches, such as, raising and promoting the issue in relations with third countries and regional and international organisations as well as in bilateral and multilateral cooperation, encouraging third countries to adopt appropriate legal instruments, following up individual cases of exceptional gravity, using EU dialogues to raise the issue, including gender-based violence in human rights reports, working towards and supporting programmes aiming at redress, rehabilitation and access to care, prevention of violence and strengthening respective capacities.

D. Gaps and challenges

The following section discusses the most important aspects including gaps and challenges of EEAS' anti-discrimination policies and instruments. In doing so, it will first have a closer look at the process of implementing anti-discrimination principles in the work of the EEAS including a short analysis of involved institutions, then it will analyse the concepts used in order to define (anti-)discrimination on the one hand and specific discrimination grounds or groups used by the Human Rights Guidelines. In a next step, the section will elaborate on the issue of coherence as anti-discrimination constitutes a crucial example where various dimensions of incoherence become manifest. In a last sub-section, the topic of effectiveness will shortly be addressed. The chapter mainly draws on the analysis of interviews with EU officers (see section B of this chapter) but also relies on the analysis of documents and academic literature.

1. Process of implementing anti-discrimination principles

Although there has been made a considerable effort to integrate principles of anti-discrimination in external relations and, specifically, within the EEAS, 'the policies on non-discrimination have been developed in a somewhat piecemeal way, depending on the priorities of successive presidencies or external events and pressures' (Lensu, 2011, p. 256). Undoubtedly, there is not only a broad variety of different strategies, tools and instruments available for EEAS officers, the respective policy process as well as the interaction with and between different units and stakeholders are rather complex. COHOM, the Council of the European Union Working Party on Human Rights, with the task 'to promote the

development, and to oversee the worldwide implementation, of the EU's policy in the field of human rights and democracy, including EU human rights Guidelines and human rights dialogues and consultations with third countries' plays a key role in this process (Mandate of COHOM, 2014, p. 3). It coordinates the deliberation and consultation process on the main important policy strategies and respective documents relevant for the work of the EEAS.

Essentially, not only the EU Strategic Framework on Human Rights and Democracy defines the fight against discrimination as an EU priority, also the interviewed officers rank the significance of anti-discrimination issues as high on the human rights agenda of the EEAS. They are declared as being a key priority. There is a multitude of factors and actors, which and who influence why and how a discrimination issue or category becomes an item on the EEAS agenda or not. The main actors in this regard are the following:

- Interest groups have a central role not only concerning the fact whether an anti-discrimination issue is given more importance to become a priority issue but also in defining the issue at stake and in developing the concepts and the drafts of policy documents, such as the Guidelines.
- Another important factor is the role of the involved officers. Committed officers who push the subject seem to have a decisive role when it comes to putting a topic on the agenda.
- The High Representative for Foreign Affairs and Security Policy, who is, *inter alia*, responsible for exercising authority over the EEAS and over the Union delegations in third countries and at international organisations, also has an influence on the agenda and on setting priorities when it comes to human rights issues, including the selection of anti-discrimination policies.
- The Council and the Member States have – also legally – a very important voice since the major part of EEAS policies and tasks is under the heading of CFSP, which is bound to the inter-governmental mode of decision-making. Thus, Member States may block or enhance certain anti-discrimination topics that are controversial or which they hold to be important.
- The European Parliament (EP) exerts an influence on the EEAS agenda. Especially, the EP Committee on External Affairs and its Subcommittee on Human Rights as well as the Committee on Civil Liberties, Justice and Home Affairs have a decisive role in this regard and frequently call on the EEAS to take into consideration anti-discrimination issues by means of reports, statements etc., e. g. the Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.
- The European Commission, and in this context especially the Directorate-General for International Cooperation and Development (DG DEVCO), is a crucial partner and collaborator in terms of EEAS' human rights policies in general and anti-discrimination policies in particular (see below).

Besides these actor-related factors there are also other dimensions that have an influence on if and how anti-discrimination is included in external relation policies:

- The question of how controversial and/or sensitive an anti-discrimination issue is. This refers to the fact that especially anti-discrimination issues are often quite controversial and this influences the way these issues are dealt with, as well as their place on the agenda.

- External events are quite decisive in putting a specific anti-discrimination topic on the EEAS agenda and defining the EEAS anti-discrimination priorities.

Against this background, the following paragraphs elaborate on some of the gaps and challenges concerning the implementation of anti-discrimination principles and policies in the work of the EEAS with regard to the process.

a) Working mode of the EEAS

The working mode of the EEAS was described – especially when taking into consideration a more historical perspective and also including the working mode of the EEAS’ predecessor DG RELEX, the former Directorate-General for External Relations – as being rather reactive. That means the EEAS tended to follow a reactive approach in responding to external events – events with a human rights or anti-discrimination dimension that happen in third countries or with an international dimension – and pressure exerted by other institutions, such as the EP, rather than on its own initiative. The EU Strategic Framework and Action Plan on Human Rights and Democracy seems to have given the EEAS a more forward-looking and a more pro-active agenda and led to the development of new Guidelines, which reinforced the pro-active impetus of the EEAS with regard to anti-discrimination policies.

b) Tension between personal commitment and institutionalisation of collaboration

In general, the implementation of human rights and anti-discrimination issues are reported to require quite a high degree of personal commitment from the officers in charge. Human rights in general and anti-discrimination issues in particular can be quite controversial. That is the case, especially when it comes to issues such as rights of LGBTI persons, gender aspects, and minority issues which are very often ‘hard to sell’, not only externally but also internally. The situation was even more problematic before the EU Strategic Framework and Action Plan on Human Rights and Democracy and the Guidelines were implemented. It was to a large extent up to the officers, and particularly up to the respective Head of Missions working in the EU delegations, as well as the so-called geographical desks to implement human rights and anti-discrimination policies which were often regarded as the ‘unpleasant part’ of the relationship to third countries or – in reference to the rights of LGBTI persons – the ‘awkward file’ nobody wanted to deal with. This meant that implementing anti-discrimination issues was dependent on the individual commitment of the officers in charge, and personal prejudices and critical voices within the delegations hampered the implementation especially of the more contentious issues. Not least because of the EU Strategic Framework and Action Plan on Human Rights and Democracy as well as the adoption of the Guidelines, anti-discrimination issues became more de-personalised. The adoption of these instruments saw an increasing institutionalisation of human rights policies, including, for example, trainings provided for all officers as well as appointing human rights focal points in all EU delegations. However, there still seems to be a huge focus on personal and individual commitment and responsibility when it comes to inter-institutional cooperation, for example, between EU institutions but also between the EEAS and NGOs. Thus, there is room for improvement concerning the right balance between structural aspects of human rights, which means a better and well-founded institutionalisation of anti-discrimination issues, and personal commitment.

c) Tensions between EU delegations and Member States' delegations with regard to human rights and anti-discrimination

Tensions and problems of coherence between EU delegations and delegations of Member States are reported when it comes to the collaboration on human rights and anti-discrimination principles. Interviewees reported that some Member States repeatedly dissociate from implementing human rights and anti-discrimination principles as laid down in EU documents such as the Action Plan or the Guidelines. Member State embassies do not feel to be constrained or bound by those instruments and tools. Member States do not pass on the information on these tools to their respective delegations. The reasons for this lack of support can, on the one hand, be found in economic reasons and cutbacks of resources of Member States' delegations. Thus, some Member States focus on those issues which are of most significance to them and 'outsource' human rights topics to the EU which they classify as being of minor importance. On the other hand, and as indicated earlier, human rights and anti-discrimination are regarded as unpleasant and difficult topics in the collaboration with third countries. Therefore, there is a tendency to leave these topics to the EU delegation as the policies and principles stipulated in the Action Plan and Guidelines are classified as being 'EU business'. Thus, also concerning anti-discrimination policies there seems to be a lack of consistency between, and a lack of support by, EU Member States and EU institutions, as seems to be the case with regard to the promotion of human rights as such. As Karen E. Smith has pointed out, there are weaknesses 'in the ability of the EU member states and institutions to agree on a more consistent approach to the promotion of human rights in their bilateral relations' (Smith, 2014, p. 172).

d) Job conditions for EEAS officers as a hampering factor of implementing human rights and anti-discrimination issues

Several dimensions that seem to have an adverse effect on the implementation of human rights and anti-discrimination principles are related to the job and working conditions of EEAS officers. First of all, officers seem to be overburdened by their work load. An increasing amount of human rights tools and instruments, such as the very comprehensive Guidelines, adds to the already considerable amount of work. Secondly, there is the principle of job rotation. Officers have to move on to another file or another delegation every couple of years. The effect of this principle was evaluated quite diversely, however, the tendency of the assessments was that the rotation has a rather negative impact on the subject of human rights and anti-discrimination as it does not allow the individual officer to build up in-depth expertise on an issue and, as a consequence, the quality and coherence of the respective policies are affected negatively. This also became apparent during the interviews because the officers very often had only limited knowledge on the history and evolvement of the anti-discrimination issue they were in charge of. On a more positive note, the expertise gained in the human rights division is said to continue having an effect when officers rotate to other jobs. The rotation, thus, may contribute to the distribution of anti-discrimination issues throughout the EEAS.

e) Procedures trump content

Another issue that was repeatedly raised in interviews was the high significance of procedures and processes to implement anti-discrimination principles as well as human rights issues in general into the work of the EEAS. There is a tendency to put considerable emphasis on procedural aspects. For example,

the three guidelines that have an explicit focus on anti-discrimination list a broad variety of operational tools describing which procedures to follow in different international and regional fora (such as UN, OSCE, etc.). The EU is said to be very good at these procedural aspects, at raising the issue on many regional and international levels, organising HR dialogues, meeting with Member States and other EU institutions etc. However, the officers also reported to focus too much on, or are overloaded with, bureaucratic work. Human rights and anti-discrimination are said to become a technical, bureaucratic exercise and there is too little space to consider conceptual and strategic issues. There is no or only little room for critical reflection, especially with regard to the officers' own attitudes and the use of conceptual approaches. This is a result of the fact that the issues at stake are very controversial among EU Member States themselves and that the results are often the lowest common denominator and/or are focusing on procedures because they are less controversial.

f) The human rights division as an isolated unit – experts versus mainstreaming

Although there was a huge effort to mainstream anti-discrimination and human rights issues in all EEAS procedures, the human rights unit is still reported to be a rather isolated unit. Although the setting-up of the EEAS saw a shift from the former Human Rights Directorate in the Commission to become 'a normal business' of any geographic desk, the expertise is still concentrated in the Human Rights Directorate of the EEAS. However, the integration of anti-discrimination and human rights issues has also increasingly become the responsibility of officers in the local delegations and geographical desks. The mainstreaming of human rights and anti-discrimination policies has paradoxically led to a 'de-expertising' of the human rights and anti-discrimination field, which has the advantage that these issues become an integral part of all levels and dimensions of EEAS work, but also the danger of a lack of expertise and sensitivity that are necessary for ensuring sustainable and effective work and policies on anti-discrimination and human rights. Although quite a major part of the EEAS workforce is using human rights and anti-discrimination language, there is a danger that there is a lack of more detailed and in-depth knowledge which would be necessary to fill the policies and strategies with more substance. Thus, the question of human rights and anti-discrimination training for EEAS officers became, and still is, an important topic to ensure the quality of EEAS human rights work. It further remains unclear if trainings on human rights and anti-discrimination are reaching the officers who really need training or only those who are already sensitive to the subject. For example, the 2011 EU report on Human Rights and Democracy in the World mentions with regard to training on gender issues for EU Delegations' staff, that 'the responses indicate that it is mostly women who receive training on gender, indicating that gender is still perceived as a "women's issue" ' (EEAS, 2012, p. 53).

g) Impact of the Guidelines

The Guidelines are said to have mainly a positive impact on anti-discrimination issues. They had the effect of institutionalising anti-discrimination issues and to de-personalise issues, which are contentious, sensitive and 'hard to sell'. It is a commitment by the highest political level and contains clear instructions on how to proceed, which actions to take and which arguments to use. According to the interviews, the Guidelines make a huge difference when dealing with a topic. For example, the LGBTI Guidelines had the effect that this topic was transformed from an awkward topic to an issue everyone

advocates. The Guidelines are an agreed language and if not legally binding, they were described as being 'politically-morally binding'. Therefore, the Guidelines constitute a considerable step from moving away from the personal commitment of the officers towards a political-structural commitment of an institution. However, the distribution of the Guidelines was described as a deliberation process, where heads of delegations have to be provided with additional information on how to implement them and that they are a priority issue. The Guidelines were also evaluated as making common EU-standards available to all EEAS units and ensuring a consistent and uniform approach to third countries as well as other international and regional bodies and, thus, preventing double standards.

h) Collaboration with other units especially DG DEVCO

Among other EU bodies, the EEAS has the closest ties with DG DEVCO in the field of external anti-discrimination policies. Although, as mentioned above, the relationship with other EU bodies and stakeholders such as the Council, the EP or NGOs is crucial as well, it is the portfolio of DG DEVCO which is of specific relevance to the work of the EEAS. DG DEVCO is more involved in working on the procedural-operational level by financing projects, such as project under the EIDHR, while the EEAS is the political counterpart. In general, the collaboration with DG DEVCO on anti-discrimination policies was characterised to be very good and strong. DG DEVCO was involved in drafting the Guidelines and, although there is no formal institutionalised bridge between the two bodies, the cooperation in this policy field is close and seems to work rather smoothly.

2. Concepts

The preceding sections suggest that the procedures and approaches in place to implement anti-discrimination priorities and policies are quite extensive and comprehensive. Anti-discrimination principles are taken into consideration in a broad range of human-rights tools and instruments used in the EEAS. However, if one looks at the content and especially at the concepts used in EEAS anti-discrimination policies the picture is less favourable. The challenges concerning EEAS anti-discrimination policies are not necessarily referring to the lack of procedural incorporation of these policies in EEAS action and tools, but instead are more serious when it comes to the substance of those policies. The focus on anti-discrimination issues in the EEAS is rather on process than on content. While there is a broad range of tools and instruments where anti-discrimination plays a role, the quality of concepts used are sometimes quite problematic. Looking at the Guidelines, the 'backbone of EU human rights policy', it is striking that although the term discrimination and non- or anti-discrimination is used, no in-depth explanation of the concept of discrimination or anti-discrimination can be found (EEAS, 2012, p. 15). There is a lack of clear-cut definitions laying down what (anti-)discrimination means in reference to gender, sexual orientation and freedom of religion or belief compared to the definitions laid down in the equality directives. This means that it is up to the officers in charge to have a profound knowledge on anti-discrimination issues and to have expertise on what discrimination on grounds of sexual orientation, gender and religion or belief means.

Yet, despite this poorly-developed or even lack of definitions and concepts, there are implicit norms or hidden concepts which the Guidelines are based on. These implicit norms and concepts are, however, sometimes quite problematic. In the following, each of the three relevant guidelines will be discussed in detail and the gaps and weaknesses regarding the concepts used will be highlighted.

a) Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons

In general, the LGBTI Guidelines are a comprehensive document with an introduction, including the reason for action, the purpose and scope of the Guidelines as well as definitions and the legal framework. The major part of the Guidelines is dedicated to the operational Guidelines elaborating on priority areas of action, operational tools regarding third countries and multilateral fora and general measures.

In their introduction the LGBTI Guidelines contain a, however non-systematic, list of examples of infringement of human rights against LGBTI persons. Discrimination is mentioned as being one example of a human rights violation:

The EU is gravely concerned that sexual orientation and gender identity continue to be used to justify serious human rights violations around the world. LGBTI persons constitute a vulnerable group, who continue to be victims of persecution, discrimination, bullying and gross ill-treatment, often involving extreme forms of violence, including torture and murder (Council of the European Union, 2013, para. 2).

There are several problematic points: Firstly, although the LGBTI Guidelines describe some examples of discrimination on the grounds of sexual orientation or gender identity, they do not specify a definition of anti-discrimination and equality. The Guidelines state:

Discrimination on grounds of sexual orientation or gender identity is the most common issue facing LGBTI persons. Discriminatory legislation, policies and practices can be found in the workplace and in the public sphere, specifically regarding access to health care and education. It can include issues of bullying and other forms of exclusion. Discrimination and inequality of treatment are also likely to be found in detention facilities. (Council of the European Union, 2013, para. 19)

Thus, the Guidelines leave it to each individual officer in charge to define non-discrimination, which is quite a demanding task as non-discrimination is a multi-layered, complex concept. Furthermore, the Guidelines do not address stereotypic notions on the part of the officers which might distort the implementation of the Guidelines or even reinforce stereotypes. Secondly, the EU Strategic Framework on Human Rights and Democracy claims to combat discrimination on grounds of sexual orientation (Council of the European Union, 2012, p. 1), however, the Guidelines are explicitly focusing on LGBTI persons. There is a complete silence on heterosexual persons and norms; the concept of sexual orientation is restricted to those who differ from the heterosexual norms. This is, as repeatedly pointed out by gender and queer researchers, a problematic practice as it reduces sexual orientation to those, 'deviating' from the heterosexual norm and at the same time renders the (hetero-)normative structure of the society invisible. Although, the Guidelines mention at another point, that '[d]iscrimination against LGBTI persons is often rooted in societal norms', however, they do not say that these norms are heterosexual norms. Heterosexuality is presumed, it 'becomes invisible as a structure' (Phelan, 2001, p.

35). Thirdly, the Guidelines describes LGBTI person as a 'vulnerable group'. This classification in itself is a stereotyping act as it embraces a very diverse group (e.g. with regard to social origin, property, ethnic origin, gender, age, education, etc.) under a rather stigmatising umbrella term. The Guidelines do not state that it is society which makes a group vulnerable, but rather indicate that it is the group that is vulnerable as such. This again makes a discriminatory structure invisible. Fourthly, although the Guidelines stipulate that 'LGBTI persons have the same rights as all other individuals – no new human rights are created for them and none should be denied to them' (Council of the European Union, 2013, para. 1), the Guidelines do not mention marriage and reproductive rights as being a necessary part of the 'same' rights. They are not even included in Annex 2, which contains elements for analysis/checklist of the situation regarding the LGBTI human rights issue. However, as already indicated in the Report on factors which enable or hinder the protection of human rights (Lassen et al., 2014), the institutions of marriage and the definition of family are core issues when it comes to heteronormative practices coming into effect through human rights law. It not only leads to social stigmatisation but also excludes sexual minorities from a broad range of rights and benefits linked to the institution of marriage and family rights. Hence, the omission is a discriminatory practice in itself. Through this normative bias and also through the confinement of policies in certain areas deeper roots of discrimination are not addressed.

b) EU Guidelines on violence against women and girls and combating all forms of discrimination against them

The EU Guidelines on violence against women and girls and combating all forms of discrimination against them show similar problematic tendencies as the LGBTI Guidelines. On a general level, they are not very substantive regarding conceptual foundations and general information. They only contain a very short outline of the objective of the Guidelines, and a few lines with the title 'Definition' which contains a brief definition of the term violence against women while the remainder of the Guidelines is mainly dedicated to the operational part. In the annex, there is a longer introduction to the issue of violence against women, its forms, causes and consequences as well as a chapter on the international legal framework and obligations of States in combating violence against women.

There are several shortcomings in reference to the conceptualisation and covering of discrimination: First of all, although the title of the Guidelines suggests that the document is dealing with violence against women and girls as well as discrimination against them, the major part of the Guidelines is dealing with violence against women and girls. The issue of discrimination is covered only marginally in a simplified and superficial way. Secondly, apart from the paragraph laying down that 'the strategies of the Member States and of the EU in its external action must in particular focus on legislation and public policies which discriminate against woman and girls, and the lack of diligence in combating discrimination practised in the private sphere and gender-stereotyping', there is no definition or clarification of the concept of discrimination against women and girls (Council of the European Union, 2008, p. 2). Again, it is up to the officer to decide on the definition or concept of discrimination which is not only a demanding task but might also be a problematic when using stereotyping or stigmatising concepts. In general, these Guidelines lack of a presentation of a sound conceptual and content-related basis. Most of the Guidelines are dedicated to the so-called operational Guidelines comprising different

strategies and tools for action in this field. Thirdly, the Guidelines also can be characterised by a discriminating approach by reducing discrimination on grounds of gender to women. Gender based violence is of course an important topic but there is again the risk of narrowing down the problem as a women's problem and, thus, reproducing stereotypes and failing to address the wider gendered context which implicates laying an increased focus on the role of men as well. Fourthly, discrimination is a much broader topic than only being the cause for violence against women and girls as suggested by the Guidelines (ibid., p. 15). Although indicated in the headlines the Guidelines do not take into account the different and complex dimensions of discrimination and in general fail to take into consideration the state of the art of gender research.

c) EU Guidelines on the promotion and protection of freedom of religion or belief

The EU Guidelines on the promotion and protection of freedom of religion or belief appear to be a quite substantive document with regard to structure, background information and conceptual basis. They reflect the same structure as the LGBTI Guidelines: The introduction contains a reflection on the reason for action, purpose and scope and definitions. Again, the major part focuses on the operational Guidelines which lay down the basic principles of action, priority areas of action as well as a list of tools. A short final section deals with implementation and evaluation. According to these Guidelines, non-discrimination is laid down as a priority area of action in the section laying down the operational Guidelines. In par. 35 the Guidelines state:

States have the duty to protect all persons within their jurisdiction from direct and indirect discrimination on grounds of religion or belief, whatever the reasons advanced for such discrimination. This includes the duty to rescind discriminatory legislation that protects freedom of religion or belief, and halt official practices that cause discrimination, as well as to protect people from discrimination by state and other influential actors, whether religious or non-religious (Council of the European Union, 2013b, para. 35).

Although these Guidelines contain a reference to direct and indirect discrimination, they do not provide a further explanation and elaboration on how these two terms can be defined. The paragraph refers to rather explicit dimensions of discriminations, such as discriminatory legal acts or practices by state and other officials. A second paragraph which is quite revealing lists a range of examples of discrimination on grounds of religion or belief:

Beliefs or practices that are, or allegedly are, traditional are often used to justify discrimination or coercion on the basis of religion or belief. Examples of this include denial of access to employment or education for women, bride kidnapping, early and forced marriage or female genital mutilation. Communities do not have the right to violate the rights of individual members of that community. All individuals, including women and girls, have the right to a religion or belief of their own individual choice, including not to have a religion or belief. (...)

The EU will (...) pay particular attention to practices and legislation discriminating against women, children and migrants on grounds of religion or belief, including discrimination in and

denial of access to education, coercion related to the wearing of religious symbols, employment, participation in public life (...) (Council of the European Union, 2013 b, para. 36 and para. 37).

There are several problematic points with regard to these paragraphs: Firstly, the examples mentioned suggest that even if the drafters of the Guidelines did not refer to any religion in particular, they had however a specific religion in mind: the Islam. The examples are practices which are very often associated with Islamic practices – such as ‘the coercion related to the wearing of religious symbols’ or ‘forced marriage and female genital mutilation’; the examples are actually a collection of common ‘Western’ stereotypes towards Muslims. Thus, the Guidelines define discrimination by listing a range of islamophobic examples of discriminatory practices. Secondly and closely related to the first point, they are about perceived discriminatory practices carried out by ‘others’. Again, the example of the wearing of religious symbols is about the coercion of wearing such symbols and not the coercion of *not* wearing such symbols which would be the practice of some European countries, such as France or in some German federal states. Thus, it can be argued that the Guidelines are using the practice of the so-called ‘othering’, a term which goes back to the writings of Simone de Beauvoir (Pilcher and Whelehan, 2004, p. 90) and became particularly relevant in the context of the so-called post-colonial studies (see e.g. Ashcroft, Griffith and Tiffin, 1998, p. 169). At a very general level, othering is understood as ‘the risk of portraying the other essentially different, and translating this difference to inferiority’ (Krumer-Nevo and Sidi, 2012, p. 299). Thirdly, it is striking that many examples have a gender dimension as they are about the discrimination of women. This is also quite a popular strategy, as pointed out by various academics (see e.g. Fernandez, 2009; Hasan, 2012). Islamophobia is very often expressed in a gendered way, the Islam is very often depicted as ‘misogynistic and oppressive to women’ by referring to examples such as veiling, forced marriages, honour killings, etc. (Hasan, 2012, p. 55). This not only ‘forces Muslim women in the category of victim’ it is also, it may be argued, a racist practice which is ‘hidden behind a face of concern for gender equality’ (Fernandez, 2009, pp. 269-272).

To sum up, the concepts and definitions – very often implicitly – used in the Guidelines are, to put it mildly, at least problematic and might even reinforce sexist, heteronormative, racist and islamophobic stereotypes. The Guidelines either aim at integrating the deviant other into the dominant norm – this is about the inclusion of women into the dominant androcentric order or the inclusion of LGBTI persons into the dominant heteronormative order – or they aim at civilising and eradicating perceived discriminatory practices of others.

3. Coherence

The question of coherence, especially with regard to the external-internal dimension, was mentioned as being a key issue concerning anti-discrimination by EEAS officers and other EU officials during the interviews. EU institutions have urged for greater coherence for some time (see Portela and Raube, 2012; see also Lewis et al., 2014). In doing so, they referred to several dimensions of coherence. In 2006, the European Commission stated:

As in national administrations, even when there is sufficient political will, the EU’s impact falls short when there are unresolved tensions or a lack of coherence between different policies. There is a need for strong and permanent efforts to enhance the complementary interaction of

various policy actions and to reconcile different objectives (for example in trade, agriculture, development, environment or migration). For the EU, there is the additional challenge in ensuring coherence between EU and national actions (European Commission, 2006, p. 6).

Coherence is, thus, related to coherence between different EU policies and actions as well as between EU and national actions. Marangoni and Raube (2014, p. 475) labelled the first dimension, the one which refers to ‘tensions that may arise between different policy areas’, *horizontal coherence*. The second dimension they called *vertical coherence*, as it covers ‘the articulation between different levels of administration, here between the EU and its member states’. Another dimension was raised by the European Council in the Stockholm Programme:

The European Council invites the Council and the Commission to enhance the internal coordination in order to achieve greater coherence between external and internal elements of the work in the area of freedom, security and justice (European Council, 2010, p. 6).

Coherence in this sense refers to differences and tensions between internal and external policies, or internal-external coherence, meaning coherence with regard to policies of internal EU policies and external action. Marangoni and Raube also mention another dimension of coherence, the institutional coherence, a term which stands for two challenges: ‘Inter-institutional conflicts arise when a single policy area is served by two sets of actors and their different procedures, for instance the Council and the Commission. Intra-institutional incoherence arises when different actors within the same organisation – for instance two Directorates-General of the Commission – have different approaches to a dossier’ (Marangoni and Raube, 2014, p. 475). The differentiation between these dimensions, however, cannot be clearly drawn, as it is more an analytical distinction with overlaps and cross- and interconnections. In the following, each of the dimensions will be discussed shortly with reference to anti-discrimination policies in the context of the EEAS.

a) Vertical coherence

Vertical coherence, in this context being consistent policies with regard to EU and its Member States in the area of anti-discrimination, was mentioned several times as being an issue that needs to be addressed. This, firstly, refers to different approaches and policies of EU delegations in comparison with national delegations in third countries. Some national delegations seem to be reluctant to adopt the same policies and approaches as EU delegations. The Guidelines, for example, are seen as ‘EU business’ and although they were supposed to be forwarded to Member States’ embassies as well, in some cases they were not. As already mentioned above, it was also reported that some national delegations tend to increasingly leave human rights and anti-discrimination issues, the ‘unpleasant part’ of the relations to third countries, to EU delegations. Thus, EEAS officers interpret this incoherence solely as a failure on the part of the Member States. There is a lack of critical in-depth reflection as to what are exactly the reasons why national delegations refrain from implementing EU policies and standards.⁵ A second problem concerning vertical coherence in this context is the use of double standards. EU external action asks for anti-discrimination standards which are not guaranteed at all by Member States for their own

⁵ It might also be the case that national delegations do not consider EU tools and strategies as being effective or appropriate and thus opt for other approaches.

populations. In contrast, severe human rights violations are also frequently occurring in EU Member States especially against LGBTI persons, minorities (in particular Roma), women (e.g. violence against women) or in the field of religion or belief, but also topics such as racism and xenophobia are problematic issues in EU Member States. Interviewees repeatedly mentioned this as being an obstacle when it comes to promoting anti-discrimination issues in their collaboration with third countries. It seems to considerably weaken the credibility of EEAS-officers when promoting these standards in bilateral and multilateral cooperation. However, this issue was not only evaluated as being a weakness but also as being a potential strength as it might be used to argue that the problems are not only problems of non-European countries but concern all States. It was suggested, that this might promote collaboration with third countries on an equal footing and intensify efforts on all sides to combat discrimination and human rights violations. A third issue of vertical coherence, which also has an institutional aspect, concerns the question of which body is dealing with anti-discrimination and human rights issues with regard to EU external relations compared to those at national as well as EU internal level. As policies and strategies for EU external action in general, and the EEAS in particular, are to a large extent part of the CFSP, the Council of the European Union and the Foreign Affairs Council are mainly responsible for adopting policies on anti-discrimination. However, when it comes to the EU internal dimension or EU Member States policies and laws on anti-discrimination, different EU bodies and (national) Ministers and Ministries are responsible for the topic. This might lead to a knowledge gap of the responsible persons about the anti-discrimination status quo in other areas and, thus, lead to different policies and standards.

b) Horizontal coherence

Horizontal coherence, meaning the issue of consistently integrating anti-discrimination principles in different EU policy fields – in the present chapter with an external dimensions – was also mentioned as being a relevant issue. Especially the lack of, or inadequate integration of, human rights and anti-discrimination policies in trade and other economic relations with third countries is a considerable point of concern. Although the EU Strategic Framework and Action Plan on Human Rights and Democracy stipulate to ‘promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade (...)’ (Council of the European Union, 2012, p. 2), economic interests in general and trade interests in particular are reported to be given priority when it comes to a conflict of interest with regard to human rights principles. Another policy field where anti-discrimination and human rights issues are inadequately taken into account are policies in the field of environment and climate change. From a non-discrimination perspective both aspects, but especially the first issue (trade and economy), are quite problematic because they have a profound impact on the prevalence of discrimination, e.g. trade agreements which do not take into consideration their potential impact on gender relations, might have an adverse effect on the rights of women.

Another dimension of horizontal coherence with regard to anti-discrimination refers to the uneven implementation of different anti-discrimination aspects into EEAS policies. The EU Annual Reports on Human Rights and Democracy (2009; 2010; 2011; 2012; 2013) reveal that, in general, anti-discrimination on grounds of gender and women rights are most extensively covered by respective action and programmes in external action. However, the emphasis is put mainly on civil rights of women (violence

against women) and to a lesser extent on political rights. The aspect of discrimination on grounds of religions is covered by the aspect of freedom of religion. The category of ethnicity is included in various aspects, either under the heading of racism and xenophobia, but also under the topic of rights of persons belonging to minorities as well as indigenous issues. Also disability is covered by the reports thematic chapter. A main issue was the accession of the EU to the UN Convention on the Rights of Persons with Disabilities but also the enhancement of the rights of persons with disability by advocating the adoption of pertinent human rights law. Discrimination against LGBTI persons has become considerably important over the last years, firstly, due to the adoption of the Toolkit to Promote and protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People and secondly, because of the adoption of the LGBT Guidelines. However, like in all anti-discrimination aspects there is also a greater emphasis on civil rights. Essentially, there is a huge variety as to how these issues are addressed and which approaches are taken. Some aspects such as age or social origin, property or birth are not mentioned.

Concerning the setting of priorities with regard to action in the field of anti-discrimination there is not only a lack of coherence but also a lack of transparency. This might also be due to the fact that decision-making in this regard is a very complex process with a multitude of people and actors involved with more or less leverage on the process (NGOs, Commission, EU delegations). Room for improvement was mentioned by the interviewees concerning the transparent and also publicly understandable choice of priorities as well as a better coordination and transparent involvement of different stakeholders when it comes to the drafting of crucial instruments such as the new action plan.

c) Institutional coherence

Anti-discrimination is relevant for both inter-institutional as well as intra-institutional coherence. Inter-institutional coherence relates to a policy field where more than one institution is in charge. This is of particular relevance for anti-discrimination issues concerning EU external action since the EEAS, as the institution with political outreach, is to a large extent dependent on collaborating with DG DEVCO and vice versa. As mentioned above, the collaboration is reported to be excellent and the exchange of information runs smoothly. Yet, some interviewees see room for improvement in transforming this quite informal, on personal commitment and relationships dependent collaboration towards a more institutionalised form of cooperation. Intra-institutional coherence, defined as different approaches of different actors within one institution was also mentioned as a relevant issue. The challenge in this context still lies in disseminating expertise generated within the human rights directorate of the EEAS in all delegations by adequately training officers and/or consulting anti-discrimination experts with an adequate and comprehensive background and education in relevant missions, negotiations and other relevant developments and events, such as developing or improving Guidelines or strategies.

d) Internal-external coherence

The lack of coherence in EU non-discrimination policies concerning internal and external policies was classified by the interviewees as being quite severe. This not only applies to problems of discrimination and inequalities which are quite serious in some EU-Member States (see vertical coherence) but also very much to the legal and policy dimension. Especially concerning gender and sexual orientation the gap is striking. For example, the Guidelines on LGBTI persons call on States to promote equality and non-

discrimination in the health sector and in education. However, the draft Directive on the prohibition of discrimination on the grounds of religion or belief, disability, age, or sexual orientation in the areas of social protection, social advantages, and access to goods and services (COM(2008) 426 final) which was proposed by the Commission in 2008 has not been adopted yet due to the resistance of some Member States. Thus, there is a considerable gap when it comes to scope but also with reference to the protected grounds. Concerning the internal dimension Art. 19 of the TFEU and the respective anti-discrimination directives based on this article contain a closed list of grounds (sex, sexual orientation, disability, age, racial and ethnic origin, religion or belief) – yet, with a varying scope – and CFREU an open list explicitly mentioning an extended list of grounds, however, with a different scope (see Tobler, 2014). The EIDHR also contains an open list, essentially mentioning the same grounds as the CFREU. The EU Strategic Framework explicitly includes only four grounds⁶ in relation to anti-discrimination (race and ethnicity, age, gender, sexual orientation). Other grounds are listed within a slightly different formulation by stipulating that the EU aims at ‘advocating for the rights of children, persons belonging to minorities, indigenous peoples, refugees, migrants and persons with disabilities’ (Council of the European Union, 2012, p. 2). Despite this explicit mentioning in the EU Strategic Framework on Human Rights and Democracy, not all grounds are translated into concrete action or number of actions in the EU Action Plan on Human Rights and Democracy. For example, although the category of discrimination on grounds of age was defined as an EU priority on human rights there is no corresponding action in the EU action plan.

	Open list including...	Sex, gender	Sexual Orientation	Disability	Age	Race, colour, ethnicity	Religion or belief	Social origin, property, birth	Genetic features	Language	Political or other opinion	Minorities and indigenous p.
Art. 19 TFEU		x	x	X	x	x	x					
CFREU	x	x	x	X	x	x	x	x	X	x	x	x
AD-Directives		x	x	X	x	x	x					
EIDHR	x	x	x	X	x	x	x	x	X	x	x	x
Strategic Framework		x	x		x	x						
Guidelines		x	x				x					

4. Effectiveness

A final point concerns the question of effectiveness. Effectiveness is a much discussed term among academics focusing on EU integration. There has been a considerable debate on what effectiveness means and how it can be conceptualised. Very often the term is used in the sense of ‘goal attainment’, referring to ‘the degree to which the European Union (EU) managed to achieve its objectives’ (Niemann and Bretherton, 2013, p. 274). In the context of external action the term has also been defined as ‘the EU’s ability to reach its objectives by influencing other actors’ (Conceição-Heldt and Meunier, 2014, p. 968). Elsig has defined a two-dimensional conception of effectiveness, the first is called ‘effectiveness in

⁶ Although race and ethnicity are listed separately, they will be counted as one ground for the purpose of this paper, as it is normally done in the context of the internal dimension.

impact’ and is congruent with the definition mentioned above, the achievement of goals (Elsig, 2014, p. 328). The second dimension, however, refers to ‘effectiveness in representation’ and ‘suggests that those speaking on behalf of the EU are able to aggregate the different demands into a unified position. The emphasis here is on avoiding a multitude of views being signalled externally and abstaining from acting in an uncoordinated fashion’ (Elsig, 2014, p. 328). Both dimensions are important for the analysis of anti-discrimination policies of the EEAS:

a) Effectiveness in representation – acting as a unified actor

It is striking that most interviewees interpret effectiveness almost exclusively in the sense of effectiveness in representation. Policies on anti-discrimination are perceived to be effective if they are evenly implemented in all EEAS units and if the EU is presenting a unified position towards external actors and in multilateral fora and bilateral relations. As indicated above, the EEAS has made a huge effort in this regard. Especially the Guidelines are said to contribute a lot in achieving this objective. They describe the process and strategies to be adopted and constitute the ‘agreed language’ which every officer should adopt. They mark a shift from a personal approach to a unified institutionalised approach. Especially with regard to LGBTI rights and women’s rights, the EU has increasingly managed to appear as a normative actor in the international scene.

b) Effectiveness in impact – achieving EEAS anti-discrimination objectives

Concerning the dimension of effectiveness in impact, the picture is less favourable. First of all, it seems to be unclear to EEAS officers what the objectives are: Most of the interviewees interpret it in a rather internal-related sense, meaning the consolidation of the EU as an actor that has certain values and norms and is able to defend these norms against others. Third countries and other international actors and stakeholders – the ‘outside world’ – should know what they can expect from the EU or what the EU is likely to do in a certain situation. The primary aim seems to be to create an image of the EU characterised by tolerance for minorities and people who are different and invoking the EU as a community of values. Secondly, effectiveness in terms of impact on the human rights situation of people in third countries is rarely seen as an explicit objective. The question is if EEAS policies on anti-discrimination are having the impact they are supposed to have when one takes, for example, the LGBTI Guidelines, which already in the title proclaims not only to protect but to promote the rights of LGBTI persons: Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. Therefore, the question whether the EEAS in its anti-discrimination strategies and policies is effective in impact, meaning in protecting people from being discriminated against or promoting non-discrimination, is hardly ever raised. There is hardly any reflection of the consequences of the instruments once put into practice. Only interviewees speaking from a more or less outsider position – former officers who have left the EEAS or people from other EU bodies, raised the question whether EEAS policies are good for the people on the ground and in what way EU bodies working in the context of external relations can be more responsive concerning adverse impacts of their own policies.

E. Conclusions

The EEAS has undertaken major efforts to address social factors that hamper the realisation of human rights for many people in all parts of the world. Anti-discrimination and equality policies and instruments are the most important starting points in this regard. Compared to the internal dimension, where both hard law and soft law instruments play an important role, the anti-discrimination and equality policies of the EEAS are implemented predominantly on basis of so-called soft-law instruments (Guidelines, strategy papers and action plans). Soft law measures as well as specific action programmes had the effect that anti-discrimination issues are integrated in many fields and with diverse procedures and mechanisms, internally as well as externally. However, it might be due to the absence of secondary law in external actions that the concepts used in the EEAS to grasp (anti-)discrimination are quite vague, unclear and even flawed. In the internal as well as the external dimension, anti-discrimination and equality policies have been developed and implemented unevenly and in a fragmented way, focusing on specific areas and categories, while neglecting or leaving out others. The involvement of civil society actors, such as NGOs, in the development and implementation of these policies is crucial for both dimensions.

Concerning the process-dimension of implementing anti-discrimination issues in the work of the EEAS in order to counteract social factors that hamper the realisation of human rights, it is important to emphasise that a multitude of actors, not only EU-bodies and -officers, but also Member States and NGOs, are involved in the policy process and exert an influence on which anti-discrimination issues are given priority and in what way they are framed and implemented. There has been a considerable effort to take into consideration anti-discrimination and equality issues in all areas of EEAS work. Especially, instruments such as the EU Strategic Framework and Action Plan as well as the Guidelines have had the effect that these policies became more and more institutionalised. However, there seem to be some problematic issues when it comes to the process of implementing equality policies. They include tensions with EU Member States delegations, constraining job conditions of EEAS officers who are overburdened with work and have to move from one post to the other every four years – a situation which hampers the possibility of building up expertise - or the reported isolation of the human rights unit within the EEAS. It remains unclear if human rights training reach the majority of EEAS officers, which would be necessary to mainstream anti-discrimination approaches throughout the service. Another problematic issue is the focus on the process level, which might lead to the fact that human rights in general and anti-discrimination in particular become a technical and bureaucratic exercise, leaving too little space for considering conceptual and strategic issues. The Guidelines, however, have reportedly had a positive impact on the anti-discrimination work of the EEAS, laying down an agreed language on contentious issues and, thus, de-personalising, and at the same time institutionalising, anti-discrimination policies throughout the EEAS.

Although the Guidelines had a positive effect on the process concerning the implementation of anti-discrimination issues, they are quite problematic when it comes to the concepts used. The concepts of (non-)discriminations are not very well - or not at all - defined and the categories used are sometimes even discriminatory as such. The concepts and definitions used are often implicitly problematic and

might reinforce sexist, heteronormative, racist and islamophobic stereotypes. Structural issues as well as crucial areas (such as marriage issues in the LGBT Guidelines) are very often neglected or left out.

The lack of coherence constitutes a problematic point when it comes to addressing social factors that hinder human rights protection by means of anti-discrimination and equality policies. Several dimensions of incoherence are at stake in this context: Vertical incoherence refers to different anti-discrimination and equality standards, instruments and measures used by EU and Member States' delegations as well as double standards, i.e. asking for anti-discrimination and equality standards which are not guaranteed at all by Member States for their own populations. Another aspect is a lack of horizontal coherence which refers to evenly integrating anti-discrimination principles in different EU policy fields as well as the even implementation of different anti-discrimination aspects into EEAS policies. It is hard to comprehend how and why priorities are set concerning the focus on certain categories or areas in the EEAS, which not only refers to a lack of coherence but also to a lack of transparency. Inter-institutional coherence seems to be quite well-functioning, especially with regard to the collaboration of the EEAS with DG DEVCO, although the officers mainly cooperate on an informal basis. However, there still seems to be room for improvement, for instance in the form of a better formalisation of this process as well as the enhancement of intra-institutional coherence within the EEAS, such as a better dissemination of anti-discrimination and equality expertise within the service. Finally, internal-external incoherence in EU non-discrimination policies is a serious issue not only with regard to the prevalence of discrimination and inequalities in EU Member States but also concerning the legal and policy dimension. Different grounds and areas of discrimination are taken into account in external compared to internal policies and laws (see above, sub-section II.E.3.d).

The effectiveness of anti-discrimination and equality policies in the EEAS is narrowed down to the aspect of effectiveness in representation. Effectiveness in impact, meaning to achieve EEAS anti-discrimination objectives, to have a positive and human rights promoting impact on the ground and to effectively combat social factors that hamper the protection and respect of human rights, is rarely seen as an explicit objective and policies are seldom reflected according to this aspect.

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III. Ethnic factors and EU internal policies of non-discrimination and equality*

A. Introduction

The Report on factors, completed under the auspices of the FRAME project mapped historical, political, legal, economic, social, cultural, religious, ethnic and technical factors that enable or hinder human rights protection in the context of the EU's internal and external policies (Lassen et al., 2014). The report concluded that further exploration of challenges and gaps through in-depth research and analysis was called for. EU legislation protecting against discrimination on the ground of race and ethnic origin and its application in practice, including the function of the designated equality bodies, was identified as a key area for additional research and analysis.

Ethnic factors that significantly enable or hinder the protection of human rights were mapped in Chapter VIII of D 2.1. (Lassen et al., 2014). The chapter defines ethnic factors as 'issues related to ethnicity, which have an impact on the enjoyment of human rights' (Lassen and García San José, 2014, p. 130). Ethnicity in itself is not a factor for enabling or hindering human rights unless interlinked and discussed within the context of other factors (Lassen and García San José, 2014; Mayrhofer and San José, 2014). Related issues that make ethnic factors relevant to explore here are the historical evolvement of societies and their states, the demographic development, the legal structures, political ideology and economic situation – just to mention some of the overriding related issues. In other words, ethnic factors enable and hinder human rights in juxtaposition with historical, legal, social, political and economic factors. For instance: a state and its society's historical evolvement set the scene as to which legal and political structures are in place to protect and promote the rights of all, irrespective of ethnicity as well as the recognition of minorities as legitimate members of the society. Economic factors play a central role as to the priorities given to combating discrimination of ethnic minorities and promoting rights. Analogously, political factors take central stage as to who is permitted to enter and enjoy equal opportunities on equal footing as its citizens.

Discrimination based on race and ethnic origin is perceived to be the most prevailing form for discrimination in the EU (European Commission, Justice, 2012). Studies on issues regarding discrimination on the EU and national levels document the lack of substantive equal treatment in practice for persons experiencing discrimination based on their race and ethnic origin in relation to access to justice, health services, education, housing, and goods and services.⁷

The principles of non-discrimination and equal treatment are pivotal principles in ensuring equal access and enjoyment of one's human rights. This in effect means that access to, for example, health care

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⁷ Studies on EU level, among others conducted by the European Fundamental Rights Agency and The Network of Legal Experts in the non-discrimination Field, and national level for example the Danish National Barometer for Integration (2014), show that approximately 49 per cent of ethnic minorities report that they have been subject to discrimination based on their ethnicity.

services or self-determination should not be hindered by '[a]ny distinction, exclusion, restriction or preference which is based on certain prohibition criteria, and has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by certain persons, on an equal footing, of certain rights and freedoms' (UN Human Rights Committee, 1989). Therefore, the promotion of equality, equal opportunities and equal treatment in access and enjoyment of human rights are proclaimed core values in the EU, internally and externally to the EU. These core values are expressed through extensive legislation and policy papers. The Treaty on European Union (TEU) and The Treaty on the Functioning of the European Union (TFEU) transposed by binding equality directives and provisions made in The Charter of Fundamental Rights for the European Union (CFREU). These documents all obligate the EU Member States to a higher or lower extent to combat discrimination based on ethnicity and to mainstream and promote the principle of equal treatment.

Are these core values, however, respected and promoted in practice? This chapter seeks to answer the following question: 'Have the core values of non-discrimination and equal treatment, implemented by the Race Directive, resulted in the desired impact in the EU in order to protect and promote human rights of ethnic minorities within the EU and its Member States? Which factors are drivers and barriers to the promotion and protection of human rights irrespective of race and ethnic origin?'

B. Method and structure

The chapter outlines the developments in EU legislation and human rights with regards to the principles of non-discrimination and equality and discusses the link between human rights and equality. It will then examine the drivers and barriers to fulfilling the EU's intention of complying with its core values of non-discrimination and equal treatment in practice concerning the promoting and protection of human rights irrespective of race and ethnic origin in the EU.

The case study chosen for the purpose of this research and analysis is the Roma. More concretely, the case study illustrates factors that influence EU anti-discrimination policies and legislation on the promotion and protection of the Roma people's human rights. The Roma constitute the largest group of ethnic minorities in the EU and are protected by the directive in place to combat discrimination based on race and ethnic origin. Nevertheless, studies (see for example FRA publications on the situation of Roma, 2014) show that the Roma are the single most discriminated and excluded ethnic group in the EU. In order to provide a better protection of the Roma, the EU has developed and adopted anti-discrimination and inclusion policies specifically targeting the rights of the Roma communities on a Member State level. The case study will serve as a concrete example of factors that have an impact on, and pose challenges to, the principles of non-discrimination and equality. The case study illustrates the incoherence between the EU Commission's core values and the lack of effective impact in practice on a Member State level.

In conclusion, the challenges and gaps between the translation of intentions to protect against discrimination and the impact of legislation and policy in practice will be discussed.

The method applied to answer the research question of this chapter has primarily involved a qualitative approach. Semi-structured interviews have been conducted with key stakeholders in the field of non-discrimination, together with a case study and a literature review.

Identified key stakeholders were contacted by e-mail, requesting their participation by providing information on FRAME and FP7 Work Package 2 'Challenges and Factors' and by providing a questionnaire, explaining the purpose of the interview in detail. The e-mail also indicated that the interview would be taped and transcribed and no material from the interview would be used without approval of the interviewees. The interviewees are guaranteed anonymity.

Prior to the interviews, the interviewees received a questionnaire⁸ both to prepare them for the interview and to function as a checklist for the interviewer. The interviews were conducted via telephone or Skype. The primary purpose of the interviews was to obtain first hand qualitative interpretation of the impact anti-discrimination and equality policies have in the promotion and protection of human rights for the individual, irrespective of race and ethnic origin. Ten interviews were conducted. Four women and six men participated in the interviews. Of the four National Equality Bodies (NEBs), two were from Western Europe and two from Central and Eastern Europe.

A literature review covering the period 2000-2015 was carried out before and after the interviews. The review had the purpose of contextualising and framing the research question as well as verifying the identified issues raised by the interviews. The literature review consists of articles, research, evaluations, studies and reports on EU and Member State implementation of EU anti-discrimination legislation and policies, legal interpretations of EU anti-discrimination legislation and perspectives of different NGOs and networks.

C. Development of EU policy and legislation on non-discrimination and equality

'The 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' (European Union, 2012b).

The principles of non-discrimination and equality have been core values of EU's foundations from its early days, and were first developed in the context of gender equality. The Treaty of Rome (1957) required equal pay between men and women, and provided the competence to develop the first equality directives.

⁸ See Chapter Annex.

The development to extend the Union's commitment to non-discrimination and equal treatment that led to the introduction of Article 13 (Art. 19)⁹ of the Treaty of Amsterdam (1997) began in the 1980s. In 1984, the European Parliament initiated debates on discrimination, which led to two reports on discrimination among the Member States and proposed recommendations for the adoption of legal measures to combat all forms of racial discrimination (Niessen and Chopin, 2004, p. 96). Article 13 (Art. 19) gave the EU Council specific powers to unanimously adopt legislation to combat discrimination and to extend the scope of prohibition and protection against discrimination from only covering gender equality and nationality, to also cover discrimination on the bases of racial or ethnic origin, religion or belief, disability, age or sexual orientation (European Union, 1997).

In 2000, after a good deal of pressure by NGOs¹⁰, the Council of Ministers adopted two key pieces of EU anti-discrimination legislation: the Racial Equality Directive (Race Directive) (Council of the European Union, 2000b) and the Employment Equality Framework Directive (General Framework Directive) (Council of the European Union, 2000c), as direct results of Article 13 (Art.19). The rather quick adoption of the Race Directive is largely attributed to Austria voting the extreme right-wing Freedom Party led by Jörg Haider into government in February 2000 and the need for the other Member States to show they were intent to combat racism (Bell, 2002a; Bell, 2002b, p. 70, 180). Until then, the commitment to combat racism and related intolerance had been reserved for political speeches and declarations without the intention of actually acting to combat racism (Howard, 2004, pp. 148-149).

These two directives are central pieces of EU legislation setting minimum requirements for Member States to combat racial and ethnic discrimination within and outside of the labour market (Council of the European Union, 2000b, Art. 6; Council of the European Union, 2000c, Art. 8). The directives give a definition of what discrimination is constituted of and forbid direct and indirect discrimination and harassment on the grounds of race and ethnic origin within and outside the labour market and thereby ensure social inclusion of ethnic minorities in EU Member States (Council of the European Union, 2000b, Art. 2; Council of the European Union, 2000c, Art. 2).

According to the Race Directive, EU Member States are required to designate one or more equality bodies for judicial or administrative procedures to promote equal treatment (Article 13). The equality body – as a minimum – should provide independent assistance to victims of discrimination, conduct independent investigations, studies and surveys regarding discrimination, publish independent reports and make recommendations on issues regarding discrimination.

The directives do not oppose positive action, namely national measures aimed at preventing or compensating for disadvantages connected with race or ethnic origin (Council of the European Union,

⁹Article 13 provision is now contained in Article 19 (1) of the Treaty on Functioning of the EU (TFEU). In the Nice Treaty (2003), the abbreviation TEC was often added after an Article to distinguish its articles from TEU-Articles of the Treaty on European Union, referring to the second and third pillar in the same treaty.

The Lisbon Treaty (2009) amended the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC). The TEU has kept its previous title. The TEC has been renamed the 'Treaty on the Functioning of the Union' (TFEU).

¹⁰ The Starting Line Group (1997) – a network of more than three hundred pro-migrant NGOs that spearheaded Article 13 and the following Directives.

2000b, Art. 5; Council of the European Union, 2000c, Art. 7). Lastly, the directives explicitly instruct Member States to have dialogue with and encourage dialogue between employee and employer organisations and NGOs '(...) with a view to fostering equal treatment, inclusion through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices' (Council of the European Union, 2000b, Art. 11; Council of the European Union, 2000c, Art. 13).

The transposition of the equality directives (deadline for transposition by EU Member States 2003) into national law was a slow process. By 2006, all Member States had, however, in one way or other made formal provisions in their legislation for prohibition of discrimination (Bell, 2008). The Race Directive had a rather different process compared to the General Framework Directive in that many Member States already had provisions to combat racism and/ or different treatment on grounds of race, colour, and ethnic belonging. Some Member States, like in UK and Sweden even had institutions in place where victims of discrimination based on race/ ethnicity could get redress before the adoption of the directive.

The Race Directive stipulates *irrespective of race and ethnic origin* – recognising all to have an ethnicity and acknowledging that discrimination based on race and ethnicity is not limited to the majority discriminating the minority. There are examples of national case law where minorities discriminate persons who ethnically belong to the majority. (Danish Complaints Committee for Ethnic Equal Treatment, 2007) Nevertheless, taking power relations and case law into account – discrimination of ethnic minorities is the most prevalent ground of discrimination in the EU Member States.

Legal studies (See for example Howard, 2007) have identified shortcomings or ambiguities in the directives that challenge the whole idea behind the directives. These shortcomings will be touched upon under the section on barriers. It could already be mentioned here that the issues concern the fact that the directive does not provide for a clear definition of ethnicity and that the Race Directive does not include protection against discrimination based on 'nationality'. Furthermore, the fact that the directives provide minimum requirements implies that it is up to the Member States' discretion on how strong their legislation is in order to transpose the directives. This is of particular interest because much of the national legislation does not technically provide the possibility for tackling institutional and structural discrimination – thereby not challenging the root causes of ethnic discrimination. Finally, it should be mentioned that to have substantive equality it is necessary to have strong promotional measures and policies, an element that is optional for the Member States (See for example Brown, 2002).

D. EU human rights framework, non-discrimination and equal treatment

'All human beings are born free and equal in dignity and rights' (Art. 1) and '[e]veryone is entitled to all the rights and freedom (...) without distinction of any kind, such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Art. 2) (Universal Declaration of Human Rights, 1948).

Non-discrimination is a fundamental principle in human rights and as such, the principle that makes all rights universal and a core value of the EU. With the ratification of the Lisbon Treaty, the Charter of

Fundamental Rights of the European Union (The Charter) came into force, strengthening the EU human rights framework. The Charter reinforced the EU's commitment to promote the core values of non-discrimination. In particular, Article 21 of the Charter underlines the principle of non-discrimination as a fundamental right by stipulating that '1. [a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited' (European Union, 2012a).

The strengthening of the human rights framework was, as such, a natural development for the EU (Giegerich, 2014). The EU Member States were already party to a range of international and European human rights conventions. All Member States are party to the Council of Europe's European Convention on Human Rights (ECHR) and subject to decisions made by the European Court of Human Rights (ECtHR). All EU Member States are also party to legally binding human rights conventions, such as the International Covenant on Civil and Political rights, the International Covenant on Economic, social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination (ICERD), the International Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).¹¹

Formally, there is a link between human rights and the principles of non-discrimination and equal treatment. The principle of non-discrimination is a fundamental principle in human rights and one that ensures the universality of human rights. In section C, the link between the two in practice will be further discussed in the context of drivers and barriers. Nonetheless, it is important here to touch upon the converging approaches to human rights and equal treatment among experts and practitioners, as it will provide a basis for understanding the link (or lack thereof) in practice.

The universality of human rights, made possible by the principle of non-discrimination, is not uncontested. This is in particular true when it comes to ensuring equal access and enjoyment of economic, social and cultural rights (Coomans, 2007, p. 365). As opposed to civil and political rights, equal opportunity to economic, social and cultural rights is not understood to be an inherent right but a principle that should be progressively achieved. There arises an incoherency between the core value of non-discrimination and enabling access to human rights such as health, education and housing in practice. In the EU context, this incoherency becomes even more pronounced. Firstly, the Race Directive and the General Framework Directive address economic and social rights: equal opportunity to access social security, health, employment, goods and services and housing. Secondly, the gap emerged due to the fact that the EU in the first instance adopted an equality based approach, while the Member States already adhered to a more human rights based approach – being party to the International Covenant on Economic, Social and Cultural Rights (ESCR) and the European Convention on Human Rights. The directives extended the scope of protection and promotion to ensure social integration of ethnic minorities in EU Member States and thereby render the right to equal access explicit. Human rights

¹¹ Finland, the Netherlands and Ireland have signed CRPD but not ratified the convention: see map http://www.ohchr.org/Documents/HRBodies/CRPD/OHCHR_Map_CRPD.pdf.

provisions in accessing economic, social and cultural rights by all is more implicit in national legislations. In some Member States, like Denmark, there are no direct references to the ESCR rights – it is merely understood that everybody living and residing in Denmark should be treated equally (The Danish Institute for Human Rights, 2015).

The Charter of Fundamental Rights of the European Union (CFREU) has ‘certain ambiguities (...) for example on the distinction between rights and principles, and on the scope and interpretation of rights (...)’ (Lassen et al., 2014, p. 55).

Back in 2000, when the Race Directive was adopted, discussions prior to the adoption did not per se include a human rights-based approach (HRBA). International human rights instruments and national legislations combating racism did indeed inspire the proposal for the directive by the Commission. However, the main inspiration came from existing EU legislation on gender equality requiring the directive to lay down general principles and to set a minimum standard which national legislators must respect when transposing the Directive in national legislation, going further if desired (Tyson, 2001). In other words, an equality-based approach (EBA) was applied.

The EBA ensures that human rights are accessed and enjoyed by all, no matter what groups they form part of, and explicitly requires the protection, promotion and fulfilment of human rights to take account of the diversity of rights holders and the realities they live in. It ensures that human rights are advanced in a manner that contributes to a more equal and inclusive society. Proponents of the EBA see equality not only as a fundamental principle in human rights but also as a tool for examining other human rights. For example, the right to equal access to adequate housing in the ESCR depends on the economic and social development level in a particular country, while the right to equality/non-discrimination will apply in whatever country, no matter how far the progressive realisation (CESCR, 1990, pkt. 2) of the right has been achieved (Equinet, 2011).

The HRBA entails that all efforts pursue a desirable human rights outcome through a legitimate human rights process. It defines the process of reaching desirable outcomes in accordance with human rights standards and human rights principles, such as non-discrimination, ensuring the legitimacy of the process. In that sense, the human rights based approach provides an equal rights framework for both means and ends of development efforts (Zarrehparvar, 2013).

Many will argue that this does not matter, as these two approaches are two sides of the same coin. This is largely true, however, it is not inconsequential which approach is chosen because the outcome and impact in practice could differ. The HRBA has a focus on the process and outcome, while the EBA focuses on the impact i.e. is it a case of discrimination based on race and ethnicity or not. It is a question of how to monitor whether the core value of non-discrimination is effectively employed.

E. Drivers and barriers of non-discrimination on ground of race and ethnic origin

'I think the EU legislation does overall have positive effects but still there are many problems left in the field. So yes, there is a discrepancy between the intention and what happens in reality'.¹²

This section examines factors that affect the impact of the Race Directive in practice. The selected factors are based on interviews with ten European stakeholders and experts in the field of non-discrimination and equal treatment. The issues identified by the interviews show a high degree of consensus among the interviewees, most of whom are or have been practitioners in the anti-discrimination field. The literature on the subject, while more legally comprehensive, supports the issues raised, illustrating a great diversity of factors that impact implementation of the directives and in general a diverse understanding of equality and equal treatment (Guiraudon, 2009, p. 534).

Evaluations carried out by, among others, the EU Commission are descriptive and have a focus on outcomes (whether there is legislation in place; is there a NEB) rather than the impact of the Race Directive for right holders. However, the conclusions of these evaluations also point to issues similar to the findings of this study. Equinet's working group on Equality Law in Practice in its Report on the Implementation of the Race and General Framework Directives (2013) points to areas where further clarification of the directives is required '(...) in order to facilitate the better implementation of the directives and to enhance their effectiveness' (Equinet, 2013).

As mentioned earlier, several factors influence the effectiveness of EU anti-discrimination legislation and policies for the protection and promotion of human rights on the grounds of race and ethnic origin. Factors such as nationality, culture and religion influence the level of protection and promotion (Lassen et al., 2014). This section is, however, limited to discussing factors mentioned by the interviewed stakeholders. The factors that have been central to the interviewees are categorised as historical, legal, political (social) and economic factors.

The following section touches upon drivers and barrier factors and presents a rather 'simplified' picture of the relations between factors and their impacts. Thus, it is important to mention that there is an underlining acknowledgment: firstly, that these factors are crosscutting – often it is not one factor that has a facilitating or hindering influence on the effective implementation but several factors converging to create a complex reality that influences adoption of legislation, policies, measures and impact (European Commission, 2014). Secondly, it is important to note that while factors influence legislation, policies etc., legislation, policies, etc. also influence the factors. Thirdly, it must be noted that facilitators and barriers are intertwined – while factors are a facilitator at one stage they are barriers at another.

¹² Interview with a Senior Policy Officer on equality.

1. Drivers

a) Legal factors

The adoption of the anti-discrimination directives on race and employment and the following action programmes in 2000, in themselves, qualify as serious drivers of promoting non-discrimination and provide protection against discrimination on the grounds of race and ethnic origin.¹³

The following implementation into national legislation, even though slow and very diverse in process and outcome, is also considered as a driver. Without the directives binding the Member States, many would not have either revised or created provisions in their national legislation combating discrimination on the ground of race and ethnicity. This is especially true for the candidate states. Accession of the new Member States required a transposition of the anti-discrimination legislation and since many of the new States did neither have a tradition of combating discrimination nor of protecting and promoting human rights, the directives facilitated a positive influence on national level political and legal factors, thereby enhancing legal protection against discrimination.

The Charter is another important document in facilitating fundamental rights of EU citizens¹⁴ by employing the non-discrimination principle. There is a growing knowledge of the Charter among national judges and the Court of Justice of the European Union (CJEU) case law shows a willingness to refer in its judgments to the Charter, including cases with relevance to equal treatment, such as *Test-Achat* (2011) and *Fuchs* (2011).

The Race Directive's requirement to designate national equality bodies to provide independent assistance to victims of discrimination, conduct independent investigations, studies and surveys regarding discrimination, publish independent reports and make recommendations on issues regarding discrimination, is seen as another important driver. Again, even though NEBs exist in all shapes and sizes, with diverse mandates, powers and degrees of independence, they could provide a framework for protection against discrimination. The NEBs are identified as 'necessary and valuable institutions for social change' (Ammer, Crowley et al., 2010). NEBs contribute positively on a national level but also on EU level. For instance, the European Network of Equality Bodies (Equinet) channels the experiences made by the equality bodies to EU institutions, NGOs and other stakeholders, spreading a greater understanding of issues regarding discrimination and, in particular, how the directives are understood in practice.

b) Historical factors

Public awareness of legislation, of what discrimination is, and where to refer to when discriminated, is of paramount importance to facilitate effective protection against discrimination. Public awareness of the existence of discrimination and the consequences of inequality are also important for society in order to facilitate change in historical stereotypes, attitudes and exclusionary behaviour towards ethnic

¹³ Interview with a Senior Policy Officer on equality.

¹⁴ 'Citizen', as all persons living in EU, nationals of the Member States and non-nationals.

minorities. On an individual level, being aware of one's rights enables pursuance of one's right not to be discriminated.¹⁵

Different stakeholders play central roles in raising public awareness, but two in particular were highlighted to have made a difference: the EU Commission and anti-discrimination NGOs (on an EU level as well as national level).

The EU Commission Directorate-General Justice (DG-Justice) Anti-discrimination Unit is a driver of the directives, especially in its effort to promote awareness of EU and national legal and policy instruments to combat discrimination. Even though initially the anti-discrimination directives were an attempt to harmonise and 'Europeanise' (Bell, 2008) the fight against discrimination, the reality of national diversity based on historical, legal, political and economic factors cannot be ignored. Looking at DG-Justice's homepage, one finds an abundance of information, documents, studies, awareness and training opportunities, funding, etc. to support efforts to combat discrimination and promote equal treatment on a national and transnational level (European Commission, 2015b). Providing Member States and other national actors with tools and good practices is an acknowledgment of the diversity and different levels of awareness of discrimination. The Commission's Communications express its commitment to combating discrimination, with the latest Communication from 2008 concluding that a '[s]uccessful legal protection of individual rights must go hand in hand with the active promotion of non-discrimination and equal opportunities. The Commission is committed to achieving further progress at EU and national levels in key areas, such as awareness-raising, non-discrimination mainstreaming, positive action and data collection' (European Commission, 2008a).

Most interviewees viewed the EU as a strong driver for equality and one of the experts expressed that:

[I]f you go back to when the directives were first enacted, the EU was certainly in the leadership role in most EU Member States. So there was actual and real leadership [in the first period 2003 -2009] and that leadership did result in the evolution of the infrastructure at Member State level and between Member States (...) [by] trying to shape a shared mind-set in relation to it.

Anti-discrimination NGOs are also identified to be important drivers in protecting against discrimination. This is true for organisations that operate on EU level and those on a national level. NGOs, on the one hand, provide a platform to raise awareness among persons vulnerable to discrimination and give support to pursue cases of discrimination, on the other hand, they channel information to the society on issues regarding discrimination through campaigns etc. as well as try to influence politicians and legislators to implement for better legislation and policies to combat discrimination and promote equal treatment. As one interviewee put it: '(...) strong NGOs, especially networks of NGOs [that] come together and employ common energy and resources with focus on social change based on the directives in fighting race discrimination [are really important drivers of change]'.

¹⁵ Interview with equality expert.

c) Political factors

Political will to combat racism is definitely a driver that was mentioned by the interviewees. Without a certain degree of political will, the directives would not have been adopted on an EU level, nor would the directives be transposed on a national level. There was some foot dragging which became evident with the transposition processes occurring in quite different tempi. However, for what it is worth, there was seemingly enough will since all Member States have, in one way or another, anti-discrimination legislation in place and have, in one form or another, established NEBs. There was also a political will among the candidate countries wanting membership in the EU to screen their legislation for full compliance with EU law including the anti-discrimination directives.

Some writers argue that Member State legislators putting in place legislation to combat discrimination had a symbolic value as the politicians' aim was first and foremost 'to make a declaration to the people in their own nation' signalling that they have an intent to combat racism (Howard, 2004, p. 142). As one interviewee put it '[political will] is a driver that is difficult to drive'. How difficult it is to drive is reflected in the follow up of the directives on an EU level and in the aftermath of the national transpositions, where the once existent will just evaporated in thin air.

2. Barriers

a) Historical and legal factors

While EU anti-discrimination directives are drivers for the promotion and protection of rights, they also pose barriers for effective implementation. One challenge and barrier is that the Race Directive does not take into account that historical, social and judicial differences exist among Member States, especially in their understanding of who an ethnic minority is, by not providing a definition of 'ethnic discrimination'. According to Bell, the policy discourse that dominated among the EU 17 at the time of the adoption of the directive was that ethnic discrimination was a matter that affected predominantly immigrants and their descendants and therefore no mention of national minorities or groups of people like the Roma was necessary. This understanding of ethnicity relating to immigrants and their descendants did not fit very well with the new Members States' understanding of the concept, since these States' ethnic minorities were largely minorities from neighbouring European States or Roma who historically were subject to repression and discrimination (Bell, 2008). A lack of definition of the concept of 'ethnic discrimination' and a lack of a common understanding of discrimination as such hinders an effective protection against discrimination based on a real or perceived belonging to an ethnic group on national level but also on EU transnational level.

Another barrier in the realisation of rights is the fact that the directives address only discrimination between individuals and thereby neglect institutional discrimination (Simoni, 2011). In contrast to the gender equality directives, there is no requirement for mainstreaming race and ethnicity. A lack of mainstreaming, easily leads to sustaining and reproducing entrenched bias inherent in structures of public and private institutions, legislation and society as such, resulting in exclusion and inequality based on race and ethnic origin.

A last issue regarding the directives brought up by the interviewees is the status of some of the NEBs. The problem here is that, even though the Race Directive obligates the Member States to establish NEBs with independent functions, it does not require the NEBs to be 'independent' bodies. The minimum standard requirement of the Race Directive for the establishment of NEBs leaves it up to the Member States' discretion to decide the scope of power and independence of such institutions. Studies on NEBs show that there is a high degree of diversity among these institutions as to size, mandate and independency level (Ammer, Crowley et al., 2010). The high degree of diversity, reflecting national historical, economic and political realities, is a barrier for an effective and comparative monitoring of the bodies and their impact on the realisation of rights.¹⁶ Standards need to be put in place in order to ensure NEBs' compliance with EU legislation. This includes ensuring that they are actually reactive to addressing discrimination and proactive in achieving equality and promotion of equal treatment; and that they are able to make choices in relation to the balance of their work - a balance between their 'work towards achieving equality and preventing discrimination, and their work addressing discrimination. These choices depend on the powers and functions accorded to them, the resources available to them, and the political context within which they operate' (Equinet, 2014, p. 6). NEBs become ineffective and face difficulties when making the choices to strike the balance when they are not independent. NEBs ineffectiveness and lack of independency is a barrier for the promotion and protection of human rights.

A number of other barriers that challenge NEBs' effectiveness are identified in a survey conducted by Equinet in 2014 in relation to NEBs' engagement in the Europe 2020 Strategy and the European Structural Funds. According to the survey, one dominant barrier was a lack of openness on the part of Member States' authorities regarding engagement with NEBs. The NEBs' limited resources and the bodies' mandate or interpretations of their mandates are other barriers (Crowley, 2014). These barriers are compounded when some NEBs lack the mandate to undertake training or the resources to deliver trainings, in particular, in getting and facilitating knowledge about European case law and the employment of the Charter. The link between human rights (the Charter) in promoting economic, social and cultural rights and anti-discrimination legislation apparently is not fully in place or understood by the Member States.

Having anti-discrimination legislation in place is very good indeed, however there is a need to resolve the legal challenges. In particular, there is a need to close gaps that are resulting in a substantive application of the anti-discrimination laws in practice (Chopin and Do, 2012, p. 126). Several barriers to accessing justice were highlighted through the interviews: a lack of coherent national legislation, underreporting and a lack of a culture of rights in many EU Member States. A lack of coherent legislation without clear definitions of concepts and scope causes confusion for those who have to implement the legislation in practice. Consequently a lack of coherence in practice leads to a lack of confidence as to the complaints mechanism's effectiveness in protecting against discrimination; a lack of confidence in

¹⁶ Standards should be understood as those for National Human Rights Institutions' UN Paris Principles or ECRI General Policy Recommendation No.2 on Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level.

judicial mechanisms leads to underreporting by victims of discrimination. The process does not occur in a vacuum since the process is occurring in a political and economic environment that does not enhance a culture of rights or raise awareness of rights.

The underreporting of discrimination cases is a strong indicator for anti-discrimination law not being applied effectively in practice. According to FRA's EU-MIDIS Survey from 2009, an average of 82 per cent of the respondents (ethnic minorities) who had experienced discrimination in the prior 12 months had not reported the incident (European Union Agency for Fundamental Rights, 2009). Studies done on under-reporting regarding discrimination and hate crime often point to victims' lack of knowledge of their rights not to be discriminated and/or victims' unawareness of where to get help (Andersen, 2011; European Union Agency for Fundamental Rights, 2009). Other studies point to a lack of trust in authorities and confidence in complaints mechanisms as reasons for not reporting discrimination incidents (Mullen, 2013).

Understanding the concept of equality and equal treatment in practice must be framed in the context of the historical and societal development of the EU and its respective Member States. That is, it is very much connected with past colonisations, politics of immigration and asylum, integration/assimilation politics, creation of new state boundaries and people who found themselves on the 'wrong side of the border', etc. The different interpretations and understandings of equality negatively influence the effective impact of the directives and of national anti-discrimination legislation. The most vulnerable groups, such as the Roma and ethnic minority women, particularly feel the negative effect. The Roma who have historically been subjected to repression and exclusion in societies where they reside, have documented difficulties in accessing justice – if they do happen to seek redress (see section on Roma).

Data from NEBs show that the number of reports made by ethnic minority women is lower than the number of reports made by women in general and the numbers are even lower than the number of reports made by ethnic minorities. Ethnic minority women are vulnerable to intersectional discrimination based on their sex and based on their ethnicity (religion). The dominant patriarchal family forms sustained among some ethnic and religious groups in the EU put women in an even more vulnerable situation.

b) Political and economic factors

Political factors have an overarching impact on the realisation of rights and equal treatment. When it comes to the protection and promotion of ethnic minorities' human rights, the political factors become ever more decisive. Economic factors such, as the global financial crisis since 2008, also play central roles in how politicians on an EU level and on a national level prioritise the combating of discrimination and the promotion of human rights. Not to forget that to achieve substantive equality in access to, for example, economic, social and cultural rights, is a costly affair.

The ideological shift to the far right of the political spectrum – that in the first place was a catalysing factor for the adoption of the two anti-discrimination directives in 2000 – is a crucial political factor that poses a barrier to the promotion and protection of human rights. In many Member States, support for extreme right-wing parties, as well as the imposed austerity measures, are increasing and have stepped

up since the economic crises of 2008. The far right popular parties are often supporting policies that discriminate third country national migrants, asylum seekers and refugees, non-nationals and economic migrants. A recent report from the European Commission against Racism and Intolerance (ECRI) states a concern for the prevailing 'racist violence and the openly anti-Roma, anti-Semitic, homophobic and xenophobic hate speech of a radical right-wing populist party' (European Commission against Racism and Intolerance, 2015). This implies that the strong political will to act against discrimination is no longer there (Howard, 2004, p. 151). This lack of will is an ongoing issue and can be illustrated, for example by the EU Council of Ministers' inability to agree on adopting the EU Commission's proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. This proposal from 2008 requires a prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation outside of the labour market (European Commission, 2015a).

The support for far right parties and ideology has also put European democratic and liberal parties, who usually are proponents of equality, non-discrimination and human rights, under pressure to adopt public discourses and policies in which ethnic minorities are used as scapegoats and distraction from issues that are more difficult to tackle – i.e. economic recession and unemployment.

The political situation on a national level has an impact on the EU level and on the work of the EU Commission in promoting equality. The interviewees mentioned that since 2000 very little has been adopted by the EU Council of Ministers that further develops anti-discrimination legislation and tools to combat discrimination. For instance, a proposal for a horizontal directive has been on the Council's table since 2008 and there is as of now no sign of it getting adopted (TFEU 19 very conveniently requires unanimity in the Council) (European Commission, 2008b). The efforts made by DG-Justice to promote good practice, provide training, funding, etc. to combat discrimination and promote rights get sucked into a black hole which is illustrated clearly with most Member States' National Roma Integration Strategies not being 'worth the paper it is written on'.

The present stalemate of EU Member States to agree on how to share responsibility for the influx of incoming migrants and refugees in the Mediterranean area is an example of European politicians paying lip service to their constituencies' rather xenophobic attitudes.

The DG-Justice's efforts are not supported by other Directorate-Generals either, where hardly any of the directives, policies on other areas of EU Commission comply with a – weak but existing – requirement to mainstream non-discrimination and equality in Title III of the Charter. For example the Directive on services in the Internal Market does not entail anti-discrimination provisions.

F. Roma – an illustrative example

'The Roma have a "flexible" lifestyle, they do not stay in a fixed territory, and they are a people of migrants (...). As has been demonstrated, the crimes that can be linked to Romani culture are theft and the use of minors in begging' (Maglie, 2010, p. 51).

Sweeping historical prejudices and stereotyping of the Roma people as culturally homogeneous with common attributes of idleness, criminal habit and non-conformity persists to this day and obstructs

efforts to protect and promote the human rights of the Roma people in the EU. The impact the EU's anti-discrimination legislation and policy transposition on a domestic level on the lives of Roma illustrates how different historical, social, legal, economic and political factors affect ethnic factors in enabling or hindering access to human rights in practice. The transposition of EU anti-discrimination legislation and policies to national law is yet to bear a meaningful impact in the lives of Roma populations. This points to the significant importance of different historical, social, legal, economic and political factors, which reinforce ethnicity as a critical determinant of access to human rights in practice. Furthermore, of the ten interviewees, nine mentioned the National Roma Integration Strategies and/or the Roma people's problems in accessing their rights due to discrimination.

The Roma and their inclusion is a litmus test of the EU's and its Member States' commitment and adherence to promoting and protecting human rights without discrimination. The Commission's somewhat extensive focus on the Roma people's rights and encouragement of Member States to apply anti-discrimination tools to advance the social inclusion of the Roma is an indicator of acknowledging historical prejudices that hinder an effective implementation of the anti-discrimination legislation and impact for people with Roma descent (European Commission, 2010, p. 5). The National Roma Integration Strategies (European Commission, Justice, 2014b) are mentioned by the interviewees as a good example of how the EU tries to raise awareness and encourage Member States to take action to promote Roma people's rights. This section outlines in short historical, social, political and legal factors that compound ethnic factors in Roma people accessing and enjoying their right to housing, education, health and inclusion in the societies they live in. The interviewees' expert perspectives will be incorporated where relevant.

1. Historical, social and political factors

'Roma' is a common term used for a very diverse group of people who identify themselves as Gypsies, Travellers, Machouches, Ashkali, Sinti and others (Fenger-Grøndahl, 2006.) It is estimated that 10-12 million Roma live in Europe, of whom approximately 6 million live in the EU, making the Roma the largest ethnic minority group (European Commission, Justice, 2014a). The history of Roma in Europe is believed to date back to the eleventh century, and over the ages until today the little existing documentation indicates that they have been subjected to repression, slavery and genocide by the societies by which they were surrounded (European Commission, Employment & Social Affairs, 2004, p. 7). During World War II, Roma along with Jews and homosexuals were targets of persecution by being either interned in death camps or simply eradicated as communities by domestic authorities.

After the end of World War II, there were efforts from both Eastern and Western European states to coerce Roma to settle down and force assimilation into society. Discrimination of Roma on either side of Europe continued through the implementation of racist measures to curb Roma people's so called culturally inherent characteristics of 'idleness, criminal habits and non-conformity'. Measures such as forced sterilisation, segregated schools, and removal of Romani children from their families to be fostered in state care are realities the Roma faced every day (European Commission, Employment & Social Affairs, 2004, p. 7).

The fall of the Berlin Wall in 1989 and the disintegration of the Communist states did not make the situation better for the Roma people. Political leaders and right wing popular movements blaming the Roma for the brake down of their societies, for the economic crisis and for high rates of crime, continued systematic state segregation of Roma children in schools, discrimination in housing, health services and in access to goods and services (European Commission, Employment & Social Affairs, 2004, p. 9; RAGE, 2015).

Negative attitudes and discriminatory practices towards the Roma are not limited to EU Eastern European Member States. Anti-Romani sentiments are present in most EU Member States. According to the Eurobarometer from 2012, three out of four Europeans in the EU agree that Roma face discrimination in their societies and 34 per cent think that they would feel uncomfortable about their children having Roma schoolmates (European Commission, Justice, 2012). A survey conducted in seven EU Member States in connection with the EU Parliament elections in 2014, on EU citizens' views of Roma, Muslims, and Jews showed that unfavourable attitudes of Roma were most widespread (Pew Research Center, 2014, chapter 4).

In its report *On the Situation of Roma in an Enlarged European Union* (2004), the Commission ascertains '[t]hat it is evident that the situation of Roma in some countries approaches a human rights emergency' (European Commission, Employment & Social Affairs, 2004, p. 13). Different surveys and studies link the anti-Romani sentiments to political factors. Generally, people who are on the right wings of the political spectrum have more negative attitudes though the anti-sentiment is also to be found among persons who place themselves on the political left wing. The Eurobarometer indicates that while 62 per cent of those who place themselves to the left are more likely to agree that society can benefit from better integration of the Roma, only 48 per cent of the Europeans who place themselves to the right agree (European Commission, Justice, 2012, p. 22).

2. Legal factors

Roma are ethnic minorities and are therefore protected by the Race Directive and the General Framework Directive. The directives are instrumental in the social inclusion of Roma in the EU in areas where they are subject to discrimination; employment, education, social protection, access to goods and services including housing. The Charter also prohibits any discrimination based on race, colour, ethnic or social origin. The Charter's chapters on freedoms and solidarity establish the right to education and access to preventive healthcare and medical treatment. The Charter also guarantees respect for cultural, religious and linguistic diversity (European Union Agency for Fundamental Rights, 2015a).

To support efforts to combat discrimination and promote Roma people's fundamental rights, a Community Action Plan was adopted, prioritising in specific national and transnational programmes and measures to combat discrimination of Roma (Council of the European Union, 2000a).¹⁷ Since 2000, a lot has happened on the area. DG-Justice's homepage on 'EU and Roma' booms with documents indicating a high level of activity in making policies, etc. to promote the social inclusion of Roma. The Commission's homepage introduction to their activities regarding Roma opens with the following statement: 'The

¹⁷ Followed by other programmes of action, i.e. Progress and Equal.

European institutions and every EU country have a *joint responsibility* to improve the lives of the EU's Roma citizens' (emphasis added) (European Commission, Justice, 2014a).

Joint responsibility is central to the adoption of the EU Framework for National Roma Integration Strategies up to 2020 in April 2012 (European Commission, 2011). It is central because, for the '(...) first time, Member States had to coordinate their efforts to close the gap between Roma and non-Roma in access to education, employment healthcare and housing' (European Commission, Justice, 2014b, p. 1). The Council also adopted a legal instrument (Council recommendation of 9 December 2013 on effective Roma integration measures in Member States) identifying measures to support Member States in developing their own Roma integration strategies tailored to meet the needs of the Roma populations in their country (European Commission, Justice, 2014b, p. 1).

As mentioned earlier, the very existence of the directives and the Charter coupled with the EU Commission's allocation of funds, training manuals, good practice, adoption of legal instruments on Roma, policies and strategies targeting Roma function as facilitators of Roma people's rights. By raising awareness among the decision makers on Member State, local government and transnational level to have targeted measures that combat discrimination, the Commission tries to promote Roma people's equal access to for instance such human rights as adequate housing, health and education.

The instruments have provided a platform for Roma NGOs on a national level to monitor the national strategies and their impact in practice for Roma people. For the European Roma Information Office (ERIO) the legislation and integration strategy also provide for a more solid fundament to monitor the development and to send 'reminders' to the President of the Council recommending them 'to support the aims of the 2013 Council Recommendation on effective Roma integration measures in the member states (point 2.8) which states that the active citizenship of Roma should be supported together with their social, economic, political and cultural participation in society' (ERIO, 2015).

Three years have gone by since the adoption of the Strategy and the Council recommendation on effective Roma measures in Member States. According to the Commission's first progress report on the Roma National Integration Strategy, '[the] progress, although slow, is beginning to take shape in most Member States' (European Commission, Justice, 2014b, p. 3). Looking closer at the individual Member States' contributions to the report, it is evident that the report's conclusion 'progress, although slow, is beginning to take shape in most Member States', must be a very diplomatic conclusion. Rather a high number of the 'Key Steps since 2011' are mainstream measures and activities that include Roma, but do not target Roma. Most of the comments by the Commission to Member States ask them to consider, for instance, the monitoring of the impact of mainstream measures on Roma. 'The strategies look good on paper but not in practice', as one of the interviewees put it.

The interviewees were critical of the national level implementation of the Roma National Integration Strategy indicating that many of the national strategies are ineffective due to the general anti-immigrant and Roma political discourse on national and transnational levels. FRA's Interim Director Constantinos Manolopoulos affirms the interviewees by stating in an a press release in connection with World Roma Day 8 April 2015 that: '[e]vidence shows that many Roma continue to suffer social exclusion and

discrimination in key areas of social life, such as employment, education, health and housing. These phenomena are intrinsically linked to the racism and intolerance against Roma in many communities across the EU. Anti-Roma prejudice and racism undermine social inclusion efforts and community cohesion, and must be tackled decisively alongside efforts to improve their socio-economic conditions' (European Union Agency for Fundamental Rights, 2015b).

A second reason mentioned was the NEBs' lack of ability to tackle discrimination against Roma. The NEBs' inability to tackle discrimination is due to several issues. Firstly, the exclusion of Roma is often due to multiple discrimination with a strong intersection of ethnicity and economic status/social status – multiple discrimination is judicially difficult to deal with in practice and/or because many national legislation do not cover the economic and social status. Secondly, some NEBs are not independent enough to strike the balance between combating discrimination and the promotion of rights. Thirdly, NEBs simply do not have the structural and economic capacity or manpower to take up cases, have little or no powers to litigate cases, and have little or no power to address institutional discrimination. Fourthly, NEBs suffer from not being visible to those who need them. Finally, a fifth barrier is the political interference in NEBs' work – which also is a question of some of the NEBs' lack of independence in reality. NEBs are key institutions for victims of discrimination to access justice and as catalysts for social change. NEBs' inability to function as intended challenges the promotion and protection of human rights of people vulnerable to discrimination such as the Roma.

G. Conclusion

This chapter attempted to answer whether the core values of non-discrimination and equal treatment implemented by the anti-discrimination directives had the desired impact internally in the EU to protect and promote human rights of ethnic minorities on a Member State level and to explore which factors are drivers and barriers to the promotion and protection of human rights irrespective of race and ethnic origin.

EU's core values of non-discrimination and equal treatment on grounds of race and ethnic origin are challenged by the Member States political and economic dispositions. Public awareness and political will are deeply values based. The ideological shift in politics and the rise of the far right indicates that there is a gap in mainstreaming and implementation of the core values. These were the values that gave rise to the antidiscrimination directives, values that are today heard largely in celebration speeches on EU level. They do not get articulated politically, neither expressed nor promoted by the Member States on national level and therefore not enjoy much popular traction. It is necessary to revisit these values and reiterate them to close the implementation gap. There is a need for stronger communication strategies at EU level on values, stronger leadership on values from the EU Commission. This has already started with the hearings of the new EU Commission where many candidates articulated the need to reassert EU's core values. But there needs to be a testing of economic and social policy for the manner in which they give expression to these values. This could be assisted by the requirement to implement equality and non-discrimination mainstreaming.

The adoption of the Race Directive was prompted by events in Austria seem harmless by today's levels of racist and xenophobic politics and rhetoric among EU Member States. Today, anti-migrant rhetoric

influences policies that hinder ethnic minorities in accessing their rights, without much protest from other states and renders the EU commission powerless and ineffective in implementing its legislation and policies to uphold its core values and promote the human rights of all EU citizens.

Lack of implementation of equality mainstreaming and the need to pursue implementation of this at EU and Member State level must be addressed. This could include further developing methodologies, guidance and support tools, investment and funding, good practice exemplars etc. The structural funds and their implementation might be a good arena for this to be progressed given the EU leverage in this field. There is a need for a leverage which catalyses a value based approach and mainstreaming of non-discrimination and equality to promote and protect human rights.

There are potentially strong drivers for the promotion and protection of ethnic minorities' rights in the EU and among the EU Member States. The very existence of anti-discrimination legislation, for instance, marks recognition of the need to combat racism and discrimination based on ethnic origin and a recognition that ethnic facts can hinder people in accessing their fundamental rights and freedoms. Unfortunately, the initial excitement over the adoption and transposition of the anti-discrimination directives and the eagerness of the candidate countries during accession process to comply with EU legislation was replaced by Member States' reluctance or by some resistance to take measures to effectively realise substantive equality in rights of ethnic minorities.

An amalgamation of historical, legal, economic and political factors contribute to Member States' reluctance to further develop and mainstream the core values of non-discrimination and equal treatment on a national level compounding in effect the ethnic factors. On an EU level, these factors challenge efforts to mainstream non-discrimination into policies and directives and into a common Union approach to addressing the economic crisis or the accelerated globalisation, we experience with large numbers of people risking their lives to reach the shores of Europe.

While fully aware that there is not appetite for legislative reform in this field, it could however be asserted that there is a need for a new generation of legislation and establish an agenda that would stimulate more proactive approaches to equality, diversity and non-discrimination. The agenda could address the ambiguities in regards to the definition of race and ethnicity and the inclusion of nationality as an illegal ground of discrimination. It could raise the need to require a reasonable accommodation of cultural diversity in employment and service provision. It could raise the need to implement duties on the public sector to have due regard to equality and non-discrimination in carrying on their functions and on the private sector to be planned and systematic in their approach to equality.

The chapter identified serious institutional issues in relation to implementing the legislation, specifically in regards to the NEB's. There needs to be European standards set and enforced to protect, enable and ensure the conditions necessary for NEB's to function effectively and independently and should be tailored to the functions and potential of equality bodies.

Underreporting of discrimination illustrated the lack of impact of the anti-discrimination legislation on national level and there is a need for action or the legislation becomes redundant. Underreporting is not only about lack of awareness among the right holders but also about culture. There is a need to

encourage a culture of rights where people feel confident in exercising their rights and are celebrated for doing so. The NEB's need to be central to this ensuring sufficient cases are brought forward. The civil society also need to be involved in taking and being supported to take the challenge to make rights real and support their individuals in their communities to use the legislation. Leadership from the EU Commission in reassertion of values of equality and human rights as core EU values will also be greatly valuable.

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I. Annex

INTERVIEW GUIDE

EU EQUALITY DIRECTIVES AND THEIR IMPACT ON PROMOTION AND PROTECTION OF HUMAN RIGHTS IRRESPECTIVE OF RACE AND ETHNIC ORIGIN

INTRODUCTION

A mapping exercise completed under the auspices of FRAME September/October 2014, identified among others that there are gaps between EU's human rights policies and the implementation of these policies in practice. These gaps are found in several areas of EU policy such as political, economic and non-discrimination areas. Gaps between policy, implementation and impact in practice could pose a barrier for protection and promotion of human rights. To understand more concretely what impact such a gaps have in protection and promotion of human rights, there is a need for further mapping and to get an interpretation from relevant institutions and persons on EU and national level.

Non-discrimination and equality policies – with a specific focus on race and ethnic origin is selected for further analysis.

Principles of non-discrimination and equal treatment are core values on which the EU is founded, set by the Charter of Fundamental Rights (article 21) and the Treaty of the European Union (articles 2, 3). These values are expressed through different policy papers and transposed by binding directives that obligate the EU Member States to set legislation in place to combat discrimination and promote equal treatment (e.g. Directive 2000/43/EC of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, also known as the Race Directive). EU Member States have in different degrees implemented the directives in national legislation.

The overarching question for this analysis is: “Have these core values of non-discrimination and equal treatment implemented by the directives, had the desired impact to protect and promote the individual’s human rights irrespective of race and ethnic origin?”

METHODOLOGY for the interview

The questionnaire is a point of departure for an interview by phone/skype with relevant stakeholders in the field of equality. The primary purpose of the interview is to obtain first hand qualitative interpretation of the impact antidiscrimination and equality policies have in promotion and protection of human rights for the individual irrespective of race and ethnic origin.

The respondents are contacted primarily by mail. The mail serves to inform respondents on the premises for the interview. It will also provide background information on FRAME.

To ensure a 360 degree assessment, the respondents represent equality bodies, national human rights Institutions (NHRIs), members of civil society, EU commission, EU parliament, Fundamental Rights Agency (FRA), independent equality experts and Equinet – the European network of equality bodies.

The interview will – if possible and accepted by the respondent – be taped and transcribed. No material from the interview will be used without approval of the respondents.

GUIDE

- Please answer the questions from the point of view of the organisation/ institution you represent.
- Please refrain from opinions that cannot be qualified
- Please provide any documentation or material in English you believe to be relevant for the illumination of the research question.
- The interview will take approximately 30 minutes

QUESTIONNAIRE

1. QUESTIONS FOR FRA, EU COMMISSION, EQUINET SECRETARIAT, EU PARLIAMENT, CIVIL SOCIETY, EQUALITY EXPERTS, EQUALITY BODIES AND NHRIS		
	✓	Please Qualify
1.1 Please state your name and affiliation		
1.2 Do you think that the <u>intentions</u> behind EU's anti-discrimination/equality policies and legislation have or are being fulfilled at EU level/ at MS level?		
1.3 If yes to 1.2: Do you think that the <u>intentions</u> behind EU's anti-discrimination/equality policies and legislation have or are being fulfilled within all ground of discrimination (gender, race, ethnic origin, age, religion and sexual orientation) or some?		
1.4 The different member states have implemented the anti-discrimination/ equality policies differently. What do you see as the driving force behind these core values having an effect?		
1.5 In continuation of my previous question, what do you see as the barriers for these core values to have an effect?		

1.6 What impact do you think anti-discrimination/equality policies and legislation have on the human rights of EU-citizens?		
1.7 Do you think that EU's Charter for Fundamental Rights article 21 on anti-discrimination plays a role in promotion and protection of human rights?		
1.8 Do you have any suggestions as to how human rights can be promoted and protected better by anti-discrimination policies/legislation? Suggestions as to how the anti-discrimination values can have better impact?		
1.9 Any other comment?		
2. SPECIFIC QUESTIONS FOR EQUALITY BODIES/NHRIS		
		Please Qualify
2.1 Do you think that your body/institutions work, is in compliance with the <u>intentions</u> behind EU anti-discrimination and equality policies and legislations?		
2.2 Do you think, your work has a direct/indirect impact on promotion and protection of human rights irrespective of race and ethnic origin in your country?		
2.3 does your statutes refer to fundamental rights?		

2.4 Is there a gender aspect, when combating discrimination and promoting equal treatment?		
2.5 Are there other factors that could be useful in promotion and protection of human rights irrespective of race and ethnic origin? E.g. political, social, economic, structural factors?		
2.6 Do you have any suggestions as to how your body could enable in a larger degree the promotion and protection of human rights irrespective of race and ethnic origin?		
2.7 Any other comment?		

IV. Religious factors: Religious minorities under pressure*

A. Introduction

The D 2.1 Report on factors which enable or hinder the protection of human rights described significant ways in which cultural and religious factors may hinder or facilitate the human rights policies of the EU, in its internal as well as external actions (Lassen et al., 2014). The report in particular paid attention to human rights in the inter-linkage between culture and religion, religion being a vital bearer of culture (Lassen, 2014, chapter VII).

In the present chapter, the focus will be on persons belonging to religious minorities, which in the above-mentioned report were often singled out as being in a particularly precarious position - whether with regard to the ability to enjoy freedom of religion or other rights - in the context of a variety of challenges in different political, historical and cultural contexts.

Both in a European and global context, the position of religious minorities in society and the protection of their rights present a huge complexity. Globally, a sharp increase in discrimination or outright persecution of religious minorities has been witnessed. In a European context there is a growing tendency of State interference in the specific part of religious freedom that concerns the exercise of religious rituals, traditions and symbols, and, in addition, there is a growing debate about such interventions. In Europe it is often religious minorities who are influenced by this tendency and who therefore may experience an accumulative pressure on their right to manifest their religious beliefs. The pressure on religious minorities is further augmented due to the rise in the number of hate crimes against persons belonging to religious minorities. In addition, both within EU Member States and globally, religiously founded extremism and radicalisation are increased - an area clearly intensified by processes of globalisation. The attacks on Charlie Hebdo and the Jewish supermarket in Paris in January 2015, followed by the attacks at a public debate meeting about freedom of expression and religion as well as at the central synagogue in Copenhagen in February 2015, are poignant examples of this.

This complexity presents major challenges to the EU, both *vis-à-vis* its Member States and in its external actions.

B. Structure and methodology

The chapter will start with a sketch of conceptual issues that are relevant when discussing religious minorities and human rights; this applies to the notion of secularisation within the EU, and it applies to conceptual reflections on freedom of religion or belief, including discussions of the scope of this right.

Then follow sections setting the scene by means of a discussion of religious minorities under pressure in a global context as well as within the EU Member States. The variety of cultural, religious and historical factors influencing the field of human rights of religious minorities, globally as well as within Europe, will be presented. In the wake of the terror attacks in February 2015, Denmark has been chosen as a case study illuminating such factors within EU Member States.

*The author of this chapter is Dr. Eva Maria Lassen, Senior Researcher, the Danish Institute for Human Rights.

Following a mapping of the international human rights instruments central to religious minorities, the chapter proceeds to present EU instruments in internal actions and to discuss the scope and efficiency of these instruments in meeting the challenges in protecting and promoting the rights of religious minorities in EU Member States. The chapter then analyses EU instruments in external actions. The scope and efficiency of the instruments addressing issues concerning religious minorities are investigated within the context of the global diversity of historical, cultural, political and religious factors affecting the rights of religious minorities. The chapter proceeds to a comparison of EU external and internal actions. Particular focus will be on the issue of coherence and incoherence of actions concerning religious minorities.

The chapter is based on a desk-study. As explored in report D 2.1, the triangle of religion, culture and human rights is a growing research field. Freedom of religion or belief is one of the classical human rights, and the international protection of freedom of religion or belief has been subject to much, mostly legal, scholarship. However, the scholarly literature on human rights in relation to religion and culture in the specific context of EU's internal and external policies has grown rapidly in recent years, and the field benefits from interdisciplinary research and includes disciplines as diverse as theology, history of religion, anthropology, law, philosophy, and global history. The present chapter is making use of this growing scholarly literature, focusing on those areas of particular relevance to the protection of religious minorities and the promotion of their rights. In addition, the chapter explores policy documents and instruments of the EU pertaining to the rights of religious minorities. Reports of NGOs, National Human Rights Institutions, and think tanks addressing issues of religious minorities have been used. At the UN level, key sources consist of both legally binding documents and soft law, including reports of the UN Special Rapporteur on Freedom of Religion or Belief.

C. Conceptual reflections

1. Secularism and the EU

'Religion has dramatically re-emerged within European politics, a state of affairs at odds with narratives of an irresistible secularizing process' (Foret, 2015, p. 1).

Religion has become a political factor. As religion is increasingly a factor on the global and local agenda, the EU and its Member States have to address more and more the relationship between religion and human rights, both within the EU and in third countries. However, it is becoming increasingly clear that Member States as well as the EU have some difficulties in this exercise due to the modern Western tradition of adopting a secular and religiously neutral approach; thus the EU has proclaimed itself religiously neutral (see below section D and F).

The problem of religion entering the political and public spheres has caught the attention of a small but growing number of scholars. Thus, a new trend in scholarly literature is concerned with how the EU and its Member States should tackle the notion of secularism and how they should meet the challenges constituted by the politics-religion dichotomy in the future (see notably Foret, 2015).

The uneasy approach of the EU *vis-à-vis* religion and human rights is accentuated by the fact that the EU Member States, due to different religious and political histories, differ widely in their position on the

relationship between State and religion and on the manner in which freedom of religion should be manifested in the public sphere (see below). This means that it is difficult to find common ground from which to proceed. It also means that the EU in its external actions, and Member States in interactions with third countries, in practice experience difficulties in adopting a consistent and shared approach when addressing human rights problems linked to ways of organising religion in third countries. As accurately put by Mandaville and Silvestri:

On an abstract level, European countries espouse a common similar notion of secular neutrality towards religion. In practice, however, they diverge considerably both from each other and from the United States, mainly due to different histories, political cultures, constitutional systems, and models of religion-state relations. This is further complicated by the growing supranational powers of the European Union, which interfere with, but not necessarily always substitute, the domestic laws and policies of its member states. If European countries appear to be behaving in rather schizophrenic ways vis-à-vis engagement with religion in their individual foreign policies, this dilemma is further exacerbated when they are addressing the same topic but working through the auspices of the European Union (Mandaville and Silvestri, 2015, p. 5).

In other words, the proclaimed religious neutrality of the EU, the diversity of approaches to religion within the EU Member States as well as in Member States' approaches to third countries raise the question of how to talk about freedom of religion or belief in general and about the protection of religious minorities in particular in a consistent way. This question is intimately linked to differing views on the scope of freedom of religion.

2. The scope of freedom of religion or belief

The scope of freedom of religion or belief (including the question of the right to change religion), the protection of freedom of religion or belief, freedom of religion or belief in conflict with other rights, the relationship between religion and the state, blasphemy laws – the discussion of these and related issues has been going on since international human rights were proclaimed in 1948, and to an increased rather than diminished degree. The discussion takes place at the national level in EU Member States as well as in third countries, at the multilateral and regional level, and among policy makers and academics.

Most EU Member States have a long history of developing regulations of freedom of religion or belief within the framework of the European Convention of Human Rights of 1953. Today, the interpretation of freedom of religion *vis-à-vis* other human rights, and the protection of the rights of religious minorities in concrete cases loom large in the case law of the European Court of Human Rights (see below Section D).

The interpretation of religious freedom is frequently being debated in international fora, the 'defamation of religion' debate of the UN Human Rights Council being a recent example (see e.g. Benedek, 2012, p. 66). In this connection it should be emphasised that freedom of religion or belief is an individual freedom, although the collective dimension of most religious practices means that the full exercise of freedom of religion or belief entails some collective rights of religious communities. It follows that religion as such is not protected by human rights. Even so, the debate at the UN level about

defamation of religion was exactly focused on whether religion was to be protected from defamation, and severe blasphemy laws are still in place in a large number of countries.

D. Religious minorities under pressure: The context

1. The global context

Religious freedom is under pressure. Even if approximately 145 countries have legislation in place that protects the right to freedom of religion, a majority of countries experience that this freedom is under pressure. There are numerous agencies 'taking the temperature' on the position of religious minorities around the world, observing that both violations of religious freedom committed by state and non-state actors are increasing in all parts of the world. These reports on freedom of religion worldwide indicate a precarious situation of religious minorities in a very large number of countries. The discrimination, harassment and persecution of religious minorities take both legal and non-legal forms, and are backed or initiated by both states and non-state actors.

The European Parliament Working group on Freedom of Religion or Belief and Religious Tolerance (from 2015 European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance) issued a report in 2014, pointing to seven categories of threat to freedom of religion, all of which may involve religious minorities:

- Intimidation, discrimination, violence and lack of state protection;
- Denial of freedom to change or leave one's religion or belief;
- Denial of freedom to worship, alone or in community with others;
- Denial of freedom to teach, promote, and publicly express religion or belief;
- Persecution under blasphemy and anti-defamation laws;
- Denial of the right to conscientious objection;
- State violations: eradication policies (European Parliament Working Group on Freedom of Religion or Belief, 2014, p. 5).

Throughout the seven categories, religious minorities are seen to be particularly vulnerable.

Surveys on the situation of religious minorities around the world show that there are huge differences, reflecting the political, cultural and religious history of each country and the impact of globalization on the region in question. The relationship between State and religion varies enormously from one third country to another, a large number of third countries having a strong interlinkage between one particular religion and the State.

Local conflicts can have consequences for religious minorities in other regions. Israel-Palestine, to take a notable example, has huge and mostly negative consequences for religious minorities in other countries, giving rise to, for instance, hate crimes against Jews. The discrimination against and persecution of Christian minorities are on the increase. In 2015, the EP Intergroup on Freedom of Religion or Belief and Religious Tolerance published a report, collecting evidence on the increased discrimination and

persecution of religious minorities across regions and in different countries (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015).

The UN Special Rapporteur on Freedom of Religion or Belief published reports in 2013 and 2014 concerning the complex interaction between, on the one hand, protection of religious minorities' rights, religious freedom and freedom of expression, and, on the other hand, religiously motivated violence, hate crime and radicalism (UN Special Rapporteur on freedom of religion or belief, 2013). The report points to the lack of inclusion and integration of religious minorities as part of the commitment to fight religious intolerance and manifestations of collective religious hatred.

2. Accumulated pressure: Religious minorities within in EU Member States

Religious freedom in Europe is not absolute and can be limited under certain conditions, for example if religious freedom conflicts with other rights or with other individuals' rights, or with, for instance, the public order. Religious freedom is dynamic and constantly changing because it is being interpreted in light of the actual development of society as well as the knowledge and the values society holds at a given time. Religious minorities are frequently under pressure also within EU member states, and the variations are considerable. Again, there are particular ways in which such pressure can be experienced.

First of all, and ironically when viewed from a human rights approach, the human rights norms themselves can be perceived as a threat to religious minorities. The question of how to interpret religious freedom and, in addition, how to square freedom of religion with other human rights, is constantly debated and the answers are constantly developing, sometimes putting religious minorities under pressure. Thus, a relatively new trend in Europe is to question the use of religious symbols and traditions. This applies, for instance, to circumcision of male infants and children (a Jewish and Muslim tradition) and the use of headscarves for religious reasons (a Muslim tradition). Religious symbols and traditions are most frequently several hundred or thousand years old. It is therefore not these symbols and traditions that are new in Europe, but rather the prohibitions and the questioning of them. These symbols and traditions are usually linked to religious minorities within Europe, notably Muslims (Lagoutte and Lassen, 2006, p. 37).

It follows that it is the freedom of religion of religious minorities (predominantly non-Christian minorities) that is being limited or is subject of political debate and/or debate in the media. A series of symbols and traditions are at stake. The prohibition of these is not necessarily, taken separately, very extensive or expansive. Viewed in its entirety, however, individuals and groups belonging to the given religious minorities (in the above examples Jews and Muslims), because of the series of possible limitation of their religious freedom, can see their freedom seriously limited or attacked – in the media and by politicians (typically representing, in religious terms, the majority population). This situation has to be seen in the context of the State being obliged by international and European human rights standards to promote religious tolerance and respect for diversity. In this way, the freedom to have and manifest a religion or a non-religious or atheistic belief can flourish in society. The European Court of Human Rights gives a wide margin of appreciation to the State (Lagoutte and Lassen, 2006, p. 52-53). The history of each Member State of the Council of Europe plays a dominant role in determining how

religious freedom is interpreted in the different States. This very much applies to EU Member States, where the principle of separating the State and religion has been expressed in different ways. As a result, scope and limitations of freedom of religion or belief as well as the regulation of the state of religious communities vary considerably.

Second, religious minorities may experience harassment and attacks from non-state actors. In the wake of the terror attack on Charlie Hebdo and the kosher shop in Paris 7 January 2015, the EU Fundamental Rights Agency (FRA) conducted a survey of the reaction in EU Member States and the importance of these acts for the protection of religious minorities. The FRA report points to the increasing fear of religious minorities for their safety and the challenges in relation to marginalisation, social inclusion and integration (FRA, 2015).

Third, religiously founded radicalisation and extremism may have adverse effects on religious minorities. In the above-mentioned example of the Paris attacks, some members of the majority acted adversely towards a whole Muslim minority as the attackers were of Muslim faith.

a) Case study: religious minorities in Denmark

Denmark is an interesting case, illuminating how historical, religious, cultural and political factors have influenced and continue to influence the position of religious minorities in society, historical reasons for treating minorities in particular ways mingling with new trends in demography and influences of globalisation processes.

Historically, Denmark was an extremely homogenous society, and even today, characterised by a great variety of Christian churches of various denominations as well as all major world religions. Approximately 78% of the Danish population belongs to the Evangelic Lutheran Church 'Folkekirken', closely resembling a State church and as such, according to the constitution, supported by the State, financially and otherwise. The close link between State and church means that the State regulates religious denominations outside of the Folkekirke differently than the Folkekirke.

The rest of the population is not registered according to religious affiliation, and therefore the number of adherents to various religions outside the Folkekirke is characterised by a certain uncertainty. The largest minority religion is Islam. It is indicated that approximately 3.8 % of the population are Muslims. Before the 1970's there were very few Muslims in Denmark. The oldest non-Christian community is the Jewish Community, which was recognised by the King in 1684. The approximate number of Jews is 7.000. In addition, there is a smaller number of adherents to other religions, for instance Buddhism and the Bahà'ì as well as other convictions, including atheism (The Danish Institute for Human Rights, 2015, pp. 10-11).

In the modern history of Denmark, starting with the establishment of the first democratic constitution in 1849, there has been a high degree of tolerance towards the manifestation and practice of religious rites and symbols, and a pragmatic approach has often been used. However, in Denmark as in the rest of Europe as described above, a tendency to increased regulation of the area can be observed. Since 2009 legislation prohibits judges in Danish courts to appear in a way that indicates a political or religious attitude or affiliation. In the debate, in and outside of Parliament, it was in particular the Muslim

headscarf for women which was in the focus (The Danish Institute for Human Rights, 2015, p. 18). Religious symbols, rituals and practices appeared on the political agenda and were subject of debate in the media several times in 2014. Prohibition against religious slaughter without prior numbing (a Jewish and Muslim practice) was introduced (Ministry of Food, Agriculture and Fisheries of Denmark, 2014). The debate about a prohibition of circumcision of male infants (a Jewish and Muslim practice) was extensive, and a strong feeling for a prohibition was aired amongst some politicians, medical doctors and opinion makers. In addition, the Board of Equality passed a decision concerning a male censor's refusal of shaking hands with an individual of the opposite gender (Danish Board of Equality, 2014). In all of these instances, the focus is thus on religious minorities.

Individuals belonging to religious minorities as well as the religious communities may, due to the series of possible intervention in religious practices, perceive their individual and collective freedom of religious as seriously impaired or at least challenged. In addition, the often severe debate in the media and among politicians about such intervention may result in a feel of 'us-them' contrast, between religious minorities and the majority population. To take a notable example, the Jewish Community in Denmark has expressed grave concern that a prohibition of male circumcision will threaten the very existence of Jewish life in Denmark because of the centrality of this ritual for Jewish identity.

The so-called Cartoon Crisis in 2005 caused an often very polemic debate in Denmark about Muslims in the country; Muslims values versus Western values, the right to scorn a particular religion, and the scope of freedom of expression, especially in relation to freedom of religion. This debate is still ongoing and oftentimes has put persons of Muslim faith in a situation where they fell under pressure and not completely accepted as equal partners of society.

The terror attack on Charlie Hebdo in Paris on 7 January 2015 had a relatively large impact on the situation in Denmark, not least because of the role of Denmark in the above-mentioned Cartoon Crisis. Thus the attacks in Paris gave rise to increased debate about democratic values and integration of ethnic minorities in Danish society. In addition, the threats against both Muslims and Jewish people increased in Denmark, as well as threats against such individuals who were perceived as belonging to Islam or Judaism. Then on 14 and 15 February two terror attacks took place in Copenhagen. One attack targeted a public meeting about 'Art, blasphemy and freedom of expression', with the participation of the Cartoonist Lars Vilks, who is known for his cartoons of the Prophet portrayed as a dog. One person was killed and several police officers were left injured. The other attack took place at the central Jewish synagogue, killing one Jewish guard and wounding two police officers (The Danish Institute for Human Rights, 2015, p. 12).

In recent years, both Jewish and Muslim minorities have experienced an increase in religiously motivated harassment and hate crimes. A report by the Danish Security and Intelligence Service (PET) reveals that these crimes and related incidences are primarily targeting religious symbols or localities (Danish Security and Intelligence Service, 2015, p. 4). Similarly to the rest of the EU, there is an increased tendency of anti-Semitism in Denmark (FRA, 2013). According to a report published by the Jewish Community in Denmark in March 2015, there were 53 reported incidents of anti-Semitism in 2014 (Jewish Community in Denmark, 2015), a very high number when viewed in the context of the small

number of Jews in Denmark. A big proportion of these crimes and related incidents of harassment are religiously motivated, often linked to the Israeli-Palestinian conflict.

To sum up, historical, religious, cultural and political factors have influenced the position of religious minorities in society in EU Member States. Denmark is an example of how historical reasons for treating minorities in particular ways are interacting with changes in demography and influences of globalisation. Denmark has a way of positioning religious minorities within the legal framework, which differs from many other EU Member states, and have therefore particular ways of legally and politically addressing the rights of religious minorities as well as the need for protection against the violation of their rights. At the same time, the issues raising concern about the rights and protection of religious communities, are, as we have seen, often identical or very similar to those issues raised in other EU Member States. This raises the question as to whether the EU can have a uniform approach to strategies for the protection of religious minorities and solutions involved.

E. International human rights instruments

The Preamble of the Universal Declaration of Human rights (UDHR) underlines the importance of freedom of religion: ‘(...) a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people’.

The UDHR proclaims religious freedom in a broad sense, including for instance the right to change religion: ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance’ (Art. 18). The declaration also refers to the cultural life of the individual: ‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’ (Art. 27(1)).

Although freedom of religion or belief does not have its own convention, numerous conventions and declarations have relevance for culture, religion and human rights (Evans, 2012, pp. 8-9). Amongst the most important are the two covenants of 1966, The UN Covenant on Political and Civil Rights (ICCPR), and the UN Covenant of Economic, Social and Cultural Rights (ICESCR).

The ICCPR, with specific reference to religious minorities, states that: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’ (ICCPR Art. 27). With regard to hate crime and the harassment of religious minorities, the ICCPR includes a State duty to criminalise national, racial and religious hatred that has the character of incitement to discrimination, hostility and violence (Article 20 (2)).

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, and the Convention of the Rights of the Child of 1989 are other important documents, which touch upon the cultural and religious rights of women and children respectively.

The UN Declaration of rights for persons belonging to national, ethnic, religious and linguistic minorities proclaims that:

Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination (Art. 2).

The UN Human Rights Committee has issued a General Comment on Freedom of Religion (No. 22). Generally speaking, both the Human Rights Committee and the UN Special Rapporteur on Freedom of Religion or Belief are cautious about limitations to freedom of religion or belief unless exceptional reasons call for this, for instance in the case of religious intolerance.

The UN Special Rapporteur on Freedom of Religion or Belief published reports in 2013 and 2014 that concern the complex interaction between, on the one hand, protection of religious minorities' rights, religious freedom and freedom of expression, and, on the other hand, religiously motivated violence, hate crime and radicalism. Thus, in December 2013 he presented his annual report to the UN, focusing in this report on the tackling of manifestations of collective religious hatred (UN Special Rapporteur on freedom of religion or belief, 2013). It is, amongst others, recommended that the States actively promote inclusion and integration of religious minorities as part of the commitment to fight religious intolerance and manifestations of collective religious hatred (UN Special Rapporteur on freedom of religion or belief, 2013, section 70, c). The Rapporteur calls for dialogue between the State and religious minorities as well as for inter-religious dialogue between representatives for the different religions, as an instrument to avoid negative stereotypes of particular minorities (UN Special Rapporteur on freedom of religion or belief, 2013, section 70, h-i).

In December 2014 the Special Rapporteur presented a report with a particular focus on the necessity to counteract violence committed in the name of religion (UN Special Rapporteur on freedom of religion or belief, 2014). The report recommends States to not exclusively identify with a particular religion and to work within an inclusive institutional framework (UN Special Rapporteur on freedom of religion or belief, 2014, section 96). The report calls for a close dialogue between the States and all relevant actors in order to develop action plans to prevent violence committed in the name of religion (UN Special Rapporteur on freedom of religion or belief, 2014, section 70 and 98).

F. EU Instruments: internal actions

The EU Charter on Fundamental Rights states in Art. 10 on 'Freedom of thought, conscience and religion' that freedom of religion includes the rights to manifest religious practices: 'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance' (Art. 10(1)).

The EU encourages, then, religious diversity and religious freedom within its Member States. At the same time the Charter only binds Member States in so far as they are implementing EU law (see also McCrea, 2014, pp. 291-292). Equally, the EU respects the States' different ways of organising the

relationship between State and religion, as expressed in the Treaty on the Functioning of the European Union, Art. 17, which states that the Union ‘respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States’ and undertakes to maintain a structured dialogue with churches and ‘philosophical and non-confessional organisations’.

In this way, the EU is committed to hear the religious and non-religious entities as part of civil society in areas of relevance to religious life within the EU.

In 2008, the European Commission presented a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (European Commission, 2008). However, this directive proposal has not been adopted yet, as Member States cannot find an agreement on this matter (see also Chapter II and III of this report).

The Council Directive 2000/78/EC of 27 November 2000 (Council of the European Union, 2000b) is covering religion, by establishing a general framework for equal treatment in employment and occupation. In contrast, the Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin does not include religion (Council of the European Union, 2000a).

It follows that religious affiliation as a ground for discrimination enjoys considerably less protection than is the case for race, ethnicity or gender. Individuals, whether of the majority religion or the religious minorities, are not generally protected against discrimination caused by religious affiliation outside the employment sphere.

In 2013, the European Network of Legal Experts in the non-discrimination field carried out a survey concerning domestic equality laws in EU Member states. The study reveals that a great diversity reigns across the EU with regard to regulating non-discrimination on the grounds of religion or belief:

Most EU (...) states surveyed have domestic equality laws which extend very significantly beyond that required by EU law. There is a significant variety in approach and in the scope and nature of domestic regulation, but the countries which have enacted domestic laws extending beyond provisions required by EU law heavily outweigh those which have not (European Network of Legal Experts in the non-discrimination field, 2013, p. 23).

It is clear from the foregoing that there is extensive regulation of discrimination on the relevant grounds beyond the context of employment both across the EU and in the other countries surveyed. That regulation frequently, though not invariably, consists in anti-discrimination legislation covering the relevant grounds (and sometimes others) across a wide material scope. In other cases regulation is achieved by some combination of detailed legislation and/or Constitutional provisions and/or field specific legislation. Of the relevant grounds disability is probably the most comprehensively covered at this time (...) the least regulated ground is probably age but there is not a huge disparity between this and the grounds of religion/belief and sexual orientation (European Network of Legal Experts in the non-discrimination field, 2013, p. 24).

The report concludes that the 'gap between legal and effective rights appears particularly acute outside the scope of employment' (European Network of Legal Experts in the non-discrimination field, 2013, p. 25).

The report also points to differences in the role of the judiciary:

In a number of cases national judges appear to have taken concepts such as reasonable accommodation which have been developed in the employment sphere, and applied them outside that sphere even absent any legislative basis for so doing (...) in other cases the judiciary have been inclined to carve out exceptions to prohibitions on discrimination even when there the legislation at issue did not appear to provide them. The nature of such exceptions is likely to vary over time. At present, and in a number of EU states, the question of the headscarf and the relationship between religious equality, on the one hand, and countervailing concerns about public security, community cohesion and the perceived requirements of gender equality, on the other. While the approach in France and Belgium has been to impose bans on full-face coverings being worn in the public sphere, Sweden has moved in the opposite direction by restricting even the power of schools to bans such religious dress. This is one example which brings home the very real differences of legal and cultural approaches which prevail across the 33 states (European Network of Legal Experts in the non-discrimination field, 2013, p. 78).

To sum up, protection against religiously grounded discrimination in the work place is regulated by the EU. By contrast, attempts to extend the regulation outside the workplace have so far not borne fruit, partly due to some Member States' resistance to increased EU regulation in the area of religion. Generally speaking, the EU keeps a low profile with regard to regulating freedom of religion in Member States.

1. Gaps and Challenges

Should the EU aim at greater protection against discrimination on account of religion or belief, to further the rights of religious minorities, and to counter-fight religiously related extremism and hate crimes affecting religious minorities? Or should the EU continue to keep a low profile in this area?

The proposed EU Directive, which is currently blocked in the Council, has the potential to promote initiatives to ensure equal treatment and opportunity of religious minorities. This will potentially have a positive effect on the economic, social and cultural rights of religious minorities, for instance in the areas of health and education of the child. The intersection of religion, ethnicity and gender may also benefit from the proposed directive.

However, it is not foreseen that there will be political will in the near future in most EU Member States to increase the protection of religious minorities by means of directives or other legislative measures. It is therefore maybe in the first instance non-legal initiatives which might hold the more potential. In this context it is interesting that the EU is attempting to address the precarious situation of religious minorities in EU Member States at a high-level meeting to be held in October 2015. Thus the EU Commission will host its first Annual Colloquium on fundamental rights in the EU. According to the press release:

The Colloquium will aim at improving mutual cooperation and greater political engagement for the promotion and protection of fundamental rights in Europe. It will seek to strengthen dialogue between the EU and international institutions, policy makers, academia and civil society, and deepen the understanding of challenges for fundamental rights on the ground. Another key objective will be the identification of gaps and achieving progress on topical fundamental rights issues (European Commission, 2015b).

The topic of the Colloquium will be 'Tolerance and respect: preventing and combating antisemitic and anti-Muslim hatred in Europe'. The background for choosing this topic is the 'increase in fear and insecurity amongst the Jewish and Muslim communities in the EU' (ibid.). More particularly,

The Colloquium will look at trends and underlying reasons of antisemitic and anti-Muslim incidents in the EU, and their impact on people's lives and rights. It will explore the most relevant avenues to address these phenomena. Focus will be put on projects, policies and legislation designed to combat hate crime, hate speech and discrimination. Discussants will look at the role of EU and international institutions, Member States, local authorities, civil society, community leaders, the media, education and the world of employment in developing a culture of inclusive tolerance and respect in the EU (ibid.).

The participation of civil society in this Colloquium is particularly interesting. The inclusion of civil society, in this context notably representatives of religious communities, is greatly needed in all Member States in the area of protecting individuals belonging to religious minorities. The EU Charter explicitly, as noted above, gives room for dialogues with faith communities.

Significantly, the issue of providing input from religious communities to the Colloquium was addressed by the annual high-level meeting with religious leaders hosted by the European Commission. These annual meetings between the EU and religious leaders were established by the EU Commission in the 1990s. At the annual meeting 2015 the First Vice-President Frans Timmermans hosted European Parliament Vice-President Antonio Tajani and fifteen religious leaders from Christian, Jewish, Muslim, Hindu, Buddhist and Mormon communities. The topic of the meeting was 'Living together and disagreeing well' (European Commission, 2015a). The First vice president stated at the meeting:

This dialogue has never been more important. Our societies face fundamental challenges, and churches and religions are among the actors that can play an important role in promoting social cohesion and bridging divides. The leaders here today are partners for the European Commission as they can share their experience in fighting against fundamentalism, discrimination and in building mutual trust and understanding (ibid.).

The conclusions of the high-level meeting will feed into the above-mentioned Colloquium on Fundamental Rights in the EU to be held in October 2015 (ibid.).

The inclusion of civil society, in this context representatives of religious minorities in the Member States and NGOs concerned with human rights and religion within the EU, is an important signal, also to

individual EU Member states, to include religious communities when addressing the rights of and the protection of individuals belonging to religious communities.

G. EU instruments and external actions

‘The EU is committed to be at the forefront of international efforts to combat religious intolerance and to defend freedom of religion or belief. In doing so, the EU remains neutral and is not supporting any specific religion or belief’ (European External Action Service, 2014a).

1. EU Strategic Framework and Action Plan

European External Action Service (EEAS) regularly issues statements on freedom of religion or belief in concrete cases, frequently concerning attacks or persecution of individuals or groups belonging to religious minorities.¹⁸ In contrast to its internal policies and instruments, the EU has very detailed external policies in the field of culture and religion. The EU includes respect for religion in its development policies and has a strong focus on freedom of religion or belief in its external actions due to the increased violation of freedom of religion or belief that takes place globally, notably in the form of discrimination of religious minorities.

The EU Strategic Framework and Action Plan on Human Rights and Democracy of June 2012 describes the ways in which the EU will pursue its human rights policies, both at a bilateral and a multilateral level. The second part of the document contains its Action Plan to be pursued until 31 December 2014.

With regard to freedom of religion, three steps are envisioned in the Action Plan: first, the development of ‘public EU Guidelines on Freedom of Religion or Belief (FoRB) building upon existing instruments and documents, recalling key principles and containing clearly defined priorities and tools for the promotion of FoRB worldwide’; second, the presentation of ‘EU initiatives at the UN level on Freedom of Religion or Belief, including resolutions at General Assembly and Human Rights Council’; third, the promotion of ‘initiatives at the level of the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE) and contribute to better implementation of commitments in the area of Freedom of Religion or Belief’. The Action Plan also includes, amongst others, the following EU priority areas: enjoyment of human rights by LGBTI persons, protection of the rights of women, and protection against gender-based violence, and respect for economic, social and cultural rights.

The EU Guidelines are particularly interesting, as they contain detailed tools for officials of the EU and Member States when engaging third countries, international organisations and civil society (Lassen, 2014b). Moreover, they aim at sending a political signal:

EU guidelines are not legally binding, but because they have been adopted at ministerial level, they represent a strong political signal that they are priorities for the Union. Guidelines are pragmatic instruments of EU Human Rights policy and practical tools to help EU representations in the field better advance our Human Rights policy (European External Action Service, 2014b).

¹⁸ For a list of such statements covering the period April 2014 – March 2015, see European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 54ff.

In the process of creating the Guidelines on Freedom of Religion or Belief, the EU invited input from religious and non-confessional NGOs and institutions (see e.g. European Platform on Religious Intolerance and Discrimination, 2015).

Persons belonging to religious minorities are explicitly singled out in the Guidelines on Freedom of Religion or Belief, in connection with explaining the scope of religious freedom:

In line with these provisions, the EU has recalled that ‘freedom of thought, conscience, religion or belief, applies equally to all persons. It is a fundamental freedom that includes all religions or beliefs, including those that have not been traditionally practised in a particular country, the beliefs of persons belonging to religious minorities, as well as non-theistic and atheistic beliefs’ (Council of the European Union, 2013, para. 10).

The Guidelines emphasise the duty of the state to ‘protect all individuals living in their territory and subject to their jurisdiction, including persons holding non-theistic or atheistic beliefs, persons belonging to minorities, States must treat all individuals equally without discrimination on the basis of their religion or belief’ (Council of the European Union, 2013, para. 22).

The Guidelines address situations where freedom of religion is evoked to justify human rights violations of, *inter alia*, persons belonging to religious minorities (Council of the European Union, 2013, para. 26). The potentially precarious situation of religious minorities caused by restrictions of freedom of expression is also dealt with in the Guidelines:

Freedom of religion or belief and the freedom of expression are interdependent, interrelated and mutually reinforcing rights, protecting all persons - not religions or beliefs in themselves – and protecting also the right to express opinions on any or all religions and beliefs. Censorship and restrictions on the publication and distribution of literature or of websites related to religion or belief are common violations of both of these freedoms, and impair the ability of individuals and communities to practice their religion or belief. Limitations to the right to express opinions on religion or belief are a source of great vulnerability for people belonging to religion or belief minorities, but also affect majorities, not least persons holding non-traditional religious views (Council of the European Union, 2013, para. 31).

In this connection, the Guidelines emphasise that the criminalisation of blasphemy can often be used to ‘to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief’ (ibid.). In such cases the EU ‘will recommend the decriminalisation of such offences’ (ibid.).

The Guidelines address the frequent restrictions concerning the collective dimension of freedom of religion to be enjoyed by, amongst others, religious minority communities:

Frequent restrictions by States include the denial of legal personality to religious and belief communities, the denial of access to places of worship/meeting and burial, the punishment of unregistered religious activity with exorbitant fines or prison terms, or the requirement for

children from religious and belief minorities to receive confessional education in the beliefs of the majority (Council of the European Union, 2013, para. 41).

Finally, the Guidelines include religious minorities in groups that may be considered when financial support is provided as a means to promote freedom of religion through the support of, amongst others, civil society (Council of the European Union, 2013, para. 55).

2. The role of the European Parliament

a) Intergroup on Freedom of Religion or Belief

Reflecting the increased focus of the EU on religious freedom in its external actions, the European Parliament Working Group on Freedom of Religion or Belief was established in December 2012. The Working Group consists of:

A group of like-minded MEPs dedicated to promote and protect FoRB in the EU's external actions. The role of the EPWG is to work with the EU institutions in monitoring FoRB in third countries and to ensure that necessary actions are taken to address serious FoRB violations. MEPs belonging to our group are committed to undertaking parliamentary work in the European Parliament to promote and protect FoRB (European Parliament Working Group on Freedom of Religion or Belief, 2014, p. 16).

The Working Group aims at monitoring freedom of religion in the external actions of the EU, and at playing a role in formulating view points of the European Parliament. In 2014 the Working Group produced its first annual report on religious freedom in the world, including recommendations (European Parliament Working Group on Freedom of Religion or Belief, 2014).

In 2015 the Working Group became the Intergroup on Freedom of Religion or Belief and Religious Tolerance, with a mandate period from 2014 to 2019. In June 2015, the Intergroup published its 2014 Annual Report. The purpose of this comprehensive document is:

To highlight freedom of religion or belief violations in the world. To this extent, for the first time, we also have written a thematic chapter on violence against places of worship and holy places. With this report we also want to raise awareness amongst European policymakers and therefore we have included recommendations for the European Union (EU) institutions as well as country-specific recommendations for a number of countries (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 9).

The report points to numerous violations of the rights of religious minorities, and initiatives and reactions of the EU in this area.

The creation and the work of the Intergroup no doubt enhances the awareness of policy makers to violations of freedom of religion, and notably to violations of the rights of individuals belonging to religious minorities. It remains to be seen whether it will influence the Parliament and other EU policy makers to the extent of raising the political will to intensify the efforts in this areas, a hope explicitly put forward by the Intergroup in the presentation of the Annual report 2014:

We firmly believe the EU is in a good position to promote and protect FoRB worldwide, as is indeed the ambition of some of its policy tools. However in order to do so the EU needs to show more political will. We hope that this report will help to build up this political will among decision-makers in the European Parliament (EP), the European Commission (EC), the European External Action Service (EEAS) and the European Council (Council) and will contribute to an improvement in the situation of freedom of religion or belief in the world (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 9).

b) Resolution on cultural and religious tolerance

The Parliament regularly adopts resolutions related to the protection of religious minorities in concrete third countries.¹⁹ One resolution of *general* interest to the protection of religious minorities is the European Parliament Resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious differences. This resolution proclaims the Parliament's will to foster policies which affirm 'respect for cultural diversity and tolerance *vis-à-vis* different concepts and beliefs, combined with action to combat all forms of extremism and fight inequalities' (European Parliament, 2014, section 1). Acknowledging that cultural and religious differences have been sources of conflict and human rights violations, the resolution reiterates:

That the protection of persons belonging to vulnerable groups such as ethnic or religious minorities, the promotion of women's rights and their empowerment, representation and participation in economic, political and social processes, and the fight against all forms of violence and discrimination based on gender or sexual orientation must be among the EU's goals in foreign relations (European Parliament, 2014, section 3).

The Resolution '[c]alls on the EEAS and the EU Delegations worldwide to further engage with third countries and regional organisations in the promotion of intercultural and interreligious dialogue' (European Parliament, 2014, section 31), and stresses 'the importance of providing EU staff with appropriate training to this end'.

The resolution addresses the complex issues of 'credibility, coherence and consistency of EU policy', pointing to inconsistencies in internal and external policies (European Parliament, 2014, section 26-27).

3. Council of the European Union: EU priorities at the multilateral level

At the Foreign Affairs Council Meeting, held on 10 February 2014, the Council reiterated its strong commitment to the promotion of freedom of religion worldwide, in cooperation with the UN:

The EU will continue to advocate for Freedom of Religion or Belief as a fundamental human right at the UN and call for the implementation of respective resolutions by all UN Member States.

¹⁹ See for instance the list put together in the Annual Report 2014 of the EP Intergroup, of resolutions adopted in 2014 and 2015 (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 56).

The EU looks forward to enhanced collaboration with partners in this area and will continue to support the work of the UN Special Rapporteur.²⁰

And indeed, at the multilateral level, the EU plays a proactive role in the area of 'Freedom of religion or belief'. This applies both at the UN General Assembly and in the Human Rights Council. Thus the EU's promotion of the rights of individuals belonging to religious minorities at the multilateral level, together with a discussion of endeavours to fight religiously related radicalism, has been frequent. A major landmark was reached in 2013, when the EU was successful in sponsoring a UN resolution, which, very significantly, stresses the right to change one's religion or belief as part of freedom of religion or belief (see here Council of the European Union, 2014, p. 83).

The EU is active in the implementation of the Human Rights Council's Resolution 16/18 on 'combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief', and has in 2013, for instance, engaged with the Organisation of Islamic Cooperation (OIC) to this end (ibid.).

The EU also actively supports the work of UN Special Rapporteur on Freedom of Religion or Belief, and *inter alia* supports the Rapporteur in his endeavour to promote the view among States that defamation of religion does not constitute a human rights violation.

Recently, at the 69th UN General Assembly, the EU emphasised the initiatives focusing on protection of the rights of religious minorities around the world (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 55).

a) Gaps and challenges

At the policy level, the EU entertains in its external actions a progressive interpretation of freedom of religion or belief as well as of the rights of individuals belonging to religious minorities. An illustration of this is the Guidelines on Freedom of Religion or Belief. Although these Guidelines are criticised on several accounts - they may, for instance, be accused of indirectly to have an anti-Islamic approach, reinforcing religious stereotypes (see above, Chapter II) – the Guidelines are an ambitious attempt at ensuring a consistent and active approach of the EU and its Member States to the field of religion and human rights. The Guidelines contain a comprehensive human rights catalogue, and include descriptions of the important intersections of, for instance, religious freedom, gender and religious minorities. It should also be mentioned that the Guidelines proposes to make use of the existing infrastructure, notably EU delegations, which means that implementation is more likely to take place.

The EU has high aspirations, then, in the field of freedom of religion or belief in its external actions. There are, however, many challenges to the effectiveness in achieving EU' anti-discrimination objectives vis-à-vis freedom of religion, and, more particularly, vis-à-vis the protection and promotion of the rights of religious minorities.

²⁰ The affirmation should be seen in the context of several global human rights issues closely link to freedom of religion (Council of the European Union, 2014).

Exactly the effectiveness and implementation of the Guidelines – which are not legally binding – will be the focus of an evaluation of the Guidelines which will take place in 2015. Even before this evaluation has been carried out, however, some key challenges related to the effectiveness and implementation of the Guidelines can be singled out:

One issue of concern in relation to the realisation of the aspirations embedded in the policies on freedom of religion is what has been named the “secular approach” of the EU and its Member States. As explicitly stated in the Guidelines on Freedom of Religion or Belief ‘the EU does not consider the merits of the different religions or beliefs, or the lack thereof, but ensures the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief’ (Council of the European Union, 2013, para. 7). This impartiality carries, according to many scholars and experts, the risk of turning into what is called a ‘secular bias within Western diplomacy’ (Mandaville and Silvestri, 2015, p. 3). Thus it has been argued that such a secular approach means that ‘the EU voice and capability as a foreign policy actor remains weak and fragmented: in this context, religion is perceived as “an exotic and esoteric business at best” as one EU official has observed’ (Mandaville and Silvestri, 2015, p. 2).

Another and intimately related issue of concern is the lack of experience of diplomats of the EU and its Member States to relate to states, where religion plays a large role in societal and political life.

The EEAS is aware of these issues and of the need to equip staff to address, in a sensitive way, the role of religion in third countries. To this end EEAS has since 2013 organised training on religion and foreign policy for EU officials and Member States diplomats (European Parliament Intergroup on Freedom of Religion or Belief and Religious Tolerance, 2015, p. 55). In this way, the ‘religious literacy’ is raised, and EU and Member State staff will become informed of the role of religion in third countries and the implications of this for the EU and Member States’ foreign policy (Mandaville and Silvestri, 2015, p. 7. Bilde, 2015, p. 159). According to a policy advisor at the EEAS, the training, *inter alia*, also ‘helps to raise awareness about how an overly secular worldview can lead to not only blind spots, but also occasional misconceptions and inconsistencies’ (Bilde, 2015, p. 159). The training allows participants to get familiar with the Guidelines on Freedom of Religion or Belief, the most important UN resolutions, and the diversity of factors involved in the interplay between religion and human rights, in concrete third countries as well as at a general level (Bilde, 2015, p. 159).

Mainstreaming ‘religious literacy’ in diplomacy is much needed, not least in the endeavour of the EU to include civil society in the field of religion and, more specifically, in endeavours to protect the rights of individuals belonging to religious minorities. As mentioned above, the EU wishes to include civil society in its promotion of human rights in its external actions, and whilst this has very promising perspectives, it should be noted that the role played by civil society in the promotion and protection of religious freedom as well as in promoting religious tolerance is highly complex and country and region specific. Therefore highly trained staff is needed in this area.

H. Coherence between EU internal and external actions

The protection of religious freedom as well as religious tolerance is a key challenge to the human rights regime, both in EU Member States and globally. In the same period as the EU in its external actions demonstrated high aspirations at the level of policy making in the area of freedom of religion or belief, the EU Member States experienced serious threats to freedom of religion or belief and to tolerance towards cultural and religious diversity. The FRA carried out surveys related to religious and cultural minorities, for instance a survey on anti-Semitism in EU Member States, which showed that many Jews experienced an increased anti-Semitism. Around the same time, the Council of European Churches put pressure on the EU to monitor religious freedom within the EU, requesting more analyses on discrimination because of religion in Member States and applicant countries.

The detailed policies on freedom of religion or belief in the EU's external policies compared with the detached role of the EU in the practice of religious freedom in Member States, and combined with indications of serious problems with discrimination based on religious or ethnic ground, have given rise to charges of incoherence in the EU's internal and external policies. This also applies to the position of the EU on the role of the state vis-à-vis religious minorities.

Does incoherence between internal and external actions matter? Many experts think it does. An example is the question of impartiality vis-à-vis religion. The Guidelines on Freedom of Religion or Belief state that 'the EU does not consider the merits of the different religions or beliefs, or the lack thereof, but ensures the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief' (Council of the European Union, 2013, para. 7). At the same time, the EU does not insist on State neutrality of EU Member States. Such apparent inconsistencies have fuelled charges of incoherence between the EU's external and internal policies. As expressed by the scholar Marco Ventura:

Without a European consistency in religious laws and policies, Europe lacks the credibility and authority to denounce and counter violations in other parts of the world. No consistency is possible in this field, without a basic reflection on the role of the State. This is why the 2013 EU Guidelines on the promotion of freedom of religion or belief could not avoid starting from an extremely strong assertion of the European Union as 'impartial' and 'not aligned with any specific religion or belief'. Europeans should address their own internal failures and seek consistency in European religious laws and policies, in order to be a legitimate and a credible international promoter of freedom of religion and belief (Ventura, 2013, p. 35).

At the level of policy makers, there is also a sense that incoherence between internal policies and external actions matters. Illustrative is the 'European Parliament Resolution on EU foreign policy in a world of cultural and religious differences' of 2014, which explicitly addresses the problem of coherence and consistency in internal and external policies:

Considers that the effectiveness of EU action rests on its exemplariness and consistency between internal practice and external action;

Calls on all Member States to repeal any existing laws which contradict the fundamental freedom of religion and conscience and freedom of expression (European Parliament, 2014, section 26-27).

Problems of consistence also occurs at the level of Member States' bilateral interaction with third countries: EU Member States do not systematically deal with the freedom of religion or, more specifically, protection of religious minorities in in their bilateral relations with third States.

In the field of religion and human rights, the EU thus demonstrates high aspirations at the policy level in external actions, whilst keeping a low profile vis-à-vis EU Member States' internal affairs. In order to achieve a higher level of coherence, policy makers must reflect upon a central question: is the solution to lower the aspirations in the external actions or to increase the aspirations in the internal actions?

I. Conclusions

The chapter has focused on how religious, historical, cultural and political factors have influenced the ways in which the EU promotes the protection of religious minorities and their right to enjoy freedom of religion as well as other rights. Religiously related acts of radicalism, hate crime and extremism were also included.

The chapter started with a discussion of conceptual issues of particular significance to EU policies concerning religious minorities, especially secularism and the EU.

The chapter proceeded to set the scene by means of a describing religious minorities under pressure in global context as well as within EU Member States. Different cultural, religious and historical factors have influenced the position of religious minorities within the EU, whose Member States have different ways of organising religion and the relationship between State and religion. This is the case even more so in third countries, where the relationship between State and religion varies enormously, a large number of third countries having a strong interlinkage between one particular religion and the State. This poses particular difficulties to religious minorities. Thus, differences in the ways in which religious minorities are under pressure in EU Member States and third countries are significant.

After a sketch of the international human rights instruments covering the protection of religious minorities, the EU instruments concerning internal actions were outlined, followed by a discussion of the scope and efficiency of these instruments in meeting the challenges posed in relation to religious minorities in EU Member States. Generally speaking, the EU steers away from a common line on religious affairs in the Member States, which have a variety of ways in which to organise their religious affairs and the relationship between State and religion. Hence, religious minorities too are organised vis-à-vis the State in different ways across Europe, and the way in which freedom of religion is interpreted varies also. At the level of law, the EU Member States have not succeeded in agreeing to a directive covering anti-discrimination vis-à-vis religion outside the workplace. A survey on what this has meant to the promotion of equality for, amongst others, religious minorities, has shown that there is a wide variety across the Member States. FRA reports demonstrate that freedom of religion is insufficiently protected within the EU and that, for instance, Jewish minorities across Europe perceived a highly increased level of anti-Semitism.

The chapter subsequently analysed EU instruments relating to external actions, looking also in this section at the scope and efficiency of the instruments in dealing with the issues concerning religious minorities. The EU, in its external actions, has a progressive and comprehensive interpretation of freedom of religion or belief and of the protection of religious minorities. Similarly, there is a pronounced understanding of the different rights that come into play in the context of culture and religion for different groups of individuals. Overall, the EU demonstrates a strong commitment to promote the protection of the rights of religious minorities. However, there are several delimitations to the EU's policies in this area. First of all, the Guidelines for Freedom of Religion and other instruments are not binding, and second, the EU staff appears not always sufficiently equipped to deal with the highly complex interplay between state policies, religion and human rights. Both elements contribute to a lack of efficiency in the promotion of equal rights for religious minorities, a point which is even more pronounced because the EU Member States do not systematically deal with the protection of religious minorities in their bilateral relations with third States.

The chapter proceeded to square the EU external and internal actions, with a focus on the issue of coherence. The issue of incoherence is shown to affect the level of efficiency of the EU, both in internal and external endeavours to promote the protection of freedom of religion and the rights of religious minorities.

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V. The nature and consistency of human rights integration in EU external country strategies*

'Your request for access to documents – 2014/161

[..] We understand from your request that you would like access to the following documents: The country human rights strategies for Ghana, Tanzania, Indonesia, the Philippines, Nepal and India.

These documents are classified RESTREINT UE/EU RESTRICTED. This classification means that the unauthorised disclosure of the information contained in the documents could be disadvantageous to the interest of the European Union or one or more of the Member States.

We have nevertheless examined each document individually and considered whether they could be declassified and given access to, totally or partially.

The existence of the country human rights strategies [...] are a key element of a tailor made approach of human rights policy, aiming for more effectiveness. Public communication on the content of the country specific human rights strategies could be detrimental to their very implementation as this would reveal to the government of their countries details of the EU strategy on particular human rights issues.

*We therefore cannot make the documents public as this would undermine the protection of the public interest as regards international relations. [...]'*²¹

A. Introduction

This chapter focuses on 'The consistency with which human rights elements are integrated into external policies'. The apparent lack of consistency of human rights integration in economic development was identified in the general mapping study in the D 2.1 Report on factors which enable or hinder the protection of human rights (Lassen et al., 2014, pp. 59-86). The subject has been chosen for two reasons. One reason is that the ambition to elaborate country-adapted strategies in more than 150 countries is considerable and may have an important impact in terms of fostering human rights protection in EU partner countries in the global South. Another reason is that it seems relevant to explore how the EU integration of human rights is pursued in external sector programs, especially those with a high impact on economic factors. How will human rights be integrated in agricultural, energy and infrastructural sector programs, and is the integration of human rights envisaged to impact positively on economic growth and distribution? Are there any indications that human rights mainstreaming implies that human rights is not only a subject in 'soft' sector programs such as governance, but also in 'hard' ones like infrastructure? How are strategies on economic and social rights balanced against civil and political rights?

So far, very little is known about the EU human rights country policies and no systematic analysis of their contents has been undertaken, not least because they are not accessible. They are relatively recent, but

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²¹ Letter from European External Action Service to Hans-Otto Sano dated 12 January 2015.

given the magnitude of the effort to develop the strategies it seems relevant to examine their consistency with the overall goals defined in various policy documents, for instance the EU Strategic Framework and Action Plan on Human Rights and Democracy (Council of the European Union, 2012a), the Council conclusions on increasing the impact of EU development policy (Council of the European Union, 2012b), and the Joint Communication to the European Parliament and the Council from the High Representative of the EU Foreign Affairs and Security Policy (European Commission, 2011b). In the Strategic Framework, it is underlined that a human rights-based approach (HRBA) will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations in the area of development cooperation (Council of the European Union, 2012a, p. 2). In the Joint Communication from the Commission to the Parliament and Council, it is stated that the country strategies should aim to tailor the approach of the EU to have a stronger impact on the ground (European Commission, 2011b, p. 8). In the Council Conclusions, it is emphasized that the promotion of human rights, democracy, the rule of law and good governance together with promotion of inclusive and sustainable economic growth are two basic pillars of the EU policy in partner countries (Council of the European Union, 2012b, p. 2).

Three main questions are raised in the following analysis: 1. To which degree does the EU pursue a rights-based approach in its country strategies in the global South and how is the balance between economic and social rights and civil and political rights put into effect in efforts to influence economic factors? – 2. To which degree are the two basic pillars of economic growth and democratisation and human rights envisaged to create synergy with each other in the global South? – 3. In which sectors are human rights elements integrated with most vigour and what does the nature of human rights integration indicate about the overall implementation of a human rights-based approach?

As the country human rights strategies are not available, we shall pursue these questions relying on policy and programme documents that provide substantial information on how human rights are integrated by the EU. Specifically, we draw on a selection of multi-year plans for the implementation of EU aid under the two largest development funding instruments of the EU, the European Development Fund (EDF) and the Development Cooperation Instrument (DCI). We shall return to these issues in the methodology section below.

Before we move on, it seems pertinent to explain in a few sentences what is meant by a human rights-based approach to development (HRBA). Although the term covers a diversity of policies and practices, HRBAs, essentially, reframe development processes in the language of rights and duties, taking the international human rights legal framework as normative basis. This perspective turns development into a multi-level process of, on the one hand, empowering local populations to claim and exercise their rights, while, on the other hand, strengthening the capacity of the state to carry out its obligations. Moreover, a core feature of the approach is that it applies principles derived from international human rights law throughout the development process (Marx et al., 2015, pp. 41-44). Since the turn of the millennium, such human rights-based approaches have been adopted by a wide range of donors and agencies (Gready and Ensor, 2005, p. 22).

B. Structure and methodology

To examine the research questions set out above, the chapter combines a quantitative content (word count) analysis with documentary case studies of selected countries. The former allows us to take ‘non-quantitative document[s] and transform [them] into quantitative data’ – and, as such, provides a useful tool for identifying patterns and trends across a large number of policy documents (Johnson and Reynolds, 2008, p. 282). The latter, in this context, serves to flesh out, clarify and possibly challenge the findings of the quantitative analysis by ‘testing’ conclusions, in particular concrete contexts. In the following, the methodological procedures applied in the analysis are outlined.

The first step in any quantitative content analysis is to define an appropriate sampling frame and select a sample for analysis (Johnson and Reynolds, 2008, p. 282). For our purpose, the tailor-made human rights country strategies described above would constitute an ideal source of information, as they ‘establish country-specific priorities and objectives, which can be integrated in all relevant EU external policies such as development, trade or security’ (European Commission, 2011b, p. 8). However, as these strategies are unavailable to the public, the present analysis instead relies on a selection of policy and planning documents related to EU development aid. More specifically, we draw on the multi-year plans compiled by the Commission and the European External Action Service country delegations for each recipient country under the two largest EU development funding instruments: the EDF, focusing on Africa, the Caribbean and the Pacific, and DCI, covering mainly Latin America and Asia. Each of these documents, known as National Indicative Programmes (NIPs) under the EDF and Multi-annual Indicative Programmes (MIPs) under the DCI, identifies one to four prioritized sectors for intervention and provides an indicative financial allocation between them. Moreover, it includes a sector intervention framework that sets out the objectives, expected results and indicators chosen for assessing results under each of the prioritized sectors. At the time of writing, 49 such bilateral indicative programmes – 25 NIPs and 24 MIPs – had been finalized for the 2014-2020 programming cycle, signed between 1 January 2014 and 1 March 2015. These 49 documents, and the 127 sector programmes contained in them, serve as empirical basis for the quantitative analysis.²²

With data in place, a crucial next step in transforming qualitative content into quantitative data is to devise a coding scheme (Johnson and Reynolds, 2008, p. 283). Specifically, a list of search terms must be specified to ‘measure’ the concepts of interest and a method of assessment must be defined. In designing the coding scheme for the present analysis, we have taken inspiration in the four-step typology²³ of human rights engagement presented in the Commission’s HRBA toolbox (European Commission, 2014a). Here, the ‘strength’ of integration of human rights into development activities is assessed along a spectrum ranging from ‘implicit human rights work’ at the low end, through explicit ‘human rights projects’ and ‘human rights mainstreaming’, to the application of the human rights-based approach as ‘the ultimate form of reconciliation between development and human rights’ (ibid., p. 5-6).

²² See Annex 1 for a full list of documents included in the analysis.

²³ The original typology includes five categories, but the first category, which relates more to aid diplomacy than to the programming of development activities, appears less relevant in this context.

In analysing the human rights content of the documents under study, we have – in line with this typology – recorded four categories of search terms. First, to capture implicit human rights work, we have recorded activities that do not directly refer to human rights, but nevertheless apply rights-related principles such as ‘governance’ and ‘empowerment’ (ibid., p. 5). Secondly, we have coded explicit references to ‘human rights’, ‘economic and social rights’ and ‘civil and political rights’, as well as citations of specific rights or families of rights, such as ‘the right to education’ or ‘rights of the child’. Thirdly, in order to be able to evaluate the extent of mainstreaming of human rights, the sectors addressed by the interventions have been registered and grouped into five categories: 1) Governance, democratization and the justice sector; 2) Agriculture and rural development; 3) Education, health, other social services, employment and social protection; 4) Energy, environment and infrastructure; and 5) Other interventions, which do not fit neatly into any of the other categories. Often, interventions cannot be easily assigned to a single category – for instance, agricultural programmes often address health-related issues such as malnutrition, or environmental issues such as climate change adaptation. Nonetheless, each programme has been assigned to the one sector category in which it is deemed to predominantly operate. Finally, for the purpose of measuring to which extent a rights-based approach is applied in the interventions, different wordings of the operational principles stated in the Commission’s toolbox, have been added to the coding scheme. These include, among others, the principles of ‘participation’, ‘non-discrimination’, ‘accountability’ and ‘transparency’ (European Commission, 2014a, pp. 16-20; see also OHCHR, 2006, pp. 23-30). See annex 2 for a full list of search terms.

All search terms have been recorded at the level of entire documents as well as that of the specific sector programmes contained in the documents. The reason for this is that some references, for instance when mentioned in document introductions, may apply to all sector programmes in the document, while others, for instance stated under objectives or indicators, are specific to each sector programme. Moreover, explicit references to human rights have been recorded at the level of programme sub-sections. This allows us to assess the depth and consistency of human rights integration – to which extent human rights standards and principles are implemented all the way through objectives, expected results and indicators. As regards the method of counting, we have taken the approach of recording the simple presence or absence of search words – whether e.g. ‘human rights’ occurs or not – rather than their frequency or intensity (Johnson and Reynolds, 2008, p. 284).

Once the quantification of content is done, simple statistical analysis can be performed to shed light on both the prevalence of search terms and the possible geographical and sectorial patterns in the data. This is the subject of the first part of the analysis. In the second part, five country cases are put under closer scrutiny. These cases have been selected to ensure sectorial variation as well as representation from five geographic regions: West Africa, East Africa, South Asia, South East Asia and Latin America. Moreover, in many respects, the country documents represent either typical examples of the patterns and trends identified in the quantitative content analysis or unusual deviations from them (Gerring, 2007, p. 89).

Evidently, the fact that we draw on only a subset of EU strategies towards third countries begs the question of generalizability. This can be considered a two-pronged issue: firstly, to what extent the 49 indicative programmes analysed in the following are representative of the ones that have not yet been

finalised; and secondly, to what extent the programmes under the EDF and the DCI are representative of the wider EU country strategies towards third countries. With regard to the first question, it can be noted that the 24 MIPs examined here account for a third of the entire DCI budget for the period 2014-2020, while the 25 NIPs account for more than a fifth of that of the EDF. While generalizability cannot be ascertained, there is no reason to expect that the indicative programmes underway will differ markedly from the ones already finalised. Concerning the second question, the scope of generalizing results is probably more limited, since the content and approaches of other funding instruments, such as the European Neighbourhood Instrument (ENI) or the European Instrument for Democracy and Human Rights (EIDHR), are not unlikely to differ from those found in the NIPs and MIPs. Regardless of the representativeness of our results, it is nonetheless evident that the documents analysed in the following make up more than 15% of the total EU aid budget for the period 2014-2020 and will leave a significant mark on EU development efforts in the coming years (Concord Europe, 2014, p. 5).

The remainder of the chapter is structured as follows. Section C briefly outlines EU commitments at the political level to integrate human rights into its external action, including the introduction of human rights country strategies and the adoption of a human rights-based approach to development. Section D presents and discusses the results of the quantitative analysis, while section E delves deeper into five country case studies. The chapter is wrapped up by a conclusion that sums up the main findings of the analysis.

C. EU commitments to human rights in its external action

The promotion of human rights has occupied a central position in EU external action for many years. Beginning with the later Lomé Conventions, human rights became part of European Community development policy towards third countries during the 1980s (Lomé III and Lomé IV; Broberg, 2013, p. 679). From the early 1990s, then, so-called ‘human rights clauses’ were systematically included in bilateral trade and cooperation agreements (Brandtner and Rosas, 1998, p. 473). The Maastricht Treaty of 1992 required development cooperation to ‘contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights’ (Art. 130u; D’Hollander et al, 2014, p. 4). Finally, the Treaty of Lisbon, which entered into force in 2009, consolidated the central position of human rights in EU external activities. Here, human rights was identified as one of the guiding principles of ‘the Union’s action on the international scene’ – principles, ‘which it seeks to advance in the wider world’ (TEU, Art. 21; D’Hollander et al., 2014, p. 4; see also Lassen et al., 2014).

Whereas the promotion of human rights has, thus, been a longstanding priority in EU external action, the explicit commitment to what has become known as a ‘human rights-based approach’ (HRBA) is a rather new phenomenon (Hickey and Mitlin, 2009). In an EU context, the first reference to a rights-based approach was made in a Commission communication, Human Rights and Democracy at the Heart of EU External Action, in late 2011. Here, the Commission declared that ‘country human rights strategies and a Human Rights-Based Approach should ensure that human rights and democracy are reflected across the entire development cooperation process’ (European Commission, 2011b, p. 11). This document also marked the introduction of the tailor-made country human rights strategies that we have – unsuccessfully – requested access to. Half a year later, in June 2012, the Council adopted an EU

Strategic Framework on Human Rights and Democracy, accompanied by an Action Plan for putting it into practice (Council of the European Union, 2012a). Setting the overall strategic priorities for EU action, the Strategic Framework committed the EU to ‘step up its efforts to promote human rights, democracy and the rule of law across all aspects of external action’, including intensified ‘efforts to promote economic, social and cultural rights’ (ibid., p. 2). The Action Plan, among many initiatives, included the development of a toolbox for working towards a rights-based approach.

Issued in spring 2014, the resulting Council conclusions and RBA toolbox²⁴ clarify the core concepts and rationale of a rights-based approach to development and describes how it can be systematically integrated into EU development cooperation (European Commission, 2014a; Council of the European Union, 2014). The Commission stresses that, rather than to change the ‘what?’, the new approach demands a thorough re-definition of the ‘how?’ of development interventions: It does *not* influence overall development priorities, but ‘requires a shift in the way development interventions are conceptualized and implemented’, which ‘extends the scope [...] to all sectors such as energy, transport, environment and health’ (ibid., pp. 16-19; see also D’Hollander et al., 2014).

A rights-based approach, as perceived by the Commission, adheres to five working principles: Firstly, recognizing the universality and indivisibility of human rights, it applies *all* rights of *all* beneficiaries; secondly, it promotes the active participation by those affected by development interventions; thirdly, it is based on a principle of non-discrimination and equal access to basic public goods and services, which translates into a prioritized focus on marginalized and vulnerable groups; fourthly, it seeks to promote accountability and access to the rule of law; and finally, it considers transparency and access to information as fundamental principles (ibid., pp. 16-19).

D. Quantitative analysis: The human rights-content of EU bilateral development agreements

This section presents the results of the quantitative content analysis of 49 country-specific multi-year plans for the implementation of EU development aid in the period 2014-2020. The following presentation is structured by the typology of increasing human rights engagement as laid out above. Thus, we start off by looking at implicit human rights activities, move on to explicit human rights work and sector mainstreaming, and end the exposition by analysing to what extent the EU applies principles of a human rights-based approach in its documents and sector programmes.

1. Implicit human rights work

As will be apparent in the next section, practically all documents – the only exception being the Multi-annual Indicative Programme for Bhutan – contain at least one reference to human rights. Yet, when human rights content is analysed at the sector-level, the situation changes considerably. More than half

²⁴ The Council Conclusions on an ‘EU Action Plan on Human Rights and Democracy’ (25 June 2012) refer to a ‘Rights Based Approach (RBA), encompassing all Human Rights’ (Council of the European Union, 2014). Adopting this terminology in the toolbox, the Commission explains that ‘an RBA [...] is an approach covering a broader category of rights than those covered by an HRBA’ (European Commission, 2014a, p. 7). In the following, however, the two terms are used interchangeably.

of the sector programmes do not mention human rights. However, it may be asked whether these programmes address human rights indirectly, by applying the principles of a rights-based approach.

In this context, we have – with inspiration in the Commission’s HRBA toolbox – defined implicit human rights work as programmes, which do not mention human rights, but which nevertheless mention at least four of the HRBA principles. Using this definition, only a minor fraction of five sector programmes (4%) qualify as implicit human rights work.

2. Explicit human rights projects

Entering the next level of human rights engagement, explicit human rights projects, Table 1 displays the occurrence of explicit references to human rights as a general term and to specific rights. As can be seen, ‘human rights’ is mentioned in all NIPs/MIPs but one. Twelve documents, a fourth of those examined, refer to ‘economic and social rights’, while only three specifically mention ‘civil and political rights’.

Regarding specific rights included, gender rights – mentioned in nine, i.e. a little less than a fifth of the documents – take the lead position, followed by labour rights appearing in six, and children’s rights and the right to education each mentioned in five documents. The right to health and rights of indigenous people are referred to three times each, property rights are mentioned twice and the right to water appears once. In addition, rights that are not conventionally considered human rights are given some attention – more specifically, three of the documents make mention of land rights. In sum, thus, the vast majority (98%) of the planning documents contain some form of explicit human rights content.

Table 1. Explicit references to human rights

	Number of documents	Percentage
Human rights as a general term	48	98 %
Social and economic rights	12	25 %
Civil and political rights	3	6 %
Gender rights or women’s rights	9	18%
Labour rights or labour standards	6	12%
Children’s rights	5	10%
Right to education	5	10%
Right to health	3	6%
Rights of indigenous people	3	6%
Land rights	3	6%
Property rights	2	4%
Right to water	1	2%
Total (N)	49	100%

To shed light on the ‘depth’ of human rights integration, Table 2 displays the occurrence of human rights references, i.e. any explicit reference to human rights, in the various sub-sections of sector programmes. As is evident, little more than a fourth (35) of the 127 sector programmes analysed make mention of human rights in programme narratives, i.e. the textual description of background and activities. Only

half of that number explicitly reference human rights in objectives (17), expected results (14) and indicators (14). In total, 46% of all sector interventions contain some explicit reference to human rights in any of the above sections.

Coupled with the finding above, this indicates that, although human rights are almost universally stated somewhere in the documents analysed, they are inconsistently implemented into sector programmes.

Table 2. Where in documents are human rights references (HR) found?

	Number of documents	Percentage
HR in programme description	35	28%
HR in objectives	17	13%
HR in expected results	14	11%
HR in indicators	14	11%
HR in any of the above	58	46%
Total (N)	127	100%

3. Mainstreaming human rights across sectors?

Are human rights integrated differently into different sectors? As described above, mainstreaming the appliance of human rights across sectors, from civil and political human rights sectors such as governance and the rule of law to social and other economic sectors, is a main pillar of the EU strategy on human rights in its external action. To take stock of sector mainstreaming in EU development programmes, Table 3 provides data on the occurrence of explicit human rights references, disaggregated into the five sector categories defined in section B.

Table 3. Sector mainstreaming

	Governance, democratization and justice sector	Agriculture and rural development	Education, health and social services	Energy and infrastructure	Other	Total
HR in programme description	21 (65%)	4 (15%)	8 (22%)	1 (7%)	5 (36%)	35 (28%)
HR in objectives	15 (44%)	0	2 (5%)	0	1 (7%)	17 (13%)
HR in expected results	11 (32%)	1 (4%)	1 (3%)	0	1 (7%)	14 (11%)
HR in indicators	11 (32%)	1 (4%)	0	0	2 (14%)	14 (11%)
HR in any of the above	27 (79%)	6 (22%)	17 (46%)	2 (13%)	6 (43%)	58 (46%)
Total (N)	34	27	37	15	14	127

This data confirms the above suspicion that human rights are implemented incoherently across sectors. Notably, the table demonstrates a significant bias towards non-economic human rights sectors. While, in the category of governance, democratisation and justice, 65% (21) of all interventions refer to human rights in the programme description, the corresponding figures for social and other economic sectors are remarkably lower. Only 22% (8 out of 37) of the programmes in the area of education, health and social services, 15% (4 out of 27) of the agricultural interventions and 7% (1 out of 15) of the energy and infrastructure programmes make reference to human rights. The same pattern is found in relation to

objectives, expected results and indicators. Whereas between 32% and 44% of governance programmes refer to human rights in these sub-sections, only a negligible number of interventions do so in the other categories. Human rights are mentioned under objectives in 5% (2 out of 37) of the education, health and social services programmes, but in all other cases, they are practically non-existent.

A clear-cut conclusion, thus, is that the incorporation of human rights into the formulation of sector programmes under the two largest development instruments of the EU appears to be strongly biased towards interventions in the areas of governance, democratization and justice. In other words, the mainstreaming of human rights throughout all sectors – an ambition for the EU at least since 2001 – is far from fully realised, at least at the discursive level analysed here (D'Hollander et al., 2014, p. 9).

4. Indications of a human rights-based approach to development?

As noted above, the EU has in recent years confirmed its commitment to a human rights-based approach to development. Moving on to the higher levels of human rights engagement, and to examine whether pledges made at the policy-level have found their way into the planning and programming of EU development interventions, we have examined to what extent the NIPs and MIPs refer to the rights-based approach. This can be done either explicitly or implicitly by applying its key programming principles. The results are presented in Table 4 below.

Table 4. Indications of a human rights-based approach

	Document-level	Sector-level					Total
	In entire NIP or MIP	Governance, democratization and justice	Agriculture	Education, health, social services	Energy and infrastructure	Other	
HRBA explicitly mentioned	10 (20%)	5 (15%)	1 (4%)	1 (3%)	0	1 (7%)	8 (6%)
Vulnerable/marginalized groups	41 (84%)	16 (47%)	18 (67%)	22 (60%)	3 (20%)	6 (43%)	65 (51%)
Empowerment	25 (51%)	7 (21%)	10 (37%)	7 (19%)	1 (7%)	4 (29%)	29 (23%)
Participation	31 (63%)	20 (59%)	6 (22%)	7 (19%)	3 (20%)	2 (14%)	38 (30%)
Non-discrimination/equal access	25 (51%)	8 (24%)	3 (11%)	10 (27%)	1 (7%)	3 (21%)	25 (19%)
Inclusion	19 (39%)	2 (6%)	4 (15%)	11 (30%)	0	2 (14%)	19 (15%)
Accountability	35 (71%)	25 (74%)	5 (19%)	7 (19%)	1 (7%)	2 (14%)	40 (32%)
Transparency	37 (76%)	26 (77%)	3 (11%)	10 (27%)	4 (27%)	2 (14%)	45 (35%)
Rule of law	35 (71%)	22 (65%)	1 (4%)	3 (8%)	0	1 (7%)	27 (21%)
Average number of principles	-	3.7	1.9	2.0	0.9	1.6	2.3
Total (N)	49	34	27	37	15	14	127

As can be seen, 10 of the 49 NIPs/MIPs – approximately a fifth – refer to the HRBA. Although only a minority of the planning documents can thus be said to explicitly commit to the HRBA, a substantively larger share does so implicitly by subscribing to some of its key principles (Marx et al., 2015, pp. 43-50). The vast majority of the documents feature core components, including a particular focus on vulnerable and marginalized groups (84%), transparency (76%), accountability (71%), the rule of law (71%) and participation (63%). Other principles, such as a focus on non-discrimination and equal access to services

(51%), empowerment (51%) and inclusion (39%), are mentioned to a lesser, but nonetheless substantial, extent.

However, when considered from the perspective of sector-level programmes, the picture changes somewhat. Only eight of the 127 sector programmes, corresponding to 6%, contain an explicit reference to the rights-based approach, and – except for vulnerable/marginalised groups – none of the principles are mentioned in more than a third of the interventions. Thus, while the key principles of rights-based development are widely mentioned in the documents, they appear to be less consistently implemented in sector interventions.

Breaking these figures down into the five sector categories, we see a similar sectorial bias to the one that was identified above. Though explicit HRBA commitments are uncommon across all sectors, they are found more frequently in interventions focusing on governance, democratisation and justice (14%) than on education, health and social services (3%) and agriculture and rural development (4%). Along similar lines, most of the key principles of rights-based approaches are referred to substantially less frequently in the context of the latter sector categories than the former. Compared to education, health and social services, for instance, governance programmes more often make mention of transparency (77% against 27%), accountability (74% against 19%), the rule of law (65% against 8%) and participation (59% against 19%). Likewise, the corresponding figures for the agricultural sector are 11%, 19%, 4% and 22%, while the principles are rarely referred to in energy and infrastructure interventions. Other HRBA components, specifically the focus on vulnerable/marginalised groups, empowerment and inclusion are more common in the ‘socioeconomic’ sectors than in the governance sectors.

Summing up, this analysis demonstrates that the integration of a rights-based approach into EU development interventions is, at the exclusively discursive level considered here, marked by the same bias against socioeconomic sectors that was identified above. This is also reflected in the fact that the average number of HRBA principles mentioned under each sector programme is significantly lower in interventions related to education, health and social services (2.0), agriculture (1.9) and energy and infrastructure (0.9) than in the governance sectors (3.7).

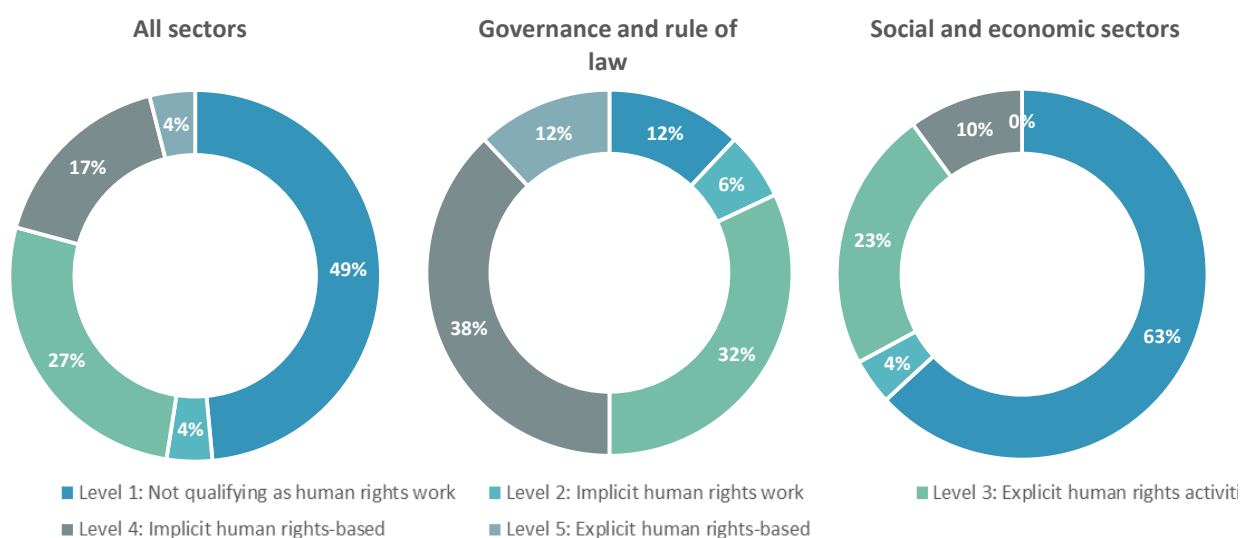
5. Typology of increasing human rights engagement

Summarizing the main findings of the quantitative analysis, Figure 1 below classifies all sector programmes under scrutiny into five categories of growing human rights engagement. First, it can be noted that almost half (49%) of the 127 sector programmes do not even meet the criteria for human rights work adopted here, i.e. they make no reference to human rights and apply less than four principles of rights-based development programming (Level 1). Next, a small proportion (4%), although not referring to human rights directly, nevertheless mentions at least four of the key HRBA principles and thus classifies as ‘implicit human rights work’ (Level 2). Around a fourth (27%) of the interventions explicitly address human rights issues, but do not contain more than four of the HRBA principles (Level 3). Interventions in the fourth category, making up 17% of all interventions, do refer to human rights and apply four or more of the HRBA principles, but do not explicitly commit to a human rights-based approach, thus classifying as ‘implicit human rights-based’ (Level 4). Finally, 4% of the sector programmes receive the highest mark, ‘explicit rights-based’, awarded to activities that explicitly refer

to human rights, commit to a human rights-based approach and make mention of at least four of the HRBA principles (Level 5).

Again, when governance-related human rights sectors are compared with social and economic sectors, the difference is remarkable.²⁵ Less than a fifth of the governance programmes either do not meet our requirements to human rights work (Level 1, 12%) or only do so implicitly (Level 2, 6%). This compares to two-thirds (63% + 4%) of all interventions in the social and economic sectors. Likewise, while half of the governance interventions can be considered human rights-based, either implicitly (Level 4, 38%) or explicitly (Level 5, 12%), this is the case for only 10% of the programmes in the social and economic sectors, in which not a single programme earns the highest mark. To recap, the mainstreaming of human rights standard and principles across sectors seems far from achieved.

Figure 1. Classification of sector programmes according to level of human rights engagement



6. Regional variation

In order to examine possible regional patterns, all analyses above have been disaggregated into world regions²⁶ instead of sector categories. Three trends are worth mentioning. Firstly, although variation between regions is much less pronounced than between sectors, it can be noted that ‘human rights’ is mentioned least frequently in multi-year plans for countries in Eastern and Southern Africa – only in a third of sector interventions – and most frequently in programmes for countries in South Asia (60%) and Central Asia (70%).

Secondly, regarding the specific rights mentioned, references to land rights appear to be an exclusively Western/Central African phenomenon, while labour rights are completely absent from African

²⁵ Here, the social and economic sectors include agriculture and rural development, education, health and social services, and energy and infrastructure. The ‘other’ category is not included.

²⁶ In the regional analysis, data has been disaggregated into four world regions: West and Central Africa, East and Southern Africa, Asia and Latin America and the Caribbean.

programmes and more predominant in Latin America and the Caribbean ones (mentioned in a tenth of the programmes). In contrast, gender rights are absent in sector interventions planned for Latin America and the Caribbean and Central Asia, but more frequently mentioned in programming documents for countries in Western and Central Africa and South Asia.

Thirdly, the balance between human rights principles applied in interventions differ across regions: 'Empowerment' is markedly less mentioned in Western and Central Africa than in the other regions; non-discrimination appears to be less of a concern in Eastern and Southern Africa and South Asia; and references to the rule of law are almost non-existent in interventions planned for Latin America and the Caribbean.

A general conclusion from the present analysis, therefore, is that the integration of human rights into EU development activities seems to differ much stronger along sectorial lines than along geographical lines.

E. Qualitative analysis: Country case studies

In order to illuminate and further illustrate the findings in the previous sections, a number of case studies based on the NIPs and the MIPs are undertaken below. We have chosen two case countries from the Africa region, two from the Asia region and one from the Caribbean and Latin American region, respectively three NIPs and two MIPs. Across these five cases, we pursue questions relating to the planned uptake of a human rights-based approach in the documents, the strength and vigor with which EU integrates human rights in the planned sector work, and the way in which human rights are integrated in the operational parts of the programmes, particularly in indicators.

1. The human rights-based approach: Poorly integrated

The EU relates a human rights-based approach to the integration of human rights standards and principles into the analysis, design, implementation, monitoring and evaluation of all development policies and programmes as indicated in the Commission's HRBA Toolbox mentioned above. This is a comprehensive agenda. However, the formulations of the NIPs and MIPs indicate that the HRBA has neither been used in the analysis nor in the design of country planning. The analysis above has already demonstrated that human rights principles and standards are implemented highly unevenly across countries and sectors – a finding which indicates that the ambitious agenda of the Commission has so far not been followed through. This general pattern is confirmed by the five country case studies. In the multi-year plans for Ghana, Tanzania, Nepal and Bolivia, elements of a human rights-based approach are hardly found.

Ghana. Ghana was chosen for this analysis as a lower middle-income country, playing an important regional role in the West Africa region and with an economy, which has been growing over the last decades, due in part to oil and gas extraction. Ghana has been granted EUR 323 million under the EDF for the period 2014-2020 (European Commission, 2014b). In the NIP for Ghana, a systematic perspective on human rights deficits and on participatory methods of engaging rights-holders and duty-bearers entailed in a rights-based approach is not apparent. If a rights-based approach was adhered to systematically across the priority sectors, there would have been a stronger emphasis on specific human rights standards, a stronger emphasis on human rights obligations (legal accountability), a stronger

emphasis on participation of rights-holders in development activities, and a more ready pursuance of issues relating to discriminatory practices.

Tanzania. Tanzania was chosen for a case study as an East African country with widespread poverty and, yet, an impressive economic growth rate in recent years. Under the 11th European Development Fund, Tanzania has been granted a total amount of EUR 626 million for the period 2014-2020 (European Commission, 2014c). In the case of Tanzania, the use of human rights as a concept is sparse and concentrated exclusively in the governance sector. Although the right to adequate living standards and the right to the highest attainable standard of health could appropriately have been applied in the socioeconomic sector interventions, the mainstreaming of human rights across sectors is not even attempted. References to international legal obligations are non-existent, and references to human rights principles are scarce.

Nepal. Nepal was chosen as a case study as one of the poorest countries in South Asia. The Multi-annual Indicative Program (MIP) runs from 2014-2020 and is funded under the Development Cooperation Instrument (European Commission, 2014d). EU's main strategic interests in Nepal are investments in socioeconomic development including support for democratization, human rights, the rule of law and domestic accountability of state and non-state actors (*ibid.*, p. 4). The MIP for Nepal cannot be claimed to be formulated with a mainstreaming of a human rights-based approach into the program priorities and activities. The program narrative is written without any major or substantial human rights reference. Except in the introductory setting of the scene for the description of the program activities and a reference to the Human Rights Commission, there is only indirect mentioning of human rights. References to human rights principles are barely present in the operational sections of the document except for a reference to inequality and inequity in the education sector. There are no indications that a rights-based situational analysis has preceded the formulation of the plan.

The Philippines. For the period 2014-2020, the Philippines has been granted a total of EUR 325 million under the Development Cooperation Instrument (European Commission, 2014e). The Multi-annual Indicative Programme, however, only covers the period up until 2016, where aid activities are expected to be reviewed due to the adoption of joint programming by the EU and the Member States active in the country (*ibid.*, p. 2). The MIP for the Philippines is, compared to most other documents analyzed in this chapter, strong in human rights content. The country is described as a 'strategic partner for the EU in promoting common values such as democracy and human rights' (*ibid.*, p. 1). In the document introduction, it is stated that 'a rights-based approach will be applied in future EU support across the chosen priority areas in order to assist partner countries in implementing their international human rights obligations and to support the right holders, with a focus on poor and vulnerable groups, in claiming their rights' (*ibid.*, p. 2). Hence, the MIP for the Philippines belongs to the minority of documents that explicitly commits to a human rights-based approach to development. Having said that, the planned activities nevertheless seem to suffer from the 'governance bias' identified earlier: Human rights and the principles of a rights-based approach are mainly included in the rule of law programme, although the energy and job creation intervention do apply some human rights principles and make references to international labour standards. Yet, compared to the entire sample, the NIP for the

Philippines comes across as one of the documents in which rights-based thinking is implemented with most vigor.

Bolivia. The MIP for Bolivia describes the allocation and priorities of the EUR 164 million granted to Bolivia under the DCI for the period 2014-2016 (European Commission, 2014f). Like in the case of the Philippines, donors are planning for joint programming from 2016, which will require a review of the MIP in the coming years (ibid., p. 3). Although the MIP for Bolivia does not explicitly align with a human rights-based approach, the document makes some use of human rights standards and principles. Under one sector programme, it is emphasized that planned activities are ‘consistent with the Human Rights Country Strategy and priorities identified by the Delegation and Member States’ (ibid., p. 3). Interestingly, this is one of only three references to the EU human rights country strategies found in the entire sample of documents analyzed in this chapter. Again, however, mainstreaming across sectors remains incomplete. While human rights are mentioned somewhere under all sector programmes, they are only superficially included in the non-governance sectors. In sum, therefore, it seems fair to conclude that human rights-based programming is only vaguely present in the EU aid activities planned for Bolivia.

2. Human rights integration in the sector plans: Confirming the ‘governance bias’

In the quantitative analysis above, it was found that human rights standards and principles are far more strongly integrated into governance and rule of law interventions than in socioeconomic sector programmes in areas such as agriculture, education and health. This ‘governance preference’ is confirmed by the five case studies. In all documents, the planned governance interventions show stronger signs of rights-based thinking.

Tanzania. The National Indicative Programme for Tanzania is an illustrious example of the unbalanced integration of human rights in, respectively, strategies on civil and political rights and economic and social rights. Here, the priority sector under the title ‘Good governance and development’ clearly is the one with the strongest (though still modest) integration of human rights. Implemented as general budget support through a Good Governance and Development Contract, this allocation is intended to reinforce budget transparency and domestic accountability and secure the Tanzanian government a fiscal space to reduce poverty through investment in social services (European Commission, 2014c, p. 9). In the description, ‘the protection of fundamental rights, including the promotion of gender equality and women’s empowerment, and the rule of law’ are recognized as ‘important underlying principles’ (ibid., p. 12). Accordingly, the delivery of budget support is made conditional upon the continued commitment to ‘fundamental values of human rights, democracy and the rule of law’ (ibid., p. 9). Thus, although this sector programme does not explicitly subscribe to a human rights-based approach, it clearly draws on some of its main tenets.

However, when it comes to the second and third focal sectors planned for Tanzania, rights-based thinking is completely absent. Identifying access to energy as one of the main constraints on socioeconomic development in the country, the ‘Energy’ intervention focuses on increasing the capacity of the country’s energy system, on a restructuring of the national utility operator and on skills

development (ibid., pp. 10-11; 15-16). Not a single reference to human rights is made, and accountability and transparency are the only principles of an HRBA that are mentioned. The intervention titled 'Sustainable Agriculture', for its part, aims at increasing the productivity and competitiveness of the agricultural sector, with a particular focus on improving food and nutrition security (ibid., p. 20). In this case, too, human rights are not mentioned at all, and the only hint of rights-based thinking is a 'special emphasis on strengthening and empowering women towards more control on incomes and assets' (ibid., p. 20). The Tanzanian case, thus, exemplifies the widespread trend that human rights standards and principles are integrated almost exclusively into strategies on civil and political rights despite an obvious potential for applying a rights-based approach to socioeconomic interventions as well. In the Tanzanian case, the rights to adequate living standards, health or food appear as obvious starting points.

Ghana. In the multi-year plan for Ghana the bias is less severe. Like in the other cases, the governance programme, under the title 'Governance: Public Sector Management and Accountability', is where a human rights-based approach resonates the most. This is revealed in an emphasis on an improved rule of law and improved access to justice, and in the envisaged strengthened role of communities. Oversight institutions are to be supported in order to hold the government accountable to its citizens (European Commission, 2014b, p. 11). However, the perspective on governance is more supply- than demand led: participation is part of the discourse, but whether such efforts will reach vulnerable and discriminated groups is uncertain.

The envisaged agricultural sector investment work in the Northern Ghana does include a reference to discrimination of women when it comes to land rights (ibid., p. 12). There is also a reference to participatory governance (ibid., p. 12), but over the two odd pages of sector description, these are the only areas where human rights principles are appearing. The sector work does not emanate as being informed by a human rights analysis or by a closer understanding of what it entails beyond a reference to discrimination against women. The right to water and sanitation, or complaints handling in relation to service provision, might be relevant human rights perspectives.

With respect to the sector priority on employment and social protection, the human rights elements are mainly found in the emphasis on vulnerable groups in need of employment, in the ambition to support establishment of a social protection floor, and in the weight attached to decent work (ibid., p. 14). These are ILO rights agendas (ILO, 2012; ILO, 2008). However, the one sector intervention with the biggest potential impact, the social protection floor, is rather vague with regard to specific content, mainly expressed as an ambition without concrete targets.

Bolivia. Moving on to Latin America, the MIP for Bolivia, at a first glance, seems to suffer less from a 'governance bias'. Here, the planning document clearly links the intervention on 'Integrated Water Resource Management' to the fulfilment of social and economic rights. It is noted that 'Bolivia has included water as a fundamental human right in its Constitution', and that the EU, accordingly, 'will ensure the interrelationship between water management and the human right to clean water as a right to life, health and livelihood' (European Commission, 2014f, p. 6). However, apart from superficially observing that access to water is considered a human right in the Bolivian constitution, no other

mention is made, neither of human rights nor of any of the operating principles of a rights-based approach. Thus, the water intervention planned for Bolivia is a good example of a programme that indeed recognizes the extension of human rights protection to socioeconomic sectors, but which then completely fails in drawing the logical implications of this, integrating rights-based thinking poorly throughout the programme.

Like in the other cases, the rights-based approach is more visible in the Bolivian 'Justice Sector Reform', which aims at 'improving access to essential justice services for the Bolivian population' (ibid., p. 3). Under this focal sector, it is stated that the intervention 'aims to build a justice system in compliance with international human rights standards, paying particular attention to the protection of individual rights and focusing on previously marginalized sectors of the population, especially children and young people, families and the elderly' (ibid., p. 3).

The Philippines. Across the five case studies, the rule of law intervention planned for the Philippines is, probably, the sector programme with the strongest human rights integration. Throughout the description of this sector intervention, which aims at strengthening oversight bodies and improving access to justice of all sections of society, human rights-based thinking is strongly evident. It is stated that 'an effective rule of law and an accessible justice system is fundamental to empower people, particularly the poor, to participate in the development process' (European Commission, 2014e, p. 4). And the document goes on to note that 'it is not only a basic civil and political right for every citizen but an essential tool for the fulfillment of social, economic and cultural rights' (ibid., p. 4). Thus, the role of a well-functioning legal system and accountable local authorities as prerequisites for socioeconomic development is recognized. In addition, efforts at reforming the justice sector will pay particular attention to the conflict-ridden areas of Mindanao, in which 'human rights violations are widespread' (ibid., p. 5). Focusing on the most vulnerable areas and sections of the population, emphasizing empowerment, participation and accountability, and articulating the links between governance and socioeconomic development, the intervention evidently draws on key tenets of human rights-based development.

The same cannot be said for the socioeconomic programme named 'Inclusive growth through access to sustainable energy and job creation'. EU support in this area consists in assisting the Philippine government raising investments in renewable energy, combined with job creation programmes focused on rural areas (ibid., pp. 3-4). Under this sector intervention, the term 'rights' is only mentioned once, and that is in referring to a plan adopted by the government that suggests basic electricity to be included as an 'essential economic right for Philippine citizens and to be linked to other developmental objectives' (ibid., p. 3). Except for this, no mention of human rights is made. Yet, the description contains elements not unknown to rights-based thinking: Job creation is targeted at poorer areas, and growth is to be inclusive by giving more poor people access to electricity, especially in rural areas, and creating decent work in compliance with international labour standards, in particular for women. Despite this, it is remarkable that even in a planning document, which explicitly states that a rights-based approach will be applied across sectors, human rights standards and principles are implemented so vaguely in the non-governance intervention, as is the case in the MIP for the Philippines.

Nepal. Finally, in the MIP for Nepal, human rights are integrated more strongly into the governance intervention, while there is some variation in the attention they receive in the two socioeconomic sectors. The sector component titled ‘Strengthening Democracy and Decentralization’ takes departure in governance indicators and in weak systems of accountability (European Commission, 2014d, p. 8). Investments in democratic capacity-building and legislative bodies are planned. Support for the National Human Rights Commission and the Supreme Court are also part of the program. Transitional justice institutions are mentioned, without, however, specifying the precise components of this support (ibid., p. 9). A substantial part of the program under this heading is devoted to decentralization and to public financial management including anti-corruption (ibid., p. 9). Generally, this program component appears as more governance- than human rights-oriented.

With respect to ‘Education’, the EU will support Nepal’s efforts to reduce historical inequality and inequity. However, entrenched gender and social exclusion permeate the development in this sector and restrain reform efforts. The program envisages also an emphasis on a well-functioning technical and vocational training. Generally, the education sector activities are seen to enhance access to education and schools for girls and for children from disadvantaged backgrounds, especially also the transition of these groups to secondary education and completion (ibid., pp. 6-8). While the planned intervention in the education sector, thus, shows some resemblance of rights-based thinking, the opposite is the case for the third focal sector, ‘Sustainable Rural Development’. This sector plan includes no major references to human rights, human rights standards, principles or concepts (like empowerment). There is, though, a perspective on social exclusion along caste, ethnicity and gender lines (ibid., p. 6). These elements are seen as drivers of social conflicts and as causing poverty to prevail. The envisaged investment under this sector relates to highly productive commercial farming, under which improvements of agricultural productivity and diversification are included. Sector work also comprises basic amenities, such as safe drinking water, sanitation and primary health care (ibid., p. 6). Although the latter focus could easily be articulated in human rights terms, and implemented through a rights-based strategy, this is evidently not done.

3. Incorporation of human rights into objectives, expected results and indicators

So far, the main focus has been on the ‘breadth’ of human rights application across sectors. This section will focus more on the ‘depth’ of integration – how human rights standards and principles are reflected into the operational sections of the planning documents, more specifically in the objectives and expected results defined for the specific interventions, as well as in the indicators chosen for assessing impact.

Ghana. In the governance intervention planned for Ghana, two specific objectives are defined: that ‘central and local institutions deliver more effective and accountable services’ and ‘to enhance the rule of law and the fight against corruption’ (European Commission, 2014b, pp. 15-16). Under the former, one result area and a number of indicators relate to ‘transparency’ (ibid., p. 27). In addition, one result area relates to gender responsive planning and budgeting at local levels, whereas gender equality is mentioned in one indicator (ibid., p. 30). Under the latter, one result area relates to access to justice through a more effective, responsive, and transparent justice sector. Here, indicators relate to, among

other things, corruption and corruption perception (ibid., p. 30). Another result area on oversight includes an indicator on '[...] administrative misconduct or human rights abuse investigated, prosecuted and adjudicated by relevant institutions' (ibid., p. 30). A third result area on the strengthened role of communities, civil society organisations and media includes an indicator on the estimated number of people who are aware of their legal rights, responsibilities and services they are entitled to (ibid., p. 30). In sum, the governance indicators relate to human rights, to equality, transparency, responsiveness, and to abuse, but also to corruption, which remains equally important. A balance is therefore signaled concerning these objectives between governance and human rights.

With respect to the priority on agricultural investments, one objective is to 'Increase household income from agricultural related activities' (ibid., p. 19). Under this objective, the last result area among four emphasizes 'decent employment', however there are no other human rights references in this objective (ibid., p. 19). The second objective on 'Sustainable and inclusive rural economy' relates merely to initiatives 'from above'. No human rights related elements can be identified (ibid., p. 20).

Concerning the priority on employment and social protection, the first objective is to 'create decent employment opportunities for vulnerable population groups (i.e. youth, women and persons with special needs) and enhance social protection services' (ibid., p. 22). The first result area among four relates to employment under vulnerable conditions (unsafe) and the attached indicator applies the ILO definition of vulnerable employment (ibid., p. 33). This is a right to work related indicator. However, the remaining result areas and indicators under this objective are not human rights related. The second objective of this sector intervention, 'Enhanced public social protection services for youth and other vulnerable groups', includes three result areas, two of which relate to institutional capacities (ibid., pp. 22-23). The third result area refers to access to social protection services at the local level with an indicator attached on the number of beneficiaries (could have been formulated as citizens) covered by basic social protection services. None of the indicators or the areas refer to social floors.

Summing up the case of Ghana, human rights are most clearly integrated into the objectives and indicators of the governance sector. Nevertheless, the prioritized focus on employment and social protection does contain elements that are relevant to human rights.

Tanzania. As to the activities planned for Tanzania, none of the three sector interventions explicitly references human rights under objectives, expected results or indicators. The governance sector, nonetheless, clearly draws on human rights principles. One of the objectives defined for this intervention is to 'strengthen human capital and social safety through improved quality and equity in the provision of social services' (European Commission, 2014c, p. 13). Here, the intervention is expected to lead to 'improvements in key quality indicators of service delivery' and to 'reduced disparities in accessing social services' (ibid., p. 13). Another expected result is a 'more accountable public administration with respect to transparency, citizen participation and integrity' (ibid., p. 13). These objectives are clearly human rights-relevant, but not strongly human rights-referenced.

When it comes to the indicators chosen for assessing results, the 'key quality indicators of service delivery' is reduced to only one indicator: the 'number of births attended by skilled health personnel'

(ibid., Annex 3). The application of a human rights-based approach would have required a less aggregative measure, more sensitive to the particular situation of vulnerable groups. For its part, the disparity in access to social services is to be assessed by the number of districts with less than four nurses/midwives per 10,000 inhabitants (ibid., Annex 3). Although this is still a somewhat narrow indicator, it is more sensitive to inequality in service delivery. In both cases, though, the target of merely increasing/decreasing the rate by 2020, not specified further, must be said to be a rather modest and vague ambition. The expected improvement in transparency, citizen participation and integrity is to be assessed by one indicator, i.e. the status of the implementation of an Action Plan on Open Governance Partnership (ibid., Annex 3).

To sum up, the envisioned governance work in Tanzania does not include human rights in objectives, expected results and indicators, but contains several human rights-relevant elements. The same cannot be said of the two socioeconomic sectors, whose objectives and expected results show no signs of human rights or a rights-based approach.

Nepal. Under the ‘Sustainable rural development’ intervention planned for Nepal, six specific objectives are defined, but human rights elements can only be traced in one of them. Specifically, by aiming to ‘improve maternal, infant and child nutrition in rural areas’, the intervention is expected to result in ‘the strengthened capacity of central and local governments to provide nutrition-related basic services in an inclusive and equitable manner’ (European Commission, 2014d, p. 10). However, none of the indicators chosen for assessing this result are explicit on efforts of inclusion (ibid., Annex 1, pp. 1-4).

In contrast, under the priority sector on education, although rights are not specifically mentioned, several elements related to human rights are included. One objective, ‘reduced inequalities in education’, includes a result area on a ‘more equal representation and greater inclusion of targeted populations in the school system’ (ibid., p. 13). Attached to this human rights-relevant area are two equally relevant indicators, one on gender parities at primary, basic and secondary levels of education, and a second indicator on the increased share of women teachers with specific targets outlined (ibid., Annex 1, p. 5). Another objective, to ‘expand access to literacy’, includes a human rights relevant indicator on literacy gender parity at the age of 15 years plus (ibid., Annex 1, p. 6). In general, several of the chosen indicators bear resemblance to some of the illustrative indicators on the right to education suggested by the Office of the High Commissioner for Human Rights (OHCHR, 2012, p. 93).

Regarding the third sector priority, ‘Strengthening democracy and decentralization’, human rights are well incorporated. One objective is to ‘support democratization, domestic accountability and human rights through electoral assistance’ (ibid., p. 16). This objective relates to the right to take part and, thus, refers to a civil and political right – and its indicators include voter registration and voter turnout (ibid., Annex 1, p. 8). Another objective is the eradication of impunity, improvement of the rule of law, and access to justice for all. The result area includes, therefore, relevant human rights principles and a relevant concern for access to justice (ibid., p. 16). Indicators include a reference to national legislation and enactment of action plans in the area of human rights and the elimination of all forms of gender- and caste-based discrimination (ibid., p. 9).

Moreover, the democratization programme aims to provide ‘support to Nepal’s decentralization and state restructuring [...] to ensure quality service delivery to citizens at the local level’ (ibid., p. 16). Two human rights relevant results are expected from this: the improvement in citizens’ access to services, and citizens and communities enabled to hold local bodies accountable. Indicators related to the latter comprise citizens’ perceptions of change based on surveys (ibid., pp. 9-10). A second result area comprises ‘policies developed and plan implemented for federalism and state restructuring’. This result area includes one indicator on devolution of policies that ensure equal participation, representation and access for excluded/marginalized groups, including Dalits (ibid., Annex 1, p. 10).

The final objective of the democratization programme planned for Nepal is to ‘improve effectiveness, efficiency, transparency and accountability of public finance management and reduce corruption at national and local level’ (ibid., p. 16). In this context, one expected result is that ‘mechanisms enabling citizens to be involved in governance processes and to exercise control over the management of public resources at national and local levels are reinforced’ (ibid., p. 16). However, no indicator is attached to this human rights related result area as no baseline is yet available (ibid., Annex 1, p. 10).

To sum up the Nepali case, there is no doubt that human rights are better integrated into the operational sections of the democratization intervention than is the case in the two socioeconomic sector programmes. However, in particular for the education programme, the lack of explicit articulation of human rights is to some extent compensated by the inclusion of indicators that are relevant to human rights.

The Philippines. In terms of incorporation of human rights into stated objectives, expected results and indicators, there is a marked difference between the two sector programmes planned for the Philippines. The priority on ‘inclusive growth through access to sustainable energy and job creation’ aims to expand ‘access to energy for the poor and for job creation’ and to foster ‘sustainable business development in Mindanao, in disaster-affected and marginalized areas’ (European Commission, 2014e, p. 7). This focus on poor and marginalized sections of the population runs through the expected results defined for the intervention. Except for this, however, the programme does not make reference to rights or rights-related principles. Likewise, indicators rely mainly on technical targets, such as efficiency and capacity, and the number of people benefitting from new power supplies and training programmes (ibid., pp. 19-20). Thus, while a human rights-relevant focus on marginalized and vulnerable groups is present in objectives and expected results, it is only vaguely integrated into indicators, as they are stated in the planning document. An exception to this, however, is a measure of the ‘number of beneficiaries of EU supported livelihood enhancing interventions in Bangsamoro’ – an indicator, which allows for a separate assessment of results for one of the most conflict-ridden and marginalized areas of the Philippines (ibid., p. 20).

With regard to the justice sector intervention, the objective is to ‘promote good governance and respect for human rights in the Philippines’ (ibid., p. 10). Through this intervention, the EU expects to strengthen the performance of oversight bodies, including the Commission on Human Rights and to enhance the ‘capacity of poor and vulnerable groups (i.e. children, minorities etc.) to access justice services’ (ibid., p. 10). Moreover, it expects to increase ‘measures to fight impunity for major human rights violations such

as extrajudicial killings, enforced disappearances and torture’ and to capacitate law enforcement authorities to ensure ‘public safety in compliance with international human rights standards’ (ibid., p. 10). Here, human rights elements are, to a large extent, included in the formulation of objectives and expected results. In addition, several human rights components are included in the chosen indicators. These include, among others, ‘the percentage of resolved human rights violation cases resulting in victims’ access to remedies’ and the ‘perception of access to justice from poor and vulnerable groups’ (ibid., p. 22).

Summarizing, the ‘governance bias’ of the Philippine case is also evident in stated objectives, expected results and indicators. Human rights standards and principles are vaguely incorporated throughout the socioeconomic programme, whereas in the justice sector intervention, a human rights-based approach is visible all the way through to indicators chosen for assessing results.

Bolivia. Finally, in the case of Bolivia, the application of rights in objectives, expected results and indicators is by far the richest in the justice sector reform. The objective of this intervention is to ‘improve access to essential justice services for the Bolivian population (in particular rural and indigenous communities) at a national and local level [...] with particular focus on the poor and vulnerable’ (European Commission, 2014f, p. 7). This focus on marginalized groups is also reflected in the indicators for the justice sector reform, which includes an indicator on the number of court cases involving vulnerable groups (ibid., p. 18). Except for that, however, none of other indicators included under this sector contain references to human rights or principles of a rights-based approach.

Also the intervention on illicit drugs includes a reference to human rights in its objectives, but except for that, no human rights elements are mentioned (ibid., pp. 8-9). Finally, the ‘water resource management’ intervention does not contain any explicit human rights elements neither in its objectives nor in expected results or indicators. Most of the indicators relate to the relative or absolute part of the population with access to water services, the number of water services suppliers etc. (ibid., pp. 21-22). These are certainly human rights-relevant indicators. Yet, they are unable to assess results for the most marginalized groups in society, which would have been included, had a human rights-based approach been applied throughout the intervention framework.

Compared to the other cases, the Bolivian case is characterized by a relatively superficial integration of human rights across sectors. Despite the fact that human rights standards and principles are mentioned to some extent in all sectors, they are not thoroughly incorporated beyond the narrative descriptions of interventions.

F. Conclusions

This chapter addressed elements of consistency in the external policies of the EU. The question of consistency was raised when, in the general mapping analysis of economic factors, it was pointed out that human rights objectives were not pursued systematically. Human rights objectives were often pursued inconsistently and in an unbalanced way.

In external policies, and especially in the field of development, inclusive economic growth has been part of the policy emphasis, yet the degree to which human rights were integrated in more than in a

superficial way was difficult to pinpoint in the general mapping study. The impact of human rights integration in trade and development policy implementation was difficult to discern.

In this chapter, we have examined how human rights are integrated into the external programming plans under the EU's two largest development funding instruments, the EDF and the DCI. Regrettably, it has not been possible to examine the relatively recently established national human rights country strategies as these strategies are not publicly available and open to scrutiny. However, from the 50 odd NIPs and MIPs that are available, it is possible to obtain a substantial level of insight into how human rights are integrated across sectors and with respect to synergy between economic sector concerns and human rights.

In the present analysis, we have therefore examined the consistency of human rights programming in external action and the level of planned synergy between economic and broader developmental concerns and human rights. We have pursued these analytical points from the point of view of general human rights integration in programming, human rights integration in specific sectors and regions, and in terms of human rights integration in results-based management of planned development.

Specifically, the chapter addresses to which degree the EU is pursuing human rights-based approach in its country planning in the South. Object of analysis is also how synergy is envisaged between the two basic pillars of economic growth and democratisation and human rights in the planning of the programs in the South. Finally, and related to the former question, in which sectors are human rights elements integrated with most vigor and what does the nature of human rights integration indicate about the overall implementation of a human rights-based approach?

To examine the research questions set out above, the chapter combines a quantitative content (word count) analysis with documentary case studies of selected countries.

Examining whether a human rights-based approach was pursued in EEAS programming, it is found that approximately a fifth of the NIPs/MIPs refer to the human rights-based approach. Although only a minority of the planning documents can thus be said to explicitly commit to the HRBA, a substantively larger share does so implicitly by subscribing to its key principles. The vast majority of the documents feature core components, including a particular focus on vulnerable and marginalized groups (84%), transparency (76%), accountability (71%), the rule of law (71%) and participation (63%). Other principles, such as a focus on non-discrimination and equal access to services (51%), empowerment (51%) and inclusion (39%), are mentioned to a lesser, but nonetheless substantial, extent. While a human rights-based approach is therefore not a strong explicit element, it does prevail implicitly in terms of a general adherence to the HRBA principles.

However, when considered from the perspective of sector-level programmes, the picture changes somewhat. Only eight of the 127 sector programmes, corresponding to 6%, contain an explicit reference to the rights-based approach, and – except vulnerable/marginalised groups – none of the principles are mentioned in more than a third of the interventions. Thus, while the key principles of rights-based development are widely mentioned in the documents, they appear to be less consistently implemented in sector interventions.

A clear conclusion, moreover, is that the incorporation of human rights into the formulation of sector programmes under the two largest development instruments of the EU appears to be strongly biased towards intervention in the areas of governance, democratization and justice. Moreover, the integration of human rights into EU development activities seems to differ stronger along sectorial lines than along geographical lines. While human rights standards and principles are implemented more consistently across regions, mainstreaming throughout all sectors is far from realised according to the planned work.

The average number of HRBA principles mentioned under each sector programme is therefore significantly lower in interventions related to education, health and social services (2.0), agriculture (1.9) and energy and infrastructure (0.9), whereas the integration of principles is higher in the governance sectors (3.7). Furthermore, it is relevant to stress in the context of this analysis that the sectors with the most important economic implications, i.e. agriculture, energy, and infrastructure, are also the sectors where human rights principles are found at a very modest level.

The latter observation is confirmed in the case studies. The five case studies reproduce the ‘governance bias’ already identified, but also show that human rights integration in the economic sectors of agriculture, energy and infrastructure is at the weakest level in the programming documents.

A general conclusion is therefore that the synergy envisaged between human rights planning and economic growth and transformation through development cooperation is modest, in some cases non-existent. Some case country documents leave the impression that the agricultural sector program, for instance, has been written by economists or technical experts who have not really been exposed to human rights thinking – or who have not managed to take in any lessons from the human rights training undertaken. Generally, therefore, a low and very modest overlap exists between economic programming and human rights. The study also indicates that economic and social rights are much more weakly present in programming compared to justice and governance efforts (for a similar conclusion, see Marx et al., 2015).

Finally, the case studies indicate, as far as results-based management planning is concerned, that human rights objectives and indicators are present with some strength in the governance sector, while less so in the socio-economic sector programs. This goes even for a programme like the one in the Philippines. In one case, though, weak objectives of plans in the education sector in Nepal are compensated by a stronger emphasis on human rights in the education indicators.

Overall, this chapter confirms a general finding of the previous mapping, namely that human rights are unevenly and inconsistently integrated in economic and social planning. Economic and broader development initiatives are hardly fostering strong human rights implementation in the EU external development action and planning.

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H. Annexes

Annex 1: List of documents

Country	Instrument	Period	Link
Afghanistan	DCI	2014-2020	Link
Bangladesh	DCI	2014-2020	Link
Bhutan	DCI	2014-2020	Link
Bolivia	DCI	2014-2016	Link
Botswana	EDF	2014-2020	Link
Burundi (French)	EDF	2014-2020	Link
Cape Verde	EDF	2014-2020	Link
Columbia	DCI	2014-2017	Link
Cote d'Ivoire (French)	EDF	2014-2020	Link
Cuba	DCI	2014-2020	Link
Djibouti (French)	EDF	2014-2020	Link
DRC Congo (French)	EDF	2014-2020	Link
Ecuador	DCI	2014-2017	Link
El Salvador	DCI	2014-2020	Link
Ethiopia	EDF	2014-2020	Link
Gabon (French)	EDF	2014-2020	Link
Ghana	EDF	2014-2020	Link
Guatemala	DCI	2014-2020	Link
Honduras	DCI	2014-2020	Link
Kenya	EDF	2014-2020	Link
Kyrgyzstan	DCI	2014-2020	Link
Lesotho	EDF	2014-2020	Link
Liberia	EDF	2014-2020	Link
Mauritania (French)	EDF	2014-2020	Link
Mongolia	DCI	2014-2020	Link

Nepal	DCI	2014-2020	Link
Nicaragua	DCI	2014-2020	Link
Niger (French)	EDF	2014-2020	Link
Nigeria	EDF	2014-2020	Link
Pakistan	DCI	2014-2020	Link
Paraguay	DCI	2014-2020	Link
Peru	DCI	2014-2017	Link
Rwanda	EDF	2014-2020	Link
Seychelles	EDF	2014-2020	Link
Sierra Leone	EDF	2014-2020	Link
Somalia	EDF	2014-2020	Link
South Africa	DCI	2014-2020	Link
Sri Lanka	DCI	2014-2020	Link
St. Lucia	EDF	2014-2020	Link
St. Vincent and the Grenadines	EDF	2014-2020	Link
Suriname	EDF	2014-2020	Link
Swaziland	EDF	2014-2020	Link
Tajikistan	DCI	2014-2020	Link
Tanzania	EDF	2014-2020	Link
The Philippines	DCI	2014-2020	Link
Turkmenistan	DCI	2014-2017	Link
Uzbekistan	DCI	2014-2020	Link
Vietnam	DCI	2014-2020	Link
Zimbabwe	EDF	2014-2020	Link

Annex 2: Coding scheme

The following table contains the coding scheme and search terms employed in the analysis. At every occurrence of a search term, it has been considered whether the term appears in a context relevant to human rights and a human rights-based approach.

META	Variable	Categories / search terms
	Country	
	Title	
	Instrument	1. Development Cooperation Instrument 2. European Development Fund
	Period	
	Total amount of aid	
	Region	1. West / Central Africa 2. East / Southern Africa 3. Latin America and Caribbean 4. Central Asia 5. South / South East Asia
	Title of sector programme (for programme-level analysis only)	
	Sector (for programme-level analysis only)	1. Governance, democratization, justice sector and public sector 2. Agriculture and rural development 3. Education, health, other social services, social protection, inclusion and employment 4. Energy, environment, climate change and infrastructure 5. Other categories, including promotion of trade and investment, conflict resolution and illicit drug

	programmes	
	Amount allocated to sector (for programme-level analysis only)	
HUMAN RIGHTS IN GENERAL	Human rights mentioned in introduction	EN: 'human right(s)' FR: 'droit(s) de l'homme'
	Civil and political rights mentioned in introduction	EN: 'civil right(s)', 'political right(s)', 'civil and political rights' FR: 'droit(s) civil(s)', 'droit(s) politique(s)', 'droits civils et politiques'
	Economic and social rights mentioned in introduction	EN: 'economic right(s)', 'social right(s)', 'economic, social and cultural rights' FR: 'droit(s) économique(s)', 'droits sociaux', 'droits économiques et sociaux'
	Human rights mentioned in (programme) narrative	-
	Civil and political rights mentioned in (programme) narrative	-
	Economic and social rights mentioned in (programme) narrative	-
	Human rights mentioned in (programme) objectives	-
	Civil and political rights mentioned in (programme) objectives	-
	Economic and social rights mentioned in (programme) objectives	-
	Human rights mentioned in (programme) expected results	-
	Civil and political rights mentioned in (programme) expected results	-
	Economic and social rights mentioned in (programme) expected results	-
	Human rights mentioned in (programme) indicators	-
	Civil and political rights mentioned in (programme) indicators	-
	Economic and social rights mentioned in (programme) indicators	-
SPECIFIC RIGHTS	Right to education	EN: 'right to education' FR: 'droit à l'éducation'
	Right to health	EN: 'right to health' FR: 'droit à la santé'
	Right to water	EN: 'right to water' FR: 'droit à l'eau'
	Indigenous people's rights	EN: 'indigenous people's rights', 'rights of indigenous people' FR: 'droits des peuples autochtones'
	Land rights	EN: 'land rights' FR: 'droit(s) foncier(s)'
	Labour rights	EN: 'labour rights', 'labour standards', 'workers' rights' FR: 'droit(s) du travail', 'droits des travailleurs'
	Gender rights / women's rights	EN: 'gender rights', 'women's rights', 'rights of women' FR: 'droits des femmes'
	Children's rights	EN: 'children's rights', 'rights of children' FR: 'droits des enfants'
	Property rights	EN: 'property rights', 'right to property' FR: 'droit(s) de propriété'
INDICATORS OF	HRBA mentioned in entire document?	EN: 'rights-based approach', 'rights based approach' FR: 'approche fondée sur les droits de l'homme'
	HRBA mentioned in programme description	-
	Focus on vulnerable groups	EN: 'vulnerable'/'marginalized' FR: 'vulnérable', 'marginalisé'

Empowerment	EN: 'empowerment', 'empower' FR: 'autonomisation'
Participation	EN: 'participation', 'participatory' FR: 'participation', 'participatif', 'participative'
Non-discrimination	EN: 'non-discrimination', 'discrimination', 'equal access' FR: 'non-discrimination', 'discrimination', 'égalité d'accès', 'accès équitable'
Inclusion	EN: 'inclusion' FR: 'inclusion'
Accountability	EN: 'accountability', 'accountable' FR: 'responsabilisation', 'responsable'
Transparency	EN: 'transparency', 'transparent' FR: 'transparence', 'transparent'
Rule of law	EN: 'rule of law' FR: 'l'état de droit'

VI. Legal factors: A case-study on international human rights and international humanitarian law in EU's Common Security and Defence Policy Operations and Missions*

A. Introduction

The EU has, since the launch in January 2003 of the EU Police Mission in Bosnia and Herzegovina (EUPM BiH), launched around 30 civilian and military missions and operations under EU's Common Security and Defence Policy (CSDP). The EU is currently involved in 16 CSDP missions and operations, including eleven civilian missions and five military operations. This chapter seeks to explore and define the role of the EU as a global security provider and a promoter of human rights through CSDP military operations in third States.

In November 2014, the Council of the European Union reiterated an 'urgent need of enabling the EU and its Member States to assume increased responsibilities to act as a security provider, at the international level and in particular in the neighborhood (such as Iraq, Libya, the Sahel, Syria and Ukraine), thereby also enhancing their own security and their global strategic role by responding to these challenges together' (Council of the European Union, 2014, p. 1). It is thereby envisaged that the EU (and thus the CSDP) should play an increasingly more important and prominent role in the future.

The European External Action Service (EEAS) likewise stressed in December 2014 that the EU is a global actor, ready to share the responsibility for global security (EEAS, 2014, para. 4). To make these ambitions credible, deployments must be able to support diplomacy and other means of conflict resolution anywhere in the world. Hence, it is envisaged that military power combined with civilian

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instruments, in symmetric and asymmetric scenarios, needs the capability to project tailored forces and expertise, with short preparation time, over strategic distances into remote regions.

It is thus evident, that the use of force is a necessary tool in EU-led military operations in third States.

When acting internally in the EU, the EU and its Member States implementing EU law are clearly bound by fundamental rights. Furthermore, it is laid down in the Treaty on European Union (TEU) that the EU shall seek to promote and strengthen international human rights in its relations with third States. But to what extent are the EU and troop-contributing Member States involved in CSDP military operations in third States bound by International Humanitarian Law (IHL) and International Human Rights Law (IHRL) standards? Shall EU-led military forces respect and protect IHL and IHRL standards in military operations in third States?

Uncertainty about the content and scope of IHL and IHRL obligations in EU-led military operations in third States is a legal factor that may hamper the effective protection of IHL and IHRL.

Publicly available EU human rights policy documents on CSDP operations and missions have mainly focused on the promotion of IHRL and IHL in third States – by third States themselves – rather than on the EU's own compliance with IHL and IHRL when involved in CSDP missions and operations. Such possible incoherence between the policy towards third States and the EU/Member States is a factor that might hinder the effectiveness of the EU human rights policy and the effectiveness of CSDP military operations in third States.

Closely linked to the question of which IHL and IHRL standards EU-led troops are bound by when involved in military operations in third States, is the question of attribution and responsibility of potential IHL and IHRL breaches. Is it EU as an international organization or the troop-contributing Member States that are responsible for a possible breach of IHL or IHRL during a military operation in a third State? This question has been much debated in academic literature in recent years and will, therefore, only be briefly touched upon in this chapter.

Through a case study on the CSDP, the chapter seeks to explore and define the role of the EU as a global security provider and a promoter of human rights and international law. More specifically it is examined whether EU-led military forces from a legal and policy perspective are required to respect and protect IHL and IHRL standards in CSDP military operations in third States.

Many of the findings in this chapter, e.g. concerning attribution (section D) and on applicable international legal norms (section C), can also be of relevance for EU-led civilian CSDP missions in third States. Nevertheless, this chapter focuses on EU-led military operations and on the specific questions that arise in such operations e.g. the applicability of IHL and the relationship and interaction between IHL and IHRL.

B. Methodology and Structure

This chapter on legal factors and military CSDP operations in third States is based on traditional legal sources in international law i.e. EU treaties most notably the TEU; relevant international conventions on

IHL and IHRL including the Charter of Fundamental Rights of the European Union (CFREU) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); international customary law; relevant case-law from international courts and human rights monitoring bodies, including the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and UN Human Rights Committees. In addition the chapter draws on relevant international literature and research on the EU and international law as detailed in the bibliography. Finally, the chapter includes a review of a large number of EU policy documents relevant for CSDP military operations in third States.

The case study consists of five main sections:

Section C seeks to explore what the EU is capable of as a global security provider and determine the link to the protection of IHL and IHRL in this context. Firstly, the section provides an overview of how the EU – on the basis of its own constituent document, the TEU (primary EU law) – aims at defining the EU as a global actor, guided by and promoting human rights and international law. Secondly, the section explores the specifics and characteristics of the CSDP, including the historical and political context from which the CSDP emerged as well as the legal basis for CSDP military operations. Finally, in order to understand, the nature of the role the EU is currently playing in this area, the section explores the nature and scope of the EU's five ongoing military missions and operations.

Section D provides a brief introduction to the question whether the conduct of EU-led military forces in third States should be attributed to the EU as an international organisation with the consequence that it is the EU that is responsible for a possible violation of IHL or IHRL/internationally wrongful acts committed by the military forces; Or whether the conduct on the contrary should be attributed to the troop-contributing EU Member State(s) with the consequence that the Member State is responsible.

Based on a review of a number of CSDP planning and operations policy documents, Section E explores how the EU, in accordance with the TEU, seeks to promote IHRL and IHL in CSDP military operations and missions in third States, both in relation to the obligations of third States and in relation to the obligations of EU-led military forces operating in third States.

Section F explores to what extent the EU, as an international organisation in the middle of globalisation processes, from a legal point of view, is bound by IHL and IHRL when involved in CSDP operations and missions in third States. The section illustrates that even though CSDP policy guidelines concerning protection of IHL and IHRL standards directed at EU-led military forces tends to be broad and somewhat superficial, EU-led military forces may be legally bound by IHL and IHRL standards when involved in CSDP military operations in third States. However, the precise scope and content of these obligations are unclear.

Section G provides conclusions and perspectives. The significance of the detected incoherencies is explored with a view to indicate to what extent these incoherencies may enable or hinder the effectiveness of EU's CSDP military operations, but also the intended human rights promotion as such. Section G also provides a set of recommendations with a view to remedy the identified legal uncertainty and incoherence in CSDP military operations.

C. The Common Security and Defence Policy

1. The EU and international cooperation – An overview

As stated in the Preamble and Articles 2 and 6 of the TEU, the EU is ‘founded on’ – among other things – the rule of law and respect for human rights and the EU ‘recognises’ fundamental rights, including human rights.

According to Article 6 of the TEU, the EU recognises the CFREU as having the same legal value as the Treaties and further recognises that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.

One of the core objectives of the Treaty of Lisbon from 2007 was to strengthen the role of the EU at the international level, and to enhance coherence and increase visibility of the Common Foreign and Security Policy (CFSP). To this end, the Treaty of Lisbon introduces two major innovations. First, the creation of the High Representative of the Union for Foreign Affairs and Security Policy, who is also Vice President of the European Commission (the HR/VP) and the EEAS; and second, the CSDP (formerly known as the European Security and Defence Policy (ESDP)). However, there are still important differences between the CFSP and “traditional” EU law and policies, e.g. the CFSP is governed by special rules and procedures similar to intergovernmental cooperation, the adoption of legal acts is excluded, and the area is largely excluded from judicial review by the CJEU.

Towards third States (‘the wider world’) the EU shall contribute to the protection of human rights and the strict observance/development of international law. Pursuant to Article 3 of the TEU, the EU shall:

In its relations with the wider world, [...] uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Likewise, it is stressed in Article 21 of the TEU that the ‘Union’s action on the international scene shall be guided by’, *inter alia*, international law and human rights. With a view to strengthening and improving the protection of human rights in third States, the EU has developed a number of tools and instruments, including by way of examples:

- Political dialogue and démarches;
- Human rights clauses (included in a large number of bilateral trade and cooperation agreements);
- Guidelines on human rights and international humanitarian law;
- Actions in multilateral fora;

- A financial instrument - the European Instrument for Democracy and Human Rights (EIDHR) – to support international human rights projects etc.

However, it is noteworthy that the TEU uses the term ‘human rights’ when describing the EU’s relationship with third States, whereas the term ‘fundamental rights’ is used when regulating human rights within the EU.

2. An overview and description of CSDP

a) The legal basis for CSDP

The CSDP forms an integral part of the CFSP. The idea of a common European defence policy dates back to 1948 when the UK, France, and the Benelux signed the Treaty of Brussels. The agreement included a mutual defence clause laying down the foundations for the creation of the Western European Union (WEU), which until the late 1990s remained, together with NATO, the principal forum for consultation and dialogue on security and defence in Europe.

In the 1990s the Member States reaffirmed the Union’s willingness to develop capabilities for autonomous action, backed up by credible military forces. Key developments were the adoption in 1992 of the ‘Petersberg tasks’ (Western European Union, Council of Ministers, 1992) defining the spectrum of military actions/functions that the EU can undertake in its crisis management operations, and the ‘Berlin Plus agreement’ from 1999 giving the EU, under certain conditions, access to NATO assets and capabilities (EEAS.b).

In 2003, the EU adopted a common European Security Strategy - ‘A Secure Europe in a Better World’ (Council of the European Union, 2003) - and in 2008, the strategy and its implementation were revised. The strategy analyses for the first time the EU’s security environment and identifies key security challenges and subsequent political implications for the EU. Its objective is to develop a stronger international society, well-functioning international institutions, and a rule-based international order and in the strategy it is emphasized that the EU is committed to uphold and develop international law and that the fundamental framework for the EU’s international relations is the Charter of the United Nations. Furthermore, the strategy identifies a range of threats and challenges to the EU’s security, including proliferation of weapons of mass destruction; terrorism and organised crime; cyber security; energy security; and climate change (High Representative, 2008).

The European Council and the Council of the EU discuss and review the CSDP on a regular basis. In November 2014, the Council of the EU reiterated that there is an ‘urgent need of enabling the EU and its Member States to assume increased responsibilities to act as a security provider, at the international level and in particular in the neighbourhood, thereby also enhancing their own security and their global strategic role by responding to these challenges together’ (Council of the European Union, 2014, p. 1).

It should be noted, that the ‘neighbourhood’ referred to includes both the immediate and wider neighbourhood such as Iraq, Libya, the Sahel, Syria and Ukraine (Council of the European Union, 2014, p. 1).

The legal basis for the CSDP is to be found in the TEU. Pursuant to Article 42(1) of the TEU, the CSDP 'shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'.

According to Article 26(1) of the TEU, the policy line for the CSDP (strategic interests, objectives and general guidelines) is determined by the European Council, while decisions relating to the CSDP, including missions and operations, are adopted by the Council of the EU acting unanimously on proposal from either the HR/VP or a Member State (cf. Article 42 (4) of the TEU). It is noteworthy that the adoption of legal acts within the scope of the CSDP is excluded (by Article 24 (1) of the TEU) and that the CSDP is largely excluded from the jurisdiction of the Court of Justice of the European Union (CJEU) (as per Article 275 of the TFEU). The nature of the CSDP is thus similar to traditional intergovernmental cooperation.

The Council of the EU can entrust the implementation of a CSDP task to a group of Member States willing and having the necessary capabilities to do so. In association with the HR/VP, those Member States shall agree among themselves on the management of the task (cf. Articles 42 (5) and 44 of the TEU). According to Articles 42(6) and 46, those Member States whose military capabilities fulfil higher criteria and that have made more binding commitments to one another may establish permanent structured cooperation within the CSDP framework.

The EU can launch CSDP missions for three interrelated tasks (previously laid down in the 'Petersberg tasks'): Peace-keeping, conflict prevention and the strengthening of international security as further defined and elaborated on in Article 43 (1) of the TEU. The tasks 'shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'.

The CSDP thus consists of both civilian missions and military operations, and in relation to military operations, it is evident that 'tasks of combat forces in crisis management' and 'peace-making' may involve combat functions and situations of armed conflict regulated by IHL, including the Geneva Conventions and the Hague Conventions. However, until now, no EU military operations have been engaged in hostilities in armed conflict, and due to the nature of the military operations, this is likely to be the case only in a few military operations (Naert, 2013, p. 639).

As the possibility, however, remains, the TEU acknowledges the potential intervention of multinational forces in the implementation of the CSDP. Since the EU does not have its own military forces, it relies on the military capabilities of the Member States – and the Member States shall make such capabilities available to the EU – as described in Art. 42 of the TEU. As the result of military alliances between certain Member States who have decided to combine their capacities, equipment, and personnel strength, some more permanent EU forces have been established. The main 'EU forces' are:

- **Eurofor**, regrouping land forces between Spain, France, Italy and Portugal;

- **Eurocorps**, regrouping land forces between Germany, Belgium, Spain, France and Luxembourg;
- **Euromarfor**, regrouping maritime forces between Spain, France, Italy and Portugal;
- **European Air Group**, regrouping air forces between Germany, Belgium, Spain, France, Italy, the Netherlands and the United Kingdom.

The planning of military operations results in an Operation Plan (OPLAN). When the use of force is authorised – beyond self-defence – the Rules of Engagement (ROE) are requested by the Operation Commander and authorized by the Council based on the EU Concept for the Use of Force in EU-led Military Operations, which requires respect for international law (EEAS, 2010). Although the operations draw on capabilities made available by the Member States, the Operation Commander possesses the highest level of military command and will normally receive operation control over forces by the participating Member States (Naert, 2013, p. 638).

b) Military Headline Goals

The EU has developed so-called Military Headline Goals (HLGs). The HLGs shall ensure that the EU possesses the military capabilities required to conduct the full range of missions encompassed by the TEU (EEAS.a). Following the agreement of EU heads of state and government at the Cologne Council deciding that the EU should possess an ‘autonomous’ military capacity to respond to crises, the 1999 Helsinki Headline Goal (2003 Headline Goals) outlined the following objectives:

By the year 2003, cooperating together voluntarily, [EU Member States] will be able to deploy rapidly and then sustain forces capable of the full range of Petersberg tasks as set out in the Amsterdam Treaty [Petersberg-tasks], including the most demanding, in operations up to corps level (up to 15 brigades or 50,000-60,000 persons). These forces should be militarily self-sustaining with the necessary command, control and intelligence capabilities, logistics, other combat support services and additionally, as appropriate, air and naval elements. Member States should be able to deploy in full at this level within 60 days, and within this to provide smaller rapid response elements available and deployable at very high readiness. They must be able to sustain such a deployment for at least one year (European Council, 1999, Annex IV).

Eventually, the experience gained from the military operations EUFOR Concordia in the former Yugoslav Republic of Macedonia and Artemis in the Democratic Republic of Congo, in addition to a changing security environment, resulted in a move away from the overwhelmingly quantitative focus of HLG 2003 to a more comprehensive and qualitative approach. The European Council in 2004 consequently set a new target for capability improvement, the Headline Goal 2010 (HLG 2010), which identified several strategic scenarios whereby the EU should:

Be able by 2010 to respond with rapid and decisive action applying a fully coherent approach to the whole spectrum of crisis management operations covered by the Treaty on European Union [i.e. the Petersberg-tasks] [...] the EU must be able to act before a crisis occurs and preventive engagement can avoid that a situation deteriorates. The EU must retain the ability to conduct

concurrent operations thus sustaining several operations simultaneously at different levels of engagement (European Council, 2004).

The Battle Group Concept became a central part of the Headline Goal 2010. Battle Groups are high readiness forces consisting of 1,500 personnel that can be deployed within 10 days after an EU decision to launch an operation and that can be sustained for up to 30 days (extendible to 120 days with rotation). At the 2004 Military Capability Commitment Conference, Member States made an initial commitment to the formation of 13 EU Battle Groups, with the aim of always having two Battle Groups on standby (Military Capability Commitment Conference, 2004). On 1 January 2007, the EU Battle Group Concept reached full operational capacity. To this date, the EU Battle Groups have yet to be deployed.

Since then, the EU has embarked on further capability enhancement, urging greater Member State cooperation through the development of pooling and sharing options as well as strengthening the role of the European Defence Agency (EDA) in this area.

Depending on the nature of the crisis, EU-led military intervention can be executive or non-executive. In executive interventions, the operation is mandated to conduct actions in replacement of the host nation. In non-executive interventions the operation is supporting the host nation with an advisory role only (EEAS, 2014, p. 9).

c) Comprehensive approach

Besides setting out the principles, aims and objectives of the external action of the EU, the Treaty of Lisbon also called for further consistency between the different areas of EU external action with a common comprehensive approach to external conflicts and crises. The approach as such was not new, but in 2013, the Commission urged for the concept to be applied systematically as guiding principles of all external action, in particular in relation to conflict prevention and crisis resolution. The objective is to make EU external action stronger, more coherent, visible and effective by making EU institutions and Member States work together based on a common strategic analysis and vision (European Commission, 2013). The Horn of Africa has been subject to such a comprehensive approach, consisting of both civilian and military contributions in order to the build-up and strengthening of the security sector. This reflects one of the strengths of the EU external action, compared to international organizations that provide either military or civilian aid.

3. Overview of ongoing CSDP Military Operations

Currently, the EU has 16 ongoing missions and operations within the framework of the CSDP, consisting of eleven civilian missions and five military operations (EEAS.j). Furthermore, on 18 May 2015 the Council of the EU agreed to establish another military operation in the Mediterranean in order to disrupt the smuggling and trafficking of people in the Mediterranean (EEAS.k). This chapter will focus on the five ongoing military operations and the operation in the Mediterranean most recently decided upon:

- EUFOR (EU Force) ALTHEA Bosnia and Herzegovina
- EUMAM RCA (EU Military Advisory Mission) Central African Republic (CAR)

- EU NAVFOR (European Naval Force) Somalia-Atalanta
- EUTM (EU Training Mission) Mali
- EUTM (EU Training Mission) Somalia

EUFOR ALTHEA Bosnia and Herzegovina was launched in December 2004 and contributes to the maintenance of a safe and secure environment. Although the security situation has improved, the mission continues to act in accordance with its peace enforcement mandate.

The mission has a capacity of 600 personnel and its main objectives are:

- To provide capacity-building and training to the Armed Forces of BiH;
- To support BiH efforts to maintain the safe and secure environment in BiH;
- To provide support to the overall comprehensive strategy for the country.

The mission thus consists of both training and capacity building units, liaison and observance teams and finally a manoeuvre/military unit (Multinational Battalion) (EEAS.c).

EUMAM (RCA) was launched in March 2015 to support the Central African authorities in preparing a reform of the security sector with respect to the Armed Forces of the Central African Republic. The mission follows the completed EUFOR operation, which contributed to the security of the capital. It is also worth a remark that besides the CSDP mission, the EU is the country's main provider of humanitarian assistance (EEAS.e).

EU NAVFOR Somalia-Atalanta contributes to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, and protects vulnerable shipping and World Food Program vessels. The operation was launched in December 2008 and, together with the EUTM Somalia, EUCAP Nestor (Regional Maritime Security Capacity Building Mission in the Horn of Africa and the Western Indian Ocean) and EU development aid, it forms part of the EU's Comprehensive Approach to the Horn of Africa (EEAS.g).

Finally, the EU has two ongoing military training missions: **EUTM Mali**, which provides for military and training advice to the Malian Armed Forces (EEAS.h), and **EUTM Somalia**, which forms part of the EU's comprehensive approach to the Horn of Africa and contributes to strengthening of the Transitional Federal Government and the Somali institutions by providing military training to members of the Somali National Armed Force (EEAS.i).

As the brief descriptions of the military operations reflect, only few operations operate under a mandate that may involve 'tasks of combat forces in crisis management' and 'peace-making' and thus activities that may involve combat. So far, EU forces have not yet become involved in combat, but especially in relation to EUFOR Artemis in the Democratic Republic of Congo, which contributed to the stabilization of the security sector (EEAS.d), and EUFOR Chad/CAR, which contributed to the stabilization of the Darfur

area, including contributing to the protection of civilians in danger and UN personnel etc. (EEAS.f), combat could have been the reality had the situation escalated (Naert, 2013, p. 639).

However, on 18 May 2015, the Council of the EU took a decision to launch a military operation in the Mediterranean, **EU NAVFOR (European Naval Force) MED**, as one element of the comprehensive EU response to the migration challenge in the Mediterranean. The aim of the operation is to disrupt smuggling and trafficking of people across the Mediterranean (Council of the European Union, 2015b).

According to Article 2(2) of the Council decision regarding the ‘mandate’ of the operation, the operation comprises three phases: The initial phase will take place as soon as possible and contains the planning of the operation and the surveillance and assessment of human smuggling and trafficking networks in the Southern Central Mediterranean. Then, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned (Libya), the second phase will consist of boarding, search, seizure and diversion of vessels suspected of being used for human smuggling and trafficking, both in high seas and the territorial waters (of Libya). Finally, in a third phase also in accordance with any applicable UN Security Council Resolution or consent from the coastal State (Libya), the EU-led forces will take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable (Council of the European Union, 2015b).

This military operation is likely to result in an EU-led force getting involved in an international armed conflict requiring the use of force by EU-led forces, if not already in the second phase, which includes boarding, search and seizure, then in the third phase, where the force can make use of ‘all necessary measures’. This could be the case if the coastal State (Libya) does not consent to the operation (which is likely to be the case). Then, both IHRL and IHL will be relevant to the situation, such as the right to private life (during investigations on board the vessels), the right to liberty and security and the prohibition of torture (during arrest of the crew), the right to life etc., depending on what will be deemed ‘necessary’.

Pursuant to recital 3 and 6 in the Preamble of the decision, the military operation shall be conducted in accordance with the requirements in international law, including the 1951 Geneva Convention relating to the Status of Refugees and international human rights law (Council of the European Union, 2015b). Therefore, the provisions related to the mandate must be interpreted in the light of the Preamble and the recitals concerning the human rights obligations in question. However, as none of these provisions contains specific references to the IHL or IHRL standards relevant to the competences given, the provisions concerning the human rights obligations of the EU-led forces remain fairly general and thereby slightly imprecise.

D. Attribution of conduct to the EU or to Member States – A brief overview

It is outside the scope of this chapter to provide a thorough and comprehensive discussion of the question about attribution of conduct and responsibility between the EU and troop-contributing Member States. The purpose of this section is to provide a brief introduction to the debate about attribution in order to set the scene for the discussion of the applicable rules in following sections.

In EU-led military operations in third States the EU is as described in section C depending on the military forces provided by the Member States. The EU is responsible for the planning and preparation of mission specific documents, including rules of engagement, and for the implementation of the operation. Military forces provided by Member States will be under the operational control of the EU, but Member States retain the final control over the soldiers e.g. in terms of disciplinary and criminal measures.

The question who is responsible for an international wrongful act during CSDP military (and civil) operations has been much debated in recent years. Who is accountable for a possible IHL or IHRL violation committed by a soldier being part of an EU-led Military force in a third State – the EU as an international organisation or the troop-contributing Member State? Or both?

The TEU provides no solution to the question who will incur international responsibility in these situations. The International Law Commission (ILC) adopted in 2011 the draft articles on the responsibility of international organisations (DARIO). It follows from Article 7 in DARIO that:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the *disposal of* another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct (emphasis added).

In CSDP military operations in third States the military forces from Member States are arguably placed at the disposal of the EU. Hence, the decisive question appears to be whether it in the concrete situation is the EU or the Member State that is exercising effective control over the soldier who is responsible for committing an international wrongful act e.g. violating IHL or IHRL obligations.

As Ramses A Wessel and Leonhard den Hertog conclude:

The ‘effective (factual) control’ argument may be decisive in establishing the division of responsibility between the EU and its Member States in very concrete situations in the framework of EU military missions (Evans and Koutrakos, 2013, p. 357).

It is an unsettled question whether there can be shared responsibility between the EU and the troop-contributing Member State. Finally, the question of responsibility for aid and assistance to an international wrongful act can be discussed. As laid down in Article 14 in DARIO an international organisation which aids or assists a State in the commission of an internationally wrongful act might be internationally responsible for doing so. In parallel if the action leading to the violation of human or fundamental rights can be attributed to the EU it might be questioned whether the troop-contributing Member State has provided aid or assistance to the EU with the consequence that Member States can also be held accountable for the human rights violation. See the principle in Art. 58 in DARIO.

Finally, it should be mentioned that a (EU) Member State can incur international responsibility if it circumvents one of its obligation by causing an international organization/EU-led Military forces to commit an act that, if committed by the State, would have constituted a breach of the obligation, see

Article 61 in DARIO. According to the ILC three conditions are required if a Member State shall be internationally responsible for circumventing its international obligations: First, the international organization has competence in relation to the subject-matter of an international obligation of State. Second, there has to be a 'significant link between the conduct of the circumventing Member State and that of the international organization'. Third, the international organization commits an act that, if committed by the State, would have constituted a breach of the obligation.

Obligations under IHL can be used as an example. While all EU Member States have ratified and are bound by the Geneva Conventions the EU is not a party to these conventions and thus not directly bound by them (the EU might be bound by certain norms in the Geneva conventions that constitute customary international humanitarian law, see section F below). Hence, EU Member States could arguably incur international responsibility if allowing EU-led military forces – under EU control and command – to act in contravention with IHL obligations. That could possibly be the situation if EU policy or operation documents would allow EU-led military forces to disregard obligations in the Geneva conventions clearly binding for EU Member States.

In parallel with this type of responsibility it is laid down in Article 17 in DARIO that the EU can incur international responsibility if it circumvents one of its international obligations by authorizing a troop-contributing Member State to commit an act that would be internationally wrongful if committed by the EU and the act in question is committed because of the authorization.

E. The integration of IHL and IHRL in CSDP policy documents

Pursuant to Art. 38 of the TEU, the Political and Security Committee (PSC)²⁷ is authorised to take a number of important decisions in relation to CSDP missions, including the preparation of planning documents, the Chain of command and the rules of engagement (Naert, 2011, p. 5).

In 2006, at its meeting on 1 June, the PSC endorsed that human rights shall be mainstreamed in the CFSP, CSDP (formerly known as the European Security and Defence Policy - ESDP) and other EU policies:

The protection of human rights should be systematically addressed in all phases of ESDP operations, both during the planning and implementation phase, including by measures ensuring that the necessary human rights expertise is available to operations at headquarter level and in theatre; training of staff; and by including human rights reporting in the operational duties of ESDP missions (Political and Security Committee, 2006).

More specifically, human rights elements should be incorporated into the 'full range of planning documents for ESDP missions, including CONOPS [the draft Concept of Operations], OPLAN [operational

²⁷ The Political and Security Committee is the permanent body in the field of common foreign and security policy mentioned in Article 38 of the TEU. It is made up of Ambassadors from the 27 Member States. The Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

plan] and rules of engagement' and the adopted documents should incorporate elements related to both respect for human rights by ESDP missions and the way in which the mission should promote respect for human rights in the mission area (Council of the European Union, 2006). It is laid down that a number of practical and concrete steps should be taken by the EU in order to ensure mainstreaming of human rights into ESDP and CSDP operations and missions:

- Develop a consolidated list of relevant human rights related documents and concepts in the context of ESDP to assist planners of ESDP missions and operations;
- Develop a model/template for generic key human rights elements which can be inserted in planning documents and reviews of ESDP missions and operations;
- Develop a standard field manual concerning human rights for ESDP missions and operations, drawing also on relevant manuals from the UN Department of Peacekeeping Operations (UN DKPO), UN Office of the High Commissioner for Human Rights (UN OHCHR) and UNICEF and other relevant organisations;
- Organise a workshop for ESDP-planners with participation of personnel from the UN DKPO, UN OHCHR and UNICEF;
- Develop standard training guidelines for general ESDP courses;
- Ensure inclusion of human rights aspects into ESDP exercises; and finally
- Ensure necessary human rights expertise to missions and operations both at headquarter level and in theatre.

On this background the EU has elaborated a number of policy documents on mainstreaming human rights and gender into military (and civilian) CSDP operations and missions. See e.g.:

- *Mainstreaming of human rights into ESDP* (Council of the European Union, 2006) and *Aceh Monitoring Mission – Human rights aspects* (Council of the European Union, 2005b)
- *Implementation of UNSCR 1325 as reinforced by UNSCR 1820 in the context of ESDP* (Council of the European Union, 2008) and related CivCom advice, doc. 59904/08
- *EU Guidelines on Children and Armed Conflict* (Council of the European Union, 2008a) and *Draft General review of the Implementation of the Checklist for the Integration of the Protection of Children affected by Armed Conflict into ESDP Operation* (Permanent Representatives Committee, 2008)
- *Guidelines on the Promotion of International Humanitarian Law (IHL)* (Political and Security Committee (PSC), 2005)
- *Transnational justice*, doc. 6197/12 of 7 February 2012
- *Generic standards of behaviour for ESDP Operations* (Council of the European Union, 2005a)
- *Protection of civilians*, doc. 14940/10 of 18 October 2010
- *Civil society*, doc. 10056/1/04 of 9 June 2004 and doc. 15574/1/06 of 18 December 2006.

These policy documents provide an important basis for the detailed planning of the specific mission and operation including for the rules of engagement, etc.

It might be observed that the public accessible operational policy documents mostly relate to the conduct of third States and not so much to whether the EU and Member States act in accordance with IHRL and IHL. As an example, the guidelines on IHL from 2005 state that the purpose of the document is to promote compliance with IHL by third States and, as appropriate, non-state actors operating in third States. It is highlighted that whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by the Guidelines.

In 2010, the Committee of Civilian Aspects of Crisis Management (CIVCOM) conducted a review of CSDP missions and operations with a view to identifying lessons and best practices of mainstreaming human rights into CSDP military operations and civilian missions. The review resulted in 17 recommendations with a view to strengthening the mainstreaming of human rights (CIVCOM, 2010).

The use of force is, as mentioned earlier, a necessary tool in EU-led military operations. However, the question remains to what extent the EU and its Member States shall comply with IHRL and IHL during CSDP missions and operations.

It is often specified in the decision from the EU Council authorizing the specific military operation that EU-led military operation will be conducted in accordance with international law, including IHRL, see e.g. Council Decision (CFSP) of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean discussed in section D above.

Furthermore, EU-led military forces' compliance with IHL and IHRL is described in some recent EU policy documents. Firstly, the European Union Military Staff adopted in 2009 a document concerning the 'framework and principles for the use of force by military units and individuals in EU-led military operations'. The document was revised in 2011. Most parts of the document are classified, but in the declassified introduction, it is laid down that '[a]ll use of force in EU-led military operations - in self-defence and under the Rules of Engagement (ROE) - must always be in conformity with international standards, especially international law as defined in applicable international treaties, customary international law and relevant decisions by international organisations'. It is highlighted that '[t]he legal issues raised and policy choices made in this concept are not intended to create new bases for use of force under international law. Neither is this concept intended to affect the existing rules on the legality of the use of force in international law' (EEAS, 2010).

Secondly, the EEAS adopted in December 2014 a document on the 'European Union Concept for EU-led Military Operations and Missions' (EEAS, 2014). The purpose of the document is to provide, *inter alia*, military commanders, military staff, EU civilian staff, external actors etc. with an overarching conceptual framework for EU-led military operations and missions. It is highlighted in the document that EU-led military missions and operations will be conducted in accordance with the basic legal framework as laid down in the Council Decision on the specific CSDP mission or operation, relevant International Law (in

particular IHL), IHRL, International Refugee Law (IRL), mission-related international agreements and arrangements, relevant EU Member States' Domestic Legislation and in addition consideration of Host Nation Law (EEAS, 2014, para. 26).

Thirdly, the EEAS adopted in March 2015 a document on the 'Concept for the use of Non-Lethal Capabilities in EU-led CSDP military operations and missions' (EEAS, 2015). The purpose is to establish a set of guiding principles for the development and employment of Non-Lethal Capabilities (NLC) in military CSDP Operations and Missions. It is stated in paras. 19-24 that:

19. [...] Any employment of NLC must comply with applicable national law and international law, including IHL and Human Rights Law. In this respect it is important to note:

a. CSDP missions are not necessarily deployed in the context of an armed conflict, and even when this is the case, the CSDP mission is not necessarily party to an armed conflict. Therefore, International Humanitarian Law (IHL) does not necessarily apply to a CSDP operation.

b. When IHL applies the principles of necessity, proportionality, humanity and distinction are pertinent.

20. Applicable International Human Rights Law includes:

a. The right to life (this right is subject to exceptions that are more limited outside the context of armed conflict, including stricter necessity and proportionality requirements);

b. The prohibition against torture (regardless the classification of the conflict or situation);

c. The prohibition against other inhumane or degrading treatment.

Generally, the degree of application of International Human Rights Law depends on the situation (e.g. Armed Conflict or not) the military operation is executed in.

21. Likewise, any use of force in self-defence is subject to the requirement of necessity and proportionality.

22. For NLC employing a chemical effect, it is essential to note that the use of Chemical Weapons (CW – note: the most common CW NLCs are irritants such as CS Gas and Pepper Spray) is limited by IHL. Great care must be taken, on a case by case basis, to ensure that when considering the employment of any CW NLCs, that especially IHL, including the CWC, is not breached. It is important to note that the national legal positions across EU MS differ on use of NLCs by Military personnel (here we are addressing irritants such as CS Gas and Pepper Spray). This is a key factor which must be taken into account when planning.

23. For NLC employment, it is essential to note that the use of laser is limited by International Humanitarian Law (IHL).

24. For other types of NLC (i.e. non CW), one cannot refer to specific international conventions but general IHL and/or Human Rights Law principles and rules apply.

In addition to these three specific EU policy documents on the behaviour of EU-led military forces it must be mentioned that the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy (HR) in April 2015 adopted a Joint Communication to the European Parliament and the Council on the elaboration of a new Action Plan on Human Rights and Democracy for the period 2015-2019 (Council of Europe, 2015a). The Joint Communication identifies five strategic areas of action one of which is to ensure a comprehensive human rights approach to conflict and crises. The Communication also identifies a number of concrete objectives – and actions that should be taken by EU agencies – within each strategic area. Objective No. 22 concern mainstreaming of human rights into all phases of CSDP planning, review and conduct. It is stated that the the EEAS and Member States by 2017 should have:

- a. Developed 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 mainstreaming of human rights, IHL, child protection and gender, including UNSCR 1325.
- b. Implemented the new common code of conduct for CSDP civilian missions, once it has been adopted, 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.

Finally, although not a policy document in its strict sense, it should be noted that military personnel in EU-led military operations are provided with as so-called Pocket Card or Soldier's Card describing the most pertinent rules of behaviour they are required to respect in the specific mission. Soldier's Cards contain restricted material and are not publicly accessible. However, extracts from the Soldier's Card for ESDP Personnel in the EUFOR CONGO (European Force in the Democratic Republic of Congo) has been made publicly accessible.²⁸ This Soldier's Card contains a section on human rights where it is stated:

Human Rights' Core Points

- (1) Transfer of detained persons is allowed only to authorities who are specifically designated by EUFOR RD Congo.

²⁸ The extract of the Soldier's Card can be found here: <<http://data.consilium.europa.eu/doc/document/ST-11359-2007-EXT-1/en/pdf>> accessed 1 June 2015.

- (2) Report all observations regarding violations of Human Rights via your chain of command.
- (3) Document all observations regarding violations of Human Rights.
- (4) Protection of civilians under imminent threat of physical violence in the areas of your deployment is part of your mandate.
- (5) Take care of particularly vulnerable groups (i. e. women, children).
- (6) You are personally responsible for respecting and promoting Human Rights.

In addition to the documents mentioned above which are (partially) publicly available it must be borne in mind that a number of internal classified documents elaborated for the specific military operation might include more specific operational guidance on IHL and IHRL. Subsequent planning documents, especially the Concept of Operations (CONOPS) and Operation Plan (OPLAN), and the rules of engagement will contain more specific guidance in this respect, including on the use of force.

In conclusion, it is clearly laid down in CSDP policy documents – albeit in a rather general and superficial way – that EU-led military forces as a matter of policy shall respect IHL and IHRL in relation to persons directly affected by their actions. Furthermore, they should promote respect for human rights by third States and non-State actors through e.g. training, supervision and monitoring. However, it remains unclear and dependent on the specific factual circumstances when there exists an armed conflict; when the EU/Member States will become party to such conflict; and how potential conflicting standards in IHL and IHRL, for instance in relation to the right to life or detention, should interact in times of armed conflict.

Furthermore, the question remains as to whether the EU/Member States are under a legal obligation to respect and protect IHL and IHRL during EU-led military operations in third States.

F. Are the EU and its Member States bound by IHRL and IHL when acting in third States?

As already described in the Report on factors which enable or hinder the protection of human rights (Lassen et al., 2014), an international organisation such as the EU, can be bound by international law, including IHL and IHRL, in three ways: (i) through terms of the international organization's constituent document, (ii) if the organization has become party to an international convention and (iii) through general rules of international law. The EU may therefore be bound by IHL and IHRL through:

- IHL and IHRL obligations derived from the Treaties (TEU and TFEU), in particular the CFREU and the ECHR,
- IHL and IHRL treaty obligations the EU has acceded to, and
- Customary international humanitarian and human rights law.

As regards human rights obligations derived from the treaties, the chapter will be delimited to the ECHR (addressed in section E.1. below) and the CFREU (addressed in section E.2 below).

It is evident that the EU and its Member States are bound by human rights standards comprised in these legal sources when acting internally on EU territory. It is, however, more controversial and unsettled whether these IHL and IHRL also bind EU and Member States involved in military operations externally in third States outside EU territory. This will be further elaborated on below.

1. The extraterritorial use of the ECHR

The geographical scope of ECHR Member States' obligations under the ECHR has been very much debated in recent years. The ECHR is applicable to all individuals under the 'jurisdiction' of the Member State, comprising all individuals present on a State's own territory, but, in exceptional circumstances, it can also be applicable to extraterritorial behaviour.

The ECtHR distinguishes, albeit not always explicitly, between two different ways in which States can violate the human rights of persons outside their own territory on another State's territory: through the extraterritorial *effect* of the ECHR; and through the extraterritorial *application* of the ECHR.

While the extraterritorial application of ECHR relates to acts a State performs outside its own territory on the territory of another State leading to a possible human rights violation, the extraterritorial effect of ECHR concerns acts a State performs on its own territory leading to a human rights violation on the territory of another State. The extraterritorial application and effect will be briefly discussed below.

a) The extraterritorial effect of the ECHR

In several cases, the ECtHR has referred to the 'extraterritorial effects doctrine' but it has never discussed the effects doctrine in a more comprehensive and in-depth way. The ECtHR has stated that States can be accountable for legislative and executive measures taken within their territory, which directly interfere with the ECHR rights of persons in another State (Heijer, 2012). Most cases concern the extraterritorial effect of legislative measures (see e.g. *Kovacic v Slovenia* from 2003), but the ECtHR has also referred to the doctrine in relation to executive measures (see e.g. *Soering v UK case* from 1989). The question remains whether the extraterritorial effects doctrine can be applied where there is no link whatsoever between the responsible State and the victim.

The extraterritorial effects doctrine has also been recognized by the UN Human Rights Committee (UN HRC) in relation to the International Covenant on Civil and Political Rights (ICCPR), albeit not explicitly. In its Concluding observations on a State report from Iran, the Committee found that a State violates the right to security of person under Art. 9 of the ICCPR if it from its own territory purports to exercise jurisdiction over a person outside its territory by issuing a fatwa or similar death sentence authorizing the killing of the victim (UN Human Rights Committee, 1992, para. 256).

The 2014 recommendation from the UN HRC to the USA to ensure that extraterritorial drone attacks and surveillance operations comply with the ICCPR can possibly also be explained under the extraterritorial effects doctrine (UN Human Rights Committee, 2014, para. 9).

The extraterritorial effects of human rights has also, at least indirectly, been accepted by the CJEU in the *Zaoui-case* from 2004. In *Zaoui*, the applicants sought compensation for the loss of a family member killed by a Hamas bomb in Israel. The applicants claimed that the EU Commission's grant of funds to education programs and projects in Palestinian territories, had incited hatred and terrorism and had led to the attack carried out by a Palestinian terrorist. The CJEU stated that there must be '[a] *direct link of cause and effect* between the wrongful act of the institution concerned and the harm pleaded, a causal link in respect of which applicants bear the burden of proof' (emphasis added).

As no such direct link was established the CJEU dismissed the case, however, it was not disputed that the EU could be responsible for the extraterritorial effect of EU policies.

The extraterritorial effects doctrine will probably only in exceptional situations be relevant in relation to CSDP operations where EU-led military forces are present on the territory of third States. Hence, it will not be further discussed in this chapter.

b) The extraterritorial application of the ECHR

During CSDP military operations, the EU-led military forces will be present and exercise their power on third States' territory, hence, it is more relevant to discuss it in the context of the extraterritorial application of the ECHR.

The ECtHR has found that the ECHR is applicable when a State exercises 'effective control of an area' on the territory of another State or exercises 'authority and control over individuals' on another State's territory, e.g. when arresting or detaining individuals on another State's territory.

The ECtHR indicated in the *Al-Skeini* case from 2011 that the ECHR – in addition to the two mentioned situations where a State exercises effective control over areas or individuals – might also be applicable to extraterritorial acts when a State is exercising 'public authority' on another State's territory with the 'consent, invitation or acquiescence of the Government of that territory' (*Al-Skeini and Others v. UK*, para 135). The ECtHR found that individuals killed by British military ground troops during patrol in British-occupied areas in Iraq in 2003 — areas over which the UK exercised some of the 'public authority' normally to be exercised by the Iraqi government — fell within UK jurisdiction under Article 1 of the ECHR. Consequently, the UK was bound by the ECHR. The deceased were not under the physical control of British soldiers when they were killed, but this was not required since the UK exercised 'public authority' at the time.

However, the ECtHR did not specify what is required for a State to exercise 'public authority', normally to be exercised by the territorial State. Does it require a regular occupation as defined in IHL? The UK was undoubtedly an occupying power in Iraq in 2003. Or can lesser degrees of control and authority suffice? In the *Al-Skeini* case the ECtHR referred to three earlier judgments, concerning the exercise of judicial authority and primary education on other States' territory, where the Court had found that the State Parties involved were exercising 'public authority' on the territory of another State. These judgments seem to imply that less intense forms of control and authority can amount to 'public authority'. The Court, furthermore, stated more generally in the *Al-Skeini* case:

Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out *executive* or *judicial functions* on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (emphasis added).

The UN Human Rights Committee has laid down that the ICCPR is applicable to anyone within the 'power or effective control' of a State Party acting outside its territory, regardless of the circumstances

in which such power or effective control was obtained (Human Rights Committee, 2004, para. 10; Human Rights Committee, 1986).

To sum-up it can be concluded that the EU and its Member States will be bound by the ECHR in military operations to the extent the EU-led military forces exercise effective control over territory or individuals in a third State. An example could be if EU forces arrest or detain an individual in a third State. On the contrary, pursuant to the case-law of the ECtHR, EU-led military forces will arguably not be exercising effective control over individuals when using force in military operations, e.g. the targeting and eventually killing of individuals during patrol or during active armed hostilities.

However, whether the extent of the extraterritorial application of the ECHR (as long as the EU has not yet acceded the ECHR and become a Member) is to be transposed fully into the EU context, or whether the transposition of the ECHR law into EU law (cf. Art. 6(3) of the TEU), may alter the scope of application, in particular with reference to the specific nature of EU constitutional order (Naert, 2012, p. 43).

2. Extraterritorial application of the CFREU

Likewise, it has been debated whether the CFREU is applicable when the EU – or Member States implementing EU law – are acting in third countries, for example in relation to EU delegations and missions, Frontex, etc., but neither the CJEU nor the ECtHR has ruled on the question.

Pursuant to Art. 51 of the CFREU, the Charter is applicable to all EU institutions and Member States when implementing EU law. There are no territorial or jurisdictional delimitation similar to Art. 1 of the ECHR and other international human rights instruments.

Against this background it is argued by some scholars that there are no territorial limits to the application of the Charter. The fundamental rights obligations follow EU activities, as well as Member State activities, when implementing EU law, including in third States. This follows from the fact that EU human rights obligations are applicable in all areas governed by EU law, or as the CJEU puts it: '[T]he applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter [CFREU]' (Case C-617/10 *Åkerberg Fransson*). The only threshold requirement, therefore, is whether EU law applies to the particular circumstances (Moreno-Lax and Costello, 2014, p. 1658). Therefore, it could be argued that this involves situations when Member States implement Council Decisions initiating a CSDP operation (Naert, 2012, p. 42).

Other scholars argue with reference to Art. 52(3) of the Charter that the CFREU must be interpreted in the light of the ECHR, limiting the scope of application of the Charter to individuals under the 'jurisdiction' of the EU. As spelled out by the ECtHR, this would mean that the CFREU is only applicable in situations where the EU exercises effective control over *territory* or *individuals* on another State's territory (Nowak and Charbord 2014, p. 77).

However, as neither the CJEU nor the ECtHR has ruled on the question, the state of the law remains unsettled.

3. Extraterritorial application of IHL and IHRL conventions the EU has acceded to

In addition to the human and fundamental rights which are applicable within the EU as laid down in Art. 6 of the TEU, the EU can be bound by IHRL to the extent the EU ratifies international human rights conventions. The EU may, pursuant to a special procedure in Title V of the TEU, ratify or conclude agreements and conventions with third countries or international organisations. According to Art. 216 of the TEU, ratified conventions become binding on the institutions of the Union and on Member States when they are implementing EU law.

The CJEU has consistently held that once an international agreement concluded by the EU enters into force, the agreement forms an 'integral part' of EU law (e.g. case 181/73 *Haegeman*). The Court has also ruled that Member States are in violation of their obligations under EU law where they fail to adopt measures necessary to implement an international agreement concluded by the EU. Hence, international agreements entered into by the EU bind the Member States by virtue of their duties under EU law and not international law (Craig and Búrca, 2011, p. 338).

The EU may, thus, ratify international human rights conventions and international humanitarian law conventions, for example the four Geneva conventions that have been ratified by all States, including all EU Member States.

However the EU is, with one recent exception, not party to any international human rights treaties. The EU ratified the UN Convention on the Rights of People with Disabilities in 2011. It was the first comprehensive human rights treaty to be ratified by the EU as a whole. It is laid down in Art. 11 of the Convention concerning situations of risk and humanitarian emergencies that:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Apart from this broad and rather imprecise statement, the convention will probably only be of rather limited relevance in relation to EU-led military operations in third States. However, it is feasible that the EU may want to consider ratifying additional IHRL conventions and, not the least in relation to CSDP operations, IHL conventions in the future. However, there are some evident legal obstacles as some of these conventions are open only for ratification by States and would have to be amended to allow the EU as an international organization to accede to the convention.

4. The extraterritorial application of customary international humanitarian law and human rights law

Finally, IHRL and IHL can be applicable to EU-led military operations in third States by way of customary international law.

It is argued that (some) international human rights and international humanitarian law norms hold the status as customary international law or general principles of law and as such are not limited to

situations occurring ‘within the jurisdiction’ of States as human rights conventions. On the contrary, it is argued that customary international norms must be respected and protected by States wherever they act (Cassimatis, 2007; Cerone, 2007).

The duty to respect life, for example, has turned into customary international law and, therefore, a State’s duty to respect the right to life (as opposed to its duty to ensure that right) follows its agents, wherever they operate. This would imply that EU-led military forces would be bound by IHL and IHRL standards that are customary international law also in situations where the ECHR will not (necessarily) be applicable i.e. where the EU-led military forces are not exercising effective control over territory or individuals.

Authoritative sources have supported this view. Two UN Special Rapporteurs have claimed that the right to life is customary international law and applicable to extraterritorial killings:

The right to life [has status] as a general principle of international law and a customary norm. This means that, irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders (UN Special Rapporteur on extrajudicial, summary and arbitrary executions, 2013, para 43; UN Special Rapporteur on counter-terrorism and human rights, 2013, para. 60).

Likewise, the International Committee of the Red Cross (ICRC) has stated:

A legal issue that could be posed in this scenario [extraterritorial targeted killings with armed drones] is the extraterritorial applicability of human rights law based on the fact that the state using force abroad lacks effective control over the person (or territory) for the purposes of establishing jurisdiction under the relevant human rights treaty. *It is submitted that customary human rights law prohibits the arbitrary deprivation of life* and that law enforcement standards likewise belong to the corpus of customary human rights law (emphasis added) (ICRC, 2011, p. 22).

Similar arguments have been put forward by researchers e.g. in a report to the European Parliament:

The international law prohibition on murder and extrajudicial killings does not depend on the applicability of particular human rights treaties, but can safely be regarded as part of customary law, and even as a general principle of law binding upon all States at all times and in all places (Melzer, 2013, p. 18).

Even though a number of legal experts have argued that customary international law and general principles of law are binding on States and international organisations when acting on other States’ territory, this is contended and there is clearly no uniform widespread State practice or *opinion juris* supporting the position. First, there is no consensus among States as to which IHL and IHRL standards have turned into customary international law or general principles of law. Second, even if accepted that certain IHL and IHRL norms have turned into customary international law, this does not in itself imply

that there are no geographic or jurisdictional limitations to such custom. It would require further evidence of State practice and *opinion juris* to suggest that there are no geographic or jurisdictional limitations to a norm of customary international law. This is the case in particular in relation to IHRL where treaty law requires a jurisdictional link between the State and the individual.

G. Conclusions and recommendations

It is clearly pronounced in the TEU that the EU – in its relations with third States – shall contribute to the protection of human rights. The EU's action on the international scene shall be guided by international law and human rights.

In 2003 (with revisions in 2008), the EU adopted a European Security Strategy with the purpose to develop a stronger international society, well-functioning international institutions and a rule-based international order. According to the strategy, the EU is committed to uphold and develop international law.

Since the launch of the first ever CSDP mission in January 2003, the EU has conducted around 30 civilian and military CSDP missions and operations. Currently, the EU has 16 ongoing CSDP missions and operations, consisting of eleven civilian missions and five military operations.

In line with the strong emphasis in the TEU on protecting human rights and international law in the EU's relations with third States, the EU has adopted a large number of operational policy documents on the protection of IHRL and IHL in CSDP military (and civil) operations and missions. Hence, it is clear that EU-led military forces from a policy view shall comply with IHRL and also IHL standards when engaged in military operations in third States. These are mainly the rights protected in the ECHR and the CFREU.

However, from a legal point of view, it remains unclear as to whether EU-led military forces are required/bound to respect and protect the ECHR, the CFREU and IHL and IHRL standards when involved in CSDP military operations in third States. Three legal factors can hamper the effective protection of IHL and IHRL standards by EU-led military forces in CSDP operations.

1. Incoherence between EU operational policy documents related to third States and to the EU

As described in section E, the EU has adopted a number of operational policy documents on how to strengthen and ensure that both third States and EU-led military forces respect and protect IHL and IHRL standards in CSDP missions and operations. However, there is a remarkable difference in how thorough and detailed the EU has thought to regulate and influence the conduct of third States compared to its own/Member States' conduct. While operational policy documents on how to ensure that third States comply with IHL and IHRL standards – and the measures EU can take in this regard – appear detailed and comprehensive, the policy documents on how to ensure that EU-led military forces comply with IHL and IHRL standards appear very brief, general and superficial. Furthermore, policy documents towards third States establish EU supervision and monitoring mechanisms while this is not the case for policy documents on EU-led military operations. In the policy document on promoting compliance with IHL – for example – it is laid down that EU Heads of Mission and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives,

in their reports about a given State or conflict, should include an assessment of the IHL situation with special attention to information which 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. On the contrary, it is not specified in public available EU policy documents on EU-led military operations if and how the EU should monitor and supervise whether EU-led forces comply with relevant IHL and IHRL standards. Such apparent double standards are difficult to explain and legitimize and constitute a legal factor which may potentially undermine the protection of IHL and IHRL during CSDP military operations and thereby also undermine the effectiveness of the CSDP itself.

2. Which substantive IHL and IHRL standards shall EU-led military forces comply with?

It remains unclear which substantive IHL and IHRL standards EU-led military forces shall comply with during military operations in third States. The description in the public accessible EU operational policy documents in section D as to which substantive IHL and IHRL standards EU-led military forces shall comply with in military operations appears to be brief, general and superficial. In relation to IHL it is simply mentioned that to the extent IHL applies, the principles of necessity, proportionality, humanity and distinction are pertinent. This provides for very little guidance and direction for soldiers engaged in EU-led military operations. In relation to IHRL, the only standards mentioned are the right to life and the right to freedom from torture. Other pertinent IHRL standards in times of armed conflict, e.g. the right to freedom of liberty and movement, the right to property and the right to privacy and family life are not mentioned. Furthermore, it is stated that the degree of application of IHRL depends on the situation (e.g. armed conflict or not) in which the military operation is executed. Hence, it is not clarified how IHL and IHRL should interrelate in situations of armed conflict and the decision on this will eventually be left to the EU-led soldiers on the ground.

Also from a legal point of view there is much doubt and uncertainty about which IHL and IHRL standards EU-led military forces are required to respect and protect during military CSDP operations. It is not clear how IHL and IHRL standards should interrelate in situations of armed conflict, including potentially conflicting standards, e.g. in relation to the right to life or freedom of liberty. Case-law and opinions from human rights monitoring bodies differ and there is no general agreement among States.

Furthermore, the issue of attribution of conduct can also cause legal uncertainty. As mentioned in the introduction, the chapter focuses on the question which international IHL and IHRL standards are applicable in CSDP military operations in third States. It falls outside the scope of the chapter to discuss attribution and international responsibility i.e. whether the conduct of an EU-led military force in a third State leading to a possible IHL or IHRL violations should be attributed to the EU as an international organization or to the involved Member State(s) and thus whether the EU or the Member State(s) or both (shared responsibility) could be held responsible for the violation (see in this regard also The International Law Commission, 'Draft articles on the responsibility of international organizations', 2011, more specifically Part Five on the responsibility of a State in connection with the conduct of an international organization). Hence, the report focuses on the applicable international rules rather than on attribution.

However, due to the fact that the EU and the troop-contributing EU Member State(s) are bound by different IHL and IHRL norms, there is a link between attribution and the question which international rules are applicable to EU-led military forces in CSDP operations in third States. In relation to IHRL, the EU is broadly speaking only bound by the ECHR and the CFREU (and the UN Disability convention ratified by the EU) whereas all EU Member States in addition have ratified, and are bound by, a large number of international human rights conventions e.g. the UN convention against torture and the UN convention against enforced disappearances, both conventions which can be very relevant in situations of armed conflict. Hence, the range of applicable IHRL norms are much broader if the EU-led military conduct is attributed to the troop-contributing EU Member States than if it is attributed to EU. This is also the case in relation to IHL. If the military conduct is attributed to EU Member States they will clearly be bound by the four Geneva conventions, the two additional Protocols to the Geneva conventions from 1977 and the Hague conventions on the means and methods of warfare as they are ratified by all EU Member States. On the contrary, if the military conduct is attributed to the EU as an international organization, the EU will only be bound by IHL rules that have emerged into customary international law. Furthermore, it is contested whether these rules are applicable to extraterritorial behaviour in third States.

Since there is much debate and uncertainty as to whether the conduct of EU-led military forces should be attributed to the EU or to the troop-contributing EU Member States or to both there is, as a corollary, also much uncertainty as to the question which IHL and IHRL standards are applicable to EU-led military forces.

3. Are IHL and IHRL standards applicable in third States?

Even if it were clear which substantive IHL and IHRL standards EU-led military forces should respect, it is unclear whether these standards are applicable *ratione loci* to EU-led military operations in third States. The geographic scope of application (*ratione loci*) of IHRL and of customary international humanitarian law is much debated and unclear.

According to consistent case-law from the ECtHR, the ECHR is only applicable when EU-led military forces exercise effective control over territory or individuals in third States. In practice this will arguably imply that the ECHR would be applicable to EU-led military forces only when they bring individuals inside an EU-controlled camp in a third State or when EU-led forces arrest or detain individuals during operations on the ground, e.g. during a patrol outside the camp. Hence, there seems to be a gap between EU policy documents requiring EU-led military forces to respect and protect IHL and IHRL, and the legal requirements under international law. However, whether the extent of the extraterritorial application is to be fully transposed into the EU context, due to the transposition of ECHR law into EU law and the specific nature of the EU constitutional order, also remains unsettled. Such gap cannot be closed with international customary law. Even though it may be accepted that certain norms in IHL and IHRL may have turned into customary international law this does not imply that there are no territorial or jurisdictional limitations to such custom and, hence, that EU-led military forces would be under an international legal obligation to comply with the customary norms when operating in third States.

Contrary to the ECHR and customary international law, there are no geographic or jurisdictional limitations to the application of the CFREU. The CFREU is arguably applicable everywhere the EU/Member States exercise EU-law. Hence, EU-led military forces will arguably be bound by the CFREU during CSDP military operations in third States, also when involved in e.g. combat, search and patrol operations exercising no prior effective control over the individual. A number of rights in the CFREU can be of particular relevance in this regard, e.g. Art. 2 on the right to life; Art. 3 on the right to integrity of the person; Art. 6 on the right to liberty and security; Art. 7 on private and family life, home and communications; Art. 8 on the right to protection of personal data; Art. 12 on freedom of assembly and association; Art. 17 on the right to property. These CFREU rights must arguably be respected by EU-led military forces operating in third States, even in situations where they are exercising no prior effective control over the affected individual.

4. Recommendations

On this background it can safely be concluded that – both from a legal and from an operational policy point of view – there is much doubt and uncertainty as to which IHL and IHRL standards EU-led military forces are required to respect and protect during EU-led military operations in third States (the question about applicable international standards). Furthermore, there is much uncertainty about whether it is the EU or the troop-contributing Member State or both that is responsible for a possible violation of IHL or IHRL during EU-led military operations in third States (the question about attribution).

The answer to the two questions on applicable international standards and attribution must be assessed on a case-by-case basis depending on the specific operation, the specific facts and the specific type of conflict. Hence, in order to get a full picture of how IHL and IHRL is integrated into and respected during EU-led military operations in third States it will be necessary to examine each specific military operation and, to the extent possible, to have access to restricted EU material.

At the same time the monitoring and supervision of IHL and IHRL standards in EU-led military operations is weak, not the least at the international level. Therefore, it cannot be foreseen that monitoring bodies, e.g. the CJEU or the ECtHR, will be able to remedy the existing norm uncertainty and provide useful guidelines on the scope of application and substantive content of IHL and IHRL standards in EU-led military operations in third States. The CJEU has as described earlier almost no competence in relation to CFSP. The ECtHR might eventually be called upon to decide a complaint concerning the conduct of an EU-led military operation in a third State. However, until the EU has become a party to the ECHR, the ECtHR will only be competent to decide such case if the Court finds that the military conduct is attributed to the involved troop-contributing EU Member State(s) and furthermore the case will solely be decided – also *ratione loci* – on the basis of the ECHR not the CFREU (or IHL standards). Regarding the EU's possible accession to the ECHR, see also the CJEU opinion of 18 December 2014 where the Court highlights that it is problematic for the EU to accede to a Treaty/the ECHR whereby another Court/the ECtHR would have review powers of a kind and scope not possessed even by the CJEU.

On this background it is recommended that the EU considers:

- The possibility of ratifying additional IHRL and IHL conventions relevant in CSDP military operations, including the four Geneva conventions and the two optional protocols from 1977.

Furthermore, it is recommended that EU – in line with action no. 22 in the Joint Communication from 28 April 2015 of the European Commission and the HRVP (*Action Plan on Human Rights and Democracy (2015-2019)*), see section E above – further specifies and clarifies in operational documents:

- Which IHL and IHRL standards EU-led military forces shall comply with during military (and civil) CSDP operations in third States and how these – potentially conflicting – standards should interact in different scenarios;
- How EU-led forces shall ensure that the relevant IHL and IHRL standards are complied with in practice; and
- Who should monitor and supervise that EU-led forces comply with the relevant IHL and IHRL standards.

Finally, it is recommended that the EU:

- Initiate a full review of how IHL and IHRL have been integrated into and protected during past and ongoing EU-led military operations in third States with a view to identify lessons learned and good practice which can be integrated into future EU-led military operations.

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VII. Conclusion

This report is a follow-up to the Report on factors which enable or hinder the protection of human rights (report D 2.1), which concerns the mapping and identification of factors which enable or hinder the protection of human rights in the EU's external and internal policies. The first report (D.2.1.) assessed a wide range of factors namely historical, political, legal, economic, social, cultural, religious, ethnical and technological factors and their impact on the EU's protection of human rights and recommended specific factors in need of further scholarly exploration and study, most notably for being affected by globalisation processes.

This present report (report D.2.2) builds on the findings and conclusions of the first report. It provides an in-depth and thorough examination of five of the most pertinent factors identified in the first report that needed further research. The five selected factors that are further explored in this report, in chapter II – VI, are in many respects intertwined and inter-related. It is beyond the scope of this report to undertake an extensive analysis of this interaction. Nevertheless, some cross-cutting themes and issues can be derived from the in-depth study of the five selected factors. These cross-cutting themes will be further discussed below after a brief summary of the subject matter and findings of each of the five studies.

A. Summary and key recommendations

Chapter II on Anti-Discrimination and the EU's external policies shows that the EEAS has worked hard to address social factors that hinder the realisation of human rights for many people around the globe. The most important approach in this regard is the integration of anti-discrimination and equality considerations and principles in all areas and policies of the EEAS. Instruments such as the EU Strategic Framework and Action Plans as well as the respective Human Rights Guidelines have reportedly had a positive effect on the anti-discrimination work of the EEAS, as they define procedures concerning contentious discrimination issues, de-personalise, and at the same time institutionalise anti-discrimination policies throughout the EEAS. However, problematic points are, amongst others, the focus on the process-level, which includes the risk of narrowing down anti-discrimination and equality policies to a technical and bureaucratic procedure, as well as the use of ill-defined and even flawed concepts of discrimination and of groups the policies are aimed at. Another difficult point in this context refers to the issue of coherence, such as different anti-discrimination and equality standards used by EU- and Member States' delegations, double standards, the uneven integration of anti-discrimination principles in different EU policy fields, as well as the dimension of internal-external coherence. The latter refers, for example, to the problem that different grounds and areas of discrimination are considered and implemented in external rather than internal policies and laws. Finally, the effectiveness of anti-discrimination and equality policies in the EEAS is defined in terms of effectiveness in representation rather than in terms of effectiveness in impact. Thus, the focus is on consolidating the EU as an actor that represents certain values and norms, such as tolerance and anti-discrimination, which is able to

defend these norms against other actors, rather than on the positive effects these policies have on the people on the ground.

Chapter III on ethnic factors focuses on the EU's internal policies of non-discrimination and equality. The study shows that there are potentially strong drivers for the promotion and protection of ethnic minorities' rights in the EU and among EU Member States. The very existence of anti-discrimination legislation, for instance, marks recognition of the need to combat racism and discrimination based on ethnic origin. Unfortunately, the initial excitement of adoption and transposition of the anti-discrimination directives and the eagerness of the candidate countries during accession processes to comply with EU legislation, was later replaced by reluctance of Member States or by some resistance to taking measures to effectively realise substantive equality in rights of ethnic minorities.

An amalgamation of historical, legal, economic and political factors contributes to the reluctance of Member States to further develop and mainstream the core values of non-discrimination and equal treatment on a national level. On the EU level, these factors challenge efforts of mainstreaming non-discrimination in policies and directives and in the Union's approach to addressing the economic crisis or the accelerated globalisation we experience with large numbers of people risking their lives to reach the shores of Europe.

Chapter IV on religious factors concerns religious minorities under pressure and focuses on how religious, historical, cultural and political factors have influenced the ways in which the EU promotes the protection of religious minorities and their right to enjoy freedom of religion as well as other rights. Religiously related acts of radicalism, hate crime and extremism are also included in the study. The issue of religious and cultural diversity and tolerance as well as the protection of religious minorities are among the biggest challenges facing the EU in the area of religion, both in relation to the EU Member States and globally in dealing with third countries.

The chapter starts with a discussion of conceptual issues of particular significance to EU policies concerning religious minorities, in particular secularism and the EU. The chapter proceeds to set the scene by means of describing the historical, cultural and political factors that have led to putting religious minorities under pressure in a global context as well as within EU Member States.

After a sketch of the international human rights instruments covering the protection of religious minorities, the EU instruments concerning internal actions are outlined, followed by a discussion of the scope and efficiency of these instruments in meeting the challenges posed in relation to religious minorities in EU Member States. Generally speaking, the EU steers away from a common line on religious affairs in the Member States, which have a variety of ways in which to organise their religious affairs and the relationship between State and religion. Hence, religious minorities, too are organised vis-à-vis the state in different ways across Europe, and the way in which freedom of religion is interpreted varies also. At the level of law, the EU Member States have not succeeded in agreeing to a directive covering anti-discrimination vis-à-vis religion. A survey on what this has meant for the promotion of equality in regard to, amongst others, religious minorities, has shown that there is a wide variety across the Member States. EU Fundamental Rights Agency reports demonstrate that freedom of

religion is insufficiently protected within the EU and that, for instance, Jewish minorities across Europe perceived a highly increased level of anti-Semitism.

The chapter subsequently analyses EU instruments relating to external actions. The EU, in its external actions, has a progressive and comprehensive interpretation of freedom of religion or belief and of the protection of religious minorities. Overall, the EU demonstrates a strong commitment to promote the protection of the rights of religious minorities. However, there are several delimitations to the EU's policies in this area. First of all, the Guidelines for Freedom of Religion and other instruments are not binding, and second, the EU staff appears not always sufficiently equipped to deal with the highly complex interplay between state policies, religion and human rights. Both elements contribute to a lack of efficiency in the promotion of equal rights for religious minorities, a point which is even more pronounced because the EU Member States do not systematically deal with the protection of religious minorities in their bilateral relations with third States.

The chapter proceeds to square the EU external and internal actions concerning religious minorities with a particular focus on the issue of coherence and incoherence between the actions. The issues of incoherence is shown to affect the level of efficiency of the EU, both in its internal and external endeavours to promote the protection of religious minorities.

Chapter V on economic factors addresses elements of consistency in the external policies of the EU. The chapter examines how human rights are integrated into the external programming plans under the EU's two largest development funding instruments, the European Development Fund (EDF) and the Development Cooperation Instrument (DCI). From the 49 National Indicative Programmes (NIPs) and Multiannual Indicative Programmes (MIPs) that are available, it is possible to obtain a substantial level of insight into how human rights are integrated across sectors and with respect to synergy between economic sector concerns and human rights. Specifically, the chapter addresses to which degree the EU is pursuing a human rights-based approach in its country planning in the global South. The object of analysis is also how synergy is envisaged between the two basic pillars of economic growth and democratisation, on the one hand, and human rights, on the other hand, in the planning of the programs in the global South.

Finally, and related to the former question, in which sectors are human rights elements integrated with most vigor and what does the nature of human rights integration indicate about the overall implementation of a human rights-based approach (HRBA)? In answering these questions the chapter combines a quantitative content (word count) analysis with documentary case studies of selected countries. Examining whether a human rights-based approach was pursued in EEAS programming, it is found that approximately a fifth of the NIPs/MIPs refer to the human rights-based approach. While a human rights-based approach is therefore not a strong explicit element, it does prevail implicitly in terms of a general adherence to the HRBA principles. However, when considered from the perspective of sector-level programmes, the picture changes somewhat. Only eight of the 127 sector programmes, corresponding to 6%, contain an explicit reference to the rights-based approach, and except for vulnerable/marginalised groups none of the principles are mentioned in more than a third of the interventions. Thus, while the key principles of rights-based development are widely mentioned in the

documents, they appear to be less consistently implemented in sector interventions. It can be concluded that the incorporation of human rights into the formulation of sector programmes under the two largest development instruments of the EU appears to be strongly biased towards interventions in the areas of governance, democratization and justice. In other words, the mainstreaming of human rights throughout all sectors is far from realised according to the planned work. Furthermore, it is relevant to stress that the sectors with the most important economic implications, i.e. agriculture, energy, and infrastructure, are also the sectors where human rights principles are found at a very modest level.

A general conclusion is therefore that the synergy envisaged between human rights planning and economic development is modest, in some cases non-existent. A low and very modest overlap exists between economic programming and human rights. The study also indicates that economic and social rights are much more weakly present in programming compared to justice and governance efforts. Finally, the case studies indicate, as far as results-based management planning is concerned, that human rights objectives and indicators are present with some strength in the governance sector, while less so in the socioeconomic sector programs. Overall, this chapter confirms a general finding of the previous mapping, namely that human rights are unevenly and inconsistently integrated into economic and social planning. Economic factors are hardly fostering strong human rights concerns in the EU external development action and planning.

Chapter VI on legal factors focuses on the protection of international humanitarian law (IHL) and international human rights law (IHRL) in military operations and missions carried out under EU's Common Security and Defence Policy (CSDP). It is clearly laid down in the Treaty of the European Union (TEU) that the EU in its relations with third States shall contribute to the protection of human rights and that EU's action on the international scene shall be guided by international law and human rights.

The EU is currently involved in 16 ongoing CSDP missions and operations, consisting of eleven civilian and five military missions and operations. In line with the strong emphasis in the TEU on protecting human rights and international law in the EU's relations with third States, the EU has adopted a large number of operational policy documents on the protection of IHRL and IHL in CSDP military (and civil) operations and missions. Hence, it is clear that EU-led military forces from a policy view shall comply with IHRL and IHL standards when engaged in military missions and operations in third States. However, from a legal point of view it remains much more unclear whether EU-led military forces are required to respect and protect the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and IHL and IHRL standards when involved in military operations in third States.

The chapter identifies two legal factors that undermine the protection of IHL and IHRL in EU-led military operations in third States. First, the precise scope and content of IHL and IHRL obligations of EU-led military operations is unclear in law as well as in policy documents. Uncertainty as to which IHL and IHRL obligations EU-led military forces shall respect and protect in military operations in third States hinders the effective protection of IHL and IHRL. Secondly, publicly available EU human rights policy documents for CSDP military operations and missions have mainly focused on the promotion of IHRL and IHL in third States – by third States themselves – rather than on the EU's and EU-led military forces' own compliance with IHL and IHRL standards when involved in CSDP missions and operations in third States. Such

incoherence between the policy towards third States and EU/Member States is a legal factor that might hinder the effectiveness of EU human rights policies. The chapter recommends that the EU considers the possibility of ratifying additional IHRL and IHL conventions relevant in CSDP military operations and missions, including the four Geneva conventions and the two optional protocols from 1977. Furthermore, it is recommended that the EU further specifies and clarifies in an operational policy document which IHL and IHRL standards EU-led military forces shall comply with during military (and civil) CSDP missions and operations in third States and how these – potentially conflicting – standards should interrelate in different scenarios. Finally, it is recommended that the EU initiate a review of how IHL and IHRL have been integrated into and protected during past and ongoing EU-led military operations in third States with a view to identify lessons learned and good practice which can be integrated into future EU-led military operations and reflected in mission specific operational documents.

B. Cross-cutting themes

The Report on factors which enable or hinder the protection of human rights (report D 2.1.) provided a picture of a diverse, multi-faceted and multi-layered complexity. The most important policy-relevant findings of the mapping was, first, that there appeared to be gaps between progressive human rights policies and implementation in practice and, second, that there seemed to be signs of incoherence in terms of how human rights are incorporated in various sectors and areas, as well as in internal and external EU actions.

These two findings were further scrutinized in the present report and the following overarching conclusions can be deduced.

First, the study reveals that the EU's human rights policies in third States are frequently not implemented in an effective and consistent way. At the overall normative level, the EU has been very successful in adopting a large number of relevant and progressive policy documents and guidelines on the protection and promotion of human rights in third States. External human rights guidelines have been developed and adopted in relation to the five selected factors, including guidelines on anti-discrimination, freedom of religion, and the protection of children and women in armed conflict. This is in line with the Treaty of the European Union where it is laid down that the EU, in its relations with third States, shall contribute to the protection of human rights and that EU's action on the international scene shall be guided by international law and human rights.

The adopted policies and guidelines have the potential to strengthen and institutionalise the EU's human rights policies and thereby to ensure a more systematic and effective approach to promoting respect for human rights in third States. However, the in-depth studies of selected factors confirm that there frequently is a considerable gap between the EU's progressive human rights policies and the implementation of these policies in practice. The EU's external human rights policies are often implemented in an uneven and sometimes inconsistent way. An example is found in chapter IV on religious factors. At the overall policy level the EU has demonstrated a commitment in its external policies to promote the protection of the rights of religious minorities in third States. However, the implementation of the policy is hindered by the fact that the guidelines and other policy instruments are

not binding, and that EU staff is not consistently trained to deal with the immense complexity presented by religious values and policies. Another example is found in chapter V on economic factors where it is demonstrated that, while the key principles of rights-based development are widely mentioned in EU policy documents they appear to be less consistently implemented in actual sector interventions. A third example is mentioned in chapter II on anti-discrimination where it is demonstrated that EU and Member States' delegations use different anti-discrimination and equality standards and that there is an uneven integration of anti-discrimination principles in different EU policy fields.

Second, the study of the five selected factors confirms and deepens the impression gained from report D 2.1., namely that there often appears to be incoherence between the EU's internal and external human rights policies. It is remarkable that the TEU consistently uses the term 'human rights' when describing the EU's relationship with third States, whereas the term 'fundamental rights' is used when describing human rights within the EU. Furthermore, the guidelines and policies on how to ensure protection of human rights in third States seem to be more elaborated than policies on the protection and promotion of human rights within the EU. An example is found in chapter VI on legal factors and Common Security and Defence Policy (CSDP) operations in third States. While operational CSDP policy documents on how to ensure that third States comply with human rights – and the measures the EU can take in this regard – are detailed and comprehensive, the policy documents on how to ensure that EU-led military forces comply with human rights standards appear to be brief, general and superficial. Another example is found in chapter IV on religious factors, where it is shown that the EU in its external guidelines has adopted a progressive and comprehensive interpretation of freedom of religion and protection of religious minorities, whereas there is no common line on religious affairs in the EU's internal policies and the EU has been unable to agree on a directive covering anti-discrimination *vis-à-vis* religion. Chapter II and III on anti-discrimination likewise demonstrate incoherence between the EU's internal and external policies. Different grounds and areas of discrimination are considered and implemented in external compared to internal policies and laws.

The inconsistent and incoherent implementation of the EU's human rights policies, as has been documented in this report through the in-depth studies of the five selected factors, can potentially undermine the effective protection of human rights both within the EU and in the EU' external policies in third States.

At an overall level it is recommended that the EU takes measures to ensure a more effective and consistent implementation of its human rights policies and that the identified incoherence between the EU's internal and external human rights policies is reduced. Chapter II-VI comprise, as described, concrete examples of inconsistent and incoherent EU policies related to the studied factors and topics and recommend specific initiatives the EU could undertake with a view to further a more consistent and coherent EU human rights policy in relation to the studied factor and topic.

Bibliography

The following pages contain selected bibliographies for each chapter of the report. For full bibliographies, please refer to the table below.

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