



The role of human rights in the EU's external action in the Eastern Partnership, the Southern Neighbourhood and in Sub-Saharan Africa

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All shortcomings nevertheless remain of the authors' own.

Executive Summary

This report discusses the role of human rights in the EU's policy to the Eastern Partnership countries, the southern neighbours and the sub-Saharan African states. It builds on the first report of FRAME Work Package 6 – Deliverable 6.1 – which gave an overview of the types of instruments used in human rights promotion in the EU's external action.

This study faces a major challenge that stems from the scope of the field of analysis. It extends to many partners of the EU. The number of states is above 60. However, they do not belong in the same category as far as the intensity of their relations and hence their importance for the EU. There is reason to divide the state partners into three groups: 1. states of the Eastern Partnership; 2. states of the southern neighbourhood, and 3. the states of sub-Saharan Africa. Beyond the elementary grouping, states matter based on their economic and political weight and their willingness/readiness to cooperate with the EU. The three groups are also different as far as the perspective of their relations with the EU. It is clear that the states of the Eastern Partnership and southern neighbourhood matter more for the EU than sub-Saharan Africa as a whole by the intensity of relations.

It is more of a complex question whether there is “hierarchy” between the southern neighbourhood (Middle Eastern and North African states) and the states of the once existent eastern neighbourhood, since the late years of the previous decade, Eastern Partnership. It depends on the starting point whether we see this in one way or the other. Namely, if we start out from that one group, the Eastern Partnership countries, carry the perspective of EU membership whereas the countries in the southern neighbourhood, as also illustrated by the example of the application of Morocco, do not, the two groups are different. This aspect has been emphasized by many European politicians who have also advocated positive differentiation for the East versus the South. "To the south, we have neighbours of Europe. To the east, we have European neighbours...they all have the right one day to apply [for EU membership]."¹ However, if we take into account the fact that the perspective of enlargement is also distant for the Eastern Partnership countries the difference may look less significant. The pronouncement of the (then) incoming President of the EU Commission to the European Parliament that there would be no enlargement during the office term of his Commission could provide with general orientation. "... the Union and our citizens now need to digest the addition of 13 Member States in the past ten years. The EU needs to take a break from enlargement so that we can consolidate what has been achieved among the 28. That is why, under my Presidency of the Commission ongoing negotiations will continue, and notably the Western Balkans will need to keep a European perspective, but *no further enlargement will*

¹ Polish Foreign Minister Radoslaw Sikorski is quoted by Renata Goldirova, 'Eastern Partnership Could Lead to Enlargement' *EU Observer* (27 May 2008) <<http://euobserver.com/26211>>.

take place over the next five years.”² The more recent comment of Commission President Jean-Claude Juncker to Ukraine specifically in March 2016 stated that “Ukraine will definitely not be able to become a member of the EU in the next 20 to 25 years, and not of NATO either”.³ If one gives credit to the two statements, there is reason to assume that none of the states whose relations with the EU is analysed in this report would become Member State of the EU in the foreseeable future.

If the view is shared that irrespective of the unpredictability in international politics, in a quarter of a century perspective no enlargement is to take place in any of the countries analysed in this study, then as far as membership perspective there is no difference between the two groups. The prospect of membership as a factor influencing the eastern partnership countries can be removed from the equation. In fact, it is possible to simplify the difference to the legal situation: The southern neighbours cannot count on membership in accordance with the legal foundations and established practice of the EU whereas the states of the Eastern Partnership can. In legal sense, this is an essential difference. However, in light of the current situation and the statements above the difference is philosophical.

The EU has traditionally been paying more attention and allocated more resources to states, which had more intensive relations with it. As Member States take the decisions on the allocation of resources in a complex institutional system, the first priority is the interests of the current members. Memorably, there were cases when the then main beneficiaries of the EU budget (Greece, Ireland, Spain, Portugal) had to get extra guarantee that they are not going to lose because of the needs of candidates. The first priority was and will continue to be the current members due to their direct decision-making authority. They are around the table in the Council(s), and in the European Parliament. Logically, candidates for membership represent the next circle in particular when their approach to the EU is moving forward linearly and can gain membership in the short to medium term. Those states that do not belong to the categories above, understandably, attract less attention and resources. However, the states of the Eastern Partnership and southern neighbourhood are in comparatively strong position compared to others further afield. It is open to question whether the “East” or the “South” is more important. This question was particularly hotly debated as long as the two neighbourhoods were compared. Since 2009, with the launch of the Eastern Partnership there is reason to accept that the East gained more prominence. This does not only stem from the legal foundation of potentially gaining membership one day but also the fact that while the South is separated from the EU by natural boundary, the Mediterranean, three Eastern Partnership states are contiguous with EU territory. Those EU Member

² Jean-Claude Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the next European Commission (Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014) <https://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.html> accessed 1 July 2016. (Emphasis added.)

³ Jean-Claude Juncker, ‘Juncker Says Ukraine Not Likely To Join EU, NATO For 20-25 Years’ (rferl.org, 4 March 2016) <www.rferl.org/a/juncker-says-ukraine-not-likely-join-eu-nato-for-20-25-years/27588682.html> accessed 1 July 2016. The article reports on a speech of EU Commission President Jean-Claude Juncker in the Hague. However, the text of the presentation did not contain the sentence cited above. It must have been a comment in the Q and A.

States, which are neighbours of Belarus, Moldova and Ukraine also represent a pressure group in the interest of those states. Moreover, Romania has particular reason to foster the prosperity and stability of Moldova on EU resources.

Both the eastern partners and the southern neighbours of the EU face the burden that many of them do not present reassuring results as far as their democratic transformation and development. This applies to three of the six eastern partners and most of the southern neighbours. Following the so-called Arab Spring the high hopes of transformation rapidly vanished and have given way to disappointment and disenchantment. The destabilization of several southern neighbours gave priority to stability over freedom and liberal values generally. A somewhat similar process has been going on in the Eastern Partnership. It is the expectation towards the eastern partners that they would become full-fledged democracies one day. However, it is clearly noticeable that the spread of democracy, among others in light of the unsuccessful democratic transformations fostered externally by the U.S. in the first decade of this century, has given way to quest for stability. In the eastern partnership, this quest mounts further due to the geopolitical contest with the Russian Federation. However, the rivalry with Russia for the states of the eastern partnership also represents an important self-constraint to avoid alienation of those countries. It has to be pointed out, that the rivalry in the eastern partnership countries means there is additional reason not to alienate the partnership states. Even though this is fully understandable, it results in the adding of another element of consideration when strongly representing its declared values. Alienation may open the door to consider options and hence weaken the influence of the EU. The current developments in the Eastern Partnership with Belarus illustrate this best. At the same time, the EU lives quite well with more curtailment of democracy in the south than in the east. There is no possibility to offer a full analysis of this complex topic.

If we are ready to accept the concept of sequencing or hierarchy as far as the allocation of resources to states actually or prospectively closer to it, we also have to respond to the question on what basis have resources been allocated. There are three aspects to consider: 1. Resource availability, 2. Needs, 3. Priorities. 1. It is my starting point that every system works with finite resources. Consequently, it depends on the decision-makers what resources they make available. For quite some time, the EU has gradually increased the financial and human resources that it used to realize its objectives. Central redistribution has benefited from more and more resources, Member States were ready to sacrifice a larger share of their GDP that made redistribution and expansion of new tasks less difficult. Those times are gone. The Member States that are the largest contributors of the EU budget do not want to spend more, and one of them is about to leave the EU. Moreover, the population of several Member States is not supportive of further expanding communitarisation. The number of Member States has grown to an unprecedented extent. Thirteen new members joined in a decade (between May 2004 and July 2013). Most of them are net beneficiaries of the redistribution system. All those factors taken together reduce resource availability. 3. As some states joined the EU with low per capita GDP, their development, in optimum case catching up with other members requires resources. They also sit around the table when the decisions pass. Consequently, they are well positioned to take advantage of their position at the expense of states, which are exposed to EU decisions. 2. The resource needs are subject to the politico-economic assessment of their allocation. Some states are rich and their citizens are sufficiently affluent

not to face the need of EU funding. It should suffice to mention Belarus or Azerbaijan as examples. In their case the EU can forego support to contribute to development and support states, which are more in need. It is open to question whether the EU has much influence on states, which neither have the prospect of membership, nor in the need of economic assistance to their development.

The study consists of three main parts: I. Introduction underlining the evolution of human rights in the external relations of the EU. II. The case studies that offer detailed analysis how the EU's interaction with states and various regions has evolved. III. Conclusions are drawn from the case studies.

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List of Abbreviations

AA	Association Agreement
AAG	Association Agenda
AAP	Annual Action Programme
ACP	African, Caribbean and Pacific Group of States
AFJS	Area of Freedom, Security and Justice (Amsterdam 1999)
AIPPA	Access to Information and Protection of Privacy Act
AP	Action Plan
AU	African Union
CAR	Central African Republic
CARIFORUM	Caribbean Forum
CFSP	Common Foreign and Security Policy
CoE	Council of Europe
COHOM	Human Rights Working Group
CSMR	Common Strategy on the Mediterranean Region (2000)
CSP	Country Strategy Programme
DCFTA	Deep and Comprehensive Free Trade Agreement
EAC	East African Community
EaP	Eastern Partnership
EBA	Everything but Arms
EC	European Communities
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood Policy Instrument
EP	European Parliament
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GMP	Global Mediterranean Policy
GNU	Government of National Unity
HRD	Human Rights Dialogue
HRW	Human Rights Watch
ICC	International Criminal Court
ILO	International Labor Organization
JFS	Justice, Freedom and Security
JHA	Justice and Home Affairs
LGBTI	Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed
NATO	North Atlantic Treaty Organization

New ENP	New European Neighbourhood Policy
NIP	National Indicative Programme
NMP	New Mediterranean Policy (sometimes Reformed or Revised Mediterranean Policy)
ODA	Official Development Assistance
OSCE	Organisation for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PCA	Partnership and Cooperation Agreement
PHARE	Poland-Hungary: Assistance for Restructuring the Economy
POSA	Public Order and Security Act
REC	Regional Economic Communities
RFERL	Radio Free Europe Radio Liberty
SADC	Southern African Development Community
SEA	Single European Act
SPRING	Support for Partnership, Reforms and Inclusive Growth
SSF	Single Support Framework
TACIS	Technical Aid to Commonwealth of Independent States
TAIEX	Technical Assistance and Information Exchange Instrument
UfM	Union for the Mediterranean
WTO	World Trade Organization

I. Introduction: European Community Human Rights Policies

Five interrelated factors combined to create a sea change on human rights promotion within the European Community between 1972 and 2010, including: first, a growing international focus on human rights; second, the extraordinary developments in communist eastern Europe and the Soviet Union during the 1980s and immediately following 1989 leading to the end of the Cold War; third the dynamic leadership of Jacques Delors⁴ that strengthened and centralised the European Community and European external policy;⁵ fourth, the ongoing troubles in the Middle East including the 1990 Iraqi invasion of Kuwait and the subsequent international coalition to expel Iraq from Kuwait in 1991; and, finally, the continued pressures by the European Parliament on the Council and Commission to include human rights as a part of the EEC/EC external policy. Each of these ultimately had a direct bearing on European Community policies regarding human rights in the Mediterranean generally and Morocco and Egypt specifically.

A. Emergence of Human Rights in the European Community (1972-1984)

Prior to 1973, the EEC had not placed human rights on its agenda. It concaved of itself principally as an intergovernmental organisation whose focus was reducing internal trade barriers and promoting economic growth for its six founding members. It had taken the first step in 1970 to harmonise some foreign policy positions in what was called European Political Cooperation (EPC). In 1973, the EEC welcomed three new members – Denmark, Ireland, and the United Kingdom – and began to see itself as something more than an economic association.

In December of 1973, immediately following the October War between Israel and surrounding Arab states, followed by the imposition of an oil embargo that threatened the economies of Europe and the United States, the EEC convened a Summit in December 1973 in Copenhagen, the capital of one of its three new members. The Copenhagen Summit's principal task was to formulate a common energy policy for the Nine and to address the emerging crisis emanating from the Middle East that had precipitated the embargo⁶. In the lead-up to the Copenhagen Summit, the European Parliament (EP) adopted a resolution declaring "that the present tensions in international relations, and their repercussions within the Community, make it even more essential to advance the deadlines for

⁴ President of the Commission from 1985 to 1995.

⁵ Including adoption of the Single European Act 1987, and the Maastricht Treaty on the European Union 1993.

⁶ 'The Copenhagen Summit Conference' (1973) 12 Bulletin of the European Union <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwgC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013>> accessed 1 June 2016.

achieving European union”.⁷ In addition, the EP called for strengthening the European Community and formulating a political identity. Noting the recommendation from the EP, the nine-member Copenhagen Summit approved a “Declaration on European Identity” that had been drafted the previous month by the Foreign Ministers. The Declaration on European Identity included the first European Community statement on human rights:

Sharing as they do the same attitudes to build a society which measures up to the needs of the individual, *they are determined to defend the principles of representative democracy, of the rule of law, of social justice —which is the ultimate goal of economic progress—and of respect for human rights.* All of these are fundamental elements of the European Identity.⁸

It was in this context of crisis emerging from the Middle East that the EEC first articulated human rights, democracy, the rule of law, and social rights as values that helped shape European identity. The Declaration did not include any implementation plan. This Declaration noticeably treats the values of democracy and human rights as the *goal* of economic progress.

There matters lay for the next four years. Shortly after his inauguration in 1977, U.S. President Jimmy Carter announced that henceforth the promotion of human rights abroad would be an integral component of the actions of his administration, an innovation in U.S. foreign policy. (Two years earlier President Gerald Ford had reluctantly signed the Helsinki Final Act over the opposition of many in his own political party.) In April of 1977, four months after the Carter initiative, the European Council, the EP, and the Commission introduced a Joint Declaration to “stress the prime importance they attach to the protection of fundamental rights” and to pledge that “they respect and will continue to respect these rights” [Joint Declaration 5 April 1977].⁹ As in the 1973 Declaration on European Identity, the April 1977 Joint Declaration offered no action plan.

In November of the same year, the European Commission proposed, in anticipation of a Council meeting the following month, that:

The Heads of Government confirm their will, as expressed in the [1973] Copenhagen Declaration on the European identity, to ensure that the cherished values of their legal, political and moral order are respected and. to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.

⁷ Ibid point 1102.

⁸ Ibid point 2501 I.1

⁹ Joint Declaration by the European Parliament, the Council and the Commission (1977) OJ C 103/1.

They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are indispensable for membership of the European Communities.¹⁰

The Council, however, did not adopt the proposed language, but urged instead that work be undertaken to establish a “European Foundation” for the purpose of promoting human contacts, youth activities, and university exchanges, which would, thereby, present the “image of a United Europe”. This European Foundation was never created.¹¹ These early statements offered little more than a pro forma recognition of human rights as general European values, and did not pledge to take action to promote or implement them.¹²

In 1984, the European Parliament, which was at the time only an advisory body, symbolically adopted a “Draft Treaty establishing the European Union”, which had been written by parliamentarian Altiero Spinelli. The 1984 Draft Treaty included provisions on human rights in articles 4, 9 and 63.¹³ Despite the EP’s enthusiasm, the Spinelli draft was never accepted by the Commission or the Member States. It nevertheless proved to be an influential draft for the subsequent framing of the Single European Act and the Maastricht Treaty.

B. Institutionalisation of Human Rights in the Delors Commission (1985-1995)

Aside from the original figures who initiated the process of creating the European Community, including Jean Monnet and Robert Schumann, probably no figure played a more important role in strengthening and consolidating the process of European unification than Jacques Delors. Beginning in January of 1985 and continuing through three terms until January 1995, Delors served as the President of the Commission and played a decisive role in the adoption of the Single European Act and the Maastricht Treaty. During his presidency, many of the *acquis* came into effect: the single market, the Common

¹⁰ Commission, ‘Declaration on Democracy’ (Communication) COM(77) 605 <<http://aei.pitt.edu/50426/1/A10109.pdf>> accessed 1 July 2016.

¹¹ Note that the proposed European Foundation was *not* the currently existing Eurofound. Council Regulation (EEC) 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions (1975) OJ L139. It was not either the European Foundation Centre <<http://www.efc.be>>.

¹² “Indeed, ever since the 1973 Copenhagen Declaration, EU statements have reiterated that joint foreign policy practice is based on common values such as the respect for human rights. While this has led to the famous depiction of the EU as a ‘normative power,’ there is limited systematic evidence about whether these policies influence *de facto* behavior”. Joakim Kreutz, ‘Human Rights, Geostrategy, and EU Foreign Policy, 1989–2008’ (2015) 69 *International Organization* 195, 197.

¹³ European Parliament, ‘Draft Treaty Establishing the European Union (1984) Bulletin of the European Communities <<http://www.spinellisfootsteps.info/treaty/>> accessed 1 July 2016.

Foreign and Security Policy (CFSP), the Three Pillars, the strengthening of the powers of the EP, and important new initiatives with regard to the promotion of human rights and democracy.¹⁴

1. The Single European Act and New Powers for the European Parliament (1985-1988)

During his first year in office, 1985, Jacques Delors focused on the deteriorating European economy, which had been widely derided as “eurosclerosis”. His solution was to propose wide-ranging reforms and plans for what would become the Single European Act. Two months after Delors became President of the European Commission, Mikhail Gorbachev became the Secretary General of the Communist Party. Gorbachev, like Delors, was confronted by a damaged economy, but with the additional problems of a military quagmire in Afghanistan. Like Delors, Gorbachev focused his energies on profound reforms of the system he inherited. Beginning in February 1986, he promoted the terms *glasnost* (openness), *perestroika* (restructuring), and later *demokratizatsiya*. The urgency of reforms in the Soviet Union were dramatically symbolised in the April 1986 Chernobyl nuclear power plant disaster, which raised the profile of Gorbachev’s *glasnost* and *perestroika* and gradually introduced the words into western vocabularies. The same month that Gorbachev proposed sweeping changes in the Soviet Union, Swedish Prime Minister, Olof Palme, was murdered one week after delivering a speech denouncing apartheid in South Africa, thus raising the profile of the boycott South Africa movement in world affairs.¹⁵

It was in the context of these events that the EEC Foreign Ministers – and not Delors, the Commission, or the Council – issued a new “Declaration on Human Rights” on 21 July 1986.¹⁶ In this document, after affirming their commitment to “protect human rights and fundamental freedoms”, the Foreign Ministers announced their intention to “seek universal observance of human rights”. They found that the “respect for human rights is an important element in relations between third countries and [the EEC]” and that its promotion would henceforth become “an important focus of attention” and for their cooperation with other states “in any part of the world”. In this important Declaration, the Foreign Ministers insisted that “lasting peace and security are unattainable without universal enjoyment of human rights” and that the realisation of human rights “is an essential factor in *achieving peace and security*, justice and well-being in Europe” (emphasis added). Thus, for thirty years since 1986, the official position of the EU (and its predecessor institutions) has been that the establishment of human rights is a necessary precondition for the establishment of genuine security. Therefore by 1986, the EEC

¹⁴ Although Delors himself was not one of the leading forces for promoting human rights, he was at the helm during the time that newly strengthened institutions were able to raise the prominence of human rights on the international agenda. It should be noted that Jacques Delors’s influence seemed to have waned significantly during the final two years of his presidency.

¹⁵ Later that same year the U.S. Congress overrode President Reagan’s veto of a bill sanctioning South Africa until it dismantled apartheid.

¹⁶ The European Council, ‘Declaration on Human Rights’ (ec.europa.eu, 21 July 1986) <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=LK9yPhMLvLLnMQhTQ6vYKWP4cv1pytVXyTfTpQ2Qjn1pL0r0rcs!1139521418?docId=151326&cardId=151326>> accessed 13 June 2016.

foreign ministers had taken the position not only regarding the interrelationship of human rights and security, but also declaring that it was an external policy concern of the EEC.

In addition, the Single European Act (SEA) included the first human rights provision in an EU founding document. It also included another innovation that would prove to have significant effect on the future approach to human rights in the European system. Up to the time of the adoption of the SEA human rights had, for all practical purposes, not been included in any European Community treaties with third parties. The important change that led to inclusion of human rights took place indirectly in the SEA’s amendment of Article 238 of the Treaty Establishing the European Economic Community (Rome Treaty) of 1957. Whereas under Article 238 of the Rome Treaty the Council was obliged only to consult with the EP, Article 9 of the SEA required the Council to receive the “assent” of the EP before a treaty could be adopted.

Treaty Establishing the European Economic Community

Article 238 (Second Clause (on Treaties))

Treaty of Rome	Single European Act
<p>These agreements shall be concluded by the Council, acting unanimously after consulting the European Parliament].</p>	<p>These agreements shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members.</p>

Inasmuch as the European Parliament has been the institution within the EU that has most consistently advocated for human rights, this new power given to Parliament would prove to have a significant effect on how the Commission would draft future treaties, knowing that Parliament would not give its “assent” to treaties that did not include important human rights clauses. The significance of this transformation would come to light later. (See below.)

Although this amendment had nothing to do with human rights per se, it gave the European Parliament the power to assent (or not assent) to treaties. This would ultimately give the EP a significant power over what was and was not included in treaties, as well be seen below in Part II.B.3.a.

Finally, later in 1987 the European Council, perhaps acting under its President rather than in a summit, established what is now known as COHOM (the Working Party on Human Rights), which was originally named “the Human Rights Working Group” in November of 1987.¹⁷

2. EU-phoria Round One: The Events of 1989

General Secretary Gorbachev’s April 1986 references to *glasnost* and *perestroika* (see above) proved to be prescient. Between November 1986 and January 1989, the principal multilateral forum for East-West discussions on issues ranging from human rights (“the human dimension”), to security, to economics, took place in Vienna under the auspices of the Conference on Security and Cooperation in Europe (CSCE). Unlike previous CSCE East-West meetings that had proved contentious, the Soviet Union played an increasingly detached rather than obstructionist role. On 15 January 1989, the CSCE’s Vienna Concluding Document was completed.¹⁸ The Vienna Concluding Document was, arguably, the most progressive international document thus far produced dealing with human rights and security, although it was a “political” agreement rather than a binding treaty. (All CSCE/OSCE documents, accept for one, have been politically binding that helps “bringing them into force” immediately after agreement is achieved.) It set forth a series of meetings that would take place during the upcoming months to further the human rights dialogue between East and West. The Vienna Concluding Document, in retrospect, can be seen as symbolically launching the year 1989 where world attention – as in the early days of the Arab Spring in 2011 – was riveted by the peaceful protests that challenged authoritarian governments in the name of democracy, human rights, and freedom.

President Jacques Delors saw an external event, in this case the signing of the Vienna Concluding Document, as providing additional grounds for strengthening the EC. Only two days after the document was signed, Delors delivered his first major speech to the European Parliament since his inaugural address four years earlier¹⁹. Emphasising the importance of economic integration, Delors nevertheless referenced the event that occurred two days earlier.

The agreements reached in Vienna will open up new prospects for balanced disarmament, broader economic, scientific and cultural cooperation and the elimination of certain obstacles to effective enjoyment of human rights. The Community as such is involved in this and must take the opportunity to express its views more forcefully. (p. 8)

[...]

¹⁷ The sources are in conflict about the actual origin of COHOM. The earliest reference we have found is the ‘Progress Report on European Union’ (1987) 2 Bulletin of the European Union 280, 286. There already existed other “working groups” and “working parties”, and apparently the addition of yet a new working group that was to focus on human rights was not worthy of contemporaneous mention.

¹⁸ CSCE, ‘Vienna Concluding Document’ (15 January 1989) <www.osce.org/mc/40881?download=true> accessed 1 July 2016.

¹⁹ Jacques Delors, ‘Address given by Jacques Delors to the European Parliament’ (No. Supplement 1/89, 8 and 13, 1989)

Our dream is of a more assertive Europe able to set a shining example to the world and to take the lead in the fight for human rights wherever they are trampled under foot. (p. 13)

Unlike Delors's 1985 speech to the EP, which did not mention human rights as being part of the European agenda,²⁰ the 17 January 1989 address recognised that they needed to be promoted "more forcefully" and that a newly "assertive Europe" must "take the lead in the fight for human rights". Almost as if in response to Delors, on 12 April 1989, the European Parliament issued its own Declaration on Fundamental Rights and Freedom.²¹ Although the Declaration had no binding legal authority, and although it did not announce any role for human rights as a part of the EC's external relations, it constituted an additional step to raise the profile of human rights.

In April, popular protests began in Tiananmen Square impressing the world with images of popular protests against an entrenched regime – just as the Tahrir Square would do 22 years later in 2011. Coinciding with the popular uprising in Beijing, a series of dramatic events began to unfold in Eastern Europe. In May, Hungary began to dismantle its border fence with Austria. Later in the month, the three Soviet republics of Estonia, Latvia, and Lithuania renewed their symbolic declarations of independence. During the first week of June, Poles were preparing to go to the polls where, on 4 June, the Polish trade union Solidarity won national elections, becoming the first non-Communist party in Eastern Europe to win in a popular vote. The excitement caused by this series of events was dashed on the same day as Solidarity's victory by scenes of Chinese soldiers brutally suppressing the unarmed uprising. Nevertheless, the world's attention was riveted on scenes of popular outcries for human rights and democracy.

On 26-27 June, at EC's Madrid Summit, the European Council condemned human rights violations in China (Tiananmen) and South America, but focused its attention on concurrent developments in Eastern Europe. Without noting specific examples, the Council found there to be an interrelationship among the respect for human rights, security, and economic growth. In its statement of 27 June, long before the ultimately transformative events at the end of the year, the Council stated in Madrid that it:

recognizes the importance of the profound changes now taking place in the USSR and the Central European and East European countries, while regretting that serious violations of human rights still occur in some of those countries, in particular against members of ethnic and religious minorities. It has reaffirmed the determination of the Community and its Member States to play an active role in supporting and encouraging positive changes and reform. The European Council has reaffirmed the full validity of the comprehensive approach integrating political, economic and cooperation aspects which the European Community and its Member

²⁰ Jacques Delors, 'Statement by Jacques Delors, President of the Commission, to the European Parliament and his reply to the ensuing debate' (No. Supplement 4/85, 1985) <http://aei.pitt.edu/7630/1/31735055261907_1.pdf> accessed 1 July 2016.

²¹ European Parliament resolution adopting the Declaration of fundamental rights and freedoms (1989) OJ C120/51.

States follow in their relations with the USSR and with Central European and East European countries.

[...]

It reaffirms its belief that progress in arms control and disarmament, respect for human rights and the free circulation of ideas, information and persons remain necessary elements for this improved East-West atmosphere to materialize into further tangible results.²²

The G7 Summit in Paris in July – which included the EC (represented by Delors) and four EC Member States – issued separate statements on the importance of respecting human rights and on East-West Relations²³.

By August, East Germans had flooded into Western embassies (primarily those of the FRG) throughout the eastern bloc seeking political asylum while tens of thousands passed through the dismantled Hungarian border in transit to West Germany – where they were legally entitled to West German financial entitlements. In October, Erich Honecker, the General Secretary of the Communist Party of East Germany, resigned, and Hungary legalised non-communist political parties. In this context the usually staid Delors, declared in a speech on 17 October, after having first discussed economic issues that “Communist Europe is exploding under our very eyes”. Gorbachev’s perestroika and glasnost had instigated a “contagion of freedom [that] has now reached Leipzig and East Berlin”.²⁴

Although the contagion may have reached Berlin by mid-October, the most dramatic and symbolic event of the year was to come a few weeks later with the breaching of the Berlin Wall on November 9. During the week of 19 November, the enormous Wenceslas Square in Prague was packed at times with as many as 350,000 – mostly young – peaceful but adamant protestors harassed by heavily armed police, giving the world yet another powerful image of a massive popular protest against an entrenched and brutal regime. By Friday of that week, the unarmed Czechoslovak demonstrators, offering only their bodies against firearms and truncheons, convinced all members of the hardline communist government to resign. In December, political dissident Vaclav Havel, who was in prison at the beginning of the year, was elected president of Czechoslovakia.²⁵ On 11 December, Bulgaria’s communist government agreed to open elections. On December 25, in a bloody ending to an ebullient year, Nicolae and Elena Ceausescu were arrested, tried and convicted by a makeshift court, and were brutally executed. In 1990, Ukraine

²² ‘European Council: Madrid, 26 and 27 June’ (1989) 6 Bulletin of the European Communities <http://aei.pitt.edu/1453/1/Madrid_june_1989.pdf> accessed 1 July 2016.

²³ ‘1989 Summit of the Arch: Official Documents’ (G7 Summits, 14-16 July 1989) <<http://www.g8.utoronto.ca/summit/1989paris/index.html>> accessed 1 July 2016.

²⁴ Jacques Delors, ‘Address given by Jacques Delors’ (Public speech, Bruges, 17 October 1989) <www.cvce.eu/content/publication/2002/12/19/5bbb1452-92c7-474b-a7cf-a2d281898295/publishable_en.pdf> accessed 1 July 2016.

²⁵ Havel, who travelled from a prison to Hradčany in less than a year, credited the CSCE with having given him and others the leverage to non-violently bring down the authoritarian government.

declared its sovereignty, Germany reunified (with the blessing of the EC), and former dissident Lech Walesa was elected president of Poland. In 1991, Yugoslavia began its split into non-communist states, the Warsaw Treaty Organization was dissolved, and the Treaty terminated. In December 26, the Soviet Union itself dissolved. The events of 1989-1991, generated a wave of euphoria particularly in Western Europe, the EC, and the United States. Academics wrote of the “end of history” and President George H.W. Bush spoke of a “peace dividend” and later a “new world order”.

The EEC, like many states, was more of an observer that responded to popular demands for democracy and human rights rather than an actor in the events. At an “informal” and “extraordinary” brief meeting of the EC Council in Paris on 18 November, the week after the opening of the Berlin Wall, it had become entirely clear that the events of Eastern Europe were not rumblings that would be suppressed as at Tiananmen, but were transformative and would reshape Europe.²⁶ The Council expressed its interest in promoting democracy and human rights for the emerging regimes, pledged financial assistance to Poland and Hungary (in the Phare project), and gave the first hint that the EC might be willing to expand its membership to eastern European countries if they proceeded on the path of democracy and human rights.

A few weeks later (8-9 December), at a planned Council meeting in Strasbourg, the agenda items were new and reflected the extraordinary developments that were occurring concurrently on the streets in Eastern Europe.²⁷ Taking a more proactive tone than had previously been part of the Council’s rhetoric, it declared that “*All in all, the actions undertaken by the Community and its member States in 1989 in the area of human rights have marked a new stage in their common commitment to the respect of human rights*”. In this “new stage”, the Council recognised the interdependency of security, development, good governance, and human rights. “The question of human rights has become an important element in the dialogue and cooperation entered into with the developing countries. Respect of human rights is essential to lasting *development*” (emphasis added). In addition to the new stage in the commitment toward human rights and Europe to the East, the Council also recognised the importance of continuing the dialogue with the Arab states (leading to the Euro-Arab ministerial in Paris later that month). With regard to Mediterranean states, the Council referred to its “preferential ties” and that relations must be “intensified”. Just as we will see following the dramatic early events of the Arab Spring, the EEC was an enthusiastic supporter that recognised that its policies were behind the unfolding events.

²⁶ ‘Informal meeting of members of the European Council’ (1989) 11 Bulletin of the European Communities <http://aei.pitt.edu/1457/1/Paris_nov_1989.pdf> accessed 1 July 2016.

²⁷ ‘European Council. Strasbourg, 8 and 9 December’ (1989) 12 Bulletin of the European Communities <http://aei.pitt.edu/1395/1/Strasbourg_1989.pdf> accessed 1 July 2016. The issue that preoccupied Delors and others seeking greater European unity, though outside of the official records of the meeting, was the Federal Republic of Germany and the extent to which it would be distracted by events in the GDR and whether it would unduly focus on unification of Germany to the detriment of the EC as a whole.

The December 1989 Council meeting in Strasbourg also was important for giving its approval to the first treaty that elevated human rights into an important component of a treaty: the Fourth ACP-EEC Convention (Lomé IV) that was signed the following week in Lomé, Togo (and went into force in 1991).²⁸

3. Emergence of Human Rights in External Policies (1984-1995)

Between 1984 and 1995, human rights came to be integrated into EEC external policy with third countries. This was a result of two concurrent and interrelated trends, first, the incorporation of human rights into treaties with third countries, and second the development of Community policies more generally. These two trends are separated below in order to provide clarity in explanation – but they were concurrent.

a) Human Rights in Treaties with Third Parties (1984-1995)

The EEC began entering into treaties and agreements with third parties shortly after it came into existence in 1957. These typically were commercial and trade agreements and contained no references to human rights²⁹. Although the EEC issued declarations related to human rights in 1973, 1977, and 1986, as shown above, human rights nevertheless had not been included in any European Community founding document prior to the Single European Act.

Until the late 1980s, human rights were promoted largely by the declaratory diplomacy of European Political Cooperation (EPC). EPC démarches and declarations frequently emphasised the importance of human rights, and condemned third countries for abuses. But using European Community (EC) trade agreements or development aid to punish human rights abuses was not acceptable. The Commission, for example, continuously rebuffed the proposal of the European Parliament (EP) to draft agreements so that sanctions could be imposed if human rights were violated.³⁰

The first time that human rights was mentioned in a treaty with a third country was in 1984 in the Third EEC-ACP Convention (Lomé III), which included only a vague reference to the signatories' "faith in fundamental human rights" (preamble) and opposition to apartheid (Annex: Joint Declaration on Article 4)³¹.

²⁸ Fourth ACP-EEC convention signed at Lomé on 15 December. Lomé IV, 'ACP-EEC Convention of Lomé' (1976) OJ L 229/3. Lomé IV entered into force in 1991 after having been ratified by 61 ACP states. For a complete list, see Council of the European Union 'Agreement' <<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1989094>> accessed 1 July 2016.

²⁹ 'List of main EEC agreements with other countries' (Europe information no. 6/78) <http://aei.pitt.edu/8247/1/31735055282283_1.pdf> accessed 1 July 2016.

³⁰ Karen E. Smith, 'The EU, Human Rights and Relations with Third Countries: "Foreign Policy" with an Ethical Dimension?' in Margot Light and K.E. Smith (eds), *Ethics and Foreign Policy* (Cambridge University Press 2001) 186.

³¹ Lomé III, 'ACP-EEC Convention of Lomé' (signed 8 Dec 1984; in force in May 1986) OJ L 86/3. (Signed 8 Dec 1984; in force in May 1986). The 1984 Convention included two human rights clauses. From the preamble: "REAFFIRMING their adherence to the principles of the said Charter and their faith in fundamental human rights, in

The beginning of the change to this policy with regard to third parties came when the SEA and its amendment to Article 238 of the Rome Treaty came into force in 1987, as described above. Under the SEA, the European Parliament – which had long been the champion of human rights inside the European Community – obtained the power to assent (or not) to treaties that had been negotiated between the Commission and third parties. The relative lack of interest (or authority) of the EEC to promote human rights can be seen in an exchange that took place inside the EP on 11 March 1987, shortly before the SEA came into force.³² The subject of the 11 March session was the recently released Rapporteur's annual report on world human rights (covering 1985-1986), which had called upon the Commission to integrate more thoroughly human rights into its policies toward third countries. Several members of the EP spoke in favour of the Rapporteur's recommendations. Following those speeches, Peter Sutherland, the EEC Commissioner for Competition Policy, responded. After first praising the quality of the Rapporteur's work, Commissioner Sutherland nevertheless declared that the Commission did not have the legal authority to promote human rights in third countries – even under the new SEA (that was slated to enter into force four months later in July 1987).

I would now like to turn to the [Rapporteur's] suggestion that the Community should be given a specific legal mandate and Parliament's invitation to the Commission to present a proposal for a Community act to the Council. The Commission has examined this suggestion thoroughly and with great interest. I regret that it is unable to take it up for the following reasons.

[...] The rapporteur's main concern would appear to be relations with non-member countries. He is probably thinking in terms of a Council act which would require the Community's institutions to work for the protection and promotion of human rights in all their activities. To the extent that such an act would affect the way in which existing responsibilities are exercised, it would more or less reiterate the 1977 declaration [on Human Rights]. Legally it could be based on Article 235 [of the new Single European Act], as could accession to the convention on human rights or the preparation of a catalogue of fundamental rights.

the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..." In Annex I regarding a Joint Declaration on article 4:

3. In this respect the Contracting Parties reaffirm their obligation and their commitment under international law to fight for the elimination of all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. They proclaim their determination to work effectively for the eradication of apartheid which constitutes a violation of human rights and an affront to human dignity.

It is sometimes incorrectly stated that the first human rights provisions in an EEC treaty with a third country were in the Fourth EEC-ACP Convention of 1989 (Lomé IV). Although Lomé IV was much broader, there were references in 1984 as seen above.

³² 'Debates of the European Parliament, 1987-1988 Session' (Report of Proceedings from 10 to 13 March 1987, 1987) OJ 2-350/92-105.

On the other hand, if such an act were to lay down a human rights policy as an end in itself and give powers to the institutions, it would probably exceed the objectives of the Community. These do not include the promotion of human rights, although they are obviously inherent in all Community activities. Indeed, the Court of Justice in Luxembourg has referred to that point. This means that the proposed act could not be based on Article 235. The only possibility would be to amend the Treaty (emphasis added).³³

Thus, according to Sutherland, the entire Commission had considered the question whether it possessed the legal authority to promote human rights on behalf of the EEC as recently as 1987 with regard to third countries, and unanimously concluded that even under the new SEA's Article 235. This lack of authority was clear despite the fact that the SEA included references to human rights in its preamble:

DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

[...]

AWARE of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter.³⁴

These preambular clauses, which themselves are the first to mention of human rights in any of the European Union's founding documents (as opposed to stand-alone declarations), reflected Jacques

³³ 'Debates of the European Parliament, 1987-1988 Session' (Report of Proceedings from 10 to 13 March 1987, 1987) OJ 2-350/104. Single European Act (1987) OJ L 169/416, art 235.5 provided that:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 235 of the SEA was slightly amended from the Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 11 (TEEEEC).

³⁴ Single European Act (1987) OJ L 169/2, 1009-1010 <http://europa.eu/eu-law/decision-making/treaties/pdf/treaties_establishing_the_european_communities_single_european_act/treaties_establishing_the_european_communities_single_european_act_en.pdf> accessed 1 July 2016.

Delors's centralising goal of establishing a Europe that speaks with "one voice"³⁵ more than any particular interest in advancing human rights per se. Although nothing in these introductory words grants the Council or Commission legal authority to promote human rights in EEC relations with third countries, as acknowledged by Commissioner Sutherland, they do continue the trend of linking human rights to security and at least vaguely acknowledge that the European Community recognised that there was a "responsibility incumbent on Europe" to speak and act consistently in the entire scope of its external policy.

The message to the Parliament by Commissioner Sutherland seems clear. The Commission believed it did not have the authority to take the initiative.

Thus, if the Parliament wanted to promote human rights, it would need to pressure the Commission to act by using its new power under SEA Article 238 and threaten to withhold its assent to agreements negotiated by the Commission unless they included human rights provisions. The first significant attempt by the Parliament to do so was during the Commission's ongoing renegotiation of what became the Fourth ACP-EEC Convention (Lomé IV) (signed 1989, in force 1991).³⁶ The EP took advantage of its new power under the SEA during the negotiations for Lomé IV and insisted that human rights provisions be included.³⁷

In addition to the general statements made in the Preamble to Lomé IV, a new Article 5 included a human-dignity and economic justice focus. While Lomé IV does not identify the gamut of human rights values, it does make human rights part of the legal obligations between the ACP and the EEC:

Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

³⁵ The most important of Delors's aims in the SEA was the creation of a single internal market by 1992. Other important aspects of the SEA included promoting European unity in a larger sense, giving the Commission an increasing role in promoting external policy (European Political Cooperation (EPC)), and establishing a permanent secretariat for the EPC (the forerunner of the EEAS).

³⁶ Fourth ACP-EEC convention signed at Lomé IV, 'ACP-EEC Convention of Lomé' (1976) OJ L 229/3 <<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1989094>> accessed 1 July 2016. Lomé IV entered into force in 1991 after having been ratified by 61 ACP states. For a complete list, see Council of the European Union 'Agreement'. Available at: <<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1989094>> (Last accessed 1 July 2016.)

³⁷ See Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague, Martinus Nijhoff Publishers 2003) 66-67. The ACP states, many of which had strong interest in promoting economic and cultural rights and opposing apartheid, also had a significant influence on the final draft.

[...]

The Contracting Parties hereby reaffirm their existing obligations and commitment in international law to strive to eliminate all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. This commitment applies more particularly to any situation in the ACP States or in the Community that may adversely affect the pursuit of the objectives of the Convention, and to the system of apartheid, having regard also to its destabilizing effects on the outside.

For all practical purposes, after Lomé IV, European Community treaties would include human rights clauses. Virtually all association agreements following Lomé IV in 1989 included legal obligations regarding human rights, even though they provided no legal mechanisms for enforcing them. Between 1989 and 1992, these new clauses typically called for “respect” for human rights, as in the cases of Argentina (1990), Uruguay (1991), Paraguay, and Mongolia (both in 1992).

The next major development in creating a binding legal obligation in such association, cooperation, and framework treaties occurred in mid-June 1992. Indeed, the agreements signed between 1989 and 1992 *before* 16 June – Paraguay (3 February) and Mongolia (16 June) – included a “respect human rights” clause while virtually all EEC/EU agreements thereafter *until the present* contain what has been called an “essential element” clause. The “essential elements” clauses that brought about a significant transformation with regard to legal enforceability of treaties with third parties occurred in mid-1992 with the negotiation and signing of the Brazil Framework Agreement on 29 June 1992 (in force 1995)³⁸. Article 1 of the Brazil Framework Agreement provided that

Cooperation ties between the Community and Brazil and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and international policies of both the Community and Brazil and which *constitute an essential component of this Agreement*.

Under international law, the insertion of the “essential component” clause gives any party the presumptive right to void the treaty if the other party fails to live up to its human rights obligations³⁹. Following the EEC-Brazil agreement, virtually every subsequent agreement contained a similar provision, including (by way of examples with the date of signature): Brazil (1992), India (1993), Moldova (1994),

³⁸ Framework agreement for cooperation between the European Economic Community and the Federative Republic of Brazil (1995) OJ L 262/54.

³⁹ It could be argued that human rights is not *really* an essential element of the treaty, but that the clause is inserted for political reasons. The legal basis for voiding a treaty for failure to adhere to an “essential element” is part of the Vienna Convention on the Law of Treaties, principally Art. 60, but the principle also may be extrapolated from Arts. 20.2, 44, 48, and 62. For studies of essential elements clauses, see Nicolas Hachez, “Essential Elements” Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights? (2015) Leuven Centre for Global Governance Studies Working Paper 158; Lorand Bartels, ‘A Model Human Rights Clause’ (German Institute for Human Rights, 2014).

Russia (1994), Ukraine (1994), Tunisia (1995), Israel (1995), (Morocco 1996), Egypt (2001), Algeria (2002), and ACP (Cotonou) (2000).⁴⁰ As a strictly legal matter, these essential elements clauses were designed to give the EEC the ability to void trade and cooperation agreements if the third state failed to satisfy its human rights commitments. Within the following ten years, the “essential element” clause had been included in 120 treaties.⁴¹ As a practical matter, however, the European Community has never invoked the essential elements clauses.⁴²

In May 1995, the Commission issued guidelines to govern the inclusion of human rights provisions in future treaties and agreements that reflected the new human rights standards.⁴³ Although issued after the Delors Commission had ended, it nevertheless articulated what had by that time become European Community policy. Thus, eight years after Commissioner Sutherland argued that the Commission did not have the power under the SEA to promote human rights in relationship with third countries, a sea change had taken place. It is now useful to turn the clock back to 1990 and examine events that were occurring simultaneously with the gradual inclusion of human rights policies into treaties.

b) Human Rights and Democracy in Community Policies (1990-1994)

The 1990s witnessed significant developments with regard to the European Community’s promotion of human rights in third countries, including the Mediterranean countries. In retrospect, scholars would recognise that the EEC increasingly acting in a normative capacity promoting human rights, democracy, the rule of law, and good governance in its external relations. “In the 1990s human rights and democracy increasingly became a part of EC/EU relations with third countries, and the process moved

⁴⁰ A complete listing can be found in Laura Beke et al., ‘Report on the integration of human rights in EU development and trade policies’ *Deliverable No. 9.1* - ‘Report on the integration of human rights in EU development and trade policies’, annex II.

⁴¹ Commission, ‘The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries’ (Communication, 8 May 2001) COM(2001) 252, 9. <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0252&from=EN>> accessed 1 July 2016.

⁴² Immediately after the launching of the “essential elements” clauses in mid-1992, another clause was introduced in 1993 that would thereafter also become standard clauses in treaties with third parties. This new “suspension” clause first appeared in Article 118 of the “Europe Agreement” between the EEC and Bulgaria (signed 1993, in effect 1994), and it was designed to provide a “consultation” procedure before a suspension of the treaty was invoked. Europe Agreement establishing an association between the European Communities and their Member states, of the one part, and the Republic of Bulgaria, of the other part (1994) OJ L358/3. For further discussion of the “Bulgarian clause” see Commission, ‘The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (Communication, 23 May 1995) COM(95) 216, 8 <<http://aei.pitt.edu/4097/1/4097.pdf>> accessed 1 July 2016.

⁴³ Commission, ‘The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (Communication, 23 May 1995) COM(95) 216,8 <<http://aei.pitt.edu/4097/1/4097.pdf>> accessed 1 July 2016.

from the declarations of the 1980s to formalising treaty-based commitments and policies”.⁴⁴ The EEC became more than an intergovernmental organisation promoting open markets and trade, but was becoming an entity that increasingly resembled a state in the international system with a wide range of interests, including the normative values of human rights and democracy. We can identify three overlapping and interrelated developments: first, the strengthening of the European Community (particularly with the signing of the Maastricht Treaty in 1992), second, the increasing inclusion of human rights clauses in third-country treaties (including the addition of “essential elements” clauses), and third, an increasing focus on the Mediterranean region. Discussion of the Mediterranean region appears below in Part III.

In the April 1990 Dublin Council meeting, the Council expressed its “deep satisfaction” with the events that began in 1989 and that continued to unfold.⁴⁵ It declared that it “stands united in its commitment to democracy, pluralism, the rule of law, full respect for human rights” and, last but not least, “the principles of the market economy”. The Dublin Council looked with favour on developments occurring in the CSCE, particularly with regard to the so-called “human dimension”.

In 1991, while the former communist countries of Eastern Europe were establishing their new democracies and while the Soviet Union was in the process of collapsing and fragmenting, the Commission and Council began to articulate more clearly their official endorsement of the importance of third countries establishing democracy. During 1991, democracy transitions from an admirable value worthy of praise into a core value that should be promoted by the European Community in its relations with third countries. Democracy had now emerged into a universal value that should be established everywhere, and 1991 the European Community took upon itself the task of promoting it in its relations with third countries. Three documents from the year 1991 reveal the emergence of this new doctrine.

With an eye on the emerging democracies of Eastern Europe, and recognising the need of establishing better economic and political ties, the Commission on 25 March 1991 took the first step in describing the interrelationship among democracy, human rights, and economic liberalisation in a document entitled: Human Rights, Democracy and Development Cooperation Policy.⁴⁶ Although the first instance of the document notes that the foci of this emerging strategy were the potential candidate countries from the former Soviet bloc, hints were included throughout the document that this would affect Community policy with regard to the Mediterranean as well.⁴⁷ The Commission noted that the need for

⁴⁴ Rosa Balfour, ‘Promoting Principles of Democracy and Human Rights. European Union Strategies towards its Neighbours’ in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in EU Foreign Policy* (London, Routledge 2006) 115-116.

⁴⁵ ‘Special Meeting of the European Council’ (1990) 12 Bulletin of the European Communities <http://aei.pitt.edu/1397/1/Dublin_april_1990.pdf> accessed 1 July 2016.

⁴⁶ Commission, ‘Human Rights, Democracy and Development Cooperation Policy’, (Communication, 25 March 1991) SEC(91) 61 <<http://aei.pitt.edu/2937/1/2937.pdf>> accessed 1 July 2016.

⁴⁷ The European Council, ‘External Relations’ (28-29 June 1991) 17 <http://www.europarl.europa.eu/summits/luxembourg/default_en.htm> accessed 1 July 2016.

developing its external policies to improve economic coordination not only with the possible new candidate countries to the east, but toward Mediterranean countries as well.⁴⁸ This was in some ways one of the first indicators of what later became the Euro-Mediterranean Partnership. Thus Maastricht did not introduce these ideas that were being developed in the Council and the Commission during 1990 and 1991, but “constitutionalised” them through the TEU and implement them through the “Common Foreign and Security Policy” (CFSP).

At the beginning of 1992, the EEC was feeling triumphant. Its biggest challenge to the east had collapsed, its institutions were about to be strengthened by a new treaty, and it looked forward to the possibility of expansion to the east.

Quite clearly the upheavals ushered in by the fall of the Berlin Wall and the Gulf War have brought new responsibilities for the Community and raised expectations both among our traditional partners and among the countries aspiring to closer links. The European Community is now seen as the main focus for peace, democracy and growth by all of Europe and the neighbouring countries to the South and East.

The Delors Commission became boastful: “Europe will remain faithful to its model of society and its tradition of openness and generosity. The Community must raise the social dimension to the same level as its ideal of justice”.⁴⁹

Shortly thereafter, Maastricht would suffer a shocking, albeit temporary, reversal when the Danes rejected the treaty in a popular referendum and the French almost did so as well.

C. Institutionalization of Human Rights (1995 – present)

The end of the Delors era arrived in January of 1995. The preceding five years had witnessed the wide range of human rights issues incorporated into official European policy, as described above. The following fifteen years would witness not only increasing institutionalisation of the policies, but simultaneously would see a significant transformation of official human rights policy in the Mediterranean region. (See Part III below.) We will examine below five core areas for human rights development affecting third countries.

[The] new assistance and economic co-operation programmes in Asia, Latin America and the Mediterranean countries mark the opening of a new era. The European Council reaffirms its conviction that certain aspects with an important bearing on these relations, such as broader-based democracy, respect for human rights, and economic reform, are bound to develop further.

⁴⁸ This was in some ways one of the first indicators of what would later become the Euro-Mediterranean Partnership.

⁴⁹ Commission, ‘From Single Act to Maastricht and Beyond: The Means to Match our Ambitions’, COM (92) 2000, 16 and 4 <<http://aei.pitt.edu/2938/1/2938.pdf>> accessed 1 July 2016.

1. Official Articulation of Human Rights Standards

To commemorate the 50th anniversary of the Universal Declaration of Human Rights, in 1998 the EU affirmed the contribution of the Vienna World Conference on Human Rights and declared its recognition of the “universality and indivisibility of human rights” and affirmed that promotion of these rights in its CFSP “constitute essential objectives for the European Union as a union of shared values and serve as a fundamental basis for our action”⁵⁰. Respect for these rights was recognised as an objective of the EU’s CFSP. The Amsterdam Treaty (in force 1999) continued in the same vein as Maastricht. It declared that the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (Art. F) and pledged as a part of its CFSP “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. (Title V J.1) In 2000, the year after the Amsterdam Treaty came into force, the EU proclaimed the Charter of Fundamental Rights (with legal affect in 2009). The Charter added to the “universality and indivisibility” of human rights proclaimed in 1998, by adding that human rights also are “indivisible” (Preamble).⁵¹ The Charter of Fundamental Rights did not address the issue of the CFSP.

2. Coherence, Effectiveness, and Mainstreaming

In 2006 and 2009 the European Community issued important documents on the importance of mainstreaming human rights and coherence and effectiveness in human rights promotion. After having long declared that rights are universal, interdependent, and indivisible and that they should be a part of the CFSP both with regard to promoting European norms as well as European security, the Council announced in June 2006 that it was necessary to “mainstream” them into the CFSP. The official policy henceforth was to change human rights from a peripheral goal to be raised as one component of a larger agenda, but that it was to appear throughout the entire relationship with third parties as an integral component of “all aspects of its external policies”⁵². Human rights were to be promoted not simply by officers particularly assigned to the subject, but also in “visits at Commissioner and high official level”.

Recognising that there had been a plethora of documents, resolutions, initiatives, and programmes, the Council declared in 2009 that there was a real need to promote increased coherence and effectiveness in human rights implementation. The Council feared that EU policies for human rights promotion might suffer from inconsistency and incoherence, as different officials and instruments might stress different if

⁵⁰ ‘Declaration of the European Union on the occasion of the 50th Anniversary of the Universal Declaration on Human Rights’ (Press release, Vienna, 10 December 1998) 14128/98 <http://europa.eu/rapid/press-release_PESC-98-149_en.htm> accessed 1 July 2016.

⁵¹ Charter of Fundamental Rights of the European Union (2012) OJ C326/391.

⁵² Council of the European Union, ‘Mainstreaming human rights across CFSP and other EU policies’ (10076/06, 7 June 2006) (note) <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news66.pdf> accessed 1 July 2016. (This document recording the 1 June decision was issued by the Council Secretariat on 6 June.)

not competing values. Accordingly, on 17 November 2009 – two weeks before the entry into force of the Lisbon Treaty – the General Affairs and External Relations Council adopted “Conclusions on Democracy Support in the EU’s External Relations – 2009 Towards Increased Coherence and Effectiveness”.⁵³ Stressing that it did not intend to introduce new conditionality, the Council nevertheless noted the necessity for improving greater coherence in the EU’s promotion of human rights in its external policy.

A holistic approach on governance entails mainstreaming of human rights and fundamental freedoms, democratic governance and rule of law to all policy sectors, i.e. by implementing the EU guidelines for human rights dialogues, and by including human rights, democracy and the rule of law in discussions with third countries, in programming discussions and in country strategy papers.⁵⁴

3. Promotion of Democracy and HR in Third Countries (2001-2009)

The Council (General Affairs) in its 9 October 2000 meeting in Luxembourg, requested the Commission to prepare a policy analysis on issues of “coherence and effectiveness” in external policy.⁵⁵ Accordingly, the Commission submitted to the Council and Parliament on 8 May 2001 an important document entitled “The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries”.⁵⁶ The Council effectively approved the Commission report on 25 June 2001.⁵⁷ The May 2001 report becomes a reference touchstone for future Community policies on human rights, particularly its introduction – to a large extent for the first time – three of the principal concepts that will become part of official Community policy until the present. First, it calls for a “more coherent and consistent” human rights policy and recognises that past efforts to promote human rights have not been consistently or

⁵³ Council of the European Union, ‘Council Conclusions on Democracy Support in the EU’s External Relations – Towards Increased Coherence and Effectiveness’ (18 November 2009) 15479/09 (note) <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016081%202009%20INIT>> accessed 1 July 2016. (The Conclusions were issued the following day, 18 November, by the General Secretariat as an annex.)

⁵⁴ Ibid. 56

⁵⁵ ‘2294th Council meeting – General Affairs’ (Luxembourg, 9 October 2000) <http://europa.eu/rapid/press-release_PRES-00-364_en.htm?locale=en> accessed 1 July 2016.

⁵⁶ Commission, ‘The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries’ (Communication, 8 May 2001) COM (2001) 252 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0252&from=EN>> accessed 1 July 2016.

⁵⁷ ‘2362nd Council meeting – General Affairs’ (Luxembourg, 25 June 2001) annex II <<http://data.consilium.europa.eu/doc/document/ST-10228-2001-INIT/en/pdf>> accessed 1 July 2016.

The Council welcomes the Commission’s Communication on the European Union’s Role in Promoting Human Rights and Democratisation in Third Countries (COM (2001) 252 final) as a valuable contribution towards reinforcing the coherence and consistency of EU policy in the field of human rights and democratisation. Realising that sustainable democracy and respect for human rights must be built from within societies, the Council reaffirms its determination to promote stable, democratic environments, founded on the full enjoyment of human rights. The Council considers this objective essential for the implementation of the European Programme for the Prevention of Violent Conflicts and a cornerstone of its work to contribute to poverty reduction, sustainable social and economic development, peace and security.

systematically followed. The “coherent and consistent” language will, henceforth, be a recurring theme. Nevertheless, while recognising that policies should follow such standards, it does not set for an actual approach to be followed and Community policy may be criticised for not actually implementing the worthy objective.

A second term that similarly will become standard Community doctrine is that human rights should be “mainstreamed” – that is fully integrated into the whole range of external policy. Human rights should not be an add-on, or afterthought, or assigned to certain officials or offices, but should be an integral part of all interactions and by all officials. The concept of mainstreaming, however, like that of “coherent and consistent”, may be more of a stated ideal than a serious plan.

Finally, and consistently with other policy positions emerging at the same time – as democratic reforms swept across Eastern Europe – democratisation is henceforth a recognised component of Community strategy. It is not one additional value, but is not a component of the broader strategy of integrating human rights *and democracy*.

These three positions articulated in the May 2001 EU Role in Promoting Human Rights and Democratisation, would henceforth be official policy and would appear in summaries of Community explanations of human rights.⁵⁸

4. Conditionality

The concept of “conditionality” is deeply rooted in human interactions and is largely a formalised way of referring to “carrots and sticks”. It is implicitly understood by parents who reward positive behaviour in their children and punish errant acts. Conditionality is present in contracts, treaties, confidence-building measures, and threats or the use of force. “Positive” conditionality provides that rewards, benefits, or “carrots” that accrue when desired actions are undertaken and “negative” conditionality presumes that benefits will be withdrawn, punishments will be implemented, or sticks will be used to threaten or punish misconduct. Rosa Balfour offers a more academic formulation in the context of the European Union in the context of the Arab Spring:

Conditionality refers to a complex set of issues including the ability to attach strings to demands, the linkages between political demands and economic incentives, the attraction and credibility of these incentives for them to be effective, the ability of the EU system, including its member states, to coordinate and deliver such incentives, and the relation between establishing general

⁵⁸ See, for example, ‘Furthering Human Rights and Democracy across the Globe’ (eeas.europa.eu, 2007) <http://eeas.europa.eu/human_rights/docs/brochure07_en.pdf> accessed 1 July 2016; and the guidelines entitled “Human Rights dialogues with third countries’ (updated in 2009, 2011) 21-29 <http://eeas.europa.eu/human_rights/docs/guidelines_en.pdf> accessed 1 July 2016 and Promotion of Democracy, Human Rights and the Rule of Law all of which reference the May 2001 document and refer to the new standards.

principles to govern conditionality and the need to devise tailor-made policies towards individual countries.⁵⁹

Conditionality explicitly became linked with human rights with the introduction of “essential elements” clauses into the first agreements beginning in 1992 and officially in all agreements after 1995.⁶⁰ As explained above, the essential elements clauses were added to trade agreements under pressure from the European Parliament that explicitly sought to link economics, security, democratization, and human rights as equally reinforcing rather than a smorgasbord of optional choices. However, as has been noted, the “essential elements” clause has never been invoked by the Commission and in response to the one occasion where the European Court of Justice essentially did so with regard to Morocco, the Council and the Commission immediately appealed the Court’s decision.⁶¹

While aspects of conditionality recur in EU external action or international relations generally, one of the earliest formalised and generalised articulations of conditionality by the European Community was in the Copenhagen Principles of 1993. The Copenhagen Principles set forth standards to be applied for states that sought accession to the European Community, with a particular emphasis on the newly democratic states of Central and Eastern Europe after the 1989-1991 period. In 2003, when the Community prepared to admit ten new members, the Community adopted its “European Neighbourhood Policy” (ENP) to set forth general criteria for developing ties with its neighbours to the east and south that fell short of actual accession but that were closer than other states with whom it interacted.

Thus the EU is looking to its neighbours to build and consolidate democracy and the respect for the rule of law. It makes the “more for more” promise with an additional promise of “the faster the faster” – prompt action by its neighbours will entitle them to more aid sooner. It concludes with an implicit threat (or warning) that backsliding will at least prompt the EU to “reconsider or even reduce” the financial benefits that had been promised.

⁵⁹ Rosa Balfour, ‘EU Conditionality after the Arab Spring’ (2012) 16 IEMed/EuroMeSCo 7.

⁶⁰ One of the best-informed and most perceptive analysts of human rights promotion in the European Community, Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 33, asserts that the first official declaration by the Community that treaties should include a human rights clause came in 1991 in Commission Communication, Commission ‘Human Rights, Democracy and Development Cooperation Policy’ (Communication, 25 March 1991) SEC(91) 61 <<http://aei.pitt.edu/2937/1/2937.pdf>> accessed 1 Jul 2016. Although we can find in this document the statement that the “existence of a contractual framework for cooperation containing explicit provisions on human rights will facilitate action by the Community,” this reads to us as more aspirational than mandatory. The document does, immediately thereafter, use the term “conditionality” with human rights in a positive way, though it speaks of two specific agreements and not a formalised policy. Regardless of whether Dr. Balfour is correct, we can conclude that the conditionality policy definitely was emerging by 1991 even if it became official only in 1995.

⁶¹ See in detail below.

D. Lisbon and Conclusion

The Lisbon Treaty, which came into force on 1 December 2009, did not introduce new concepts with regard to human rights, though it did reiterate previously articulated standards.⁶² In summary, the European Community first cited human rights as a value in its Declaration on European Identity in 1973. Over the next thirty-five years the official approach to human rights underwent significant broadening and deepening. It came to cover the full range of human rights, and developed mechanisms for promoting them. By the time the Arab uprisings began in late 2010 and in early 2011, the EU had officially and repeatedly declared that:

- Human rights are universal, interdependent, and indivisible
- Promotion of human rights is a fundamental component of EU external policy
- Human rights must be “mainstreamed” in EU external action
- Human rights and democracy are prerequisites for long-term security and stability
- EU promotion of human rights should be coherent, and
- EU promotion of human rights should be effective.

These are all official positions of the EU. Whether they are respected and implemented in practice is a different question.

⁶² Article 1a of the Lisbon Treaty identified human rights as one of the values on which the EU was founded, and Article 2.5 pledged to promote such values in the EU’s foreign policy and pledged that in “its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens”, including “the protection of human rights”. (Art. 2.5) Elaborating on this concept, Art. 10A of the Lisbon Treaty provides 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. . . .” Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) OJ C306/01

Case Studies

As the report covers more than sixty states, it is indispensable to identify the priority and present certain cases. Among the states of the Eastern Partnership, the emphasis is on the three western most former Soviet republics, Ukraine, Moldova and Belarus. Two of them have gone through frequent changes and although currently show strong aspiration to align their political course with the EU their situation has demonstrated oscillation and volatility. Belarus, to the contrary, has demonstrated significant regime stability and a clear alignment with the Russian Federation. The three states were the first states of the Eastern Neighbourhood followed by the three states of the South Caucasus. In the Southern Neighbourhood, the cases of Egypt and Morocco have been selected. Two cases, which have shown major dissimilarities. Egypt is undoubtedly the most important state of the southern neighbourhood. However, its post-Arab spring transformation has turned out to be a failure and following the period of transition resulted in a regime that may well end up in close resemblance of the system that lost legitimacy and had to leave office in 2011. Morocco, on the other hand, and similarly to most countries of the Middle East governed by royal families (Jordan, Saudi Arabia) have demonstrated significant stability of governance. This was based on the combination of the legitimacy of the hereditary regime and the readiness for some compromise that reduced authoritarianism and the concentration of power. It is impossible to address the sub-Saharan African countries *in extensu*. The four cases refer to countries that lag behind in providing human rights to their citizens and thus share the fate of many other states in that region.

II. Ukraine

A. General Overview

Ukraine is seen by EU institutions as an ‘enormously important’ country for the EU.⁶³ Bordering several EU states, its large geographic size and population, and its status as a transit country for Russian gas and Russia’s vested interests therein, make it stand out from other Eastern neighbours. In addition, Ukraine distinguished itself in the region by making strong declarations regarding its ambitions for European integration. The EU policies towards Ukraine, including on human rights, can be viewed through consecutive stages. The first stage includes the establishment of relations and subsequent half-hearted engagement from 1991 until 2004. In the second stage, a more visible presence of the EU marks the period between the Orange Revolution and the 2010 elections of President Yanukovich. The last stage includes a stagnation of relations between the parties leading to the Maidan crisis in 2013 and the subsequent signing of the Association Agreement (AA) between the parties in 2014. This period is also linked to more pronounced political support of the EU in view of the Russian annexation of Crimea and the military conflict in Donbass.

1. Stage I: 1991-2004

After the declaration of independence on 24 August 1991,⁶⁴ for the first decade Ukraine was preoccupied with state-building including establishing its sovereignty⁶⁵ and carving a balanced foreign policy between Russia and the West.⁶⁶ Within the first decade of its independence Ukraine was said to have embraced ‘soft authoritarianism’.⁶⁷ Pavliuk divided EU-Ukraine relations until the Orange Revolution into four phases, including neglect (1991-1993), support (1994-1996), frustration and fatigue (1997-1999), and disengagement following 2000.⁶⁸ The EU has developed and maintained a normative

⁶³ Štefan Füle, ‘EU-Ukraine Relations: Future Expectations’ (Taras Shevchenko National University of Kyiv, Kyiv, 22 April 2010) SPEECH/10/175.

⁶⁴ ‘Act of Declaration of Independence of Ukraine’ (Verkhovna Rada of Ukraine, August 24, 1991).

⁶⁵ The 1997 Friendship, Partnership and Cooperation Agreement between Russia and Ukraine recognised Ukraine’s territorial integrity, including in relation to Crimea; Eugeniusz Piontek, ‘Ukraine’ in Steven Blockmans and Adam Łazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration* (TMC Asser Press 2006) 504.

⁶⁶ Kurt R. Spillman, Andreas Wenger and Derek Müller (eds), *Between Russia and the West: Foreign and Security Policy of Independent Ukraine* (Peter Lang 1999).

⁶⁷ Ilya Prizel, ‘Ukraine between Proto-Democracy and “Soft” Authoritarianism’ in Karen Dawisha and Bruce Parrott (eds), *Democratic Changes and Authoritarian Reactions in Russia, Ukraine, Belarus, and Moldova* (CUP 1997) 330-369.

⁶⁸ Oleksandr Pavliuk, ‘Unfulfilling Partnership: Ukraine and the West: 1991-2001’ (East-West Institute, Kiev, 2001).

rhetoric as part of its general approach towards the region and the evolving trends in its foreign policy.⁶⁹ The issue of human rights protection surfaced prior to the establishment of bilateral relations in the Declaration on the Recognition of New States in Eastern Europe and the former Soviet Union. Among the conditions for recognition, this declaration mentioned respect for provisions of the UN Charter, the Helsinki Final Act and the Charter of Paris, “especially with regard to the rule of law, democracy and human rights”.⁷⁰ Nonetheless, in the early 1990s, the EU lacked any meaningful engagement with the country on the issue of political reform, focusing instead on security issues such as non-proliferation and denuclearisation.⁷¹

The normative rhetoric was preserved in the Partnership and Cooperation Agreement (PCA).⁷² Ukraine was among the first Eastern neighbours to start negotiations on a PCA in 1993, leading to its conclusion in 1994 as a replacement for the trade and co-operation agreement signed in 1989 between the EC and the Soviet Union.⁷³ Initially planned to cover a period of ten years,⁷⁴ the PCA established the political and legal framework for bilateral cooperation. The PCAs with the Western CIS countries, including Ukraine, were more advanced in comparison with South Caucasian or Central Asian PCAs as they included the possibility of establishing a free trade area, albeit a distant prospect lacking genuine commitment.⁷⁵ Some consider that as a ‘framework’ agreement the PCA has already met some of its objectives, such as Ukraine’s accession to the WTO.⁷⁶ As far as human rights policies are concerned, the PCA established a political dialogue between the parties and included a ‘standard’ human rights clause in line with the emerging practice of the EU in the 1990s, allowing for treaty suspension in case of a serious breach of

⁶⁹ Paul Kubicek, ‘The European Union and Democratisation in Ukraine’ (2005) 38 *Communist and Post-Communist Studies* 269, 270.

⁷⁰ ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ - Declaration (16 December 1991)..

⁷¹ Balfour *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 33; Iryna Solonenko, ‘The European Union as Democracy Promoter: The Case of Ukraine’ (2005) 5/2 *Europe as a Democracy Promoter*, 57; Hryhoriy Nemyria, ‘The Orange Revolution: Explaining the Unexpected’ in Michael Emerson (ed), *Democratisation in the Neighbourhood* (CEPS 2005) 54.

⁷² Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other (1998) OJ L 049.

⁷³ Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation (1990) OJ L 068.

⁷⁴ After the expiry of ten years, the Agreement could be renewed on an annual basis provided there is no denunciation by either party; OJ L 049, art 101.

⁷⁵ Roman Petrov, ‘The Partnership and Cooperation Agreements with the Newly Independent States’ in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Union Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press 2002) 175-194; Christophe Hillion, ‘Partnership and Cooperation Agreements between the EU and the NIS of the Ex-Soviet Union’ (1998) 3 *EFAR* 399.

⁷⁶ Roman Petrov, ‘The New EU-Ukraine Enhanced Agreement versus the EU-Ukraine Partnership and Cooperation Agreement: Transitional Path or Final Destination?’ in Francesco Maiani, Roman Petrov and Ekaterina Mouliarova (eds), *European Integration Without EU Membership: Models, Experiences, Perspectives* (EUI Working Paper MWP 2009/10) 43.

democratic principles or human rights.⁷⁷ Human rights conditionality had already formed a part of the original Council Regulations concerning technical assistance to former Soviet States (TACIS).⁷⁸

In the same year the PCA was concluded, a Commission representation was established ahead of similar representations in other countries, and a Common Position on Ukraine was adopted in the framework of Common Foreign and Security Policy (CFSP) with a view to fostering political partnership, democratic reform, integration into the world economy and nuclear cooperation.⁷⁹ On a rhetorical level, the Common Position predicated action on democratic development resulting from advice on legislation and practical assistance in establishing democratic institutions, mediated by Ukrainian and European officials and parliamentarians and non-governmental organisations at different levels.⁸⁰ Yet it was clear that security and stabilisation concerns were the predominant reasons for adopting the Position, indicating an inherent bias towards security concerns ahead of other priorities, such as human rights. Balfour cites divergences among Member States, a cautious attitude towards the Commission's role in aid management and strategic interests surrounding Ukraine among the reasons for the EU's late and cautious engagement.⁸¹

While the PCA was still being ratified, the Commission produced an Action Plan on Ukraine in 1996 in response to the latter's request. The Action Plan recognised that the 'progress of democracy in Ukraine is real' at the same time acknowledging its weaknesses.⁸² The support envisaged by the EU under the Plan was restricted to economic reform, social transformation, CFSP cooperation, deepening of contractual relations, regional cooperation and to overhauling the energy sector.⁸³ Although these consecutive measures demonstrated a certain engagement by the EU, the Action Plan and the subsequent developments exposed the mismatch in the parties' expectations. It took four years for the PCA to enter into force in 1998 due to the long ratification process by the EU Member States.⁸⁴ The agreement was not backed by sufficient funds levelled at political reform, and no longer matched Ukraine's political ambitions. Although declarations on European integration had already been made in

⁷⁷ OJ L 049, art 2, art 6; Commission, 'Human rights, democracy and development cooperation policy' SEC(91) 61; Luxembourg European Council, 'Declaration on Human Rights' (1991) 6 Bulletin of the European Communities; 'Resolution of the Council on human rights, democracy and development' (1991) 11 Bulletin of the European Communities 122; Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005), 17–22.

⁷⁸ Council Regulation (EC) 2053/93 concerning the provision of technical assistance to economic reform and recovery in the independent States of the former Soviet Union and Mongolia (1993) OJ L 187, art 4(7). It was also subsequently reproduced in Council Regulation (EC) 99/2000/EC concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (2000) OJ L 12, art 16.

⁷⁹ Common Position 94/779/CFSP defined by the Council on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union towards Ukraine (1994) L 313.

⁸⁰ *Ibid*, para 2.

⁸¹ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 51.

⁸² Commission, 'Action Plan for Ukraine' (Communication, 20 November 1996) COM(96) 593, 9-10.

⁸³ *Ibid*, 5-6, 13.

⁸⁴ Ukraine ratified the agreement by the end of 1994.

the early 1990s, from 1998 onwards they were formalised in a number of legislative acts, inter alia via legislative approximation.⁸⁵ In Wolczuk's words, Ukraine opted for 'declarative Europeanisation' whereby the declared intentions were not backed by political or economic reform, revealing the declarations to be somewhat hollow.⁸⁶

In the absence of an EU membership promise, the PCA did not act as a catalyst for internal domestic change, particularly given the political system formed by the end of 1990s. Although the 1996 Constitution declared Ukraine a democratic state and guaranteed human rights and freedoms,⁸⁷ this remained largely confined to paper. By the time the PCA came into force, Ukraine had entered a 'grey zone' of political transformation.⁸⁸ By the end of 1990s, it was characterised by an undemocratic outlook with an authoritarian executive, vested oligarchic interests tied to the government and poor electoral and human rights records.⁸⁹

Regular political dialogue took place at high-level bilateral summits in 1997 and the PCA annual Cooperation Councils in 1998, followed by a Council Common Strategy on Ukraine in 1999 that was perceived as aiming to match the level of relations with Russia.⁹⁰ Although it viewed Ukraine as a country 'with a unique position in Europe' and welcomed its pro-European choice, it confined itself to support for political and economic transformation.⁹¹ The 'strategic partnership' was based on 'shared values', and set as one of its principal objectives 'to contribute to the emergence of a stable, open and pluralistic democracy in Ukraine, governed by the rule of law'.⁹² Under this heading, the Strategy envisaged the protection of human rights, which placed a major emphasis on Ukraine's compliance with its international obligations, yet it merely 'took note' of the 1999 presidential elections that had been criticised by OSCE/ODIHR.⁹³ According to Sasse, this CFSP instrument was a 'misnomer, as it [was] neither "common" nor "strategic"'.⁹⁴ It was viewed more as an internal/external experiment rather than

⁸⁵ Presidential Decree (Ukraine, 11 June 1998) 615/98; Presidential Decree (Ukraine, 14 September 2000) 1072/2000; 'On the National Programme of adapting legislation of Ukraine to the legislation of the European Union' Law (Ukraine, 27 November 2003).

⁸⁶ Katarzyna Wolczuk, 'Ukraine's Policy towards the European Union: A Case of 'Declarative Europeanisation' (2003) <http://www.batory.org.pl/ftp/program/forum/eu_ukraine/ukraine_eu_policy.pdf> accessed 28 September 2016.; Taras Kuzio, 'EU and Ukraine: A Turning Point in 2004?' (2003) European Union Institute for Security Studies Occasional Papers 47/2003, 15-16.

⁸⁷ Constitution of Ukraine (Ukraine 28 June 1996) art. 1, 3.

⁸⁸ Pridham as cited in Kubicek (n 69) 269, 274.

⁸⁹ Katarzyna Wolczuk, 'Ukraine: Tormented Constitution-Making' in Jan Zielonka (ed.), *Democratic Consolidation in Eastern Europe. Volume I: Institutional Engineering* (OUP, 2001) 243-268.

⁹⁰ Dov Lynch, 'The New Eastern Dimension of the Enlarged EU' (September 2003), Institute for Security Studies Chaillot Paper 64, 41; Kuzio (n 86) 15-16.

⁹¹ European Council Common Strategy 1999/877/CFSP on Ukraine (1999) OJ L 331/1, para 1, 6.

⁹² *ibid.* para 5.

⁹³ *ibid.* 10, 12, 15.

⁹⁴ Gwendolyn Sasse, 'The EU Common Strategy on Ukraine: A Response to Ukraine's "Pro-European Choice"' in Ann Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (London, Federal Trust, 2002) 220.

an instrument devised to deliver results, and criticised for its lack of significant outputs⁹⁵ and ‘little follow-up’.⁹⁶

The Ukrainian democratic and human rights record continued to deteriorate in the face of the EU’s inability to foster change.⁹⁷ The Kuchma regime was nevertheless tolerated, as the country seemed to be on track towards EU integration, and therefore willing to cooperate with the EU and curtail relations with Russia.⁹⁸ After over a decade, Ukraine’s political record was poorer than ever, with widely criticised parliamentary elections in 2002 and a hostile political environment that encompassed severe violations of freedom of the press and political prosecutions.⁹⁹ Despite calls for reforms on various EU official visits, CFSP démarches and certain informal initiatives,¹⁰⁰ the EU neglected to deploy instruments to address the worsening situation, and no relevant assistance was offered until 2004.¹⁰¹ The PCA’s negative conditionality, as well as the possibility of aid suspension were overlooked,¹⁰² nor was there any overt threat of sanctions.¹⁰³ It was perceived that EU criticism was influenced not by genuine concern over Ukraine’s slide into authoritarianism, but rather by President Kuchma’s simultaneous rapprochement with Russia and its regional integration projects.¹⁰⁴ The engagement, therefore, secured Ukraine ‘outside of Russia’s sphere of control’.¹⁰⁵ The EU was keen on Ukraine demonstrating its European intentions, rather than its credentials. Thus, despite the ongoing political repression,¹⁰⁶ the ‘progress made by Ukraine towards meeting OSCE and Council of Europe standards’ was welcomed at the 2002 bilateral summit.¹⁰⁷ Cooperation even expanded in security-related areas, including the CFSP and the Justice, Freedom and Security (JFS).¹⁰⁸ By the end of the 1990s, Ukraine was perceived as a ‘keystone in the arch’ of European security.¹⁰⁹ Ultimately, despite a certain political orientation due to Ukraine’s membership of the CoE and the OSCE, the lack of EU membership perspective limited the

⁹⁵ *ibid.* 219-220.

⁹⁶ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 54.

⁹⁷ Katarzyna Wolczuk, ‘Ukraine after Orange the Revolution’ (CEP Policy Brief, 4 February 2005) 2.

⁹⁸ Paul Kubicek, ‘The European Union and Ukraine: Real Partners or Relationship of Convenience’ in Paul Kubicek (ed), *The European Union and Democratisation* (Routledge 2003), 155.

⁹⁹ Resolution 1346 Honouring of Obligations and commitments by Ukraine (Ukraine, PACE, 29 September 2003).

¹⁰⁰ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 68-69.

¹⁰¹ Only the 2004-2006 TACIS NIP allocated 10 million out of available 212 million to civil society, media and democracy.

¹⁰² Kubicek, ‘The European Union and Ukraine’ (n 98), 163.

¹⁰³ Kubicek (n 69) 280.

¹⁰⁴ Richard Youngs, ‘Ukraine’ in Ted Piccone and Richard Youngs (eds), *Strategies for Democratic Change: Assessing the Global Response* (DCP/FRIDE 2006) 103.

¹⁰⁵ Kubicek (n 69) 284.

¹⁰⁶ Amnesty International, ‘Ukraine before the United Nations Human Rights Committee’ (15 October 2001)

¹⁰⁷ EU-Ukraine Summit- Joint Statement, (Copenhagen, 4 July 2002) 10607/02 Presse 195

¹⁰⁸ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 68.

¹⁰⁹ Garnett as cited in Kubicek (n 69) 274.

latter's influence, while other incentives proved too weak for the Ukrainian political elite to transform itself.¹¹⁰

The EU remained unwilling to meet Ukraine's pleas for an accession process. A number of Ukrainian initiatives for revising the bilateral relations were left unanswered.¹¹¹ This lack of strategy was at least in part due to ambivalence among Member States wary of Russian influence.¹¹² Conversely, some candidate countries for EU membership appeared ready to challenge this attitude. For instance, even prior to its accession to the EU, Poland strongly advocated involvement with Ukraine on the basis of political, including human rights, conditionality.¹¹³

The absence of a coherent EU strategy towards Ukraine was one of the causative factors of the European Neighbourhood Policy (ENP). The ENP was initiated in 2003 to integrate EU neighbours without offering them membership, relying inter alia on political conditionality and pre-accession instruments.¹¹⁴ With its exclusionary rationale, the ENP was primarily directed at Eastern neighbours that had membership aspirations, such as Ukraine and Moldova, and whose expectations therefore had to be managed.¹¹⁵ Although the ENP offered closer political and economic cooperation than did the PCA, Ukraine's grouping with the South Caucasian countries implied downgraded relations, much to Ukraine's vexation.¹¹⁶ The agenda for bilateral cooperation was to be set in a non-binding Action Plan (AP)

¹¹⁰ *ibid* 284.

¹¹¹ Agenda-Ukraine January 2001; Joint Memorandum on co-operation between Ukraine and the European Union in matters related to the potential negative impact of the EU enlargement on Ukraine (September 2000); Memorandum of Ukraine concluding an Agreement [on] Co-operation between Ukraine and the EU in the Field of the Fight Against Organised Crime (September 2000); Memorandum of Ukraine [on] Strengthening Co-operation between Ukraine and the EU in the sphere of foreign and Security Policy, Military and Military-and-Technical Co-operation (September 2000); Memorandum of Ukraine [on] reforming joint bodies that have been set up by Ukraine and the EU in accordance with the provisions of the PCA; Aide-memoire on giving Ukraine the Stability Pact beneficiary status (January 2002); Aid-memoire on Participation of Ukraine's Law Enforcement representation in the Peacekeeping Operation (January 2002) .

¹¹² Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 56-57.

¹¹³ Michal Natorki, 'National Concerns in the EU Neighbourhood: Spanish and Polish Policies on the Southern and Eastern Dimension' in Laure Delcour and Elsa Tulmets (eds), *Pioneer Europe: Testing EU Foreign Policy in the Neighbourhood* (Nomos 2008) 59, 63; On the role of Poland see Roman Wolczuk, 'Ukraine: Poland's Failing Project' in Ann Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (Federal Trust 2002) 171-179; Piontek (n 65) 5147-218.; Kuzio (n 89) 22-24.

¹¹⁴ On ENP more generally see Marise Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008); Marise Cremona and Christophe Hillion, 'L'Union Fait La Force? Potential and Limitations of the ENP as an Integrated EU Foreign and Security Policy' in Nathaniel Copey and Alan Mayhew (eds), *European Neighbourhood Policy: The Case of Europe* (2006) SEI Seminar Papers Series 20; Bart van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2014); Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (Hart 2014).

¹¹⁵ Ghazaryan (n 114) 1-3; Karen E Smith, 'The Outsiders: The European Neighbourhood Policy' (2005) 81 *International Affairs* 757, 757-758.

¹¹⁶ Kuzio (n 90) 20-22.

negotiated in 2004 without much say from Ukraine. It failed to anticipate the political developments that unfolded prior to its final approval.

Thus, during this stage the EU's human rights policy towards Ukraine was characterised by late intervention without targeted instruments, where continuous engagement was preferred to taking a strong pro-democratic or pro-human rights stance.

2. Stage II: 2004-2010

In autumn 2004, Victor Yanukovich, backed by outgoing President Kuchma, won the presidential race in reportedly rigged elections, prompting mass demonstrations.¹¹⁷ The EU met this political crisis with a rather cautious approach. The High Representative, Javier Solana, and the Commission were slow to react and, only after prompts from Poland and Lithuania, the EU engaged in international mediation.¹¹⁸ This came to be seen by some as 'one of the very rare successes of the EU common foreign policy'.¹¹⁹ The EU took a hardline stance, issuing a 'bombshell' resolution condemning the conduct of the elections and sending missions to mediate.¹²⁰ The intervention by the EU institutions and Member States was not unequivocally seen as motivated by normative aspirations but also by the fear of civil war and separatism and the need to 'manage' relations with Russia.¹²¹ It appeared that the ENP AP would not be established until after new elections. As a result of international mediation and the stance taken by the Ukrainian Parliament and the Supreme Court,¹²² new presidential elections were held in December 2004, ushering into power a pro-European candidate, Victor Yushchenko. Subsequently, the ENP AP was established without reflecting the developments of the 'Orange Revolution': a mere ten points (mostly

¹¹⁷ OSCE/ODIHR, 'Ukraine: Presidential Election 31 October, 21 November and 26 December 2004', (OSCE/ODIHR Election Observation Mission Final Report, 11 May 2005).

¹¹⁸ Javier Solana, 'Remarks on Presidential elections in Ukraine' (Brussels, November 2, 2004) <http://eu-un.europa.eu/articles/en/article_3992_en.htm> accessed 1 July 2016; Council, 'Declaration by the Presidency of the European Union on the presidential elections of 31 October 2004 in Ukraine' (1 November 2004); European Council, 'Presidency Conclusion, Declaration on Ukraine' (5 November 2004); On the parliamentary ad hoc delegation see 'EP — Resolution on Ukraine is a "bombshell", says Yushchenko' (*eu-un.europa.eu*, 3 December 2004) <http://eu-un.europa.eu/articles/en/article_4114_en.htm> accessed 1 July 2016.

Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 83-87; Youngs (n 104) 109; Michael Emerson, 'Policies towards Ukraine, 2005-2007: Status Quo Unintended' in Nathalie Tocci (ed), *The European Union as a Normative Foreign Policy Actor* (2008) CEPS Working Document No 281/January 2008, 25; Michael Emerson, et al. 'The Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (CEPS 2005) 199; Richard Youngs, "'A Door Neither Closed nor Open": Europe' Inconsistent Support for Democratic Reform in Ukraine' (2008) UCD Dublin European Institute Working Paper 08-5, 6, 10.

¹¹⁹ Nemyria (n 71) 59.

¹²⁰ European Parliament Resolution on Ukraine (2 December 2004) (P6_TA(2004)0074); 'EP — Resolution on Ukraine is a "bombshell", says Yushchenko' (n 118)

¹²¹ Kubicek (n 69) 287; Youngs (n 104) 114.

¹²² Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 6960) 79-81.

irrelevant for political reform) were added to the plan without making any adjustment to the established priorities,¹²³ despite calls from the EP to renegotiate the document in keeping with the post-Revolutionary reality.¹²⁴ The refusal to renegotiate was said to stem from France's objection to preferential treatment for Ukraine.¹²⁵ The revolution and subsequent transition were played out to a large extent against a background of incitement of pro-European sentiment and declarations of unrealistic political objectives vis-à-vis EU integration.¹²⁶ In what was described as 'a slap in the face to millions of Ukrainians',¹²⁷ the Council and the Commission refused to match Ukraine's expectations, only the Parliament advocating Ukraine's membership of the Union.¹²⁸ This proved insufficient given the mixed attitudes of the Member States.¹²⁹

The Ukrainian authorities reluctantly accepted the unilaterally imposed agenda of the ENP as the only path towards EU integration.¹³⁰ On the surface, the AP appeared to have strengthened the political conditionality by establishing a set of priorities to be implemented for three years, monitored by the European Commission. To demonstrate its accession ambitions, Ukraine requested and believed that it had obtained the most detailed and comprehensive list of actions.¹³¹ Nonetheless, the scope of the priorities in the area of political reform is comparable to those found in APs for Moldova and the Southern neighbours (with the exception of Israel and Palestine).¹³²

Certain steps towards implementing the AP were undertaken, including creating the post of Deputy Prime Minister specifically to coordinate European integration in the 2005 government. The post was

¹²³ Youngs (n 104) 112.

¹²⁴ European Parliament Resolution on the Results of Ukrainian Elections (13 January 2005) P6_TA(2005)0009, para. 12..

¹²⁵ Iryna Solonenko and Balazs Jarabik, 'Ukraine' in Richard Youngs (ed), *Is the European Union Supporting Democracy in its Neighbourhood?* (FRIDE 2008) 88.

¹²⁶ Katarzyna Wolczuk, 'Implementation without Coordination: the Impact of EU Conditionality on Ukraine under the European Neighbourhood Policy' (2009) 61 *Europe-Asia Studies* 187, 197-198.

¹²⁷ Kubicek (n 69) 288.

¹²⁸ Michael Emerson, et al. 'The Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (CEPS 2005) 199

¹²⁹ Young notes the divergencies in the position of Poland, Hungary, Slovakia and Lithuania and Germany, Spain, France and Netherlands; Youngs (n 104) 111-112; Richard Youngs, "'A Door Neither Closed nor Open": Europe's Inconsistent Support for Democratic Reform in Ukraine' (2008) UCD Dublin European Institute Working Paper 08-5, 7-9; Kuzio (n 86) 19-20.

¹³⁰ Marco Overhaus, Hanns W Maull and Sebastian Harnisch (eds), 'The New Neighbourhood Policy of the European Union. Perspectives from the European Commission, France, Germany, Poland, Ukraine and Moldova' (Ask-Europa Stiftung, Trier, 2006) 7/19; Katarzyna Wolczuk, 'Adjectival Europeanisation? The Impact of EU Conditionality on Ukraine under the European Neighbourhood Policy' (2007) European Research Institute Working Paper Series 18, 11-12.

¹³¹ Julia Langbein and Katarzyna Wolczuk, 'Convergence without Membership? The impact of the European Union in the neighbourhood: Evidence from Ukraine' (2012) 19 *Journal of European Public Policy* 863, 869.

¹³² Nariné Ghazaryan, 'The Fluid Concept of 'EU values' in the Neighbourhood: A Change of Paradigm from East to South?' in Sara Poli (ed), *The European Neighbourhood Policy: Values and Principles* (Routledge 2016) 11-32.

later abolished and multiple institutional arrangements were instead concocted to mitigate European integration issues across various ministries, undermined by a lack of coordination and by ministerial rivalries.¹³³ From 2005 onwards, Ukraine started adopting a Road Map for AP implementation what Delcour calls ‘accommodated conditionality’ in relation to the *acquis communautaire* approximation, Ukraine ‘positioned itself as a would-be EU candidate preparing for accession process’.¹³⁴ It signed a number of sectoral instruments and agreements following the ENP, including on energy, aviation and a satellite navigation system.¹³⁵

Yet in the domain of human rights and political reform, Ukraine’s progress was marred by a constitutional crisis that led to the dissolution of the government in 2005 and of the parliament in 2007. The ambiguous incentives of the ENP¹³⁶ proved too weak to capitalise on the momentum of the Orange Revolution in instigating radical political reform, especially given internal political and institutional constraints.¹³⁷ In addition to the lack of tangible incentives, no solid financial support was directed at political reform. Until 2007, there was no special funding for ENP, and it was to be financed from residual funds available from various programmes such as TACIS.¹³⁸ Despite the hopes raised by the ‘revolution’, the Ukrainian state failed to transform and modernise, and such characteristics as an inefficient party system, weak institutional and legal framework, and the domination of oligarchic interests in state institutions.¹³⁹ Despite the renewed political openness and pluralism by guaranteeing freedom of assembly and speech,¹⁴⁰ the political system remained dysfunctional.¹⁴¹ This was inter alia due to years of stagnation fomented by the rivalry between President Yushchenko and his erstwhile ally as Prime Minister, Yulia Tymoshenko. Emerson described the state of the Ukrainian political scene as a ‘vibrant’ yet ‘dysfunctional democracy’.¹⁴² However, the parliamentary elections of 2006 were viewed by

¹³³ Oleksandr Stegny, ‘Ukraine and the Eastern Partnership: ‘Lost in Translation’ in Elena Korosteleva (ed), *Eastern Partnership: A New Opportunity for the Neighbours* (Routledge 2012), 52, 54

¹³⁴ Laure Delcour, ‘Does the European Neighbourhood Policy Make a Difference? Policy Patterns and Receptions in Ukraine and Russia’ (2007) 7 *European Political Economy Review* 118, 146.

¹³⁵ ‘Memorandum of Understanding on Co-operation in the Field of Energy between Ukraine and the European Union’ (1 December 2005);

¹³⁶ On the blurred incentives of the ENP see Ghazaryan (n 114) 78-81.

¹³⁷ Kataryna Wolczuk, ‘Ukraine and its Relations with the EU in the Context of the European Neighbourhood Policy’ (2008) EU Institute for Security Studies, Chaillot Paper 108, 87-118.

¹³⁸ Commission, ‘Paving the Way for a New Neighbourhood Instrument’ (Communication, Brussels, 1 July 2003) COM (2003) 393 final.

¹³⁹ Pawel Wolowski, ‘Ukrainian Politics after the Orange Revolution: How Far from Democratic Consolidation?’ (2008) EU Institute for Security Studies Chaillot Paper 108, 25-54.

¹⁴⁰ Iryna Solonenko, ‘The EU’s “Transformative Power” beyond Enlargement: the Case of Ukraine’s Democratisation’ (2007) European Research Institute, University of Birmingham European Research Working Paper Series 21, 1.

¹⁴¹ See further Grzegorz Gromadzki and others, ‘Beyond Colours: Assets and Liabilities of “Post-Orange” Ukraine’ (International Renaissance Foundation and Stefan Batory Foundation 2010).

¹⁴² Michael Emerson, ‘Policies towards Ukraine, 2005-2007: Status Quo Unintended’ in Nathalie Tocci (ed), *The European Union as a Normative Foreign Policy Actor* (2008) CEPS Working Document 281, 27.

the EU as the ‘first truly free and fair’ elections,¹⁴³ marking Ukraine out as a frontrunner among Eastern partners.¹⁴⁴

In March 2007, Ukraine became the first Eastern partner to negotiate a ‘new enhanced’ agreement after being sanctioned by the Council,¹⁴⁵ which acquiesced somewhat to Ukraine’s quest for special dispensation.¹⁴⁶ The outcome of the 2006 parliamentary elections was seen as a successfully fulfilled precondition to advancing the relations between the parties.¹⁴⁷ At the same time, it was due to internal political compromise, under the German presidency, between two groups of Member States that were advocating enhanced cooperation with either the Eastern or the Southern neighbourhoods.¹⁴⁸ Despite ambiguity regarding the ‘enhanced’ nature of the agreement with Ukraine, it later emerged as an AA. The EP proposed stronger incentives, as well as conditionality linking the conclusion of the Agreement to political reform.¹⁴⁹ At this stage Ukraine was considered to be a ‘willing’ partner whereby ENP political conditionality had the potential to deliver results, which nevertheless depended on the incentives of the policy and the scale of the internal problems of Ukraine.¹⁵⁰ Calls were made for the EU to engage with a wide range of actors other than the government.¹⁵¹

Ukraine’s special position was dealt a blow by the Eastern Partnership (EaP) initiative,¹⁵² which stemmed from a joint Polish-Swedish proposal that singled out Ukraine as the primary beneficiary of deepening bilateral relations,¹⁵³ and which was hastened as a result of the August 2008 war between Russia and Georgia. The EaP bilateral dimension had ‘no real added value’ for Ukraine which was already

¹⁴³ Commission, ENP Progress Report Ukraine (Brussels, 4 December 2006) SEC(2006)1505/2.

¹⁴⁴ Solonenko (n 140) 1.

¹⁴⁵ Council, ‘Conclusions concerning the negotiation of a new enhanced agreement between the EU and Ukraine’ (22 January 2007).

¹⁴⁶ Gwendolyn Sasse, ‘ENP and the EU’s Eastern Neighbours: Ukraine and Moldova as Test Cases’ in Richard G Whitman and Steffan Wolff (eds), *The European Neighbourhood Policy in Perspective: Context, Implementation and Impact* (Palgrave 2010) 188.

¹⁴⁷ Christophe Hillion, ‘Mapping Out the New Contractual Relations between the European Union and its Neighbours’ (2007) 12 EFAR 169, 181.

¹⁴⁸ Elizabeth Johansson-Nogues, ‘The “Normative Power EU” Argument Revisited: The EU and the European Neighbourhood Policy’ in Laure Delcour and Elsa Tulmets (eds), *Pioneer Europe: Testing EU Foreign Policy in the Neighbourhood* (Nomos 2008) 125-126.

¹⁴⁹ European Parliament Recommendation to the Council on a Negotiation Mandate For a New Enhanced Agreement Between the European Community and its Member States of the One Part and Ukraine of the Other Part (12 July 2007) 2007/2015(INI).

¹⁵⁰ Nathalie Tocci, ‘Can the EU Promote Democracy and Human Rights Through the ENP? The Case for Refocusing on the Rule of Law’ in Marise Cremona and Gabriella Meloni (eds), *The European Neighbourhood Policy: A New Framework for Modernisation?* (2007) EUI Working Papers, LAW 21, 23, 27.

¹⁵¹ Solonenko (n 140) 51.

¹⁵² Katarzyna Wolczuk, ‘Perceptions of, and Attitudes towards, the Eastern Partnership amongst the Partner Countries’ Political Elite’ (2011) 5 Eastern Partnership Review, 7-8.

¹⁵³ ‘Polish-Swedish Proposal, Eastern Partnership’ ([euneighbours.eu](http://www.euneighbours.eu), 2008) <<http://www.euneighbours.eu/library/sites/default/files/attachments/Polish-Swedish%20Proposal.pdf>> accessed 1 September 2016.

negotiating an AA.¹⁵⁴ The EaP introduced a multilateral framework of cooperation, including a thematic forum on democracy and biannual high-level summits between EU and Member States leaders and the heads of Ukraine, Moldova, Belarus, Georgia, Armenia and Azerbaijan. Since high-level annual summits with Ukraine were already taking place, this aspect of the initiative did not contribute much to relations between the parties. Similar to the ENP, the EaP left Ukraine lacking a sense of direction, partnership and joint ownership,¹⁵⁵ and disappointed by the equivalent treatment of other neighbours.¹⁵⁶ The EaP retained the normative rhetoric, however.¹⁵⁷ One of the more welcome aspects of the initiative was the Euronest Parliamentary Assembly and the Civil Society Forum, which created an outlet for civil society organisations to express their views and concerns on the process of integration, including on human rights issues.¹⁵⁸ The latter was particularly welcome given the EU's hitherto limited involvement, predominantly confined to the most active and established organisations despite civil societies' willingness to become engaged, including in monitoring activities.¹⁵⁹

Meanwhile, an Association Agenda (AAg) was adopted in 2009 to replace the ENP AP and 'prepare for and facilitate the entry into force of the [AA]'.¹⁶⁰ The negotiations on the new agreement continued in spite of the mixed performance in political reformation. In 2007, Ukraine was seen to have made 'significant advances',¹⁶¹ despite the 'systematic constitutional crisis' and 'grave concern' in many other areas, including incursions on various political freedoms recorded by the Parliamentary Assembly of the Council of Europe (PACE).¹⁶² A year later, 'no or only limited progress in the implementation of some key political reform measures including constitutional and judicial reform and combating corruption' was

¹⁵⁴ Dmytro Shulga, 'Food-for-thought Paper: Ukraine' (*ecfr.eu*, 2015) <http://www.ecfr.eu/article/commentary_ukraine3031> accessed 1 September 2016.

¹⁵⁵ Elena Korosteleva, 'The Eastern Partnership Initiative: A New Opportunity for the Neighbours' in Elena Korosteleva (ed), *The Eastern Partnership: A New Opportunity for the Neighbours* (Routledge 2012) 1-23, 13; Elena Korosteleva, 'Change or Continuity: Is the Eastern Partnership an Adequate Tool for the European Neighbourhood?' (2011) 25 *International Relations* 243, 254.

¹⁵⁶ Sergey Tumanov, Alexander Gasparishvili and Ekaterina Romanova, 'Russia-EU Relations, or How the Russians Really View the EU' in Elena Korosteleva (ed), *The Eastern Partnership Initiative: A New Opportunity for the Neighbours* (Routledge, 2012) 132.

¹⁵⁷ Commission, 'Eastern Partnership' (Communication) COM(2008) 823 final. For normative rhetoric see further Commission, 'Eastern Partnership Roadmap 2012-13' (Brussels, 15 May 2012) SWD(2012) 109 final calling for action in a number of areas inter alia via the cooperation with international organisations.

¹⁵⁸ For instance see Eastern Partnership Civil Society Forum, 'EaP Civil Society Forum Appeal on Ukraine: the Association Agreement between the EU and Ukraine should be initiated' (21 November 2011).

¹⁵⁹ Iryna Solonenko, 'European Neighbourhood Policy Implementation in Ukraine: Local Context Matters' in Erwan Lannon (ed), *The European Neighbourhood Policy's Challenges* (PIE Peter Lang 2010) 363-367.

¹⁶⁰ 2009 EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement (hereinafter 2009 A), 2.

¹⁶¹ Commission, 'Implementation of the European Neighbourhood Policy in 2007' (Communication, Brussels, 3 April 2008) COM(2008) 164, 3.

¹⁶² PACE, 'Honouring of obligations and commitments by Ukraine' (*Parliamentary Assembly*, 18 March 2008) <http://assembly.coe.int/CommitteeDocs/2008/20080318_amondoc06r.pdf> accessed 1 September 2016.

recorded.¹⁶³ By 2010, progress was reported in the sphere of media freedom, but major shortfalls in others such as the prevention of torture.¹⁶⁴ Despite major shortcomings in securing human rights and freedoms, the independence of the judiciary and the fight against corruption, the conduct of elections is seen by the EU as the main indication of the country moving in the right direction. Thus, the conduct of the 2010 presidential elections as free and fair was considered ‘significant progress’ in spite of the deep constitutional crisis.¹⁶⁵

Notwithstanding the failure of successive governments to implement reform, there was political consensus on European integration, meaning that the lack of reform has not compromised cooperation overall.¹⁶⁶ As in the early 2000s, cooperation between the parties continued to intensify in other areas, including the CFSP and migration policies.¹⁶⁷ On the basis of 2005 Memorandum of Understanding cooperation intensified in the energy sector, much to Russian distaste.¹⁶⁸ Shortly after the 2008-9 winter gas crisis the EU-Ukraine Joint Declaration on the Modernisation of Ukraine’s Gas Transit System was ratified, and Ukraine’s accession to the European Energy Community was approved.¹⁶⁹

The ENP was ultimately lacking in incentives, its conditionality weak and transformation costs too high for the political elite, all of which inhibited Ukraine’s progress.¹⁷⁰ The absence of an EU membership dimension has been seen as one of the factors undermining the EU’s normative capability in terms of instigating political reform.¹⁷¹ The protracted reluctance to acknowledge Ukraine’s membership aspirations was linked not only to enlargement fatigue, but also to divergences of the Member States in terms of the preservation of their internal power and to the so-called ‘Russia first’ policy.¹⁷² The status quo in relations between the parties was challenged, however, after the pro-Russian Yanukovich won the presidential elections of February 2010. The election process was endorsed by international organisations including the EU.¹⁷³

¹⁶³ Commission, ‘Implementation of the European Neighbourhood Policy in 2008’ (Communication, Brussels, 23 April 2009) COM(2009) 188/3, 7.

¹⁶⁴ Commission, ‘Taking stock of the European Neighbourhood Policy’ (Communication, Brussels, 12 May 2010) COM (2010) 207, 3.

¹⁶⁵ *Ibid.*, 3.

¹⁶⁶ Solonenko (n 140) 354.

¹⁶⁷ COM(2009) 188/3 (n 163) 7.

¹⁶⁸ Hannes Adomeit, ‘Russia: ENP Competition’ in Erwan Lannon (ed), *The European Neighbourhood Policy’s Challenges* (PIE Peter Lang 2012) 398.

¹⁶⁹ Ministerial Council, ‘Decision of the Ministerial Council of the Energy Community on the accession of Ukraine to the Energy Community Treaty’ (18 December 2009) DI2009I04IMC-EnC.

¹⁷⁰ Solonenko (n 140) 346.

¹⁷¹ Emerson (n 142) 27.

¹⁷² *Ibid.* 25; Youngs (n 129) 16-22.

¹⁷³ ‘EU endorses Ukraine election result’ (*Euractiv*, 8 February 2010).

Ultimately, during this period a more visible human rights agenda appears in relations between the parties. However, the lack of necessary incentives and support, as well as internal domestic factors predetermined the poor performance in human rights and other areas of political reform.

3. Stage III: 2010-till present

Following the Yanukovich victory, Neighbourhood Commissioner Štefan Füle presented a set of key reforms during a visit to Ukraine in April 2010, known as the 'Füle matrix'.¹⁷⁴ Though not an official document, the matrix was leaked to the press, and appeared to include also conditions for political reform. Unlike the AP and the AAg, the matrix had deadlines concerning various priorities, the implementation of which was to be met with EU support, as well as incentives.¹⁷⁵ It included constitutional reforms and amendments to electoral law (6-18 months) and measures on the fight against corruption (within 18 months),¹⁷⁶ focusing on 'formal democracy' prerequisites.¹⁷⁷ In the same year the EP criticised the conduct of local elections and voiced its concerns about freedom of the media.¹⁷⁸ Despite these apparently stronger demands on behalf of the EU, the state of Ukrainian democracy and rule of law continued to deteriorate, so that by 2012 Amnesty International characterised Ukraine's human rights record as 'appalling'.¹⁷⁹ It particularly highlighted the human rights abused by law enforcement institutions, discrimination against various groups, as well as the breaches of the rights of asylum seekers and refugees. Despite the worsening political situation, the EU appeared to be content with the progress in AA negotiations,¹⁸⁰ and did not restore to the negative conditionality of the PCA or the European Neighbourhood and Partnership Instrument (ENPI),¹⁸¹ instead opting for continuous engagement.¹⁸² The cooperation continued and in 2011 Ukraine joined the Energy Community. However, at a summit in December 2011, the AA text was not initialled in view of the political situation in Ukraine, but this was reversed in March 2012, followed by the initialling of the deep

¹⁷⁴ Štefan Füle, 'Exchange of views on South Caucasus and Ukraine' (28 April 2010) SPEECH/10/189 <http://europa.eu/rapid/press-release_SPEECH-10-189_en.htm> accessed 1 September 2016.

¹⁷⁵ Solonenko (n 140) 357.

¹⁷⁶ 'Евросоюз подготовил Украине список требований и поощрений' (*Kommersant*, 30 April 2010) <<http://www.kommersant.ru/doc/1363505>> accessed 1 September 2016.

¹⁷⁷ Tom Casier, 'The EU's Two Track Approach to Democracy Promotion: The Case of Ukraine' in Sandra Lavenex and Frank Scimmelfennig (eds), *Democracy Promotion in the EU's Neighbourhood: From Leverage to Governance?* (Routledge 2013) 84.

¹⁷⁸ European Parliament Resolution on Ukraine, (25 November 2010) P7_TA(2010)0444).

¹⁷⁹ Amnesty International, 'Amnesty International tells Ukraine's new parliament it's time to address country's appalling human rights record' (12 December 2012) EUR 50/016/2012.

¹⁸⁰ Commission, 'A New Response to a Changing Neighbourhood' (Communication, Brussels, 25 May 2011) COM(2011) 303, 1.

¹⁸¹ Regulation No 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (2006) OJ L 310, art 28.

¹⁸² Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 61.

and comprehensive free trade agreement (DCFTA) on 19 July 2012.¹⁸³ There were also hints that the signing of the AA could be delayed.¹⁸⁴

A particularly thorny issue was the imprisonment of former Prime Minister Yulia Tymoshenko and her allies on charges of abuse of office and corruption, widely denounced by international organisations as politically motivated.¹⁸⁵ Besides, when the October 2012 parliamentary elections were assessed as neither fair nor free, the Council of the EU demanded that Ukrainian authorities 'demonstrate determined action and tangible progress' in a number of areas related to human rights and rule of law, in particular selective justice, implementation of ECtHR judgments and judicial reform.¹⁸⁶

EU Member States differed in their disposition to apply pressure on Ukraine, some expressing a preference for continuous dialogue.¹⁸⁷ At a bilateral summit in February 2013, a deadline was set for the following May to demonstrate 'concrete progress' in meeting the EU demands on course to signing the AA at the EaP summit in Vilnius in November.¹⁸⁸ The EP also demonstrated an active interest by dispatching a monitoring mission to establish a dialogue between the EU and Ukraine, and between

¹⁸³ European Union and Ukrainian Negotiators Initial Association Agreement, including Deep and Comprehensive Free Trade Area' (EEAS, 30 March 2012).

¹⁸⁴ Commission and High Representative for Foreign and Security Policy, 'Delivering on a New European Neighbourhood Policy' JOIN(2012)14 final, 4; Štefan Füle, 'Ukraine 20 Years On: Challenges for the Future' (EPC Brussels, 21 September 2011) <http://www.epc.eu/prog_forum_details.php?cat_id=6&pub_id=1337&forum_id=18&prog_id=3> accessed 1 September 2016.

¹⁸⁵ Amnesty International, 'Jailed former Ukraine prime minister must be released' (Amnesty, 11 October 2011) <<https://www.amnesty.org/en/latest/news/2011/10/jailed-former-ukraine-prime-minister-must-be-released/>> accessed 1 September 2016.; European Parliament Resolution on the current developments in Ukraine (27 October 2011) P7_TA(2011)0472.

¹⁸⁶ FAC, Conclusions on Ukraine, 10 December 2012; 'Joint statement on the situation in Ukraine' Strasbourg, 12 December 2012.

¹⁸⁷ 'Analysts slam Germany's Ukraine policy shortcomings' (Euractiv, 19 November 2013) <<http://www.euractiv.com/section/europe-s-east/news/analysts-slam-germany-s-ukraine-policy-shortcomings/>> accessed 1 September 2016; 'EU countries divided over Tymoshenko case' (Euractiv, 30 April 2013) <<http://www.euractiv.com/section/europe-s-east/news/eu-countries-divided-over-tymoshenko-case/>> accessed 1 September 2016; 'Campaign to Free Tymoshenko: Merkel Wants Mass Boycott of Euro 2012 in Ukraine' Spiegel Online International, (7 May 2012) <<http://www.spiegel.de/international/europe/merkel-campaigning-for-eu-wide-boycott-of-euro-2012-a-831772.html>> accessed 1 September 2016.

On different choices of Member States regarding the boycotting of Euro 2012 Football Championship see Julio C. Perez-Bravo, 'Progress or Deterioration? The Effect of Human Rights and Democratisation Policies and Actions by the European Union and the Council of Europe in the Ukraine' in Henry F Carey (ed), *European Institutions, Democratisation, and Human Rights Protection in the European Periphery* (Lexington Books 2014) 97-98.

¹⁸⁸ Council, '16th EU-Ukraine Summit Joint Statement' (Brussels, 25 February 2013) 6811/13 PRESSE 72 <https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/135667.pdf> accessed 1 September 2016.

various political forces in Ukraine.¹⁸⁹ When in May 2013 it became clear that Ukraine was not willing to bow to pressure, the Lithuanian presidency extended the deadline by a further six months.¹⁹⁰

Over and above the worsening internal political situation, Ukraine faced external pressure from Russia. Keen for Ukraine to join a Russian-led alternative integration process for a Eurasian Union,¹⁹¹ Russia exerted economic pressure and even resorted to threats.¹⁹² On the other hand, the closer the Vilnius summit loomed, the more strident EU demands for Tymoshenko's release became,¹⁹³ at the expense of other serious concerns raised through the annual monitoring process including about the state of judiciary, corruption, and the worsening conduct of elections.¹⁹⁴ Ukraine appeared to fall back on its old custom, noted by Kubicek, of bargaining between Russia and the EU 'to avoid real punishment and extract maximum concession' from both.¹⁹⁵ Not only did Ukraine not succumb to the pressure of these restricted demands, but in a surprise move just prior to the Vilnius EaP summit it declared an intention to abstain from signing the Association Agreement, citing the need 'to ensure the national security of Ukraine ... to restore trade and economic relations with Russia'.¹⁹⁶ The decision was met with strong public resistance and mass protests in the Maidan Square in Kyiv leading to a political standoff and

¹⁸⁹ Council, 'EU Annual Report on Human Rights and Democracy in the World in 2013' (23 June 2014) 11226/14 PRESSE 360, 132-133.

¹⁹⁰ 'Lithuania gives Ukraine extra time to meet EU demands' (*Euractiv*, 14 May 2013) <<https://www.euractiv.com/section/europe-s-east/news/lithuania-gives-ukraine-extra-time-to-meet-eu-demands/>> accessed 1 September 2016.

¹⁹¹ Russia denies bullying Ukraine into its customs union' (*Euractiv*, 5 February 2013) <<http://www.euractiv.com/section/europe-s-east/news/russia-denies-bullying-ukraine-into-its-customs-union/>> accessed 1 September 2016;

¹⁹² "Russia hits at Ukraine with chocolate war' (*Euractiv*, 14 August 2013) <<http://www.euractiv.com/section/europe-s-east/news/russia-hits-at-ukraine-with-chocolate-war/>> accessed 1 September 2016; 'Russia reiterates warnings to Ukraine ahead of EU summit' (*Euractiv*, 24 September 2014) <<http://www.euractiv.com/section/europe-s-east/news/russia-reiterates-warnings-to-ukraine-ahead-of-eu-summit/>> accessed 1 September 2016.

¹⁹³ 'Ukraine president ready to release Tymoshenko for treatment' (*Euractiv*, 18 October 2013) <<https://www.euractiv.com/section/europe-s-east/news/ukraine-president-ready-to-release-tymoshenko-for-treatment/>> accessed 1 September 2016; 'EU Ministers Urge Ukraine to Stop Bluffing on Tymoshenko' *Voice of America* (22 October 2013) <<http://www.voanews.com/a/reu-eu-ministers-urge-ukraine-to-stop-bluffing-on-tymoshenko/1774905.html>> accessed 1 September 2016; 'EU makes new bid for deal on Ukraine's jailed Tymoshenko' (*Euractiv*, 30 October 2013) <<http://www.euractiv.com/section/europe-s-east/news/eu-makes-new-bid-for-deal-on-ukraine-s-jailed-tymoshenko/>> accessed 1 September 2016.

¹⁹⁴ Commission and High Representative, 'European Neighbourhood Policy: Working towards a Stronger Partnership' (Brussels, 20 March 2013) JOIN(2013) 4 final, 6-7.

¹⁹⁵ Kubicek (n 69) 274.

¹⁹⁶ Cabinet of Ministers of Ukraine, (November 2013) Decree 90521 <http://www.modernukraine.eu/wp-content/uploads/2013/11/ECFMU-Newsflash_-21-November-2013.pdf> accessed 1 September 2016.

violence and taking the country to a brink of a civil war.¹⁹⁷ Meanwhile, Russia continued to hold sway, in part by manipulating its gas policy.¹⁹⁸

With the political situation on the ground worsening in early 2014 due to the adoption of further anti-democratic laws and escalating violence,¹⁹⁹ the EU opted to continue dialogue and intervene as a mediator, concurrently warning of ‘possible consequences’ without clarifying what it meant.²⁰⁰ In addition to the engagement of EU institutions on manifold trips and meetings,²⁰¹ in February 2014 the Council threatened to react in the event of further deterioration of the situation,²⁰² and ten days later target sanctions were enacted.²⁰³ A day later, President Yanukovich fled the country. The incumbent President Turchynov, chosen by the Verkhovna Rada without national elections, was now in charge of signing the agreement.

The political provisions of the AA were signed separately in March 2014.²⁰⁴ Although the signing of the political provisions by a non-elected President raised concerns over legitimacy, it was at the same time a gesture of political support for Ukraine.²⁰⁵ The rest of the agreement was signed in June 2014.²⁰⁶ The AA

¹⁹⁷ ‘Protestors in Kyiv urge Yanukovich to sign EU pact’ (*Euractiv*, 26 November 2013) <<http://www.euractiv.com/section/europe-s-east/news/protestors-in-kyiv-urge-yanukovich-to-sign-eu-pact/>> accessed 1 September 2016.

¹⁹⁸ Russia leverages its gas, cash supremacy in Ukraine’ (*Euractiv*, 4 December 2013) <<http://www.euractiv.com/section/europe-s-east/news/russia-leverages-its-gas-cash-supremacy-in-ukraine/>> accessed 1 September 2016.

¹⁹⁹ ‘Ukraine anti-democracy laws spark violent clashes’ (*Euractiv*, 20 January 2014) <<http://www.euractiv.com/section/europe-s-east/news/ukraine-anti-democracy-laws-spark-violent-clashes/>> accessed 1 September 2016.

²⁰⁰ ‘EU offers help to curb bloodshed as Ukraine clashes escalate’ (*Euractiv*, 23 January 2014) <<http://www.euractiv.com/section/europe-s-east/news/eu-offers-help-to-curb-bloodshed-as-ukraine-clashes-escalate/>> accessed 1 September 2016.

²⁰¹ Catherine Ashton, ‘Remarks by EU High Representative Catherine Ashton at the end of her visit to Ukraine’ (Kyiv, 25 February 2014).

²⁰² Foreign Affairs Council, ‘Conclusions on Ukraine’ (Brussels, 10 February 2014) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/140960.pdf> accessed 1 September 2016.

²⁰³ Foreign Affairs Council, ‘Conclusions on Ukraine’ Brussels, (20 February 2014) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141110.pdf> accessed 1 September 2016.

²⁰⁴ Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (2014) Preamble, art. 1, I, II, VII.

²⁰⁵ Guillaume van der Loo and Peter van Elsuwege and Roman Petrov, ‘The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument’ (2014) EUI Working Papers 9, 5.

²⁰⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) OJ L161.

is the ‘most ambitious and complex’ treaty signed by the EU with any third country.²⁰⁷ This, however, can be disputed in view of the Ankara Agreement with Turkey inter alia aiming at the establishment of a customs union between the parties.²⁰⁸ Its preamble neither directly recognises Ukraine’s membership aspiration nor precludes it.²⁰⁹ It upgrades the institutional framework and intensifies the economic cooperation via the establishment of a deep and comprehensive free trade agreement (DCFTA).²¹⁰ It also includes the most extensive human rights clause thus far, as discussed below. Despite this, the AA has been criticised for the scope of *acquis* export at the very high cost of transformation, not matched by the allocation of EU funds and increased as a result of the Russian stance.²¹¹ As a mixed agreement requiring ratification by the EP, as well as the national parliaments of all EU Member States, the agreement was not expected to enter into force immediately. Hence, the EU introduced unilateral autonomous trade measures in April 2014 to open the European market.²¹² Certain other provisions of the agreement, including those relevant for political reform, started to apply provisionally as of 1 November 2014. The provisional application of the DCFTA provisions, however, was postponed until 1 January 2016 and will depend on the trilateral talks with Russia.²¹³

After unidentified troops (widely seen as Russian forces) occupied Crimea in the end of February, a swift referendum was held resulting in the conclusion of an Accession Treaty to include the Republic of Crimea and Sevastopol as part of the Russian Federation on 16th of March 2014. The EU was unequivocal in its condemnation of the illegal referendum on independence and the subsequent annexation of the peninsula,²¹⁴ which was swiftly followed by a breakaway conflict in Eastern Ukraine. This was inter alia triggered by the repealing of the law allowing for Russian to be the second official language in the Ukrainian regions.²¹⁵ Although two ceasefires have been agreed under the auspices of the OSCE,²¹⁶ the conflict has had a significant impact on Ukraine’s internal and external political affairs. It

²⁰⁷ Štefan Füle, ‘EU-Ukraine Relations: future expectations’ Taras Shevchenko National University of Kyiv (Kyiv), 22 April 2010) SPEECH/10/175.

²⁰⁸ Agreement establishing an association between the European Economic Community and Turkey (1973) OJ C113/1, art 4.

²⁰⁹ In particular, it states that the agreement ‘will not prejudice and leaves open future developments in EU-Ukraine relations’.

²¹⁰ *ibid*, arts 460, 463.

²¹¹ Kataryna Wolczuk, ‘Ukraine and the EU: Turing the Association Agreement into a Success Story’ (23 April 2014) European Policy Centre, Policy Brief.

²¹² Regulation 374/2014 of the European Parliament and of the Council on the reduction or elimination of customs duties on goods originating in Ukraine (2014) OJ L 118.

²¹³ See for instance, AA/DCFTA, Joint Conclusions of the EU-Russian Federation-Ukraine ministerial meeting on the effects of implementation of the EU-Ukraine (Brussels, 11 July 2014).

²¹⁴ Foreign Affairs Council, ‘Conclusions, 17 March 2014’ (2014) para 1; European Council, ‘Conclusions, 20-21 March 2014’ (2014) para 29.

²¹⁵ ‘Western nations scramble to contain fallout from Ukraine crisis’ *The Guardian* (24 February 2014) <<https://www.theguardian.com/world/2014/feb/23/ukraine-crisis-western-nations-eu-russia>> accessed 1 September 2016.

²¹⁶ Protocol of the Trilateral Contact Group ‘Minsk Protocol’ (Minsk, 5 September 2014 and 11 February 2015)

also distracted attention from EU-Ukraine relations with an emphasis now being placed on establishing peace and ensuring Ukraine's sovereignty and territorial integrity. The human rights agenda between the parties thus came to be dominated by the situation in both Crimea and the Eastern Ukraine. In support of the central Ukrainian authorities, the EU resorted to negative measures, including individual sanctions and economic sanctions against Russia and Crimea.²¹⁷ In contrast to its post-Orange Revolution approach, the EU reacted with the promise of vast financial assistance and a change of attitude towards civil society.²¹⁸ The post-Maidan events and the current state of affairs in Eastern Ukraine have leveraged a reduction in demand on Ukraine in terms of political reform. For instance, a 2014 progress assessment acknowledged that the political events had hampered the functioning of the state,²¹⁹ seemingly a pretext for a less than perfect political record. The EP was quick to hail the October 2014 parliamentary elections,²²⁰ despite the OSCE finding shortfalls in electoral standards.²²¹ Consequent to the change of leadership that Maidan engendered and to the unfolding propaganda war with Russia, Ukraine imposed restrictions on various broadcasting channels and banned many foreign journalists.²²² The Commission noted this development in its 2015 Progress Report as a matter of fact 'for national security reasons', yet it withheld criticism.²²³ In December 2015 the Communist party was banned for 'promoting separatism'.²²⁴

To sum up, since 2010 the EU human rights policies in Ukraine were challenged by the development of internal and external political events. The EU's strategic interests at times demanded a stronger position

²¹⁷ See for instance Council Decision 2014/386/CFSP (2014) OJ L 183; Council Decision 2014/933/CFSP (2014) OJ L 365; Council Regulation (EU) 692/2014 (2014) OJ L 183; Council Decision 2014/145/CFSP (2014) OJ L 78; Council Decision 2014/455/CFSP amending Decision 2014/145 (2014) OJ L 205. For full list of sanctions, see <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf> accessed 27-09-2016.

²¹⁸ 'Ukraine-EU Country Roadmap for Engagement with Civil Society 2014 - 2017' (EEAS, 31 July 2014) <http://eeas.europa.eu/delegations/ukraine/documents/eu_ua/ukraine_civil_society_roadmap_2014.pdf> accessed 1 September 2016.

²¹⁹ Commission and the High Representative, 'European Neighbourhood Policy: Working towards a Stronger Partnership' JOIN (Brussels, 20 March 2013) 4 final, 4.

²²⁰ 'Ukraine election "free and fair", MEP delegation says' (Euractiv, 28 October 2014) <<http://www.euractiv.com/section/europe-s-east/video/ukraine-election-free-and-fair-mep-delegation-says/>> accessed 1 September 2016.

²²¹ OSCE/ODIHR, 'Election Observation Mission Final Report, Ukraine Early Parliamentary Elections of 26 October 2014' (Warsaw, 19 December 2014) <<http://www.osce.org/odihr/elections/ukraine/132556?download=true>> accessed 1 September 2016.

²²² 'Should Ukraine get a pass because Russia censors too?' (Radio Free Europe, 27 March 2014) <<http://www.rferl.org/a/should-ukraine-get-a-pass-because-russia-censors-too/25312077.html>> accessed 1 September 2016; 'Ukraine bans Euronews' (Euractiv, 20 March 2015) <<http://www.euractiv.com/section/global-europe/news/ukraine-bans-euronews/>> accessed 1 September 2016.

²²³ Commission, '2015 Progress Report' (Brussels, 25 March 2015), SWD(2015) 74 final, 6.

²²⁴ 'Ukraine bans Communist party for "promoting separatism"' (The Guardian, 17 December 2015) <<https://www.theguardian.com/world/2015/dec/17/ukraine-bans-communist-party-separatism>> accessed 1 September 2016.

on human rights. The current events, however, demonstrate that the position on human rights might be loosened in order to continue the bilateral cooperation.

B. Specific Tools and Instruments

Over the years, the EU has deployed a plethora of instruments incorporating normative rhetoric in one way or another. These include framework, cross-policy and policy-specific instruments, as well as financial and technical assistance instruments.

1. The PCA

The PCA was the first bilateral instrument to ensure the presence of human rights in relations between the parties, asserting in its preamble ‘the paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multiparty system with free and democratic elections’. It established political dialogue with the objective of ensuring cooperation on ‘the observance of the principles of democracy, the respect and promotion of human rights, particularly those of minorities’.²²⁵ In Article 2, respect for democratic principles and human rights, as defined in particular by the Helsinki Final Act and the Charter of Paris for a New Europe, underpins the internal and external policies of the Parties and constitutes an essential element of the agreement. The essential element is at the foundation of the standard human rights clause that became an integral part of EU policy by the mid-1990s and that, in addition to the preambular reference, contains a provision on the suspension of agreements.²²⁶ The essential element clause was accompanied by a so-called ‘Bulgarian’ suspension clause, which emphasised consultation for ‘appropriate measures’ to be taken and in which immediate suspension would only be possible in cases of ‘special urgency’ including breaches of essential elements.²²⁷

Until the post-ENP annual monitoring by the Commission, the PCA Cooperation Council was the main platform for evaluating Ukraine’s performance as part of the political dialogue. The focus on issues varied from year to year, at times with significant gaps as pointed out by the EP.²²⁸ The Cooperation

²²⁵ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other (1998) OJ L 049, art 6.

²²⁶ Eibe Riedel and Martin Will, ‘Human Rights Clauses in External Agreements of the EC’ in Philip Alston (ed), *The EU and Human Rights* (OUP 1999), 731-732; Allan Rosas, ‘The European Union and Fundamental Rights/Human Rights’ in Catarina Krause and Martin Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University: Institute for Human Rights 2009) 467; Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Intersentia, 2001) 157; Bartles (n 77) 23.

²²⁷ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other (1998) OJ L 049, annex ‘Joint Declaration concerning Art. 102’ art 102.

²²⁸ European Parliament, ‘Annual Report on human rights in the world in 2002 and European Union’s human rights policy’ (16 July 2003) 2002/2011(INI) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A5-2003-0274&language=ET>> accessed 1 September 2016.

Council had been virtually silent on political reform until 2002, when it proclaimed that free and fair elections, reform of the judiciary and transparent state-media relations were key to the development of the Ukrainian state, without linking them to progress in relations between parties. Elections were again on the agenda in 2002 and 2006, but there was a marked silence on political reform in between. It was not until the constitutional crisis in 2006-7 that political reform started to feature more prominently on the Cooperation Council's agenda. The main emphasis was on constitutional reform (in cooperation with the Venice Commission of the CoE),²²⁹ ensuring checks and balances,²³⁰ conduct of elections,²³¹ the independence of the Constitutional Court,²³² freedom of assembly and freedom of media.²³³ The independence of the judiciary and the fight against corruption were linked to improvement of the business environment.²³⁴ Similar to the bilateral summits,²³⁵ a shift took place in the last two rounds of meetings of the Cooperation Council, with an emphasis on selective justice,²³⁶ the rights of detainees and defendants²³⁷ and reforms of the judiciary, the General Prosecutor's Office and the Criminal Code.²³⁸ The main weaknesses of the Cooperation Council were the lack of binding powers affecting the pace of relations between the parties and that it excluded civil society from any possible contribution.

Moreover, the PCA Parliamentary Cooperation Committee provided a socialisation platform and created an avenue for election observation²³⁹ separate from the EP's election monitoring.²⁴⁰ The Justice, Liberty and Security subcommittee also exercised oversight of political reform, although on a bureaucratic level. Although the latter succeeded in translating human rights rhetoric to lower levels of engagement with state institutions, its contribution was rather limited in terms of instigating reform. Yet the committee was capable of producing practical benefits, for instance in May 2013, when it was instrumental in compelling Ukraine to respond to a list of allegations of human rights violations.²⁴¹

²²⁹ PCA Cooperation Council Meetings for 2007-2010.

²³⁰ PCA Cooperation Council Meetings 2007-2008.

²³¹ PCA Cooperation Council Meetings 2008-2010.

²³² PCA Cooperation Council Meeting 2008.

²³³ PCA Cooperation Council Meeting 2010.

²³⁴ PCA Cooperation Council Meeting 2009.

²³⁵ See below.

²³⁶ PCA Cooperation Council Meetings 2012-2013.

²³⁷ PCA Cooperation Council Meeting 2012.

²³⁸ PCA Cooperation Council Meeting 2013.

²³⁹ For instance, the Committee delegation observed the local and regional elections held in Ukraine on 31 October 2010.

²⁴⁰ EP sent monitors to 2002 parliamentary and 2004 presidential elections.

²⁴¹ Council, 'EU Annual Report on Human Rights and Democracy in the World in 2013' (n 189)

Yet in the years that followed the PCA ratification, Ukraine's poor democratic and human rights records proved insufficient to incur punitive measures.²⁴² One notable example is the brutal murder of journalist Georgiy Gongadze in 2000, which prompted a mere declaration from the Council.²⁴³

2. Bilateral Policy Documents

A number of bilateral policy documents have been used since the introduction of the ENP, cutting across all areas of EU-Ukraine cooperation.

a) ENP Action Plan

The 2005 AP confirmed ENP conditionality, whereby 'the pace of progress of the relationship will acknowledge fully Ukraine's efforts and concrete achievements in meeting commitments to common values'.²⁴⁴ The commitment to common values was to be demonstrated with reference to the actions established in priority area 2.1 on democracy, rule of law, human rights and fundamental freedoms. It includes 30 priorities organised under twelve headings. The first three are generic headings concerned with strengthening the stability and effectiveness of institutions guaranteeing democracy and the rule of law (elections, electoral reform, administrative and local governance reform), judicial reform and reform of the justice sector (reform of prosecution, law enforcement, independence of judiciary, implementation of ECtHR judgments, relevant trainings) and the fight against corruption (joining of CoE's Group of States against Corruption, reform of civil service, implementation of JHA scoreboard measures). The remaining headings are predominantly dedicated to particular rights or freedoms and require adherence to and implementation of UN and CoE conventions and protocols. They include freedom of association, media, protection of national minorities, prevention of ill treatment and torture, equal treatment of men and women and rights of children. The only priority with economic and social underpinning involves the rights of trade unions and core labour standards, in accordance with European standards and ILO conventions. Ukraine was required also to ensure international justice, inter alia by ratifying the ICC convention. Human rights-related actions (e.g., on asylum, migration and trafficking) are also provided for within the priority on JHA. According to Tom Casier, the political priorities do not take sufficient notice of aspects of 'substantive democracy' including transparency,

²⁴²PACE, Resolution 1239 'Freedom of expression and the functioning of parliamentary democracy in Ukraine' (25 January 2001); PACE, Resolution 1244 'Honouring of obligations and commitments by Ukraine' (26 April 2001); PACE, Resolution 1346 'Honouring of obligations and commitments by Ukraine' (29 September 2003).

²⁴³ There were suspicions of involvement of the Ukrainian authorities in the disappearance of Gongadze. Besides, the state failed to investigate the crime and bring the culprits to justice.

Amnesty International, 'Three years on: Who was responsible for the "disappearance" of Georgiy Gongadze?' (*Amnesty International*, 16 September 2003); Council of the EU, 'Declaration by the Presidency on behalf of the EU about working conditions for media and to remind about concerns regarding the Gongadze case' (5 February 2001) 5922/01 Presse 41.

²⁴⁴ ENP AP, 1.

dialogue or the involvement of civil society, which are at best scattered across various other sectors of cooperation.²⁴⁵

The AP allowed for flexibility in setting the agenda of cooperation,²⁴⁶ by expanding the understanding of political reforms beyond the PCA human rights clause. However, the majority of its stipulations were formulated more as calls for action than as concrete steps, the implementation of which could be measured substantively or temporally. Only in respect of the conduct of the 2006 parliamentary election can a timeline be discerned. The only stipulations that perhaps can be viewed as having some concreteness are those referring to the implementation of recommendations made by other international organisations.²⁴⁷ The reliance on the standards of other international organisations, including the OSCE/ODIHR, Council of Europe, or at times 'European' or 'international' standards is seen as 'mainly a reinforcement strategy' whereby the EU uses 'its bargaining power to back up the existing European organisations'.²⁴⁸ Some priorities are clear examples of the failure to translate the institutional knowledge onto paper. For instance in 2005, the EP noted deep divisions along cultural and regional lines in Ukraine,²⁴⁹ yet there was no acknowledgment of this in the more generally formulated priority to respect minority rights. Besides, the political 'priorities' were not priorities as such, having the same status as hundreds of other priorities in many other areas of cooperation between the parties. The document was therefore seen to be a 'shopping list'.²⁵⁰ At the same time, some political reform priorities were viewed as more important than others. For instance, by the end of 2005, the Commission identified 'crucial priorities' to include free and fair parliamentary elections (in March 2006), steps to strengthen the independence of the judiciary and the fight against corruption.²⁵¹

The Commission and the PCA Cooperation Council conducted the monitoring of AP implementation on an annual basis. The 2006-2009 PCA Cooperation Councils focused only on constitutional reform, proper checks and balances, conduct of elections and improvement of the judiciary, ignoring the rest of the AP priorities. In its annual monitoring reports, the Commission relies on the CoE, the OSCE and the Venice Commission, and its tone has been perceived as less critical than when reviewing the progress of the accession countries.²⁵² While the annual reports demonstrate awareness of the shortfalls in priority

²⁴⁵ Casier (n 177) 78.

²⁴⁶ Peter Van Elsuwege, 'Variable Geometry in the European Neighbourhood Policy: The Principle of Differentiation and its Consequences' in Erwan Lannon (ed), *The European Neighbourhood Policy's Challenges* (PIE Peter Lang 2010), 70.

²⁴⁷ For instance, implement the recommendations by the UN Committee on the Rights of the Child of 2002 or the recommendations of the European Committee for the Prevention of Torture.

²⁴⁸ Casier (n 177) 76.

²⁴⁹ European Parliament Resolution on the results of the Ukraine elections (13 January 2005) P6_TA(2005)0009, para 8.

²⁵⁰ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 36.

²⁵¹ Commission, 'Implementing and promoting the European Neighbourhood Policy' (Brussels, 22 November 2005) SEC(2005) 1521, 10.

²⁵² Solonenko (n 140) 89.

actions, they often focus on formal adoption of new legislation or amendments of the legislative framework as an indication of progress, rather than their enforcement. The conduct of elections, constitutional reform and the state of the judiciary come across as key aspects of the Commission's evaluation. Often, actions in particular areas appear to constitute sufficient grounds to qualify as 'making progress'. For instance, in cases of the Commission assessing developments in freedom of media and expression to be 'significant', civil society finds a 'discrepancy', whereby the planned legislative changes are only partially implemented or not at all.²⁵³ Another example is progress in the area of corruption. While the Commission notes developments in Ukraine on a legislative level, civil society concludes that the objectives set by the EU have not been achieved.²⁵⁴

The Commission's evaluation did not appear to be linked to changes in substantive policy or its instruments, since it was not used as grounds either for the application of conditionality or for the revision of the approaches deployed. Even when 'no or only limited progress' was noted in key political reforms, other developments such as the 2008 WTO accession, the AA negotiations, positive cooperation in Transnistria and the CFSP demonstrate overall progress in bilateral relations.²⁵⁵ The AP priorities were not mandatorily factored into support provided by the EU. Although the ENPI Regulation provided for the AP to be part of the reference framework for the allocation of financial assistance,²⁵⁶ the first indicative programme was planned to run between 2007 and 2010, one year short of the AP's expiry.

b) The 2009 and 2013 Association Agendas

The 2009 AAg was aimed at preparing and facilitating the entry into force of the AA. Similar to the AP, it is a non-binding document that sets priorities 'specifically' to consolidate democratic reform. Exactly the same number of priorities can be found, with emphasis on the same issues as described above, albeit organised slightly differently. Here, the fight against corruption and the actions on the ICC are set in separate priority areas. Some actions have been shifted between different headings. For example the implementation of the ECtHR judgments, which had been under judicial reform in the AP, is to be found under the heading on human rights and fundamental freedoms in the AAg, demonstrating a flexible approach towards concepts of rule of law and human rights. Besides these slight distinctions, the AAg follows the AP in its lack of detail, deadlines or indications of support available. Only in relation to one priority action, that is the implementation of the ECtHR judgments and promoting the evolving jurisprudence of the ECtHR, does the AAg mention that the EU supports it. An even longer list of

²⁵³ Sasse (n 146) 193.

²⁵⁴ See for instance, Commission, '2009 Progress Report' (Brussels, 23 April 2009) SEC(2009) 515/2, 4; Commission, '2010 Progress Report' (Brussels, 12 May 2010) SEC(2010) 524, 4-5; Razumkov Centre, 'Political Corruption in Ukraine: Actors, Manifestations, Problems of Countering' (2009) Special Issue, National Security and Defence, 7.

²⁵⁵ Commission, '2009 Progress Report' (Brussels, 23 April 2009) SEC(2009) 515/2, 2-3.

²⁵⁶ Regulation 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (2006) OJ L 310/1, art. 3.

measures under similar headings can be found in the updated 2013 AAg. The addition of certain priorities (for instance, creating the conditions necessary for journalists to work freely and shielded from threats or actual violence) demonstrated the EU's awareness of the deteriorating situation in the country. However the technique has not changed: the document includes generally phrased priorities without deadlines, at times expressed in a language of recommendation or a choice on behalf of the party (for instance, 'consider the establishing of an independent police complaint mechanism').

The annual monitoring exercised by the Commission (jointly with the High Representative/EEAS after 2009) also highlights awareness of the lack of reform, yet it singles out constitutional, electoral and judicial reform as the most important aspects. In the wake of the 'Füle matrix',²⁵⁷ the pursuit of these reforms has been linked to the deepening of relations between the parties.²⁵⁸ The post-2010 annual reports portray a more critical stance, often with reference to Ukraine's failure to meet international standards. They demonstrate a willingness to expose the window-dressing efforts of Ukrainian authorities. For instance, criticism was levelled at the establishment of a non-representative working group for elaborating a draft electoral code, ignoring one already assessed positively by international organisations and sponsored by the EU.²⁵⁹ At times, the assessment goes so far as to emphasise certain issues (sometimes combining human rights and governance matters under the same heading), such as political parties,²⁶⁰ LGBT rights,²⁶¹ local and regional government²⁶² and civil society.²⁶³ Often, however, the assessment is very generic and lacking in specification, for example in stipulating 'some further progress in children's rights'.²⁶⁴

In addition to the monitoring by the Commission and the EEAS, a Joint Committee was established at Senior Official Level to review progress, revise priorities and make adjustments if necessary. The Joint Committee focused on 78 priorities for 2010 and 90 for 2011-2012, highlighting at the same time that the agenda should be implemented in its entirety.²⁶⁵ The level of assessment was primarily focused on the change of legislative framework, indicating the gaps and shortcomings of the existing legislation.²⁶⁶

²⁵⁷ Štefan Füle, 'Exchange of views on South Caucasus and Ukraine' (n 174).

²⁵⁸ Commission, '2012 Progress Report' (Brussels, 15 May 2012) SWD(2012) 124 final, 2; Commission, '2013 Progress Report' (Brussels, 20 March 2013) SWD(2013) 84 final, 2.

²⁵⁹ Commission, '2011 Progress Report' (Brussels, 25 May 2011) SEC(2011) 646, 5.

²⁶⁰ Ibid.

²⁶¹ Commission, '2013 Progress Report' (Brussels, 20 March 2013) SWD(2013) 84 final, 7; Commission, '2012 Progress Report' (Brussels, 15 May 2012,) SWD(2012) 124 final, 7.

²⁶² Ibid. 7-8; Commission, '2013 Progress Report' (Brussels, 20 March 2013) SWD(2013) 84 final, 7.

²⁶³ Commission, '2014 Progress Report' (Brussels, 27 March 2014) SWD(2014) 96 final, 9-10.

²⁶⁴ Commission, '2012 Progress Report' (Brussels, 15 May 2012) SWD(2012) 124 final, 8.

²⁶⁵ Joint report regarding progress in implementation of the Joint Committee at senior official level of the EU-Ukraine Association Agenda (Brussels/Kyiv, June 2010).

²⁶⁶ See for instance, the EEAS, 'Joint Report of the Joint Committee of the EU-Ukraine Association Agenda to the EU-Ukraine Cooperation Council'

3. Association Agreement and 2015 Association Agenda

The AA should be assessed in terms of how it has been used to trigger political reform and how its specific provisions reflect the EU's human rights policy.

As noted above, the negotiations on the AA commenced in 2007, ostensibly on the basis of the positive record of the 2006 elections and despite significant shortfalls in political reforms overall. The negotiations on the agreement appeared to be unhindered until the election of President Yanukovich in 2010, when the 'Füle matrix' was presented and more specific demands were placed on Ukraine in response to political prosecutions in the country. On the one hand, the EU appeared to take a hard stance, implicitly threatening to abstain from signing the AA if the conditions were not fulfilled. On the other hand, the closer it got to EaP Vilnius, the keener the EU seemed to sign the agreement, on condition that a concession could be made on the Tymoshenko case. Subsequent events and the circumstances of signing the agreement, noted above, suggest that the negotiations on the Agreement and its signing largely failed as an incentive to instigate substantive political reform in Ukraine, although they invited a closer attention to the state of human rights in Ukraine.

A reinforced commitment to human rights and democratic principles is evident from the Agreement's Preamble. The association depends not only on the implementation of the Agreement, but on 'Ukraine's track record in ensuring respect for common values', which has since been interpreted as 'strict conditionality'.²⁶⁷ This view is supported by a further addition to the Preamble in which many values — such as democratic principles, the rule of law, good governance, human rights and fundamental freedoms — are listed, making it the agreement that is the most extensively referenced to international standards of all the neighbourhood agreements.²⁶⁸ This preambular reference constitutes a part of the standard human rights clause, which, together with an essential elements clause, is one of the few examples of human rights-specific instruments deployed in relations between the parties.²⁶⁹

The Ukraine agreement stands out from other neighbourhood agreements, including those concluded with Georgia and Moldova, in a number of ways. For a start, it has the widest approach towards the normative scope of the provision. Over and above the ubiquitously referenced UDHR, the ECHR, the Helsinki Final Act and the Paris Charter of the CSCE/OSCE feature among the international instruments forming the basis of cooperation. This makes it the agreement that is also the most extensively referenced to international instruments even in comparison with agreements with accession

<http://eeas.europa.eu/ukraine/docs/third_joint_report_eu_ua_association_agenda_nov2012_en.pdf> accessed 1 September 2016.

²⁶⁷ Guillaume van der Loo, Peter van Elsuwege and Roman Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument' (n 205) 3.

²⁶⁸ Nariné Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 *European Law Review* 391, 396.

²⁶⁹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 4.

countries.²⁷⁰ Moreover, it follows a novel approach in which the essential elements clause refers to ‘other relevant human rights instruments’ in addition to those mentioned above, thus rendering the list open-ended as had been advocated by academics.²⁷¹

The Ukraine agreement includes certain unprecedented elements as essential. Besides democratic principles, human rights, fundamental freedoms and the rule of law in line with most common practice, it features a new essential element of non-proliferation of weapons which, while in keeping with the 2003 Council Common Position,²⁷² departs from other neighbourhood agreements including the Euro-Med agreements concluded after 2003. This addition to the Eastern AAs can be explained perhaps by the priority that the EU has given the Eastern neighbourhood in this domain.²⁷³ The most notable addition to the Ukrainian essential clause, however, is that it includes the principles of sovereignty and territorial integrity, inviolability of borders and independence as essential elements. This unprecedented addition can be interpreted as an expression of the EU’s support of Ukraine faced with the political situation and the Russian annexation of Crimea. Although the rationale of this addition is obvious, its function is less so: a provision in a bilateral agreement between the EU and Ukraine cannot be relied upon to reprimand a third party. Instead, the essential element in the PCA with Russia could conceivably be deployed for this purpose.²⁷⁴ Ultimately, this demonstrates the security connotations of the human rights clauses.²⁷⁵

Furthermore, the Ukrainian AA stands out by expanding its General Principles beyond the essential elements clause, making a further distinction between ‘hard core common values’ and ‘other general principles’ important to the parties,²⁷⁶ including the free market economy, rule of law, good governance,

²⁷⁰ Ghazaryan, ‘A New Generation of Human Rights Clauses?’ (n 268) 398.

²⁷¹ The Ukrainian AA is not the only agreement following such an approach. It can also be found in Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, on the other part (2013) OJ L20, art 1.; Lorand Bartels, ‘The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’ (*European Parliament* February 2014), 9, 14-15.

²⁷² Common Position 2003/805/CFSP of 17 November 2003 on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery (2003) OJ L302/34; Marise Cremona, ‘Values in EU Foreign Policy’ in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart, 2011) 305.

²⁷³ Roberto Aliboni, ‘The Non-Proliferation Clause in a Preventive Perspective’ (2004) 4 *Conflict in FOCUS*, 2-3.

²⁷⁴ The Helsinki Final Act is one of the documents referred to in the essential elements clause in art. 2 of the PCA with Russia; Ghazaryan, ‘A New Generation of Human Rights Clauses?’ (n 268) 400.

²⁷⁵ Deliverable No 1, ‘Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion’ 12-13. <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> 1 September 2016.

²⁷⁶ Guillaume van der Loo, Peter van Elsuwege and Roman Petrov, ‘The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument’ (n 205) 13.

the fight against corruption and transnational organised crime and terrorism, the promotion of sustainable development and effective multilateralism.²⁷⁷

In line with previous practice on the standard human rights clause, a non-execution clause is included within the agreement, with the option of suspension as an ‘appropriate measure’ appearing at the final stage.²⁷⁸ Treaty suspension is possible in ‘exceptional cases’, including violation of the essential elements or denunciation of the agreement not sanctioned by the general rules of international law. The exceptional cases could therefore include all breaches of essential elements, dispensing with the general requirement for a three-month consultation period. Further ‘appropriate measures’ can include the suspension of the DCFTA, in contrast with the non-fulfilment of other treaty obligations.

The function of the essential elements clause is not limited to this negative aspect, and can be viewed positively as informing other parts of the agreement relevant to political reform.²⁷⁹ This includes political dialogue between the parties, which *inter alia* aims to ‘strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, and to contribute to consolidating domestic political reforms’.²⁸⁰ Other relevant provisions include Article 6 on dialogue and cooperation on domestic reform and Article 14 on cooperation on JFS, which unusually for a framework agreement set some requirements for reform. Article 14 in particular seems to highlight the human rights conditionality in the area of JFS, by stressing that ‘[r]espect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security’. Another significant achievement of the AA should be seen in the unprecedented introduction of a chapter on civil society cooperation.²⁸¹

As noted earlier, the institutional framework of the Agreement includes the addition of the Association Council as a platform for political dialogue and monitoring at a ministerial level.²⁸² The First Association Council is virtually silent on political reform, focusing instead on the situation in Crimea, East Ukraine, visa-free travel and energy cooperation.²⁸³ Furthermore, the EU-Ukraine Association Committee

²⁷⁷ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 3.

²⁷⁸ *Ibid* art 478

²⁷⁹ Ghazaryan, ‘A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood’ (n 268) 407-410.

²⁸⁰ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 4.

²⁸¹ *Ibid* ch 26; Natalia Shapovalova, ‘Ukraine: A New Partnership’ in Richard Youngs (ed), *The European Union and Democracy Promotion: A Critical Global Assessment* (The Johns Hopkins University Press 2010) 73.

²⁸² Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 460-461.

²⁸³ ‘Joint Press Release following the first Association Council meeting between the European Union and Ukraine’ (Brussels, 15 December 2014.) PRESSE 653.

incorporates a subcommittee on Justice, Freedom and Security that its first meeting held in July 2015.²⁸⁴ Among the topics analysed during the meeting were the implementation of the VLAP, the prevention of and fight against corruption, reform of the judiciary, prosecution and law enforcement agencies, legal cooperation and data protection.²⁸⁵ In addition, a Parliamentary Association Committee was established as a socialisation forum with the power to make recommendations to the Association Council.²⁸⁶ The Committee had held two rounds of meetings by November 2015, intent on playing a proactive role in relations between the parties.²⁸⁷

To facilitate the implementation of the Agreement, the Association Council established a new AAg in March 2015 as ‘the principal vehicle for the monitoring and assessment of Ukraine’s progress’. At first sight, the Agenda appears to have a distinct approach in comparison with the ENP AP and the previous AAgS. It sets short-term priorities, including constitutional and election reform, the prevention and combating of corruption and reform of the judiciary and public administration, in addition to general priorities that are divided into specific areas of cooperation. The short-term reform actions are rather generally formulated without any deadlines attached. The only indication of the expectation of a swift result has been a call to give first priority to the revision of the law in anticipation of the local elections in the second half of 2015.

These ‘short-term’ actions are supplemented by a further 46 political reform actions, including the prevention and combating of corruption, largely following the generic approach of the ENP AP and the previous AAgS. While a few actions might be seen as somewhat concrete (for instance the adoption of specific laws), the majority of actions lack deadlines, concrete measures or indications of available support. The Agenda manifests a more inclusive approach towards other actors such as civil society, which, through the EU-Ukraine Civil Society Platform and the Parliamentary Association Committee will be encouraged to undertake monitoring of the AAg.

4. Justice, Freedom and Security Instruments

The EU’s normative language is entrenched also in JFS instruments, starting with the 2001 Action Plan on JHA that was established with an eye on forthcoming enlargement.²⁸⁸ Among actions for

²⁸⁴ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 466 allows establishing subcommittees at civil servant level.

²⁸⁵ Mission of Ukraine to the European Union, Cooperation in justice, liberty and security <<http://ukraine-eu.mfa.gov.ua/en/ukraine-eu/justice/cooperation>> accessed 1 September 2016.

²⁸⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) L 161/3, art 467-468.

²⁸⁷ EU-Ukraine Parliamentary Association Committee, ‘Final Statement and Recommendations; Second Meeting’ (4-5 November 2015) <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/41761-zaklyuchna-zajava-ta-rekomendacii-drugogo-zasidannya-parlamentsykogo-komitetu-asociacii-mizh-ukrajinoju-ta-jes>> accessed 1 September 2016.

²⁸⁸ ‘EU Action Plan on Justice and Home Affairs in Ukraine 2001’ (*consilium.europa.eu*, 2001) <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/en/EJN290.pdf> accessed 1 September 2016.

cooperation, a heading on strengthening the judiciary, rule of law and good governance can be found, containing a number of actions phrased as general calls. As with accession countries, the Action Plan also provided for a Scoreboard to be set up, 'as a tool for implementation, monitoring, evaluation and definition of annual priorities', considered an indication of Ukraine's 'distinctive profile among the neighbours'.²⁸⁹ These instruments continued to be the basis of cooperation in JFS even after the initiation of the ENP.²⁹⁰ A visa facilitation and readmission agreement entered into force in June 2007,²⁹¹ the first among the neighbouring countries. It can be argued that this development was linked to perceptions regarding Ukraine's progress after the 2006 election.

The revised 2007 Action Plan on JHA seemingly places a stronger emphasis on political reform in terms of its aims and actions.²⁹² While some of the priorities (for instance, under the heading 'Judiciary') are based on the ENP AP relevant priorities, they similarly lack indications of deadlines or of the support provided. The monitoring of JFS-related actions was part of the annual monitoring exercised by the Commission, which often recorded shortfalls in relation to the rights of asylum seekers or refugees.

A Visa VLAP was adopted in November 2010 featuring human rights.²⁹³ It was made conditional upon 'significant improvements' inter alia in the area of human rights, fundamental freedoms linked to the movement of persons and minority rights on the basis of a successive set of benchmarks to be assessed and decided by the Commission and the Council (including through evaluation missions). Although the primary focus in the assessment appears to be on the legislative framework and its improvement, a certain emphasis can be seen also on the implementation and institutional development, including through training. In some years, certain rights take a more prominent role, for instance in the 2012 and 2013 reports the visa liberalisation was linked to stop the deterioration of the situation of minority rights.²⁹⁴

²⁸⁹ Delcour (n 134) 147.

²⁹⁰ The ENP AP did not set specific priority actions in this area instead referring to the Action Plan on JHA and the respective Scoreboard.

²⁹¹ Agreement between the European Community and Ukraine on the facilitation of issuance of visas, Agreement between the European Community and Ukraine on the facilitation of issuance of visas (2007) L 332/68.; Agreement between the European Community and Ukraine on the readmission of persons (2007) OJ L 332.

²⁹² It aims at consolidating democracy, protecting human rights, ensuring the application of principles of rule of law, independence and efficiency of judiciary. Revised EU-Ukraine Action Plan on Freedom, Security and Justice Challenges and strategic aims <http://eeas.europa.eu/enp/pdf/pdf/action_plans/ukraine_enp_ap_jls-rev_en.pdf> accessed 27 September 2016.

²⁹³ EU-Ukraine Visa Dialogue Action Plan on Visa Liberalisation <<http://novisa.com.ua/upload/file/EU-Ukraine-Action-Plan.pdf>> accessed 27 September 2016.

²⁹⁴ Commission, 'Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation' COM(2013) 809 final, 24-25;

Commission and High Representative, Second progress report on the implementation by Ukraine of the Action Plan on Visa Liberalisation, SWD(2012) 10 final, 27-29.

While only the first set of benchmarks was being met, in view of the political situation in Ukraine the EP called for an immediate visa-free agreement,²⁹⁵ which would have resulted in making the conditionality redundant. The Commission, however, continued with the monitoring of the first set of benchmarks, and in its final round of monitoring found the reforms conducted by the post-Yanukovich government to be 'satisfactory', primarily focusing on the adoption of legislation rather than their implementation (or in some cases dropping of bills, e.g. against propaganda of homosexuality).²⁹⁶ This meant the second phase of the benchmarks could start alongside the pledge to offer Ukraine more support.²⁹⁷ There have been reports on the Commission's intention to propose visa liberalisation by the end of 2015,²⁹⁸ but it remains unclear whether this is linked to Ukraine's satisfactory fulfilment of the conditions of the relevant AP. Ultimately, despite the rhetoric, the cooperation in the area of JFS progressed notwithstanding Ukraine's breaches,²⁹⁹ and rather weak compliance in the area of asylum policy, for instance.³⁰⁰

5. CFSP Instruments

CFSP instruments include both human rights-specific instruments and those not related to human rights.³⁰¹ Political dialogue is among non-human rights-specific instruments. In addition to the PCA Cooperation Councils, political dialogue took place through the bilateral summits held since the end of the 1990s. The summits were not always or consistently used by the EU as a channel in its demands for political reform. Thus, the poor electoral record of the late 1990s and early 2000s, alongside dubious

²⁹⁵ European Parliament Resolution on the future of EU visa policy (27 February 2014) 2014/2586(RSP).

²⁹⁶ Commission, 'Fourth Report on the Implementation by Ukraine of the Action Plan on Visa Liberalisation' (Brussels, 27 May 2014) COM(2014) 336 final, 5-6.

²⁹⁷ *Ibid*, 3.

²⁹⁸ 'Is Ukraine a 'migration threat' to the EU?' (*Euractiv*, 9 October 2015) <<https://www.euractiv.com/section/justice-home-affairs/opinion/is-ukraine-a-migration-threat-to-the-eu>> accessed 1 September 2016.

²⁹⁹ Human Rights Watch, 'Ukraine: Stop Harassing Somali Asylum Seekers' (*Human Rights Watch*, 1 February 2012); Simone Troller, 'With a Migrant Crisis Looming, the EU Should Learn from its Past Mistakes' (*Human Rights Watch*, 6 April 2011).

³⁰⁰ Tina Freyburg and Sandra Lavenex and Frank Schimmelfenning and Tatiana Skripka, and Anne Wentzel, 'EU Promotion of Democratic Governance on the Neighbourhood' (2009) 16 *Journal of European Public Policy* 924; Tina Freyburg and Sandra Lavenex and Frank Schimmelfenning and Tatiana Skripka, and Anne Wentzel, 'Democracy Promotion Through Functional Cooperation? The Case of the European Neighbourhood Policy' (2011) 18 *Democratisation* 1045;

Tina Freyburg and Sandra Lavenex and Frank Schimmelfenning and Tatiana Skripka, and Anne Wentzel, 'Democracy Promotion through Functional Cooperation? The Case of the European Neighbourhood Policy' in Sandra Lavenex and Frank Schimmelfenning (eds), *Democracy Promotion in the EU's Neighbourhood: From Leverage to Governance?* (Routledge 2013) 155.

³⁰¹ Deliverable No 1 - 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion', Work Package, 88-89. <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 1 September 2016.

constitutional reforms, passed unnoticed by the EU both at the bilateral summit level and the PCA Cooperation Council meetings.

Only after 2002 did the political reform become a fixture of the dialogue with varying intensity and a predominant focus on elections.³⁰² Constitutional reform (or strengthening institutions guaranteeing democracy and rule of law) made a sporadic appearance until 2008,³⁰³ when, due to the political stalemate, emphasis was made on constitutional reform.³⁰⁴ Freedom of media³⁰⁵ and freedom of speech³⁰⁶ appear occasionally, but after 2010 there was a more consistent emphasis, including on the freedom of assembly.³⁰⁷ The summits at times refer to the 'consolidation of state of law' or 'rule of law',³⁰⁸ or occasionally make a reference to human rights as a generic concept.³⁰⁹ Independence of the judiciary and judicial reform make an early appearance,³¹⁰ but then do not resurface until 2010 when they start to be mentioned consistently. This was linked to political prosecutions following the victory of President Yanukovich. In this connection, the 2013 summit invited attention to the need to comply with ECtHR judgments and to follow the CoE's recommendations regarding detention conditions and medical assistance to persons in detention. Thus, the focus is predominantly on the formal criteria of democracy and rule of law, and in terms of specific rights and freedoms it is mostly on political freedoms (expression, media and assembly) if at all. Nonetheless, the majority of summits do not link even these parameters to progress in relations between parties. References to political reform as a precondition for closer ties start appearing in 2008.³¹¹ Most notably, the 2013 summit refers to the conditions imposed by the Council for the signing of the AA. The 2015 summit no longer hinges upon conditionality. However, it assumes 'a commitment to building deep and sustainable democracy', at the same time mentioning the need for further constitutional reform, judicial reform, fight against corruption, ratification of the Rome Statute of the International Criminal Court, further electoral reform and public administration reform.

Another platform for dialogue on political reform is human rights dialogue as a human rights-specific instrument aiming to mainstream political reform in EU external action.³¹² After the conclusion of the AA, two rounds of human rights dialogues were held, in 2014 and 2015. In common with the bilateral summits, electoral framework and freedom of expression, assembly and media are part of the agenda.

³⁰² Ukraine-EU Summit Joint Statement for 2002, 2004-2011, 2013, 2015. No summits took place in 2012 and 2014.

³⁰³ Ukraine-EU Summit Joint Statement for 2002-2003.

³⁰⁴ Ukraine-EU Summit Joint Statement for 2008-2011, 2015.

³⁰⁵ Ukraine-EU Summit Joint Statement for 2002-2003.

³⁰⁶ Ukraine-EU Summit Joint Statement for 2006.

³⁰⁷ Ukraine-EU Summit Joint Statement for 2010, 2011.

³⁰⁸ Ukraine-EU Summit Joint Statement for 2005, 2008-2009.

³⁰⁹ Ukraine-EU Summit Joint Statement for 2002, 2005, 2008, 2010.

³¹⁰ Ukraine-EU Summit Joint Statement for 2002, 2003.

³¹¹ Ukraine-EU Summit Joint Statement for 2008, 2010.

³¹² Council, 'EU Guidelines on Human Rights Dialogues with Third Countries' (2001) 5. <www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf> accessed 1 September 2016.

At the same time, a new emphasis is placed on the human rights situation in Crimea and the Eastern territories.³¹³ Ukraine is called upon to investigate the reported human rights violations and allegations of possible war crimes in accordance with international law, and it is urged to ratify the Statute of the International Criminal Court.³¹⁴ In contradistinction to general political dialogue, the human rights dialogue focuses on specific human rights, stressing such issues as non-discrimination and minority rights in both rounds. The rights of LGBTI people, the rights of the child and gender equality and women's rights are mentioned in 2015.

Other CFSP instruments, including declarations and démarches, have been used most prominently since the end of 1990s.³¹⁵ In the absence of a clear strategy towards Ukraine and HR policy in particular, they allowed for rhetorical presence without much normative content. Besides, the reliance on CFSP instruments demonstrates the close links the human rights agenda has to the CFSP concerns. Statements were used also in the period after 2010, allowing expression of the EU's disapproval without restoring to negative conditionality.³¹⁶ As noted earlier, in view of the annexation of the Crimea and the conflict in Eastern Ukraine, CFSP decisions were used in support of Ukraine's territorial integrity and sovereignty.

6. Financial Assistance Instruments

The EU is one of almost thirty assistance providers to Ukraine.³¹⁷ While the funding provided to Ukraine by the EU increased over the years, it did not always support human rights and democratic development in a systematic or concerted fashion.

a) TACIS

TACIS has been the main funding framework to advance cooperation between the EU and Ukraine until 2007. The indicative programme for 1996-1999 targeted three areas including institutional reform and development, economic reform and private sector development, and energy and the environment. Democracy and human rights featured very little in the allocation of funds, a substantial part of which was spent on Chernobyl-related grants.³¹⁸ The TACIS NIP 2000-2003 concentrated on the following objectives: institutional, legal and administrative reform, the private sector and assistance for economic

³¹³ 'EU-Ukraine Human Rights Dialogue' (Kyiv, 25 July 2015) Press Release 150725_01_en; 'EU-Ukraine Human Rights Dialogue' (Kyiv, 04 July 2014) Press Release 140704/02.

³¹⁴ 'EU-Ukraine Human Rights Dialogue' (Kyiv, 25 July 2015) Press Release 150725_01_en.

³¹⁵ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 71, 73.

³¹⁶ See for instance, Catherine Ashton, 'statements issued on 5 August and 11 October 2011 on behalf of the European Union on the verdict in the case of Yulia Tymoshenko'.

³¹⁷ Natalia Shapovalova, *Assessing Democracy Assistance: Ukraine* (FRIDE, May 2010) 2.

³¹⁸ 'Draft Ukraine Indicative Programme TACIS 2000-2003' (Worldbank, 2000) <[http://Inweb90.worldbank.org/ECA/Transport.nsf/ExtECADocByUnid/628BD49DB14AF4D585256B7A006AA6A0/\\$file/5.%20Tacis%20Draft%20Indicative%20Prog.pdf](http://Inweb90.worldbank.org/ECA/Transport.nsf/ExtECADocByUnid/628BD49DB14AF4D585256B7A006AA6A0/$file/5.%20Tacis%20Draft%20Indicative%20Prog.pdf)> accessed 1 September 2016.

development and addressing the social consequences of transition, with a budget of approximately €200 million. Although relevant for political reform, the first target was predominantly reduced to institutional developments, civil service reform and NGO support, but shied away from addressing central aspects of democracy building.³¹⁹ Thus, until 2004 there was no support for electoral reform.³²⁰ The NIP 2004-2006 TACIS preserved the same target of institutional, legal and administrative reform by adding certain new elements. Out of the €212 million available, it allocated only €10 million to civil society, media and democracy (including electoral reform), €15 million to legal and administrative reform, and €60 million for JFS including border management.³²¹ The overwhelming preference for border management was explained with reference to the approaching enlargement.³²²

The support provided through TACIS was criticised as lacking in vision and a systematic approach in view of the absence of an EU membership incentive,³²³ as well as the scarcity and nature of the assistance.³²⁴ There were calls to reform TACIS assistance on the basis of the PHARE programme used to support the candidate countries.³²⁵ TACIS was seen as having limited ability to 'address the most politically sensitive questions'.³²⁶ Even for the sectors key to TACIS, e.g. economic reform, the Commission acknowledged the lack of improvement and real influence on the policy level.³²⁷

The EU's approach was further criticised after the Orange Revolution. As noted earlier, the post-revolutionary momentum was not immediately supported by funding. Despite the EP's calls to mobilise assistance to Ukraine,³²⁸ until 2007 only the remnants of TACIS and other projects were used to finance the reform process. One commentator observed that the funding was so scattered and insignificant, 'one would struggle to intuit that a revolution had occurred'.³²⁹ Besides, instead of further support to civil society, the funding was redirected to the state.³³⁰ Some of the funding was channelled through the

³¹⁹ Ibid.

³²⁰ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 80.

³²¹ Ukraine National Indicative Programme 2004-2006 TACIS. Available <http://www.forumpartnerships.zsi.at/attach/UA_03_NS_EC_NationalIndicativeProgramme.pdf>.

³²² Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 41.

³²³ Youngs (n 129) 106.

³²⁴ Ann Lewis, 'Ukraine: Where Next?' in Ann Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (Federal Trust 2002) 265.

³²⁵ John Tedstrom, 'The EU and Ukraine: A Transatlantic View' in A Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (Federal Trust 2002) 34.

³²⁶ Kubicek (n 69) 278.

³²⁷ Evaluation of the European Commission's Country Strategy for Ukraine (*ec.europa.eu*, June 2003) <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/tacis/951643_en.pdf> accessed 1 September 2016.

³²⁸ European Parliament Resolution on the results of the Ukraine elections, (13 January 2005) P6_TA(2005)0009, para 12.

³²⁹ Youngs (n 129) 118.

³³⁰ Ibid, 113-114, 118; Shapovalova (n 317) 7.

support provided by other international organisations, e.g. the OSCE in preparation for the 2006 elections,³³¹ or through the Council of Europe for instance on corruption,³³² or judicial training in 2007.

b) ENPI

Under the ENPI for 2007-2013 Ukraine was allocated over €964 million, the largest sum in the Eastern neighbourhood (although falling behind Egypt and Morocco). It has been noted that the larger sum allocated to Ukraine in comparison with other neighbours is due to Ukraine being the ‘most advanced’ in terms of reforms.³³³ However, if viewed per capita, the assistance will place Ukraine in the middle of other countries,³³⁴ as was noted by the EP, which called for increase in assistance upon the commencement of the AA negotiations.³³⁵ Under the ENPI Regulation, the funding was to be allocated on the basis of priorities set in the ENP AP or equivalent documents, such as the AAGs.³³⁶ The ENPI Country Strategy Paper 2007-2013 included support for democratic development and good governance as one of the three focal areas in addition to support to regulatory reform and administrative capacity building, and support for infrastructure development.³³⁷ The allocation took place on the basis of National Indicative Programmes (NIPs) spanning three or four years. The NIP 2007-2010 for Ukraine allocated €494 million, mirroring the three priority areas of the ENPI Country Strategy Paper noted above. For each of the first two priorities, €148.2 million (30%) was allocated, while support for infrastructure development received EUR €197.6 million.³³⁸ An overview of the sub-priorities under the heading of support for democratic development and good governance reveals an emphasis on public administration reform, reform of judiciary, human rights, civil society development and local government, education, science and people-to-people contacts/exchanges. While this heading includes non-political issues, it is not reflective of the body of political priorities established in the ENP AP. For instance, the sub-heading on human rights, civil society and local development sets a wide objective of ensuring ‘respect of human rights and fundamental freedoms, including in economic and social spheres,

³³¹ Youngs (n 129) 113.

³³² For instance, ‘Support to good governance: Project Against Corruption in Ukraine’ (*coe.int*, 2008) <https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/upac/344-UPAC-Summary-Eng_March08-updated.PDF> accessed 1 September 2016.

³³³ European Parliament, ‘Improving the EU’s Aid to Its Neighbours: Lessons Learnt from the ENPI, Recommendations for the ENI’ (2012) Briefing Paper, 12.

³³⁴ Zsuzsa Ludvig and Michal Koran and Tamás Seemliér, ‘Analysis of the EU’s Assistance to Ukraine’, (European Parliament, 29 October 2008) Briefing Paper, Policy Department External Policies, 6.

³³⁵ European Parliament Recommendation to the Council on a Negotiation Mandate For a New Enhanced Agreement Between the European Community and its Member States of the One Part and Ukraine of the Other Part (12 July 2007) 2007/2015(INI).

³³⁶ Regulation 1638/2006 24 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (2006) OJ L310/1, art 3.

³³⁷ Commission, ‘ENPI Ukraine CSP’ (2006) 16-17. <http://eeas.europa.eu/enp/pdf/pdf/country/enpi_csp_ukraine_en.pdf>. accessed 1 September 2016.

³³⁸ Commission, ‘ENPI Ukraine NIP 2007-2010’ (2006) 4.

in line with international and European standards’, but names merely two rights, freedom of expression and freedom of media. The programme has been criticised for not focusing on ‘political foundations of democracy’³³⁹ and shying away from meaningfully supporting political reform by highlighting the issues that were the most pressing at the time.³⁴⁰ Moreover, between 2007 and 2009, more than 70% of total annual allocations were directed to budget support.³⁴¹

By 2010, in analysing the achievements of support in the area of democracy and rule of law through TACIS, ENPI (and the European Instrument for Democracy and Human Rights (EIDHR) discussed below), the Commission summarised mixed results from the projects on the judiciary, civil society (mainly projects targeted at social services) and, after 2005, media freedom.³⁴² While only in the area of media is a positive assessment given, the evaluation concluded that despite the implementation of administrative reforms of the judiciary, it failed to achieve independence, and despite increased civil society participation, no systematic institutional basis was developed for its engagement.³⁴³ Human rights-related support was also evaluated under the heading of JHA: despite certain projects, the poor record on human rights violations persisted, as documented by international organisations.³⁴⁴ Thus, there is no mention of any other priorities in the ENP AP. Perhaps this is because up until 2010 the majority of the Commission’s projects were undertaken within the TACIS regulatory framework in the hope that the ENPI to become more important in subsequent years.³⁴⁵ Other reports by the Commission present the same picture in a more positive light: ‘[p]ositive developments were achieved in respect of democracy and good governance, notably a more effective and efficient functioning of justice and strengthened cooperation between CSOs and government bodies at central and local levels’.³⁴⁶ In the 2010 Progress Report, the Commission notes that by that point, greater emphasis was placed on the other two financial priorities.³⁴⁷

With a budget of over €470 million, a retreat is noticeable in the 2011-2013 NIP in a number of respects. First, the priority area is ‘good governance and rule of law’ instead of ‘democratic development and good governance’. Second, the allocation is reduced to 20-30% in comparison with 25-35% for the facilitation of the entry into force of the EU-Ukraine AA, 45-55% for sustainable development. Most significantly however, an overview of the sub-priorities of good governance and rule of law support

³³⁹ Shapovalova (n 317) 64.

³⁴⁰ Zsuzsa Ludvig, Michal Koran and Tamás Seemliér, ‘Analysis of the EU’s Assistance to Ukraine’ (n 334), 14-17.

³⁴¹ Commission, ‘Evaluation of the European Commission’s Cooperation with Ukraine’ (2010) Final Report Volume I, 14. <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2010/1283_vol1_en.pdf> accessed 1 September 2016.

³⁴² Ibid 27.

³⁴³ Ibid 28-33.

³⁴⁴ Ibid 78-80.

³⁴⁵ Ibid 15, 89.

³⁴⁶ Ibid 2.

³⁴⁷ Commission, ‘2010 Progress Report’ (Brussels, 12 May 2010) SEC(2010) 524, 23.

demonstrates an inherent focus on security issues, including justice, freedom and security, border management, public administration reform and public finance management, and disarmament. They include only a few democracy-related objectives, including the reform of judiciary and law enforcement, with only a fleeting role for human rights enforcement and corruption, ultimately ignoring the calls from the EP to align the NIP funding closely with the AAg.³⁴⁸ This regress further restricted the EU's capacity to support issues deemed of relevance within the AAg. For instance, following the worsening situation with media freedom after 2010, there were calls for the EU to step up its support as it had 'few if any concrete projects on the ground'.³⁴⁹

This retreat is particularly regrettable in the view of certain mechanism of such programmes as the EU-CoE Joint Programme supporting projects on media standards, judiciary, women's and children's rights and anti-corruption, and also ensuring necessary expertise and evaluation through PACE and the Venice Commission.³⁵⁰ The importance of the continuous support is particularly visible when encountering the possible impact various projects can have. For instance, Roman Petrov finds a link between the amount of assistance directed at the Constitutional Court of Ukraine, both from the EU and other international organisations, and the 'championing' role of the Court in securing human rights and fundamental freedoms.³⁵¹

It should be noted that the ENPI introduced twinning and Technical Assistance and Information Exchange Instrument (TAIEX) to Ukraine.³⁵² Borrowed from the accession practice, these instruments provide expertise and training to Ukrainian civil servants by their counterparts in EU Member States. Twinning is mostly directed at legislative approximation and public administration reform.³⁵³ According to Buscaneanu, out of 139 TAIEX events and 21 twinning projects only four TAIEX events had a 'definite relationship to democratic development'.³⁵⁴

³⁴⁸ European Parliament Resolution on the situation in Ukraine (25 February 2010) P7_TA(2010)0035, para 15.

³⁴⁹ 'Russian and Ukrainian journalists send SOS to Brussels' (*Euractiv*, 27 November, 2012) <<https://www.euractiv.com/section/europe-s-east/news/russian-and-ukrainian-journalists-send-sos-to-brussels/>> accessed 1 September 2016.

³⁵⁰ Shapovalova (n 317)

³⁵¹ Roman Petrov, 'Legislative Approximation and Application of EU Law in Ukraine' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2014), 148.

³⁵² Deliverable No 1— 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion', Work Package 6 , 114, 151. <<http://www.fp7-frame.eu/frame-reps-6.1/>> accessed 1 September 2016.

³⁵³ Evaluation of the European Commission's Cooperation with Ukraine,(2010) 1 Final Report,14 <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2010/1283_vol1_en.pdf> accessed 1 September 2016.

³⁵⁴ Sergiu Buscaneanu, 'EU Democracy Promotion in Eastern ENP Countries' (2015) 29 East European Politics and Societies 248, 261.

More generally, the EU's approach under the ENPI has been criticised due to the lack of transparency in sectoral support, lack of overall vision of reforms and unwillingness to get involved in policy change.³⁵⁵ Despite the ENPI emphasis on the civil society, the participation of civil society in the programming was optional, with limited influence, and even less so at the level of evaluation or monitoring.³⁵⁶ Calls were therefore made to ensure the EU's engagement with the civil society.³⁵⁷ Shapovalova also notes the gap between setting the ENPI CSP for six years in advance, when both the PCA and the ENP AP were about to run their course.³⁵⁸

c) *Support for Civil Society*

The EU's approach towards supporting civil society was criticised for a number of reasons. These include a preference for established recipients,³⁵⁹ widening the gap between 'top' NGOs in the capital and the much weaker ones outside of the capital.³⁶⁰ Another reason was the limited funds available.³⁶¹ Lack of vision and a scattered approach was also a factor undermining efficient support for civil society.³⁶² The procedural and regulatory aspects are also overly burdensome.³⁶³

The EIDHR is a human rights-specific instrument, which does not depend on the consent of the Ukrainian government. The support provided through EIDHR was branded 'less political' (in comparison with some other international donors) focusing 'on social rights protection (such as vulnerable groups) rather than on voter education and mobilisation'.³⁶⁴ The failure to use the EIDHR to direct support where it was needed most has been noted previously, when for instance the EIDHR could have been used to address the shortcomings in freedom of media in the early 2000s.³⁶⁵ Moreover, EIDHR funds available are rather limited: over €8 million was allocated for 2007-2014, and €3.5 million for 2013-2017.

³⁵⁵ Natalia Shapovalova, 'Assessing Democracy Assistance: Ukraine', (n 317), 9-10.

³⁵⁶ Sasha Tessier-Stall, Victoria Gumenyuk, Olga Shumylo, Svetlana Kaltygina, 'ENPI Monitoring in Ukraine', 2009, 7-8, 9, 39.

³⁵⁷ Ibid, 65-65; Shapovalova (n 317) 9.

³⁵⁸ Solonenko (140) 24.

³⁵⁹ Shapovalova (n 317) 11.

³⁶⁰ Kristi Raik, 'Promoting Democracy through Civil Society: How to Step up the EU's Policy towards the Eastern Neighbourhood' (2006) CEPS Working Document 237, 12.

³⁶¹ Raik calculates that assistance to democracy from EU in 1998-2006 accounted for only 16%, out of which only 2% was allocated to civil society; *ibid*, 16-19.

³⁶² *Ibid*; Zsuzsa Ludvig, Michal Koran and Tamás Seemlier, 'Analysis of the EU's Assistance to Ukraine' (n 334) 15-16.

³⁶³ *Ibid* 16; Natalia Shapovalova and Richard Youngs, 'EU Democracy Promotion in the Eastern Neighbourhood: A Turn to Civil Society?' (FRIDE 2012), 6.

³⁶⁴ Shapovalova (n 317) 3.

³⁶⁵ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 70.

Since the reform of the EIDHR,³⁶⁶ the EU's approach has changed somewhat. Although the funds are still limited, Shapovalova notes 'a shift from a focus on rights protection to a more complex approach of supporting civil society through dialogue with state actors and public advocacy, among other methods'.³⁶⁷ The shift is also visible in the types of programmes financed, enhancing the participation of civil society in supporting democratic processes in the country, including by guaranteeing human rights.³⁶⁸ For instance in the 2012-2013 work programme, two lots were envisaged on human rights (mostly on political freedoms), election processes and monitoring of the EU-Ukraine AA.³⁶⁹

The EU also deployed other 'targeted' instruments.³⁷⁰ These include the Civil Society Facility established in 2011 allocating Ukraine €6 million for 2011-2013 (ahead of other Eastern neighbours with the exception of Belarus) with an emphasis on public administration reform and services.³⁷¹ Thus, it does not necessarily aim at creating a dialogue with the civil society relevant for political reforms. For instance, the Civil Society Facility 2013 call for proposals was for dialogue with civil society in energy, environment, public finance management, migration and regional development sectors.³⁷² Another instrument deployed for civil society support is the Non-State Actors and Local Authorities providing for assistance in the areas of poverty reduction and sustainable development with a limited impact on political reform.³⁷³ Also, the ENPI cross-border cooperation mechanisms involved local authorities and civil society.³⁷⁴

A more political instrument for non-state actors and political activists, supported by the EU and its Member States, is the European Endowment for Democracy instigated by Poland and established in

³⁶⁶ Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (2006) OJ L 386.

³⁶⁷ Shapovalova (n 317) 3-4.

³⁶⁸ European Commission, 'EIDHR and Ukraine' Information Note (2009) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/83_eidhr_/83_eidhr_en.pdf> accessed 1 September 2016.

³⁶⁹ Work Programme of the Delegation of the European Union to Ukraine for Grants for Ukraine, European Instrument for Democracy and Human Rights – Country-based Support Scheme 2012-2013 in Ukraine (EIDHR CBSS Ukraine 2012-2013).

³⁷⁰ Deliverable No 1, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion' 84-85. <<http://www.fp7-frame.eu//frame-reps-6.1/>> 1 September 2016.

³⁷¹ 2011 Joint Communication 4; 'EU Response to the Arab Spring: the Civil Society Facility' - Joint Communication (2011) 4 MEMO/11/638, 27; Shapovalova and Youngs (n 363) 9.

³⁷² 'Ukraine-EU Country Roadmap for Engagement with Civil Society 2014 - 2017' (n 218).

³⁷³ Regulation 1905/2006 establishing a financing instrument for development cooperation (2006) OJ L 378/41, art 14.

³⁷⁴ Shapovalova (n 317) 3.

October 2012 as a private law Foundation under Belgian Law.³⁷⁵ To date, it has supported almost thirty initiatives in Ukraine.³⁷⁶

d) *Other Aid Instruments and Human Rights Conditionality*

Support was provided to Ukraine under various other instruments deployed by the EU. The ENPI Governance Facility, established in 2007 under ENPI, provided funds to Ukraine (€22 million) and Morocco, and was regarded as an embodiment of 'positive financial conditionality'.³⁷⁷ According to Sasse, the 2006 election record, improved media freedom and the efforts in the fight against corruption provided the basis for the deployment of this instrument.³⁷⁸ However, the support itself was not specific to political reform, and focused on energy and trade policy, as well as well as twinning projects.³⁷⁹

Other instruments of support included the Instrument for Stability and Peace (formerly 'Instrument for Stability'), effective for quick responses, the Programme on Migration and Asylum,³⁸⁰ the Neighbourhood Investment Facility, the Instrument for Nuclear Safety Cooperation, Comprehensive Institution Building and the Development Cooperation Instrument. It is not clear whether the support provided under these instruments is factored into the political conditionality of the ENP or the ENPI.

There were very few examples of the EU exercising negative financial conditionality. One is a support programme worth €70 million for public administration reform was cancelled, due to Ukraine's failure to take into account the core recommendations made by the EU-funded SIGMA programme.³⁸¹ The programme is a joint initiative of the OECD and the European Union, principally financed by the EU.

Following the expiry of the ENPI in 2014, it was replaced with the European Neighbourhood Instrument (ENI), which rests both on positive and negative conditionality.³⁸² It operates through a Single Support

³⁷⁵ Council Presidency, 'Declaration on the Establishment of a European Endowment for Democracy', (Brussels, 20 December 2011);

'European Endowment for Democracy – additional support for democratic change', (Brussels, 9 January 2013) A 5/13 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134628.pdf>. accessed 1 September 2016.

³⁷⁶ European Endowment for Democracy <<https://www.democracyendowment.eu/we-support/?country=ukraine&page=2>> accessed 27 September 2016.

³⁷⁷ Commission, 'On Strengthening the European Neighbourhood Policy' (Brussels, 4 December 2006) COM(2006) 726, 12-13; Van Elsuwege (n 246) 77.

³⁷⁸ Sasse (n 146) 192.

³⁷⁹ Shapovalova (n 317) 11.

³⁸⁰ Commission, 'Evaluation of the European Commission's Cooperation with Ukraine' (2010) I Final Report,9. <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2010/1283_vol1_en.pdf> accessed 1 September 2016

³⁸¹ Commission, '2012 Progress Report' (Brussels, 15 May 2012) SWD(2012) 124 final, 8; Commission, '2013 Progress Report' (Brussels, 20 March 2013) SWD(2013) 84 final, 8.

³⁸² Regulation 232/2014 establishing a European Neighbourhood Instrument (2014) OJ L77/27 art 4(2).

Framework established for 2014-2017, whereby a separate large package of up to €11 billion in grants can be provided to Ukraine including through the involvement of international financial institutions. The decision to invest such large funds was seen by some as indicative of the EU's willingness to support the country's democratic transition after the turbulent events.³⁸³ The Western macro-financial assistance is said to be 'the most effective leverage on reforms in Ukraine' currently in the EU's possession.³⁸⁴ In highlighting the key areas for support, however, political reform is noted last in 'additional actions' without specifying the funds available.³⁸⁵ As far as support conditionality is concerned, only in relation to development assistance will there be an annual top-up in addition to the ENI funds 'subject to proven progress in deepening democracy and respect of human rights'.³⁸⁶

The support is to be administered by the Support Group for Ukraine, created in spring 2014.³⁸⁷ Its short-term focus (until the end of 2014) was primarily on the stabilisation of the Ukrainian economy, boosting economic growth and reforms to ensure immediate benefits of the AA and Visa Liberalisation Action Plan.³⁸⁸ Subsequent priorities were set in a document entitled 'A European Agenda for Reform' established jointly by the European Commission, the EEAS and the Ukrainian Government. The document is mostly focused on actions relevant for the implementation of the AA and its DCFTA component, although other areas of cooperation do feature within it.³⁸⁹ However, only a handful of priorities are picked for support in political reform-related areas. These include the improvement of the electoral framework, reform of the civilian security sector, adequate protection of minorities, constitutional reform, establishment of an anti-corruption authority, and judiciary/prosecution. The Agenda mentions the support provided to the OSCE Sustainability Fund for Ukrainian elections, without specifying the funds, a CSDP EU Advisory Mission for Civilian security sector reform,³⁹⁰ and a 'State Building Contract' programme (€355 million, plus €10 million to support civil society,) with an emphasis on economic stabilisation. A Civil Society Support Programme was established in September 2014 with

³⁸³ Decision 2015/601/EU of the European Parliament and of the Council providing macro-financial assistance to Ukraine (2015) OJ L 100/1;

Sara Poli, 'Promoting EU Values in the Neighbourhood Through EU Financial Instruments and Restrictive Measures' in Sara Poli (ed), *The European Neighbourhood Policy: Values and Principles* (Routledge 2016).

³⁸⁴ Dmytro Shulga, 'Food-for-thought Paper: Ukraine' (*ecfr.eu*, 2015) 27. <http://www.ecfr.eu/article/commentary_ukraine3031> accessed 1 September 2016.

³⁸⁵ Commission, 'European Commission's support to Ukraine' - memo (Brussels, 5 March 2014) <http://europa.eu/rapid/press-release_MEMO-14-159_en.htm> accessed 1 September 2016.

³⁸⁶ Ibid.

³⁸⁷ Commission, 'Support Group for Ukraine' - Press Release, (9 April 2014) <http://europa.eu/rapid/press-release_IP-14-413_en.htm> accessed 1 September 2016.

³⁸⁸ Ibid.

³⁸⁹ Commission, 'EU-Ukraine: A European Agenda for Reform' (4 July 2014) <http://ec.europa.eu/archives/commission_2010-2014/fule/docs/ukraine/a_european_agenda_for_reform.pdf> accessed 1 September 2016.

³⁹⁰ Council, 'EU establishes mission to advise on civilian security sector reform in Ukraine' (Brussels, 22 July 2014) PRESSE 405.

€10 million for civil society,³⁹¹ in tune with the 2014-2017 EU Country Roadmap for Engagement with Civil Society'.³⁹² A further €55 million were allocated in November 2014 for decentralisation and regional policies, although it is unclear whether this was on the basis of the Agenda.³⁹³

Casier notes that at the level of small projects, 'substantive democracy features more prominently' whereby participation and transparency issues are addressed through financial assistance or specific projects, including trainings and twinning.³⁹⁴ The list of projects recorded by the EU Delegation to Ukraine indeed demonstrates a shift in the EU's approach in terms of engaging various sectors of society in areas relevant for political reform.³⁹⁵ While a number of projects in the past were implemented with the assistance of international organisations (CoE, OSCE), at times the EU is criticised for its lack of strategic cooperation with them.³⁹⁶

C. Perceptions of EU Human Rights Policies

Perceptions of EU human rights policies should be placed within the general perceptions of EU-Ukraine cooperation and the wider political context. Perceptions of the Ukrainian political leadership have been closely linked to the European integration course declared by successive political powers. Solonenko notes that the EU is a 'reference point' in Ukraine's political life, affording the former with a certain leverage.³⁹⁷ At the same time, it can be suggested that the Ukrainian authorities used this 'reference point' as much as it suited their interests given the ambiguities of the EU's policies and their incentives.

Thus, the EU's policy of offering Ukraine the same instruments of cooperation as Russia, while signalling that Ukraine would not be treated less favourably, meant for pro-European forces in Ukraine that the integration course depended more on the relationship with Russia than their own efforts in undertaking reforms.³⁹⁸ In the absence of any EU membership perspective, Ukraine has accepted successive EU

³⁹¹ Commission, 'New EU Support for the Civil Society in Ukraine' - Press Release (Kiev, 13 September 2014) <http://europa.eu/rapid/press-release_IP-14-999_en.htm> accessed 1 September 2016.

³⁹² 31 July 2014.

³⁹³ Commission, 'EU supports Decentralisation and Regional Policy Reforms in Ukraine with €55 millions' - Press Release (27 November 2014 <http://europa.eu/rapid/press-release_IP-14-2221_en.htm> accessed 1 September 2016.

³⁹⁴ Casier (n 177) 78.

³⁹⁵ Governance, democracy, human rights and support for economic and institutional reforms <http://eeas.europa.eu/delegations/ukraine/projects/list_of_projects/projects_en.htm> accessed 27 September 2016.

³⁹⁶ On cooperation with the OSCE, Fouéré notes that while there is close relationship in such areas, such as conflict resolution, in others, including human rights, the cooperation is more ad hoc; Erwan Fouéré, 'Ukraine and Security Disorder in Europe A Defining Moment for the OSCE?' (CEPS Commentary, 24 April 2014) 3.

³⁹⁷ Solonenko (n 140) 48-49; Iryna Solonenko, 'European Neighbourhood Policy Implementation in Ukraine: Local Context Matters' (n 159) 355.

³⁹⁸ James Sherr, 'Russia and Ukraine: A Geopolitical Turn?' in Ann Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (The Federal Trust 2002) 168.

offers, engaging as long as necessary until membership is promised in order to give real impetus to Ukrainian reforms. Indeed, the EU's decision on Ukrainian integration was seen only as a matter of political preference and lack of strategy, while 'pretend' efforts to fulfil the demands suffice until there is an acknowledgment of the membership perspective.³⁹⁹ Ukraine embarked on the process of legislative approximation mostly to 'accommodate' its own aspirations to demonstrate to the EU its willingness to integrate.⁴⁰⁰ As far as political reforms were concerned, efforts were undertaken at a legislative level on a variety of issues, as documented by progress reports (albeit not always positively assessed).

In his analysis of Ukraine's efforts at political reform, Tom Casier highlights Ukraine's search for legitimacy, leading to reforms insofar as 'formal democracy' is concerned.⁴⁰¹ The reforms in 'substantive democracy' incur much higher costs, including a change in political culture undermining the status quo of oligarchic power structure. The 'European choice' shared between political groups was part of the domestic discourse, regarded as linked to democratic reforms, yet these remain formal rather than substantive. This is viewed as a 'legitimising' factor in terms of the declared objective of EU accession.⁴⁰² Conducted with representatives of Ukrainian institutions, Casier's interviews demonstrate that the acceptance of formal requisites of political reform is part of acquiring credibility in the eyes of the EU.⁴⁰³ The EU is perceived as having a 'substantial effect as [formal] democracy promoter': for instance, the 'Füle matrix' was welcomed as clarifying the EU's expectations about the formal criteria of democracy.⁴⁰⁴ Thus, the EU itself contributes to the perception that legislative actions in a narrow range of issues are sufficient for progress. The conditions imposed prior to the signature of the AA are yet another example of this.

Despite preferences for 'European choice', even the post-Orange Revolution forces failed to establish a clear strategy of integration: '[i]ntegration with the EU has remained an abstract and distant prospect for many Ukrainian politicians'.⁴⁰⁵ The concentration of EU efforts at the level of politicians and civil servants resulted in a lack of awareness and understanding of EU policies and requirements. This was particularly the case until the formalisation of dialogue with civil society through the EaP civil society forum and the subsequent initiatives. Similarly, the EU monitoring results received no resonance inside the country, excluding the bureaucracy.⁴⁰⁶ Shapovalova goes further to suggest that not even the government or the political parties take the reports seriously.⁴⁰⁷ Besides, given the informational gap, the ambiguity of ENP incentives allowed Ukrainian politicians to exploit it for their domestic gains, often

³⁹⁹ Kuzio (n 86) 19.

⁴⁰⁰ Delcour (n 134) 146.

⁴⁰¹ Casier (n 177) 77.

⁴⁰² Ibid 83.

⁴⁰³ Ibid 84.

⁴⁰⁴ Ibid 84.

⁴⁰⁵ Grzegorz Gromadzki and others, *'Beyond Colours: Assets and Liabilities of "Post-Orange" Ukraine'* (International Renaissance Foundation and Stefan Batory Foundation 2010) 73.

⁴⁰⁶ Solonenko (n 140) 23.

⁴⁰⁷ Natalia Shapovalova, 'Ukraine: A New Partnership' (n 281) 73.

making unrealistic promises to the population, such as obtaining an ‘associated membership’ by 2008, by President Yushchenko, and visa-free travel by 2012, by President Yanukovich.⁴⁰⁸

At times, Ukraine perceives the EU policies, including on human rights, from a bargaining position. Becoming an important geopolitical neighbour, the Ukrainian leadership viewed this significance as alleviating the necessity to comply with political conditionality,⁴⁰⁹ confident that the cooperation would continue irrespective of the latter. This was the case during Kuchma’s reign in the period leading to the Orange Revolution. The most vivid example of this position, however, was President Yanukovich’s double game with Russia and the EU in 2012-2013. With a nose for Ukraine’s importance for the EU, he did not succumb even to the most limited EU demands prior to the signature of the AA.

As for the Ukrainian public, their perceptions of the EU-Ukraine prospect and the role of the EU have not been consistent. It has been reported that in 2000, the majority favoured integration with the CIS instead of the EU.⁴¹⁰ This was explained with reference to the elitist integration process confined to the level of politicians without much engagement with the public.⁴¹¹ Subsequently, the preferences of the Ukrainian population continued to fluctuate, often in response to domestic events.⁴¹² Often, the same proportion of Ukrainians favoured both EU and Russian-led integration projects, demonstrating poor knowledge of EU integration requirements,⁴¹³ but perhaps also the geographic and cultural divide in Ukraine. According to public surveys, the public identifies human rights, democracy and individual freedoms among the top five characteristics they associate with the EU, although the percentage decreased through 2009-2010.⁴¹⁴ Other priority areas, such as economic development, trade and regional cooperation top the list of areas where a greater role is preferred for the EU.⁴¹⁵ In 2010 this was in tune with the public’s general prioritisation of economic development over democratic rights, given

⁴⁰⁸ Iryna Solonenko, ‘European Neighbourhood Policy Implementation in Ukraine: Local Context Matters’ (n 159) 355.

⁴⁰⁹ C. Perez-Bravo (n 187) 89.

⁴¹⁰ In a survey conducted in 2000, 57% supported integration with CIS and Russia and only 29 prioritised integration with the EU; Inna Pidluska, ‘Ukraine and the EU: What Prospects for Integration’ in Ann Lewis (ed), *The EU and Ukraine: Neighbours, Friends, Partners?* (The Federal Trust 2002), 190.

⁴¹¹ Ibid.

⁴¹² Nathaniel Copsey and Natalya Shapovalova, ‘Ukrainian Views of European Integration’, report for the Swedish International Development Agency (SIPU 30 April 2008) <<http://www.wider-europe.org/files/Ukrainian%20Views%20of%20EU%20Integration.pdf>> accessed 1 September 2016.

⁴¹³ Ibid.

⁴¹⁴ ENPI, ‘Perceptions of the EU in Neighbourhood Partner Countries: Ukraine’ <http://enpi-info.eu/files/interview/a21103013ENPI_Ukraine%20%28EUpoll%29en.v.1.pdf> accessed 1 September 2016.

⁴¹⁵ ENPI, Perceptions of the EU in Neighbourhood Partner Countries: Ukraine.<http://www.enpi-info.eu/files/interview/a21103013ENPI_Ukraine%20%28EUpoll%29en.v.1.pdf <[http://www.enpi-info.eu/files/interview/a110070_ENPI_Ukraine\(EUpocptns\)EASTen.v.3.pdf](http://www.enpi-info.eu/files/interview/a110070_ENPI_Ukraine(EUpocptns)EASTen.v.3.pdf)> accessed 1 September 2016.

the economic hardship faced by many Ukrainians.⁴¹⁶ The Maidan events, however, demonstrated that the EU is still the political pole when it comes to the struggle for human rights and democracy.

D. Assessment of EU Policies

Despite an impressive plethora of instruments in EU-Ukraine relations, no meaningful process of political reforms has taken place. This overall failure should be attributed to a number of inherent inconsistencies and mismatches in the EU's approach in conjunction with the internal domestic factors in Ukraine.

1. Values v. Interests, Rhetoric v. Implementation

The value rhetoric has been present in EU-Ukraine relations from the start. The rhetoric and the EU policy documents have been described as 'highly normative' in language,⁴¹⁷ which have persevered until today. Through the majority of the 1990s, the EU's policy was overly focused on security related issues, including disarmament and nuclear cooperation, rather than attempts to assist Ukraine's political transformation. The EU missed the opportunity to influence the political process in Ukraine in the early 1990s,⁴¹⁸ the instruments employed within that decade, including the PCA arrived too late with little incentive and assistance to steer the Ukrainian state-building in the direction of democratisation. At the same time, the EU policies towards Ukraine reflected a pattern of cooperation with Russia, taking precedence over Ukrainian needs and aspirations and allowing for ambiguity as to the EU's intentions.

Nor did the promotion of values become an important factor in engagement with Ukraine later on. By the early 2000s, the EU continued to cooperate notwithstanding the worsening political situation and human rights breaches under President Kuchma. Despite a reaction through CFSP instruments, the EU showed no interest in exercising much influence. The EU's indecisiveness and lack of strategy in this respect were conditioned by the divided opinions of Member States, as well as lack of leadership from EU institutions, with the exception of the EP.⁴¹⁹ Ukraine's emergence as a neighbour important in geopolitical terms, however, has signalled that cooperation should be intensified in traditional and soft security areas, including border management, given the anticipated enlargement.⁴²⁰ Pleas from Ukraine to address its European perspective went ignored, and instead the ENP was devised to exclude Ukraine's membership and pursue the EU's security agenda.

⁴¹⁶ USAID, 'Transition and Trepidation: Public Opinion in Ukraine 2010' (September 2010) 23 <http://www.ifes.org/sites/default/files/20110207_ukraine_key_findings_final_2.pdf> accessed 1 September 2016.

⁴¹⁷ Emerson (n 118) 25.

⁴¹⁸ Solonenko (n 140) 48.

⁴¹⁹ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 72-75; 137-138.

⁴²⁰ *ibid*

The Russia-oriented approach to Ukraine became altogether evident during the Orange Revolution. The AP was agreed with the Kuchma Government, and although it was postponed until after the second round of elections, the EU did not use either PCA or ENP political conditionality.⁴²¹ The apparent threat of withholding the Action Plan was not an officially declared position, but rather an innuendo.⁴²² Despite the political momentum created in Ukraine, the EU was cautious and reluctant to get involved and it did so only following impetus from Poland and Lithuania. Its involvement was explained in connection with strategic and security concerns and the position of new Member States on Ukraine, as well as Russia, rather than as a united front on upholding democratic values.⁴²³ This was not a moment to assist Ukraine in its political transformation, but rather a necessity to avoid a political crisis in a neighbouring country.⁴²⁴ That the political transformation of Ukraine was not the main factor driving the EU was also seen in its refusal to renegotiate the political priorities of the AP to reflect Ukraine's reaction and the post-revolutionary reality.

When the Orange Revolution failed to deliver the promised political transformation, the interests of the EU demanded that the cooperation continue and deepen in some areas, including border management and energy cooperation, and conflict management in Transnistria. Ukraine had a certain role to play in the conflict resolution effort as one of the mediators alongside Russia and the OSCE.⁴²⁵ Even when it appeared that a certain conditionality was in place, for instance linking the 2006 election results with the advancement in the relations,⁴²⁶ this position per se lacked credibility as it failed to clarify either the incentives on offer or the nature of the agreement. Besides, the advancement in relations should have been made conditional upon a genuine transition to democracy, rather than upon the result of one round of elections or upon support of the opposition candidate.⁴²⁷

Despite the political crisis in Ukraine and the failure to implement substantive reforms, the negotiations on the AA continued and, until 2010, the political conditionality of the ENP was largely ignored. The EU's muted reaction to the constitutional crisis in 2007 was linked to Yushchenko's pro-European attitude.⁴²⁸ It was not until Victor Yanukovich's victory in the 2010 presidential elections that the EU's tone changed

⁴²¹ Tocci (n 150) 27-28.

⁴²² Youngs (n 104) 107.

⁴²³ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 83-87; Youngs, "'A Door Neither Closed Nor Open': Europe's Inconsistent Support for Democratic Reform in Ukraine' (n 118) 12-15.

⁴²⁴ Youngs (n 104) 110.

⁴²⁵ See further Nicu Popescu, 'The EU in Moldova – Settling conflicts in the neighbourhood' Institute for Security Studies, Occasional Paper No 60, October 2005; Rostyslav Khotin, 'Moldova and Ukraine: Pro-Western Guarantor to the East' in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (Federal Trust 2004) 143-148; Nicu Popescu and Leonid Litra, 'Transnistria: A Bottom-up Solution' (ECFR/63, September 2012) 6-7.

⁴²⁶ Commission, 'Statement by External Relations Commissioner, Benita Ferrero-Waldner' Press Release (March 2, 2006) IP/06/255.

⁴²⁷ Youngs (n 104) 118-119.

⁴²⁸ C. Perez-Bravo (n 187) 93.

with an almost immediate presentation of the 'Füle matrix'. While the failures in advancing political reforms by the pro-European governments went ignored by the EU in the previous years, the rise to power of the pro-Russian Yanukovich led to a seemingly hard stance on political conditionality. The subsequent EU position on the imprisonment of Tymoshenko and the specific demands to be fulfilled prior to the signing of the AA were the first instances of exercising negative political conditionality, which the EU had avoided hitherto. Rather than being motivated by purely normative considerations, this position was prompted by Ukraine steering in a pro-Russian direction.

When Ukraine decided to refrain from signing the agreement, the EU, taken by surprise, demanded that the former clarified its position and signed the agreement. It was not clear therefore whether the political conditionality still mattered. The EU appeared to be in a stand-off with Russia, rather than genuinely insisting on political conditionality. Again it demonstrated its dislike for negative conditionality and continued to engage with Yankovich to find a solution to the situation and conclude the AA. The Union's preparedness to continue the cooperation with Yanukovich demonstrated that the EU was willing to work with the Yankovich-led elite to find a solution, suggesting the 'EU was out of touch with civil society'.⁴²⁹ With the escape of Yanukovich's and subsequent events in Crimea and Eastern Ukraine, the Member States finally demonstrated unity in imposing mostly targeted sanctions.

The circumstances of the signature of the AA are perhaps the most vivid example of the abandonment of political conditionality for strategic and security reasons requiring the EU's engagement with Ukraine. The signing of the political chapters prior to new elections being held sent a signal from the EU acting as if in a zero-sum game with Russia. The EU's rhetoric following these events was pitched to a new level, together with a shift towards civil society and increased financial support. Given the continuous lack of vision for Ukraine and the past record, however, it is not clear how this will be factored into political conditionality.

2. Policy-Setting Instruments and Lack of Prioritisation

In terms of the choice of instruments,⁴³⁰ in its relations with Ukraine the EU relies predominantly on soft power tools, including economic and diplomatic measures. The hard and soft law instruments are public, with rare examples of non-transparent measures, including the 'Füle matrix'. This should be viewed mostly as a measure of diplomatic pressure rather than a substantive new instrument. The majority of instruments deployed by the EU are positive in nature with very few examples of negative measures, including the withholding of financial assistance for a couple of sectoral programmes and the delay in

⁴²⁹ Richard Youngs, 'Ukraine and the Intricacies of Transition' (Carnegie Europe 2014) <<http://carnegieeurope.eu/strategieurope/?fa=54696>> accessed 1 September 2016.

⁴³⁰ Deliverable No 1, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion' 71-109. <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> 1 September 2016.

signing the AA. It is doubtful whether the latter should be viewed as a genuine instance of exercising negative political conditionality or a warning not to retract from the EU integration course. The bulk of EU measures include very few human rights-specific instruments, including human rights dialogues and such targeted support measures as the EIDHR. The rest of the instruments mainstream the normative rhetoric, however.

The instruments established in 1990s, including the PCA and the Common Strategy introduced the normative rhetoric on the basis of multilateralism to the relations between the parties. However, their late entry, weak incentives and lack of support failed to carve a meaningful role for the EU in Ukraine's political process. Further instruments introduced during Ukraine's slide towards authoritarian tendencies, including the JHA Action Plan 2001 preserved the rhetoric, but reinforced the importance of security cooperation.

The ENP AP expanded the understanding of political reform, but given Ukraine's political reorientation, it missed an opportunity to establish a workable and measurable set of requirements accompanied by much needed support. In the absence of any deadlines and given the width of the priorities established, they were anything but priorities. Another major weaknesses of the AP approach was the lack of prioritisation between various areas of cooperation, creating a wide scope of manoeuvre for Ukraine in terms of which priorities to comply with and at which pace. A similar approach was subsequently adopted in the AAGs without addressing the criticism of the AP. Moreover, for the majority of the period the AP was in force, the document's already weak potential to instigate reform was further undermined by lack of clarity as to the rewards.

These successive policy documents demonstrated that human rights are used in combination with democracy and the rule of law, with priorities at times shifting from one heading to another.⁴³¹ Ultimately, the EU insists on formal criteria of democracy, whereby Ukraine's corresponding perceptions explain why there are certain developments on a legislative level in some areas, such as electoral reform, while at the same time the country fails to establish a proper checks and balances system.⁴³² The centre of the EU's attention is the conduct of elections, independence of the judiciary and certain political freedoms, such as freedom of expression and media. Furthermore, the singling out of these freedoms demonstrates the EU's understanding that they are closely linked to democracy and rule of law. At times, dictated by the political context, the EU insists on specific rights, e.g. right to a fair trial or the rights of those in detention, demonstrating a reactionary approach. Little or no attention is paid to economic, social, and cultural rights. Moreover, the manner of setting the priorities blurred the basis of the monitoring by the EU or bilateral institutions, as the more general and vaguer the priorities, the less clear it is what 'progress' in their implementation would constitute.

⁴³¹ Ibid, 64.

⁴³² Casier (n 177) 85-87.

At various points within the bilateral cooperation, the overall improvement or deterioration in the conduct of national elections appeared to be the turning point or the factors on which further advancement hinged. The focus on elections as an indication of sufficient progress presents a reductionist view of political conditionality as it focuses only on the appearance of democratic governance with an emphasis on its representative element. However, even on those occasions when there was an apparent link between election results and advancement in cooperation, alternative motivations could be found. For instance, it appeared that for the 2004 elections a link was made between the outcome of the elections and political freedoms and progress in cooperation with the EU.⁴³³ Balfour explained this with a change of approach when Yushchenko appeared in 2002 as potential presidential candidate who could be a replacement to Kuchma.⁴³⁴ While the worsening electoral record can be viewed as a reflection of the overall deterioration in the political life of the country, the insistence on a satisfactory electoral record marginalises the role of human rights, i.e. guaranteeing the latter does not appear at any stage to be a precondition for cooperation. While insistence on the rights of those on trial or in detention prior to the AA can be seen as such an example, the singling out of these rights, and at that stage, can be seen as means of supporting the pro-European opposition, rather than guaranteeing human rights per se.

While the APs and the AAGs were soft law documents, not legally binding on the parties, many expectations were attached to the AA, carrying with it the main incentive on offer, the DCFTA. While the start of negotiations could have been used to instigate serious reform in Ukraine, similar to awarding a candidate status, it was only loosely linked to the outcome of 2006 elections. The Agreement is most vocal on the importance of political reform in comparison with other neighbourhood agreements, and includes the most onerous essential elements clause. It demonstrates that the scope of the provision can be extended to make a political point for the notice of a third party, leading us to question its function.⁴³⁵ As far as negative conditionality is concerned, the Agreement fails to clarify what would count as 'exceptional circumstances' allowing for treaty suspension or provide an explicit suspension mechanism given the mixed nature of the agreement.⁴³⁶ Yet the most peculiar aspect of the non-execution clause is that, in 'exceptional circumstances', trade relations — more specifically the operation of the DCFTA — can be suspended, in contrast to non-fulfilment of other treaty obligations. Although the partial suspension has its advantages, the possible suspension of the trade-related part of

⁴³³ Council, 'General Affairs and External Relations Council Conclusions' (Luxembourg, 11 October 2004).

⁴³⁴ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 87.

⁴³⁵ Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (n 268) 401.

⁴³⁶ *Ibid.*

the agreement would go against the fundamental practice and preferences of the EU. The essential elements clause has never been used to justify restrictive trade measures.⁴³⁷

It can be argued that the significance of the threat of DCFTA suspension lies not so much in the potential interruption of trade relations, as in the possibility that the main incentive — the DCFTA itself — will be withdrawn. A DCFTA suspension would not preclude the political cooperation required to achieve the ENP objectives, but the extent to which Ukraine aspiring for membership would cooperate willingly in political and other spheres when the main incentive is put on hold must be doubted. The application of this provision would be extremely doubtful given the EU's past practice, whereby suspensions were recorded only in the cases of ACP countries, and mostly in cases of serious breaches of democratic principles, such as a coup d'état.⁴³⁸ At the same time, the essential element and other provisions in the AA can be assessed positively as establishing the normative framework for the relations between the parties and creating binding obligations on the cooperation with civil society. Ultimately, the success of the AA, including in the area of political reform, will depend on the 'ultimate finalité' of the relationship.⁴³⁹

The lack of concreteness and prioritisation in EU requirements is further undermined by the inconsistency in policy content.

3. Inconsistency in Policy Content

The EU preferences expressed in terms of the priorities for cooperation were not efficiently or sufficiently linked to the monitoring of the progress and the financial and technical assistance provided to Ukraine. The purpose or effects of the monitoring exercised through various media were not always clear. The platforms for political dialogue, including the PCA Cooperation Councils and the bilateral summits, mainstreamed the normative rhetoric in general but often failed to address the most prevalent concerns or indicate the way in which political conditionality (positive or negative) would be used. One of the limitations of the political dialogue was the exclusion of civil society from the process, which lasted for the most part of the cooperation between the parties. The same observation can be made regarding the monitoring conducted by the Commission (subsequently jointly with the EEAS). The monitoring and unilateral criticism should be assessed from two angles. First, they did not have much

⁴³⁷ 'Commission, 'Using EU Trade Policy to Promote Fundamental Human Rights: Current Policies and Practices' (Non-Paper, 2012) <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf> accessed 1 September 2016; Lorand Bartels, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries' (2008) Policy Department External Policies, European Parliament, 14.

⁴³⁸ Johanne D Saltnes, 'The Human Rights Policy: Unpacking the Literature on the EU's Implementation of Aid Conditionality' (2013) Arena Working Paper 2, 7-8; Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 *Legal Issues of Economic Integration* 297, 304-305.

⁴³⁹ Christophe Hillion, 'Mapping Out the New Contractual Relations between the European Union and its Neighbours' (2007) 12 *EFAR* 169, 182.

effect on the process of reform in Ukraine because they were limited to reception on a bureaucratic level without the involvement of civil society. Second, the unilateral criticism was not linked to the revision of the substantive agenda of the cooperation between the parties, demonstrating the lack of continuity between monitoring and such instruments as the AAGs. Because the criticism was not factored in constructively to indicate or highlight specific priorities accompanied with incentives and support further, it fuelled the Ukrainian perceptions of EU rejection and even a push towards other projects.⁴⁴⁰

From this perspective, only the superficial engagement of the political leadership restricting itself to certain legislative efforts was evaluated, without a proper follow-up as to its implementation.⁴⁴¹ Even for the element considered to be crucial for the EU, that is electoral record, the EU institutions appear to be cautious in their reactions. For instance, while the evaluation welcomes those elections the OSCE considers largely or mostly in line with international standards, the EU merely calls for reform when serious deficiencies are found.⁴⁴² Some rights feature more prominently within the evaluation than others, favouring political rights, particularly freedom of expression and media, in comparison with economic and cultural rights.

Furthermore, there is no obvious link between the outcomes of monitoring through political dialogue and the actual policies or their continuation between the parties, as well as the allocation of technical or financial support. While in the 1990s, political reform was not one of the priorities of either the agenda of cooperation or the support provided, in the beginning of the last decade the deteriorating situation in Ukraine could have led to a revision of both. The policy cooperation, however, continued and TACIS was not revised to demonstrate the EU's willingness to support political reform. Similarly, a gap with targeted assistance on political reform transpired after the Orange Revolution. Besides, the funding was redirected to the state instead of to civil society. The EIDHR funding of the civil society programmes focused on small programmes mostly for non-political activities. While the ENPI increased the support for political reform and placed more emphasis on support to civil society, the funds were stretched to also finance priorities not strictly related to political reform, although under the heading for democracy and good governance. Besides, they were not aligned properly with either the ENP AP or AAG priorities. Given these continuous shortcomings in Ukraine's political reforms and the revised ENP's 'deep and sustainable democracy' approach, the 2011-2013 ENPI NIP was particularly surprising in its downgrading of political reform. Although some instruments, such as the Governance Facility, were used as part of positive conditionality, these appeared to be linked solely to the outcomes of one round of elections. Apart from some minor withholding of assistance for specific programmes, negative conditionality was not deployed with regards to financial assistance. Following the 2013-2014 events, the EU appears to

⁴⁴⁰ Piontek (n 65) 509.

⁴⁴¹ Tom Casier, 'The EU's Two-track Approach to Democracy Promotion: The Case of Ukraine' (2011) 18 *Democratisation* 956-977.

⁴⁴² Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 82-83.

have revised its post-Orange revolution approach, characterised by lack of support, by directing large financial assistance to Ukraine and shifting emphasis to civil society. However, political reform does not appear to be at the centre of the assistance. Nor it is clear how political conditionality will be used in the future with regards to the allocation of assistance.

E. Reactive Policy Development and Lack of Coherence

The EU human rights policies were undermined by lack of strategy and coherence towards Ukraine in general. Often instruments and policies were deployed to mask the lack of unity among the EU Member States. The lack of coherence among Member States *inter alia* depended on their attitude to Russia, whereby the policies to Ukraine would either emulate those towards Russia or would be hinged on cautious indecisiveness over the Russian reaction. The Member States have been viewed as EU ‘policy entrepreneurs’ depending not only on the Russian factor, but also on their positions on human rights and other interests.⁴⁴³ The lack of strategy on behalf of the EU allows for such policy ‘entrepreneurship’ whereby the Member States with the most interest in Ukraine’s fate can either mobilise the EU institutions or else take leadership. Various turns in EU policies, including such initiatives as the EaP, were also due to Member States taking the lead. The lack of coherence among the Member States was particularly prominent in relation to one factor that may have had the most influence over the EU’s human rights policies — the EU membership prospect of Ukraine. Similarly, the EU institutions also lacked a common vision on this issue with only the Parliament consistently advocating for Ukrainian membership and stronger political conditionality.

Besides, policies are often reactionary in response to the events in Ukraine or neighbourhood in general. The EU does not use its existing instruments or incentives, including financial support, to trigger change in the neighbourhood.⁴⁴⁴ At the same time, the reactionary attitude is centred on the EU or on its Member States, often ignoring Ukraine’s quests or failing to ensure genuine joint ownership.

Ultimately, following Lucarelli’s classification of the approaches towards human rights in foreign policy,⁴⁴⁵ the Ukrainian practice demonstrates that human rights and political reform do not serve as the final aim of the policy, but rather that their incorporation in mainstream instruments legitimises the discourse on political reform and merely indicates the direction favoured by the EU. Whereas successive Ukrainian governments did little to ensure a departure from autocratic practices and a genuine commitment to democratic reform, the cooperation with the EU appeared to depend predominantly on Ukraine’s commitment to a pro-European course. The very few instances of insistence on political conditionality were motivated by reasons other than a genuine interest in Ukraine’s political record.

⁴⁴³ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (n 60) 139-141.

⁴⁴⁴ *Ibid*, 136.

⁴⁴⁵ Sonia Lucarelli, ‘Introduction’ in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in EU Foreign Policy* (Routledge 2006) 14-15.

While the EU is unequivocal in its condemnation of separatists in Eastern Ukraine and Crimea, its stance on the rise of nationalism in Ukraine and the increasingly intolerant policies of the Ukrainian authorities is yet uncertain. A clear and consistent message of incompatibility between these practices and Ukraine's obligations under the AA should be sent by the EU through all available domains.

III. Moldova

Moldova has made a lengthy journey from a country ‘far down the list of priorities for the EU’ in the early 1990s⁴⁴⁶ to a frontrunner in the EU’s Eastern neighbourhood until recently. After Romania’s accession to the EU, Moldova became an immediate neighbour of the EU. It has expanded its trade relations with the EU, the latter currently being Moldova’s largest trade partner.⁴⁴⁷ Despite the Transnistrian conflict and economic troubles throughout its independence — two factors influencing the country’s prospects for democratisation⁴⁴⁸ — Moldova has been seen as one of the most democratic countries in the region, where elections allowed for change of political power, and which was ‘never as repressive’ as Ukraine or Belarus.⁴⁴⁹ It continues, however, to be Europe’s poorest country,⁴⁵⁰ remittances accounting for over 25% of its GDP for the past 20 years.⁴⁵¹ The EU human rights policies towards Moldova can be analysed through a prism of consecutive stages.⁴⁵² The first stage includes the establishment of relations and scant attention from the EU in 1991-1998. From 1999 to 2004, a more visible EU stance transpired on certain issues as Moldova became more vocal in proclaiming its European aspirations. The period between 2005 and 2009 marks a more active engagement with Moldova through the ENP and the EaP. The last period following 2009 has seen the deployment of the EU’s most attractive incentives so far, that is an AA containing a DCFTA and visa liberalisation to induce political reform, including human rights reform in the country.

A. Stage I: 1991-1998

Moldova declared its independence from the Soviet Union in August 1991 by establishing a new republic.⁴⁵³ The state-building process was, however, marred by the Transnistrian conflict, culminating in

⁴⁴⁶ Marius Vahl, ‘The EU and Moldova: A Neglected Relationship’ in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 181.

⁴⁴⁷ European Commission, ‘Moldova: Trade Picture’ (ec.europa.eu) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/moldova/>> accessed 1 September 2016.

⁴⁴⁸ Ekaterina McDonagh, ‘Is Democracy Promotion Effective in Moldova? The Impact of European Institutions on Development of Civil and Political Rights in Moldova’ (2008) 15 *Democratisation* 142, 148.

⁴⁴⁹ Raik, ‘Promoting Democracy’ (n **Errore. Il segnalibro non è definito.**) 9.

⁴⁵⁰ ‘A banking scandal is set to bankrupt Europe’s poorest economy’ *The Economist* (1 August 2015)

⁴⁵¹ The World Bank, Personal Remittances <<http://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS>> accessed 1 September 2016.

⁴⁵² These stages are partly based on Danii and Mascauteanu’s classification which distinguishes three periods: initial neglect in 1991-1998, increased EU interest in 1998-2005, and 2005-2012 involving Moldova’s efforts to fulfil the Copenhagen criteria; Olga Danii and Mariana Mascauteanu, ‘Moldova under the European Neighbourhood Policy: “Falling between Stools”’ in Elena Korosteleva (ed), *The Eastern Partnership: A New Opportunity for the Neighbours?* (n 155) 102-104.

⁴⁵³ Declaration of Independence of the Republic of Moldova (27 August 1991).

a short war in 1992.⁴⁵⁴ Moldova lost control not only of a part of its territory, but also of most of its heavy industry.⁴⁵⁵ Various efforts to resolve this so-called ‘frozen’ conflict with the involvement of the OSCE, Russia and Ukraine proved unsuccessful.⁴⁵⁶ At the time the conflict received little attention from the EU or its Member States.⁴⁵⁷ It is said that because of the conflict, the democratisation of Moldova was delayed until 1994,⁴⁵⁸ and the so-called ‘stateness’ issue continued to hinder democratisation subsequently.⁴⁵⁹ In contrast to some other post-Soviet states with frozen conflicts, however, ‘the existence of the secessionist conflict over Transnistria has not made any substantial impact on Moldova’s quality of democracy’ and the conflict has not been exploited for populist nationalistic reasons.⁴⁶⁰

Moldova joined a number of international organisations by the mid-1990s, including the UN and the Conference for Security and Co-operation in Europe (now the OSCE) in 1992, the NATO ‘Partnership for Peace Programme’ in 1994 and, in 1995, the CoE. The EU’s engagement with Moldova has been characterised by ‘a rather limited amount of attention’.⁴⁶¹ Its small size and lack of strategic value were two significant factors contributing to the EU’s reluctance to engage.⁴⁶² The EU dealt with Moldova as part of its regional approach towards other Western NISs and the evolving trends in its foreign policy at the time.⁴⁶³ The issue of human rights protection surfaced prior to the establishment of bilateral

⁴⁵⁴ Oleh Protsyk, ‘Federalism and Democracy in Moldova’ (2005) 21 *Post-Soviet Affairs* 72; Gottfried Hanne, ‘The “Dniester Moldovan Republic”: Building an Authoritarian State’ in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 79-86.

⁴⁵⁵ John Lowenhard, Ronald J. Hill and Margot Light, ‘A Wider Europe: The View from Minsk and Chisinau’ (2001) 77 *International Affairs*, 605, 606, 614.

⁴⁵⁶ These include the 1997 Memorandum on the ‘Normalisation of Relations between the Republic of Moldova and the Transnistria Moldavian Republic’ under the auspices of Russian Foreign Minister and the 2003 ‘Kozak Memorandum’.

⁴⁵⁷ Vahl (n 446) 172.

⁴⁵⁸ Theodor Tudoroiu, ‘Structural Factors vs. Regime Change: Moldova’s Difficult Quest for Democracy’ (2011) 18 *Democratisation* 236, 244.

⁴⁵⁹ Gwendolyn Sasse, ‘Linkages and the Promotion of Democracy: The EU’s Eastern Neighbourhood’ (2013) 20 *Democratisation* 553, 555-556.

⁴⁶⁰ Nicu Popescu and Andrew Wilson, ‘Moldova’s Fragile Pluralism’ in Richard Youngs and Michael Emerson, *Democracy’s Plight in the European Neighbourhood. Struggling Transitions and Proliferating Dynasties*, CEPS 2009, 97-98.

⁴⁶¹ Alla Skvortova, ‘Moldova’ in Steven Blockmans and Adam Lazowski (eds), *The European Union and its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration* (TMC Asser Press 2006) 552.

⁴⁶² Jan M. Wiersma, ‘Moldova and the European Union: A Missed Opportunity’ in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 195.

⁴⁶³ Kubicek, ‘The European Union’ (n **Errore. Il segnalibro non è definito.**) 269, 270.

relations in the Declaration on the Recognition of New States in Eastern Europe and the former Soviet Union referred to above in relation to Ukraine.⁴⁶⁴

The normative rhetoric was preserved in the PCA,⁴⁶⁵ which in 1994 replaced the 1989 trade and cooperation agreement between the EC and the Soviet Union.⁴⁶⁶ Initially concluded for ten years,⁴⁶⁷ the PCA established the political and legal framework for bilateral cooperation. The PCAs with Moldova, similar to other Western CIS countries was more advanced and included the possibility of establishing a free trade area, albeit as a distant prospect lacking genuine commitment.⁴⁶⁸ As far as human rights policies are concerned, the PCA established a political dialogue between the parties and included a 'standard' human rights clause in line with the emerging practice of the EU in the 1990s, allowing for treaty suspension in case of a serious breach of democratic principles or human rights.⁴⁶⁹ Human rights conditionality had already formed a part of the original Council Regulation concerning technical assistance for former Soviet States (TACIS).⁴⁷⁰ The PCA, however, did not enter into force until years later and no meaningful assistance was provided by the EU to foster human rights development.

In the 1990s, Moldova revised its foreign policy towards the EU in response to the need for foreign assistance to tackle serious economic troubles and the unresolved conflict in Transnistria.⁴⁷¹ Moreover, Russia's economic crisis in 1998 had a detrimental impact on this highly dependent former Soviet

⁴⁶⁴ Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991).

⁴⁶⁵ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other (1998) OJ L181.

⁴⁶⁶ Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation (1990) OJ L 068.

⁴⁶⁷ After the expiry of ten years, the Agreement could be renewed on an annual basis provided there is no denunciation by either party; PCA (n 465) art 98

⁴⁶⁸ Roman Petrov, 'The Partnership and Cooperation Agreements with the Newly Independent States' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press 2002) 175-194; Hillion, 'Partnership and Cooperation Agreements' (n **Errore. Il segnalibro non è definito.**) 399.

⁴⁶⁹ PCA (n 465) Arts 2, 6; Commission, SEC(91) 61 (n **Errore. Il segnalibro non è definito.**); Luxembourg European Council, 'Declaration' (n **Errore. Il segnalibro non è definito.**); Luxembourg European Council, 'Resolution' (n **Errore. Il segnalibro non è definito.**) 17-22; Bartels, (n **Errore. Il segnalibro non è definito.**) 17-22.

⁴⁷⁰ Council Regulation 2053/93 concerning the provision of technical assistance to economic reform and recovery in the independent States of the former Soviet Union and Mongolia (1993) OJ L 187, art 4(7). It was also subsequently reproduced in Regulation 99/2000/EC concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (2000) OJ L 12, art 16.

⁴⁷¹ Maria Ruxandra Lupu, 'External Democracy Promotion in Ukraine and Moldova: The Impact of the European Union' (2010) Danish Institute for International Studies Working Paper, 14 <<https://www.ciaonet.org/attachments/16948/uploads>> accessed 15 September 2016.

republic, prompting Moldova to further reappraise its foreign policy.⁴⁷² Thus, the EU slowly emerged as a political pole, challenging Moldova's default alignment towards Romania or Russia in the 1990s.⁴⁷³ In 1996, the Moldovan President declared his objective of acquiring EU membership for Moldova.⁴⁷⁴ While the PCA was being ratified, Moldova made requests to the EU to become an associate member.⁴⁷⁵ In the absence of any substantive EU vision on this matter, as well as of advocates for Moldova among the Member States, the requests remained unrequited.⁴⁷⁶ Moldova was further 'marginalised' when the 1998 Vienna European Council offered neither a common strategy, nor bilateral summits, as with Russia and Ukraine.⁴⁷⁷ Unlike some other post-Soviet states, however, Moldova did not slide into authoritarianism. Its split identity and the existence of various political poles, including Russia and Romania, allowed for political pluralism to develop.⁴⁷⁸ Some have labelled this 'pluralism by default'.⁴⁷⁹ By 1997, Moldova was seen as having 'made significant progress in instituting democratic politics' in spite of its conflict in Transnistria, its economic downslide and its dependence on Russia.⁴⁸⁰

Thus, the first stage in relations between the EU and Moldova was characterised by a practical absence of a human rights agenda by the EU.

B. Stage II: 1999-2005

As the PCA was being ratified, Moldova declared the EU integration to be one of the priorities of its foreign policy of 1998 to 2002.⁴⁸¹ Moldova's ambitions received a setback when, at the 1999 Helsinki summit, it was left out of the list of candidates,⁴⁸² yet it preserved its European rhetoric even though the envisaged institutional structures were not established and the main commitments of the PCA were not fulfilled.⁴⁸³ Moreover, despite the political pluralism noted earlier, by the early 2000s the EU was

⁴⁷² Ion Stavila, 'Moldova between East and West: A Paradigm of Foreign Affairs' in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 130.

⁴⁷³ Sasse, (n **Errore. Il segnalibro non è definito.**) 194.

⁴⁷⁴ Vahl, (n 446) 173.

⁴⁷⁵ Sergiu Buscaneanu, 'How Far is the European Neighbourhood Policy a Substantial Offer for Moldova?' (Leeds, August 2006) 5-6 <<http://pdc.ceu.hu/archive/00005503/>> accessed 15 September 2016.

⁴⁷⁶ Danii and Mascauteanu (n 452) 102-103.

⁴⁷⁷ Vahl, (n 446) 176.

⁴⁷⁸ Lupu, (n 471) 10; Popescu and Wilson, (n 460) 96-97; Lucan Way, 'Weak States and Pluralism: the Case of Moldova' (2003) 17 *East European Politics and Societies* 454.

⁴⁷⁹ *ibid* 454, 455.

⁴⁸⁰ William Crowther, 'The Politics of Democratisation in Post-communist Moldova' in Karen Dawisha and Bruce Parrott (ed), *Democratic Changes and Authoritarian Reactions in Russia, Ukraine, Belarus, and Moldova* (CUP 1997) 321.

⁴⁸¹ Principal Directions of Foreign Policy for the Period 1998-2002.

⁴⁸² Alla Skvartova, *Moldova and the EU: Direct Neighbourhood and Security Issues* in Iris Kempe (ed), *Beyond EU Enlargement, Volume 1: The Agenda of Direct Neighbourhood for Eastern Europe* (Bertelsmann Foundation Publishers 2001) 106.

⁴⁸³ Vahl, (n 446) 174.

reputed to have done little to prevent the creation of oligarchic power structures intertwined with public institutions.⁴⁸⁴ There was also a constitutional conflict at the end of 1990s over Moldova's political system, which resulted in the establishment of a parliamentary republic in 2001.⁴⁸⁵

Concurrently, Moldova attempted to accelerate its course towards the EU through alternative means. It entered the Stability Pact for South Eastern Europe, the 'shortest route to EU integration'.⁴⁸⁶ Others saw this as a compensatory measure by the EU for its previous lack of attention.⁴⁸⁷ Due to its late entry, when the projects had already been in place for a while, Moldova benefited little from this initiative.⁴⁸⁸ In addition, Moldova was invited to participate in the European Conference established in 1997 for political dialogue with candidate states, later extended to include non-candidate countries. The 2001 government again proclaimed European integration as its desired goal.⁴⁸⁹

Gradually, EU interest awakened due to the high stakes riding on security matters, including on conflict- and energy-related issues.⁴⁹⁰ Some have argued that the more active involvement by the end of 1990s was the result of new competences conferred upon the EU in the Treaties of Amsterdam and of Nice.⁴⁹¹ After the Party of Communists came to power following the 2001 elections in Moldova, a National Strategy Paper for Moldova was adopted for 2002-2006 focusing on closer cooperation with the EU.⁴⁹² Coinciding with this, a Friendship and Cooperation Treaty was signed between Moldova and Russia, establishing a strategic partnership.⁴⁹³ The human rights record and control of the judiciary deteriorated.⁴⁹⁴ The worsening political situation triggered a more active engagement by European international organisations, including the EU.⁴⁹⁵ When an opposition party was suspended in 2002, the European Commission issued a 'shaming' statement demanding the annulment of the suspension, calling on Moldova to comply with its international obligations and promising assistance depending on the political situation.⁴⁹⁶ Noting 'a radical change' in the EU's behaviour, McDonagh highlights the

⁴⁸⁴ Lynch, (n **Errore. Il segnalibro non è definito.**) 47.

⁴⁸⁵ Lowenhard and Hill and Light (n 455) 605, 615-616; McDonagh (n 448) 142, 147.

⁴⁸⁶ Andreu Neguta and Alexandru Simionov, 'Moldova and the EU: A View from Chisinau' in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 192.

⁴⁸⁷ Skvortova, (n 461) 556.

⁴⁸⁸ *ibid.*

⁴⁸⁹ Danii and Mascauteanu (n 452) 103.

⁴⁹⁰ *ibid.*, 108-109; Vahl, (n 446) 174-175; Skvortova, (n 461) 573.

⁴⁹¹ Vahl, (n 446) 175.

⁴⁹² Freyburg and Lavenex and Schimmelfenning and Skripka and Wetzels, 'Democracy Promotion through Functional Cooperation' (n **Errore. Il segnalibro non è definito.**)

⁴⁹³ Stavila (n 472) 138.

⁴⁹⁴ Luke March and Graeme P Herd, 'Moldova Between Europe and Russia: Inoculating Against the Coloured Contagion?' (2006) 22 *Post-Soviet Affairs* 349, 360; Amnesty International, '2001, 2002, and 2003 Amnesty International reports on human rights in Moldova' <<http://www.web.amnesty.org>> accessed 15 September 2016.

⁴⁹⁵ McDonagh (n 448) 153-154; Vahl, (n 446) 178.

⁴⁹⁶ McDonagh (n 448) 154-155.

addition of new elements to the cooperation, including assistance for reform of the judicial system and harmonisation of Moldovan legislation with European standards.⁴⁹⁷

Attention towards the conflict was magnified with the first statement on Transnistria in 2002.⁴⁹⁸ This was followed by targeted sanctions against the Transnistrian leadership in response to lack of progress in resolving the conflict and to the closure of Romanian language schools in Transnistria,⁴⁹⁹ while the High Representative Javier Solana pledged to support conflict resolution.⁵⁰⁰ The shift in the EU's approach reflected increased awareness of the links between the conflict and Moldova's political and economic situation, as well the surge in transnational crime emanating from Transnistria.⁵⁰¹ At the same time, developments surrounding the conflict caused Moldova to turn towards the EU. Moldova's sound rejection of the Russian 'Kozak memorandum', which advocated a federal solution with equal status for Moldova and Transnistria and the entrenchment of Russia's military role for twenty years, was a turning point in Moldova's reorientation towards the EU.⁵⁰² Some, however, saw it as part of a strategy by the Moldovan Communist leadership to 'play the European Union off against Russia'.⁵⁰³ In 2003 the Concept of Integration of the Republic of Moldova was submitted to the EU, elaborated by the recently established National Commission for European Integration.⁵⁰⁴ In 2003, President Voronin raised the prospect of becoming an associate member by 2007, in concert with the anticipated Romanian accession.⁵⁰⁵

The European response to this was the 'Wider Europe' initiative, leading to the ENP. Along with Ukraine, Moldova was one of the countries in the sights of the pre-ENP rationale forwarded by the foreign ministers of Sweden and Britain.⁵⁰⁶ The 2002 Council Conclusions commissioned a new approach to be

⁴⁹⁷ *ibid*, 155.

⁴⁹⁸ Popescu and Litra, (n **Errore. Il segnalibro non è definito.**) 7.

⁴⁹⁹ Council Common Position 2003/139/CFSP concerning restrictive measures against the leadership of the Transnistria region of the Moldova Republic (2003) OJ L 53/60;
Council Common Position 2008/160/CFSP concerning restrictive measures against the leadership of the Transnistria region of the Republic of Moldova (2008) L 51/23;
Council 2010/573/CFSP concerning restrictive measures against the leadership of the Transnistria region of the Republic of Moldova (2010) OJ L 253/54.

⁵⁰⁰ Skvortova, (n 461) 562.

⁵⁰¹ Vahl, (n 446) 180.

⁵⁰² Robert Weiner, 'Whither Moldova: East or West?' in Joan De Bardeleben (ed), *The Boundaries of EU Enlargement: Finding a Place for Neighbours* (Palgrave 2008) 185.

⁵⁰³ Robert Weiner, 'The European Union and Democratisation in Moldova' in Henry F. Carey (ed), *European Institutions, Democratisation, and Human Rights Protection in the European Periphery* (Lexington Books 2014) 130.

⁵⁰⁴ Natalia Shapovalova and Jos Boonstra, 'The European Union: From Ignorance to a Privileged Partnership with Moldova' in William Schreiber and Marcin Kosienkowski (eds), *Moldova: Arena of International Influences* (Lexington Books 2012) 60.

⁵⁰⁵ Wiersma (n 462) 197.

⁵⁰⁶ Emerson and others, 'The Reluctant Debutante' (n **Errore. Il segnalibro non è definito.**) 196-197.

developed, aimed inter alia at Moldova.⁵⁰⁷ Together with Ukraine, Moldova was seen as a country that to some extent 'defined the shape and pace of the ENP'.⁵⁰⁸ Moreover, the ENP security rationale meant that Moldova was of particular interest due to the unresolved status of Transnistria.⁵⁰⁹ With the ENP, a stronger human rights conditionality appeared to have been injected into the bilateral relations. Certain commentators suggested that the EU believed that democratic reform was not possible without the resolution of the conflict.⁵¹⁰

While the EP acknowledged Moldova's prospects for an EU membership — provided the relevant conditions were fulfilled,⁵¹¹ other EU institutions and the Member States preferred managing Moldova's expectations through the ENP. With the ENP's exclusionary rationale directed primarily at countries like Moldova,⁵¹² this led to Moldova's 'bitter disappointment',⁵¹³ and eventually 'forced acceptance'.⁵¹⁴ Although its EU ambitions were to galvanise Moldova's search for identity, the policy became a 'source of despair', blurring this identity further.⁵¹⁵ The effect of the ENP was to distance Moldova from the Western Balkans,⁵¹⁶ with which the country was trying to be associated. The ENP incentives for Moldova were even less clear than for others as, in the Commission's estimates, Moldova did not possess the competitive strength or administrative capacity to take on the reciprocal obligations of a free trade area,⁵¹⁷ settling instead for autonomous trade preferences.⁵¹⁸ At the same time, the anticipated border meant security and immigration would be a particular concern for the EU.⁵¹⁹

Despite its initial apprehension, Moldova engaged with the ENP on its path towards European integration.⁵²⁰ It went on to create an extensive institutional framework modelled after accession countries.⁵²¹ Yet this was criticised for lack of coordination and overlapping activities.⁵²² The main

⁵⁰⁷ Council of the European Union, Conclusions (18 November 2002) para 2.

⁵⁰⁸ Sasse (n **Errore. Il segnalibro non è definito.**)181.

⁵⁰⁹ Commission, 'Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication, Brussels, 11 March 2003) COM(2003) 104 final, 9.

⁵¹⁰ Weiner 'Whither Moldova' (n 502)183.

⁵¹¹ European Parliament, Resolution on 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours (COM(2003) 104) P5_TA(2003)0520, para 15.

⁵¹² Ghazaryan, 'The European Neighbourhood Policy' (n **Errore. Il segnalibro non è definito.**) 1-3.

⁵¹³ Danii and Mascautuanu (n 452) 106-107; Skvortova, (n 461) 564.

⁵¹⁴ Florent Parmentier, 'The Reception of EU Neighbourhood Policy' in Zaki Laidi (ed), *EU Foreign Policy in a Globalised World: Normative Power and Social Preferences* (Routledge 2008) 107.

⁵¹⁵ Lynch, (n **Errore. Il segnalibro non è definito.**) 54.

⁵¹⁶ Marise Cremona, 'The European Neighbourhood Policy: Partnership, Security and the Rule of Law' (2004) revised version of a paper given at a Workshop organised by the Center on Democracy, Development and the Rule of Law, Institute for International Studies, University of Stanford in October.

⁵¹⁷ Commission, 'Wider Europe' (n 509) 11.

⁵¹⁸ Commission, 'Implementing and Promoting' (n **Errore. Il segnalibro non è definito.**1) 12.

⁵¹⁹ Judith Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy' (2006) 44 *JCMS* 29, 31.

⁵²⁰ Buscaneanu, (n 475) 17.

⁵²¹ Danii and Mascautuanu (n 452) 107; Skvortova, (n 461) 572.

bilateral instrument, the ENP AP was endorsed by the PCA Cooperation Council in February 2005, although it had been ready for signing half a year earlier.⁵²³ The AP was set for a period of three years, Moldova insisting on a shorter term so that it could be revisited later with an EU accession in mind.⁵²⁴ Moldova's request to include provisions of the prospect of an associate membership were left without a response.⁵²⁵

To sum up, this stage of the bilateral relations, although characterised by an increased EU interest, did not result in the emergence of a human rights policy. Only with the initiation of the ENP a stronger politically conditionally appeared to have emerged.

C. Stage III: 2005-2009

Following the endorsement of the ENP AP, Moldova's pro-European rhetoric persisted. At times, it was used by the governing Communist party to stay in power, avoiding events similar to the 'Orange Revolution' in Ukraine.⁵²⁶ By 2005, Moldova was seen as a 'competitive authoritarian state' where elections co-existed with abuses of democratic procedure.⁵²⁷ Despite shortfalls and continuing negative trends, the 2005 parliamentary elections were found to be consistent generally with international standards.⁵²⁸ In addition, Moldova, which suffered economically as a result of Russian sanctions, received 'symbolic' support from the EU.⁵²⁹

Moldovan cooperation with the EU intensified in different ways. As a means of enhancing the cooperation,⁵³⁰ the EU began participating as an observer in the '5+2' talks on the Transnistrian conflict from 2005, a move said to be the result of President Voronin's attempts to 'internationalise' the conflict.⁵³¹ The political transformation of Moldova came to be seen both by commentators and the European Commission as a factor that could contribute to resolution of the conflict.⁵³² A Special Representative for Moldova was appointed in 2005 with a mandate *inter alia* 'to contribute to the strengthening of democracy, rule of law and respect for human rights and fundamental freedoms'.⁵³³ Although, together with the ENP, this allowed for a more pronounced EU engagement it did not

⁵²² Criticism by the UNDP as cited in Weiner 'The European Union and Democratisation' (n 503) 131.

⁵²³ Buscaneanu (n 475) 21.

⁵²⁴ Kelley (n 519) 33.

⁵²⁵ Skvortova, (n 461) 565.

⁵²⁶ Tudoroiu, (n 458) 236, 241; Weiner 'Whither Moldova' (n 502) 185.

⁵²⁷ Steven Levitsky and Lucan A. Way, 'International Linkage and Democratisation' (2005) 16 *Journal of Democracy*, 20.

⁵²⁸ OSCE/ODIHR, 'Election Observation Mission Final Report, Parliamentary Elections 3 June 2005' (2005).

⁵²⁹ Weiner 'Whither Moldova' (n 502) 194-195.

⁵³⁰ Skvortova, (n 461) 564.

⁵³¹ Weiner 'Whither Moldova' (n 502) 188.

⁵³² Popescu and Litra, (n **Errore. Il segnalibro non è definito.**) 13.

⁵³³ Council Joint Action 2005/265/CFSP appointing a Special Representative of the European Union for the Republic of Moldova, (2005) OJ L 81/50, art 2; Council Joint Action 2006/210/CFSP (2006) OJ L 49/11.

necessarily alter the dynamics of the conflict.⁵³⁴ The same year, the Commission's Delegation opened in Moldova, enhancing EU capacity to engage with domestic actors. This, however, was a late development, where the absence of delegation in previous years was seen as a serious omission.⁵³⁵ A major achievement in relations between the parties was the deployment of the border management mission, the so-called EUBAM in 2005.⁵³⁶ By 2008, its performance was positively assessed,⁵³⁷ and it was extended further.⁵³⁸ Although initiated at the request of Moldova and Ukraine, it is said they had little involvement in '[shaping] the dynamics of the cooperation'.⁵³⁹ In 2007 the common visa application centre was established.

Most importantly from human rights perspective, Moldova engaged in the implementation of the ENP AP, which, according to the Commission became 'the centrepiece of [the government's] reform strategy'.⁵⁴⁰ In 2005 Moldova adopted a European Strategy of Moldova together with some institutional developments, although this did not result in the creation of the necessary capacity to implement the AP.⁵⁴¹ Moldova undertook efforts directed at legislative approximation, at times implementing more extensive measures for approximation than envisaged in the PCA, for example in its energy and aviation sectors.⁵⁴² By 2007 the country was classified as 'willing' in terms of openness towards EU engagement in its transformation and aspiration for EU membership.⁵⁴³

Economic cooperation further intensified by the granting of GSP+ status in 2006, and later, autonomous trade preferences — 'the most generous measure of *ad hoc* trade liberalisation'⁵⁴⁴, deemed to offset the consequences of the Russian trade embargoes deployed earlier.⁵⁴⁵ In November 2008 negotiations were

⁵³⁴ Sasse (n **Errore. Il segnalibro non è definito.**) 196-197.

⁵³⁵ Wiersma (n 462) 201.

⁵³⁶ Commission, 'On Strengthening the European Neighbourhood Policy' (Brussels, 4 December 2006) COM(2006) 726, 4,9.

⁵³⁷ Court of Auditors, 'The Effectiveness of EU Support in the Area of Freedom, Security and Justice for Belarus, Moldova and Ukraine' (2008) Special Report No 9, 3.

⁵³⁸ The mission's mandate was extended in November 2015 for further 24 months. EEAS, 'EU, Moldova and Ukraine strengthen border cooperation' (25 November 2015) <http://eeas.europa.eu/delegations/ukraine/press_corner/all_news/news/2015/2015_11_25_1_en.htm> accessed 29 September 2016).

⁵³⁹ Parmentier (n 514) 110.

⁵⁴⁰ Commission, 'Implementing and Promoting the European Neighbourhood Policy' (Brussels, 22 November 2005) SEC(2005) 1521.

⁵⁴¹ Sasse (n **Errore. Il segnalibro non è definito.**) 198.

⁵⁴² Anna Khvorostiankina, 'Legislative Approximation and Application of EU Law in Moldova' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2014) 163.

⁵⁴³ Tocci (n **Errore. Il segnalibro non è definito.**) 21, 27.

⁵⁴⁴ Iorence Gaub and Nicu Popescu, 'The EU Neighbours 1995-2015: Shades of Grey' (ISS, December 2015) Chaillot Paper No 136, 49.

⁵⁴⁵ *ibid*, 50; Council Regulation No 55/2008 introducing autonomous trade preferences for the Republic of Moldova and amending Regulation No 980/2005; Commission Decision 2005/924/EC (2008) OJ L 020.

launched on Moldova's accession to the Energy Community Treaty, reflecting substantial progress in energy sector reform. No or limited progress, however, was made on certain key priorities, such as respect for human rights including freedom of expression.⁵⁴⁶ Nonetheless, the first visa facilitation agreements were concluded in 2007 with Ukraine and Moldova, by then the most promising neighbours in the East.⁵⁴⁷ This was linked to the detrimental impact that Romanian accession to the EU might have on Moldova.⁵⁴⁸ It was followed by Mobility Partnership in 2008.⁵⁴⁹

While in 2006, Gunter Verheugen, the EU Commissioner for Enlargement, ruled out Moldova's membership prospects for the next two decades,⁵⁵⁰ Moldova's own rhetoric was bifurcating with the EU and Russia in mind to preserve a balance of sorts.⁵⁵¹ President Voronin was cautious with his pro-European and pro-NATO declarations opting for neutrality,⁵⁵² given the Russian pressure (including the trade embargo in 2006) and its role in the Transnistrian conflict.⁵⁵³ At the same time, Moldova undertook legislative reforms and preserved the pro-European rhetoric to continue crucial cooperation with the EU without genuine commitment to reform.⁵⁵⁴ The economic and security dependence on the EU acted as factors preventing Moldova from becoming fully authoritarian, despite the worsening record in the sphere of political freedoms.⁵⁵⁵ At times the EU made an effort to link the available incentives to Moldova's political situation. For instance, in February 2008 Commissioner Ferrero-Waldner, visiting Chisinau, linked the prospect of a new agreement to political reforms.⁵⁵⁶ After the expiry of the ENP AP, President Voronin unsuccessfully attempted to negotiate an Association and Stabilisation Agreement.⁵⁵⁷ Instead, Moldova was included in the EaP initiative. In the joint Polish-Swedish proposal for the EaP, Moldova was not singled out, as was Ukraine, to benefit 'first and foremost', but its progress would depend on its 'ambition and performance'.⁵⁵⁸ The Moldovan political

⁵⁴⁶ Commission, 'Implementation of the European Neighbourhood Policy in 2008' (Brussels, 23 March 2009) COM(2009) 188/3,5.

⁵⁴⁷ [2007] OJ L 334/169; [2007] L 332.

⁵⁴⁸ Oxana Gutu and Valeriu Gheorghiu, 'River Prut: A Softer Iron Curtain?' in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 203-210.

⁵⁴⁹ Commission, 'The European Union and the Republic of Moldova Enter into a Mobility Partnership' Press Release (Brussels, 5 June 2008) IP/08/893;

RH Sagrera, 'Moldova: Pioneering Justice and Home Affairs Cooperation with the EU in the Eastern Partnership?' (2011) 30 *Moldova's Foreign Policy Statewatch*.

⁵⁵⁰ 'Moldova will not enter the EU within next 20 years — EU Commissioner for Enlargement' *Moldova Azi* (20 February 2006).

⁵⁵¹ Weiner 'Whither Moldova' (n 502) 195-196; Sasse (n **Errore. Il segnalibro non è definito.**) 194-199.

⁵⁵² *ibid*, 197.

⁵⁵³ Elena Korosteleva, 'Moldova's European Choice: "Between Two Stools"?' (2010) 62 *Europe-Asia Studies* 1267, 1279-1280.

⁵⁵⁴ *ibid*, 1276, 1278.

⁵⁵⁵ Lupu, (n 471) 22.

⁵⁵⁶ Korosteleva, 'Moldova's European Choice' (n 553) 1267, 1274.

⁵⁵⁷ Weiner 'The European Union and Democratisation (n 503) 135.

⁵⁵⁸ Joint Polish-Swedish Proposal on Eastern Partnership, June 2008, 1.

elite was ambiguous towards it, viewing it as a continuation of the political limbo⁵⁵⁹ and even a political move against Russia.⁵⁶⁰ Moldova felt it is caught between the EU and Russia.⁵⁶¹ In early 2009 President Voronin was openly critical of the initiative attempting another rapprochement with Russia and missing the launch of the EaP.⁵⁶²

Nonetheless, Moldova eventually engaged with the EaP, just as it had with the ENP.⁵⁶³ Moldova was more positive about the multilateral track, although it preferred the latter to be aligned with the priorities of its bilateral cooperation.⁵⁶⁴ The EaP intensified political dialogue with Moldova, since no high level summits had been held.⁵⁶⁵ The EuroNest Parliamentary Assembly and the Civil Society Forum were a welcome addition to the cooperation, given the weak civil society, mostly concentrated in the capital, and the practical exclusion of civil society from the ENP.⁵⁶⁶ The EaP was used as an additional platform from which to reinforce the ENP's human rights priorities set in bilateral documents.⁵⁶⁷

Ultimately, in 2005-2009 the Moldovan Government engaged in the implementation of the ENP AP in order to secure most needed EU assistance and cooperation. However, there was no significant pressure or incentives to change the Moldovan record on human rights and democratic principles.

D. Stage IV: 2009 – till present

The year 2009 was something of a 'turning point' in EU-Moldova relations due to the so called 'twitter revolution'.⁵⁶⁸ In April 2009, after the Communists appeared to have won again in the parliamentary elections, mass protest broke out resulting in the use of force by authorities and leading to numerous human rights breaches, including four deaths in suspicious circumstances.⁵⁶⁹ Because the OSCE/OIDHR did not dismiss the election result,⁵⁷⁰ the EU did not take a stance directly supporting the opposition,

⁵⁵⁹ Korosteleva, 'Change or Continuity' (n **Errore. Il segnalibro non è definito.**) 243, 255.

⁵⁶⁰ Sergey Tumanov, Alexander Gasparishvili and Ekaterina Romanova, 'Russia-EU Relations, or How the Russians Really View the EU' in Elena Korosteleva (ed), *Eastern Partnership: A New Opportunity for the Neighbours* (Routledge, 2012) 132.

⁵⁶¹ Korosteleva (ed) 'The Eastern Partnership'(n **Errore. Il segnalibro non è definito.**) 15-16.

⁵⁶² Korosteleva, 'Moldova's European Choice' (n 553) 1267, 1269, 1286.

⁵⁶³ Korosteleva (ed) 'The Eastern Partnership'(n **Errore. Il segnalibro non è definito.**) 13.

⁵⁶⁴ Wolczuk (n **Errore. Il segnalibro non è definito.**) 9.

⁵⁶⁵ Iryna Solonenko and Natalia Shapovalova, 'Is the EU's Eastern Partnership promoting Europeanisation?' (FRIDE, September 2011) Policy Brief No 97, 2.

⁵⁶⁶ Tudoroiu, (n 458) 236, 250-251; Sasse (n **Errore. Il segnalibro non è definito.**) 198.

⁵⁶⁷ See for instance, Commission and High Representative of the EU for Foreign Affairs and Security Policy, 'Eastern Partnership Roadmap 2012-13: The Bilateral Dimension' (Brussels, 15 May 2012) SWD(2012) 109 final, 7-8.

⁵⁶⁸ Kristi Raik, 'From Attraction to Europeanisation—Moldova's Slow Movement towards the EU'(November 2011) 2 Eastern Partnership Review, 6.

⁵⁶⁹ In June 2009 the Council authorised the opening of negotiations on AA with Moldova.

⁵⁷⁰ OSCE/ODIHR, 'Election Observation Mission Final Report, Parliamentary Elections 5 April 2009' (2009)

instead opting for mediation.⁵⁷¹ In the months that followed, the EU Special Representative was said to have been ‘the only channel for dialogue between the competing political forces’,⁵⁷² although this was a late intervention due to the lack of support from EU Member States and institutions.⁵⁷³ Member States disagreed over the best course of action with Moldova, some advocating tougher action and others continuous engagement and support.⁵⁷⁴ In July 2009, new parliamentary elections were held creating a coalition Government, the Alliance for European Integration. Despite the political unrest, the handing of power from the Communists to the new Government through orderly election was seen as a confirmation of Moldova’s positive record as ‘the only post-Soviet state (the Baltics aside) with an uninterrupted cycle of legal and constitutional transfers of power through elections since its independence in 1991’.⁵⁷⁵

The establishment of a pro-European government gave new impetus to EU-Moldova relations, where for the first time a keen interest on behalf of the EU and its Member States in the country’s fate could be observed. While before 2009 Moldova appeared to have been ‘almost entirely absent from the travel map of senior EU officials’,⁵⁷⁶ the high level political dialogue intensified with mutual visits. In November 2009, Ferrero-Waldner visited Moldova assuring support and to ‘invigorate’ the bilateral cooperation.⁵⁷⁷ Moldova was said to have been rewarded with negotiations on AA in early 2010.⁵⁷⁸ That same day, the European Union chief negotiator, Gunnar Wiegand, stated that Moldova was prepared for the conclusion of this agreement.⁵⁷⁹ Wolczuk viewed the negotiations as ‘accelerated’, based on the Ukrainian model.⁵⁸⁰ In January 2010, with the Romanian initiative and French support, an informal ‘Group of EU ministers for the European Action of the Republic of Moldova’ was set up in Brussels as a ministerial platform for advice on Moldova’s integration, subsequently holding regular meetings.⁵⁸¹ In March the same year, the new EU Commissioner for Enlargement and European Neighbourhood Policy, Stefan Füle, described Moldova’s government as a ‘reliable partner’ with a visible reform strategy.⁵⁸² In April 2010 a High Level Policy Advisory Mission was established in response to a Moldovan request to

⁵⁷¹ Raik, ‘From Attraction to Europeanisation’ (n 568) 7.

⁵⁷² Popescu and Wilson, (n 460) 99.

⁵⁷³ Nicu Popescu and Andrew Wilson, ‘The Limits of Enlargement-Lite: European and Russian Power in the Troubled Neighbourhood’ European Council on Foreign Relations, Policy Report June 2009, (2009) 19.

⁵⁷⁴ *ibid.*

⁵⁷⁵ Popescu and Wilson, (n 460) 92.

⁵⁷⁶ Popescu and Wilson ‘The Limits of Enlargement-Lite’ (n 573) 30.

⁵⁷⁷ Commission, ‘Commissioner Benita Ferrero-Waldner visits the Republic of Moldova to invigorate relations’, Press Release (Brussels, 26 November 2009) IP/09/1822.

⁵⁷⁸ Weiner ‘The European Union and Democratisation’ (n 503) 134-135.

⁵⁷⁹ Tudoroiu, (n 458) 236, 253.

⁵⁸⁰ Wolczuk (n **Errore. Il segnalibro non è definito.**) 7. See also Raik, ‘From Attraction to Europeanisation’ (n 568) 7.

⁵⁸¹ See the website of the Ministry of Foreign Affairs of Romania.

⁵⁸² Tudoroiu, (n 458) 236, 253.

assist in ‘democratic reforms and acceleration of political association and further economic association’.⁵⁸³

While the new government embarked on an extensive mission for reform, becoming the first country in the neighbourhood to elaborate a methodology for legal approximation in 2010,⁵⁸⁴ relations were affected by the constitutional crisis linked to the inability of electing a President for three years. According to commentators, the fragile coalition riven by ‘mutual distrust’ seriously impeded the course of reforms, particularly in such areas as the judiciary and the fight against corruption.⁵⁸⁵ At the same time, the EU deployed the main incentives it had to offer, including the VLAP in 2010 and DFCTA negotiations in 2012. After the election of President Timofti in 2012 bringing the three-year-long standoff to an end, several high-level EU visits and meetings took place; at one of them Commissioner Füle hinted at Moldova’s prospective membership under art. 49 TEU.⁵⁸⁶ The deployment of significant EU incentives intensified the Government’s reform efforts resulting in significant legislative and institutional developments relevant for human rights.

Another political crisis involving high-ranking officials at the end of December 2012 halted the progress in negotiations, with some Member States raising concerns over ‘selective’ justice.⁵⁸⁷ Popescu noted that the EU and its Member States ultimately preferred to avoid interfering in national politics and instead called for ‘stability and expressed hope that Moldova will continue along its path to a closer relationship with the EU’.⁵⁸⁸ The situation improved with a parliamentary vote of confidence for the government in May 2013, leading to the initialling of the AA at the EaP Vilnius summit⁵⁸⁹ in the face of obvious Russian threats⁵⁹⁰ as well as attempts to stimulate government change.⁵⁹¹ It was seen as the intention of the Moldovan government to seal the deal with the EU before the November 2014 elections.⁵⁹² As Moldova appeared to demand EU membership,⁵⁹³ visa-free travel for Moldovans was

⁵⁸³ See UNDP, ‘Moldova’ <http://www.md.undp.org/content/moldova/en/home/operations/projects/democratic_governance/eu-high-level-policy-advice-mission-.html> accessed 29 September 2016.

⁵⁸⁴ Khvorostiankina (n 542) 166.

⁵⁸⁵ Raik, ‘From Attraction to Europeanisation’ (n 568) 10; Kamil Cașu, ‘Reforms in Moldova: Moderate Progress and an Uncertain Outlook for the Future’ (OSW, 22 January 2013) Centre for European Studies, Commentary No 100, 1, 5.

⁵⁸⁶ These include visits by German Chancellor Angela Merkel and Commission President Barroso. See Richard G Whitman and Ana E. Juncos, ‘Stasis in Status: Relations with the Wider Europe’ (2013) 51 (Special Issue) *JCMS* 155, 163; Stefan Füle, European Commissioner for Enlargement and European Neighbourhood, EU-Moldova Forum, (22 October 2012)

⁵⁸⁷ These included Sweden, UK and Poland; Nicu Popescu, ‘Moldova’s Political Crisis’ (ISS, 2013) 1 Issue Alert, 1-2.

⁵⁸⁸ *ibid*, 2.

⁵⁸⁹ Khvorostiankina (n 542) 177.

⁵⁹⁰ ‘Russia threatens Moldova over its EU relations’ *Euractiv* (3 September 2013)

⁵⁹¹ Nicu Popescu, ‘After Vilnius’ (ISS, 2013) 40 Issue Alert, 2.

⁵⁹² Kristian L Nielsen and Maili Vilson, ‘The Eastern Partnership: Soft Power Strategy or Policy Failure?’ (2014) 19 *EFAR* 243, 254.

granted in April 2014. The latter is said to have helped to keep the AA on track,⁵⁹⁴ as certain developments including the February referendum in Gagauzia (another breakaway-prone region), which favoured entry into the Russian-led Customs Union and the Transnistrian request for Russian annexation,⁵⁹⁵ threatened to derail Moldova's pro-European course. At the same time, the EU lifted import duties on Moldovan wine, banned in Russia.⁵⁹⁶ The AA was expected to be adopted some time at the end of 2014.⁵⁹⁷ Given the political instability and the Russian pressure on Moldova,⁵⁹⁸ however, the EU decided not to wait and signed the AA in June, followed by swift ratification in the Moldovan parliament.⁵⁹⁹ The EU also appeared to have reconsidered the role of the civil society by establishing a Roadmap for Engagement with the Civil Society for 2014-2017.⁶⁰⁰

The DCFTA started to apply provisionally in September of the same year. The EU and its Member States continuously rallied in support of Moldova throughout 2014 prior to national elections,⁶⁰¹ at times even referring to Moldova's 'European future'.⁶⁰² With a marginal win for pro-Europeans in autumn 2014, Moldova seemed to be bound to the course of European integration, as repealing the AA would result in a loss of its biggest market and the visa-free regime.⁶⁰³ The conduct of elections was seen as an evidence of Moldova's potential 'to represent a success story in the East' if it managed to continue the reforms and successfully fight corruption.⁶⁰⁴ This did not necessarily mean that the country was firmly on a pro-democratic course. The subsequent internal developments again led to constitutional troubles, with difficulties in forming a government and chronic corruption recorded by Transparency International.⁶⁰⁵ The banking scandal, with the disappearance of almost \$1 billion from the national banking sector

⁵⁹³ 'Moldova Deputy PM: EU membership perspective is "a matter of urgent necessity" for Eastern countries' *Euractiv* (18 March 2014).

⁵⁹⁴ Iana Dreyer and Nicu Popescu, 'A Solidarity Package for the Eastern Partners' (ISS, 2013) 32 Issue Alert, 1-2.

⁵⁹⁵ 'Gagauzia Voters Reject Closer EU Ties For Moldova' *Radio Free Europe*, (3 February 2014);

'Anxiety grows in Europe as Transnistria asks for Russian annexation' *Euractiv* (19 March 2014).

⁵⁹⁶ 'France, Germany promise Moldova EU support' *Euractiv* (24 April 2014).

⁵⁹⁷ According to Popescu it would have taken about a year after the initialing 'to fine-tune, legally screen and then translate the agreements into all 24 official EU languages'; Nicu Popescu, 'Keeping the Eastern Partnership on Track' (ISS, 2013) 29 Issue Alert, 1.

⁵⁹⁸ 'Russia defies Moldova's EU pact by boosting Transnistria trade' *Euractiv* (3 July 2014);

'Russia imposes 'temporary ban' on Moldovan fruits' *Euractiv* (22 July 2014).

⁵⁹⁹ The EP ratified the Agreement in November, but the ratification in all EU Member States will take much longer;

'Moldova sets record in ratifying EU association agreement' *Euractiv* (2 July 2014);

'EU-Moldova deal approved by MEPs' *Euractiv* (13 November 2014)

⁶⁰⁰ Available <<https://www.euractiv.com/section/europe-s-east/news/eu-moldova-deal-approved-by-meps/>>.

⁶⁰¹ 'EU foreign ministers gather in Moldova in show of support' *Euractiv* (2 September 2014).

⁶⁰² 'Remarks by President Barroso following his meeting with the Prime Minister of Moldova, Iurie Leancă' Joint Press Conference (Chisinau, 12 June 2014).

⁶⁰³ Nicu Popescu, 'Moldova: A Narrow Win for Pro-Europeans' (ISS, 2014) 51 Issue Alert.

⁶⁰⁴ *ibid*, 2.

⁶⁰⁵ In 2014 Moldova ranked as 103rd in the world; Transparency International, Corruption Perception Index for 2014; Nicu Popescu, 'Moldova's Star: Shining or Falling?' (2015) European Union Institute for Security Studies, 21 Brief Issue 3.

fuelled mass protests, leading to the fall of the pro-European government at the end of October.⁶⁰⁶ Some significant failures of the pro-European government, for instance the lack of accountability regarding the human rights breaches after the events of 2009,⁶⁰⁷ were raised as concerns by the EU without much effect on further cooperation. Following the signing of the AA, the EU was noted to have closed its eyes to some undemocratic practices by the pro-European forces, including the exclusion of an opposition party prior to the parliamentary elections.⁶⁰⁸ Doubts linger over Moldova's potential to pursue radical transformation, given the control of political authority by oligarchic forces interested in the preservation of the status quo.⁶⁰⁹

To start with, the final and ongoing stage in EU-Moldova relations was characterised by an ambivalent approach of the EU towards the political situation in Moldova affecting its human rights record. However, after the win of the pro-European coalition the EU intensified its support for human rights reform, deploying its most attractive incentives on offer.

E. Specific Tools and Instruments

The EU has deployed various frameworks and sectoral, hard and soft law instruments in its cooperation with Moldova, which are relevant for human rights and political reform.

1. The PCA

The PCA was the first bilateral instrument to ensure the presence of human rights in relations between the parties, asserting in its preamble 'the paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multiparty system with free and democratic elections'. It established political dialogue with the objective of ensuring cooperation on 'the observance of the principles of democracy, the respect and promotion of human rights, particularly those of minorities'.⁶¹⁰ In Art. 2, respect for democracy, principles of international law, and human rights as defined in particular in the Helsinki Final Act and the Charter of Paris for a New Europe ... underpin the internal and external policies of the Parties and constitute an essential element'. The inclusion of principles of international law as an essential element can be explained with reference to the frozen conflict in Transnistria. The essential element is at the foundation of the standard human rights clause

⁶⁰⁶ 'Moldova government dismissed by MPs amid bank scandal' *BBC* (29 October 2015).

⁶⁰⁷ Judithanne Scourfield McLauchlan, 'The Rule of Law, Judicial Reform and the Protection of Human Rights in Moldova and Transnistria' (2014) 9 *Intercultural Human Rights Law Review* 103, 118-119.

⁶⁰⁸ Stanislav Secieru, 'Food-for-thought Paper: Moldova' in *Riga and Beyond: What Future for the Eastern Partnership?* (ECFR Riga Series, Views from EP Countries, 2015) 19. <http://www.ecfr.eu/page/-/Riga_Series_EAP_Countries.pdf> accessed 15 September 2016.

⁶⁰⁹ Kamil Căluș, 'A Captured State? Moldova's Uncertain Prospects for Modernisation' OSW, Centre for European Studies, Commentary No 168, 22 April 2015.

⁶¹⁰ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other (1998) OJ L181, art 6.

that became an integral part of EU policy by the mid-1990s and that, in addition to the preambular reference, contains a provision on the suspension of agreements.⁶¹¹ The essential element clause was accompanied by a so-called ‘Bulgarian’ suspension clause, which emphasised consultation for ‘appropriate measures’ to be taken and in which immediate suspension would only be possible in cases of ‘special urgency’ including breaches of essential elements.⁶¹²

The PCA’s institutional framework allowed for the preservation of the democratic rhetoric, particularly through the political dialogue conducted at the Cooperation Council meeting at ministerial level. It has been noted that since the early 2000s certain areas such as justice and home affairs, security and defence became more prominent.⁶¹³ Also, political reforms started gradually making appearance on the agenda of the Council only since 2002 and most prominently after 2003 with the ‘Wider Europe’ initiative, albeit with general references to democracy and the rule of law. The subsequent record is patchy in terms of the issues raised during the dialogue. Sporadic references can be found to rights of parliamentary opposition, freedom of media, corruption (often in relation to improve the business climate), conduct of elections when they are close, independence of the judiciary, the functioning of civil society. Certain specific issues are highlighted at times when they threaten the stability of political institutions, e.g. political standoff in terms of the inability to elect a president in 2009-2012, or fighting corruption at ‘all levels’ when Government members were implicated in corruption scandals in 2014. The records of the Council are, however, rather muted in criticism and the issues are raised in a rather general fashion to ensure that the dialogue on political reform continues. Only rarely does the PCA refer to political reform within the context of political conditionality, that is linking the progress in relations to political reform.⁶¹⁴

The Joint Parliamentary Cooperation Council allowed for parliamentary interaction and at times was seen as a useful mechanism for mediation between the opposition and the forces in power.⁶¹⁵ The Sub-Committee on Justice, Freedom and Security also allowed for interaction in the relevant area at civil servant level although had little impact on fostering political reform. Besides, the same subcommittee was dedicated to customs and cross-border cooperation shifting the focus away from political reform per se.

⁶¹¹ Riedel and Will, (n **Errore. Il segnalibro non è definito.**) 731-732; Allan Rosas (n **Errore. Il segnalibro non è definito.**) 467; Bulterman (n **Errore. Il segnalibro non è definito.**) 157; Bartels (n **Errore. Il segnalibro non è definito.**) 23.

⁶¹² Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other (1998) OJ L181, Joint Declaration concerning art 99.

⁶¹³ Lupu, (n 471) 16.; Skvortova, (n 461) 559.

⁶¹⁴ EU-Republic of Moldova Cooperation Council, Press Release (Brussels, 21 December 2009) 17732/09 (Presse 388).

⁶¹⁵ Wiersma (n 462) 198.

2. ENP AP

The 2005 AP confirmed the ENP's positive conditionality, whereby '[t]he pace of progress of the relationship will acknowledge fully Moldova's efforts and concrete achievements' in its commitment to common values and the implementation of the agreed priorities.⁶¹⁶ The commitment to common values was to be demonstrated with reference to the actions established in priority area 2.1 on democracy and the rule of law, and human rights and fundamental freedoms. It includes 32 priorities organised under 14 headings.

The first three are generic headings concerned with strengthening the stability and effectiveness of institutions guaranteeing democracy and the rule of law (constitutional reform in view of Transnistria, operation of Parliament and parliamentary elections, local self-government, strengthening law enforcement, including the implementation of Constitutional Court judgments), judicial reform and reform of justice sector (independence of judiciary, prosecution, improved training, developing alternative means of dispute settlement) and the fight against corruption (implementing GRECO recommendations, collaboration with IOs and civil society, implementing the relevant National Strategy). The remaining headings are dedicated to actions on fulfilling international commitments on human rights, as well as implementing relevant national measures (e.g. the National Human Rights Action Plan), and actions highlighting particular rights and freedoms. These include minority rights, anti-discrimination, fight against trafficking, eradication of ill-treatment and torture, children's rights, equal treatment, freedom of expression, freedom of association, development of the civil society, and ratification of the ICC. The only priority with economic and social underpinning involves the rights of trade unions and core labour standards, in accordance with European standards and ILO conventions.

Some advantages have been ascribed to the ENP AP, including according 'a greater importance to the political transformations' in comparison with the PCA by inter alia expanding the approach towards political reform.⁶¹⁷ Indeed, the soft law nature of the document allowed expanding the concept of political reforms beyond the PCA essential elements. However, the emphasis of the document as such has been seen to be on stability and security issues,⁶¹⁸ where the AP has 'developed and strengthened' the CFSP and JFS dimensions of the relations between the parties with the priority area on Transnistria conflict.⁶¹⁹ In terms of the range and depth of the issues covered the Moldovan AP can be compared to those with Ukraine, and the Southern Mediterranean countries with whom an AP was agreed (with the

⁶¹⁶ ENP, AP, 1. <http://eeas.europa.eu/enp/pdf/pdf/action_plans/moldova_enp_ap_final_en.pdf> accessed 15 September 2016.

⁶¹⁷ Buscaneanu (n 475) 32, 34, 37.

⁶¹⁸ Sasse (n **Errore. Il segnalibro non è definito.**) 195; Lupu (n 471) 19.

⁶¹⁹ Christophe Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP 2008) 321.

exception of Israel and Palestine).⁶²⁰ However, the priorities on political reform fall in the same trap as their counterparts in other ENP countries due to lack of specification, deadlines and ultimately benchmarks, criticised for undermining the basis on which the monitoring would take place.⁶²¹

The AP was concluded initially for three years, and despite the Moldovan leadership's reassurances, after its expiry the document was not implemented and it was extended further.⁶²² The lack of success in the implementation of the political reforms is particularly disappointing given that the political priorities were reflective of the relevant actions in Moldova's own European Strategy.⁶²³ The civil society was critical of the Communist Government's efforts highlighting the gap between legislative reform and the actual practice on respecting human rights and democratic principles.⁶²⁴ Other stakeholders also doubted the commitment of the Moldovan authorities. For instance, the anti-corruption measures were criticised by Transparency International due to the lack of implementation.⁶²⁵ New measures were adopted to ensure a 'minimal' compliance with EU recommendations, whereby new institutions would be established. However they would be rendered inefficient due to lack of resources, unclear responsibilities and vague legislation etc.⁶²⁶ Lupu also highlights the lip-service efforts at implementation with another example where a law was adopted on a professional body of civil servants, but not published in the official journal and with no follow-up efforts.⁶²⁷ The opposition branded the reforms by the Communist government as 'pseudo-reforms'.⁶²⁸

Some suggested that the EU 'is acutely aware of these issues, but rarely voices its criticism of the government in Chisinau'.⁶²⁹ As noted above, the political dialogue through the PCA Cooperation Council does come across as muted in its critical tone. Also, initial progress reports by the Commission were hopeful in tone recording progress overall,⁶³⁰ or 'good progress',⁶³¹ or 'substantive progress'.⁶³² Sasse

⁶²⁰ Ghazaryan, 'The Fluid Concept of 'EU values' (n **Errore. Il segnalibro non è definito.**)

⁶²¹ Buscaneanu (n 475) 27.

⁶²² Korosteleva, 'Moldova's European Choice' (n 553) 1267, 1274.

⁶²³ Buscaneanu (n 475) 33.

⁶²⁴ 'ADEPT Report on the Monitoring of the Implementation of the EU/Moldovan Action Plan in the First Trimester of 2007' (2007); EXPERT-GRUP and ADEPT, *Euromonitor* No 1, 2 and 3 (2006); 'Implementation of the EU-Moldova Action Plan: February 2005-January 2008' (2005), 'Moldova and the EU in the European Neighbourhood Policy Context, ADEPT and EXPERT-GRUP, Chisinau, February 2008, 18-39' (2008)

⁶²⁵ Weiner 'The European Union and Democratisation' (n 503) 142.

⁶²⁶ Lyudmila Gamurari and Cristian Ghinea, 'It has only just Begun: EU and Anticorruption Institutions in Moldova' (EPC, 1 August 2014) Policy Brief.

⁶²⁷ Maria Ruxandra Lupu, 'External Democracy Promotion in Ukraine and Moldova: The Impact of the European Union' (2010) Danish Institute for International Studies Working Paper, 19. Available <<https://www.ciaonet.org/attachments/16948/uploads>> accessed 15 September 2016.

⁶²⁸ Weiner 'Whither Moldova' (n 502) 187.

⁶²⁹ Kamil Calus, 'Reforms in Moldova: Moderate Progress and an Uncertain Outlook for the Future' (OSW, 22 January 2013) Centre for European Studies, Commentary No 100, 1, 7.

⁶³⁰ Commission, 2006 Progress Report (Brussels, 4 December 2006) SEC(2006) 1506 2.

⁶³¹ Commission, 2008 Progress Report (Brussels, 3 April 2008) SEC(2008) 399, 2.

suggested that the Commission's early evaluation 'reads like an acknowledgement of the government's good intentions to address all of the issues in the [AP]'.⁶³³ Despite this overall positive tone, a keen awareness by the Commission of the superficiality of the efforts regarding democracy and human rights should be noted as well. Here a qualitatively distinct approach —both in its scope and depth— is present in comparison with the monitoring in all other EaP countries. First, the monitoring is much more extensive than in any other country. At times, some other issues are also considered, e.g. the law on political parties,⁶³⁴ or protection of personal data.⁶³⁵ Second, when recording developments at a legislative level, most commonly the Commission either highlights the lack of implementation or calls the Government to ensure efficient implementation. In some instance, this stretches to the evaluation of judicial practices in relying on a new piece of legislation (for instance on the law on anti-discrimination)⁶³⁶ or detailed statistics as an indicator of developments on equal treatment (gender equality).⁶³⁷ The Commission's scrutiny intensified after 2009 with a stronger criticism using sharp language denouncing pro-European coalition practices or high-level corruption.⁶³⁸ The Commission can also be seen to push for demands which were not so openly present in other EaP countries, for instance on the rights of the LGBT community.⁶³⁹ Often, the Commission's language gives away the role of an enforcer of Moldova's commitments to other international organisations highlighting the omissions in following their recommendations. According to Popescu the reason why the EU emphasises issues on 'broader politics of democracy' is because Moldova is a much more open political system in comparison with other EaP countries, where the EU demands are confined to 'technical matters'.⁶⁴⁰

3. Justice, Freedom and Security Instruments

In the next few years following the establishment of the ENP AP, the EU introduced a number of JFS soft and hard law instruments including mobility partnership, visa facilitation and readmission agreements.⁶⁴¹ The democratic credentials of Moldova's efforts in this area were evaluated as

⁶³² Commission, 2009 Progress Report (Brussels, 23 March 2009) SEC(2009) 514/2, 2.

⁶³³ Sasse (n **Errore. Il segnalibro non è definito.**) 199.

⁶³⁴ Commission, SEC(2008) (n 631) 3.

⁶³⁵ Commission, 2010 Progress Report (Brussels, 12 May 2010) SEC(2010) 523, 6.

⁶³⁶ Commission, 2014 Progress Report (Brussels, 27 March 2014) SWD(2014) 93 final, 8.

⁶³⁷ Commission, 2015 Progress Report (Brussels, 25 March 2015) SWD(2015) 69 final, 8-9.

⁶³⁸ Commission, 2013 Progress Report (Brussels, 20 March 2013) SWD(2013) 80 final, 2, 5;

Commission, 2014 Progress Report (Brussels, 27 March 2014) SWD(2014) 93 final, 2, 5, 7;

Commission, SWD(2015) (n 637) 6-7.

⁶³⁹ For instance, Commission, 2012 Progress Report (Brussels, 15 May 2012) SWD(2012) 118 final, 4;

Commission, 2013 Progress Report (Brussels, 20 March 2013) SWD(2013) 80 final, 6.

⁶⁴⁰ Popescu as cited in Nicola Del Medico, 'A Black Knight in the Eastern Neighbourhood? Russia and EU Democracy Promotion in Armenia and Moldova' (2014) College of Europe, EU Diplomacy Paper 07, 20.

⁶⁴¹ Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova (Brussels 21 May 2008);

containing a gap between rule adoption and implementation.⁶⁴² However, after the formation of the pro-European coalition, the EU deployed a VLAP in December 2010 seen as ‘an especially important instrument of leverage’,⁶⁴³ and the ‘strongest carrot’ at the EU’s disposal.⁶⁴⁴ While Moldova commenced the visa dialogue few years after Ukraine it quickly overtook the latter,⁶⁴⁵ becoming the ‘*bon élève*’ in this area.⁶⁴⁶

The VLAP was to be implemented in two phases including the reform of the legislative and policy framework in phase 1, and benchmarks for effective implementations in phase 2. A number of actions set in the document are linked to human rights and the fight against corruption. Already in 2011, the visa liberalisation process was seen as ‘a particularly effective tool of norms transfer, covering different aspects of the rule of law’.⁶⁴⁷ The Commission and the High Representative undertook frequent detailed reviews of the progress in meeting the targets of the first phase.⁶⁴⁸ On the basis of these reports, close to the end of 2012, the Council agreed that Moldova completed the first phase of visa liberalisation, and the Commission commences its evaluation of the second phase.⁶⁴⁹ When in November 2013 the Commission concluded that Moldova has complied with the conditions of the second phase of VLAP it recommended visa liberalisation after the EaP Vilnius summit in December 2013.⁶⁵⁰ In March 2014 relevant amendments were made to Council Regulation No 539/2001 and Moldovan citizens holding

Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas (2007) OJ L 334/169;

Agreement between the European Community and Ukraine on the readmission of persons [2007] OJ L 332.

⁶⁴² Freyburg and Lavenex and Schimmelfenning and Skripka and Wetzel, ‘EU Promotion of Democratic Governance’ (n **Errore. Il segnalibro non è definito.**) 924, 924-925; Freyburg and Lavenex and Schimmelfenning and Skripka and Wetzel, ‘Democracy Promotion through Functional Cooperation’ (n **Errore. Il segnalibro non è definito.**) 1045, 1038.

⁶⁴³ Weiner ‘The European Union and Democratisation’ (n 503) 141.

⁶⁴⁴ Jos Boonstra, ‘Moldova: An EU Success Story?’ (FRIDE, 2011) Policy Brief No 92, 3.

⁶⁴⁵ Raik, ‘From Attraction to Europeanisation’ (n 568) 8; Solonenko and Shapovalova (n 565) 3.

⁶⁴⁶ Kerry Longhurst, ‘Derisory Results or Reasons to be Cheerful? Evaluating the Implementation of the European Neighbourhood Policy in Ukraine, Moldova and Belarus’ (2011) College of Europe, Department of European Interdisciplinary Studies, Natolin Research Paper, 54.

⁶⁴⁷ Raik, ‘From Attraction to Europeanisation’ (n 568) 8.

⁶⁴⁸ Commission and High Representative, First Progress Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation (Brussels, 16 September 2011) SEC (2011) 1075 final;

Commission and High Representative, Second Progress Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation (Brussels, 9 February 2012) SWD(2012) 12 final;

Commission, Third Progress Report on the Implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation (Brussels, 22 June 2012) COM (2012) 348 final.

⁶⁴⁹ European Council, ‘Council Conclusions’ (12 November 2012)

⁶⁵⁰ Commission, Fifth Progress Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation (Brussels, 15 November 2013) COM(2013) 807 final.

biometric passports were offered visa-free travel to the Schengen area.⁶⁵¹ Nonetheless, this does not suggest that the state of rule of law was intact or the fight against corruption was won as recorded in the Commission's ENP progress reports. Indeed, the Commission's recommendations to grant visa-free travel to Moldova hinged on its evaluation of the sustainability of the reforms undertaken.

4. CFSP Instruments

CFSP instruments include both human rights-specific instruments and those not related to human rights.⁶⁵² The general political dialogue, as a non-human rights-specific instrument, was regularly taking place through the PCA Cooperation Councils until 2014, as noted above. High-level political dialogue intensified after 2009. During the political crisis, EU diplomatic measures were deployed extensively as noted earlier. After the pro-European Coalition came to power, a more visible EU high-level presence was recorded. It was needed to keep Moldova on the European track during the AA negotiations, as well as pre and post-AA signing period. The various meetings and visits that followed often referred to Moldova's political transformation, at times alluding to its membership perspectives, thus preserving the political rhetoric.

A more specialised platform for human rights is the HRD as a human rights specific instrument aiming to mainstream human rights in EU external action.⁶⁵³ The HRD with Moldova was established in 2010 and it was meant to 'integrate a civil society component'.⁶⁵⁴ This 'integration' takes a form of consultations with local and international NGOs prior to the dialogue. Six rounds of dialogue have been held to date. The dialogues refer to bilateral instruments between the parties, including the ENP AP and the VLAP as sources of Moldova's commitments, in addition to the latter's international obligations. The subject of the dialogues varies from year to year to include political freedoms (e.g. freedom of expression and media),⁶⁵⁵ rights of children,⁶⁵⁶ at times rights of women and gender equality,⁶⁵⁷ occasionally civil society functioning,⁶⁵⁸ trafficking,⁶⁵⁹ and detention conditions.⁶⁶⁰ The fight against discrimination makes the

⁶⁵¹ European Parliament and Council, Regulation No 259/2014 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (2014) OJ L 105.

⁶⁵² Deliverable No 1 - 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion', Work Package, 88-89. <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 1 September 2016.

⁶⁵³ Council, 'EU Guidelines on Human Rights Dialogues with Third Countries' (2001) 5. <www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf> accessed 1 September 2016.

⁶⁵⁴ Council, Conclusions on establishing the EU - the Republic of Moldova Human Rights Dialogue (Brussels, 15 February 2010).

⁶⁵⁵ 2010, 2012, 2013.

⁶⁵⁶ 2010-2011, 2013, 2015.

⁶⁵⁷ 2010, 2015.

⁶⁵⁸ 5 March 2010.

⁶⁵⁹ Ibid.

most consistent appearance.⁶⁶¹ Since 2012 the dialogues also regularly refer to ‘fight against impunity and ill-treatment’ (referring to torture). At times the dialogue stretches to such issues as judicial reform and electoral code reform. It should be noted that on an occasion the HRD made an unusual reference to EU Treaties and Charter of Fundamental Rights in relation to the law on equality reiterating ‘[EU’s] attachment to the general principles and values stated’ therein.⁶⁶² Economic, social and cultural rights do not feature within the human rights dialogue.

As mentioned earlier, targeted sanctions were deployed by the EU in the past against the Transnistrian regime inter alia in response to breaching the rights of Romanian-speaking population by closing Romanian-language schools.

5. Association Agreement and 2014 Association Agenda

It is hardly the case that the negotiations on AA started due to good progress in political reform. As noted earlier, the Moldovan Government was not very successful in implementing the ENP AP. Some commentators suggested that the agreement was promised on the basis of ‘passing a test of democratic elections in spring 2009’.⁶⁶³ However, in June 2009 the Council expressed its ‘willingness to start negotiations as soon as circumstances allow’ leaving it unclear whether it depended on the conduct of new parliamentary elections.⁶⁶⁴ As noted before the negotiations commenced in January 2010, after the formation of the pro-European coalition government. The negotiations appeared to progress at a speedy pace due to the ready-made Ukrainian model, and were not even halted by political crisis in 2013 which ‘discredited democratic institutions, threatened the transformation process initiated by the Moldovan authorities in 2005, and affected the political dialogue between the EU and Moldova’.⁶⁶⁵ The Agreement was eventually signed in June 2014 ahead of the schedule due to Ukrainian events,⁶⁶⁶ followed by an AAg to support its implementation.

A reinforced commitment to human rights and political reform is evident from the Agreement’s Preamble, although it is more toned down in comparison with its Ukrainian counterpart.⁶⁶⁷ Here the common values ‘lie at the heart of political association and economic integration’, considered by some

⁶⁶⁰ 5 March 2010; 6 April 2011.

⁶⁶¹ 5 March 2010; 6 April 2011; 23 May 2012; 19 April 2013; 10 June 2015.

⁶⁶² 23 May 2012.

⁶⁶³ Natalia Shapovalova and Jos Boonstra, ‘The European Union: From Ignorance to a Privileged Partnership with Moldova’ in Marcin Kosienkowski and William Schreiber (eds), *Moldova: Arena of International Influences* (Lexington Books 2012), 59.

⁶⁶⁴ General Affairs and External Relations Council, 15 June 2009.

⁶⁶⁵ Commission, 2014 Progress Report (Brussels, 27 March 2014) SWD(2014) 93 final, 2.

⁶⁶⁶ ‘Herman Van Rompuy: EU wants to speed up signing of agreement with Moldova, Georgia’ *Euractiv* (20 December 2013).

⁶⁶⁷ Ghazaryan ‘A New Generation’ (n **Errore. Il segnalibro non è definito.**) 391, 396.

as an evidence of 'strict conditionality'.⁶⁶⁸ The common values include democratic principles, the rule of law, good governance, human rights and fundamental freedoms which, similar to other Eastern AAs, make the most extensive reference to international standards in comparison with other neighbourhood agreements.⁶⁶⁹ As noted above, this preambular reference constitutes a part of the standard human rights clause which, together with an essential elements clause, is one of the few examples of human rights-specific instruments deployed in relations between parties.⁶⁷⁰

In terms of its normative scope, the Moldovan essential elements clause is wider than other neighbourhood agreements with references to the UDHR, the ECHR, the Helsinki Final Act and the Paris Charter of the OSCE.⁶⁷¹ However, unlike its Ukrainian counterpart it does not include a reference to 'other relevant human rights instruments' therefore somewhat narrowing its scope. As far as essential elements are concerned, art. 2 AA includes democratic principles, human rights, and fundamental freedoms and a new essential element of non-proliferation of weapons which, while in keeping with the 2003 Council Common Position,⁶⁷² departs from other neighbourhood agreements including the Euro-Med agreements concluded after 2003. This addition to the Eastern AAs can be explained perhaps by the priority that the EU has given the Eastern neighbourhood in this domain.⁶⁷³ In contradistinction to the Ukrainian AA, art. 2 in the Moldovan AA does not include the rule of law or the principles of sovereignty and territorial integrity, inviolability of borders and independence as essential elements. The absence of the latter from essential elements can be explained with a less pressing nature of the Transnistrian conflict.⁶⁷⁴ Meanwhile, the rule of law together with good governance and some other principles is included within art. 2 as 'general principles' rather than an essential element, suggestive of a further distinction between 'hard core common values' and 'other general principles' important to the parties.⁶⁷⁵ Ultimately, this distinction appears to be somewhat arbitrary if viewed in the context of the Ukrainian AA.⁶⁷⁶

⁶⁶⁸ Roman Petrov, 'Constitutional Challenges for the Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia' (2015) 21 *European Public Law* 241, 243-244.

⁶⁶⁹ Ghazaryan 'A New Generation' (n **Errore. Il segnalibro non è definito.**) 391, 396.

⁶⁷⁰ AA. Art 2

⁶⁷¹ Ghazaryan 'A New Generation' (n **Errore. Il segnalibro non è definito.**) 391, 398.

⁶⁷² Common Position 2003/805/CFSP of 17 November 2003 on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery (2003) OJ L302/34; Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart, 2011) 305.

⁶⁷³ Roberto Aliboni, 'The Non-Proliferation Clause in a Preventive Perspective' (2004) 4 *Conflict in FOCUS*, 2-3.

⁶⁷⁴ Art. 5 on Foreign and Security Policy, however, does affirm the parties' commitment 'to the principles of respect for sovereignty and territorial integrity, inviolability of borders and independence'.

⁶⁷⁵ van der Loo and van Elsuwege and Roman Petrov (n **Errore. Il segnalibro non è definito.**) 13.

⁶⁷⁶ Ghazaryan 'A New Generation' (n **Errore. Il segnalibro non è definito.**) 391, 401.

In line with previous practice on the standard human rights clause, a non-execution clause is included within the agreement, with the option of suspension as an ‘appropriate measure’ appearing at the final stage.⁶⁷⁷ Treaty suspension is possible in ‘exceptional cases’, including violation of the essential elements or denunciation of the agreement not sanctioned by the general rules of international law. The exceptional cases could therefore include all breaches of essential elements, dispensing with the general requirement for a three-month consultation period. Further ‘appropriate measures’ can include the suspension of the DCFTA, in contrast with the non-fulfilment of other treaty obligations. The function of the essential clause is not limited to this negative aspect, and can be viewed positively as informing other parts of the agreement relevant to political reform.⁶⁷⁸ This includes political dialogue between parties, which *inter alia* aims ‘to strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to minorities, and to contribute to consolidating domestic political reforms’.⁶⁷⁹ Other relevant provisions include art. 4 on domestic reform and art. 12 on cooperation on JFS, which unusually for a framework agreement set some requirements for reform. Art. 12 in particular seems to highlight the human rights conditionality in the areas of FSJ, by stressing that ‘[t]he respect for human rights and fundamental freedoms will guide all cooperation on [FSJ]’. Another major achievement of the AA should be seen in the unprecedented introduction of a chapter on the civil society cooperation.⁶⁸⁰

The newly established Association Council with binding powers replaced the PCA Cooperation Council as a platform for political dialogue and monitoring at a ministerial level.⁶⁸¹ The First Association Council held in March 2015 referred to the necessity of stepping up the fight against corruption and implementing a justice sector reform, but the priority appears to be on energy cooperation.⁶⁸² The EU-Moldova Association Committee in its first meeting in 2015 also referred to the reform of the justice sector.⁶⁸³ In addition, a Parliamentary Association Committee was established as a socialisation forum with the power to make recommendations to the Association Council.⁶⁸⁴ The Committee had held two rounds of meetings by November 2015, intent on playing a proactive role in relations between the parties.⁶⁸⁵

⁶⁷⁷ AA art 455

⁶⁷⁸ Ghazaryan ‘A New Generation’ (n **Errore. Il segnalibro non è definito.**) 391, 407-410.

⁶⁷⁹ AA art 3(2)(e)

⁶⁸⁰ AA Chapter 26; Shapovalova (n **Errore. Il segnalibro non è definito.**) 73.

⁶⁸¹ AA art 460-461.

⁶⁸² ‘Joint press release following the first Association Council meeting between the European Union and the Republic of Moldova’ (16 March 2015) Press Release 136/15.

⁶⁸³ ‘First meeting of Moldova-EU Association Committee held in Chisinau’ (19 October 2015) <<http://www.frankfurt.mfa.md/news-from-moldova-en/?news=502349>> accessed 15 September 2016.

⁶⁸⁴ AA arts 467-468.

⁶⁸⁵ EU-Ukraine Parliamentary Association Committee, ‘Final Statement and Recommendations’ (Second Meeting, 4-5 November 2015) <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/41761-zaklyuchna-zajava-ta->

In June 2014 an AAg finally replaced the ENP AP becoming the ‘practical framework through which the overriding objectives of political association and economic integration can be achieved’.⁶⁸⁶ However, in its method and technique the AAg closely resembles the ENP AP defying the criticism directed at the latter. The priorities on human rights and democratic principles, initially set for 2014-2016 include 42 actions of general nature with no deadlines or specificity. According to the Agenda, there will be annual monitoring by the EU, and the ‘[c]ivil society will also be encouraged to focus their monitoring work on the [AAg]’.

6. Financial Assistance Instruments

Moldova receives the highest per capita assistance among the EaP countries.⁶⁸⁷ Since Moldova’s independence EU assistance was disbursed through a variety of instruments, which were not consistently used to support human rights and democratic principles.

a) TACIS

The first decade of financial assistance under TACIS was characterised by limited budget and lack of attention to human rights or other political reforms. In 1995-1999 TACIS allocation was €56.5 million, focusing on agriculture, private sector development, public administration and social sector reform.⁶⁸⁸ Sasse notes that at times no allocations were made for several years.⁶⁸⁹ In 2000–2006, TACIS indicative programme had three priorities including institutional, legal and administrative reform, alongside developing enterprise and support for economy, and dealing with social consequences of transition. Gradually, the EU funds grew, and so did the focus on democratic reform. In 2003 alone, the Commission allocated €25 million through TACIS,⁶⁹⁰ compared to €61 million in 1991-1999.⁶⁹¹ The 2005-2006 NIP under the heading of institutional, legal and administrative reform focuses inter alia on the implementation of the PCA and the ENP AP, including its political priorities, as well as a separate objective on the strengthening the civil society.⁶⁹² The first priority was also reported to have included

[rekomendacii-drugogo-zasidannya-parlamentsykogo-komitetu-asociacii-mizh-ukrajinoju-ta-jes](#)>accessed 15 September 2016.

⁶⁸⁶ Available <http://eeas.europa.eu/moldova/pdf/eu-moldova-association-agenda-26_06_en.pdf> accessed 15 September 2016.

⁶⁸⁷ European Parliament: Directorate General External Policies of the Union, ‘Analysis of the EU’s Assistance to Moldova’ (Briefing Paper, November 2008) [http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT\(2008\)388970_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT(2008)388970_EN.pdf) accessed 15 September 2016.

⁶⁸⁸ Commission, ‘Evaluation of TACIS Country Strategy in Moldova’ (December 2000) Volume I, Final Report, 5.

⁶⁸⁹ Sasse (n 459) 553, 565.

⁶⁹⁰ Commission, ENP Country Report (Brussels, 12 May 2004) SEC(2004) 567, 4.

⁶⁹¹ Mcdonagh (n 448) 142, 156.

⁶⁹² Commission, ‘TACIS NIP 2005-2006 Moldova’ 3, 22 <http://eeas.europa.eu/moldova/csp/csp04_06_nip05_06_en.pdf> accessed 15 September 2016.

certain projects on judicial trainings.⁶⁹³ At times, however, the EU objectives were somewhat puzzling. For instance, in addition to fulfilling Moldova's commitments in the CoE or OSCE, the objective on the implementation of the ENP AP and PCA mentions that support should be provided for '[s]trengthening democracy, the rule of law, improve governance by, i.a, approximating key areas of Moldova's legislation to the EU's'⁶⁹⁴ when the EU had no legislation on democracy or rule of law. The post-1999 TACIS also allowed for joint programmes to be implemented with CoE focusing on media independence,⁶⁹⁵ support for civil society,⁶⁹⁶ judicial independence.⁶⁹⁷ No TACIS evaluation was undertaken by the Commission after 2000.

TACIS focus on the three general priorities noted above for 2002-2006 was positively seen: '[t]he definition of these areas was large enough to give the possibility to respond to the country needs in the best possible way, at the same time keeping sufficient flexibility to develop projects at the cross-road of several sectors'.⁶⁹⁸ Yet it was criticised for not placing a stronger emphasis on 'the law enforcement mechanisms compatible with EU standards' instead focusing on new laws or legislative review.⁶⁹⁹ Besides, TACIS was criticised for the 'illusory' civil society participation.⁷⁰⁰ Despite direct support for civil society being possible under TACIS, the allocations were overall miniscule. It has been estimated, that together with the EIDHR in 1998-2004, only 5% of the total assistance was granted to the civil society.⁷⁰¹

b) ENPI

EU funds allocated to Moldova were significantly expanded under the ENPI. While throughout 1991-2006 Moldova received around €320 million (TACIS and other programmes),⁷⁰² under only the ENPI €483.14 million was allocated for 2007-2013. The funding steadily increased from year to year throughout this period.⁷⁰³ Under the ENPI Regulation, the funding was to be allocated on the basis of

⁶⁹³ Vic Heard, 'Has the EU's Development Assistance Helped?' in Ann Lewis (ed), *The EU and Moldova: On a Fault-Line of Europe* (The Federal Trust 2004) 215.

⁶⁹⁴ Commission, 'TACIS NIP 2005-2006 Moldova' 24
<http://eeas.europa.eu/moldova/csp/csp04_06_nip05_06_en.pdf> accessed 15 September 2016.

⁶⁹⁵ McDonagh (n 448) 142, 156.

⁶⁹⁶ Commission, 'TACIS NIP' (n 694)

⁶⁹⁷ Commission, 2014 Progress Report (Brussels, 27 March 2014) SWD(2014) 93 final, 14.

⁶⁹⁸ Commission, 'Monitoring Review of the TACIS NP Moldova' (October 2005) 4
<<http://capacity4dev.ec.europa.eu/rom/document/monitoring-review-tacis-np-monitoring-programme-moldova>> accessed 15 September 2016.

⁶⁹⁹ *ibid.* 5-6.

⁷⁰⁰ *ibid.*

⁷⁰¹ Raik, 'Promoting Democracy' (n **Errore. Il segnalibro non è definito.**) 17.

⁷⁰² European Parliament: Directorate General External Policies of the Union (n 687) 7; 'ENPI CSP 2007-2013' annex 6.

⁷⁰³ Raik, 'From Attraction to Europeanisation' (n 568) 9.

priorities set in the ENP AP.⁷⁰⁴ It has been noted that the ENPI CSP and the NIPs were set to ‘support the priorities of the Government of Moldova’.⁷⁰⁵ The ENPI CSP 2007-2013 included support for democratic development and good governance as one of the three focal areas in addition to support for regulatory reform and administrative capacity building, and support for poverty reduction and economic growth.⁷⁰⁶ The Strategy Paper reflects on the criticism directed at TACIS, particularly its top-down approach and lack of emphasis on legal enforcement.⁷⁰⁷ The priorities of the CSP were spelled out in NIPs spanning three or four years. Under the 2007-2010 NIP the priority on democratic development and good governance received 25-35% of the available €209.7 million. Out of its four sub-priorities two are relevant for political reform — rule of law and judicial reform, and human rights, civil society development and local government.⁷⁰⁸ Surprisingly, the annual programming documents were hardly directed at political reform.⁷⁰⁹ For instance, the 2007 AAP with €40 million was mostly focused on border management,⁷¹⁰ in addition to the reform of the Moldovan social assistance system, technical assistance and twinning operations in support to the trade and growth related part of ENP AP and the support for civil society in Transnistria.⁷¹¹ The 2008 ENPI AAP 2008 with almost €62 million (with a top-up from Governance Facility) focused on modernisation of the primary health care system; justice, liberties and security with an emphasis on border and migration management again; and sectoral technical assistance and twinning.⁷¹² The 2009 AAP with €57 million focused on two priorities: support for regulatory reform and administrative capacity building, and poverty reduction.⁷¹³ The 2010 AAP with €66 million has no priorities on political reform either.⁷¹⁴

Despite the lack of designation of political reform in the funding priorities, according to Weiner, the progress achieved in political reform precipitated the increase in support to Moldova from 2009 onwards.⁷¹⁵ 2011-2013 NIP with an indicative budget of €273.14 million set three priorities, one of them being good governance, rule of law and fundamental freedoms receiving an increased 35-40%. The sub-priorities under this heading demonstrate an emphasis largely beyond political reform, which includes

⁷⁰⁴ Regulation OJ L310/1 (n **Errore. Il segnalibro non è definito.**) art 3.

⁷⁰⁵ Igor Munteanu and Olesia Cruc and Ghenadie Mocanu, ‘Assessment of ENPI Funding: Monitoring for Moldova’ (24 July 2009).

⁷⁰⁶ ‘ENPI CSP 2007-2013’

⁷⁰⁷ *ibid.* 11-12.

⁷⁰⁸ The other two include public administration reform and public finance management, and education, science and people-to-people contacts/exchanges.

⁷⁰⁹ Medico (n 640) 21.

⁷¹⁰ Sasse (n **Errore. Il segnalibro non è definito.**) 195.

⁷¹¹ Commission, SEC(2008) (n 631) 3. 18.

⁷¹² Commission, SEC(2009) (n 632) 22.

⁷¹³ Commission, SEC(2010) (n 635) 22.

⁷¹⁴ ENPI, ‘2010 ENPI AAP’ (2010) <http://ec.europa.eu/europeaid/documents/aap/2010/aap_2010_mda_en.pdf> accessed 15 September 2016.

⁷¹⁵ Weiner ‘The European Union and Democratisation’ (n 503) 127.

rule of law, human rights and security, public administration reform, and facilitation of new EU-Moldova Agreement. Thus, the sub-priority relevant for political reform is the rule of law and human rights, but even that appears to be linked to security, including conflict resolution and confidence-building measures.⁷¹⁶ The sub-priority is linked to ensuring the ‘sustainability of reforms in the areas of justice, freedom (including the consolidation and protection of human rights) and security (including in particular the reform of the penitentiary sector and assistance on border-related issues)’, but also support for civil society. These measures do not only aim at fostering the active participation of civil society in Moldova’s public and social life, but also strengthening the state’s capacity to support CSO development and capacity building through an appropriate subsidisation system and by putting in place an inclusive interaction and consultation process with civil society.⁷¹⁷ These measures will be taken in coordination with other international organisations and ‘will build on the achievements of the EC “Democracy Support Package” for Moldova’.⁷¹⁸ The latter was adopted by the Commission to support Moldova’s transformation after the post-election events in 2009.⁷¹⁹ While there is a certain lack of transparency around this package, the 2012 ENP Progress Report notes that it allowed for supporting justice sector reform.⁷²⁰ This was on top of €62 million (budget and technical assistance) allocated to support a comprehensive justice sector reform.⁷²¹ The latter was one of the areas supported under 2011 and 2012 ENPI AAP.⁷²² It is said that conditionality was applied by the EU to advance reforms in the justice sector when the funding was made contingent upon the adoption of a reform strategy.⁷²³ It should be noted that democracy support under the ENPI was not confined strictly to the AAP priorities. For instance, in February 2009, the Commission allocated €3 million to a project in support of free and fair parliamentary elections.⁷²⁴ It also established a joint programme with the CoE on issues related to democracy, including separation of powers and media freedom.⁷²⁵

⁷¹⁶ Rather than being a separate priority area, conflict resolution and confidence-building accounts for 15% of the overall assistance spread across all priority areas.

⁷¹⁷ ENPI, ‘NIP 2011-2013’ (2011) 14
<http://eeas.europa.eu/enp/pdf/pdf/country/2011_enp_nip_moldova_en.pdf> accessed 15 September 2016.

⁷¹⁸ *ibid.*

⁷¹⁹ Benita Ferrero-Waldner, ‘European Commissioner for External Relations and European Neighbourhood Policy, Address to Members of Parliament of the Republic of Moldova’ (27 November 2009) SPEECH/09/563
<http://europa.eu/rapid/press-release_SPEECH-09-563_en.htm> accessed 15 September 2016.

⁷²⁰ Commission, 2012 Progress Report (Brussels, 15 May 2012) SWD(2012) 118 final, 4.

⁷²¹ *ibid.*

⁷²² ENPI, ‘2011 ENPI AAP’ (2011) <<http://www.enpi-info.eu/library/content/moldova-commission-approval-enpi-annual-action-programme-2011>> accessed 15 September 2016.

⁷²³ Raik, ‘From Attraction to Europeanisation’ (n 568) 9.

⁷²⁴ Munteanu and Cruc and Mocanu (n 705) 17.

⁷²⁵ Council of Europe, ‘Council of Europe and European Union Joint Programme on Democracy Support in the Republic of Moldova’ (2010);
Council of Europe, ‘Action Plan to support democratic reforms in the Republic of Moldova 2013-2016 (17 November 2013).

It should be noted that the ENPI introduced twinning and TAIEX to Moldova.⁷²⁶ Borrowed from the accession practice, these instruments provide expertise and training to Moldovan civil servants by their counterparts in EU Member States. Twinning is mostly directed at legislative approximation and public administration reform.⁷²⁷ According to Buscaneanu, out of 97 TAIEX and 9 twinning activities only four were directly linked to democratic development.⁷²⁸

Certain criticism was directed at the ENPI assistance in Moldova. This included the lack of accountability of the national authorities for the monitoring of the externally funded projects.⁷²⁹ The CSP priorities were criticised by civil society for leaving ‘untouched’ ‘fundamental democratic principles, such as access to information, rule of law, and an independent and effective judiciary’.⁷³⁰ Besides, despite the ENPI’s focus on civil society engagement, the assistance was either to the budget or technical support without significant mechanisms for the involvement of the civil society in its programming, implementation or evaluation.⁷³¹ Thus, recommendations were made to establish early ‘entry points’ for the civil society in this process.⁷³² Others have called for more aid to be directed to the development of the civil society.⁷³³

c) ENI

Following the expiry of the ENPI in 2014, it was replaced with the ENI based both on positive and negative conditionality.⁷³⁴ It operates through a Single Support Framework (SSF) established for the 2014-2017 period, consulted with national authorities and civil society following an apparently more inclusive approach under ENI.⁷³⁵ The approximate budget is between €335-410 million. The SSF is mindful of the AA’s ‘great emphasis on democracy and the rule of law, human rights and fundamental freedoms, good governance’, and suggests that the assistance provided for 2014-2017 ‘is synchronised

⁷²⁶ Deliverable No 1, ‘Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion’ 114, 151 < <http://www.fp7-frame.eu/frame-reps-6-1/> > 1 September 2016.

⁷²⁷ Commission, ‘Evaluation of the European Commission’s Cooperation with Ukraine’ (2010) I Final Report, 14 <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2010/1283_vol1_en.pdf> accessed 1 September 2016.

⁷²⁸ Sergiu Buscaneanu, ‘EU Democracy Promotion in Eastern ENP Countries’ (2015) 29 *East European Politics and Societies and Culture* 248, 261.

⁷²⁹ Victoria Boian, ‘Taking Stock and Evaluation of Financial Assistance Granted to Moldova by the European Union’ Chisinau, 2010, 9.

⁷³⁰ Munteanu and Cruc and Mocanu (n 705) 39.

⁷³¹ *ibid* 39-42; Giselle Bosse, ‘The EU’s Relations with Moldova: Governance, Partnership or Ignorance?’ (2010) 8 *Europe-Asia Studies* 1291, 1307.

⁷³² *ibid*, 44-46.

⁷³³ European Parliament: Directorate General External Policies of the Union, (n 687) 13;

⁷³⁴ OJ L77/27 (n **Errore. Il segnalibro non è definito.**) art 4(2).

⁷³⁵ Art. 4(5), *ibid*; ‘European Union supports key reforms in the Republic of Moldova’ (Press Release, Brussels, 29 July 2014).

with the priorities and objectives set out' in the AA and DCFTA.⁷³⁶ Three priorities have been agreed for this period, including public administration reform (30%), agriculture and rural development (30%), police reform and border management (20%) to reflect also on cooperation set in other instruments including the JFS instruments.⁷³⁷ Public administration reform will focus on civil service and local government. As far as police reform is concerned, the SSF notes that the justice sector was supported under the ENPI, and now it can focus on other aspects of rule of law. It is clear that the police reform is linked to border management and the control required for visa-free travel.⁷³⁸ 20% of the available budget is for complementary support out of which up to 5% might be available for civil society 'through a continuation at country level of the Civil Society Facility 2011-2013'.⁷³⁹ The latter, is an example of a 'targeted' instrument,⁷⁴⁰ established in response to the 'Arab Spring' to enhance the role of civil society both in the East and South, including in the implementation of EU policies, albeit with limited funds.⁷⁴¹ The SSF notes that the funding will be used to increase the role of the civil society in enhancing accountability and transparency in policy-making, including budgetary processes,⁷⁴² thus focusing on substantive criteria of democracy.⁷⁴³

The ENI AAP 2014 Annual Action Programme 2014 with a budget of €101 million focuses on two actions: support to public finance policy reforms and support for agriculture and rural developments.⁷⁴⁴ In May 2014 an additional €30 million was issued to Moldova to support small business, develop national legislation in line with EU quality standards and promote export and investment opportunities, communication and information campaigns on the DCFTA trade agreement with the EU.⁷⁴⁵ The latter can be seen as necessitated by the tense atmosphere preceding the signature of the AA and DCFTA, as support was also given to Georgia.⁷⁴⁶ Following the 2014 banking scandal and the subsequent government crisis, the EU budgetary support was put on hold until the affair has been cleared up.⁷⁴⁷ At

⁷³⁶ 'SSF for EU support to the Republic of Moldova' (2014-2017), 3. <http://eeas.europa.eu/enp/pdf/financing-the-enp/republic_of_moldova_single_support_framework_2014-2017_en.pdf> accessed 15 September 2016.

⁷³⁷ *ibid*, 4.

⁷³⁸ *ibid*, 6.

⁷³⁹ *ibid*, 13.

⁷⁴⁰ Deliverable No 1, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion' 84-85 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> 1 September 2016.

⁷⁴¹ 'EU response to the Arab Spring: the Civil Society Facility' (27 September 2011) MEMO/11/638.

⁷⁴² 'SSF for EU support to the Republic of Moldova' (2014-2017), 13. <http://eeas.europa.eu/enp/pdf/financing-the-enp/republic_of_moldova_single_support_framework_2014-2017_en.pdf> accessed 15 September 2016.

⁷⁴³ On formal and substantive democracy see, for instance, Casier (n **Errore. Il segnalibro non è definito.**)

⁷⁴⁴ '2014 AAP' <https://ec.europa.eu/europeaid/sites/devco/files/aap-moldova-2014_en.pdf> accessed 15 September 2016.

⁷⁴⁵ 'European Union supports key reforms in the Republic of Moldova' (Press Release, Brussels, 29 July 2014).

⁷⁴⁶ Commission, Implementing Decision (2 May 2014) C(2014) 2988 final.

⁷⁴⁷ 'Moldova banking scandal fuels biggest protest ever' *Euractiv* (7 September 2015);

its first meeting, the EU-Moldova Parliamentary Association Committee expressed its concerns over the relevant inquiries and the recovery of the missing assets.⁷⁴⁸ As a result no ENI AAP programme was in place for the most of 2015.

d) Civil Society Support and Other Financial Instruments

The EIDHR is a human rights-specific instrument, which does not depend on the consent of Moldovan authorities.⁷⁴⁹ Thematic in nature, it is specialised for democracy and human right-related projects implemented by civil society. A number of shortcomings regarding support for civil society were recorded in the past. Until 2007, less than €1 million was allocated to Moldova with allocations only in 2000 and 2001.⁷⁵⁰ The limited EIDHR funding to Moldova should be seen within the context of small funds allocated to Eastern Europe as a region in comparison with other parts of the world: during 2000-2006, €48 million was paid to Eastern Europe compared to €163million to Sub-Saharan region.⁷⁵¹ Even though the funding increased post-2006, it was still limited and irregular: for instance only €200.000 was issued to Moldova in 2007.⁷⁵² The EU's approach towards civil society funding was also criticised for lack of strategy on supporting civil society, as well as lack policy finalité and procedural obstacles due to the complexity of the financial regulations.⁷⁵³ In an assessment of EU's assistance for Moldova conducted for the EP, the EU was called upon to make a more active use of EIDHR resources.⁷⁵⁴

In the last few years the amount under the EIDHR has increased and it is mostly focused on anti-discrimination and protection of vulnerable groups. In 2013, €1.7 million was available for projects on all forms of discrimination and promotion of tolerance.⁷⁵⁵ Under 2015 call priorities are on gender equality

'EU Budget Support for the Republic of Moldova – pending the fulfilment of several conditions' (Press Release, 8 July 2015).

⁷⁴⁸ EU-Moldova Parliamentary Association Committee, 'First Meeting, 21-22 September 2015' (2015) para 6.

⁷⁴⁹ European Parliament and Council, Regulation No 235/2014 [2014] OJ L 77.

⁷⁵⁰ ENPI CSP 2007-2013, Annex 6.

⁷⁵¹ European Parliament: Directorate General External Policies of the Union, 'Analysis of the EU's Assistance to Moldova' (Briefing Paper) November 2008, 9-10. Available <[http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT\(2008\)388970_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT(2008)388970_EN.pdf)>.

⁷⁵² Ibid, 7.

⁷⁵³ Kristi Raik, 'Promoting Democracy through Civil Society: How to Step up the EU's Policy towards the Eastern Neighbourhood' CEPS Working Document No 237, February 2006, 18-19.

⁷⁵⁴ European Parliament: Directorate General External Policies of the Union, 'Analysis of the EU's Assistance to Moldova' (Briefing Paper) November 2008, 20. Available <[http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT\(2008\)388970_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/388970/EXPO-AFET_NT(2008)388970_EN.pdf)>.

⁷⁵⁵ Fourth Round of HRD, 19 April 2013.

and women's rights, rights of those in psychiatric institutions, and ethnic minority rights with a budget of €700.000.⁷⁵⁶

In addition to EIDHR, support for non-state actors was also provided under another thematic instrument, that is Non-State Actors and Local Authorities in Development.⁷⁵⁷ Launched in Moldova in 2010, it provided small amounts for projects directly relevant for democratic participation.⁷⁵⁸ The exact funds distributed to the civil society under various interments or the coordination between them is not clear. Many of the projects sponsored after 2009 concerned such core aspects of democracy, as political freedoms, anti-discrimination, development of journalism, although they can be considered as limited in terms of their budget and number.⁷⁵⁹ As of 2014, there were 10 EIDHR, 1 Neighbourhood Civil Society Facility and 2 Non-State Actors and Local Authorities ongoing programmes.⁷⁶⁰ In addition, projects are also sponsored under the European Endowment for Democracy, noted above. It has sponsored 16 projects to date, including on wider topics of EU integration.⁷⁶¹

Under the Governance Facility, seen as an instrument of 'positive financial conditionality',⁷⁶² €16.6 million was disbursed to Moldova in 2008.⁷⁶³ It could be seen as justified due to the Commission's overall positive assessment of Moldova's performance in 2007 and 2008, although as noted above it was largely confined to legislative developments. It should be noted that it is not clear how the funding was used. The EaP Integration and Cooperation Programme, based on the rationale similar to Governance Facility, that is providing additional funding to countries with the most progress in political reform ('more for more' approach), was also used to provide additional funding to Moldova.⁷⁶⁴ In 2012 and

⁷⁵⁶ Moldova: Call For Proposals For Civil Society Under European Instrument For Democracy And Human Rights (Eidhr) 10 July 2015. Available <<http://www.csdialogue.eu/news/moldova-call-proposals-civil-society-under-european-instrument-democracy-and-human-rights-eidhr>>.

⁷⁵⁷ 2011 Progress Report, SEC(2011) 643, Brussels, 25 May 2011, 21.

⁷⁵⁸ 'The European Union Delegation to the Republic of Moldova has launched the "Non-state actors – In-country interventions" call for proposals within the thematic programme "Non-State Actors and Local Authorities in Development"', Delegation of the EU to Moldova, 9 August 2010.

⁷⁵⁹ Available <http://eeas.europa.eu/delegations/moldova/projects/list_of_projects/projects_en.htm>.

⁷⁶⁰ Roadmap for Engagement with the Civil Society for 2014-2017, 10.

⁷⁶¹ Available <<https://www.democracyendowment.eu/we-support/?country=moldova&page=1>>.

⁷⁶² Commission, On Strengthening the European Neighbourhood Policy COM(2006) 726, Brussels, 4 December 2006, 12-13; Peter Van Elsuwege, 'Variable Geometry in the European Neighbourhood Policy: The Principle of Differentiation and its Consequences' in Erwan Lannon (ed), *The European Neighbourhood Policy's Challenges* (PIE Peter Lang 2010), 77.

⁷⁶³ 2009 Progress Report, SEC(2009) 514/2, Brussels, 23 April 2009, 22.

⁷⁶⁴ Commission Implementing Decision on the Eastern Partnership Integration and Cooperation programme 2012-2013 in favour of the Eastern Neighbourhood to be financed under Article 19 08 01 03 of the general budget of the European Union, C(2012) 4170 final, 26 June 2012; Richard G. Whitman and Ana E. Juncos, 'Stasis in Status: Relations with the Wider Europe' (2013) 51 *Journal of Common Market Studies* 155, 164.

2013, €28 million and €35 million were issued respectively to reward Moldova ‘as one of the best performers in the neighbourhood’ for progress in democracy and human rights.⁷⁶⁵

According to ENI SSF 2014-2017, further support can be provided to Moldova through a number of other EU instruments, including such thematic programmes as the Instrument Contributing to Peace and Stability, Humanitarian Aid, the Partnership Instrument, the Instrument for Nuclear Safety Co-operation, Macro-Financial Assistance, Development Co-operation Instrument, and external actions under EU internal programmes (e.g. Erasmus+).⁷⁶⁶ While it will not be justified to link some of these programmes, e.g. humanitarian aid, to political conditionality, it is not clear whether others are factored into Moldova’s performance in terms of meeting the apolitical priorities of the bilateral cooperation.

F. Perceptions of EU Human Rights Policies

While the Moldovan political elite was in search of an identity throughout most of the 1990s, with the proclamation of its pro-European course, certain perceptions started to emerge regarding EU policies and Moldova’s possible compliance with them. The readiness to undertake reform appeared to depend on the EU exercising pressure. At the end of the 1990s, the then deputy foreign minister of Moldova remarked that ‘[w]e now need constructive pressure from the EU to set things in motion’.⁷⁶⁷ While the PCA did not manage to ‘set things in motion’ due to lack of incentives and funding, the ENP similarly did not create such pressure. Besides, the then ENP Commission Ferrero-Waldner remarked in 2006, the EU’s support for political and economic transformation through the ENP ‘[was] not about imposing specific models from the outside’.⁷⁶⁸ The EaP was similarly a disappointment, not only because it failed to provide an EU membership perspective,⁷⁶⁹ but because it did not match the expectations of obtaining clear guidelines from the EU. The Moldovan officials anticipated the EU would be more critical and give clearer guidance as to compliance.⁷⁷⁰ These perceptions at the level of political elite in the words of Korosteleva meant that ‘instead of taking the lead in foreseeing European reforms, [the Moldovan authorities shift] responsibility for their initiation and implementation to third party supervision’.⁷⁷¹ The supervision by the EU, although mindful of the persistent problems, throughout the existence of the

⁷⁶⁵ European Commission, ‘Eastern Partnership: progress in deep democracy and human rights rewarded with additional funding’, IP/13/1245, Brussels, 12 December 2013.

⁷⁶⁶ ‘SSF for EU support to the Republic of Moldova’ (2014-2017), 3. <http://eeas.europa.eu/enp/pdf/financing-the-enp/republic_of_moldova_single_support_framework_2014-2017_en.pdf> accessed 15 September 2016.

⁷⁶⁷ John Lowenhard, Ronald J Hill and Margot Light, ‘A Wider Europe: The View from Minsk and Chisinau’ (2001) 77 *International Affairs* 605, 618.

⁷⁶⁸ Benita Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy, ‘The EU, the Mediterranean and the Middle East: A Partnership for Reform’ (Hamburg, 2 June 2006) SPEECH/06/341.

⁷⁶⁹ Ruxandra Lupu (n **Errore. Il segnalibro non è definito.**)

⁷⁷⁰ Korosteleva (n **Errore. Il segnalibro non è definito.**) 13.

⁷⁷¹ Korosteleva, ‘Moldova’s European Choice: “Between Two Stools”?’ (n **Errore. Il segnalibro non è definito.**) 1283-1284.

Communist government was positive in general, confirming the Government is on the right track. As a result it appeared that the country is on track as long as there is a certain minimum compliance ensured – usually legislative amendments or adoption of new laws. Besides, the EU's high appeal among the Moldovan public also meant that 'the government cannot contest the normative appeal of European values. It can only fake adherence to them and try to bandwagon on the popularity of the EU idea'.⁷⁷² In 2008, the Moldovan public was the most pro-EU and pro-NATO among the CIS countries.⁷⁷³ The Moldovan public associated itself with liberal values of the EU, which was seen as exceptional in the regional context.⁷⁷⁴ However, this high appeal of the EU was compromised after the pro-European government came to power in 2009.

The public's view of the government's poor performance translates into lower public support for the EU. The public perceives the EU to have sided with the coalition government 'praising it excessively, while downplaying the problems' which led to diminished public support for the EU in the years the coalition government has been in power.⁷⁷⁵ While the EU was immediately supportive of the pro-European government, including by offering democracy-related assistance, the Commission was quite keen on criticising the pace and nature of the reforms undertaken. However, the results of the Commission's monitoring are not necessarily disseminated within the society. As far as the Moldovan public was concerned the EU continued to cooperate with the government. Besides, the intensified high-level meetings and visits were characterised by an 'abundance of positive statements'.⁷⁷⁶ As a result, the EU was criticised for mistaking 'pro-European' with 'pro-reform' which led to perceptions of the EU siding with unscrupulous regimes.⁷⁷⁷ Not only the public support for the EU, but also the trust in it fell due to the coalition government's performance. For instance, in 2013 the public trust in the EU fell to 48% from 61% in 2012.⁷⁷⁸ The support for EU diminished further, with only 40% recorded in 2015, again linked to the performance of the pro-European government.⁷⁷⁹ The continuous political scandals implicating various high-level officials linked to the pro-European government in corruption affects the public

⁷⁷² Popescu and Wilson, (n 460) 99.

⁷⁷³ Steven Roper, 'Post-Soviet Moldova's National Identity and Foreign Policy' in Oliver Schmidtke and Serhy Yekelchuk (eds), *Europe's Last Frontier? Belarus, Moldova, and Ukraine between Russia and the European Union* (Palgrave 2008) 94.

⁷⁷⁴ Korosteleva, 'Moldova's European Choice: "Between Two Stools"?' (n **Errore. Il segnalibro non è definito.**) 1281-1282.

⁷⁷⁵ Raik (n **Errore. Il segnalibro non è definito.**) 11.

⁷⁷⁶ Kristi Raik and Ruxandra Lupu Dinesen, 'The European Union and Upheavals in its Neighborhood: A Force for Stability?' (2015) 38 *International Journal of Public Administration* 902, 908. .

⁷⁷⁷ Jana Kobzova, 'Eastern Partnership after Riga: Rethink, Reforms, Resilience' (ECFR) Riga Series, 6-7 <http://www.ecfr.eu/page/-/Riga_Series_Jana_change.pdf> accessed 15 September 2016.

⁷⁷⁸ EU Neighbourhood Barometer, 'The Key Indicators, Results for Moldova' (2012); EU Neighbourhood Barometer, 'Wave 4: Moldova' (2013)

⁷⁷⁹ Gaub and Popescu (n **Errore. Il segnalibro non è definito.**) 49; Secieru (n **Errore. Il segnalibro non è definito.**) 19.

perceptions of European policies, swaying public support towards closer cooperation with Russia.⁷⁸⁰ Despite various reforms undertaken by the coalition government, the latter did not immediately translate into tangible benefits for the population reducing the impact of EU reforms in public perception.⁷⁸¹

In addition, the worsening socio-economic situation in the country also affects the public perceptions of the EU reforms.⁷⁸² For instance, Weiner notes a drop in support for EU from 70% in 2006 to 52% in 2012 due to economic difficulties and the financial crisis in the EU.⁷⁸³ This is not surprising given that economic development tops the list of issues where greater role for the EU is preferred and where the public wants the EU assistance to be directed at. For instance, in 2012, 77% of the Moldovan public preferred the EU to play a greater role in economic development, followed by trade and human rights (60%), and democracy (52%)⁷⁸⁴. Similar preferences emerge for the direction of EU assistance, where tackling poverty and employment are on top of the list in 2013 (41% and 33% respectively), whereas only 15% of the public wants the EU support to be directed at democracy and good governance, and human rights each.⁷⁸⁵ The drop in support for EU policies is also explained by the fact that not all EU-induced reforms are popular and that many reforms do not have immediately visible effects on the population.⁷⁸⁶ This is exacerbated by lack of information on EU policies, including a lack of government-led campaign.⁷⁸⁷ Also, the national authorities place the blame for certain unpopular reforms, such as the anti-discrimination law inter alia protecting sexual minorities, on EU demands, leading to negative views among the Moldovan population on closer integration with the EU.⁷⁸⁸

G. Assessment of EU Policies

Despite its late engagement with Moldova, the EU has become the most important actor influencing Moldova's human rights record, albeit with limited effects.

⁷⁸⁰ Popescu 'Moldova's star: shining or falling?' (n **Errore. Il segnalibro non è definito.**)

⁷⁸¹ Calus (n **Errore. Il segnalibro non è definito.**) 6; Secieru (n **Errore. Il segnalibro non è definito.**)

⁷⁸² Popescu 'Moldova's star: shining or falling?' (n **Errore. Il segnalibro non è definito.**)

⁷⁸³ Robert Weiner, 'The European Union and Democratisation in Moldova' in Henry F Carey (ed), *European Institutions, Democratisation, and Human Rights Protection in the European Periphery* (Lexington Books 2014) 142.

⁷⁸⁴ EU Neighbourhood Barometer, The Key Indicators, Results for Moldova, Autumn 2012; 'Moldovans turn to EU yet again' Annual Trends, Perceptions of the EU in the Neighbourhood Countries, 2010.

⁷⁸⁵ EU Neighbourhood Barometer, Wave 4: Moldova, Autumn 2013.

⁷⁸⁶ Secieru (n **Errore. Il segnalibro non è definito.**) 19.

⁷⁸⁷ Calus (n **Errore. Il segnalibro non è definito.**) 6-7; Raik 'From Attraction to Europeanisation—Moldova's Slow Movement towards the EU'(n **Errore. Il segnalibro non è definito.**) 11.

⁷⁸⁸ Ibid.

1. Values v. Interests, Rhetoric v. Implementation

Although the EU introduced its normative approach to relations with Moldova in the 1990s, it nevertheless remained disengaged throughout most of that decade. Moldova's location, size and credentials did not merit special EU attention. The conflict in Transnistria was brief and subsequently frozen not demanding immediate action from the EU. Only as part of its regional approach, did the EU cooperation intensify through the conclusion of the PCA which entered into force in 1998. The end of the 1990s and early 2000s witnessed a reorientation towards external security issues, inter alia inviting attention to Moldova. The EU stepped up its presence in Moldova, including through certain CFSP instruments. However, there was no particular agenda on Moldova's human rights record or democratisation, and the prospect of accession capable of changing the political system was ruled out.

When the Moldovan Communist Party came to power in 2001 to rule for most of the decade, it reiterated the pro-European rhetoric. The political situation on the ground worsened, while the EU cooperation continued. Instead of relying on PCA or TACIS negative conditionality, the EU preferred continuous engagement using financial assistance as an incentive to improve the situation 2002. Disappointed with the Russian cooperation on Transnistria, Moldova reaffirmed its pro-European outlook. Instead of an EU membership perspective it was included in the ENP to manage Moldova's expectations alongside other neighbours keen on EU accession. Although strengthening the democratic rhetoric, the ENP did not provide Moldova with strong enough incentives to radically transform the country. Neither did the EU become the only political pole as far as Moldova's development was concerned. The lack of an EU membership prospect, allowed Moldova to waver between the EU and Russia, given Moldova's economic and security dependence on the latter. The disappointment and alienation emanating from the exclusion of an EU membership through the ENP 'dramatically [reduced] the EU's prospects to encourage democracy and human rights' in a 'willing' Moldova.⁷⁸⁹

Despite its despondency over the ENP and later the EaP, Moldova did engage with the policy and appeared to undertake certain efforts to implement the ENP AP, including its human rights-related priorities. However, its engagement was seen as necessitated by its need for financial assistance and economic development, whereby the Communist Government managed to resist EU demands in terms of deep political reform and avoided alienating Russia.⁷⁹⁰ In Sasse's evaluation, due to the vagueness of the ENP incentives, even few years after its inception, the integration 'process has begun to store up dissatisfaction and potential disengagement from the implementation of the AP.'⁷⁹¹ However, the EU's continuous engagement, alongside other European organisations, such as the OSCE, the CoE, was eventually evaluated as having certain effect on Moldova's transformation, albeit limited to level of legislative reforms.⁷⁹² Instead of negative conditionality, the EU gradually deployed the available

⁷⁸⁹ Tocci (n 150) 27.

⁷⁹⁰ Del Medico (n **Errore. Il segnalibro non è definito.**) 20.

⁷⁹¹ Sasse (n 146) 200.

⁷⁹² Mcdonagh (n **Errore. Il segnalibro non è definito.**) 157-158.

incentives, including increased aid, visa facilitation and a promise of a new agreement.⁷⁹³ While in the areas of mutual interest (for instance, trade, visa liberalisation etc) the EU's policies were assessed more positively,⁷⁹⁴ the Communist Government's 'pro-Europeanism' was eventually assessed as 'shallow' where harmonised laws are poorly implemented, civic and political rights breached.⁷⁹⁵ The poor record in implementing the ENP AP was linked not only to the lack of commitment by the Government, but also due to the exclusion of the civil society.⁷⁹⁶

The Communist Government was seen by the EU as a partner willing to cooperate on important issues as Transnistria and border management. While officially Moldova's democratisation was seen as a factor in assisting in conflict resolution, in practice the EU was willing to cooperate with the Communist government despite its political record. In the words of Tudoroiu, 'Brussels preferred to ignore [President Voronin's] authoritarian practices, hoping that closer ties would lead implicitly to gradual democratisation', and eventually preferring stability to democratisation.⁷⁹⁷ Despite the Commission's criticism of the poor record in human rights and democratic principles, 'until April 2009 the EU treated the Communists as the only possible base for a stable government' and did not encourage regime change,⁷⁹⁸ respecting their legitimacy even after the April 2009 events.⁷⁹⁹ From the analysis of other commentators it appears that viewing the Communists as a source of stability might have explained the EU's reluctance to become involved in the events of 2009. According to Tudoroiu the EU Special Representative attempted to tone down the criticism of EU Member States' ambassadors directed at the Communists actions results in human rights beaches, and even to convince the opposition parties to give the necessary vote for electing a president which would have allowed the Communists to stay in power.⁸⁰⁰ Others suggest that the EU preferred mediation rather than strict criticism of the Communists' actions due to the fears of increasing authoritarian tendencies and a turn to Russia demonstrating 'the limits of EU transformative power and its ability to enforce conditionality when local semi-authoritarian regimes feel that they have other foreign policy options should the EU become an "uncomfortable" partner'.⁸⁰¹

⁷⁹³ Ibid, 150.

⁷⁹⁴ Bosse (n **Errore. Il segnalibro non è definito.**) 1306–7.

⁷⁹⁵ Popescu and Wilson (n 460) 94.

⁷⁹⁶ Dumitru Minzarari, 'EU-Moldova Action Plan: An Unfinished Task or a Complete Failure?' (January-July 2008) The Institute for Development and Social Initiatives 'Viitorul', Discussion Paper No 2, 39.

⁷⁹⁷ Tudoroiu (n **Errore. Il segnalibro non è definito.**) 253.

⁷⁹⁸ Raik 'From Attraction to Europeanisation—Moldova's Slow Movement towards the EU'(n **Errore. Il segnalibro non è definito.**) 11.

⁷⁹⁹ Ibid, 11.

⁸⁰⁰ Tudoroiu (n **Errore. Il segnalibro non è definito.**) 253.

⁸⁰¹ Popescu and Wilson (n 460) 101; Raik and Lupu Dinesen (n 776) 907.

As a result, Raik remarks that '[t]he eventual change of leadership was motivated by Europe's power of attraction, but it happened in spite of EU policy, not because of it'.⁸⁰² However, a readjustment of EU policy followed by strengthening 'the normative dimension by increasing support to the reform-oriented new leadership'.⁸⁰³ The EU instantly equated the 'pro-European' label of the new Government with a pro-reform commitment and pledged its support. The support went beyond statements to include financial assistance, including funds relevant for democratisation and human rights, and the deployment of available incentives, including visa liberalisation and an AA containing a DCFTA. Some suggest that the change of the regime was rewarded with the negotiations of the AA.⁸⁰⁴ The possibility of negotiating a new agreement was based on implementing the AP priorities as monitored by the Commission,⁸⁰⁵ which by that time did not demonstrate sufficient progress. Thus, it might seem that it was the change of the regime that led to the opening of the AA negotiations. However, this should not mean that it was the pro-European or pro-democratic stance of the new government which was rewarded with the negotiations, since they commenced alongside the AA negotiations with the three South Caucasian countries, some widely viewed as authoritarian.⁸⁰⁶ Moldova swiftly progressed both in AA negotiations and in its visa liberalisation efforts. While the political dialogue intensified with numerous high-level meetings, the Commission's progress reports were rather critical of the record in human rights protection and other political reforms. Nonetheless, due to its legislative reforms Moldova was seen as the success story in the East. There were suggestions that 'the EU needs the Moldovan "success story" for its internal reasons, to inject belief in itself',⁸⁰⁷ particularly given the direction Ukraine was heading to. Once more, propositions were forwarded to afford Moldova a prospect of an EU membership to give the EU the power to exercise stronger conditionality over the latter's political transformation.⁸⁰⁸

While there were some innuendos by EU officials, it could be suggested that there was no real intention behind them to offer Moldova an accession prospect. It was rather to keep the country on track towards the signing of the AA. Among EU institutions, only the EP regularly advocated for offering Moldova an EU membership perspective.⁸⁰⁹ Eventually, given the pressure Russia exerted on Moldova and other EU

⁸⁰² Raik 'From Attraction to Europeanisation—Moldova's Slow Movement towards the EU'(n **Errore. Il segnalibro non è definito.**) 7.

⁸⁰³ Raik and Lupu Dinesen (n 776), 908.

⁸⁰⁴ Weiner (n **Errore. Il segnalibro non è definito.**) 134.

⁸⁰⁵ ENPI, '2010 ENPI AAP' (2010) <http://ec.europa.eu/europeaid/documents/aap/2010/aap_2010_mda_en.pdf> accessed 15 September 2016.

⁸⁰⁶ Kristi Raik, 'Between Conditionality and Engagement: Revisiting the EU's Democracy Promotion in the Eastern Neighbourhood' (The Finnish Institute of International Affairs, 80 April 2011) Briefing Paper 5.

⁸⁰⁷ Kristi Raik, 'From Attraction to Europeanisation—Moldova's Slow Movement towards the EU' Eastern Partnership Review, No 2, November 2011, 9.

⁸⁰⁸ Tudoroiu (n **Errore. Il segnalibro non è definito.**) 12.

⁸⁰⁹ European Parliament, 'Resolution on strengthening the European Neighbourhood Policy', (15 November 2007, 2007/2088(INI)) para 26.; Resolution on the review of the European Neighbourhood Policy - Eastern Dimension, (7 P7_TA(2011)0153) para 10.; Resolution containing the European Parliament's recommendations to the Council,

neighbours, the EU was keen on signing the agreement as soon as possible bringing it forward in time, and therefore irrespective of Moldova's record in human rights protection. Also the visa liberalisation came to fruition before the signature of the AA signing on the basis of the sustainability of legislative and institutional reforms undertaken by Moldova, despite shortcomings in practice. While it seemed that Moldova was bound by its Europeanisation process, the events of 2014-2015 demonstrated how little the political culture has changed in Moldova threatening the country's stability, as well as its European prospects due to a number of political scandals leaving the EU somewhat puzzled. Calls were made to use tougher EU conditionality in terms of political reform, particularly on anti-corruption, to keep Moldova on the path of Europeanisation.⁸¹⁰

2. Policy-Setting Instruments and Human Rights

In terms of the choice of instruments,⁸¹¹ the EU relies predominantly on soft power tools, including economic and diplomatic measures. Diplomatic measures are particularly prominent at times of political crisis. The EU set its human rights conditionality through consecutive hard and soft law instruments. The majority of instruments deployed by the EU are positive in nature, although there have been examples of certain negative measures noted below. The bulk of EU measures include very few human rights-specific instruments, including human rights dialogues and such targeted support measures as the EIDHR. The rest of the instruments mainstream the human rights rhetoric, however.

While the PCA was seen as having had a certain positive influence on legislative approximation, trade liberalisation and the private sector,⁸¹² overall it was seen to have had little impact due to lack of incentives, the EU's distant approach and the absence of benchmarking.⁸¹³ The agreement did not become a positive catalyst for democratic transformation, neither was its negative conditionality relied upon at times of breaches of human rights or democratic principles.

The ENP AP expanded the understanding of political reform beyond the PCA, however it missed an opportunity to establish a workable and measurable set of requirements expected in Moldova. The priorities were set alongside issues of democratic governance, rule of law and fundamental freedoms. As far as human rights and fundamental freedoms are concerned, the main emphasis is on civil and political rights, and rights of minorities, while little or no attention is paid to economic, social, and cultural rights. Not only the priorities were not proper benchmarks, but they were to be implemented

the Commission and the EEAS on the negotiations between the EU and the Republic of Moldova on the Association Agreement (2011/2079(INI)) para 15.

⁸¹⁰ Popescu 'Moldova's star: shining or falling?' (n **Errore. Il segnalibro non è definito.**) 4.

⁸¹¹ Deliverable No 1, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion' 71-109. <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> 1 September 2016

⁸¹² Skvortova, (n 461) 559.

⁸¹³ Buscaneanu, (n **Errore. Il segnalibro non è definito.**) 24-25.

alongside actions in all other areas without strict prioritisation for political, including human rights, reform. Besides, the political priorities per se focus on formal at the expense of substantive criteria of democracy. The weaknesses of the ENP AP and its implementation became evident by the end of its term, however it was extended for years despite the possibility of revising its content or its approach. Moreover, for the majority of the period the AP was in force, the document's already weak potential to instigate reform was further undermined by the lack of clarity of ENP incentives. Besides, the AP was seen as an asymmetrical document too 'thick' on Moldovan and too 'thin' on EU obligations.⁸¹⁴ This was particularly the case regarding indications as to EU support for political reform.

The EU also deployed policy-specific instruments in the CFSP and JFS areas. Political dialogue, HRDs, statements and *démarches* preserved the human rights and democratic rhetoric through the last 17 years. JFS instruments, particularly the VLAP were instrumental in securing legislative and institutional reforms in anti-corruption and law enforcement areas relevant for human rights protection.

The next framework document that was established between the parties is the AA, which according to the Commission 'committed Moldova to developing democratic institutions and to upholding human rights in accordance with European Union rules and standards'.⁸¹⁵ The Agreement does impose an obligation on Moldova to honour democratic principles, human rights and fundamental freedoms in a standard human rights clause, which similar to the Ukrainian and Georgian AAs, is more extensive in its scope than other neighbourhood agreements. At the same time, it has less essential elements in comparison with Ukraine. As far as negative conditionality is concerned, the Agreement fails to clarify what would count as 'exceptional circumstances' allowing for treaty suspension or to provide an explicit suspension mechanism given the mixed nature of the agreement.⁸¹⁶ Yet the most peculiar aspect of the non-execution clause is that, in 'exceptional circumstances', trade relations — more specifically the operation of the DCFTA — can be suspended, in contrast to non-fulfilment of other treaty obligations. Although the partial suspension has its advantages, the possible suspension of the trade-related part of the agreement would go against the fundamental practice and preferences of the EU. The essential elements clause has never been used to justify restrictive trade measures.⁸¹⁷ It can be argued that the significance of the threat of DCFTA suspension lies not so much in the potential interruption of trade relations, as in the possibility that the main incentive — the DCFTA itself — will be withdrawn. A DCFTA suspension would not preclude the political cooperation required to achieve the ENP objectives, but the extent to which a country with accession aspirations would cooperate willingly in political and other

⁸¹⁴ Popescu, 'The EU in Moldova - Settling Conflicts in the Neighbourhood' (n 425) 38.

⁸¹⁵ Commission, 2015 Progress Report (Brussels, 25 March 2015) SWD(2015) 69 final 5.

⁸¹⁶ Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (n 268) 404.

⁸¹⁷ 'Using EU Trade Policy to Promote Fundamental Human Rights: Current Policies and Practices' <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf> accessed 27 September 2016; Bartels (n 437) 14.

spheres when the main incentive is put on hold must be doubted. The application of this provision would be surprising given the EU's past practice, whereby suspensions were recorded only in the cases of ACP countries, and mostly in cases of serious breaches of democratic principles, such as a coup d'état.⁸¹⁸ At the same time, the essential element and other provisions in the AA can be assessed positively as establishing the normative framework for the relations between the parties and creating binding obligations on the cooperation with civil society. In this connection, the EU demonstrates a certain reorientation towards civil society by inter alia establishing a roadmap for its engagement.

However, it is disappointing to note that the 2015 AAg follows the pattern of the ENP AP. Instead of reflecting on the criticism directed at the latter, it similarly fails to provide a shorter list of workable and measurable actions for a period of time, and to link them to other policy elements considered next.

3. Inconsistency in Policy Content

Until the establishment of the ENP AP there was no visible connection between the need to implement human rights and democratic reforms and either the assistance provided by the EU or the policy outcomes. In fact, the assistance to democratic reform either under TACIS or EIDHR was scarce, irregular and very patchy. The ENP, however, suggested that the priorities set for cooperation will be regularly monitored and evaluated leading to assistance and policy revision.

Until the 2009 change of Moldovan leadership the political dialogue between Moldova and the EU was largely confined to the PCA Cooperation Council. Although it upheld the human rights rhetoric throughout the years, it nevertheless was not an efficient platform for either voicing criticism or linking Moldova's performance in this area to the advancement in relations between the parties. The main monitoring of the ENP AP undertaken by the Commission, however, is notable for a number of reasons. While Moldova's progress was viewed holistically within the context of the overall cooperation, thus allowing for a scope to find positive trends, the Commission has been rather critical of the efforts in human rights and democratic reforms both under the Communist government and the pro-European coalition, demonstrating a more robust approach. If anything, the scrutiny has intensified after 2009. The robustness of the evaluations was expressed in its scope and depth, as well as the insistence on the implementation of obligations in other international organisations. There is no similar emphasis on conduct of elections as in the case of Ukraine, because Moldova managed to conduct elections that generally meet international standards and as noted before has distinguished itself from its neighbours. Instead the Commission engages extensively with practically all human rights-related issues prioritised in the ENP AP. Unlike in other neighbours, the Commission is keen to criticise the implementation of new legislation, highlight its deficiencies or increase pressure on issues obscured in other neighbours, e.g. LGBT rights. However, the results of the scrutiny are not straightforward. First, they have not resulted in any review of the policy documents. Neither did the negative feedback lead to exercising negative

⁸¹⁸ D. Saltnes (n 438); Bartels (n 437).

conditionality. Nor was there a clear link with financial assistance allocations. In connection with certain issues relevant for political reform, the Commission at times noted that the lack of funding and resources were among the reasons for lack of progress. In some areas these findings were followed up by dedicated assistance allocation. For instance, the lack of resources was a factor affecting reforms in the justice sector,⁸¹⁹ which was followed up by ENPI support of justice sector in 2011-2012. However, in other areas, such as the position of children in residential care where the Commission similarly noted lack of resources affecting progress,⁸²⁰ no similar follow-up can be found.⁸²¹ Furthermore, the results of the monitoring find little reception among the Moldovan public, which perceives the EU as siding with inefficient and even corrupt pro-European government. The way certain information reaches the public leads to negative perceptions of EU policies, for instance on the anti-discrimination legislation.

The ENPI increased the financial package for Moldova, introduced new instruments of technical assistance, and appeared to have a stronger emphasis on democratic development in 2007-2013 CSP. However, the NIPs and the AAPs demonstrate a lack of focus on political reform. Often if prioritised, democracy related reforms are linked to security issues. A notable assistance was the package provided to justice sector reform which was based on a precondition of establishing a relevant national strategy. While the AAPs were not always indicative of the projects financed relevant for political reform, the Commission's progress reports at times mentioned that certain developments took place on the basis of EU support. For instance, the 2013 and 2014 progress reports mention the projects on political parties, and various other issues relevant for political reform implemented by the CoE and supported by the EU politically and financially.⁸²² This means there was no systematic link between the priorities established, the results of the Commission's monitoring and the financing priorities. The ENPI was also weak on financing the civil society. The latter was financed through the EIDHR, which was rather irregular and had a limited budget. Other instruments were also used to sponsor non-state actors, however little information is available about their budget or impact. On a number of occasions, the EU used financial assistance as an incentive or reward to affect the political situation in the country or to keep Moldova on its pro-European track. Under ENP, the Governance Facility and the EaP Regional instrument were used to encourage Moldova in its reforms as it appeared to have made advancement in terms of legislative and institutional reforms. The ENI also deploys positive and negative financial conditionality, and appears to involve the civil society more prominently. The ENI budgetary support was withheld in 2015 in an unprecedented event, due to political scandals in Moldova. Some indications of EU

⁸¹⁹ Commission, 2010 Progress Report (Brussels, 12 May 2010) SEC(2010) 523, 6; Commission, 2011 Progress Report (Brussels, 25 May 2011) SEC(2011) 643, 5.

⁸²⁰ Commission, 2012 Progress Report (Brussels, 15 May 2012) SWD(2012) 118 final, 6.

⁸²¹ An ongoing civil society project concerns ill-treatment of children (Roadmap for Engagement with Civil Society 2014-2017, 10)

⁸²² Commission, 2013 Progress Report (Brussels, 20 March 2013) SWD(2013) 80 final, 5.; Commission, 2014 Progress Report (Brussels, 27 March 2014) SWD(2014) 93 final, 3.

expectations can be discerned from the first AA Parliamentary Committee meeting. However, this occasion could have been used for revising the AAg in a meaningful way.

4. Policy by Default or by Reaction?

The policies to Moldova including in relation to political reform developed either by default or by reaction. The first decade was characterised by a default regional approach devoid of an emphasis on political reform. While more attention followed at the end of the 1990s and early 2000s, this was due to security concerns rather than an interest in Moldova's political transformation. Similarly, the ENP, although directed primarily at Moldova and Ukraine, was reactionary to the new reality linked the enlargement rather than a specific vision on Moldova. At an expert level the EU policies were seen as reactionary towards events in Moldova, rather than guided by a coherent strategy.⁸²³ Despite the ENP's more enhanced democratic rhetoric, Moldova was left to its devices without clear requirements, incentives or specific and conditional support. The EU preferred the stability it associated with the Communist government, and only reacted after the situation radically changed in 2009. Its increased support, inter alia through the Democracy Support Package and high-level meetings, although a welcome reaction, nevertheless did not use the incentives at its disposal to induce change beyond legislative and institutional reform. They were rather directed at keeping Moldova bound by European integration and securing its cooperation and continuous engagement. Besides, certain development that could be assessed positively were a response to the events in the neighbourhood generally. For instance, there was no clear strategy as to the role of the civil society, and the Civil Society Facility deployed under the ENPI was a response to the Arab Spring.

⁸²³ Olga Danii and Mariana Mascauteanu, 'Moldova under the European Neighbourhood Policy: "Falling between Stools"' in Elena Korosteleva (ed), *The Eastern Partnership: A New Opportunity for the Neighbours?* (Routledge 2012) 115.

IV. Belarus

A. Introduction

The present chapter focuses on the concrete problems of the EU's human rights promotion activities in Belarus. The main research question the present analysis seeks to answer, in line with the overall framework of the above mentioned major research project, is how effective are the EU's tools and instruments of human rights promotion vis-à-vis Belarus. However, one needs to take into account the fact that the political relations of the EU and Belarus remain the most limited from all six EaP countries, ever since the EU has suspended the ratification of the Partnership and Cooperation Agreement with Minsk already in 1997, due to the serious human rights violations that took place after President Aleksandr Lukashenko came to power.⁸²⁴ Among such circumstances, the variety of political tools the EU can rely on is much more limited than in the case of such EaP countries, which have more developed and more institutionalized relations with the European Union.

Regarding the methodology of the research, the main question, of course, is how to measure efficiency. The present chapter uses a basically Max Weber-ian approach by looking at whether the use of the given EU tools and instruments were successful in achieving their designated goals, for example, the release of political prisoners, or the holding of free and fair elections.

The very limited scope of EU-Belarus political relations present a particular methodological hardship that is not present in the case of the other five EaP countries. In the case of Georgia, Ukraine, Moldova, and to a smaller extent, also vis-à-vis Armenia and Azerbaijan, there is a clear, largely linear trend of development in relations with the EU, accompanied by subsequent institutionalized achievements, for example, signing Association Agreements, etc.

However, bilateral EU-Belarus relations are largely characterized by periodical ups and downs, but without any institutionalized developments that from the methodological perspective could serve as indicators of any progress. In fact, institutionalized EU-Belarus relations have remained pretty much the same ever since the suspension of the PCA ratification. No EU Neighbourhood Policy Action Plan has been prepared on Belarus, and though the country got included into the Eastern Partnership, it participates only in the multilateral track of the initiative.

At this point, many elements requested for the chapter in the outline of the FRAME project are not applicable in the case of Belarus, because the EU simply does not have many generally used tools and means of human rights promotion place due to largely under-institutionalized nature of relations. For example, the EU cannot rely on actions plans, or an Association Agreement to foster its human rights

⁸²⁴ The Belarusian names mentioned in the study are going to be transliterated to English from their Russian-spelling equivalents.

agenda in Belarus, because none of these frameworks are present. Consequently, in the absence of institutionalized, cooperative frameworks, a comparatively much higher role is played by unilateral, dominantly restrictive measures than vis-à-vis other EaP countries.

The chapter is composed of five main parts. Following the introduction, the first part provides a brief overview of the human rights aspects of EU-Belarus relations focusing on the turning points. The second part analyzes specifically the tools and means the EU has been using vis-à-vis Belarus. The third part intends to provide an insight into the reactions of Belarus to the EU's human rights agenda and the motivations behind it. A factor of decisive importance to be discussed here will be the dominant role played by Russia in the very sustainability of the regime of Aleksandr Lukashenko. The subsequent, fourth part assesses the flexibility and adaptability of the EU's policies, as well as their consistency. The chapter ends with a fifth, concluding part, in which the EU's human rights-related engagement in Belarus gets assessed and also recommendations are made.

In the last years of the Soviet Union, Belarus also had a chance to start its way towards establishing a functioning, multi-party democracy. However, from the very beginning independence was hampered by numerous dysfunctions. First and foremost, similarly to Russia itself, Belarus started its independence years still with the Supreme Soviet elected yet in 1990. Hence, this parliament was dominated by Communist functionaries organized into a number of smaller fractions, the structure of which stabilized finally in January 1991. Meanwhile, in 1990 the pro-independence Belarusian National Front (BNF) won only 37 seats of the altogether 360, thus committed reformists constituted only a small minority. Personal rivalries also inflicted considerable damage to the very functionality of the newborn state: leader of the main opposition movement, the Belarusian National Front (BNF) and the Chairman of the Supreme Soviet (i.e. the parliament) Stanislav Shushkevich and Prime Minister Vyacheslav Kebich, who originally belonged to the classical Communist nomenclature, were the fiercest enemies of each other.

Following the failed Orthodox Communist coup d'état effort in Moscow in August 1991 and the formal breakup of the Soviet Union in December 1991, the balance of power in Belarus changed, but not decisively. Conservative forces still dominated the Supreme Soviet, headed by Kebich. His conservative faction named 'Belarus' was supported by a number of other smaller, pro-regime parties as well, de facto controlled also by Kebich. One of them was the so-called Communists for Democracy group, led by a young politician, the yet inexperienced, but energetic and ambitious Alexandr Lukashenko. Thus political stagnation prevailed and the lack of reforms compared to Ukraine and particularly to the Baltic States became more and more visible to the population. This, together with severe economic hardships and rampant corruption scandals quickly eroded the support of the new parliamentary system. This was particularly so, because – as pointed out by Andrew Wilson⁸²⁵ – for ordinary Belarusians achieving independence was not an as cathartic, identity-forming experience as for the Baltics nations or the Ukrainians.

This was the context when Kebich, in order to finally break both Shushkevich and the BNF, decided to launch a campaign based on corruption charges. Hence, he set up a parliamentary committee to investigate corruption in June 1993, and appointed Lukashenko to lead it. Strangely enough, initially even the BNF backed the idea, because they hoped that Lukashenko would uncover corruption cases related also to the supporters of Kebich. During the anti-corruption campaign Lukashenko gained very high visibility and popularity among ordinary Belarusians. For many the young, dynamic politician with his energy and great rhetorical skills became a symbol of change vis-à-vis the conservative, old nomenclature. The attack on Shushkevich was successful, and finally he had to leave his position in January 1994.

Thereafter Kebich intended to stabilize his position by creating the new, relatively strong post of the president of Belarus, supported by the majority of Supreme Soviet members. However, he was not the

⁸²⁵ Andrew Wilson, *Belarus. The Last European Dictatorship* (Yale University Press, 2011) 140-167.

only candidate, as both Shushkievich and Lukashenko nominated themselves to the race, as well as emblematic BNF leader Zyanon Pazniak. During the election campaign it was already visible that Lukashenko had high support both among ordinary people and also in the business elite.

In the 1994 presidential elections Kebich suffered a surprising and serious defeat from Lukashenko in the first round, when Lukashenko gained 44,8 per cent of the votes, while Kebich got only 17,3. As no candidate received more than half of the votes in the first round, a second round was held, again won by Lukashenko, who received 80,1% of all votes, thus became the first president of Belarus – democratically elected for the first time and until now.

1. Turning Point No. 1: The authoritarian transformation and the freezing of EU relations

In these early years of the nineties the relations of the European Community, later European Union and Belarus were very promising. In August 1992 diplomatic relations were established, and from November 1993 the negotiations with the European Commission on a Partnership and Cooperation Agreement started in Brussels. The PCA was finally initialed on 22 December 1994 and signed on 6 March 1995.⁸²⁶ However, ratification never took place, due to the major domestic political changes in Belarus.

The newly elected Lukashenko intended to avoid similar problems emerging from liberal economic reforms like the ones that happened in neighbouring Russia. Hence, instead of continuing the economic transformation, he decided to change it back and preserve as much of the Soviet stability as possible, in order to cement in his power. This he intended to reach via re-establishing and maintaining close political and economic relations with Russia. Gradually Russia has become the primary economic partner and main supporter of the Lukashenko-regime. Russian economic subsidies have allowed the Belarusian president to maintain social stability and relatively high standards of living in the country. Today Russia is clearly the most important factor that shapes the foreign policy of Belarus. Relations of Minsk with the EU are mostly a dependent variable defined by the relations with Moscow. This is going to be discussed more in detail in Part 3.

In domestic politics, his main priority was to stabilize his power and get rid of all possible contestants. The strongest rivals were the Belarusian National Front and the parliament. In May 1995 a referendum was held, initiated by Lukashenko, on which it was decided that Russian language was to be guaranteed a status equal to the Belarusian, and state symbols were changed back from the old historical ones (the red-white-red flag and the *Pahonia*, a knight on a white horse, both favored by the BNF) to the ones used in Soviet times. This was an important victory over the Belarusian National Front. The referendum was timed in such a way that closer economic cooperation with Russia already started to bear fruits,

⁸²⁶ Commission of the European Communities, 'Proposal for a Council and Commission Decision on the Conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States of the one part, and the Republic of Belarus, of the other part' COM (95) 44. <[http://aei.pitt.edu/48964/1/COM_\(95\)_44_final.pdf](http://aei.pitt.edu/48964/1/COM_(95)_44_final.pdf)> accessed 29 September 2016.

thus the population supported also the other two questions, empowering the president to pursue closer economic integration with Russia, as well as to change the constitution to limit the powers of the Supreme Soviet, which was still composed of the members elected.

The next step was to completely subdue the parliament. The elections held in 1995 did not provide Lukashenko with the full control he wished to have, though he was successful in pushing the BNF out of the Supreme Soviet. However, various liberal groups were still strong. Hence, Lukashenko started to set up fake opposition parties in order to divide opposition supporters, and decided to replace the Supreme Soviet with a new body loyal to him. Thereafter, Lukashenko basically set up a new parliamentary structure parallel to the Supreme Soviet in order to decrease its influence. This was the so-called All-Belarussian People's Assembly, a large, Soviet-style, mostly consultative institution, of course, fully loyal to Lukashenko, organized in October 1996.

Besides, he strengthened his influence among the Ministry of Interior and particularly the secret service structures (*siloviki*), and also took direct control over the state media. In late 1996 he took control over the earlier strong and independent Constitutional Court as well. The Central Electoral Committee shared the same faith: its respected and ambitious chairman, Viktor Hanchar was forcibly replaced by Lidiya Yermoshina, a loyal supporter of Lukashenko. Yermoshina has been holding the same position ever since then, and is steadily present both on the EU and U.S. visa ban list due to her active participation in rigging the results of all referenda and elections.

Following all these, the referendum held in November 1996 was already far from being either free or fair. Its results were used by the president to modify the constitution (de facto to draft a new one). According to the new constitution, the powers of the president became stronger than ever before. The earlier strong Supreme Soviet was replaced by a significantly weaker, bicameral parliament and the principle of separation of powers was ignored almost completely. The president was empowered to appoint all members of the Supreme Court, half of the Constitutional Court (the other half was nominally elected by the upper chamber of the parliament, but on the president's recommendation). The president has the right also to appoint all district and military judges. In addition to all these, based on the adoption of the new constitution, the ongoing term of the president was re-started, thus his mandate was extended until 2001 instead of the original 1999. Pro forma Belarus has become a presidential republic, but in fact, with almost all powers centralized in the president's hand, the country has become a dictatorship.

2. Turning point No. 2: From complete isolation towards a two-track approach

Against all these sweeping changes, the European Union could do little more than protesting, which had little effect on Lukashenko who was pursuing a fully pro-Russian foreign policy. The president simply ignored protests coming both from the EU and the Council of Europe, in which Belarus had a special guest status since 1992. The new parliament of Belarus, established by the 1996 constitution was not recognized either by the EU or by the Council of Europe as the legitimate representative of the people of Belarus. In January-February 1997 the EU sent two fact-finding missions to Belarus to assess the

situation. Parallel to their work, the Council of Europe suspended the special guest status of Belarus in the organization due to the anti-democratic transformation of the country.⁸²⁷

As protests were of no use, the EU gradually came to the conclusion that suspending institutional ties was the only remaining option. Finally, on 15 September 1997⁸²⁸ the EU decided to basically freeze institutional ties by not supporting the candidacy of Belarus to the Council of Europe; by not concluding either the Partnership and Cooperation Agreement or the interim agreement; by limiting bilateral ministerial contacts between the EU and Belarus to be established only through the EU Presidency or the Troika; and by halting all EU assistance programmes except for humanitarian and regional ones (the latter meaning practically the ones related to the consequences of the 1986 Chernobyl nuclear disaster) and the ones aimed exclusively at democratization. Member States were encouraged to review their own assistance programmes along the same principles. This decision was the first important turning point in EU-Belarus relations by basically suspending institutional ties due to the worsening democratic and human rights situation in Belarus.

However, isolation did not bring the expected positive results. Hence, from 1999 to 2003 the EU tried to follow a gradual, step by step approach that would have honored every step made by the Belarusian regime towards democratization with a positive step made by the EU. As pointed out by Peter van Elsuwege, the EU set four criteria in cooperation with the OSCE and the Council of Europe: political truce with the opposition including the stop of arrests and disappearances; liberty of media and free access to it for all political groupings; substantial reform of the electoral code; and to re-establish the meaningful functions of the parliament. Unfortunately, no progress could be observed either during the parliamentary elections of 2000 or the presidential elections in 2001.⁸²⁹

a) *A strategic break in the relations of Belarus and Russia*

Though not directly related to EU-Belarus relations, here one needs to mention an important development in the ties of Belarus and Russia. In the second half of the 1990s, Belarus was strongly pursuing an as close integration with Russia as possible. After a number of transitional steps, the so-called Union State Treaty was signed between Moscow and Minsk in December 1999⁸³⁰ that created a close integration of the two countries. Besides significantly profiting from the close economic cooperation with Russia, Lukashenko presumably also planned to use the Union State as a way to

⁸²⁷ 'Post-Referendum Events, January and February 1997' *A Belarus Miscellany* (1997) <<http://www.belarus-misc.org/post-ref1.htm>> accessed 29 September 2016.

⁸²⁸ European Commission, 'Press Release' (Brussels, 15 September 1997) 10368/97 Presse 269 <http://europa.eu/rapid/press-release_PRES-97-269_en.htm > accessed 29 September 2016.

⁸²⁹ Peter van Elsuwege, 'The European Union and the Belarus Dilemma: Between Conditionality and Constructive Engagement'- Proceedings of the Institute for European Studies (2010) 7 *Journal of Tallinn University of Technology*, 6. <<https://biblio.ugent.be/publication/983686/file/6829541>> accessed 29 September 2016.

⁸³⁰ Katja Yafimava, *Post-Soviet Russian–Belarussian Relationships. The Role of Gas Transit Pipelines* (Ibidem-Verlag, 2007)

dominate Russia. Due to an institutional particularity, in the Executive Committee of the Union State Lukashenko could much more rely on the Chairman of the Russian Duma, the Communist Gennady Seleznev than the increasingly weak and ill Russian President, Boris Yeltsin could. Some experts even think that through the Union State Lukashenko may have planned to be a candidate at the Russian presidential elections held in 2000.⁸³¹

However, the emergence of the young, strong and dynamic Vladimir Putin to the Kremlin fundamentally changed Russia-Belarus relations. The new Russian president was much less tolerant to the economic freeriding of Lukashenko than his predecessor was. Instead, Putin decided to use the Union State for increasing Russia's control over Belarus and transform the so far intergovernmental integration into a real, common state, under unified leadership. Putin even suggested to hold a referendum in both countries in May 2003 about the unification; then to elect the common parliament in December 2003 and thereafter to introduce the Russian ruble as a common currency from 2004.⁸³²

This project would have probably brought the gradual end of Belarus' sovereignty, as well as the power of Alexandr Lukashenko. Not surprisingly, the Belarusian president firmly rejected Putin's proposal.⁸³³ Hence, from autumn 2002 on, the development of the Union State was put to a halt, and instead of further strengthening the ties of Belarus with Russia, Lukashenko shifted on preserving his country's independence from Moscow.

b) The European Neighbourhood Policy

Hence, though purely by chance, the launch of the EU's Wider Europe initiative in 2003 and the European Neighbourhood Policy in 2004 took place in a very favorable moment concerning the relations with Belarus. However, neither of them changed the EU's approach immediately. Both the Wider Europe paper and the European Neighbourhood Policy (ENP) Strategy⁸³⁴ maintained the earlier rigid stance on Belarus.⁸³⁵ Re-establishment of high-level ties with Minsk was still under the condition of introducing functional democratic structures and free and fair elections. According to the ENP Strategy: *"When fundamental political and economic reforms take place, it will be possible for Belarus to make full use of the ENP. Currently however, an authoritarian system is in place in Belarus. Elections since 1996 have failed to meet international democratic standards and democratic structures are lacking. Under*

⁸³¹ Valery Karbalevich, 'The Prospects of Slavic Unity. Belarus' Relations with Russia and Ukraine: a Belarusian View', Arkady Moshes and Bertil Nygren (eds), *A Slavic Triangle?* (FOI, 2002) 97.

⁸³² Andras Racz, 'A belorusz-orosz viszony és a szuverenitás problémája' (2013) 3 Külügyi Szemle <http://kki.gov.hu/download/e/7a/b0000/Kulugyi_Szemle_2013_03_A_belorusz-orosz_vizony_.pdf > accessed 29 September 2016.

⁸³³ Yafimava (n 830) 32.

⁸³⁴ European Commission, 'European Neighbourhood Policy. Strategy Paper' COM(2004) 373 final, <http://www.iemed.org/docs_oficials_migracio/regionalis/COM_2004_373_ENP_Strategy_paper/ENP_COM_2004_373_strategy_paper_en1.pdf > accessed 29 September 2016.

⁸³⁵ Elsuwege (n 829) 6.

*these circumstances, it is not yet possible to offer the full benefits of the ENP to Belarus.*⁸³⁶ However, the Lukashenko-regime did not pay much attention, as Minsk still prioritized its relations with Russia.

Additional steps towards putting pressure on the regime were taken in September 2004, when the first EU sanctions were introduced against four Belarusian leaders, in reaction to the fraudulent presidential elections held in 2001, and also to the disappearance of four well-known figures in 1999-2000,⁸³⁷ including former Minister of Interior Yuri Zakharenko. The EU decision extensively relied on a thorough investigation conducted by the Council of Europe, coordinated by Rapporteur Christos Pourgorides, published in February 2004.⁸³⁸ This was among the first cases, when in the field of human rights the EU relied on the assessment of external actors while shaping its own policy vis-à-vis Belarus.

However, neither condemnation, nor the sanctions induced any meaningful change in the domestic politics of the Lukashenko-regime. The September 2004 parliamentary elections were just as the same fraudulent as the previous ones; moreover, together with the elections, the regime organized a referendum about abolishing the limitation on the number of presidential terms. Not surprisingly, the referendum was “successful”, thus from then on Lukashenko has no constitutional limitation on the number of his presidential terms.

Following all these failures the EU gradually developed a second, parallel approach to its usual – and ineffective – policy of isolation, replacing it with a two-track approach.⁸³⁹ On the one hand, it kept applying a “sticks and carrots” policy towards official Minsk, by promising various rewards for improvements in the field of democracy and human rights, while sanctioning violations and restricting contacts with official authorities. On the other hand, the EU has increased support to the Belarusian civil society, including opposition movements, hoping that they would be able to induce real change in the system.

3. Turning point No. 3: The failed ‘color revolution’ of 2006 and post-election violence

The next chance for a change came with the 2006 presidential elections. Not independently from the wave of so-called ‘color revolutions’ that transformed the post-Soviet space significantly (2003: Georgia, 2004: Ukraine, 2005: Kyrgyzstan and Moldova), the Belarusian democratic opposition also started to campaign for a joint action against Lukashenko. The most important element of their strategy, intensively supported by several external actors, including the EU, the U.S. and several Western political

⁸³⁶ *European Commission*, ‘European Neighbourhood Policy’ (n 834) 11.

⁸³⁷ Council of the European Union, Common Position 2004/661/CFSP concerning restrictive measures against certain officials of Belarus <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004E0661>> accessed 29 September 2016.

⁸³⁸ Parliamentary Assembly of the Council of Europe, ‘Disappeared Persons in Belarus. Report by Mr Christos Pourgourides’ (2004) Doc. 10062 <<http://www.refworld.org/docid/4162a4654.html>> accessed 29 September 2016.

⁸³⁹ *Elsuwege* (n 829) 6-8.

foundations was to nominate a single opposition candidate who would be able to seriously challenge Lukashenko.

Following a lengthy, but basically democratic selection procedure, in October most democratic opposition forces agreed to support Alexandr Milinkevich, a 59 years old physician. Milinkevich decided to follow the models of earlier “color revolution” in his campaign for the election to be held on 19 March 2006. However, he was not successful to include all democratic opposition forces: the charismatic former rector of the Belarusian State University, Alexandr Kazulin stayed out of the opposition coalition and run his own campaign, which was often more colorful and vivid than the somewhat too academic style of Milinkevich.⁸⁴⁰

The strategy of the united opposition was built on active street presence in order to counter the media-superiority of the regime, as well as on a large-scale demonstration on the eve of the elections. Through the latter, the idea was to ensure maximum transparency of the voting by demonstrating the real power of the opposition, and to put pressure on the regime through massive street presence.

Besides various American political foundations, Milinkevich was actively supported both by some EU countries as well as the EU Commission itself. In January-February 2006 he was received by the French Ministry of Foreign Affairs, by the Prime Minister of Poland, by the President of Lithuania, and met several other prominent European politicians, including Angela Merkel.⁸⁴¹ Moreover, he was even received by the European Commission, by its President Jose Manuel Barroso himself, as well as by then CFSP High Representative Javier Solana.⁸⁴² These meetings were very strong statements about the political preferences of the EU, taking into account that both the Commission and Solana had been consistently refusing to meet President Lukashenko.

However, regardless of all opposition efforts, on the 19 March 2006 presidential elections, Lukashenko again scored a landslide victory. According to the official results, the president received 84.4% of the votes, while Milinkevich got 6.2% and Kazulin 2.3%. There was a fourth candidate too: Sergey Gaydukevich, a long-term ally of Lukashenko, who regularly runs on presidential elections, formally always in opposition. He did so in 2001, 2006 and also in 2015. In 2006 the Liberal Democratic Party of Gaydukevich received 3.5% of the votes. In order to judge, to what extent Gaydukevich represented real opposition, it is useful to remember that between December 2006 and September 2007 he served as

⁸⁴⁰ Charles Grant and Mark Leonard, ‘The EU’s Awkward Neighbour: time for a new policy on Belarus’, *Policy Brief*, Centre for European Reform. (2006) 4
<http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/policybrief_belarus_6april06-825.pdf> accessed 11 January 2016.

⁸⁴¹ *ibid.*

⁸⁴² Andrew Rettmann, ‘Belarus opposition leader faces awkward EU reception’ (*RFEL/RL*, 25 January 2006)
<<https://euobserver.com/foreign/20767>> accessed 11 January 2016.

the **special representative of the Foreign Minister of Belarus for relations with European parliamentary organizations.**⁸⁴³

Right on the eve of the elections, democratic forces organized the largest demonstration to Minsk to the October Square (since then, the Belarusian equivalent of the word square, *ploshcha* has become the local version of the Ukrainian political term *Maidan*) ever seen since the early 1990s. According to official sources, only 5-10'000 people took the streets, but there are also estimates about 50'000 participants. Demonstrators protested against the allegedly falsified elections and against the frequent misuse of state power during the campaign and voting in favor of Lukashenko. Support by the preliminary OSCE statement released on 20 March⁸⁴⁴, which spoke about numerous irregularities and declared that the election fell short of OSCE commitments and international electoral standards, protestors demanded new elections, and erected a number of tents, in which many of them intended to stay until new elections took place. This was clearly an effort to copy the success of the Ukrainian Orange revolution in 2004.

However, the overall size of the protest remained limited, further decreased by the freezing temperature. The tent camp was small and really of ad hoc nature, with no logistics organized almost at all. Hence, the demonstration was much smaller in size and in terms of organization than the one in Kyiv two years earlier. Therefore, after a few days of subtle efforts to undermine the cohesion of the demonstrators, in the morning of 24 March 2006 authorities dispersed the tent camp by force, and arrested 3-400 demonstrators. On the next day opposition forces organized another protest demonstration against the forceful dispersal of the *ploshcha*. The riot police brutally cracked down this gathering: one person died and hundreds were injured and arrested, including Alexandr Kazulin himself. He was later sentenced to six years of imprisonment.

The EU answered to the events by strengthening its two-track approach, still based on the continued isolation of the regime conditioned on improvements in the field of human rights and democracy, and on the parallel engagement with civil society forces. Already in May 2006 a new round of sanctions were passed⁸⁴⁵, composed of visa bans and asset freezes against President Lukashenko and 35 of his top officials. Besides, in November the EU released a non-paper titled "What the European Union could

⁸⁴³ 'Syarhey Haydukevich relieved of duties of foreign minister's special representative' (*Naviny.by*, 14 September 2007) <http://naviny.by/rubrics/english/2007/09/14/ic_news_259_276966/> accessed 11 January 2016.

⁸⁴⁴ OSCE Parliamentary Assembly International Electoral Observation Mission, 'Presidential Election, Republic of Belarus – 19 March 2006' (2006) <<http://www.osce.org/odihr/elections/belarus/18487?download=true>> accessed 11 January 2016.

⁸⁴⁵ Council Regulations (EC) 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus (2006) OJ L134/1 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:134:0001:0011:EN:PDF>> accessed 11 January 2016.

bring to Belarus,⁸⁴⁶ in which significant political and trade concessions were offered in exchange for improving the situation of human rights and democracy in the country, including the release of all political prisoners. The non-paper, to be discussed more in detail in Part 2, has been the first, really comprehensive set of expectations that the EU has set vis-à-vis Belarus. The non-paper also stressed that if no improvements take place, the EU would not be able to engage with Belarus any further, thus de facto the on-going restrictive policy would continue.

The next step of restrictions took place in mid-2007, when the EU suspended the access of Belarus to the Generalized System of Preferences⁸⁴⁷ (GSP), thus in practice imposed trade restrictions on Minsk. The reason was that Belarus repeatedly failed to comply with the recommendations of the International Labour Organization (ILO) on trade unions, given following a three years long, thorough survey of workers' rights. However, Minsk did not adapt them, and kept on repressing trade unions, most probably motivated by the will to prevent any organized activity that may possibly oppose the regime. Suspending the GSP was the second case following the first trade restrictions adopted in 2004 when the EU took a step following the recommendation of an external actor.

Parallel to the “sticks and carrots” policy conducted with the regime, the EU also intensified its engagement with Belarusian civil society, in line with the two-track approach described above. The EU has developed a specific tool, the European Instrument for Democracy and Human Rights (EIDHR), established in December 2006.⁸⁴⁸ The EIDHR was intended to support Belarusian civil society more efficiently, than it was possible in the TACIS framework. Besides, in December 2006 the EU granted the Sakharov Prize to Alexandr Milinkievich⁸⁴⁹, which was another clear indication of Brussels' priorities.

4. Turning point No. 4: the war in Georgia and the false hopes of liberalization

The August 2008 war in Georgia brought a definite change in the whole EU Neighbourhood Policy, including the EU's relations to Belarus. Instead of a direct confrontation with Russia, the EU decided to intensify its policies towards the common neighbourhood. As it was put in the Presidency Conclusions of

⁸⁴⁶ EEAS, 'What the European Union could bring to Belarus' - Non-paper <http://eeas.europa.eu/delegations/belarus/documents/eu_belarus/non_paper_1106.pdf> accessed 12 January 2016.

⁸⁴⁷ Andrei Yeliseyev, 'Belarus Risks Becoming Only State Stripped Of EU Trade Preferences' (*Belarus Digest*, 14 February 2013) <<http://belarusdigest.com/story/belarus-risks-become-only-state-stripped-eu-trade-preferences-12979>> accessed 12 January 2016.

⁸⁴⁸ Council Regulations (EC) 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (2006) OJ L386/1 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006R1889>> accessed 11 January 2016.

⁸⁴⁹ European Parliament, 'Sakharov Prize Network, Aliaksandr Milinkievich' (2006) <http://www.europarl.europa.eu/intcoop/sakharov/laureates/milinkevich_en.html> accessed 12 January 2016.

the Extraordinary Council Meeting held on 1 September 2008, the EU *“decides to step up its relations with the eastern neighbours.”*⁸⁵⁰

Belarussian diplomacy quickly took note of the changing EU approach, and as a move of goodwill, all political prisoners were released already in late August 2008, including former presidential candidate Alexandr Kazulin. From the side of the EU, Benita Ferrero-Waldner declared that *“This news comes at a critical time as Belarus prepares for parliamentary elections next month. I very much hope the positive momentum will continue and allow the European Union and Belarus to rapidly develop closer relations.”*⁸⁵¹ In reality, the positive momentum did not continue, as the 28 September parliamentary elections were just as undemocratic as they „usually“ have been in Belarus. No opposition candidate could make it to the parliament, despite some earlier hopes.

However, despite the apparent lack of progress, the EU still continued to renew its relationship with Belarus. The main motivation of the EU to do so was, besides the above-mentioned release of political prisoners, that Belarus denied to recognize the „independence“ of Abkhazia and South-Ossetia, despite strong Russian pressure. This was very much appreciated by the EU.⁸⁵²

The first step of reconciliation was to suspend the visa ban for six months against almost all Belarusian officials, including President Lukashenko himself. Altogether, the ban on 36 officials was suspended, out of the 41 included on the list.⁸⁵³ One of the notable exceptions was Lidiya Yermoshina, Head of the Central Electoral Committee of Belarus, who was held responsible for the anti-democratic nature of the elections.

During the visit of Hugues Mingarelli, deputy director of DG External Relations to Minsk on 5-6 November 2008, the Belarusian leadership expressed its readiness to renew technical cooperation with the EU. They mentioned three main areas: food safety, contacts between financial institutions and the

⁸⁵⁰ European Council, Presidency Conclusions of the Extraordinary European Council' (Brussels. 1 September 2008) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/102545.pdf> accessed 13 January 2016.

⁸⁵¹ Office for a Democratic Belarus, 'Benita Ferrero-Waldner today welcomes the release of Andrei Kim and Siarhei Parsyukevich' (2008) <<http://democraticbelarus.eu/node/4822>> accessed: 13 January 2016.

⁸⁵² Actually the non-recognition was a precondition of Belarus getting included to the Eastern Partnership, as it was openly declared by Czech foreign minister Karel Schwarzenberg in December 2009: *If they recognize South Ossetia and Abkhazia, it would create a very, very difficult situation for Belarus because Belarus would be out of the European consensus.*" Minsk did not, thus finally it got included into the Eastern Partnership project. The EU had an obvious geopolitical motivation in this case, i.e. not to push Belarus in Russia's arms. Meanwhile, the non-recognition has become a severe breaking point in the Russia-Belarus relations. Moscow has expressed hopes from the very beginning that Minsk was going to recognize the two break-away republics, but this did not happen. For more information, see: 'EU warns Belarus not to recognize separatist regions' The New York Times (3 Dec 2009). <<http://www.nytimes.com/2009/02/23/world/europe/23iht-union.4.20381388.html>> accessed 13 January 2016.

⁸⁵³ 'EU preparing to renew Belarus sanctions as election looms' (*EUobserver*, 27 September 2010) <<http://euobserver.com/9/30895>> accessed 13 January 2016.

harmonization of food safety regulations.⁸⁵⁴ It is worth noting though that human rights were not mentioned at all. A few days later, on 13 November 2008 Head of the Presidential Administration Vladimir Makey declared that the Belarusian leadership was interested in cooperation with the EU on all levels.

This sudden cooperative change in the foreign policy of Belarus vis-à-vis the EU was mainly motivated by economic concerns. The financial crisis that started in autumn 2008 affected the Belarusian economy seriously, and the rising Russian energy prices also contributed to the problems. Thus it became especially important to attract as much foreign investment as possible in the long run, while in the short run the regime aimed at getting a large loan from the IMF. In order to get support from the IMF, Belarus did its best to further improve relations with the EU as well.

In order to demonstrate goodwill of the regime, from November 2008 the opposition newspapers *Narodnaya Volya* and *Nasha Niva* became again allowed to be distributed by the state distribution monopoly Belsoyuzdruk company. After the publication of the first version of the Eastern Partnership document, which was favorable to Belarus, the Lukashenko-regime permitted the registration of the 'For Freedom' movement of former presidential candidate Alexandr Milinkevich on 17 Dec. 2008. The EU responded with launching two extensive assistance programmes on environmental assistance and food safety, in 2008 and 2009 respectively.

Again, the promotion of human rights was missing both from the official Belarus and also from the EU agenda. It seemed that both sides tacitly put human rights and democracy-related concerns aside in favor of a possible political *rapprochement*. The Belarusian leadership did not miss the moment to act: on 10 November 2008 Lukashenko signed a particularly repressive law on information sources that has seriously limited independent media. In addition to this, a month later the police arrested several young activists, who organized a commemoration on the anniversary of the Universal Declaration of Human Rights. There came no official criticism from the EU.

5. Turning point No. 5: Post-Election Violence in 2010

Despite the softening of the EU approach that followed the war in Georgia, the presidential elections held in 2010 constituted another turning point, this time to a negative direction. Originally the elections would have taken place only in 2011, but the regime decided to hold them earlier, on 19 December 2010, mostly due to the dramatically worsening relations with Russia, to be described more in detail in Part 3.

Compared to the previous presidential elections, this time the opposition was given much more room for campaigning, including equal access to the public media and visibility in the press. There was even an unprecedented, public media debate held for all the presidential candidates, permitted by a January

⁸⁵⁴ 'EU Wants to Cooperate With Belarus in Three New Areas.' (*IStockAnalyst*, 5 November 2008) <http://www.istockanalyst.com/article/viewiStockNews+articleid_2772304.html> accessed 13 January 2016.

2010 modification of the Electoral Code.⁸⁵⁵ Unlike in 2006, opposition political parties were not successful in uniting their forces, mainly because the Western external donors financing them reportedly could not agree among themselves. Besides, the U.S. administration of Barack Obama did not pursue the spread of democracy and the support of ‘color revolutions’, which further contributed to the weakness and fragmented nature of Belarusian opposition.

Among such circumstances, emblematic opposition leader of 2006, Alexandr Milinkevich decided not to participate in the elections at all. Instead, he tacitly supported the Movement for a European Belarus and its charismatic leader, Andrey Sannikov. Another prominent opposition candidate was writer and poet Vladimir Neklyayev, founder and leader of the ‘Tell the Truth!’ civil society campaign.

Despite the structural weaknesses of opposition forces (fragmentation, low external support) compared to 2006, the regime still did not allow a fully free and fair campaign. In many respect the situation was much better than in 2006. However, the death of the main campaign manager of Sannikov, journalist Oleg Bebenin overshadowed these positive developments. Bebenin, founder and director of the well-known opposition news website Charter97.org⁸⁵⁶ was found hanged in his countryside home on 3 September 2010. Though authorities quickly closed the case as a suicide, numerous factors pointed towards a murder in connection with Bebenin’s political activities.⁸⁵⁷ If true, the death of Oleg Bebenin represented a serious fallback in the already grave human rights situation of Belarus, as the previous cases of disappearances (allegedly: killings) of opposition activists took place in 1999-2000.⁸⁵⁸ If Bebenin was murdered for his political activity, this means that the regime was still able and willing to use even extremely severe measures against its opposition even in 2010.

The election held on 19 December followed the almost usual patters, with numerous irregularities both during the voting and the counting of the votes.⁸⁵⁹ On the evening of the elections, opposition forces summoned their supporters to a protest demonstration to the centre of Minsk. However, the riot police blocked the demonstrators from reaching the originally designed place of the rally, thus they decided to gather on a nearby square. Meanwhile, unknown, masked men attacked opposition candidates Vladimir Neklyayev and Mikola Statkevich, who both walked in the crowd. Both politicians were forcefully abducted, while Neklyayev was beaten to unconsciousness.

⁸⁵⁵ OSCE, ‘OSCE/ODIHR Election Observation Mission Final Report, Republic of Belarus, Presidential Election, 19 December 2010’ (2011) <<http://www.osce.org/odihr/elections/75713?download=true>> accessed 14 January 2016.

⁸⁵⁶ <www.charter97.org> accessed 29 September 2016.

⁸⁵⁷ FIDH Worldwide Movement for Human Rights, The persecution against independent voices must stop. The death of Aleh Byabenin must be investigated (2010) <<https://www.fidh.org/en/region/europe-central-asia/belarus/The-persecution-against>> accessed 16 January 2016.

⁸⁵⁸ Amnesty International, ‘16 Years of Silence: Enforced Disappearances in Belarus Must Be Investigated’ (*Amnesty International*, 18 September 2015) <http://blog.amnestyusa.org/europe/16-years-of-silence-enforced-disappearances-in-belarus-must-be-investigated/> > accessed 16 January 2016.

⁸⁵⁹ OSCE, ‘OSCE/ODIHR Election Observation Mission Final Report, Republic of Belarus, Presidential Election, 19 December 2010’ (2011) <<http://www.osce.org/odihr/elections/75713?download=true>> accessed 14 January 2016.

During the main demonstration, on which approximately 30-40000 people took part, a few people – according to opposition sources: provocateurs – attacked the building of the government and smashed its windows. This gave the green light for the riot police to crack down the whole demonstration by force. Hundreds were beaten severely and altogether 639 persons arrested.⁸⁶⁰ Sannikov, who also participated in the demonstration, was specifically singled out by riot policemen and was beaten brutally: he suffered serious head injuries and got his legs broken as well.

Several other opposition candidates and politicians were arrested too, such as Alexandr Mikhalevich and Vitaly Rimashevsky. Parallel to the crackdown of the demonstrations, several opposition websites were jammed, hacked or their editorial boards raided by special forces. Editor-in-chief of the website Charter97, Natalya Radina, who replaced Bebenin was arrested while the editorial office was searched.⁸⁶¹

While most ordinary opposition demonstrators were released, most arrested politicians and journalists were charged with organizing mass disorder, punishable by 8-15 (!) years in prison. Amnesty International declared all of the arrested ones to be prisoners of conscience. The spokesperson of Sannikov was quickly sentenced to four years of imprisonment. Sannikov himself, after getting severely mistreated in the prison, was finally sentenced to five years in May 2011. He was pardoned by Lukashenko and released in April 2012.

As pointed out by Andrew Wilson, crackdown of the opposition protests was clearly designed and executed in such a way that it surely ruined all efforts to restore relations with the West. Whether it was a deliberate decision of Lukashenko himself, or he was misled by his subordinates, and what role Russia played in the events remains to be researched. However, from the perspective of Western reaction, this did not really matter: already in January 2011 the EU has extended the list of sanctions, including visa bans and asset freezes,⁸⁶² affecting altogether 117 persons, including Lukashenko too. In June 2011 additional sanctions were introduced against four other individuals and three business companies, including the national arms trader Beltechexport,⁸⁶³ as well as an arms embargo.⁸⁶⁴

⁸⁶⁰ Wilson (n 825) 234.

⁸⁶¹ Michael Schwirtz, 'Clashes in Belarus Show Resilience of Both Sides' *The New York Times* (21 December 2010) <http://www.nytimes.com/2010/12/22/world/europe/22belarus.html?_r=0> accessed 16 January 2016.

⁸⁶² Council Implementing Regulation (EU) No 84/2011 amending Regulation (EC) No 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus (2011) OJ L28/17 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1408098487338&uri=CELEX:32011R0084>> accessed 16 January 2016.

⁸⁶³ Council Decision 2011/357/CFSP amending Decision 2010/639/CFSP concerning restrictive measures against certain officials of Belarus (2011) OJ L161/25 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011D0357>> accessed 16 January 2016.

⁸⁶⁴ Council Regulation (EU) No 588/2011 amending Regulation (EC) No 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus (2011) OJ L161/1 <http://www.sipri.org/databases/embargoes/eu_arms_embargoes/belarus/council-regulation-eu-no-588-2011.pdf> accessed 16 January 2016.

6. Turning point No. 6: The War in Ukraine

Ever since the crackdown of post-election protests in December 2010, EU-Belarus relations remained basically in the same situation. The Lukashenko-regime showed no serious signs of any rapprochement intentions, and the EU kept up the sanctions introduced by modifying the ones affected from time to time. The only meaningful exception was the suspension of the travel ban against Minister of Foreign Affairs Vladimir Makei in June 2013⁸⁶⁵ in order to allow him to participate in the Vilnius Summit, held in November 2013.⁸⁶⁶

However, the war in Ukraine has decisively changed both the geopolitical landscape in Eastern Europe, and also the place of Belarus in it. From the isolated, last dictator of Europe, as he was once called by Victoria Nuland, Lukashenko has become an important partner in the conflict settlement. Belarus hosted the Minsk I and Minsk-II ceasefire negotiations, as well as provided Ukraine with important trade opportunities by not joining the Russian sanctions against Kyiv. Lukashenko declared several times that Belarusian armed forces were not going to cross the Ukrainian border, thus made an important contribution to the security of Ukraine. Besides, the regime decided not to prosecute the Belarusian individuals who participated in the EuroMaidan demonstrations, or volunteered to fight on the side of the government forces in Ukraine.

However, at the same time Lukashenko refused to condemn the Russian annexation of the Crimea; moreover, in the UN General Assembly on 27 March 2014 Belarus voted against the resolution that supported the territorial integrity of Ukraine and declared the Crimean “referendum” invalid.⁸⁶⁷ These steps clearly demonstrated where the limits of his freedom of manoeuvre have been.

As the war in Ukraine escalated, several Western experts argued⁸⁶⁸ that it was in the best interest of the EU to support Lukashenko in his efforts to distance his country from Moscow, thus suggested the suspension of the EU sanctions introduced and extended in 2011. The regime has clearly been not only aware of, but actively supporting this discourse, and recognized the opportunity. Hence, in July 2015 in

⁸⁶⁵ Council Decision 2013/308/CFSP amending Decision 2012/642/CFSP concerning restrictive measures against Belarus (2013) OJ L172/31 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:172:0031:0031:EN:PDF>> accessed 16 January 2016.

⁸⁶⁶ Ryhor Astapenia, ‘EaP Summit In Vilnius: Weak But Positive Signals On Belarus’ (*BelarusDigest*, 29 November 2013) <<http://belarusdigest.com/story/eap-summit-vilnius-weak-positive-signals-belarus-16298>> accessed 16 January 2016.

⁸⁶⁷ UN PaperSmart, ‘Voting Record on Draft Resolution A/68/L.39 Territorial Integrity of Ukraine’ (2014) <<https://papersmart.unmeetings.org/en/ga/68th-session/plenary-meetings/documents/voting-record/resolution-68262/>> accessed 16 January 2016.

⁸⁶⁸ For example, see Vladimir Socor, ‘Bringing Belarus Back In From the Cold (Part One)’ (2015) 12/107 *Eurasia Daily Monitor* <http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=44012&cHash=bdd799881a6ad4ca5f6339d095307373#.VrNoJHYrK70> accessed 16 January 2016.

Brussels the second-ever EU-Belarus human rights dialogue meeting was held⁸⁶⁹ – the original dialogue started in 2009, but was suspended after 2010.

As a positive reaction to the gesture made by Minsk, on 31 July 2015 the EU removed 24 Belarusian officials from the sanctions list⁸⁷⁰, including such prominent figures as Head of the State Border Committee Leonid Maltsev and Gennadiy Nevyglas, Commander of the Presidential Security Service. Lukashenko reacted with a similarly positive gesture, thus in late August pardoned the last remaining six political prisoners, who were incarcerated yet in connection with the 2010 post-election demonstrations, among them former opposition presidential candidate Mikola Statkevich.⁸⁷¹

Though several analysts warned⁸⁷² that the release of political prisoners has been nothing more than an usual tactical move from the regime, similar to the ones made in 2008 aimed at improving the relations with the EU in the shadow of an aggressive Russia, both the EU⁸⁷³ and the U.S.⁸⁷⁴ warmly welcomed the decision. The U.S. stressed however, that the upcoming presidential elections also need to be conducted without any major disturbances.

On 11 October 2015 Lukashenko easily won his fifth term in the presidential elections.⁸⁷⁵ He did not meet much resistance from the opposition: besides their usual internal divisions, opposition parties were also unwilling to seriously challenge Lukashenko. The reason was that they realized that any major electoral unrest might provide Russia with a pretext to intervene in order to prevent political developments unfavorable for Moscow. Hence, at this point, paradoxically enough the interests of the regime and its opposition matched in keeping Russia out, thus in keeping Lukashenko the president.⁸⁷⁶ Unlike in 2006 and 2010, no serious post-elections demonstrations took place, even though both the

⁸⁶⁹ Human Rights Watch, 'Belarus. Events of 2015' (2016) <<https://www.hrw.org/world-report/2016/country-chapters/belarus>> accessed 2 February 2016.

⁸⁷⁰ Council Implementing Regulation (EU) 2015/1326 implementing Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (2015) OJ L206/16 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R1326>> accessed 2 February 2016.

⁸⁷¹ 'Belarus president Lukashenko pardons six jailed opposition figures' *The Guardian* (24 August 2015) <<http://www.theguardian.com/world/2015/aug/24/belarus-president-lukashenko-pardons-six-jailed-opposition-figures>> accessed 2 February 2016.

⁸⁷² Joerg Forbrig, 'Belarus prisoner release: Same old trick' (*EUobserver*, 24 August 2015) <<https://euobserver.com/opinion/129969>> accessed 2 February 2016.

⁸⁷³ European Commission, Statement STATEMENT/15/5522, (2015) <http://europa.eu/rapid/press-release_STATEMENT-15-5522_en.htm> accessed 2 February 2016.

⁸⁷⁴ United States Mission to the OSCE, Release of Belarus Political Prisoners (2015) <http://osce.usmission.gov/sep_3_15_belarus.html> accessed 2 February 2016.

⁸⁷⁵ Andrei Makhovsky, 'Belarus re-elects 'last dictator in Europe' for fifth term' *Reuters* (11 October 2015) <<http://www.reuters.com/article/us-belarus-election-idUSKCN0S40ZI20151012>> accessed 2 February 2016.

⁸⁷⁶ For more details, see Arkady Moshes and András Rác, 'No Change on the Horizon: Belarus After the 2015 Presidential Election' (2015) Fiiia Briefing Paper 181 <<http://www.fiiia.fi/assets/publications/bp181.pdf>> accessed 29 September 2016.

campaign and the election were as non-democratic as the earlier ones.⁸⁷⁷ The EU's official commentary refrained from any harsh criticism and stressed the importance of peacefully conducted elections.⁸⁷⁸

Despite this foreseeable outcome of the elections, on 29 October 2015 the EU suspended the travel ban against 170 Belarusian individuals and the assets freeze against three Belarusian enterprises for the duration of four months, until the end of February 2016, as a positive reaction to the release of all political prisoners. Only the sanctions introduced against the four individuals involved in the disappearances remained in place, as well as the arms embargo.⁸⁷⁹

Hence, at present it remains to be seen, whether the war in Ukraine and the performance of Belarus as a facilitator will bring a structural change in EU-Belarus relations, including the promotion of human rights and fundamental freedoms. A declaration of Lukashenko, in which he described hosting the Minsk talks only as a present (!) to the EU in order to get the sanctions suspended,⁸⁸⁰ gives only limited room for any optimism about any structural change in the field of human rights and democracy in Belarus.

This is particularly so, because the regular daily harassment of opposition politicians and civil society activists did not stop. Moreover, the Belarusian criminal justice system is still sentencing people to death, despite the repeated requests from the EU and the Council of Europe to abolish death penalty. Since the suspension of the EU-sanctions, already two individuals received capital sentence, one in the end of November 2015⁸⁸¹, and one in mid-January 2016,⁸⁸² though they have not been executed yet. The lack of improvement of the human rights situation in Belarus is confirmed also by the World Report 2016 of Human Rights Watch.⁸⁸³

⁸⁷⁷ OSCE, 'OSCE/ODIHR Election Observation Mission Statement of Preliminary Finding and Conclusions, Republic of Belarus, Presidential Election, Presidential Election, 11 October 2015' (2015) <<http://www.osce.org/odihr/elections/belarus/191586?download=true>> accessed 2 February 2016.

⁸⁷⁸ EEAS, Statement, 151012_04_en (2015) <http://eeas.europa.eu/statements-eeas/2015/151012_04_en.htm> accessed 2 February 2016.

⁸⁷⁹ Laurence Norman, 'EU Suspends Most Sanctions on Belarus' *The Wall Street Journal* (30 October 2015) <<http://www.wsj.com/articles/eu-suspends-sanctions-on-belarus-1446128237>> accessed 2 February 2016.

⁸⁸⁰ 'Лукашенко: переговоры в Минске по Украине стали подарком для Запада и поводом для отмены санкций' (*Tut.by*, 30 December 2015) <<http://news.tut.by/politics/479077.html>> accessed 2 February 2016.

⁸⁸¹ EEAS, 'Statement, 151120_04_en' (2015) <http://eeas.europa.eu/statements-eeas/2015/151120_04_en.htm> accessed 2 February 2016.

⁸⁸² EEAS, 'Statement, 160113_01_en' (2016) <http://eeas.europa.eu/statements-eeas/2016/160113_01_en.htm> accessed 2 February 2016.

⁸⁸³ Human Rights Watch, 'Belarus. Events of 2015' (2016) <<https://www.hrw.org/world-report/2016/country-chapters/belarus>> accessed 2 February 2016.

B. Human Rights Tools of the EU vis-à-vis Belarus

1. Limits of the EU's Toolbox vis-à-vis Minsk

The human rights toolbox of the European Union vis-à-vis Belarus is much more limited than it is in connection with other countries of the Eastern Partnership due to a multitude of reasons. One of them is the shortage of institutionalized contacts between the EU and Minsk that also limits the scope of policy tools to be used; the other is the limited EU presence in Belarus, while a third reason is that the EU can rely only on a very few partners if needs human rights-related input coming from Minsk.

a) *Limited institutionalized contacts*

The fact that there is no valid PCA between the EU and Belarus results in a serious shortage of institutionalized contacts and communication channels. There is no such an established, regular dialogue between Brussels and Minsk as there is with every other country belonging to the EU's Neighbourhood Policy. Consequently, Belarus is not part of the bilateral track of the EU's Eastern Partnership initiative either.

In the absence of an overarching institutionalized framework, currently EU-Belarus bilateral relations are formally governed by the subsequent conclusions of the EU Foreign Affairs Council,⁸⁸⁴ though from time to time there is also room for less formal, second-track initiatives. However, these are only of limited efficiency, mostly due to the strategic manoeuvring of Minsk, to be discussed more in detail in Part 3.

Besides, as part of the EU's restrictive measures adopted following the authoritarian transformation of Belarus, it was decided that dialogue with Minsk was limited to the so-called Troika format, while other high-level (heads of states, ministerial, etc.) contacts were seriously restricted. Though there were a few exceptions made on bilateral basis in the last two decades – for example, Lithuanian president Dalia Grybauskaitė visited Minsk in 2010⁸⁸⁵, or German foreign minister Guido Westerwelle together with his Polish colleague Radek Sikorski in 2010 – the decision to limit high-level contacts with Minsk has been largely observed until the breakout of the war in Ukraine.

Another factor limiting high-level contacts has been that President Lukashenko was on the EU visa ban list between 2004 and 2015, together with many of his ministers and other prominent officials. Therefore, discussions and negotiations on technical matters (trade, transport, education, etc.) have been mainly conducted on lower levels, involving mostly deputy ministers, heads of ministerial departments from both sides.⁸⁸⁶ Though the war in Ukraine and the negotiations in Minsk brought a

⁸⁸⁴ EEAS-Delegation of the European Union to Belarus, 'Relations between Belarus and the EU – an Outline' <http://eeas.europa.eu/delegations/belarus/eu_belarus/political_relations/index_en.htm> accessed 3 February 2016.

⁸⁸⁵ Rokas M. Tracevskis, 'Grybauskaite's historic visit to Belarus' *The Baltic Times* (27 October 2010), <<http://www.baltictimes.com/news/articles/27230/>> accessed 3 February 2016.

⁸⁸⁶ Interview with Belarusian diplomat in Budapest, November 2015.

spectacular change in this policy – it would have been very hard to imagine the German Chancellor visiting Minsk before – it does not mean that the EU’s possibilities of taking action would have improved in any sense regarding the human rights situation in Belarus.

b) Limited diplomatic presence

Besides, the EU has only a limited diplomatic presence in Minsk. Concerning the EU as a whole, the Commission Representation in Minsk was opened only in 2008. It is a relatively small representation, with only a handful of diplomats working there. Regarding individual EU Member States, only 16 of them have embassies or other diplomatic representations in Minsk.⁸⁸⁷ While Poland and Lithuania also have consulates in some major countryside cities in addition to their embassies in Minsk, most embassies are small in terms of staff.

One also needs to mention that Minsk is traditionally considered to be a difficult place to work, which does not make Belarus to be an attractive place for Western diplomats. According to interviews conducted with several diplomats of EU member states who served or serve in Minsk, surveillance conducted by the Belarusian special services is exceptionally strong and tight. Besides, there are regular efforts to compromise or blackmail EU diplomats, or simply to make their life and work difficult. Some of these even reached the public, for example the case of the Hungarian diplomat filmed in early 2011 while conducting an extra-marital love affair, or the Estonian *charge d'affaires* in a similar kind of situation, while a Swedish diplomat was charged of smuggling and expelled from the country. While these compromising efforts are more inconvenient than dangerous, one needs to keep in mind that there were also cases when diplomats of EU countries died among suspicious circumstances, for example a Lithuanian diplomat, who allegedly fell off from a 9th floor balcony in 2006⁸⁸⁸, or a Polish diplomat also in the same year.⁸⁸⁹

The diplomatic presence of Belarus in EU countries is also limited.⁸⁹⁰ Part of the reasons of this limited presence is that the Belarusian foreign service is still operating mostly according to Soviet standards, and particularly among higher-ranking officials the number of English-speakers is still limited.

⁸⁸⁷ The EU countries not having diplomatic representations in Belarus are Austria, Belgium, Croatia, Finland, Ireland, Luxembourg, the Netherlands, Portugal, Slovenia, Spain and Sweden.

⁸⁸⁸ ‘Suspicious surround Lithuanian diplomat's death in Belarus’ *The Baltic Times* (30 August 2008) <<http://www.baltictimes.com/news/articles/16214/>> accessed 3 February 2016.

⁸⁸⁹ WikiLeaks, ‘*Embassy Minsk Weekly Report April 18, 2006*’ (2006) Cable No. 06MINSK427_a <https://wikileaks.org/plusd/cables/06MINSK427_a.html> accessed 3 February 2016.

⁸⁹⁰ Belarus has diplomatic representation in 17 EU countries: Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Romania, Slovakia and the United Kingdom. See: Министерство иностранных дел Республики Беларусь, ‘Дипломатические представительства Республики Беларусь’ <<http://belarusfacts.by/belembassy/>> accessed 3 February 2016.

c) The EU has only a few partners to rely on regarding human rights

An additional problem is that not only its presence is limited, but so is the number of partners the EU can work together regarding the human rights situation in Belarus. First and foremost, Belarus is the only country in Europe that is not a member of the Council of Europe. Though accession was on the agenda in the early 1990s, and Minsk even applied for membership in 1993, its candidacy was suspended in 1996, as a reaction to the authoritarian turn of President Lukashenko.

Second, the presence of the OSCE in Belarus is also limited. The official OSCE representation in Minsk was opened only in 2003, but the regime forced the OSCE to close it down in 2011. Third, a key EU partner in cooperation for the protection of human rights, the United States is in a very similar situation. Though the State Department maintained a large embassy in Minsk, in 2008 its ambassador, Karen Stewart had to leave her position, while five of her colleagues were declared *persona non grata* by the Belarusian authorities. All in all, most of the diplomatic staff was also requested to leave the country. Since then, the U.S. maintain only a largely symbolic presence in Minsk that can be only of limited use for cooperating with the EU in terms of human rights and fundamental freedoms.

Fourth, the Lukashenko-regime operatives have been and are regularly harassing domestic and foreign human rights organizations. Repression is regular and tough. Tools employed range from administrative pressure to criminal procedures, from severe fines to years-long imprisonments. Sadly enough, the suspension of EU sanctions in late October 2015 did not bring much change: though political prisoners were released, harassment of opposition and human rights organizations has continued uninterrupted, as confirmed both by the December 2015 and the January 2016 reports of the Viasna human rights organization.⁸⁹¹

d) The lack of will of Belarus to cooperate

Last, but not at least, one needs to realize that probably the most important limitation of the EU's human rights protection possibilities in Belarus is simply the lack of will of Minsk to cooperate. As this will be explained more in detail in Part 4, here only two factors are mentioned. First, as a strongly authoritarian system, the Lukashenko-regime perceives human rights and particularly democratic freedoms as an endangering factor that could destabilize the political system and the rule of the present elites. Hence, it is not surprising at all that repressing those ideas and movements has been constantly high on the domestic political agenda of the regime.

Second, unlike some other partners of the EU's eastern neighbourhood policy, Minsk does not aspire for any closer, more institutionalized relations with the EU, or for Western-style modernization of the country, not to mention EU membership perspective. At this point, the EU is deprived of its most

⁸⁹¹ Viasna Human Rights Center, 'Human Rights Situation in Belarus in 2015. Analytical review' (2016) <<http://spring96.org/en/news/81992>> accessed 3 February 2016.

effective and most attractive incentive vis-à-vis the neighbouring countries, and has actually not much to offer to Minsk.

As a result, Belarus has been rather consistently refusing, or simply ignoring Western requests for a substantial change in the nature of the system. The first such effort of the EU was made shortly after freezing of the relations with Minsk, already in 1999. At that time the EU, together with the Council of Europe and the OSCE set four criteria for Minsk to fulfill in exchange for the normalization of relations. These were: 1) set a political truce with the opposition and put politically motivated arrests and disappearances to an end; 2) freedom of the media and free access to it for all political groupings; 3) substantial reform of the electoral code, meaning practically the annulling of all changes Lukashenko introduced in favor of himself; and 4) re-establishing the meaningful functions of the parliament. However, as stated above, the regime lacked any will or interest in normalizing relations with the EU, so demands were simply ignored. Both the parliamentary elections in 2000 and the presidential elections of 2001 were conducted exactly in the same anti-democratic way like the previous one.

More than a decade later, Belarus received a much more open and somewhat blunt offer from two EU countries: in their joint visit to Minsk the German and Polish foreign ministers Guido Westerwelle and Radek Sikorski offered three billion euros economic aid in exchange for democratic reforms, including democratically conducted presidential elections. However, their conditioned offer was flatly refused by the Belarusian side,⁸⁹² and the December 2010 presidential elections was followed by heavy repressions.

2. Mostly negative tools remains

As a result of all the factors mentioned above, the EU left only with negative, punitive tools that could be used vis-à-vis Belarus. The oldest punitive measure taken against Minsk was the decision to limit high-level contacts, which is formally still in force, despite the decision to suspend the EU sanctions against Minsk in October 2015.

Another long-term policy is the persistent non-recognition of the Belarusian parliament as a legitimate representative of the people's will in Belarus. This measure is particularly important because it also limits many other ways of engagement with Minsk. Non-recognition makes it impossible also for the European Parliament to have any institutionalized relations with Belarus. Moreover, the Inter-parliamentary Assembly of the Eastern Partnership could not be launched for almost a year because it had to be decided, whether the Belarusian parliament was allowed to participate. Finally a negative decision was taken, thus Belarus was also excluded from that institution.

The travel bans introduced against several Belarusian leaders and officials also need to be listed here, despite being already mentioned above. While the first travel sanctions affected only four individuals, by the time of finalizing this analysis there were more than 150 Belarusian officials on the visa ban list. In

⁸⁹² Andrew Rettmann, 'Poland puts €3 billion price tag on democracy in Belarus' (*EUobserver*, 4 November 2010) <<https://euobserver.com/foreign/31203>> accessed 3 February 2016.

the twelve years that have passed since the introduction of the travel bans, the entry ban policy of the EU vis-à-vis Belarus has developed into a considerably flexible and adaptable tool, to be described more in detail in Part 4.

A fourth, closely connected measure has been the assets freeze used against several Belarusian individuals. One needs to add though that the introduction of the assets freeze was preceded by lengthy public debates, which probably allowed most targeted individuals to transfer the assets to countries unaffected by the EU assets freeze. Following the logic of assets freeze, the EU also put under sanctions several Belarusian business enterprises, by freezing their assets held in EU territory.⁸⁹³

Besides, the EU has suspended the Generalized System of Preferences vis-à-vis Belarus in 2007 as a reaction to Minsk's ignorance to the criticism coming from the International Labor Organization (ILO) regarding the rights of trade unions.⁸⁹⁴ Estimates about the losses caused by the suspension of GSP vary around 40-50 million USD annually, which equals more than 400 million altogether since the introduction of this measure. However, despite the financial loss caused by the suspended GSP, Minsk refused to grant trade unions with more independence.⁸⁹⁵

From the institutional perspective, so far the EU has introduced punitive measures in two ways. Some of them were activated as a reaction to criticism coming from other international organizations. The first one was the Pourgorides-report of the Council of Europe published in 2004, to which the EU reacted with introducing the first travel bans against Belarusian leaders named responsible for the politically motivated disappearances. The suspension of GSP is another example: in this case the EU reacted on the criticism coming from the ILO. Other punitive measures were introduced by the sovereign decision of the EU, such as the suspension of the PCA negotiations, or the non-recognition of the Belarusian parliament.

3. The sole exception: financial assistance

Financial assistance constitutes basically the sole non-punitive tool the EU has been so far using vis-à-vis Belarus also for the promotion of democracy and human rights; of course, together with a number of other priorities. Hence, hereby an effort is made to define the overall place of human rights promotion in the EU's assistance policy towards Belarus.

In the absence of Belarus' full participation in the Eastern Partnership the EU assistance to Belarus is channeled through the European Neighbourhood Instrument (ENI) that has replaced the European

⁸⁹³ Council Decision 2012/642/CFSP concerning restrictive measures against Belarus (2012) OJ L285/1 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:285:0001:0052:EN:PDF>> accessed 3 February 2016.

⁸⁹⁴ Kirill Hajduk and Vitali Silitski, 'After the GSP Withdrawal: The Case for the Revision of the EU Policy Towards Belarus' (Belarusian Institute for Strategic Studies, 2007) <<http://belinstitute.eu/images/stories/documents/gspaug7en.pdf>> accessed 3 February 2016.

⁸⁹⁵ *Yeliseyeu* (no 847)

Neighbourhood Policy Instrument (ENI) from 2014 on.⁸⁹⁶ However, as the present 2014-2017 cycle is still running, therefore it is hard to analyze; thus from the methodological perspective it is more solid to study the already closed 2007-2013 term of the ENPI.

Interestingly enough, though the strategy document regulating ENI assistance to Belarus, *the Strategy Paper and Multiannual Indicative Programme for EU support to Belarus*⁸⁹⁷ enumerates the problems of the Belarusian political system, and repeats the EU's concern about the situation of human rights, democracy and media freedoms, these priorities appear only to a limited extent, if one analyses the concrete amounts of financial resources used.

The assistance Belarus received from the EU in the 2007-2013 period was distributed as follows:⁸⁹⁸

⁸⁹⁶ European Commission, 'European Neighbourhood Policy and Enlargement Negotiations, Belarus' <http://ec.europa.eu/enlargement/neighbourhood/countries/belarus/index_en.htm> accessed 3 February 2016.

⁸⁹⁷ EEAS, 'Programming of the European Neighbourhood Instrument (ENI) - 2014-2020. Strategy Paper and Multiannual Indicative Programme for EU support to Belarus (2014-2017)' 2-3. <http://eeas.europa.eu/enp/pdf/financing-the-enp/belarus_2014_2017_programming_document_en.pdf> accessed 29 September 2016.

⁸⁹⁸ *ibid*, 11.

EC PROGRAMMES AND BUDGET LINES FOR ASSISTANCE TO BELARUS		2007-2013
ENPI (European Neighbourhood Policy Instrument) National Allocations		€ 83.5 m* (nat.)
ENPI top-ups (national)	Comprehensive Institutional Building	€ 2.35 m* (nat.)
	Pilot Regional Development Programmes	€ 8.38 m* (nat.)
ENPI Special Measures (national)		€ 6 m (nat.)
ENPI Global Allocation (national and regional)		€ 0.39 m (nat.) € 0.397 m (reg.)
ENPI Regional East	Landmines destruction (for BY)	€ 3.9 m (nat.)
	Council of Europe Facility (reg.)	€ 4 m (reg.)
	EaP Culture Programme (regional)	€ 12 m (reg.)
	EaP Youth Window (regional)	€ 19.5 m (reg.)
	CIUDAD (Coop in Urb. Dev/Dial; reg)	€ 1.115 m (reg.)
	Black Sea River Basin (reg.)	€ 13 m (reg.)
ENPI Regional East - Eastern Partnership (EaP) Flagships (FS)	FS 1: Integrated Border Management (IBM)	€ 10.06 m* (nat.) € 2 m (reg.)
	FS 2: SME	€ 27 m (reg.)
	FS 3: Energy	€ 54 m (reg.)
	FS 5: Disaster Preparedness	€ 10.988 m* (reg)
	FS 6: Environment	€ 58.785 m* (reg.)
ENPI Inter-regional	Pilot Proj: preparing staff for EU-ENP related jobs	€ 1.982 m (reg.)
	TAIEX (Techn Assistance and Information Exchange) (for BY)	€ 0.58 m (nat.)
	Tempus	€ 1.895 m (nat.) € 12.235 m (reg.)
	Erasmus Mundus	€ 33.9 m (reg.)
FP (Framework Programme) 7 / Marie Curie (for BY)		€ 2.3 m (nat.)
ENPI CBC (Cross- Border Coop) + ERDF	LV/LT/BY (for BY)	€ 33.44 m (nat.)
	PL/UA/BY (for BY)	
	Baltic Sea (for BY)	
ENPI EaP Territorial Cooperation Support Programme		€ 5.5 m (reg.)
EIDHR (European Instrument for Democracy and Human Rights) (2007-2010: figures reflect contracted amount, not an allocation for a specific budget year)	Global (for BY)	€ 15.493 m* (nat.)
	CBSS (Country Based Support Schemes)	
	EHU (European Humanities University)	
ENPI Civil Society Facility (for BY)		€ 2.36 m (nat.)
DCI NSA (Non-State Actors) / LA (Local Authorities) (2008-2010: see comment under EIDHR section)		€ 8.685 m (nat.)
DCI (Development Cooperation Instrument) ENVIRONMENT AND NATURAL RESOURCES (ENRTP) (regional)		€ 3.484 m (reg.) € 1.236 m (nat.)
DCI MIGRATION (regional)		€ 1.023 m (nat.) € 12.076 m (reg.)
DCI SANTE – Invest in People (national)		€ 0.311 m (nat.)
Nuclear Safety (for BY)		€ 5.044 m (nat.)
TOTALS of national allocations + known Belarus shares in regional projects		€ 187.6685 m*
TOTALS of regional projects		€ 281.163 m*

Table 1: EC Programmes and Budget Lines for Assistance to Belarus 2007-2013; *: Indicative allocations
Source: EEAS, 'Programming of the European Neighbourhood Instrument (ENI) - 2014-2020 Strategy Paper and Multiannual Indicative Programme for EU support to Belarus (2014-2017)' 11 <https://eeas.europa.eu/enp/pdf/financing-the-enp/belarus_2014_2017_programming_document_en.pdf>

From the table it becomes clear that most EU assistance was dedicated to such policy fields that are also of direct security, economic or environmental relevance for the EU, such as environmental issues, including the management of the consequences of the Chernobyl disaster (58.785 million EUR), energy issues (54 million), cross-border cooperation projects (more than 33 million), migration-related issues (12 million), disaster preparedness (nearly 11 million EUR).

Meanwhile, fields related to the broader interpretation of democracy and human rights, including the support of civil society organizations, youth issues and education, received much less support. Out of the altogether 281.163 million euros allocated to Belarus, only the following fields may be constituted relevant to the promotion of human rights and democracy: EaP Culture Programme (12 million), EaP Youth Window (19.5 million), Tempus (slightly more than 14 million), Erasmus Mundus (33.9 million), European Instrument for Democracy and Human Rights (EIDHR, 15.493 million, most of which was spent on the European Humanities University, a Belarusian university in exile that operates in Lithuania), the ENPI Civil Society Facility (2.36 million) and also the DCI Sante (0.33 million). These budgetary chapters constitute altogether roughly 97,5 million EUR, equal to basically one-third of the overall EU allocations to Belarus.

Based on these numbers, one may conclude that in the period of 2007-2013 the promotion of democracy, human rights and fundamental freedoms was far from being a top priority of the EU's assistance activities to Belarus. Though it constituted an important share of the resources used, it still amounted only to one-third of all assistance dedicated to Minsk. The other two-third was composed mostly of security-related, as well as economy-oriented and environmental projects.

One needs to add though that there have been considerable differences in the priorities of the Member States that contributed as individual donors. By far the largest one has been Sweden, with a contribution of 12 million EUR per year, distributed along the priorities of democracy, human rights, gender equality, environment and market development.⁸⁹⁹

The present term of the ENI shows a negative change from the perspective of human rights promotion. Currently the ENI towards Belarus is operating along three main priorities: social inclusion, environment, and local and regional economic development.⁹⁰⁰ The money to be allocated for this period is between 71 million to 89 million EUR. Clearly the most important sector of EU assistance is social inclusion, planned to reach 30 per cent of the overall EU contribution. Environment is the second priority, with approximately 25% share, similarly to local and regional economic development, also planned to be of 25% share.⁹⁰¹ Meanwhile, only 10% of the total assistance is going to be allocated to civil society assistance, and another ten per cent for capacity development. This constitutes a significant drop compared to the roughly 1/3 share of such project in the previous period.

⁸⁹⁹ *ibid*, 13.

⁹⁰⁰ European Commission, 'European Neighbourhood Policy' (no 896)

⁹⁰¹ EEAS, 'Programming of the European Neighbourhood Instrument' (n 897) 18.

C. The Belarusian Reactions and the Motivations Behind

In order to understand why Belarus has been reluctant to comply with the EU's demands regarding the respect for human rights and democratic freedoms, one needs to have a deeper understanding of the very functioning of the Lukashenko regime and its dependence on Russia.

1. Stability and resilience of the regime

A starting point for the analysis of Belarus should be the understanding that its political system is generally stable and highly change-resistant due to a number of factors. First and foremost, with Lukashenko being in power for more than two decades, the system is itself a socialization element for the Belarusian society. By now a whole generation of Belarusians were born, raised and reached adult age knowing no other leader than the central figure of President Lukashenko.

An important element of this "Lukashenko-socialization" has been that in Belarus the predictability and many social benefits of the Soviet era could be preserved until very recently. Despite all the economic hardships and the rapid, multiple devaluation of the Belarusian ruble, education and health care are still for free, as well as many other social benefits, including pensions much higher than they are in neighbouring Russia or Ukraine. Moreover, in the second half of the 1990s and in the 2000s until the world financial crisis, Belarus was able to produce an impressive and relatively steady GDP growth, reaching sometimes even 10% per year.

Another factor of the regime's resilience has been the political stability, security and calmness it granted, both if compared to the inefficiency and political stalemate of Belarusian domestic politics between 1991 and 1994, and also if compared to the turbulent, often unpredictable and violent, oligarch-ridden political lives of neighbouring Russia and Ukraine. These differences and the relative stability, of course, have been skilfully utilized by the propaganda machine of Lukashenko.

Besides, the democratic opposition in Belarus has been traditionally weak and fragmented, rocked by personal grievances, corruption and also by strong penetration of Belarusian state security services. Even in 2006, when they were the most united, the opposition was not able to join its forces behind a single opposition candidate, as Alexander Kazulin did not join the other forces that supported Alexandr Milinkievich. In the decade that passed since then the Belarusian opposition forces never achieved the level of unity they had in 2006. Therefore, they do not pose a serious challenge to the power of the president, particularly among the circumstances of the highly repressive domestic political environment. A highly symbolic sign of the current weakness of the opposition is that the United Civic Party, an organization widely perceived to be one of the most important opposition structures, was unable to

collect the 100,000 signatures necessary for registering Anatoliy Lebedko, the leader of the party, as a presidential candidate in 2015.⁹⁰²

The lack of political changes resulted in that the Belarusian society is still dominantly Soviet-minded, meaning a paternalistic, passive, individualistic and generally obedient political attitude. Though the younger, under-30 generation is already much more active socially and politically, membership in opposition political parties and civil society organizations is still very low. The largest demonstration that opposition political forces were able to organize took place in 2006, and the number of participants did not exceed some 50,000, according to the opposition's own estimates, which is far from an impressive result in a country of ten million. Passivity and the general reluctance to get engaged in politics is an important factor strengthening the rule of Lukashenko. All in all, the regime is not threatened from within.

2. Dependence on Russia

Since independence achieved in 1991, Belarus has managed to preserve its statehood.⁹⁰³ The project of the Belarus-Russia political and institutional integration, called the Union State, since 1999 has not developed into a supranational entity, but remained essentially an intergovernmental organization. The main reason of this was that with Vladimir Putin's ascent to power in Russia the *finalité politique* of the organization changed. The original idea of a confederative structure that would give Minsk equal rights in decision-making was replaced by a view of the integration of the two countries that would in practice mean a merger, i.e. Belarus having to become a part of Russia. This was unacceptable for Minsk, and the further development of the Union State stagnated at the intergovernmental level. Belarus maintained its formal sovereignty in the sense that it did not cease to exist as an independent state, even if a closer look at the present situation reveals that the sovereignty of Belarus is gradually decreasing vis-à-vis Russia.

a) Security and defence

In the sphere of security and defence, if until the mid-2000s Belarus was successful in simply shifting a part of the burden to Russia through the Union State project without making concessions that would undermine its sovereignty, since then Belarus has become increasingly dependent on Russia both in terms of military capabilities and financing.⁹⁰⁴ Furthermore, Russia is both the primary raw material supplier and the main market for the Belarusian defence industry, which further strengthens the

⁹⁰² "'Elections" turnout unlikely to go beyond 30%' (*Charter97*, 22 August 2015) <<http://charter97.org/en/news/2015/8/22/165589/>> accessed 4 February 2016.

⁹⁰³ Moshes and Racz (n 876).

⁹⁰⁴ Andrei Portnikov, 'Armed Forces: Degradation of the Defense Potential' in *Belarusian Yearbook 2012* (Belarusian Institute for Strategic Studies, 2012) 35-42.

dependence.⁹⁰⁵ A good indicator to follow is a planned Russian air base in Bobruysk. Lukashenko was firmly opposed to the establishment of the base in the beginning, but, according to media reports, the final decision has not yet been reached.⁹⁰⁶ If the agreement is reached, the facility will be the first military base of Russia newly established in an independent country since 1991. Instead of fostering further formally equal cooperation with the Belarusian military, Moscow will simply deploy its own forces to Belarus. A lot will depend on the details though, namely whether or not the new base will be operated in the framework of the unified air defence system of Russia and Belarus established in 2012.

b) Foreign policy

The gradual decrease of the freedom of decision on key issues of foreign policy is more self-evident. In 2008, following the Georgia war, Minsk could still afford not to recognize the 'independence' of Abkhazia and South Ossetia, despite strong pressure from Russia. However, six years later in March 2014 in the UN General Assembly Belarus had no choice but to vote against the condemnation of Moscow for the incorporation of Crimea,⁹⁰⁷ though formally this act was even more serious than the case of the two Georgian territories, because those were not annexed by Russia. Basically the same happened in Riga at the Eastern Partnership summit in May 2015. Reportedly, it was due to the opposition of Belarus (as well as Armenia) that the summit could not arrive at a common position as concerns the annexation of Crimea. Participants only reiterated their positions taken earlier, which made a joint statement meaningless on this point.⁹⁰⁸

c) Economic

Neither does Belarus enjoy full sovereignty in terms of economy and trade, partly due to its membership in the Eurasian Economic Union (EaEU). Though the EaEU is far from being a fully functional integration body, the Customs Union implies that external trade-related decisions are dealt with on a supranational level and administered by the Eurasian Commission, even though in practice some rules can be circumvented and some further decisions can be vetoed by the Member States. In the process of creating the Customs Union, Russian national tariffs largely became the basis for the whole Union, which is, of course, only natural given the dominant size of the Russian economy. Nevertheless, it further

⁹⁰⁵For details, see Anaïs Marin, 'Trading off sovereignty. The outcome of Belarus' integration with Russia in the security and defence field' (2013) Centre for Eastern Studies, OSW Commentary.

⁹⁰⁶Siarhei Bohdan, 'Belarus Strengthens Its Air Force With Russia's Reluctant Support' *Belarus Digest* (25 August 2015) <<http://belarusdigest.com/story/belarus-strengthens-its-air-force-russias-reluctant-support-23083>> accessed 4 February 2016.

⁹⁰⁷UN PaperSmart (n 867)

⁹⁰⁸European Council, 'Joint Declaration of the EU Eastern Partnership Summit Riga, 21-22 May 2015' (2015) 2 http://www.consilium.europa.eu/en/meetings/international-summit/2015/05/Riga-Declaration-220515-Final_pdf/ accessed 3 February 2016. Furthermore, expressions like "illegal annexation of Crimea" and "the acts against Ukraine and the events in Georgia since 2014" are used in the text without even mentioning Russia as an actor. This had to be done so due to the resistance of Minsk and Yerevan to concretely name Russia.

strengthens the argument about the limits of choice that are imposed on Belarus. Bilateral economic dependence on Russia is another crucial element that decreases the country's economic sovereignty. Russian energy subsidies to Belarus account for approximately up to 15% of the country's GDP.⁹⁰⁹ Concerning macro-economic assistance, solely in 2012 it was higher than 6 billion USD, while the total revenue of the Belarusian budget was around USD 16 billion.⁹¹⁰

The Russian takeover of many Belarusian state-owned companies of strategic importance is taking place generally against the will of the Lukashenko regime. Moscow has to force Minsk to gradually give up control over these key assets. That's why this may take time, but the trend is rather clear. The process as a whole was very well demonstrated in the case of Beltransgaz, but one could also mention the increasingly strong Russian positions in the Belarusian petrochemical sector (full ownership of Lukoil-Belarus and more than 40% of shares in the Mozhyr oil refinery⁹¹¹), or in the telecommunication sector (Russian MTS has already taken over 49% of the MTS Belarus company, while 51% of the shares is still held by the Minsk government⁹¹²). Another source of concern for Minsk are the on-going industrial integration projects between Russia and Belarus, where Minsk is worried about losing control over its strategic companies after they get integrated with their Russian partners; as an example, one may mention the MAZ automotive production plant and the BelAZ, producer of heavy vehicles and mining trucks, both reportedly planned to be merged with Russian KAMAZ.⁹¹³ In order to delay these processes, Belarus reportedly tries to play on the conflicts between various groups of the Russian elite.⁹¹⁴ Yet, domestic financial hardships are likely to keep pushing Belarus towards privatizing more and more state assets,⁹¹⁵ while most investors come from Russia. Hence in this field the sovereignty of Belarus gets compromised again.

It is highly unlikely that any of these processes could be reversed. In order to maintain social stability that is of key importance for the domestic legitimacy of the Lukashenko-system, securing continuous economic and financial support from Russia is a must. In exchange for these benefits, Minsk needs to

⁹⁰⁹ Aleś Alachnovič, 'How Russia's Subsidies Save The Belarusian Economy' *Belarus Digest* (26 August 2015) <<http://belarusdigest.com/story/how-russias-subsidies-save-belarusian-economy-23118>> accessed 3 February 2016.

⁹¹⁰ Agata Wierzbowska-Miazga, 'Support as Means of Subordination. Russia's Policy on Belarus',. [2013, Centre for Eastern Studies] 34 OSW Point of View, 7 <http://www.osw.waw.pl/sites/default/files/pw_34_bialorus_ang_net.pdf> accessed 3 February 2016.

⁹¹¹ *ibid*, 18.

⁹¹² 'Russian company 'wants to buy' MTS Belarus stake, ambassador says' *TeleGeography* (13 June 2014) <<https://www.telegeography.com/products/commsupdate/articles/2014/06/13/russian-company-wants-to-buy-mts-belarus-stake-ambassador-says/>> accessed 3 February 2016.

⁹¹³ Miazga (n 910) 19.

⁹¹⁴ 'Kremlin strengthens „privatization” pressure on Minsk' *Belarusinfo* (22 July 2014) <<http://belarusinfocus.info/p/6360>> accessed 3 February 2016.

⁹¹⁵ 'Могилевхимволокно, БАТЭ, "Горизонт"... Власти раскрыли планы по приватизации на 2015 год' (*Tut.by*, 13 March 2015) <<http://news.tut.by/economics/439560.html>> accessed 3 February 2016.

make increasing concessions to Moscow, altogether making the erosion of sovereignty a permanent trend.

3. Maneuvering between East and West

It is a well-documented feature of Belarusian foreign policy that Minsk has been conducting continuous balancing between the West and Russia. There have been several occasions when Lukashenko tried to resist Russian pressure by making political and human rights-related concessions to the West, but thereafter again gravitated back to Russia, dominantly due to economic reasons, as explained above.

From this aspect, the recent release of political prisoners in August 2015 did not constitute much of a novelty, and actually fit well into the decade-long cyclical pattern. Lukashenko frequently uses the release of political prisoners as a tool of maneuvering and pleasing the West. He did the same nine years ago, when the political prisoners detained before and after the 2006 presidential elections were released in February 2007,⁹¹⁶ in order to receive economic and political benefits from the EU. At that time Lukashenko openly commented the releases that it was *“the turn of the European Union to show its good intentions.”*⁹¹⁷ Another example occurred immediately after the August 2008 war in Georgia the Belarusian regime released the remaining political prisoners, including former presidential candidate Aleksander Kazulin, presumably to secure Western recognition for the then approaching September 2008 parliamentary elections. Lukashenko even stated that *“if elections go smoothly, the West will recognize Belarus.”*⁹¹⁸ The West, still shocked by the Russian aggression against Georgia, reacted positively by including Belarus into the Eastern Partnership initiative, which was then in the process of preparation.⁹¹⁹ However, this promising start was not followed by any systemic change in Belarus: not a single opposition candidate could win a seat in the new parliament, and new opposition figures were imprisoned in February 2009.⁹²⁰ Apparently, political prisoners were considered to be a bargaining chip: when positive expectations did not materialize, it was always possible for the regime to return to repression.

Concerning the release of political prisoners in August 2015, the situation was very similar to the one in August-September 2008. The ongoing financial crisis hit Belarus hard. Neither Western, nor the Russian economies were in good shape, which limited the financial resources from both directions that could be

⁹¹⁶ Claire Bigg, 'Belarus: Release Of Political Prisoners Focuses On Kazulin Case' (*RFE/RL*, 25 February 2008), <<http://www.rferl.org/content/article/1079534.html>> accessed 3 February 2016.

⁹¹⁷ *ibid.*

⁹¹⁸ Luke Harding, 'Lukashenko waits for recognition as Belarus goes to the polls' *The Guardian* (29 September 2008) <<http://www.theguardian.com/world/2008/sep/29/3>> accessed 3 February 2016.

⁹¹⁹ Council of the European Union, 'Presidency Conclusion, 12594/2/08, Extraordinary European Council, Brussels, 1 September 2008' (2008) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/102545.pdf> accessed 3 February 2016.

⁹²⁰ Freedom House, 'Freedom in the World 2013. Belarus' (2013) <<https://freedomhouse.org/report/freedom-world/2013/belarus#.Vd71g89Cog0>> accessed 3 February 2016.

potentially allocated towards assisting Belarus. The shock, caused in the West by Russian actions in Ukraine raised the importance of geopolitical arguments at the expense of value-based considerations. Elections were coming in Belarus and Minsk signaled that it needed Western support to counter-balance Russian pressure, playing both on Western geopolitical sensitivities and especially economic interests of some states, the neighbouring Baltic states in particular, but not only. Hence, just as it did in 2008, the regime released political prisoners, and expects significant benefits in exchange. About the present release the press service of the Belarusian president stated somewhat similarly that it was an act motivated by humanism-related considerations.⁹²¹ However, many analysts agree that it was part of the usual maneuvering policy of Belarus.⁹²² Moreover, as pointed out by analyst Diana Potjomkina, taking into account the pre-election state of the Belarusian opposition, the release of the six political prisoners actually did not have much domestic political significance – in other words, this was a cheap move to make for the regime.⁹²³

4. Reluctance to observe EU human rights policy recommendations

The most important reason why Minsk has been strategically unwilling to make any meaningful concession to the EU in the field of human rights and democratic freedoms lies in the very nature of the regime. Concerning its political system, Belarus is a strongly centralized, stable dictatorship with the same person ruling it for more than two decades. Regime security has always been of key importance for Lukashenko, which explains he has transformed the Belarusian political system since the second half of the 1990s. Such a regime is obviously unwilling to guarantee its possible opponents even the basic political rights in order not to risk losing power.

Following the logic of regime security, and judging from the long history of manoeuvring between East and West, the conclusion needs to be drawn that Lukashenko was most probably never serious about complying with the EU's requests about human rights and fundamental freedoms. The small concessions he made were all only of tactical nature, aimed at gaining short-term political benefits but without changing the fundamentals of his regime.

The release of political prisoners in August 2015 perfectly fits this logic and need not be overestimated due to two main reasons. First, they were freed not because the political and legal system of Belarus would have changed. They were granted a presidential pardon in the same arbitrary manner as before, by a personal decision of President Lukashenko, which could be a result of anything, including a non-transparent trade-off with Western negotiators. This means that in the future, anyone may be easily imprisoned again on political grounds, because the legal environment that makes such incarcerations

⁹²¹ The Guardian 'Belarus President' (n 871)

⁹²² Joerg Forbrig (n 872); Tatjana Kulakevich, 'Humanism or Political Calculation: Why Did Lukashenka Pardon Political Prisoners?' *Belarus Digest* (24 August 2015) <<http://belarusdigest.com/story/humanism-or-political-calculation-why-did-lukashenka-pardon-political-prisoners-23131>> accessed 3 February 2016.

⁹²³ Diana Potjomkina, 'Freeing Political Prisoners: Lukashenko's 'Chess Sacrifice'', (*Komentāri*, 2015) <<http://liia.lv/lv/blogs/freeing-political-prisoners-lukashenkos-chess-sacr/>> accessed 3 February 2016.

possible did not change. Moreover, the political prisoners were not rehabilitated, and from the point of view of Belarusian legislation they remain convicted criminals, which makes it practically impossible for them to participate in public politics any time soon.

Another reason why one should not overestimate the importance of Lukashenko's recent steps made towards the EU is that the EU is both unable and unwilling to replace the massive macro-economic support Moscow is providing to Minsk. Moreover, a more active involvement of the EU in the financing of Belarus would probably imply demands of political liberalization, which is something that Lukashenko cannot afford without endangering his own position.

An equally important reason why the Lukashenko regime has not been complying practically at all with the EU's human rights-related recommendations is that it is neither forced to do so, nor can it afford such a move. The EU has much less leverage over Belarus than Russia does, and the dominance of Russia is only increasing gradually by time, as it was demonstrated above.

Consequently, Lukashenko could never risk breaking up with Russia or to provoke, annoy or disappoint Moscow to such an extent that would result in the loss of political and economic support and subsidies. He could also not risk direct, forceful Russian interference into Belarusian domestic politics. Though Russia has always been involved to a varying extent, this never reached such a point when Moscow would have aimed at directly overthrowing of Lukashenko. Russian actions taken against the Belarusian president were intended more to weaken and worry him⁹²⁴ in order to force him into various concessions – but never intended to break him or destroy his power, mostly because Russia also has no alternative to Lukashenko.⁹²⁵ However, in line with the increasing assertiveness and unpredictability of Russian foreign and security policy, Moscow might change its mind about the Belarusian president.

Hence, Lukashenko has not much other choice but to maintain his careful, grossly obedient policy line vis-à-vis Russia. This is particularly so because since the Russian annexation of the Crimea and the start of the war in Eastern Ukraine, a direct Russian military intrusion in Belarus has become a very realistic possibility. In Ukraine, Moscow has demonstrated that it has both the will and the means to take even military action in order to prevent unwanted political developments.

As a result of the primacy of Russia, relations with the EU could be and will always be only of secondary importance for Lukashenko. The ability of Minsk to get engaged with the EU in the framework of the balancing policy described above always depended on and was defined by its actual relations with Moscow. Meanwhile, relations with the EU got stuck on a very low level in the mid-1990s, and the EU has not much to offer to Minsk either economically or politically.

⁹²⁴ As an example, one may mention the Russian-made film series aimed at discrediting Lukashenko right before the 2010 presidential elections, titled *The Godfather*, or the open Russian support given to some of the political parties and candidates participating in parliamentary and presidential elections.

⁹²⁵ Recognized also by many Russian experts, such as: Kirill Koktysh, 'Russia and Belarus – doomed to be together'- Analysis (Russian International Affairs Council, 2012) <http://russiancouncil.ru/en/inner/?id_4=97#top-content> accessed 3 February 2016).

D. Flexibility, Adaptability and Consistency of the EU Policies

Based on the overview of the history of EU-Belarus relations described in detail in Part 1, one needs to realize that the European Union has always been and still is a reactive actor vis-à-vis Belarus. The EU has never been a driver of the political developments in Belarus, not even indirectly. Instead, it only reacted to them and tried to adapt its policies to them – not always appropriately, one has to add.

1. Attempts of the EU to adopt an effective policy

As it was described in detail in Part 1, the EU reacted to the emergence of an independent Belarus from the ruins of the Soviet Union by offering several ways and channels of cooperation. However, the EU could not prevent either the domestic political stalemate in Belarus resulting in the rise of Lukashenko to power, nor the swift authoritarian transformation of the country conducted by its first (and only) president. The vague protests coming from Brussels did not even slow down the establishment of a full-scale dictatorship: Lukashenko apparently ignored the foreign policy costs originating from losing the ties with the West in favor of the benefits he gained from maximizing his domestic power.

Hence, the EU was again forced to run after the events, and the decision was taken to freeze relations with Belarus in 1995. However, the isolation was not much of help either, as in the second half of the 1990s, Lukashenko was focusing exclusively on strengthening the ties with Russia, and paid not much attention to the West. Meanwhile, the situation of human rights of democratic freedoms turned only worse in the second half of the 1990s with several politically motivated disappearances and death cases taking place, including the suspicious death of prominent opposition politician of the United Civic Party, Gennady Karpenko, as well as the disappearance of former Minister of Interior Affairs Yuri Zakharenko.

From 1999 to 2003, though the situation of human rights did not turn any better, the EU decided to replace its isolation policy with a gradual, step by step approach that would have honored every step made by the Belarusian regime towards democratization with a positive step made by the EU. However, the regime did not give any positive reaction to this change in the EU's approach.

a) *Evaluation of the two-track approach*

Following the obvious failure of the gradualist policy, marked by the parliamentary and presidential elections in 2000 and 2001, respectively, the EU had drawn the consequences, and gradually shifted to a two-track approach, composed of employing a “sticks and carrots” policy vis-à-vis the Lukashenko-regime on the one hand, and supporting the opposition movements and civil society on the other. The key element shaping official relations with Minsk remained strong and strict human rights conditionality.

The two-track approach turned out to be slightly more effective than its predecessors, at least judged from the outcomes. Though Belarus could not be transformed into a democratic state, at least the opposition was able to mount significant pressure on the regime in 2006. Moreover, after 2000 no political killings or disappearances took place, thus at least the further worsening of the human rights situation could be prevented.

The reason of Belarus showing slightly more respect for human rights was, however, only due to the external pressure coming from Russia. As explained in detail earlier, since 2002 political relations of Minsk with Moscow started to gradually cool down, and the political agenda of Minsk has shifted from deepening the integration with Russia to preserving the independence of Belarus. In this context fostering closer relations with the EU served as a tool for trying to counterbalance Russian pressure. Hence, the Lukashenko regime decided to show slightly more respect for human rights in order to improve its ties with the EU. However, this decision was not taken due to any suddenly emerging commitment to EU fundamental values.

2. Giving up the consistency of the human rights conditionality in 2008 and 2014/2015

Meanwhile, instead of preserving its consistency and trying to capitalize on the increasing cooperativeness of Belarus, the EU has openly given up its human rights conditionality vis-à-vis Minsk twice already. The first happened in 2008, when following Russia's war against Georgia in August 2008 and the geopolitics of the post-Soviet space suddenly changed, definitely not in favor of Minsk. Hence, Lukashenko made a quick gesture of goodwill and released former presidential candidate Alexandr Kazulin from custody in August. Besides, he refrained from recognizing the "independence" of Abkhazia and South Ossetia, despite the strong pressure from Moscow to do so. However, it is worth noting that none of these moves were irreversible, nor did they change the dire situation of human rights and democracy in the country at all.

The EU was quick to reward these gestures, and suspended most sanctions against Belarus. The reason was the decision taken at the 1 September 2008 extraordinary European Council meeting, i.e. not to confront Russia directly, but to intensify the ties with countries of the common neighbourhood. Therefore, Minsk was also promised to be included in the Eastern Partnership, then yet to be launched. These moves were done despite the fact that the parliamentary elections held on 28 September 2008 were neither free, nor fair.⁹²⁶ Further approximation, particularly in the field of economy and trade took place, while the EU basically ignored the extremely restrictive regulation on the media introduced in November 2008. If anyone in the EU had any illusions about real changes taking place in Minsk, those hopes were shattered by the post-election violence of 2010.

From the perspective of Lukashenko, the EU's decision to put aside the human rights-based conditionality after the August 2008 war offered a perfect opportunity to increase its freedom of manoeuvre vis-à-vis Russia, but without making any strategic concession regarding the very nature of his own regime. By securing another four years in the parliament, getting included into the Eastern Partnership and by receiving significant economic benefits from the West he gained strategic benefits in

⁹²⁶ OSCE, 'OSCE/ODIHR Election Observation Mission Final Report, Republic of Belarus, Parliamentary Elections, 28 September 2008' (2008) <<http://www.osce.org/odihr/elections/belarus/35123?download=true>> accessed 16 January 2016.

exchange of only tactical, non-irreversible moves. In theory the possibility of imprisoning opposition politicians at any time prevailed, and also the non-recognition of Abkhazia and South Ossetia could have been revoked, if Minsk would have found it necessary.

The suspension of the EU sanctions against Belarusian officials and enterprises in October 2015 can be criticized on the very same basis. The EU again gave up its human rights conditionality due to the changes in the geopolitical situation, i.e. Russia's war against Ukraine. This was again done so despite the fact that the situation of human rights and democratic freedoms did not improve at all. Moreover, Lukashenko played basically a similar game like he did in 2008: in exchange for basically tactical moves (releasing the political prisoners and hosting the Minsk talks) he gained strategic benefits, i.e. he secured another presidential term and he got the sanctions suspended against Belarus. The initial four-month period of the suspension of sanctions was extended in February 2016. The EU was committing exactly the same mistake in the promotion of human rights and democratic freedoms for already the second time.

3. Flexible and inflexible tools

From the EU's human rights promotion toolbox analyzed above, only two can be considered relatively flexible and adaptable. These are the sanctions, and the high-level contacts with Lukashenko regime. With time, both could be adapted to the changing circumstances quickly and easily. As the EU-Belarus negotiations on the political prisoners in the summer of 2015 demonstrated, easing the sanctions by removing certain names and individuals from the list can be done in a tailored way by simple EU Council decisions.

The EU was even successful in playing a tit-for-tat with Minsk first by rewarding the holding of the EU-Belarus human rights dialogue with the removal of several names from the sanctions list. Besides, the EU indicated that releasing the political prisoners and peacefully conducting the presidential elections were the preconditions for further developments. Thereafter, when Lukashenko fulfilled both conditions, sanctions were suspended.

The same flexibility applies to the high-level contacts of the regime. When needed, the EU has been able to swiftly make concessions, or to soften its own regime, even without declaring the limitation of high-level contacts invalid or suspending them. Allowing the Belarusian foreign minister to participate in the Vilnius Eastern Partnership summit or holding the Ukraine ceasefire negotiations in Minsk constitute perfect examples.

However, all the other tools and means are structurally inflexible, including the non-recognition of the Belarusian parliament, or the suspension of the GSP, or the lack of a PCA. The reason is that these measures have been tied to such developments in Belarus that constitute the essential foundations of the regime. Lukashenko cannot make significant concessions either in the status of the parliament or in the president's powers without endangering his own position. Therefore, these measures are most likely to remain in place for a long time.

E. Conclusions and Assessment

The EU's efforts to promote human rights and fundamental freedoms in Belarus can hardly be considered successful. The democratic track record of the elections has not improved at all since 1995. Opposition candidates cannot make it even to the regional councils, not to mention the national parliament. The freedom of media significantly worsened, concerning particularly the increasing governmental control over the internet. Even the abolishment or suspension of death penalty could not be abolished: at present Belarus is the only country in Europe where death penalty is still in use, because Minsk is not in the Council of Europe. Had Belarus joined the organization, it would have been obliged to give up capital punishment.

Politically motivated imprisonment still exists. Though by the time of closing the present analysis there are actually no political prisoners, the legal environment that makes it possible to incarcerate people on political basis remains unchanged, thus one cannot exclude further politically motivated jail sentences. The regular harassment of opposition politicians, activists, as well as members of the civil society has been going on practically uninterrupted, even after the EU has suspended most sanctions against Belarus in October 2015.

The only meaningful, seemingly lasting result of the EU's human rights protection work is that politically motivated killings and disappearances seem to have stopped, at least for now. The last such case, the death of Oleg Bebenin happened in 2010, meaning that it is already the sixth year without similar crimes getting committed.

Reasons of the EU's spectacular inefficiency in protecting human rights and democratic freedoms are multifold. First and foremost, the very nature of Alexandr Lukashenko's authoritarian regime *per se* prevents the respect for most democratic freedoms, concerning particularly the freedom of elections and freedom of the media. From the perspective of regime security, the Belarusian president cannot risk holding free and fair elections, or allow the existence of free, critical national media channels.

Second, the EU lacks almost all the institutionalized points of entry to Belarus that could be used for protecting human rights and fundamental freedoms. As the country has no Partnership and Cooperation Agreement with the EU, the EU has neither an ENP Action Plan, nor an Association Agreement. Besides, diplomatic presence and contacts are limited with the regime, both on the level of the EU and also on the level of its Member States. In addition to all these, the EU has very limited domestic or foreign partners it could cooperate with in order to more efficiently protect human rights: the OSCE office is closed, the US Embassy is operating in Minsk with a minimal staff, and human rights organizations are regularly harassed by the Belarusian state.

Third, Belarus is simply not interested in maintaining too close ties with the EU. For Minsk, official relations with the EU constitute mostly a tool to counterbalance the pressure from Russia, instead of serving as a real orientation point. Belarus does not intend to join the EU, or to approximate its political system to European standards at all. Moreover, a more active involvement of the EU in the financing of Belarus would probably imply demands of political liberalization, which is something that Lukashenko cannot afford without endangering his own position.

The fourth reason is the increasingly strong dependence of Belarus on Russia, which the EU could not counter-balance either militarily or financially, even if it wanted to do so. EU assistance to Belarus is dwarfed compared to the size of the Russian subsidies, which are equal to 20-25 per cent of Belarusian GDP annually. Russia constitutes a primary, defining vector in Belarusian foreign policy, and has always done so since the dissolution of the Soviet Union. Though the extent and nature of dependence varied by time, the very fact did not change either in the political-security, or in the economic field, not to mention the obviously strong social and cultural ties.

The war in Ukraine though brought a considerable change into this relationship, a clearly negative one from the perspective of the EU. Before 2014 Lukashenko could well use improving ties with the EU as a possible counter-balance to the pressure coming from Russia, both in political and economic terms. However, a post-2014 Russia already constitutes a grave, existential danger to the very survival of the regime in case Moscow gets too irritated by the domestic developments in Minsk. At this point, from the perspective of Lukashenko closer relations with the EU are gradually getting transformed from a policy tool more to a policy risk, which obviously has a strongly negative effect on the EU's abilities to foster human rights and democratic freedoms in Belarus.

Many argue that the main reason of the EU's inefficiency in promoting human rights in Belarus lies in the two-track policy and the sanctions regime, thus they had to be changed. However, this opinion can easily be deconstructed by a number of counter-arguments. First and foremost, there is no guarantee at all that a softer EU policy would bring any better results, simply due to the internal reasons mentioned above. This is particularly true because a key structural reason that prevents Lukashenko from softening his regime, namely the dependence on Russia is becoming only stronger by time, at least as long as Vladimir Putin is in power in Moscow.

Second, the EU already tried twice to ease its human rights conditioned policy, once in 2008 and since 2014. However, in neither case took place any structural improvement. On the contrary, significant softening of the EU's human rights conditionality in 2008 was followed by a serious fallback in 2010, reflected in the massive post-election violence. It remains to be seen, whether lifting of most sanctions in 2015 brings any lasting positive changes or not.

The main reason for the EU of softening its own approach again, similarly to 2008, was action taken by an outside actor, namely Russia. This observation further strengthens the argument that vis-à-vis Belarus the EU is dominantly a reactive player, while it has been unable to change or influence the domestic developments in the country, including the respect for human rights and democratic freedoms.

V. The European Union and the Mediterranean: The Arab Spring in Egypt and Morocco

A. A Note on Terminology

The present chapter uses the generic term “Community” (or “European Community”) to identify broadly the collective institutions that began with the European Coal and Steel Community in 1951 and continued through that of the present European Union⁹²⁷. The use of any term to identify generally these institutions either requires the invention of an awkward neologism or an anachronistic use of a term. We have selected “Community” as the most generic and perhaps least problematic of the possibilities, but it should be borne in mind that our use of the term is designed to include all of the embodiments from the 1950s to the present. When a specific time period is being referenced with particularity, such as that of the European Economic Community (EEC) between 1957 and 1992, or the European Union after 2009, we will use the narrower identifier. In this sense, we can observe that there was an increasing emphasis over time in the importance of human rights in the Community and that it was during the years of the EEC that human rights was first articulated in formal policy positions.

The chapter will use the term “Europeans” very loosely either to refer to Europe broadly or to the member states of the “European Community” regarding the period being discussed. When there is a need to identify the specific states being included (or excluded), we will do so. Thus “Europeans” is not a term of art, but a term of convenience where the context should make the sense clear.

⁹²⁷ The generic term “Community” as used here thus includes the European Coal and Steel Community (1951-1967), the European Economic Community (EEC) (1957-1993), the European Community (1993-2009), and the European Union (2009-present).

The term “European Union” was frequently used, albeit informally and unofficially, as a synonym for “European Community” after 1993 until the European Union officially came into existence once the Lisbon Treaty entered into force in 2009. One source of confusion regarding the correct names to be applied comes from the fact that one of the two components of Maastricht was the Treaty on European Union (TEU) (which did *not* create an entity with that name as such) and the other component was a separate “Treaty on establishing the European Community” (TEC) (which *did* create an institution by that name). To add to the confusion, the subsequent Lisbon treaty also had two separate components, a *new* Treaty on the European Union (which effectively amended Maastricht’s TEU) and *did* create an institution by that name as well as a separate Treaty on the Functioning of the European Union” (TFEU) that amended Maastricht’s TEC. This “clarification” itself does not take into account the additional complications of the Treaty of Amsterdam, the Treaty of Nice, and the consolidation of the treaties into a new text that was completed in 2012. For the 7 June 2016 consolidated versions of the two treaties see Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

The European Community uses a variety of terms, abbreviations, and shortened forms of terms to describe its programmes and policies related to the Mediterranean region⁹²⁸. In most cases the variations do not cause confusion, but it is perhaps worth noting briefly some of the different terms in order to add some clarity. In 1972, the EEC introduced a policy that we refer to as the “Global Mediterranean Policy” (GMP). This policy was revised during the years 1990-1992 and became what we refer to below as the “New Mediterranean Policy” (NMP). Community documents during these periods, however, use different terms to describe what we have to some extent reified with our terminology. The actual terms used were more fluid. Thus, for example, terms were used to describe this revised policy such as “renewed Mediterranean policy”, “new Mediterranean policy”, “new Mediterranean Policy”, “Renewed Mediterranean Policy”, and sometimes simply “Mediterranean policy”.

During the period 1994-1995, the GMP (or NMP) was transformed into a new policy (that we will shorten to “Euro-Med”) is variously described as the “Euro-Mediterranean partnership”, “Euro-Mediterranean Partnership”, “Euro-Med”, “Euromed”, and “EUROMED” (particularly in French), and EMP. The most important document that first delineates the established the programme (the Cannes Council meeting of 1995) consistently uses the term “Euro-Mediterranean partnership”, though other Community sources use the alternatives, with “Euromed” and “EMP” seemingly being the most frequent. (Although “EMP” is very frequently used, it could be inadvertently confused with “ENP”, which is an entirely different, albeit overlapping, Community programme that began in 2004). The variety of terms may cause some minor confusion if one is not alert to the issue, such as in searching current EU databases where the use of different terms produces different search results. One case where the varying uses of the terms *does* cause confusion occurs when “Euro-Med” (etc.) is used to describe the *internal European Community policies toward the region* (as formulated by the Commission and Council) while at other times the terms are used to describe *the policies of the Barcelona-related multilateral forum* where the European Community is only one of several entities that participates in establishing policies. Here we will use consistently “Euro-Med” as the shortened term to identify *internal European Community policies toward the Mediterranean region that were first formulated in 1994-1995 and that continue to the present*.

We will use the term “human rights” somewhat broadly. In each case it will include at a minimum the standards as articulated in documents such as the Universal Declaration of Human Rights and the Charter of Fundamental Rights. It will also be used on occasion to refer to the broader normative values of democracy, good governance, the rule of law, and transparency.

The term “Arab Spring” is itself controversial and its meanings are contested. Here we will be using the term in a very general sense to identify a timeframe for events, rebellions, uprisings, and

⁹²⁸ Due to the evolving and sometimes inconsistent terminology used by the Community, several different terms have been employed to describe the overlapping “regions” in which Morocco, Egypt, and Tunisia are located, including: “Arab world”, “Middle East”, “Mediterranean”, “Southern Mediterranean”, “North Africa”, “MENA”, “Islamic world”, Mediterranean Non-Community Countries (MNCs), and “Maghreb”.

demonstrations that occurred in several countries of the Maghreb and Middle East beginning in 2010 and continuing through 2011.

B. Introduction to the Arab Spring in the Mediterranean

Writing in May 2005, Saad Eddin Ibrahim invoked the term “Arab Spring” six years before it became famous in 2011. Ibrahim was an Egyptian university professor, dissident, and former prisoner who was convicted of insulting Egypt by using European Union funds for election monitoring.

Whether we are in fact seeing an ‘Arab spring’ or a mirage depends on where you stand. Many in the Middle East, having been betrayed in the past, cannot be blamed for fearing that this is an illusion, and remembering other spring stirrings of democracy – like Budapest in 1956, Prague in 1968 and Tiananmen Square in 1989 – that were brutally crushed while the world looked on.

For me, however, something about events of the past few months feels new and irreversible. Too many people in too many places – Egypt, Iran, Lebanon and elsewhere – are defying their oppressors and taking risks for freedom. Across the region the shouts of ‘Kifiya! [Kifaya]’ – ‘Enough!’ – have become a rallying cry against dictators.

With luck, the Middle East may catch the so-called third wave of democracy, which has rolled through some 100 countries since the fall of the dictatorship in Portugal in 1974. But whether it will be a spring wind or a sandstorm will depend in great part on how the Islamists are accommodated in Egypt, Lebanon and Palestine in the months ahead⁹²⁹.

There is both optimism and melancholy in Ibrahim’s prescient statement. What he wrote about the “Arab Spring” of 2005 would have been just as timely and accurate had it been written not in 2005, but during the Arab Spring of 2011 following the downfall of Zine Ben Ali in Tunisia in January, or at the beginning of the popular protests and occupation of Tahrir Square in Cairo a week later, or following the ouster of Hosni Mubarak in February after his 30-year rule, or following the electoral victory of the Muslim Brotherhood in Egypt at the end of the year. Although Ibrahim’s declared audience was the people of the Middle East (albeit through a western publication), his warning similarly could be understood as being aimed at the European Union and the United States.

1. Background Interests and Values: Europe and the Mediterranean

From the 1830s until the 1960s, some current member states of the European Union were colonial powers in the Middle East and Mediterranean region. (A brief history is provided below). During this period, European states, particularly France and the United Kingdom, seized control of what are now the

⁹²⁹ ‘Islam can Vote, if We Let It’, *New York Times*, 21 May 2005. Available: <http://www.nytimes.com/2005/05/21/opinion/islam-can-vote-if-we-let-it.html> [accessed 14 Jul 2016]. We might question Ibrahim’s apparent trust in the bona fides of all Islamist parties, particularly after seeing the results of Morsi’s rule in Egypt and Erdogan’s in Turkey.

Arab countries of Morocco, Algeria, Tunisia, Libya, Egypt, Jordan, Israel, Palestine, Syria, Lebanon, Sudan, and Iraq. All subjected states were treated either as colonies or, more euphemistically, “protectorates”. The UK similarly acquired substantial control over Iran. Control over these lands was maintained by military force that used violence against popular movements. Europeans arrested, imprisoned, and tortured patriots from these colonised lands who sought freedom of expression, independence, and self-rule. The European powers demonstrated little interest either in democracy or in accepting the will of the people. Europeans had shown little interest in promoting human rights (with one admirable exception of their opposition to chattel slavery), and they certainly did not allow for freedom of political speech, press, or association. As recently as World War II, countries that are now member states of the European Union fought wars against each other using Mediterranean lands as their battlegrounds, including in Morocco, Tunisia, Algeria, Libya, and Egypt.

Although Europeans did speak of their civilising missions toward their southern colonies and although they did take some steps to promote limited western-style education, improved transportation, and administrative bureaucracy, their principal interests centred on economic profit and military security. The economic resources of their colonies (or protectorates) were seized for the advantage they provided to the Europeans and not to their colonial subjects. Later, when the newly emerging independent states attempted to regain local control over European-dominated institutions in their own countries, as in Iran’s nationalisation of petroleum (in 1951) or Egypt’s nationalisation of the Suez Canal (in 1956), the European response was either to instigate a coup (with the United States aiding the British in Iran) or invading the country (with Israel aiding France and the UK).

While this legacy of European political, military, and economic domination in the Middle East against the popular will of the people may be vaguely recalled by some European politicians, it continues as a vivid and intense memory throughout the Middle East. When delegations from the European Union today make recommendations to the former colonies regarding human rights, democratisation, and liberalisation of barriers to trade, the Europeans’ “southern partners” detect an odour of hypocrisy.

European economic preponderance in the Mediterranean is not simply a legacy of the distant historical past. The European Union – one of the three largest economies in the world – negotiates with the much smaller and poorer countries to the south on a bilateral basis: the entire European Union sits on one side of the table and the individual countries of Morocco, Tunisia, or Jordan sit on the other⁹³⁰. The economic disparity and power differentiation between the two sides is remarkable. For example, the EU purchased approximately in 2015 50% of Morocco’s total exports (Morocco’s largest trading partner) while Morocco’s goods constitute less than 1% of EU imports⁹³¹. Little would change for EU consumers if trade were to be disrupted with Morocco whereas a disruption could have a devastating effect on Moroccan agriculture and farmers. Other trading relationships with the EU’s southern neighbours are

⁹³⁰ Abis, S. (2014). No-Magreb: ¿coste económico o jugada política?. *Quaderns de la Mediterrània*, 20-21, 166-169.

⁹³¹ DG Trade, European Commission (2016). “European Union, Trade in goods with Morocco”, 8. Available: <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113421.pdf> [accessed 21 Sept 2016].

similarly disproportionate. The EU annually maintains a balance of trade-in-goods surplus with Morocco, Tunisia, and Egypt (though not with Algeria due to petroleum)⁹³². The entire southern Mediterranean provides less than 9% of European imports⁹³³. In trade negotiations, the EU has relatively little to risk by a failure to reach agreement while the smaller countries have a great deal to lose.

In its trading relations, the “European Community”⁹³⁴ has traditionally sought to reduce barriers on manufactured items (where Europe has the comparative advantage) and to allow for European tariffs on imported agricultural goods (tomatoes, potatoes, citrus, olives, cucumbers, grapes) where the southern states have their comparative advantage. European farmers, who have demanded high tariffs on competitive southern-Mediterranean produce, particularly farmers in Spain, France, and Italy, have influence in the hallways of governments in Paris, Madrid, and Rome and consequently in Brussels, than do the sovereign states of Morocco, Tunisia, Egypt, Algeria, and Lebanon. Thus the imbalance of economic and political power already apparent at the beginning of European colonisation in the 1830s, has continued long after the former colonies became independent states.

It is important to recognise, however, that the EU has not attempted to use its power advantage solely to maximise its own profits at the expense of poorer and weaker countries. *One component* of EU policy is the so-called “normative Europe”, which promotes positive human values, human rights, fairness, and is mindful of deep cultural ties between the two sides of the Mediterranean⁹³⁵. While southern Mediterranean countries are entirely justified in having suspicions of European motives and interests, and are aware of many inconsistencies and hypocrisies, Europe nevertheless brings with it some experience of having emerged from undemocratic and violent regimes that exploited people on the basis of race, religion, gender, and economics. European promotion of human rights is not *bad* simply because it is advocated by the Community, nor is it *good* simply because Europeans euphemistically characterise it as a part of their “identity”.⁹³⁶

⁹³² Eurostat (2015) “Euro-Mediterranean Statistics – 2015 edition”, p. 69. Available: <<http://ec.europa.eu/eurostat/documents/3217494/7053328/KS-GR-15-001-EN-N.pdf/08db83d1-966c-4b4d-869a-4a5dc2a9538d>> [accessed 24 Sept 2016].

⁹³³ European Commission, ‘Euro-Mediterranean Partnership’, 29 April 2016. Available: <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>> [accessed 14 Jul 2016].

⁹³⁴ For explanations of terminology used in this paper, including “European Community”, see below.

⁹³⁵ Fraczek, S et al., ‘Mapping, analysing and implementing foreign policy instruments’, (2015) FRAME, Deliverable 6.1, 23. Available: <<http://www.fp7-frame.eu/frame-reps-6-1/>> [25 Sept 2016].

⁹³⁶ The first time that “human rights” was identified as a European value was in the Copenhagen Summit’s “Declaration on European identity” of 15 December 1973 (Bulletin EC 12-1973):

Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, [the European Community is] determined to defend the principles of representative democracy, of the rule of law, of social justice —which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity. (p. 119, l.1)

2. Brief Introduction to the Arab Spring and its Aftermath

The term “Arab Spring” began to be used in the press as early as January 2011⁹³⁷ to describe the series of popular revolts that ultimately broke out in several countries of the Arab world between January and March, 2011, including the countries of Tunisia, Egypt, Yemen, Morocco, Libya, and Syria. The term initially evoked memories of 20th century popular uprisings against authoritarian governments, including those of Hungary (1956), Czechoslovakia (1968), and much of Eastern Europe (1989), if not the earlier popular uprisings sometimes called the “Spring of Nations” in 1848. While the term “Arab Spring” originally was invoked in 2011 with a sense of hope, optimism, curiosity, and even enthusiasm – as several long-ruling dictators were overthrown – several years later it is more likely to be invoked with a tone of irony, sarcasm, or even as a pejorative. While none of the individual overthrown leaders returned to power, the authoritarian regimes have either reverted to their prior condition, such as Egypt and Bahrain, or dissolved into chaos (Syria, Libya, and Yemen). After the extraordinary turmoil that led to the deaths of tens of thousands of people and social disruption, there appears to be only one country that is on a decidedly better (though still uncertain) path – Tunisia – and one where there appears to be perhaps a slightly modest improvement, but with no fundamental change in the ruling system – Morocco.

a) Conditions in the Arab World Pre-Arab Spring

In 2010, prior to the rebellions and demonstrations that broke out across the Arab Middle East, from Morocco to Iraq, most of the regimes were authoritarian and had been entrenched for decades with only a few superficial signs of democracy. Egypt, the largest country, had largely been under military rule since 1952, although Gamal Abdul Nasser (d. 1970), unlike his successors, was a genuinely popular figure. Tunisia’s President Zine Ben Ali had ruled an authoritarian regime since 1987⁹³⁸. Morocco, Saudi Arabia, Bahrain, Jordan were all monarchies, albeit with varying degrees of popularity for their rulers⁹³⁹. Libya was ruled by Muammar Gaddafi, who seized power in a military coup in 1969⁹⁴⁰. Syria was ruled by a military regime that was in the process of becoming a hereditary dictatorship with the passing of the presidency from Hafez al-Assad to his son Bachir al-Assad⁹⁴¹. Algeria was under the military dictatorship of Abdelaziz Bouteflika, a regime that had suppressed the results of a popular election in 1992, which

⁹³⁷ It appeared in ‘Obama’s Arab Spring’, *Foreign Policy*, 6 January 2011, available: <<http://foreignpolicy.com/2011/01/06/obamas-arab-spring/>> [accessed 14 Jul 2016] and in ‘How do you solve a problem like Mubarak?’, *The New York Times*, 28 January 2011, available: <<http://opinionator.blogs.nytimes.com/2011/01/28/how-do-you-solve-a-problem-like-mubarak/>> [accessed 14 Jul 2016]. During January, the term “printempsArabe” begins to appear in the French publications *Le Monde*, *L’Express*, *Le NouvelObservateur*, *Le Point*, and *Libération*.

⁹³⁸ Alan Richards et al., ‘A Political Economy of the Middle East’ (Boulder, Westview Press, 2013), 292 and 294.

⁹³⁹ Ibid, 311-316.

⁹⁴⁰ Ibid, 308.

⁹⁴¹ Ibid, 303.

otherwise would have brought Islamists to power⁹⁴². The states that included some limited democratic institutions were Lebanon, Morocco, and Iraq. The only quasi-democratic Arab state was Lebanon, and the two or three most democratic states in the region were not Arab: Turkey, Israel, and Iran⁹⁴³. On the whole, the Middle East was in the process of producing yet another generation of authoritarian rulers who had little regard for democracy, human rights, transparency, good-governance, or the rule of law⁹⁴⁴.

The authoritarian heads of state in the Middle East ruled over countries with failing economies. The five UN Arab Human Development Reports – written by Arabs for Arabs – that were published between 2002 and 2009 were consistently scathing in their criticism of the human condition in the Arab world, including the countries' poor human rights records, poor educational achievement, severe unemployment, environmental degradation, unequal treatment of women as well as racial and religious minorities, and the failure of governance. The political regimes were described as being largely insular, corrupt, self-dealing, and abusive of the populations over which they ruled. There was a widespread sense of hopelessness, bitterness, and dismay that permeated the disenfranchised populations, particularly the youth, where unemployment or underemployment was widespread.⁹⁴⁵

The disparity of human development between the countries the European Union identifies as its “southern neighbours” and some selected EU member states are demonstrated in the data below derived from the UN Human Development Reports. The table below identifies all of the southern neighbours (excluding Israel) and provides the HDI ranking and the gross national income per capita for the years for the years 2011⁹⁴⁶ and 2014⁹⁴⁷. It also identifies

Table: United Nations Human Development Reports (2011 and 2014)

Country	2011		2014 ⁹⁴⁸	
	HDI	GNI (PC) \$ 2005	HDI	GNI (PC) \$ 2011

⁹⁴²Ibid, p. 299.

⁹⁴³Ibid, p. 316.

⁹⁴⁴Ibid, p. 411.

⁹⁴⁵The five reports, published in 2002, 2003, 2004, 2005 and 2009 can be accessed and downloaded at: <http://www.arab-hdr.org/contents/> [25 Sept 2016].

⁹⁴⁶ UNDP, 'Human Development Report 2011. Sustainability and Equity: A Better Future for All' (2011). Available: http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf [accessed 14 Jul 2016].

⁹⁴⁷ UNDP, 'Human Development Report 2015. Work for Human Development – Statistical annex' (2015). Available: http://hdr.undp.org/sites/default/files/hdr_2015_statistical_annex.pdf [accessed 14 Jul 2016].

⁹⁴⁸ UNDP, 'Human Development Report 2015'. Available: <http://report.hdr.undp.org> [accessed 14 Jul 2016].

Algeria	96	7,658	83	13,054
Egypt	113	5,269	108	10,512
Jordan	95	5,300	80	11,365
Lebanon	71	13,076	67	16,509
Libya	64	12,637	94	14,911
Morocco	130	4,196	126	6,850
Palestine	114	2,656	113	4,699
Syria	119	4,243	134	2,728
Tunisia	94	7,281	96	10,404
Belgium	18	33,357	21	41,187
Bulgaria	55	11,412	59	15,596
Croatia	46	15,729	47	19,409
Estonia	34	16,799	30	25,214
France	20	30,462	22	38,056
Hungary	38	16,581	44	22,916
Netherlands	3	36,402	5	45,435
Poland	39	17,451	36	23,177
Romania	50	11,046	52	18,108
Spain	23	26,508	26	32,045

Turkey	92	12,246	72	18,677
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selected member states of the European Union, including the three that rank lowest on the Human Development Index (HDI) (Croatia, Romania, and Bulgaria). Every one of the EU member states ranks higher than the identified southern neighbours. (Data on Turkey is provided as a reference point.) Of the southern neighbours, Morocco consistently ranks lower on the HDI index, even behind Palestine, Egypt, Libya in the midst of civil war (with Syria having fallen behind Morocco due only to its civil war). Lebanon is typically among the highest⁹⁴⁹.

b) The European Union and the Mediterranean on the Eve of the Arab Spring

By the eve of the Arab Spring, the human rights policy of the European Community had undergone a profound transformation since the emergence of the European Coal and Steel Community in 1951. (For the historical development of European Community human-rights policy, see below). The EU's External Action Service has nicely summarised and condensed the EU's official global human rights position as it now exists (as well as on the eve of the Arab Spring):

The European Union views all human rights as universal, indivisible and interdependent. It actively promotes and defends them both within its borders and when engaging in relations with non-EU countries.

The EU's human rights and democracy policy encompasses civil, political, economic, social and cultural rights. The EU is adamant about protecting the universal nature of human rights when this is questioned on grounds of cultural or political differences. The EU furthermore believes that democracy is the only political system which can fully realize all human rights⁹⁵⁰.

It is almost all here: human rights are universal, indivisible, and interdependent – the policy of the European Community since 1998. Human rights must be promoted as a part of Community external action, which had been official since 1995. What is missing in this short statement is that EU human rights policy must be “effective”, that it is an “essential element” of relations with third states, and that human rights must be “mainstreamed” in all aspects of EU external action.

This EEAS summary continues to place human rights in a context broader than that of an isolated “soft value” to be promoted by a “normative Europe”, but as being integrally connected to hard interests of security, stability, and long-term development.

⁹⁴⁹ Israeli's HDI rankings are similar to those of Belgium.

⁹⁵⁰ EEAS, 'Human Rights and Democracy'. Available: <http://eeas.europa.eu/human_rights/about/index_en.htm> [accessed 16 Mar 2016]. This EEAS description appears to follow the Council 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, Luxembourg, 11855/12.

The European Union is founded on a strong engagement to promote and protect human rights, democracy and rule of law worldwide. ***Sustainable peace and stability, long-term development and prosperity cannot exist without respect for human rights and democratic institutions.*** This commitment underpins all internal and external policies of the European Union⁹⁵¹ (emphasis added).

Thus the EU's official position is that human rights is not simply a soft humanitarian value, but is inextricably linked to the hard interests of security and economic development both for the EU and all countries of the world. In 2016, the EU underscored the "hard interest" in human rights with regard to trade. The revised EU position on "sustainable development" establishes a "trade policy which aims to encourage third countries to comply with core international standards in the areas of human rights, labour rights, environmental protection and good governance"⁹⁵².

c) The Events of the Arab Spring

The term "Arab Spring" is used loosely to identify a series of events that is commonly understood to have begun on 17 December 2010, with the self-immolation of a distraught 26-year-old fruit vendor named Mohammed Bouazizi in a town in central Tunisia. His hospitalisation for severe burns and his death several days later galvanised popular antagonism against the country's deeply unpopular and authoritarian ruler, President Zine Ben Ali, to such an extent that the despised ruler felt compelled to visit the young victim in his hospital bed and to promise to make reforms. Following Bouazizi's death on 4 January 2011, protests grew in strength. As popular anger was increasingly visible on the streets of Tunis, the French Minister of Foreign and European Affairs, Michèle Alliot-Marie, in an ill-advised statement to the French parliament, announced that France had offered to send its internationally renowned security forces to Tunisia and Algeria to help the government restore order against the protestors⁹⁵³. Two days after Alliot-Marie's offer to help prop up Ben Ali, he resigned and fled to Saudi Arabia on 14 January 2011.

Egyptians were stunned to see the entrenched Ben Ali brought down by popular protests. Combining the example of Tunisia, earlier Egyptian martyrs, and resentments against President Hosni Mubarak who had ruled Egypt with an iron fist under "emergency laws" since 1981, crowds poured into Tahrir "Liberation" Square in Cairo, triggering a massive popular protest against the aging dictator. In less than

⁹⁵¹ EEAS, 'Human Rights and Democracy'. Available: <http://eeas.europa.eu/human_rights/about/index_en.htm> [accessed 16 Mar 2016]. This EEAS description appears to follow the Council 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, Luxembourg, 11855/12.

⁹⁵² European Commission, 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') covering the period 2014-2015', SWD(2016) 8, 28 January 2016, p. 6. Available: <http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154178.pdf> [accessed 14 Jul 2016].

⁹⁵³ 'Michèle Alliot-Marie et la Tunisie, retour sur une polémique', Le Monde, 7 February 2011. Available: <http://www.lemonde.fr/politique/article/2011/02/07/michele-alliot-marie-et-la-tunisie-retour-sur-une-polemique_1476436_823448.htm> [accessed 14 Jul 2016].

three weeks, between Tuesday, 25 January, and Friday, 11 February, Mubarak was brought down due to pressure triggered by a largely non-violent massive popular protest centred in Cairo's Tahrir Square. (In fact he was overthrown by a military coup.)

Nine days after Mubarak's fall, on the far west of the North African continent, simultaneous and orchestrated demonstrations occurred in several Moroccan cities on 20 February. Unlike the personalised attacks that led to the overthrow of the Egyptian head of state, Moroccan demonstrators did not directly challenge King Muhammad VI (1999-present) or personalise their frustration toward their head of state (as had the Tunisians and Egyptians), but called instead for greater democratisation, transparency, and employment opportunities in Morocco. Less than three weeks after the 20 February protest movement began, the King went on national television and called for a redrafting of the Moroccan constitution and appointed personally the members of the drafting committee. Three months later, on 17 June, the new draft constitution was presented to the public. The following month, on 1 July, the Moroccan state reported that (an eyebrow-raising) 98.5% of the Moroccans who went to the polls voted to ratify the new constitution. The King thereafter largely continued his rule without any major shift in power relationships under the new 2011 Constitution and the 20 February Movement dwindled in importance. The King largely retained his powers; Moroccans were relieved that they did not suffer the cataclysms of Egypt, Syria, and Yemen; and protestors who failed to accomplish their goals were marginalised with little having changed.

The "Arab Spring" of January through April 2011 was a time of hope, optimism, and enthusiasm. The famous English poet, William Wordsworth, described his visit to France shortly after the revolution of 1789 when the country was in a state of euphoria.

OH! pleasant exercise of hope and joy!

...

Bliss was it in that dawn to be alive,

But to be young was very heaven!⁹⁵⁴

Although describing the France during his youthful visit, Wordsworth wrote the words more than a decade later with the intent of contrasting the naïve hope of 1789 with the brutal reality of the Terror and the rise of Napoleon who would send Europe into its first continent-wide series of wars.

In Yemen, where protests against the ruler had begun as early as June of 2010, ultimately turned violent, but produced the desired result of the ouster of President Ali Abdullah Saleh in June of 2011. Significant protests broke out in other countries, including Jordan, Oman, Djibouti, Sudan, Bahrain, and Lebanon. Some protests led to violent conflict, including Yemen, Libya (where Muammar Gaddafi was captured and murdered), and Syria – where a bloody civil war has been continuing for more than five years. Four

⁹⁵⁴ William Wordsworth, 'The French Revolution as It Appeared to Enthusiasts at Its Commencement' (1805).

regimes were toppled (Tunisia, Egypt, Libya, and Yemen). Civil war or prolonged fighting continues in Syria, Yemen, and Libya, and each has spread conflict beyond its own borders. Five years after the beginning of the Arab Spring, the term is now more commonly used sarcastically or cynically, or replaced by other terms such as “Arab Nightmare” or “Arab Winter”.

In Egypt at the end of 2011, the most democratic elections in its history brought Mohammed Morsi, a member of the Muslim Brotherhood, to the presidency. Nevertheless, a year later Morsi was overthrown by another military coup led by General Abdel Fattah el-Sisi, and Egypt has now returned to the same entrenched military rule that it had experienced under Hosni Mubarak for 30 years, although the regime appears to be increasingly intolerant of dissent and is increasingly being criticised as being more repressive than the regimes of either Mubarak or Morsi’s Muslim Brotherhood.

With the exception of Tunisia, the final outcome of which remained tenuous five years later, and Morocco, which seems to have returned in many ways to the *status quo ante*, the so-called Arab Spring has led to a humanitarian disaster in Syria, Libya, and Yemen. Estimates for Syria suggest that 4.5 million people are now refugees and that more than 250,000 people have been killed. There is no immediate scenario for resolutions of the conflicts. Egypt has gone from the heady days of broad-based popular support for the overthrow of Mubarak in Tahrir Square, to two divisive sets of constitutional “reforms” and elections bringing to power people whose legitimacy was widely challenged. While one might continue to feel inspiration in the images of popular protest in favour of democratic change during the spring of the Arab Spring, there are few signs of hope that the protestors of Tahrir Square imagined.

d) Post-Arab Spring: Plus ça change . . .

The first report issued by the EU’s funding agency EuropeAid after the beginning of the Arab Spring included a cover photo of a Tunisian protestor holding a handwritten sign calling for Ben Ali to depart (“Ben Ali Dégage”)⁹⁵⁵. The photograph depicts the protesting woman in a favourable light, implying her courage in the ultimately successful cause of contributing to the downfall of the dictator. The apparently unarmed woman appears to challenge the power of the state with little more than her message, her body, and her bravery.

⁹⁵⁵EuropeAid, ‘EIDHR - Delivering on Democracy. Highlight of the Semester January – June 2011’ (2011). Available: http://www.eidhr.eu/files/dmfile/EIDHR_DemocracyReport2.pdf [accessed 14 Jul 2016]

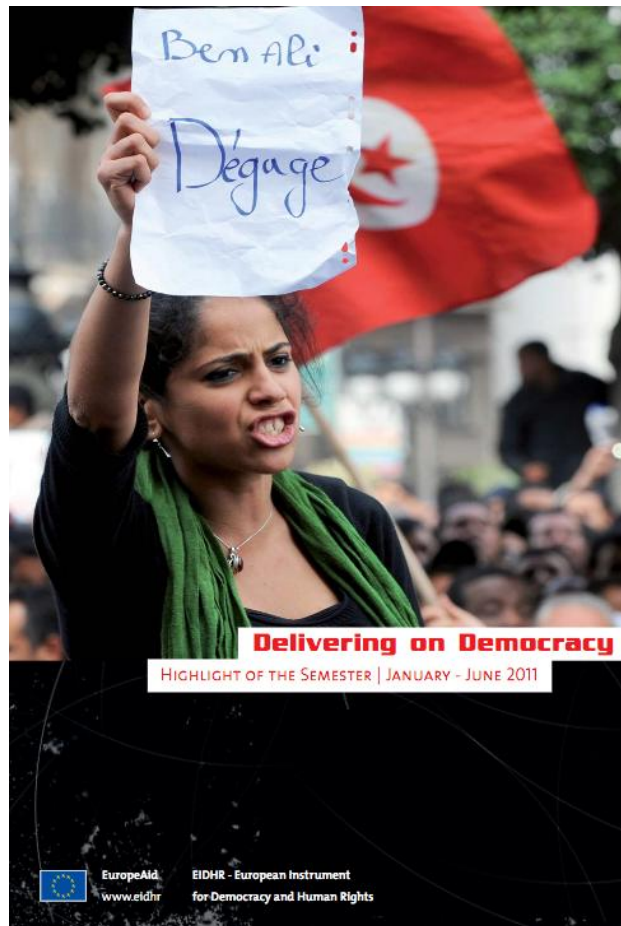


Figure 1: The EU Applauds Calls for Departure of Ben Ali – *after* his Departure

The fact that Ben Ali was a dictator was no secret to the EU prior to 2011. Yet the economically and politically powerful EU demonstrated less combined moral courage in directly confronting the brutality of the Ben Ali regime than the single woman depicted on the cover of its “posthumous” report. The EU did not have the courage to publish such a photograph in any official publication until *after* Ben Ali had fled Tunisia. This did not, however, prevent EuropeAid from taking partial credit for his downfall by acknowledging its clandestine financial contributions to civil society in Tunisia⁹⁵⁶.

⁹⁵⁶ ‘The “Jasmine revolution” means the EIDHR may now reveal its involvement in projects in Tunisia in 2010, where prior to transition, it supported the League of Human Rights (LTDH), the Association of Democrat Women (AFTD), Trade Unions (UGTT), Judges’ and Lawyers’ Associations and Reporters without Borders (RSF) for activities not authorised in the country. Lack of publicity for its involvement at the time could have been interpreted as abandonment or as a lack of responsiveness; EIDHR was in fact very active and ultimately successful’. EuropeAid, ‘EIDHR - Delivering on Democracy. Highlight of the Semester January – June 2011’, 15, (2011). Available: <http://www.eidhr.eu/files/dmfile/EIDHR_DemocracyReport2.pdf> [accessed 14 Jul 2016]

Although prior to the Arab Spring the European Union had *officially declared* that security and stability could be achieved in the long run only through respect for human rights and democracy, its policies had theretofore emphasised short-term security and stability through engagement with its brutal “partners” who ruled in Egypt and Tunisia. *After* Mubarak and Ben Ali had left the scene, high EU officials admitted their past mistakes in having promoted the short-term economic and security interests rather than the long-term values that constituted official policy. European Commissioner Štefan Füle, whose portfolio included relations with the southern Mediterranean, acknowledged early in the Arab Spring that the EU’s actual policies of dealing with dictators had been inconsistent with EU values. In a speech to Parliament on 28 February 2011, after Ben Ali and Mubarak had been toppled, he issued a *nostra culpa*:

we must show humility about the past. Europe was not vocal enough in defending human rights and local democratic forces in the region. Too many of us fell prey to the assumption that authoritarian regimes were a guarantee of stability in the region. This was not even Realpolitik. It was, at best, short-termism —and the kind of short-termism that makes the long term ever more difficult to build⁹⁵⁷.

Did the EU’s external policy toward dealing with dictators in fact change *after* the heady first days of the Arab Spring? Did EU external action henceforth align itself with Commissioner Füle’s speech, or did it return to the “short-termism that makes the long term ever more difficult to build”?

3. Framework of this Case Study

This chapter emphasises the role of human rights in the relationship between the European Community and the two countries of Morocco and Egypt (with some references to Tunisia) in the period leading up to, during, and following the so-called “Arab Spring”. Nevertheless, the two countries cannot be isolated from the policies of the Community with regard to human rights generally (particularly after 1973), nor can they be separated from the overlapping multilateral and regional approaches adopted by the Community towards the southern Mediterranean region since 1972. The variety of programmes and initiatives render the interrelationships somewhat complex.

The relationship between the Community and Morocco and Egypt with regard to human rights and democracy resembles something like three-dimensional chess that includes: (a) the emergence of human rights as a Community value and its incorporation into its external policy; (b) the development of broader Mediterranean (and Middle Eastern policies); and (c) the bilateral relations between the Community and individual states. Unfortunately, each of these three overlapping dimensions developed along slightly different timelines and thus do not readily present themselves in a neat chronological or thematic form.

⁹⁵⁷Štefan Füle, ‘Speech on the recent events in North Africa’, Speech/11/130, Available: http://europa.eu/rapid/press-release_SPEECH-11-130_en.htm [accessed 14 Jul 2016]. For further discussion on the post-Arab Spring response by the EU, see below.

After outlining the development of Community human rights policy generally and Community policy toward the southern Mediterranean, the chapter will focus on the bilateral relationships between the Community and Morocco and the Community and Egypt, particularly with regard to approaches to human rights in the context of the Arab Spring and thereafter.

C. The European Community and the Mediterranean

1. Overview: Europe in the Mediterranean and Middle East

a) *The European Colonial Legacy in the Middle East*

At the outbreak of the “Arab Spring” in 2011, two European Union member states had longstanding political and military involvement in the Mediterranean and Middle East since the nineteenth century⁹⁵⁸. The UK had treated Egypt as a protectorate (if not a colony) beginning in 1882, which gave it control over the vital Suez Canal. France similarly ruled over Algeria, Tunisia, and Morocco since 1830, 1881, and 1912 respectively.⁹⁵⁹ Other EU member states had played similar roles in Libya (Italy) and northern Morocco (Spain). The League of Nations granted mandatory power to Britain over Iraq, Jordan, Israel, and Palestine (using their modern names), while France had authority over Syria and Lebanon. The modern boundaries of these Mashreq countries do not reflect ancient, tribal, or traditional boundaries, but were drawn by Europeans in the twentieth century for European purposes⁹⁶⁰.

During the first and second quarters of the 20th century, the United Kingdom controlled oil production and its profits in Iran, Iraq, and the Persian Gulf (though not Saudi Arabia). In 1951, the popular, democratically elected Iranian parliament (Majlis) nationalised British-controlled Iranian oil fields, an action perfectly legal under international law. Rather than accepting the broad democratic expression of the Iranian people, the British (joined by Americans) instigated a coup that overthrew the popular Prime Minister Mohammad Mossadegh, and reasserted the authority of the more western-compliant Shah Mohammad Reza Pahlavi, thereby returning the control over oil to western companies. (The Ayatollah Khomeini nationalised Iranian oil after coming into power in 1979.)⁹⁶¹ With the exception of Syria, Lebanon, Iraq, Jordan, Libya, whose gradual independence was associated with the end of World War II, most Mediterranean and Middle Eastern states continued to be dominated in 1945, through military force, by states that are now members of the European Union⁹⁶².

⁹⁵⁸ And, of course, relations between Europe and the Mediterranean go back centuries before that.

⁹⁵⁹ Steven A. Cook, *The Struggle for Egypt: From Nasser to Tahrir Square* (Oxford: Oxford University Press, 2012); M.W. Daly, ed. *The Cambridge History of Egypt: Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge, UK: Cambridge University Press, 1998); Thomas Pakenham, *The Scramble for Africa: White Man's Conquest of the Dark Continent from 1876 to 1912* (New York: Random House, 1991).

⁹⁶⁰ Roger Owen, *State, Power and Politics in the Making of the Modern Middle East* (London, Routledge, 2006) 5-22.

⁹⁶¹ Ervand Abrahamian, 'The 1953 Coup in Iran' (2001) 65 *Science & Society* 182-215.

⁹⁶² Owen, *ibid*, 9.

In 1951, at the time that the European Coal and Steel Community (ECSC) came into existence, many Middle Eastern and Maghreb states continued to be subjected to direct or indirect European rule, including Morocco, Algeria, Tunisia, Libya, Egypt, and Gulf states (again excepting Saudi Arabia). While technically independent at the birth of the ECSC in 1951, Iran was largely dominated by the UK. Two salient vestiges of European colonialism that continue to trouble Moroccans to this day are the Spanish cities of Ceuta and Melilla, seized as colonies in the fifteenth century and never returned to Morocco⁹⁶³.

Even after Egypt obtained independence from British control with the overthrow of King Farouq in 1952, British military forces continued to be stationed in Egypt (against the Egyptians' wishes) along the Suez Canal until 1956. When Egypt nationalised the Suez Canal in 1956, the United Kingdom – with the aid of France and Israel – attempted to retake it by military invasion until forced to stand down by the United States⁹⁶⁴. In the same year, 1956, that the UK and France invaded Egypt, France and Spain finally recognised the independence of Morocco and Tunisia⁹⁶⁵. Yet, even after France agreed to Tunisian independence in 1956, it continued to operate a naval base in Bizerte against the will of the Tunisians until 1963. (Several hundred were killed in open fighting at Bizerte in July 1961.)⁹⁶⁶ Britain recognised Kuwait's independence only in 1961⁹⁶⁷. France fought against Algerian attempts to obtain independence until 1962⁹⁶⁸.

Since 1951, the European Community's⁹⁶⁹ principal interests have been directed toward trade and commerce, both with regard to lessening internal barriers among member states as well as improving trade outside the bloc. Indeed, the name of the principal institution from 1957 until 1993 was the European *Economic* Community, with the word "Economic" being removed only in 1993 with the ratification of the Maastricht Treaty. With regard to its relations with the Mediterranean and Middle East, trade and commerce have always been the dominant concerns. During the 20th and 21st centuries, petroleum has been the most important and strategic commodity imported into Europe, and it is the fuel that allows the European Union to be among the world's three largest economies.

Middle Eastern petroleum has been vital to the United Kingdom since 1910, long before the Community came into existence or the UK joined it in 1973. Although Middle Eastern petroleum has been a strategic resource for all of Europe since World War II, its salience soared dramatically in the 1970s as Middle Eastern countries either nationalised their oil fields that had heretofore been controlled by western companies (as in the cases of Iraq and Iran), or acquired ownership by purchasing shares of western

⁹⁶³ Portugal originally seized Ceuta and Spain Melilla. Morocco argues that just as Spain claims Gibraltar, Morocco is entitled to these two remnants of colonialism.

⁹⁶⁴ Richards et al., *ibid*, 188-189.

⁹⁶⁵ Owen., *ibid*, 18

⁹⁶⁶ Werner Klaus Ruf, 'The Bizerta Crisis: A Bourguibist Attempt to Resolve Tunisia's Border Problems' (1971) *The Middle East Journal* 201-2011.

⁹⁶⁷ Nigel Ashton, 'Britain and the Kuwaiti crisis, 1961' (1998) 9 *Diplomacy and Statecraft* 163-181.

⁹⁶⁸ Owen, *ibid*, 18.

⁹⁶⁹ See the Part I Note on Terminology at the end of this section.

companies (as in the case of Saudi Arabia's purchase of Aramco). Rather than being able to rely on oil produced and refined by the western-controlled international oil cartel (the "Seven Sisters")⁹⁷⁰, Europeans subsequently needed to deal directly with the oil-producing countries that had long been dominated by unpopular western states⁹⁷¹. In 1973, several Arab oil exporting countries first announced cutbacks and then cut-offs of oil shipments to the United States and the Netherlands, with threats to expand the embargo further to other European states. Always important, the salience of oil and European dependency on it became a defining issue in the 1970s and it was increasingly referred to as the "oil weapon"⁹⁷².

While petroleum was the dominant commodity of interest to Europeans from the greater Middle East, the Community had other important albeit lesser interests. Other products from the region that have an importance at the margins for Europe, but that are of vital interest to Mediterranean exporting countries, include agricultural products (particularly citrus, olives, tomatoes, potatoes, cucumbers, and grapes), phosphates (from Morocco, Jordan, Egypt, and Tunisia), fish (through fishing rights), and some manufactured products (particularly leather and textiles). Bilateral trade agreements governing these commodities between Middle Eastern states and Europe largely began in the late 1960s⁹⁷³.

The most salient political conflict in the Middle East prior to the 1970s, and which profoundly shapes international relations today, is the Israeli-Palestinian dispute. Although always simmering, it broke out into international armed conflict in 1947-1948, 1956, 1967, 1973, and in the Israeli invasions of Lebanon. After 1967, Israel occupied lands seized by force in the West Bank, Golan Heights, Gaza, and the Sinai (until 1982), and this occupation has been a constant source of conflict and a recurring theme of discussion between the European Community and the countries of the Mediterranean and Middle East. The Israeli arsenal in 1967, which allowed it to make these significant gains, was largely supplied by EU-member state France. (The US became the major military supplier to Israel only in the 1970s). In response to the Israeli-Palestinian dispute, political terrorism became a recurring phenomenon in the 1960s and early 1970s. Adopting tactics taken from Europe's own radical Red Army Brigade and others, Palestinian groups increasingly used terror as a tactic to dramatise their hostility toward Israel. In September 1970 ("Black September"), five airplanes were hijacked (one of which was immediately retaken) by the Popular Front for the Liberation of Palestine and three of the planes were spectacularly blown up in the desert in Jordan before world's television cameras, albeit with no loss of life. Two years

⁹⁷⁰ The so-called Seven Sisters oil companies (British Petroleum, Gulf Oil, Standard Oil of California, Texaco, Royal Dutch Shell, Standard Oil of New Jersey, and Standard Oil Company of New York (Socony), controlled between 80 and 90% of world production, and 100% of the production in Iran, Iraq, and Saudi Arabia. As late as the 1960s, petroleum wealth was perceived as being more closely tied to the powerful international oil companies than to the territories in which they operated.

⁹⁷¹ Richards et al., *ibid*, 51.

⁹⁷² *Ibid*, 53-54.

⁹⁷³ Richards et al., *ibid*, 57-61.

later, a new movement taking the name of Black September, murdered Israeli athletes at the Munich Olympics, thereby adding intentional murder to international terrorism.

b) Context: The 1970s and 1980s

It was in this context of the early 1970s (Israeli occupations following 1967, nationalisation of oil, and emergence of Middle Eastern terrorism) that the Community developed its first articulated approach toward the region as a whole: the “Global Mediterranean Policy” (GMP) in 1972. However, despite the salience of the dramatic economic and security events occurring in the Middle East, the Community had never taken a stand or issued a proclamation on human rights as a whole (and it had only recently, for the first time, addressed the Israeli-Palestinian dispute). The first inclusion of human rights in a European Community-approved document occurred one year after the GMP, in 1973, in the “Declaration on European Identity” (which newly asserted that human rights had long been a European value)⁹⁷⁴. The first brief mention of human rights in a treaty with a third country took place only in 1984 in the Third EEC-ACP Convention (Lomé III)⁹⁷⁵. The first statement proclaiming that human rights were an important part of the Community’s external policy occurred in 1986 in a new “Declaration on Human Rights”⁹⁷⁶.

Thus, the beginning of the Community’s drawing attention to human rights coincided with, but was on a completely separate track from, the beginning of its formulating a policy toward the Middle East. Though politics was exploding in the region, the Community’s focus remained on trade. During the next twenty years, as the Community’s human rights policy developed, so did the increase of issues related to the Middle East. Lebanon underwent a civil war that lasted from 1975 to 1990, and whose consequences continue to undermine Lebanese stability. One consequence of the instability in Lebanon was the subsequent invasions by Israel and Syria. The most dramatic series of events with the greatest long-term consequences to face the Middle East directly and the Community more broadly arose during the year 1979. In February of 1979, the Ayatollah Khomeini returned to Iran after the Shah left and took control as the Supreme Jurist until his death 10 years later. Iran was transformed into (arguably) the first modern Islamist state, with repercussions for Sunni Islamists who took inspiration by an Islamic takeover of a modern state.⁹⁷⁷ In that same year the Soviet Union invaded Afghanistan, turning that country into a

⁹⁷⁴ ‘The Copenhagen Summit Conference’ Copenhagen, 14-15 December 1973. Available: <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwgC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013>> [accessed 1 Jun 2016].

⁹⁷⁵ Lomé III Convention [1986] OJ L 86/3 (signed 8 Dec 1984; in force in May 1986).

⁹⁷⁶ The European Council, ‘Declaration on Human Rights’ (1986). Brussels, 21 July 1986. Available: <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=LK9yPhMLvLLnMQhTQ6vYKWP4cv1pytVXyTfTpQ2Qjn1pL0r0rcs!1139521418?docId=151326&cardId=151326>> [Last accessed 13 June 2016].

⁹⁷⁷ Vanessa Martin, *Creating an Islamic State: Khomeini and the Making of a New Iran* (London: I.B. Tauris, 2003), 147-166 (first Islamic state) and 188 "Studies of the effect of the revolution from around the Muslim world indicate that it provided a boost of confidence to Muslims, both Sunni and Shi'i, especially where either was a minority

jihadist training ground. At the end of the year, the first dramatic, modern, violent attack by Muslims against other Muslims in the name of Islam took place, when Juhayman al-Utaybi and Muhammad al-Qatani led a group of armed rebels into the Holy Mosque in Mecca, killing hundreds of people and establishing a new model of religio-political violence. The rise of modern armed, militant Islam can largely be traced to these events. Where previously in the Middle East terrorism had been associated with *Arabs* (both Christian and Muslim) and with left-wing anti-imperialist ideologies, after 1979 terrorism increasingly became associated with groups acting in the name of Islam. Although Islamist suicide attacks now seem to be an almost a daily occurrence⁹⁷⁸, the first such suicide attack can be traced back only to the bombing of the US Embassy in Beirut in 1983, and the subsequent attacks on American and French marine barracks at the Beirut international airport later in the year.

From 1980-1988, Iraq and Iran were involved in a conflict that left more than one million dead, the two countries ravaged along their border, and virtually no change of territory. The conflict among Israel, Lebanon, Syria, and the Palestinians took on a decided religious overtone with the establishment of Hezbollah in 1992. The Islamist group Hamas challenged the secular/socialist PLO. The movement was shifting from one of national liberation to one of claiming to be answering the call of God.

Saddam Hussein invaded Kuwait in 1990, leading NATO and many European states to contribute to the effort to expel him. When a no-fly zone was imposed after the war, it was enforced by NATO and supported by sanctions, including by many states within the European Community. The Community similarly imposed economic restrictions on Libya in the 1990s due to the rogue actions of the rogue leader of the rogue state⁹⁷⁹. The 1990s also saw the rise of Osama bin Laden and al-Qaeda, which in turn used the name of Islam to attack principally US interests in the Middle East, and that culminated in the attacks of 11 September 2001. The American response to 9/11 included the European-supported war in Afghanistan and the largely American and British-led invasion of Iraq in 2003.

Obviously, issues in the Middle East since the promulgation of the Community's GMP in 1972 had become much more complicated. While Europe's need for petroleum had not diminished, and its other trading issues had remained intact, the difficulties had become more intractable and less predictable. Not only had Iran switched from being a reliable, if unpredictable, ally to a hardened enemy. The Israel-Palestine dispute did not disappear, even if the wars with neighbouring states subsided. The Middle East increasingly produced a new generation of authoritarian rulers who had little regard for democracy, human rights, transparency, good-governance, or the rule of law: the al-Assads (father and son), Saddam Hussein, Muammar Qaddafi, Hosni Mubarak, Ben Ali, and AbdelazizBouteflika. How would the

group." See also John Esposito, ed., *The Iranian Revolution: Its Global Impact* (Gainesville: University Press of Florida, 1990)

⁹⁷⁸ Three hours after this sentence was first written, three suicide bombers attacked the Atatürk International Airport in Istanbul on 28 June 2016.

⁹⁷⁹ Common Position of 16 April 1999 defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning Libya [1999] OJ L103/1.

Community's external action policies deal with these messy issues in the period leading up to the 2011 Arab Spring in light of its human rights policies that emerged after 1972?

c) Summary: The European Community in the Mediterranean since 1972

In order to understand the interaction between the European Community and Mediterranean countries with regard to human rights issues, it may be helpful to consider three overlapping and interacting categories in addition to the human rights policies as explained in Part II above: first, formal *policies* (or strategies) adopted by the Community toward the Mediterranean, second, the *multilateral fora* in which the policies were promoted, and third, the *bilateral relations* between the Community and the individual states in the Mediterranean region.

Policies. For practical purposes, the Community did not have an articulated policy or strategy toward the region as such prior to 1972. Since that time there have been four principal regional approaches that have evolved over time and that have overlapped to some extent.

- The Global Mediterranean Policy (GMP) (1972-1990)
- The "New" Mediterranean Policy (1992-1996)
- The Euro-Mediterranean Partnership (EMP) (1995-)
- European Neighbourhood Programme (ENP) for "Southern Neighbours" (2004-)

Multilateral fora. The Community has had relations with states and intergovernmental organisations in the region in a variety of multilateral fora, including most prominently, but not exclusively, the Barcelona Process (1995-2008) and the Union for the Mediterranean (UfM) (2008-present). The Community's approach to the multilateral Barcelona Process was articulated largely through the EMP policy.

Bilateral relations. The Community also has bilateral relations with the individual countries in the region. While each country presents the Community with specific and unique bilateral issues, the Community's regional approaches have led to highly similar treaty relations with countries in the region. Thus the EMP, for example, set forth a policy not only for the Barcelona Process, but also for each of the new bilateral treaties for the individual states in the region that were ratified after 1995. Similarly, with the adoption of the ENP in 2004, the bilateral relations with individual countries were shaped by a general policy that largely applied to all. For example, the Community's current bilateral treaties with Egypt and Morocco (called "Association Agreements") were drafted following the policies articulated in the EMP. At the same time, both countries are considered "Southern Neighbours" under the ENP, and both states have "Action Plans" and review processes that were set forth in the ENP.

Although the Community had begun to articulate human rights positions as early as 1973, and although the Community adopted human rights as part of its external policies with third countries as early as

1984 (see Part II above), human rights did not become incorporated into its relations with the Mediterranean generally until the 1995 Barcelona Declaration, and human rights were not incorporated into bilateral Association Agreements, including Egypt, Tunisia, and Morocco, until the late 1990s⁹⁸⁰.

It is frequently argued, and will be discussed below, that trade and security were the “hard interests” of the Community prior to 2010, and that the “normative Europe” values of democracy, human rights, and good governance were “soft” issues that were discussed in the margins rather than present at the core (as the doctrines of “mainstreaming” and “coherence and effectiveness”) provide. It is important to ascertain whether this was indeed the case before the outbreak of the Arab Spring, and whether such interests shaped policy during the Arab Spring and thereafter.

The European Communities had formally articulated a policy in which *long-term* stability and security would be achieved only through the implementation of high standards of human rights, democracy, good governance, and the rule of law. Yet the question remains whether this was mere rhetoric on the part of the Community, or whether it actually attempted to promote such a position.

On many occasions prior to the Arab Spring, the European Community and its predecessors stressed the strategic importance of the Mediterranean to Europe with regard to several issues: security, migration, economics and trade, and political stability. In 1995, the Commission, reporting to Parliament and the Council, explicitly linked the protection of human rights to maintaining stability in the region:

The Mediterranean is strategically important to the European Union.

One of Europe's priorities is to consolidate peace and stability in the region. This challenging task would involve:

- supporting political reform and defending human rights and freedom of expression as a means of containing extremism;
- promoting economic and social reform in such a way as to produce sustained growth (to create jobs) and an increase in standards of living, with the aim of stemming violence and easing migratory pressure⁹⁸¹.

The respect for human rights is thus not simply a beloved humanitarian value, it is an integral component of a package of long-term hard interests that are necessary to support stability in the Community's relationship to the “strategically important” Mediterranean region.

⁹⁸⁰ The first inclusion of human rights in a treaty was Lomé III in 1984 (see Part II.B.3.a), and the first time it was articulated as an official policy was in 1986. The European Council, ‘Declaration on Human Rights’, 21 July 1986, Available: <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=LK9yPhMLvLLnMQhTQ6vYKWP4cv1pytVXyTfTpQ2Qjn1pL0r0rcs!1139521418?docId=151326&cardId=151326>> [accessed 13 Jun 2016].

⁹⁸¹ Commission Communication, ‘Strengthening the Mediterranean Policy of the European Union: Proposals for Implementing a Euro-Mediterranean Partnership’ COM(95) 72, 8 March 1995, 2. Available: <<http://aei.pitt.edu/4315/1/4315.pdf>> [accessed 2 Jul 2016]

The economy of the combined European Union is one of the two largest in the world and it dominates the Mediterranean region. Its trading power with its southern neighbours is vastly disproportionate. The combined imports from all Mediterranean countries reach less than 9% of the EU's total⁹⁸². The power relationship is highly imbalanced. Morocco's exports to the EU constitute 50% of the country's total exports, while they reach less than 1% of the EU's imports⁹⁸³. The EU maintains a positive balance of trade surplus with its Mediterranean neighbours, leaving them in ongoing economic debt to their rich neighbour to the north.

2. European Community Policies toward the Mediterranean (1972-present)

As mentioned immediately above, there have been four major European Community policies that have developed relative to the Mediterranean region. They will be considered in turn.

a) Global Mediterranean Policy (GMP) (1972-1990)

Prior to 1972, EEC relations with states in the Mediterranean were governed by individual bilateral agreements that were not part of an articulated common Community strategy toward the region. At that time, the EEC had entered into agreements with 12 of 17 countries in the region⁹⁸⁴. All of the agreements were purely commercial in nature. In preparation for the Paris summit of October 1972, when the nine-member EEC would be joined by the three incoming members (United Kingdom, Ireland, and Denmark), the Council requested the Commission to prepare a paper on the Mediterranean region. At that time, non-member states in the Mediterranean included not only states in the Maghreb and Mashreq (including Israel), but also Spain, Cyprus, Greece, Malta, Yugoslavia, and Albania.

The Commission's paper was submitted on 27 September 1972 and consisted of three principal topics: creation of a free-trade area in manufactured goods; second, reductions on the export of EEC agricultural goods to Mediterranean countries; and third, cooperation on technical and other matters⁹⁸⁵. Based upon the paper submitted by the Commission, the Summit adopted on 21 October a common approach toward the region that would subsequently be called the "Global Mediterranean Policy" (GMP), even though that term itself was not itself used as such in the Summit communiqué and even

⁹⁸² <http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>

⁹⁸³ Niklas Bremberg. *Diplomacy and security community-building: EU crisis management in the western Mediterranean* (New York, Routledge, 2016), 31.

⁹⁸⁴ Loukas Tsoukalis, 'The EEC and the Mediterranean: Is 'global' policy a misnomer?' (1977) 53 *International Affairs* 427, 422-438

⁹⁸⁵ Commission Communication, 'Les relations entre la Communauté et les pays du basin arabe' SEC(72) 3111, 27 September 1972, np. Available: <<http://aei.pitt.edu/4436/1/4436.pdf>> [accessed 2 Jul 2016] See also Loukas Tsoukalis, 'The EEC and the Mediterranean: Is 'global' policy a misnomer?' (1977) 53 *International Affairs* 429-430, 422-438.

though the global policy was not explained in any detail⁹⁸⁶. Indeed, the Summit's description of its new strategy toward the region was stated only briefly as follows:

10. The Heads of State and Government affirm that their efforts to construct their Community will only take on their full meaning to the extent that the Member States succeed in acting together to meet Europe's growing responsibilities in the world.

11. The Heads of State and Government are convinced that without vitiating the advantages enjoyed by the countries with whom it has special relationships, the Community must respond more than ever before to the expectations of all the developing countries. From this angle the Community puts great value on the Association policy confirmed by the Accession Treaty and on honouring its commitments towards the Mediterranean countries with whom agreements have been or are to be made, agreements which require an overall and balanced handling⁹⁸⁷.

This first statement on a common and global Mediterranean policy by the EEC is of importance for understanding the Community's statement about its preferred relationship with the region for at least three reasons. First, it is self-consciously a component of the developing plan of the EEC (acting as nine even before the formal accession of the new members three months later) to develop a common external policy to meet its "growing responsibilities in the world". Second, the first region that it intends to include in this expanding external policy is a region with which it has a "special relationship": the Mediterranean. Third, it pledges that the relationships, which will be formulated through its future bilateral agreements, "require an overall and balanced handling". It also is very important for what it does not say. There is no statement whatever about the EEC's wish to understand issues *from the perspective of Mediterranean countries*. It is a Euro-centric, top-down policy to be implemented and is not a policy of dialogue and exchange.

The Global Mediterranean Policy (GMP) was in fact outlined in an 18-page 'information memo' entitled "The Relations between the Community and the Mediterranean Countries" that was released immediately after the summit⁹⁸⁸. Curiously, the term "Global Mediterranean Policy" was itself not used in the English version of the document, which adopts the Summit's language to describe the policy as

⁹⁸⁶ Statement from the Paris Summit [1972] No. Supplement 72/10, 14-26. Available: <http://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf> [accessed 2 Jul 2016]. The policy is not articulated in any detail in the document from the summit.

⁹⁸⁷ Statement from the Paris Summit [1972] No. Supplement 72/10, 14-26. Available: <http://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf> [accessed 2 Jul 2016]. The policy is not articulated in any detail in the document from the summit.

⁹⁸⁸ Commission Information Memo, 'The Relations between the Community and the Mediterranean Countries' 48, np. Available: <http://aei.pitt.edu/30142/1/P_48_72.pdf> (in both English and French).

“an overall and balanced approach” (p. 1)⁹⁸⁹. The document identifies the “Mutual interests, in particular in the fields of external security, trade, both in industrial and agricultural products and the provision of energy, and the labour sector, create an interdependence which is based on the principle of cooperation free of all strings”. (p. 2) More specifically within the document there also are references to environmental issues (sewage and the Mediterranean Sea), working conditions of migrants from Mediterranean countries who live in the European Community, and especially reduction of trade barriers.

Despite whatever the best intentions of the Summiteers might have been, the GMP as implemented over the next two decades was neither balanced nor global. It established, or perhaps formalised, an unequal rather than balanced relationship built on a centre-periphery model. The economically powerful EEC negotiated as a single entity with each of the smaller and poorer Mediterranean countries individually. Whatever collective influence the Mediterranean states might have had if acting in concert was entirely diluted by the hub and spoke relationship. Moreover, each of the individual countries had much greater economic needs in their trading relations with the EEC than did the EEC any of with the individual countries. Thus the model implemented in the GMP inherently strengthened the relative power of the EEC and weakened that of the individual countries. Although of course the individual countries *could have* banded together to establish a common negotiating strategy with the EEC, but as a practical matter this simply would not work. Although promoting a GMP that it characterised as building on a “special relationship” and on “mutual interests”, the relationship was one of a superior to the subordinate where the superior defined the mutual interests. This can be seen by the absence of references to *the* salient issues from an Arabo-Muslim perspective: the Israeli-Palestinian dispute and Israeli occupation of “Arab” lands. That significant omission will come back to haunt the EEC the following year when Saudi Arabia starts the process of purchasing all of Aramco shares and the October War leads to an oil embargo against Europe and the United States.

Another issue of interest to the southern Mediterranean states that *was* mentioned was the possibility of joining the club of the powerful with a possible future accession to the EEC. This issue was addressed in the statement that the EEC “keeps open the door to the accession of the European Mediterranean countries to the Community”⁹⁹⁰. Whatever intentions the EEC might have left open in 1972 with regard to future membership for Arab or Muslim states ultimately proved not to include them. With the exception of Turkey, none of the other states has been or is likely to be considered for membership. Morocco’s request to begin accession talks was rejected in 1987. (See below.)

⁹⁸⁹ The French version, however, speaks of the ‘mise en oeuvre de ses engagements avec les pays du Bassin méditerranéen, avec lesquels des accords sont conclus ou à conclure, accords qui devront faire l’objet d’une approche globale et équilibrée’ (a “global and balanced approach”) Commission Information Memo, ‘The Relations between the Community and the Mediterranean Countries’, p. 1. Available: <http://aei.pitt.edu/30142/1/P_48_72.pdf>

⁹⁹⁰ Commission Information Memo, ‘The Relations between the Community and the Mediterranean Countries’ P-48, 2. Available: <http://aei.pitt.edu/30142/1/P_48_72.pdf>

As would be expected, human rights, democratisation, and good governance are not mentioned in the “global” policy⁹⁹¹. Nor, as mentioned above, does it take into account the perspectives of southern Mediterranean states on issues or strategy. Nor does it include the important issues of particular interest to the southern Mediterranean countries, including the Israeli-Palestinian dispute. One close observer, writing in 1977, found the policy to have several flaws. An “obvious conclusion to draw about the EEC's global Mediterranean policy is that the term used gives an exaggerated idea of what it is actually all about. First of all, the policy has only been about trade and aid. The EEC started with rather unrealistic assumptions about the globality of its approach and the actual contents of its policy”⁹⁹². Others have been even less generous: the GMP “did not deliver on its promises. It remained trade-driven, it did not spur European investments (only 1% of total European investments was channelled to the Southern Mediterranean) [and] it did not contribute to bridge the prosperity gap between the two shores of the Mediterranean”⁹⁹³.

b) New Mediterranean Policy (NMP) (1992-1996)

As early as 1989, the Council called for a new approach for the foreign policy targeting the Mediterranean⁹⁹⁴. Despite the fact that it already had a “global” policy, there was a realisation that it had not succeeded. A document produced in 1992 acknowledged that the former policies, particularly with regard to the Maghreb, included “twenty-five years of cooperation” that ultimately was “disappointing when compared with the hopes cherished by the two sides”⁹⁹⁵. In 1990, the Council acknowledged the need for a new policy and directed the Commission to launch preparatory work⁹⁹⁶. By December of 1990 in Rome, the Council adopted a resolution stating that it noted “with satisfaction the progress made in redirecting Mediterranean policy, which involves inter alia Community support for structural adjustments” and sought to “complete its discussions as quickly as possible so that negotiations on the Financial Protocols could be opened”⁹⁹⁷.

By the middle of 1991, on a track separate from its Mediterranean policy, the Council, with the events in Eastern Europe in mind, articulated its emerging policy of linking human rights, democracy, and economics, and suggested this should apply to the Mediterranean region as well. At the Luxembourg

⁹⁹¹ Human rights would not have been expected to be a part of the Community approach in 1972, as explained in Part II above, because human rights would not become a part of the EEC’s internal agenda until the following year, 1973, and it would not be referenced in Community external policy for an additional 13 years in 1986.

⁹⁹² Loukas Tsoukalis, ‘The EEC and the Mediterranean: Is ‘global’ policy a misnomer?’ (1977) 53 *International Affairs* 435.

⁹⁹³ Bichara Khader, ‘The European Union and the Arab World: From the Rome Treaty to the ‘Arab Spring’ (2013) 17 *PapersEMed* 9.

⁹⁹⁴ European Council Conclusions, ‘Conclusions of the Presidency’ SN 441/2/89, Strasbourg 8-9 December 1989.

⁹⁹⁵ Commission Communication, ‘the future of the relations between the Community and the Maghreb’ SEC (92) 401, 14. Available: <<http://aei.pitt.edu/4309/1/4309.pdf>> [accessed 2 Jul 2016].

⁹⁹⁶ European Council Conclusions, ‘Conclusions of the Presidency’, SN 60/1/90, Dublin, 25-26 June 1990.

⁹⁹⁷ European Council Conclusions, ‘Conclusions of the Presidency’, No. 12/1990, Rome, 14-15 December 1990.

Summit in 1991, the Council stated that “the new assistance and economic co-operation programmes in . . . the Mediterranean countries mark the opening of a new era. The European Council reaffirms its conviction that certain aspects with an important bearing on these relations, such as broader-based democracy, respect for human rights, and economic reform, are bound to develop further”⁹⁹⁸.

As noted above, by the beginning of 1992, the EEC spoke in a surprisingly self-congratulatory way as it saw itself triumphantly following the collapse of the European communist regimes (See Part II.B and the Commission report on Maastricht⁹⁹⁹). This self-flattery at the beginning of 1992 appeared not only with regard to the role that it intended to play in the world generally, but carried over with regard to its role in the Mediterranean. In another Delors Commission report, it proudly declared that the “European Community is now seen as the main focus for peace, democracy and growth by all of Europe and the neighbouring countries to the South and East”¹⁰⁰⁰. Having praised itself as the world’s recognised role, it noted the importance of turning its attention to the Mediterranean: “Nor can there be any doubt as to the urgent necessity of making the Mediterranean a drawbridge rather than a moat – a necessity that recent events [in Eastern Europe] have served only to underline”¹⁰⁰¹. Unlike the GMP, which avoided discussion of the political and economic challenges that confronted the region, the Commission was now identifying them.

Most Mediterranean countries are facing political instability, rapid population growth, large movements of population and high unemployment. These problems, especially in the case of the Maghreb countries, are also our problems-- such is their influence on the region's security and the potential migratory pressure on the Community¹⁰⁰².

The proposed new approach, however, acknowledged the immediacy of the issue unlike that of the GMP. “The time has now come to give this regional policy the cogency required for its message to be credible, embracing respect for the rights of individuals, political democracy, social progress, economic development and all the other conditions for a secure, shared future”¹⁰⁰³. As of 1992, it was seen that the need for action was urgent: “There is clearly a danger that the Maghreb will become increasingly cut off from political, economic, social and cultural changes in Europe, and that this will lead to

⁹⁹⁸ European Council Conclusions, ‘Conclusions of the Presidency’, No. 14/S-91, Luxembourg, 28-29 June 1991, 17. Available: <http://www.europarl.europa.eu/summits/luxembourg/default_en.htm> [accessed 2 Jul 2016].

⁹⁹⁹ Commission Communication, ‘From Single Act to Maastricht and Beyond: The Means to Match our Ambitions’, COM(92) 2000, 11 February 1992, Available: <<http://aei.pitt.edu/2938/1/2938.pdf>> [accessed 1 Jul 2016].

¹⁰⁰⁰ Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 4.

¹⁰⁰¹ Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 4.

¹⁰⁰² Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 4.

¹⁰⁰³ Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 5.

instability”¹⁰⁰⁴. Importantly, for the developing policy toward the Mediterranean, it was now acknowledged that the promotion of human rights must become, for the first time, a vital component of Community external action in the Mediterranean:

The human rights and democracy aspect has in recent years become an essential component of the Community's foreign policy. It has been affirmed through political commitments, the inclusion of specific clauses as new agreements have been concluded, and the setting-up of special programmes for certain regions of the world. Relations between the Maghreb countries and the Community are based on agreements concluded at a time when this component was not as much of a priority as it is now. It goes without saying that what is now seen as an anomaly should be corrected when the Euro-Maghreb agreements are concluded¹⁰⁰⁵.

The inclusion of human rights as an “essential element” – which had become EEC policy generally – should now specifically be included in the Mediterranean.

The new Mediterranean Policy, was adopted in 1992 at the Summit in Lisbon¹⁰⁰⁶. (It has alternatively been described as either the “New” or “Renewed” Mediterranean Policy.)

The Council articulated its new policy in extremely general terms:

The European Council underlines the importance it attributes to its general relations with the Mediterranean countries and welcomes in this connection the recent agreement on the renewed Mediterranean policy, which constitutes an essential element towards greater political and economic stability in the Mediterranean region¹⁰⁰⁷.

The Lisbon Council identified three regulations (that were adopted shortly thereafter) as the core of the new Mediterranean policy. The three regulations acknowledged at Lisbon were published the following month in the Official Journal and set forth the practical details of the “new Mediterranean Policy” to be in place from 1992-1996 and focus on issues of financial and technical cooperation, financial aid, and imports of products from the region¹⁰⁰⁸. Curiously, even though the Council had, between 1989 and

¹⁰⁰⁴ Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 5.

¹⁰⁰⁵ Commission Communication, ‘the future of the relations between the Community and the Maghreb’, SEC (92) 401, 18.

¹⁰⁰⁶ European Council, ‘Lisbon European Council’, Bulletin of the EC, No. 6/1992. Available: http://aei.pitt.edu/1420/1/Lisbon_june_1992.pdf [accessed 2 Jul 2016].

¹⁰⁰⁷ European Council, ‘Lisbon European Council’, Bulletin of the EC, No. 6/1992, point I.23, 16. Available: http://aei.pitt.edu/1420/1/Lisbon_june_1992.pdf [accessed 2 Jul 2016].

¹⁰⁰⁸ The three Council regulations are: Council Regulation (EEC) 1762/92 of June 1992 on the implementation of the Protocols on financial and technical cooperation concluded by the Community with the Mediterranean non-member countries [1992] OJ L181/1; Council Regulation (EEC) 1763/92 of 29 June 1992 concerning financial cooperation in respect of all Mediterranean non-member countries [1992] OJ L181/5; Council Regulation (ECC) 1764/92 of 29 June 1992 amending the arrangements for the import into the Community of certain agricultural

1991, taken an increasingly firm position that human rights should be a component in all of its relations with third countries, the three new regulations cited by the Lisbon Council in 1992 are completely silent on the issues of human rights, democracy, good governance, the rule of law, and transparency.

The Lisbon Council also referenced as a part of its new policy a “Declaration by the European Council on relations between Europe and the Maghreb”.¹⁰⁰⁹ This Declaration, by its specific terms, references not the Mediterranean generally, but only the Maghreb. It reaffirms its solidarity and wish to contribute to “stability and prosperity”. *Unlike* the GMP (which it does not cite), the model is not that of the periphery and centre where policy is made at the centre, but “partnership”. It raises values that were not cited in the previous policy, stating that its relations with the Maghreb will be built on a “common commitment” to respect human rights, democratic values, and tolerance. It also speaks of other issues not included in the 1970 GMP: a “harmonious development of the Maghreb region with a view to its economic integration, the introduction of true market economies and the modernization of economic systems”. The EEC agrees to provide financial assistance and to promote investments. “The European Council notes that talks have already made it possible to explore this approach with Morocco and hopes that rapid progress can be made along these lines. It proposes that a similar approach be adopted towards other countries in the region”. Also, unlike the unilateral approach of the GMP, the new Maghreb policy (and implicitly the entire Mediterranean policy) must focus on “problems raised on both sides of the Mediterranean” while acknowledging the “links forged by geography and by history”.

While the language of the Maghreb declaration is dramatically different from prior policy, the regulations issues nevertheless remain completely silent on the fine values broadly proposed. Given that the Association Agreements and Cooperation Agreements between the EEC and Mediterranean countries did not include any human rights provisions as of 1992, the EEC’s policies favouring human rights were inconsistent with its actual policies that in fact ignored them. The other ongoing issue, not addressed, is the unequal power relationship between the European Community, already one of the world’s leading economic and technical powers, and its bilateral relationships with third world countries with entrenched regimes.

c) Euro-Mediterranean Partnership (Euro-Med) (1995-present)

During the period 1994-1995, the EEC launched a new initiative that is variously identified as the “Euro-Mediterranean Partnership”, the “Euro-Mediterranean Partnership Initiative”, and the “Barcelona Process”. These terms are frequently shortened or abbreviated as “EMP”, “EMPI”, “Euro-Med”, “Euromed”, and “EUROMED”. Curiously, these different terms are sometimes used as synonyms and sometimes they are treated as distinct concepts.

products originating in Algeria, Cyprus, Egypt, Israel, Lebanon, Malta, Morocco, Syria and Tunisia [1992] OJ L181/9.

¹⁰⁰⁹ European Council, ‘Lisbon European Council’, Bulletin of the EC, No. 6/1992, Annex IV, point I.34, 23-24. Available: <http://aei.pitt.edu/1420/1/Lisbon_june_1992.pdf>[accessed 2 Jul 2016].

In 2008, a new initiative called the “Union for the Mediterranean” (UfM) emerged from this cluster. Frequently, the UfM is treated as if it completely consolidated and superseded all of the earlier programmes, while at other times the UfM is treated as if replaced only the Barcelona Process and that the Euro-Med continues. Thus, some describe the UfM as existing concurrently and separately from Euro-Med and others treat the two as being the same thing. Sometimes the Barcelona Process is described as having emerged out of Euro-Med and sometimes Euro-Med is described as having emerged out of the Barcelona Process.

Although there is a lack of clarity and consistency about the competing uses of these terms (or programmes), they should not be conflated with an entirely distinct initiative entitled the “European Neighbourhood Program” (ENP) that emerged on an entirely different track in the European Union in 2004. The ENP will be discussed separately below.

In order to bring some clarity out of the confusing use of these various terms, this chapter proposes a scheme to explain them. The reader should be advised, however, that different authors treat these terms differently (and inconsistently) and that explanations of their relationships differ according to the source, and that on occasion the same source will use the terms differently¹⁰¹⁰. While the following scheme may be somewhat unusual, it appears to the authors to be the clearest and most accurate way of explaining a (needlessly) confusing use of terms.

In the period 1994-1995, the Council and Commission developed yet another regional approach for the Mediterranean area to succeed the EEC’s earlier Global Mediterranean Policy (1972-1990) and the New Mediterranean Policy (1992-1996). Although different terms were used in the 1994-1995 period to identify this new initiative, we will use consistently the term “Euro-Mediterranean Partnership” (or Euro-Med) to describe this EEC policy as it emerged over time. Thus, Euro-Med should be understood to be an internal European Community regional policy formulated solely by European Community institutions.

During the initial discussions about what ultimately would become Euro-Med, a specific proposal was made by Spain to hold a regional conference that would bring together the EEC, some member states of the EEC, and non-EEC states from the Mediterranean region for a multilateral discussion. The EEC adopted this proposal, and planning began for the conference that ultimately was held in Barcelona in 1995. The Barcelona Conference, whose participants included the EEC, some EEC member states, and other countries, adopted the “Barcelona Declaration”. This was a consensus document in which all participants were included in its preparation. Following from the Barcelona Declaration, the participants decided to continue the multilateral exchanges under a forum known as the “Barcelona Process”, which continued through 2008.

¹⁰¹⁰ The competing and arguably inconsistent use of these terms appears even on the web pages of the European External Action Service, where one might hope some coherence might have been offered.

Thus, as used here, and we believe correctly, ***Euro-Med (or Euro-Mediterranean Partnership) is an exclusively EEC policy proposal toward the Mediterranean region while the Barcelona Process was a multilateral forum that discussed issues of common concern to the EEC and Mediterranean countries.***

In 2008, French President Sarkozy (then President-in-Office of the EU Council) proposed an entirely new initiative that ultimately became the Union for the Mediterranean (UfM). Although President Sarkozy did not specify the differences (or similarities) between the existing Barcelona Process and the proposed UfM, over time the UfM supplanted the Barcelona Process and established a permanent Secretariat in Barcelona.

In sum, we will use the term “Euro-Med” to refer to the internal European Community regional policy designed to promote a “Euro-Mediterranean Partnership”, while the Barcelona Process and UfM are the multilateral fora in which Euro-Med played itself out.

Compounding the confusion created by the varying and inconsistent use of terms as described above, the Euro-Med proposal developed over time. In discussing the formation of Euro-Med, authors typically overlook some of the steps and omit others¹⁰¹¹. In chronological order, the principal documents are:

- 1994 June 24-25: Council meeting in Corfu¹⁰¹²
- 1994 October 19: Commission document “Strengthening the Mediterranean Policy”¹⁰¹³
- 1994 December 9-10: Council meeting in Essen¹⁰¹⁴
- 1995 March 8: Commission document “Strengthening the Mediterranean Policy” (revised)¹⁰¹⁵
- 1995 June 26-27: Council meeting in Cannes¹⁰¹⁶
- 1995 July 24-November 15: Brussels preparatory meetings for Barcelona Conference (including EEC and southern Mediterranean countries)¹⁰¹⁷
- 1995 November (27-28) Barcelona Conference and Declaration¹⁰¹⁸

¹⁰¹¹ Perhaps the best explanation of the development is that of Esther Barbé, ‘The Barcelona Conference: Launching Pad of a Process’ (1996) 1 *Mediterranean Politics* 25-42.

¹⁰¹² European Council. Corfu, 24-25 June [1994] EC Bulletin No. 6/1994. Available: http://aei.pitt.edu/1444/1/corfu_june_1994.pdf [accessed 3 Jul 2016].

¹⁰¹³ Commission Communication, ‘Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership’ COM(94) 427, 19 October 1994. Available: <http://aei.pitt.edu/2950/1/2950.pdf> [accessed 3 Jul 2016].

¹⁰¹⁴ European Council. Essen, 9-10 December [1994] EC Bulletin No. 12/1994. Available: http://aei.pitt.edu/1447/1/Essen_Dec_1994.pdf [accessed 3 Jul 2016].

¹⁰¹⁵ Commission Communication, ‘Strengthening the Mediterranean Policy of the European Union: Proposals for Implementing a Euro-Mediterranean Partnership’ COM(95) 72, 8 March 1995. Available: <http://aei.pitt.edu/4315/1/4315.pdf> [accessed 3 Jul 2016].

¹⁰¹⁶ European Council. Cannes, 26-27 June [1995] EC Bulletin No. 6/1995. Available: http://aei.pitt.edu/1446/1/cannes_june_1995.pdf [accessed 3 Jul 2016].

¹⁰¹⁷ Draft Declaration prepared. See Esther Barbé, Esther Barbé, ‘The Barcelona Conference: Launching Pad of a Process’ (1996) 1 *Mediterranean Politics* 28-29 and 34-36, 25-42.

The Cannes Council, 26-27 June 1995, outlined the EEC's Euro-Med project as establishing a "lasting pattern" of arrangements with countries in the region to create an "area of exchange and dialogue" in order to guarantee peace, stability, and well-being. The lengthy document sets forth the European Community's wish for the multilateral discussion to include the entire gamut of political, social, economic, and environmental goals. It recognises that there are common challenges facing the countries of the region that should be faced on a multi-lateral basis. The documents identified many avenues of potential cooperation.

The new partnership is to be "based on strengthening democracy and respect for human rights, which constitute an essential element in relations between Europe and its Mediterranean neighbours"¹⁰¹⁹. The proposed multilateral dialogue has three "aspects": first, political and security; second, economic and financial, and third, social and human.¹⁰²⁰

The political aspect is designed to tie security, stability, the rule of law, and fundamental freedoms. The economic aspect is designed to build a "zone of shared prosperity" within the framework of the WTO and to develop a free-trade area. Particular emphasis is given to the improvement of development of the private sector. The social aspect places a high emphasis on person-to-person contacts and exchanges with civil society. This emphasis on contacts between people "differs fundamentally from the peace process in the Middle East". It is designed more for building relationships rather than resolving disputes.

For the first time as a part of European external action with regard to the Mediterranean, the Cannes Summit document raises human rights to a priority position in relations among countries and the European Community. The document declares that, with regard to human rights, the "Euro-Mediterranean partnership" should be based on respect for human rights texts; the rule of law (including free and fair elections and independence of the judiciary); parties taking practical steps in common to further human rights; and pluralism and tolerance. The document assumes that human rights, stability, security, and economic development are interrelated and create a unified whole.

Whereas many of the Community's external relations documents might be criticised for being too narrow or limited, the Cannes document, if anything, may be too ambitious. It places everything on the table, although, in retrospect, it treats the issue of migration in only a cursory way.

¹⁰¹⁸ Euro-Mediterranean Conference, 'Barcelona Declaration' 27-28 November 1995. Available: <http://www.eeas.europa.eu/euromed/docs/bd_en.pdf> [accessed 3 Jul 2016].

¹⁰¹⁹ European Council. Cannes, 26-27 June [1995] EC Bulletin No. 6/1995, p. 22. Available: <http://aei.pitt.edu/1446/1/cannes_june_1995.pdf> [accessed 3 Jul 2016].

¹⁰²⁰ Persons familiar with the CSCE process will recognise these three aspects in the CSCE's "three baskets".

The Commission's October 1994 communication to the Council proposed that the Community convene a conference with Mediterranean partners in 1995, albeit without suggesting a specific location¹⁰²¹. Because the conference was planned for late 1995, the decision on its location was granted to the Spanish presidency (July-December 1995), and for internal political reasons Prime Minister Felipe González deferred to the Catalanian's preference for Barcelona¹⁰²². For the Barcelona Conference itself, see below.

By 2004, there was widespread criticism of Euro-Med both within and without the programme¹⁰²³.

d) Common Strategy on the Mediterranean Region (2000)

The Amsterdam Treaty (in force 1999) established new mechanisms for enhancing the Community's Common Foreign and Security Policy (CFSP). These mechanisms included enhancing the ability of the Council to establish policies with a qualified majority and the establishment of the new position of high representative for the CFSP. In the year 2000, the Council, acting in accordance with this new tool, established common strategies for four different regions, including a "Common Strategy on the Mediterranean Region" (CSMR) (June 2000). The CSMR was designed to articulate Community policy. It was understood to highlight the Community's concerns regarding the Mediterranean region and to give a new burst of energy into the weakening Barcelona Process, even though many of the major provisions tracked those of Barcelona¹⁰²⁴.

It declared a linkage among the issues of security, human rights, and Middle East peace. While favouring the Middle East Peace Process, it effectively excluded it from playing a role in the strategy.

While endorsing in principle the CSMR, the European Parliament was concerned that it could be read as overly emphasising issues of security and trade rather than broader issues involving the human dimension. The EP calls "on the Member States and the Commission to avoid reinforcing the notion that the EU is interested in the Mediterranean for security reasons alone or that its economic intervention is intended only to open up the markets of the Southern countries"¹⁰²⁵. The EP favoured an increased emphasis on promoting human rights and cultural and human exchanges.

Ultimately, the CSMR had little positive impact. The Community issued it unilaterally and thus Mediterranean countries were again placed in the position of listening to the Europeans' conception of how relations should operate. Ultimately, its results were "limited" and its implementation was

¹⁰²¹ Commission Communication, 'Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership' COM(94) 427, 19 October 1994. Available: <<http://aei.pitt.edu/2950/1/2950.pdf>> [accessed 4 Jul 2016].

¹⁰²² Esther Barbé, 'The Barcelona Conference: Launching Pad of a Process' (1996) 1 *Mediterranean Politics* 29, 25-42.

¹⁰²³ Sarah Wolf, *The Mediterranean Dimension*, 4-5.

¹⁰²⁴ <http://www.consilium.europa.eu/uedocs/cmsupload/mediien.pdf>

¹⁰²⁵ <http://www.europarl.europa.eu/meetdocs/committees/afet/20010208/muscardinien.pdf>

“disappointing”¹⁰²⁶. According to Rosa Balfour, “it did not introduce any innovative approach nor did it play an important role in pushing for increased cooperation between the member states”.¹⁰²⁷ One has the impression that a great deal of work was expended for developing a new strategy, but that ultimately it largely tracked former strategies in words and accomplished little in the way of practical improvements.

e) European Neighbourhood Program (ENP) (2004-present)

(1) Establishment of the European Neighbourhood Policy (2003-2004)

From its inception, the most powerful leverage possessed by the European Community was its ability to offer states membership in the exclusive organisation. Following the collapse of communism in Eastern Europe in 1989, the EU began the process of negotiation with several formerly communist states, culminating in the 2004 enlargement to 25 members. Recognising the increasing costs and difficulty in continuing to expand its membership, the Community began to develop a new strategy for the countries toward its east and south with which it would like to have improved relationships short of becoming members. The first articulation of this strategy appeared in 2003 in the Commission document ‘Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’. Rather than “partners” – the operative term for Euro-Med since 1995 – the southern countries would become “neighbours”¹⁰²⁸. “Everything but the institutions” was one way that this thinking was formulated. After long consultations, the Community announced its new “European Neighbourhood Policy” (ENP) in 2004 in the same month that its total membership expanded to 25¹⁰²⁹.

ENP was designed to replace the accession procedure. Accession had the possibility of really changing laws inside candidate countries; ENP does not. It provides some benefits available otherwise available only to member states; but without possibility for full access¹⁰³⁰.

The ENP was thus designed, in part, to promote closer ties with states that were not likely to be considered for future membership in the EU. The ENP is divided into two separate groupings: the

¹⁰²⁶ Michael A. Köhler, “The Security Concept of the European Union for the Mediterranean” in Hans Gunter Brach, et al., *Security and Environment in the Mediterranean* (Berlin: Springer, 2003), 208.

¹⁰²⁷ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The cases of Ukraine and Egypt* (Routledge 2012), 98.

¹⁰²⁸ Commission Communication, ‘Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’, COM(2003) 104, np. Available: <https://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf> [Last accessed 14 July 2016].

¹⁰²⁹ Commission Communication, ‘European Neighbourhood Policy – Strategy Paper’, COM(2004) 373, np. Available: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0373&from=EN>> [Last accessed 14 July 2016]

¹⁰³⁰ Eva-Maria Maggi, *The Will of Change: European Neighborhood Policy, Domestic Actors and Institutional Change in Morocco* (Springer Fachmedien Wiesbaden 2016) 84-85.

Eastern neighbourhood (including Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine), and the Southern or Mediterranean neighbourhood (including Morocco, Algeria, Tunisia, Libya, Egypt, Jordan, the Palestinian Authority, and (initially) Syria). The ENP operates exclusively on a bilateral basis between the EU and individual countries, unlike the current Union for the Mediterranean (UfM) in which the EU engages in multilateral projects with several Mediterranean countries, including all of the states that are in its Southern neighbourhood.

(1) Arab Spring: New Response to a Changing Neighbourhood (2011)

The Commission launched a study of the ENP in the southern Mediterranean in July 2010 that was subsequently overtaken by the events of the Arab Spring.

The Commission's analysis appeared in two separate documents issued in March and May of 2011. On 8 March 2011, the Commission issued the joint communication 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean'¹⁰³¹. Two months later, the Commission issued another joint communication, 'A New Response to a Changing Neighbourhood' (New Response)¹⁰³². Although the studies were launched prior to the outbreak of the Arab Spring, the documents were in some ways a pressured response to the rapidly developing situation.

Both documents reflect enthusiasm and sense of progress brought about largely by brave protestors challenging dictatorial rule. While acknowledging that much remains to be done, they speak of a transformation as having already, and apparently permanently, having taken place.

The events unfolding in our southern neighbourhood are of historic proportions. They reflect a profound transformation process and will have lasting consequences not only for the people and countries of the region but also for the rest of the world and the EU in particular. The changes now underway carry the hope of a better life for the people of the region and for greater respect of human rights, pluralism, rule of law and social justice – universal values that we all share. Movement towards full democracy is never an easy path – there are risks and uncertainties associated with these transitions. While acknowledging the difficulties the EU has to take the clear and strategic option of supporting the quest for the principles and values that it cherishes.¹⁰³³

¹⁰³¹ European Commission, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final, 8 March 2011. Available: <https://eeas.europa.eu/euromed/docs/com2011_200_en.pdf> [Last accessed 24 July 2016]

¹⁰³² European Commission, 'A new response to a changing Neighbourhood', COM(2011) 303, 25 May 2011, Available: <https://eeas.europa.eu/enp/pdf/pdf/com_11_303_en.pdf> [Last accessed 24 July 2016]

¹⁰³³ European Commission, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final, 8 March 2011, p. 2. Available: <https://eeas.europa.eu/euromed/docs/com2011_200_en.pdf> [Last accessed 24 July 2016]

The EU pledges that it will support the efforts of the countries undergoing the transition from autocracy to democracy and pledges a “qualitative step forward” in relations between the EU and the countries undergoing transition.

Earlier ENP documents acknowledged that countries in the region had a “history of autocratic and non-democratic governance”, as if this were a prior problem that no longer existed. By 2011, with the toppling of Ben Ali and Mubarak, the Commission was finally able to acknowledge that two of their ENP “partners” were indeed autocratic and that it was a positive sign that they had been overthrown. The EU insists that the “commitment to democracy, human rights, social justice, good governance and the rule of law must be shared. The Partnership must be based on concrete progress in these areas”¹⁰³⁴. The Commission outlines many of the concrete steps that need to be undertaken. The Commission promotes conditionality as a useful tool.

This new approach, a “Partnership for Democracy and Shared Prosperity” represents a fundamental step change in the EU’s relationship with those partners that commit themselves to specific, measurable reforms. It is an incentive-based approach based on more differentiation (‘more for more’): those that go further and faster with reforms will be able to count on greater support from the EU. Support will be reallocated or refocused for those who stall or retrench on agreed reform plans¹⁰³⁵.

If words were to be taken seriously, this would be an extraordinarily important statement on the part of the EU. Since the time that human rights became an “essential element” of international agreements in the 1990s, as explained above, the EU had never actually triggered the clause. Now, in the heady days of the Arab Spring, the EU announces that it is now very serious. This is a “new approach” that “represents a fundamental step change” and that will require “measurable reforms”. This new approach will be “incentive-based”. Conditionality, it would seem, is now going to be serious EU policy.

The New Response to a Changing Neighbourhood, which appeared two months later, reaffirmed the importance of conditionality in future EU efforts to promote human rights with third countries. It announced that “Increased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law. The more and the faster a country progresses in its internal reforms, the more support it will get from the EU” (New Response, p. 3. See also pp. 10, 20).

As will be shown below, the EU never actually took concrete steps to implement this “new approach” in its “New Response”.

¹⁰³⁴ Ibid., 2.

¹⁰³⁵ Ibid., 5.

The New Response also proposed to promote the new concept of “deep democracy”, which it characterised as being long-lasting due to its promotion, along with the right to vote, freedom of speech, impartial justice, and independent judiciary, and human rights. (New Response, p. 2)

(2) *The New European Neighbourhood Policy (New ENP) (2015)*

On 18 November 2015, the Commission and the HR/VP issued a joint communication to the Parliament and Council entitled “Review of the European Neighbourhood Policy”¹⁰³⁶. It repeatedly refers to the “new ENP” whose formulation was prompted by the “events of recent years” – an unveiled reference to the Arab Spring and its consequences – saying that for the ENP there is a “need for a new approach, a re-prioritisation and an introduction of new ways of working” (New ENP, p. 2) It professes a wish “to build more effective partnerships” (p. 2) Inasmuch as the New ENP was formulated after the Arab Spring, we will consider it in our concluding analysis below.

3. *European Community Multilateral Fora in the Mediterranean (1973-present)*

a) *Mediterranean Multilateral Fora (1973-1995)*

The 1972 Global Mediterranean Policy (GMP), as mentioned above, did not identify the Israeli-Palestinian dispute as a subject to be included within its “global” policy. The following year, open war broke out on 6 October when Egypt and Syria invaded the Israeli-occupied Arab territories in the Golan Heights (legally Syria) and the Sinai (legally Egypt). After a stunning but brief victories by Egypt and Syria during the first days, Israel pled for American assistance. On 9 October, before any aid arrived, the tide began to shift to favour Israel, although the warring parties did not immediately understand this. On 10 October the United States agreed to supply emergency military shipments to Israel to preclude a potential disaster. On 13 October, EEC Foreign Ministers issued a brief statement calling for an end to hostilities and a negotiated settlement to the conflict, thereby continuing the theme first articulated in 1972¹⁰³⁷. The following day, on 14 October, one of the largest tank battles in world history took place in the Sinai with the Egyptian forces being soundly defeated. That same day, massive amounts of US aid to Israel began to arrive. As early as 15 October, reports began to leak that Saudi Arabia was preparing to cut back on deliveries of oil to the United States and that Arab states were preparing to use oil as a

¹⁰³⁶ Commission Communication, ‘A Review of the European Neighbourhood Policy’, SWD(2015) 500 final, 18 November 2015 <http://eeas.europa.eu/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf> [Last accessed 16 July 2016].

¹⁰³⁷ European Political Cooperation, ‘Statements of the Foreign Ministers and Other Documents’, 1973. Available: <<http://aei.pitt.edu/5576/1/5576.pdf>> [accessed 4 Jul 2016]. For 1972, see David Allen, ‘The Euro-Arab Dialogue’ (1978) 16 *Journal of Common Market Studies* 326, 323-342. For the Commission 1972 propositions, see ‘Necessary Progress in Community Energy Policy’, 13 October 1972, *Bulletin of the EC*, supplement 11/72.

weapon on any country that favoured Israel¹⁰³⁸. By 21 October, Saudi Arabia, Qatar, Kuwait, Bahrain, Libya, and Dubai had announced their intention to completely cut off oil shipments to the United States, thereby increasing pressure against Europeans who feared a spill over effect. By 22 October, Libya's Qaddafi threatened to cut off oil shipments to Europe, and soon thereafter Arab states announced complete oil embargoes to EEC member state Netherlands.

Whether for reasons of world peace or the assurance of continued oil shipments, the EEC's foreign ministers issued a "Declaration on the Middle East" on 6 November 1973, which included support for UN Security Council resolutions, opposition to the use of force to acquire territory, and the need for Israel to relinquish the territory it seized in 1967¹⁰³⁹. While referring to all states in the region having the right to live in security, it offered no support to Israel by name. Members of the League of Arab States believed that they saw an opening with Europe in the wake of the October oil crisis¹⁰⁴⁰. At a 28 November meeting in Algiers, the Sixth Summit of the Arab League, the leaders decided to propose a dialogue with the EEC on the Middle East conflict¹⁰⁴¹. The EEC accepted the invitation at its Copenhagen summit immediately after, and the Euro-Arab Dialogue (EAD) (1973-1979) was born, launching a new multilateral forum for the Community and Arab-majority states to discuss the Middle East conflict. During the first years of its existence, different mechanisms were launched, namely an EAD Coordinating Group, made up of senior figures from the EEC member states, an EAD committee, and a General Committee mandated with the conceptual foundation of the EAD¹⁰⁴². At the same time, thematic Working Groups were established, together with a Parliamentary Association for Euro-Arab Cooperation.

With its first plenary session taking place in Cairo in June 1975, the EAD continued to deliver steady contacts between different actors of both regions, with the purpose of enhancing economic integration and cultural exchanges. The Euro-Arab Dialogue did not broach the topic of human rights generally,

¹⁰³⁸ 'A Saudi Threat on Oil Reported' *The New York Times*, 16 October 1973. Available: <<http://query.nytimes.com/mem/archive/pdf?res=990CE6DD1739E73ABC4E52DFB6678388669EDE>> [accessed 4 Jul 2016]

¹⁰³⁹ European Political Cooperation, 'Statements of the Foreign Ministers and Other Documents', 1973. Available: <<http://aei.pitt.edu/5576/1/5576.pdf>> [Last accessed 4 July 2016].

¹⁰⁴⁰ See Rory Miller, 'The Euro-Arab Dialogue and the Limits of European External Intervention in the Middle East, 1974-77' (2014) 50 *Middle Eastern Studies* 937, 936-959.

¹⁰⁴¹ The text of the Arab League Summit Declaration was never officially released. A purported text was published by the Lebanese newspaper *Al Nahar*, and is now available on an Israeli government's website, 'Declaration of the Arab Summit Conference at Algiers', 28 November 1973. Available: <<http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/19%20declaration%20of%20the%20arab%20summit%20conference%20at%20al.aspx>> [accessed 14 Jul 2016]. The text refers to the apparently greater European readiness to discuss the Israeli-Palestinian problem.

For additional background, see Rory Miller, 'The Euro-Arab Dialogue and the Limits of European External Intervention in the Middle East, 1974-77' (2014) 50 *Middle Eastern Studies* 937, 936-959.

¹⁰⁴² Rory Miller, 'The Euro-Arab Dialogue and the Limits of European External Intervention in the Middle East, 1974-77' (2014) 50 *Middle Eastern Studies* 937, 936-959.

limiting itself only to general comments about the rights of the Palestinian people. The EEC Council meet in Italy in June of 1980 and issued the Venice Declaration to propose a way to overcome the Middle East conflict¹⁰⁴³. Following the lead of the Islamic Summit in 1969 and the Arab League in 1973, the Venice Declaration spoke not of human rights in general but of the rights of the Palestinian people. However, the suspension of activities in 1979 due to the Camp David Agreements would suppose the inauguration of a bleak decade for the Dialogue, which would not longer really recover¹⁰⁴⁴. Politicisation, lack of policy definition and American hostility towards the frame would divert the Dialogue from its original *raison d'être*, and result in a "limited Europe's capacity to establish itself as a major political player in the Middle East"¹⁰⁴⁵. The EAD, like other subsequent fora, would be seen as ultimately unproductive – and would launch a precedent for avoiding a serious discussion of human rights (other than the rights of the Palestinian people) in all of the upcoming multilateral fora.

Following the perceived success of the Organisation for Security and Cooperation in Europe during the events of 1989, there was a brief attempt in 1990 to propose a similar "Conference on Security and Cooperation in the Mediterranean" (CSCM) following the model of the Conference on Security and Cooperation in Europe, but it never gained momentum. Although it did have "the human dimension" on its agenda, it did not have the durability or success of the CSCE.

The year 1990 also saw the launching of the "Western Mediterranean Forum" (later called 5+5 in reference to the number of participating entities, five from Europe and five from the Maghreb). Although it technically continues to exist and meets occasionally, it has accomplished little and also did not place human rights on the agenda¹⁰⁴⁶. Already by 1995, the CSCM and 5+5 were in a "state of paralysis"¹⁰⁴⁷.

Other brief attempts at establishing other multilateral fora were launched with a similar lack of success, including the Union of the Arab Maghreb (1989)¹⁰⁴⁸ and FOROMOD (1994)¹⁰⁴⁹.

¹⁰⁴³ Euro-Arab Dialogue, 'VeniceDeclaration', 13 June 1980. Available: <http://eeas.europa.eu/mepp/docs/venice_declaration_1980_en.pdf> [accessed 4 Jul 2016].

¹⁰⁴⁴ 'Euro-Arab Dialogue' MEDEA Themes, available:

<<http://www.medeas.be/en/themes/euro-mediterranean-cooperation/euro-arab-dialogue/>> [accessed 2 Jul 2016].

¹⁰⁴⁵ Rory Miller, 'The Euro-Arab Dialogue and the Limits of European External Intervention in the Middle East, 1974-77' (2014) 50 *Middle Eastern Studies* 938, 936-959.

¹⁰⁴⁶ BicharaKhader, 'The European Union and the Arab World: From the Rome Treaty to the 'Arab Spring'' (2013) 17 *PapersIEMed* 5-6, 9-46.

¹⁰⁴⁷ Esther Barbé, 'The Barcelona Conference: Launching Pad of a Process' (1996) 1 *Mediterranean Politics* 25-26, 25-42.

¹⁰⁴⁸ Commission Communication, 'The Future of Relations between the Community and the Maghreb' SEC(92) 401, 30 April 1992. Available: <<http://aei.pitt.edu/4309/1/4309.pdf>> [accessed 4 Jul 2016].

¹⁰⁴⁹ BicharaKhader, 'The European Union and the Arab World: From the Rome Treaty to the 'Arab Spring'' (2013) 17 *PapersIEMed* 12-13, 9-46.

Thus, as of 1995, there had been no meaningful multilateral exchange established between the European Community and the countries of the Mediterranean, and with the exception of the failed CSCM, none put human rights on the agenda.

b) The Barcelona Declaration and the Barcelona Process (1995-2008)

(1) Barcelona Meeting and Declaration (1995)

After months of preparatory meetings in Brussels, on 27-28 November 1995, the foreign affairs ministers of European Community member states and 12 Mediterranean non-member countries assembled in Barcelona for the purpose of beginning the process of establishing an area of economic liberalisation and free trade as well as cooperation in common interests such as security, good governance, democracy, and human rights. The Barcelona Declaration was the result of their work¹⁰⁵⁰. The Barcelona Declaration provides the first formal acknowledgement of the importance of human rights in a joint document between the European Community and Mediterranean non-member countries. The Barcelona Declaration includes the same basic formulation linking security, human rights, and economic development as articulated in the 1986 and 1991 declarations on human rights cited above:

convinced that the general objective of turning the Mediterranean basin into an area of dialogue, *exchange and cooperation guaranteeing peace, stability and prosperity requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development*, measures to combat poverty and promotion of greater understanding between cultures, which are all essential aspects of partnership¹⁰⁵¹. (emphasis added)

There is, however, a striking difference between the Cannes document and the Barcelona Declaration. Cannes was written in the context of European Community policy that had evolved, particularly since 1992, when “essential elements” clauses began to be added to binding legal agreements with third parties. The month before Cannes, the Commission had established the policy that human rights should

¹⁰⁵⁰ Euro-Mediterranean Conference, ‘Barcelona Declaration’ 27-28 November 1995- Available: <http://www.eeas.europa.eu/euromed/docs/bd_en.pdf> [accessed 3 Jul 2016]. The Barcelona Declaration included as signatories the “Council of the European Union”, the European Commission, Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey, as well as several members states of the European Community, including Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom, and Sweden.

¹⁰⁵¹ *Ibid*, 2.

be incorporated in future Community treaties¹⁰⁵². (See Part II.B.3 above) The Cannes paper was very much in line with evolving Community policy as of 1995:

This is the spirit in which the European Union has embarked on the present discussion, which seeks to establish an overall partnership based on strengthening democracy and respect for human rights, which constitute an essential element in relations between Europe and its Mediterranean neighbours. (1.49)

The Barcelona Declaration, however, makes no comparable statement, finding instead that an “essential element of the agreement was not to be human rights, but free trade (see Barcelona Agreement, part III).

(2) *Barcelona Process (1995-2008)*

Throughout the different meetings held under the EMP, the Barcelona Process has repeated its commitment for human rights to be included in the Association Agreements with the Mediterranean partners, giving strategies and directives on how to make human rights play an important and increasing role within the EMP¹⁰⁵³. However, the political situation in many Southern partners and more generally in the Middle East passed from being one of relative enthusiasm in the early years of the 1990s to being characterised by tension and even a belligerent tone in the 2000s¹⁰⁵⁴. As a whole, the Barcelona Process has failed to deliver what expected, notably due to the dichotomy between policy definition and real regional developments. Commemorating its first decade in Barcelona in 2005, the “overall assessments of the first decade” in fact “reflected a feeling of paralysis and disappointment with what was considered to be a double failure”.¹⁰⁵⁵ In this context, human rights, democratisation and rule of law promotion efforts have been severely compromised.

c) *Union for the Mediterranean (UfM) (2008-present)*

The Paris Summit of 2008 gathered 43 Euro-Mediterranean partners and concluded with the compromise to institutionalise a new multilateral framework, the Union for the Mediterranean (UfM). In the Joint Declaration of the Paris Summit it is stated that the UfM builds upon the objectives of the

¹⁰⁵² Commission Communication, ‘The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’, COM(95) 216, 23 May 1995, 8. Available: <<http://aei.pitt.edu/4097/1/4097.pdf>> [accessed 1 Jul 2016]

¹⁰⁵³ Eight foreign affairs meetings were held in the period 1995-2008, together with other sectorial meetings. From the Barcelona 1995 onwards: Malta, Stuttgart, Marseilles, València, Napoli, Luxembourg, Tampere.

¹⁰⁵⁴ Roland Dannreuther, ‘Recasting the Barcelona Process: Europe and the Greater Middle East’ in Peter Seeberg (ed), *EU and the Mediterranean. Foreign Policy and Security* (Odense University Press of Southern Denmark 2007), 41.

¹⁰⁵⁵ Irene Fernandez-Molina, *Moroccan Foreign Policy under Mohammed VI, 1999-2014* (London Routledge/Taylor & Francis Group 2016), 108. See also Balfour, *Human rights and democracy in EU foreign policy: The cases of Ukraine and Egypt* (Abingdon, Routledge, 2013), 97.

Barcelona Process, a relevant matter in terms of the new multilateral body vis-à-vis its human rights commitments¹⁰⁵⁶. However, in light of the projects in which the UfM has embarked, human rights, rule of law and democratisation efforts do not rank high in the Union's priorities; rather, infrastructure and integration policies take the lead in an organ that focuses its work in channelling development projects and initiatives¹⁰⁵⁷.

Different reasons can account for this limited, at best, and inexistent, at worst, presence of human rights in the work of the UfM. A more refined and developed bilateral human rights policy has taken shape in parallel to the multilateral development of the UfM under the ENP¹⁰⁵⁸. Too, and similarly to what happened to the EMP, the political situation in the region does not allow the UfM to deal with any substantive matter, permitting it only to focus on technical aspects¹⁰⁵⁹. In short, political multilateralism is not the best strategy to promote change in the human rights domain, at least in the specific context of the Euro-Mediterranean relations.

4. *European Community Bilateral Relations with Mediterranean States (1969-2010)*

The European Community has entered into bilateral agreements and treaties with Mediterranean and Middle Eastern states since the 1960s. Although the specific agreements and treaties were negotiated bilaterally, after 1972 the individual treaties were negotiated by the Europeans within the context of the goals of the evolving regional strategies identified above. There can be some confusion because of the lag-time between when new agreements were signed under one regional policy and when they came into force under a subsequent regional policy. Thus the timing of the regional strategies outlined above does not strictly correspond with the signing or entering into force of the bilateral agreements as will be described below.

a) Round I: Association Agreements

Following requests by Morocco and Tunisia in 1963, the EEC negotiated and then entered into association agreements with southern Mediterranean states beginning in 1969, including Morocco¹⁰⁶⁰

¹⁰⁵⁶ Joint Declaration of the Paris Summit for the Mediterranean. Paris, 13 July 2008. Available: <http://ufmsecretariat.org/wp-content/uploads/2012/09/ufm_paris_declaration1.pdf> [accessed 24 Jun 2016].

¹⁰⁵⁷ UfM, List of UfM Projects and Initiatives. Available: <<http://ufmsecretariat.org/list-of-ufm-projects-and-initiatives/>> [Last accessed 24 June 2016].

¹⁰⁵⁸ Paul James Cardwell, 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean.' (2011) 49 *JCMS: Journal of Common Market Studies* 225, 219-241.

¹⁰⁵⁹ Paul James Cardwell, 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean.' (2011) 49 *JCMS: Journal of Common Market Studies* 227, 219-241.

¹⁰⁶⁰ Agreement establishing an association between the European Economic Community and the Kingdom of Morocco, 11 July 1969, L/3227. Available: <https://www.wto.org/gatt_docs/English/SULPDF/90820127.pdf>

and Tunisia¹⁰⁶¹. (These agreements are often identified as “commercial” agreements or “trade” agreements. These 5-year agreements were entirely commercial in nature and contained no provisions for European aid. They contained no provisions relating to human rights or institutional reforms. Manufactured goods were exempt from duties, where Europe had a comparative advantage, but tariffs were allowed on many agricultural products, where the Southern Mediterranean states had a comparative advantage. Some countries, particularly Algeria, promoted textile and leather investments in order to take advantage of absence of tariffs on manufactured goods. At the time, the EEC as a whole did not provide financial support to these countries, although France did on a bilateral basis

b) Round II: Cooperation Agreements (under the GMP) (1975-1990s)

Under the EEC’s Global Mediterranean Policy (1972-1990) (see above), the principal form of EEC bilateral relationship with southern Mediterranean countries was through five-year bilateral “Cooperation Agreements” with third Mediterranean countries (TMCs), including Israel (1975), Morocco (1976)¹⁰⁶², Algeria (1976), Tunisia (1976)¹⁰⁶³, and Egypt (1977)¹⁰⁶⁴, Jordan (1976), and Lebanon (1976). These Cooperation Agreements were originally planned for five-year terms, but were extended through supplemental protocols up until new Association Agreements were signed under the Euro-Mediterranean Partnership (EMP) initiative that was launched in 1995.

The Cooperation Agreements typically contained three major components: commercial cooperation (with tariffs and quotas), financial and economic cooperation (specifying aid to be provided to TMCs), and social cooperation (with pledges by the European Communities to improve conditions for TMC nationals living in European Community countries). Although subsequent renewal protocols of the Cooperation Agreements continued to support some lower tariffs for manufactured goods, they were raised somewhat (harming Algeria’s investment strategy). The protocols continued to have relatively higher tariffs for agricultural goods, which helped protect European farmers particularly in France and Italy. (Greece entered the EEC in 1981, and Spain and Portugal in 1986.) Although northern European countries favoured lower agricultural tariffs (to their advantage), southern European states favoured providing financial assistance, loans, and grants to the Southern Mediterranean states – which thereby protected their farmers from southern Mediterranean competition while spreading the costs of financial

[accessed 4 Jul 2016] (in English); Règlement (CEE) 1462/69 du Conseil du 23 juillet 1969 portant conclusion de l’accord créant une association entre la Communauté économique européenne et le royaume du Maroc et relative aux mesures à prendre et aux procédures à suivre pour son application [1969] OJ L197/1.

¹⁰⁶¹ Accord créant une association entre la Communauté économique européenne et la République tunisienne et documents annexes [1969] OJ L198/3.

¹⁰⁶² ‘EEC – Morocco Cooperation Agreement’, Europe information – Development, February 1980. Available: <<http://aei.pitt.edu/12754/1/12754.pdf>> [accessed 4 Jul 2016].

¹⁰⁶³ ‘EEC – Tunisia Cooperation Agreement’, Europe information – Development, X/86/1982. February 1982. Available: <<http://aei.pitt.edu/7753/1/7753.pdf>> [accessed 4 Jul 2016].

¹⁰⁶⁴ ‘EEC – Egypt Cooperation Agreement’, Europe information – Development, May 1978. Available: <<http://aei.pitt.edu/12765/1/12765.pdf>> [accessed 4 Jul 2016].

aid programmes throughout the entire EEC. These Cooperation Agreements, like the earlier Association Agreements, contained no provisions on human rights or institutional reforms.

As the expiration of the 1981-1986 extension of the Cooperation Agreements approached, a new round of trade agreements was negotiated. By December of 1985, the text of the Single European Act (SEA) had been agreed (signed on 17 February and ratified in July 1987). As explained above, the SEA gave the new power to the EP to disapprove of treaties.

By 1992, the Global Mediterranean Policy was in the process of being superseded by the New Mediterranean Policy (1992-1996). The fourth generation of protocols was negotiated for this 1992-96 period, but the EP initially refused to approve Morocco's protocol until later in October 1992, because of what it insisted was Morocco's poor human rights record at home and in the Western Sahara.

Certainly from the perspective of Southern Mediterranean countries, these agreements disproportionately benefitted Europeans over themselves. And, for all practical purposes, human rights were not on the bilateral agenda between the EEC and southern Mediterranean states.

c) Round III: Euro-Med Association Agreements (1995-present)

Under Euro-Mediterranean Partnership (Euro-Med), which came into existence at the Cannes Summit in 1995, the EEC proposed that a new round of bilateral Association Agreements be negotiated with its "partner" states in the Mediterranean. (See *Strengthening the Mediterranean Policy (1995) (1.8)*¹⁰⁶⁵) Perhaps the first and most important human rights consequence of the Euro-Med partnership was the negotiation of new bilateral "association agreements" (in fact, treaties) between the EU and southern Mediterranean states. These association agreements now form the principal legal basis of the relationship between the EU and Mediterranean countries with whom the treaties have been ratified. These association agreements contain human rights clauses that are identified as "essential elements" of the treaties. For example, article 2 of the 1996 Euro-Mediterranean association agreement between the European Communities (and member states) and Morocco (in force 2000) provides that the:

Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and shall constitute an essential element of this Agreement¹⁰⁶⁶.

This text, which is similar to other association agreements, constituted the legal basis for all subsequent EU-Moroccan human rights discussions. This "essential element" clause, which appears in comparable treaties, provides a powerful but heretofore unused basis for abnegating association agreements.

¹⁰⁶⁵ Commission Communication, 'Strengthening the Mediterranean Policy of the European Union: Proposals for Implementing a Euro-Mediterranean Partnership' COM(95) 72, 8 March 1995. Available: <<http://aei.pitt.edu/4315/1/4315.pdf>> [accessed 4 Jul 2016].

¹⁰⁶⁶ 'Barcelona Declaration and Euro-Mediterranean partnership', 8 September 2011. Available: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:r15001&from=EN>> [accessed 4 Jul 2016].

The association agreements typically establish ongoing mechanisms to promote bilateral relations. The leading mechanism is the “Association Council” that typically operates at a ministerial level (for both the individual country and the European Community) and that meets yearly. There also typically are “Association Committees” that consist of senior officials that meet more frequently. Other ad hoc or specialised committees also are created. The entire range of bilateral issues may be placed on the agenda. Such ongoing meetings continue to the present, though they are sometimes suspended, as in the case of Egypt following the outbreak of the Arab Spring.

d) Round IV: ENP Action Plans and Annual Reviews (2004-present)

Even after launching the new European Neighbourhood Policy (ENP) in 2004, the legal basis of the Community’s relationship with individual Mediterranean countries continued to be the Association Agreements (including their “essential element” human rights clauses) and the Association Council mechanism that were formed under Euro-Med. The ENP launched, however, a new mechanism to formalise and institutionalise the dialogue. Beginning in 2004, the European Commission issued “country reports” to identify the strengths and weaknesses in each of its “southern neighbours”. In order to systematically address problems in need of reform, five-year “action plans” were negotiated on a bilateral basis between the European Community and the individual neighbour countries. The European Community would then issue an annual “progress report” to note both accomplishments and failures during the year. (The progress reports typically are issued early in each calendar year to cover the preceding calendar year.) Upon the expiration of the five-year action plan, a new one is negotiated, though it is typical to have a two-three year gap where the “expired” action plan continues to be the reference point.

The analysis below examines the Egyptian and Moroccan action plans and progress reports on a few selected items pertaining to human rights during the period 2004-2015. See below for Egypt and Morocco.

5. European Community Funding Instruments (affecting human rights)

The European Community has established several funding instruments to provide “Official Development Assistance (ODA) funds to recipient countries¹⁰⁶⁷. The three sets of funding instruments that have supported human rights include the EIDHR, MEDA I and II, the ENPI, the ENI, and SPRING.

¹⁰⁶⁷ The OECD defines ODA as:

Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount). By convention, ODA flows comprise contributions of donor government agencies, at all levels, to developing countries (“bilateral ODA”) and to multilateral institutions. ODA receipts comprise disbursements by bilateral donors and multilateral institutions. Lending by export credit agencies—with the pure purpose of export promotion—is excluded.

a) EIDHR: European Instrument for Democracy and Human Rights (1999-present)

The specific European Community funding instrument that has human rights and democracy promotion at its core is the European Initiative for Democracy and Human Rights (EIDHR). The most innovative (and arguably controversial) feature of the EIDHR is that it provides assistance directly to CSOs without the consent (and often knowledge) of the state in which the CSO is based¹⁰⁶⁸. However, as shown in the Appendix, the EIDHR is much smaller than other funding instruments.

Although the European institutions had as early as in 1994 funded projects outside of its borders with a clear human rights mandate¹⁰⁶⁹, it would not be until 1997 that the Commission would make a clear proposal underlying what objectives the EIDHR should have¹⁰⁷⁰. The proposal was eventually made into law in 1999, with reauthorisations in 2006 and 2014¹⁰⁷¹.

In its 2006 version, in place prior to and immediately after the Arab Spring, the objectives of the EIDHR are summarised as follows:

- Respect, observance and reform in line with human rights, fundamental freedoms and democratisation, through support to CSOs, human rights defenders and victims of repression
- Support and reinforce of the multiple frameworks working in the human rights field, with a special emphasis on CSOs
- Strengthen electoral processes in terms of trust and administrative procedure, through election observation missions and support to the relevant thematic CSOs.

<http://stats.oecd.org/glossary/detail.asp?ID=6043>

¹⁰⁶⁸ European Commission, 'Delivering on the Arab Spring. Highlights of the Semester July-December 2011' (2012), 9. Available: http://www.eidhr.eu/files/dmfile/EIDHR_DeliveringontheArabSpring_Report.pdf [accessed 6 Jul 2016]

¹⁰⁶⁹ In 1994, the European Parliament asked for the inclusion of a mechanism in the general budget of the Communities (B7-7) of aid destined to human rights protection and promotion. Special Report No. 12/2000 on the management by the Commission of European Union support for the development of human rights and democracy in third countries, together with the Commission's replies [2000] OJ C230/1.

¹⁰⁷⁰ Proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms [1997] OJ C282/14.

¹⁰⁷¹ Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms [1999] OJ L120/1; Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries [1999] OJ L120/8; Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide [2006] OJ L386/1; Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77/85.

b) MEDA I and MEDA II (under the GMP) (1997-2006)

The Global Mediterranean Policy (GMP) launched a financial instrument known as MEDA (from the French *MEsures D'Accompagnement*) in 1996 (in effect in 1997), with a subsequent reform in 2000 with the so-called MEDA II¹⁰⁷². It took the shape of the existing financial frameworks already in place for Eastern Europe and did have, albeit as a sub-objective, the strengthening of democracy, human rights and the rule of law (Art. 4). The concrete steps to be taken were accepted by the EU and selected Mediterranean countries. At the same time, the MEDA I and II consisted not only of grants, but also of loans administered by the European Investment Bank (EIB). Although MEDA I and MEDA II have provided funds for human rights activities, the percentage of such contributions has been small. MEDA is thus less of an instrument to support democracy directly, but has at best an indirect effect as providing a general incentive to recipient countries.

Nevertheless it should also be noted that, consistent with European Community policy beginning in 1992 and formalised in 1995 (see Part III.B above), MEDA included human rights as an “essential element” of the programme. Article 3 of MEDA I provides:

This Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures. (Art. 3)

This article was continued in MEDA II. As the Commission’s Communication of 2003 entitled “Reinvigorating EU Actions on Human Rights and democratisation with Mediterranean partners” outlines, MEDA programmes have given increasing support and attention to human rights, rule of law, and democratisation projects¹⁰⁷³. However, the EU itself acknowledged that this instrument had many pitfalls.

c) ENPI and ENI (including SPRING) (under the ENP) (2006-present)

Following the establishment of the European Neighbourhood Policy (ENP) in 2004, the new European Neighbourhood Policy Instrument (ENPI) instrument was developed in 2006 and ultimately replaced the MEDA programmes that had operated under the GMP¹⁰⁷⁴. Thus after 2006, financial assistance was

¹⁰⁷² EUR-Lex, ‘MEDA programme’ (2007), art. 1. Available: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar15006>> [Last accessed 7 July 2016].

¹⁰⁷³ Commission Communication, ‘Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners’, COM(2003) 294. Available: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0294&from=EN>> [Last accessed 14 July 2016].

¹⁰⁷⁴ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument [2006] OJ L310/1.

provided to ENP “southern neighbours” rather than to the GNP’s “Mediterranean partners”¹⁰⁷⁵. In 2014, the ENPI was revised and renamed the European Neighbourhood Instrument (ENI)¹⁰⁷⁶. According to official EU sources, the ENI has the objective of triggering financial responses that are tailored to the specific particularities and developments of each designated “neighbour”. Up to 10% of ENI allocations are subjected to progress made by partner countries, assessed by ENP Progress Reports.

During the Arab Spring, the European Union introduced a new financial instrument named SPRING (Support for Partnership, Reforms and Inclusive Growth)¹⁰⁷⁷. It established an additional EUR 1.24 billion for the period 2011-2013 and it is primarily directed to benefit Tunisia, Egypt, Morocco and Jordan. SPRING supposes a step forward in the more-for-more approach, as it targets states in which change, in the shape of reform or regime transition, took place in 2011. Its objectives basically navigate between (a) consolidation of democratic reform and institution building, and (b) sustainable and inclusive growth and economic development. In order to trigger funding through SPRING, host governments are required to make a financial contribution as well. As shown in the Appendix, Egypt for the period 2011-2013 did not commit any of the programmed sources to human rights. SPRING, in turn, committed EUR 7.7 million in that period for human rights, out of the EUR 49.8 million that had been programmed for that very same purpose during the analysed period.

The European Community has not taken a strong stand with regard to the Sahara issue. Even in the situation where it presumably had the most leverage, during the negotiations for advanced status in 2008, the issue did not present itself.

Western Sahara conflict was notably absent from the Advanced Status negotiations, and was not referred to at all in the Joint Document. Such striking silence, which was already present in the 2005 ENP Action Plan, amounted to a reflection or replication of taboos within Moroccan official discourse. This can be regarded as an unintended consequence of the ENP’s mild introduction of co- ownership, which in practice allowed neighbouring countries to exclude any topic they wished from bilateral dialogue or negotiations with the EU (Gillespie, 2013: 180)¹⁰⁷⁸.

A telling example of the complicated interaction of trade, human rights, and the political relations between Morocco and the EU can be seen in the serious diplomatic rift that began in late 2015 and that continues as of the time this report is being submitted. As a part of their bilateral relations, Morocco and the EU entered into a trade agreement in 2012 that led to a reduction on tariffs of many agricultural

¹⁰⁷⁵Karen E. Smith, ‘The outsiders: the European Neighbourhood policy’ (2005) 81 *International Affairs* 758, 757-773.

¹⁰⁷⁶ Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument [2014] OJ L77/27.

¹⁰⁷⁷ European Commission, ‘Action Fiche for the Southern Neighbourhood region programme SPRING’ (2011). Available: <http://ec.europa.eu/europeaid/documents/aap/2011/af_aap-spe_2011_enpi-s.pdf> [accessed 7 July 2016].

¹⁰⁷⁸ Irene Fernandez-Molina, *Moroccan Foreign Policy under Mohammed VI, 1999-2014* (London Routledge/Taylor & Francis Group 2016) 145.

products¹⁰⁷⁹. Although EU policy is to integrate human rights issues into all agreements, the 2012 agreement implicitly included the “Western Sahara” within its terms without noting the human rights dimension of what many in the international community (but not in Morocco) see as being a Moroccan occupied territory. A case was brought before the EU’s European Court of Justice, which ruled on 10 December 2015 that the portion of the agreement pertaining to the Western Sahara was “annulled” because of the failure to address the requisite human rights concerns for the claims of the indigenous Sahrawi people of the “Western Sahara”. According to the ECJ:

Declares that Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part is annulled in so far as it approves the application of that agreement to Western Sahara¹⁰⁸⁰.

Morocco immediately protested the decision and the European Commission immediately appealed on its own behalf as well as that of Morocco. From the Moroccan perspective, a long and painfully negotiated agreement was undermined by a European institution that interfered in Moroccan internal affairs on the most sensitive political issue in Morocco. Although the Commission’s appeal may be seen as agreeing with Morocco that human rights issues were not implicated, Morocco was sufficiently annoyed that by Morocco immediately broke off most of its diplomatic communications with the EU, albeit without fully explaining its reasons. By 2016 Morocco publically announced that it was breaking off diplomatic discussions with the EU. In order to calm relations, the EU’s Vice President for External Action, Federica Mogherini, travelled to Rabat and met with Moroccan officials on 4 March 2016. Although official EU external policy is that human rights should be integrated into every document and every discussion at every level, this sensitive issue was largely omitted from discussion.

Although official EU policy is that human rights are universal, interdependent, and indivisible, and that they should be fully “mainstreamed” in all aspects of EU external relations, the EU Commission and EEAS – knowing the fervour with which Morocco adheres to its claims – does not engage in discussions regarding “deep democratisation” in the Sahara, the human rights of the Sahrawi people, or the legitimacy of Morocco’s acquisition of the territory.

¹⁰⁷⁹ Council Decision 2012/176/EU of 8 March 2012 on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, on a framework agreement between the European Union and the Kingdom of Morocco on the general principles for the participation of the Kingdom of Morocco in Union programmes [2012] OJ L 90/1. Exchange of letters 2012/497.

¹⁰⁸⁰ Case T-512/12 *Front Polisario v Council* [2015] ECR II-953.

D. Egypt and the European Community

Egypt has by far the largest population of any country in the Arab world and it has played a disproportionately important role in the region in education, culture, and political leadership. It is the largest Muslim country in the Arab world, but it also has a sizable Coptic Christian community that comprises somewhere between six and twelve per cent of the total population. With one brief exception, under the Presidency of Muhammad Morsi, Egypt has been ruled since 1952 by officials coming from the military community. Egypt received more financial assistance from the EU than did any of its other southern Mediterranean partners during the Mubarak regime (1981-2011). Between 2007 and 2013, Egypt received approximately one billion euros from the EU according to a 2013 study conducted by the EU's Court of Auditors (hereinafter Egypt Audit) (¶¶ III, 15)¹⁰⁸¹.

1. Historical Background of Europe and Egypt

Europe and Egypt have interacted for thousands of years. Alexander the Great of Macedonia arrived in Egypt in 332 BCE, ousted the Persians, created a city that would bear his name, Alexandria, and that would become a great centre of world learning, culture, and commerce. Following Alexander's death, one of his generals, Ptolemy, served as governor of Egypt before placing the province under his own rule, thereby launching the Ptolemaic Dynasty that controlled Egypt until another European, Caesar Augustus, displaced the last of the Ptolemys, Cleopatra, and turned the land into a Roman Province. During the first century of the common era, Christianity was introduced to Egypt, the modern vestiges of which are found in the Coptic Church. When the capital of the Roman Empire moved to Constantinople, political control over "Roman" Egypt continued to decline until the province was briefly seized by the Persians in the 7th century of the Common Era, only to lose it shortly thereafter to Islamic armies emerging from the Arabian Peninsula. While political control over Egypt underwent several transitions between the 7th and 18th centuries, the rulers always professed to be Muslim and to rule in the name of Islam.

In July 1798, the brash young French General Napoleon Bonaparte, landed in Egypt, quickly captured Alexandria, and then marched on to Cairo where he defeated the Mamluks in the hour-long battle of Cairo. Bonaparte ruled Cairo, and Egypt, for six months before departing for Palestine. Although Bonaparte left shortly after arriving, he had a lasting effect both by introducing western technology and education as well as by (unintentionally) stimulating a movement for reform within Islam. Bonaparte founded the *Institut d'Égypte* (later the Egyptian Scientific Institute), a manuscript library and centre for

¹⁰⁸¹ European Court of Auditors, Special Report No 4/2013, EU Cooperation with Egypt in the Field of Governance together with the Commission's replies', Available: <http://www.eca.europa.eu/Lists/ECADocuments/SR13_04/SR13_04_EN.PDF> [accessed 24 Jul 2016]

research. It was the home of the oldest research institute of its kind in the Muslim world and housed one of its most valuable manuscript collections until it was destroyed during the Arab Spring in 2011¹⁰⁸².

Following a brief military occupation by the French and then the British, another European –an Albanian named Mehmet Ali (born in what is now Kavala, Greece) – arrived ostensibly to serve the Ottoman Empire. Mehmet Ali ultimately preferred serving himself by founding his own dynasty that ruled, at least in name, until 1952. During the first 70 years of the Mehmet Ali dynasty, European traders, scholars, entrepreneurs, artists, orientalists, and vagabonds settled in Egypt, particularly in Alexandria and Cairo.¹⁰⁸³ Their presence led to revolts, particularly in 1881.¹⁰⁸⁴ As a result, the French and British sent warships to Alexandria in 1882 to intimidate Egyptians. In September, the British and French invaded, easily defeated the Egyptian military, and placed a compliant Khedive back on the throne. The French and British built the Suez Canal, which became one of the most valuable strategic locations in the world.¹⁰⁸⁵ To ensure its protection, the British subsequently built its largest overseas military base that extended along the western length of the Suez Canal Zone. From 1882 to 1952, the British remained the foreign power behind the throne in the country that it ruled as a protectorate (or colony). The British established private polo and cricket clubs, and socialising that excluded all Egyptians other than servants.¹⁰⁸⁶ BadiaMasabni opened the Casino Opera nightclub in 1926 that became famous for introducing the belly dance to her European clientele – and ultimately the world. It was burned down in the revolt of 1952.

Thus Europeans promoted in the Muslim world's most important centre of learning and education, and culture, a heady mix of alcohol, casinos, gambling, night clubs, polo, cricket, and discrimination against Egyptians and Muslims. The 1952 Free Officer's Movement against the British puppet, King Farouq, was more against the British than their puppet. And, just as the French did not want to abandon their military base in Bezirte after granting independence to Tunisia in 1956, so the British did not want to abandon the Suez Canal military base that protected that strategic waterway. It took two years for the British and Egyptians to negotiate the surrender of the base and another two years before the base was finally evacuated in 1956. However, when Egypt nationalised the Suez Canal shortly thereafter, the

¹⁰⁸² *New York Times*, 17 December 2011 <http://thelede.blogs.nytimes.com/2011/12/17/video-shows-egyptian-soldiers-beating-and-shooting-at-protesters/> (with a link showing the burning building). *History Today* 3 March 2012 <http://www.historytoday.com/jonathan-downs/calamity-cairo>.

¹⁰⁸³ André Raymond, *Cairo* (translated by Willard Wood) (Cambridge, USA: Harvard University Press, 2000), 336-338, Nezar AlSayyad, *Cairo: Histories of a City* (Cambridge, USA: Harvard University Press, 2011), 227-228.

¹⁰⁸⁴ Khaled Fahmy, "The Era of Muhammad 'Ali Pasha, 1805-1848" in M.W. Daly, ed. *The Cambridge History of Egypt: Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge, UK: Cambridge University Press, 1998), 139-144.

¹⁰⁸⁵ Donald Malcolm Reid, "The 'Urabi revolution and the British Conquest, 1879-1882" in M.W. Daly, ed. *The Cambridge History of Egypt: Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge, UK: Cambridge University Press, 1998), 219-220.

¹⁰⁸⁶ M.W. Daly, "The British Occupation," in M.W. Daly, ed. *The Cambridge History of Egypt: Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge, UK: Cambridge University Press, 1998), 239-241.

British, French, and Israelis invaded, instigating the Suez Crisis of 1956. Cairo's famous Tahrir Square, the birthplace of the Arab Revolt in Egypt, was built to celebrate Egyptian independence from the British.

2. Formal Relations between the European Community and Egypt (1973-present)

The formal (legal and quasi-legal) relations between the European Community and Egypt have developed over time in four somewhat overlapping stages:

- EEC-Egypt Association Agreement (1973-1977)¹⁰⁸⁷
- EEC-Egypt Cooperation Agreement (under GMP) (1977-2004)¹⁰⁸⁸
- EEC-Egypt Association Agreement (under Euro-Med) (2004-present)¹⁰⁸⁹
- EEC-Egypt as a "Neighbour" (under ENP) (2004-present)

The 2004 Association Agreement forms the legal basis for EU-Egypt relations. Under its terms, a ministerial-level "Association Council" should meet at least once each year. These meetings were interrupted in 2011 due to the Arab Spring. Article 2 of the 2004 Association Agreement provides that human rights are an essential element of the relationship and that parties may suspend it if human rights are not taken sufficiently seriously. Separate from, but in addition to, the ENP policy provides for ongoing meetings and "progress reports" wherein the EU evaluates Egypt's actions under both the 2004 agreement and the ENP's action plans.

As explained above, the EU's principal funding instrument for Egypt from 2006-2014 was the ENPI. According to article 28 of the ENPI, EU assistance to recipient countries should be suspended when "a partner country fails to observe [Article 1] principles" including the "values of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law"¹⁰⁹⁰. The European Court of Auditors interprets ENPI article 28 as making aid "conditional on the respect of democracy and human rights"¹⁰⁹¹. Thus the EU should have made aid to Egypt conditional on its respecting human rights, and aid should have been suspended if Egypt did not do so¹⁰⁹². Between 2007 and 2013, the ENPI provided

¹⁰⁸⁷ EEC-Egypt Association Agreement (1973-1977) (signed 1972; in force 1973); [1973] OJ L251/13, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21973A0907\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21973A0907(01)&from=EN)

¹⁰⁸⁸ EEC-Egypt Cooperation Agreement (under GMP) (1977-2004) (signed 1977; in force 1978).

¹⁰⁸⁹ EEC-Egypt Association Agreement (under Euro-Med) (2004-present) (signed 2001; in force 2004).

¹⁰⁹⁰ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006, Available: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1638&from=EN> [accessed 25 July 2016].

¹⁰⁹¹ European Court of Auditors, Special Report No 4/2013, EU Cooperation with Egypt in the Field of Governance together with the Commission's replies, ¶ 15. Available: http://www.eca.europa.eu/Lists/ECADocuments/SR13_04/SR13_04_EN.PDF [accessed 24 July 2016]

¹⁰⁹² For the discussion of the Court of Auditors' criticism of the EU in this regard, see below.

90 million euros to Egypt for democracy, human rights, and justice; 409 million euro for competitiveness and productivity; and 508 million euro for sustainable development¹⁰⁹³.

3. European Union and the Crises in Egypt (emphasizing 2010-2016)

*Timeline*¹⁰⁹⁴

- 1. Mubarak Presidency (1981 to 11 February 2011)
 - Mubarak rules under State of Emergency laws (1981-2011)
 - Khaled Said beaten to death by policemen (June 2010)
 - Facebook page “We are all Khaled Said” by Wael Ghonim (June 2010)
 - Parliamentary election believed to be entirely corrupt (November 2010)
 - “We are all Khaled Said” has 500,000 Facebook supporters (January 2011)
 - Protests begin against Mubarak and police in Tahrir Square (25 January 2011)
 - “Day of Rage” protests throughout Egypt against Mubarak (28 January 2011)
 - “Battle of the Camels” (2 February 2011)
 - Popularly supported coup d’état overthrows Mubarak (11 February 2011)

- 2. Supreme Council Armed Forces (SCAF) (11 February 2011 to 30 June 2012)
 - EP resolution on Egypt (Feb 17)
 - Ongoing protests that SCAF not moving quickly enough
 - First violence against protestors (26 February 2011)
 - Protestors enter security headquarters to seize records (5 March 2011)
 - Massive anti-SCAF protest in Tahrir Square (1 April 2011)
 - Protesting women forced to undergo “virginity tests” (April 2011)
 - Military breaks up anti-SCAF protest in Tahrir Square (9 April)
 - Crackdown on protestors (28 June 2011)
 - Hundreds of thousands protest in Tahrir “Second Revolution” and begin occupation of Tahrir Square (8 July 2011)
 - Hundreds of protestors killed (Abbasiya) 23-24 July 2011)
 - Police evict protestors from Tahrir (1 August 2011)
 - Police, military attack and kill Copts (near Tahrir) engaging in peaceful protest march (9 October 2011) (Maspero)
 - Brutal attacks on protestors (“blue bra girl”) (December 2011)¹⁰⁹⁵
 - Protestors evicted from Tahrir Square (December 2011)

¹⁰⁹³ Court of Auditors, Special Report No. 4/2013, 15.

¹⁰⁹⁴ Larbi Sadiki, ed., *Routledge Handbook of the Arab Spring: Rethinking Democracy* (London: Routledge, 2015) I.

¹⁰⁹⁵ ZezoRezo, انتهاكات المجلس العسكرى published 17 December 2011. Youtube video, available: <https://www.youtube.com/watch?v=4iboFV-yeTE&bpctr=1468931443> [26 Jul 2016].

- 2011 Provisional Constitution (30 March 2011)
 - Parliamentary elections (November 2011 to January 2012)
 - Supreme Constitutional Court invalidates parliamentary elections (14 June 2012)
 - Presidential elections (23-24 May and 16-17 June 2012)
 - Supreme Constitutional Court limits powers of President (17 June 2012)
 - Morsi declared winner of presidential election (24 June 2012)
 - State of Emergency Law expires (31 May 2012)
- 3. Morsi Presidency (30 June 2012 to 3 July 2013)
 - Morsi inaugurated 30 June 2012
 - Morsi attempts to reinstitute Parliament (July 2012)
 - Morsi assumes legislative powers until new parliament (August 2012)
 - End of period covered by European Court of Auditors (September 2012)
 - Morsi (illegally) sacks prosecutor general (11 October 2012)
 - EU-Egypt Task Force Meeting (14 November 2012)¹⁰⁹⁶
 - Praises election; positive developments; promote economics, tourism
 - “The Task Force was the occasion for the EU to send a strong political message in support of the democratic reform process Egypt has embarked on following the 25th January 2011 revolution”
 - Morsi announces new powers for himself November 22
 - EU response:
 - EU paradoxically posts fact sheet about good relations¹⁰⁹⁷
 - EU says nothing
 - EU accepts Nobel Peace Prize (10 December 2012)
 - “The Nobel Peace Prize 2012 was awarded to European Union (EU) "for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe".¹⁰⁹⁸
 - 2012 ENP Progress report (20 March 2013)¹⁰⁹⁹:

¹⁰⁹⁶ ‘EU-Egypt Task Force – Co-Chairs conclusions’ (2012). Available: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133511.pdf> [accessed 26 July 2016].

¹⁰⁹⁷ Delegation of the European Union to Egypt, ‘EU-Egypt Task Force Fact Sheet’ (2012). Available: <http://eeas.europa.eu/delegations/egypt/press_corner/all_news/news/2012/20121122_02_en.htm> [accessed 26 July 2016].

¹⁰⁹⁸ Nobelprize.org, ‘The Nobel Peace Prize 2012’ (2012). Available: <http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/> [accessed 26 July 2016].

¹⁰⁹⁹ European Commission, ‘Implementation of the European Neighbourhood Policy in Egypt Progress 2012 and recommendations for action’ SWD(2013) 89, 5, 20 March 2013

- “President Morsi’s constitutional declaration of 22 November giving him near absolute power, the rushed adoption of a draft Constitution by the Constituent Assembly, the abrupt interruption of the dialogue on its provisions, and the President’s subsequent call for a constitutional referendum have pitched the nation into a deeply divisive political crisis between supporters of the President, on the one hand and the secular liberal opposition, mainly represented by the National Salvation Front on the other.” (20 March 2013) (p. 2)
- “The culture of violence and torture in the police, the security sector, and in some cases the military, did not change dramatically after January 2011” p. 6
 - Lambrinidis speech on HR (10 December 2012)
 - Van Rompuy visits Cairo (13 January 2013)¹¹⁰⁰
 - EU-Egypt ENP dialogue resumes (February 2013)¹¹⁰¹
- Egyptian street response
 - Large-scale protests against Morsi (22 November 2012 to 3 July 2013)
 - Triggered by Morsi’s weakening powers of judiciary
 - Tahrir Square protests against Morsi begin (25 January 2012)
 - Tamrod launches movement for Morsi to resign (April 2013)
 - Wave of protests begins throughout Egypt (28 June 2013)
 - *Millions* go to streets to protest Morsi (30 June 2013)
 - Tamrod claims 22 million signatures for resignation (30 June 2013)
- Morsi begins to back down from degree (26-27 November 2012)¹¹⁰²

<https://eeas.europa.eu/enp/pdf/docs/2013_enp_pack/2013_progress_report_egypt_en.pdf> [accessed 26 Jul 2016].

¹¹⁰⁰ European Commission, ‘Implementation of the European Neighbourhood Policy in Egypt Progress 2012 and recommendations for action’ SWD(2013) 89, 20 March 2013, <https://eeas.europa.eu/enp/pdf/docs/2013_enp_pack/2013_progress_report_egypt_en.pdf> [accessed 26 Jul 2016].

¹¹⁰¹ European Commission, ‘Implementation of the European Neighbourhood Policy in Egypt Progress 2012 and recommendations for action’ SWD(2013) 89, 20 March 2013, <https://eeas.europa.eu/enp/pdf/docs/2013_enp_pack/2013_progress_report_egypt_en.pdf> [accessed 26 Jul 2016].

¹¹⁰² ‘Seeming Retreat by Egypt Leader on New Powers’, *The New York Times*, 26 November 2012. Available: <<http://www.nytimes.com/2012/11/27/world/middleeast/egypts-president-said-to-limit-scope-of-judicial-decree.html>> [accessed 26 Jul 2016]; ‘Egyptian Islamists Approve Draft Constitution despite Objections’, *The New York Times*, 29 November 2012. Available: <<http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html>> [accessed 26 Jul 2016].

- Constitutional Court building attacked by Morsi supporters and court suspends work (c. 28 November 2012)
 - Morsi officially withdraws decree (8 December 2012)¹¹⁰³
- 2012 Constitution (pro-Islamist) adopted with low voter turnout (December)
- Military issues decree telling Morsi to settle conflict (1 July 2013)
- Morsi insists he is the legitimate Egyptian President (2 July 2013)
- Coup d'état (3 July 2013)
 - Sisi announces Morsi overthrown
 - Morsi was first freely elected President in Egypt's history
 - Supreme Court Justice Mansour becomes interim President
 - Coup supported by Mohamed ElBaradei
 - Constitution suspended
- 4. El-Sisi Regime (3 July 2013-present)
 - Mansour acting President following coup (3 July 2013 to 8 June 2014)
 - ElBaradei Vice President (14 July 2013 to 14 August 2013)
 - Street protests by Morsi supporters (4 July 2013 to 8 June 2014)
 - Protests by Morsi supporters at Rab'a al-Adawiya mosque
 - Rab'a massacre of Morsi supporters (14 August 2013)
 - State of Emergency declared (14 August 2013)
 - ElBaradei resigns in protests
 - Closing of EU Court of Auditors investigation (September 2013)
 - Muslim Brotherhood banned (25 December 2013)
 - Referendum approves 2014 Constitution (98% vote) (January 2014)
 - EP Resolution on Egypt (6 February 2014)¹¹⁰⁴
 - "2013 in Egypt saw the highest number of incidents involving Christians in the world, with at least 167 cases reported in the media; whereas there were nearly 500 attempts to close or destroy churches in the country and at least 83 cases of religiously motivated killings of Christians"
 - Sisi elected president (May 2014); Sisi inaugurated president (8 June 2014)
 - Several trials and convictions of Morsi
 - Death sentence (May 2015)
 - Life imprisonment (June 2016)

¹¹⁰³ 'Backing Off Added Powers, Egypt's Leader Presses Vote', *The New York Times*, 8 December 2012. Available: <<http://www.nytimes.com/2012/12/09/world/middleeast/egypt-protests.html>> [accessed 26 Jul 2016].

¹¹⁰⁴ European Parliament, 'Resolution of on the situation in Egypt', P7_TA(2014)0100, (2014). Available: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0100+0+DOC+PDF+V0//EN>> [accessed 26 Jul 2016]

- EP Resolution on the Situation in Egypt (15 January 2015)¹¹⁰⁵
 - “Reminds the Egyptian Government that the long-term success of Egypt and its people depends on the protection of universal human rights and on the establishment and anchoring of democratic and transparent institutions also engaged in protecting citizens’ fundamental rights; calls, therefore, on the Egyptian authorities to fully implement the principles of international conventions”

a) The Mubarak Regime (1981-2011)

(1) Background

Hosni Mubarak, whose professional career began in the Egyptian air force, came to power following the assassination of Anwar Sadat in 1981. He was elected president five times in elections that were neither free nor fair. Prior to 2005, Mubarak was the only candidate on the ballot. Following the election of 2005, which did permit other candidates on the ballot, Mubarak had his principal opponent convicted on false forgery charges and then sent to prison for three years. Outside observers found that the parliamentary elections of 2010 were the most corrupt in Egyptian history¹¹⁰⁶. Prior to his fall, Mubarak was preparing his son to replace him as president. Mubarak ruled under four-year state of emergency laws that were repeatedly renewed during his tenure. Human rights were rigorously suppressed during his tenure and his regime was repeatedly criticised by international human rights NGOs. The Muslim Brotherhood, founded in 1928, acted as the *de facto* opposition to Mubarak throughout his tenure, even though it was declared to be illegal for most of the period. Despite his suppression of dissent and ruthless rule, Mubarak was praised outside of Egypt by European and American political leaders that frequently saw him as a staunch ally. The United States and Europe took a particular interest in the stability of Egypt due to its having entered into a peace agreement with Israel and having broken ranks within the Arab world.

For thirty years prior to the Arab Spring, Egypt was governed under emergency laws that severely restricted the freedoms of expression and association, a subject of ongoing concern to the international NGO Human Rights Watch (HRW). HRW made repeated reference to the Law on Political Rights (Law 73/1956) and the 1996 Press Law as responsible for the lack of freedom of expression in Egypt, allowing

¹¹⁰⁵ European Parliament, ‘Resolution of 15 January 2015 on the situation in Egypt’, P8_TA(2015)0012, (2015). Available: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0012+0+DOC+PDF+V0//EN>> [accessed 26 Jul 2016].

¹¹⁰⁶ “We knew it was going to be bad, but I don't think anyone realised it was going to be this bad,” said Shadi Hamid, director of research at the Brookings Institution think tank and an analyst of Egyptian politics. Egypt has joined the ranks of the world's most autocratic countries. Now we're talking full-blown, unabashed dictatorship. ‘Egypt's rulers tighten grip amid claims of election fraud and intimidation’, *The Guardian*, 30 November 2010. Available: <<https://www.theguardian.com/world/2010/nov/30/egypt-poll-electoral-fraud-claims>> [accessed 25 Jul 2016].

for the criminal prosecution of journalists and writers. In 2005, Law 73/1956 was amended to include criminal penalties for those publishing “false information” (2005 HRW, 438)¹¹⁰⁷. Both laws were enforced between 2005 and 2010 to criminalise dissent and political opposition (see 2005 HRW 437, 2006 HRW 459, 2007 HRW 466-467, 2008 HRW 436, 2009 HRW 491, 2010 HRW 517). In 2008, Egypt went so far as to promote its restrictive press law internationally through the League of Arab States. (2008 HRW 456) Both traditional media (e.g., newspapers) and new media (e.g., Facebook and Twitter) were targeted, with increasing pressure put upon bloggers (2008 HRW 436, 2009 HRW 491, 2010 HRW 517). Thus, during the Mubarak regime, state control of the press became increasingly more severe.

(2) *The Overthrow of Mubarak (25 January-11 February 2011)*

In June of 2010, six months before Muhammad Bouazizi set himself afire in a desperate act of protest, a 28-year-old Egyptian named Khaled Said was beaten to death by two policemen in Alexandria, Egypt¹¹⁰⁸. He was reported to have in his possession a video showing two policemen dividing money between themselves that they seized from a drug dealer. The police killers of Said beat their victim’s head into an unrecognizable mess. The story of Khaled’s murder in June captured the imagination of a young Google executive from Egypt who launched a Facebook page “We are all Khaled Said”. The page circulated in popular media and a photo of his beaten and distorted head stimulated people to gather at Tahrir (Independence) Square in Cairo in June for what would become the first of the Arab Spring protests against President Mubarak. (The police officers were later arrested and convicted.) Although the brutal murder of Said did not launch an international movement, his death was one precipitating cause for Egyptians in the later demonstrations at Tahrir Square.

Eleven days after Ben Ali fled Tunisia for Saudi Arabia, on 25 January 2011, frustrated Egyptians in Cairo gathered at Tahrir Square without any plan of action. What had been expected to be a modest demonstration of a few dozen people turned into a massive demonstration of thousands. When the police attacked the protestors, who typically would have fled such a police assault, spontaneously pushed back and began erecting barricades in an impulsive response. They defiantly demanded the resignation of Mubarak and called for a “day of rage” protest three days later on Friday, 28 January. Massive revolts began throughout Egypt on the 28th after Friday prayers, particularly in Cairo. One of the organisers of the protests was Wael Ghonim, the Google official who had started the Facebook campaign for Khaled Said. During the day, the military confronted protestors throughout the city,

¹¹⁰⁷ These in-text citations make reference to the Annual Human Rights Watch Reports. The year in brackets corresponds to the events year, and not publishing year. The latter number is the page in which the information appears. For a complete list of the HRW reports used in this work, see: Human Rights Watch, 'Previous World Reports'. Available: <<https://www.hrw.org/previous-world-reports>> [30 Sept 2016]

¹¹⁰⁸ 'Remembering Khaled Saeed, whose death sparked Egypt's revolution', *Al Arabiya News*, 25 January 2014. Available: <<http://english.alarabiya.net/en/perspective/features/2014/01/25/Khaled-Saeed-Egypt-s-Jan-25-icon-remembered-unlike-before.html>> [accessed 26 Jul 2016]; 'Movement Began with Outrage and a Facebook age that Gave It an Outlet', *The New York Times*, 5 February 2011. Available: <<http://www.nytimes.com/2011/02/06/world/middleeast/06face.html>> [accessed 26 Jul 2016].

resulting in burned and toppled vehicles. Mubarak appeared on television and refused to accede to the protestors' demand that he leave. The day after Mubarak announced his refusal to leave, the first major EU figure, Council President Herman Van Rompuy issued the first statement regarding the events in Egypt, stating that he was "troubled" by them and that he hoped for "openness" on the part of Mubarak¹¹⁰⁹. It was, however, not the EU that took the lead, but three of its member states. On the 29th, David Cameron of Great Britain, Nicolas Sarkozy of France, and Angela Merkel of Germany, while not calling for Mubarak's resignation, made it clear that he needed to move immediately and seriously to address the calls for reform arising from the population¹¹¹⁰.

Over the next several days, tensions mounted with protestors occupying Tahrir Square and refusing to leave. On Wednesday, February 2, thugs sponsored by the security services rode into Tahrir on horses and camels and brutally attacked protestors. What started as protests was increasingly turning into open conflict as the position of the protestors hardened. Whatever power of persuasion that the forces of order might have inspired with the Egyptian public prior to February 2 was lost. It was as if all of Egypt rose up in support of the protestors occupying Tahrir Square. On the day of these dramatic events, HR/VP Catherine Ashton addressed Parliament, for the first time, on the Arab Spring¹¹¹¹. She stated that the EU had taken actions against the deposed regime of Ben Ali and was working closely with the new authorities in Tunisia. With regard to Egypt, her sensitivities clearly were with the protestors whose courage she applauded, and she urged more dialogue and restraint by the Egyptian government. Nevertheless, the same day that protestors were brutally attacked by state-hired thugs, she called upon all parties to "show restraint and to stop the violence", as if the largely peaceful protestors were equally at fault with those who were engaged in a brutal crackdown. By this time, the United States had concluded that Mubarak must go and had begun diplomatic discussions with him directly and presumably through other diplomatic channels as well. Ashton, however, said nothing about Mubarak. While the EU apparently was willing to take firm action against the deposed tyrant in Tunisia, it did not yet want to offend a ruling tyrant.

Twenty-four hours later, Ashton issued a somewhat stronger statement that clearly blamed the violence on the authorities. "I have repeatedly expressed my great concern over the reports that peaceful demonstrators have been violently attacked by armed individuals. . . I have made clear that it is the responsibility of the army and law enforcement to protect its citizens. The Government is accountable

¹¹⁰⁹ European Council, 'Statement by Herman Van Rompuy, President of the European Council, on the situation in Egypt', PCE 020/11, 29 January 2011. Available: <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/118993.pdf> [accessed 26 Jul 2016].

¹¹¹⁰ 'Key European Leaders Urge Restraint in Cairo', *The New York Times*, 30 January 2011. Available: <<http://www.nytimes.com/2011/01/31/world/europe/31europe.html>> [accessed 26 Jul 2016].

¹¹¹¹ European Commission, 'EU HR/VP Remarks on Egypt and Tunisia', SPEECH 11/66, Available: <http://europa.eu/rapid/press-release_SPEECH-11-66_en.htm> [accessed 26 Jul 2016].

for the welfare and safety of its people”¹¹¹². She called, however, not for Mubarak to step down, but urged instead “democratic reform” – as if that were a option being considered by a dictator who had ruled Egypt under state of emergency laws for the preceding 30 years.

Finally, the following day, 4 February, the EU made its first strong statement on the events unfolding in Egypt. The Council, the highest authority in the EU, while not mentioning the name Mubarak, “condemned in the strongest terms the violence and all those who use and encourage violence. It emphasised the right of all citizens to demonstrate freely and peacefully, under due protection from law enforcement authorities. Any attempt to restrict the free flow of information, including aggression and intimidation directed against journalists and human rights defenders, is unacceptable”.¹¹¹³

On Thursday, 10 February, President Mubarak, facing a deteriorating situation, announced that he would address the nation that evening. Demonstrators encamped in Tahrir Square congratulated themselves during the day, confident that Mubarak would announce his resignation. Defying such predications, Mubarak went on television and announced that he would continue in authority. Having had their expectations defied, the crowd in Tahrir and others throughout Egypt became defiant. Approximately 3,000 marched to the state radio and television, near Tahrir, and camped outside the barricades shielding it. Later that evening, following Mubarak’s speech, VP/HR Ashton delivered her most forthright statement to date. No longer did she indirectly call on Mubarak to make reforms, she finally placed the EU on the side of the Egyptian people against their ruler. “The demands and expectations of the Egyptian people must be met”¹¹¹⁴. Mentioning the leader by name for the first time, Ashton said that “President Mubarak has not yet opened the way to faster and deeper reforms”. She stated that the “EU salutes the courage of the Egyptian people who have pursued their campaign for democratic change peacefully and with dignity”. This statement later became famous for having used, apparently for the first time, a reference to “deep democracy”, which she said is “required” for Egypt. “An orderly and irreversible transition towards democracy and free and fair elections is the shared objective of both the EU and the Egyptian people”. She concluded by saying that the “time for change is now”.

The next day, Friday, threatened to become the largest mass protest to date, with the frightening question remaining whether it would be violent and bloody or would remain peaceful. It was not necessary to say, as it was well understood, the protests would begin immediately following Friday noon prayers, scheduled to begin at 11:44.

¹¹¹² European Commission, ‘Statement by the High Representative, Catherine Ashton on the situation in Egypt’, MEMO/11/67, 3 February 2011. Available: <[http://europa.eu/rapid/press-release MEMO-11-67 en.htm](http://europa.eu/rapid/press-release_MEMO-11-67_en.htm)> [accessed 26 July 2016].

¹¹¹³ European Council, ‘Declaration on Egypt and the Region’, 4 February 2011. Available: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119145.pdf [accessed 26 July 2016].

¹¹¹⁴ European Commission, ‘Representative/Vice-President Catherine Ashton following the speech of President Mubarak’, IP/11/146, 10 February 2011. Available: <[http://europa.eu/rapid/press-release IP-11-146 en.htm](http://europa.eu/rapid/press-release_IP-11-146_en.htm)> [accessed 26 July 2016].

At 10:50 a.m., an announcement was issued by the Office of the President – though not necessarily by Mubarak – that an “urgent statement” was about to be issued¹¹¹⁵. By 11:20, the announcement had been completed on Egyptian television that Mubarak had resigned. Word spread like lightning throughout Tahrir Square where a massive wave of excitement broke out. The Supreme Council of the Armed Forces (SCAF) had seized power. Rather than being portrayed as a military takeover, which it most certainly was, it was publicly acclaimed by the population as the overthrow of a tyrant and a submission to the will of the people. While the overwhelming majority of the Egyptian population cheered, those who were more sober understood that this may have been less a renunciation of tyranny and more of a changing of the palace guard¹¹¹⁶.

Nevertheless, later on the same day in Brussels, with no apparent reservations about the military taking of civilian authority in Cairo a few hours earlier, the European Union issued a joint statement by Council President Van Rompuy, Commission President José Manuel Barroso, and HR/VP Ashton. The EU roundly applauded the democratic transition. Apparently assuming that Mubarak had willingly stepped down – despite the fact that in his last public appearance only 12 hours earlier he had defiantly refused to resign – the EU applauded the deposed leader whom it declared “listened to the voices of the Egyptian people and has opened the way to faster and deeper reforms, and an orderly transition to democracy”¹¹¹⁷. Having missed all past signs of events as they unfolded, and without candidly acknowledging that the military had seized power in Egypt, the EU now anticipated “an orderly and irreversible transition towards democracy and free and fair elections” The President of the European Parliament, in a separate statement issued the same day, declared that he too was “convinced that this is an historic day of peaceful, lasting and democratic change”¹¹¹⁸.

If the EU was aware of the mixed signals from the Egyptian military authorities, it did not express any concerns publicly. On 16 February, the EU Commissioner for Enlargement and Neighbourhood Policy, Štefan Füle, the member of the Commission most directly engaged in the events in Egypt, issued a statement praising both the Egyptian people for their courage and praised the EU for its actions in support of the people. He declared that the EU had “repeatedly called on the Egyptian authorities to

¹¹¹⁵ ‘Updates on Day 18 of Egypt Protests’, *The New York Times*, 11 February 2011. Available: <<http://thelede.blogs.nytimes.com/2011/02/11/latest-updates-on-day-18-of-egypt-protests/>> [accessed 26 July 2016].

¹¹¹⁶ ‘Politics vs. Protests: The Egyptian Revolution in Crisis’, *Perfectionatic’s blog* [Blog], 27 July 2011. Available: <<http://perfectionatic.org/?p=62>> [accessed 26 July 2016].

¹¹¹⁷ European Commission, ‘Joint statement by President of the European Council, Herman Van Rompuy, President of the European Commission, José Manuel Barroso, and EU High Representative, Catherine Ashton on recent developments in Egypt’, MEMO/11/83, 11 February 2011. Available: <[http://europa.eu/rapid/press-release MEMO-11-83_en.htm](http://europa.eu/rapid/press-release_MEMO-11-83_en.htm)> [Last accessed 26 July 2016].

¹¹¹⁸ European Parliament, ‘Buzek on the resignation of Mubarak’, 11 February 2011. Available: <http://www.europarl.europa.eu/former_ep_presidents/president-buzek/en/press/press_release/2011/2011-February/press_release-2011-February-14.html> [Last accessed 26 July 2016]

ensure an immediate transition and to respond to the democratic ambitions of the people”,¹¹¹⁹ a claim that does not describe accurately EU policy at any time prior to Mubarak’s departure. He does correctly state that the EU had begun programmes to provide support for the desired democratic transition. What might be questioned, however, was his assertion that the EU “is unequivocally supportive of the transformation process that has started”. While such a statement may have been made with the best of intentions, the EU was not in a position to be certain of what actually was happening and it should have not been “unequivocally supportive” of the strings being pulled by the military leaders. The EU had gone from reluctance to denounce Egypt’s long term ruler whose abuses of democracy and human rights were perfectly clear, to an enthusiastic endorsement of the bona fides of the leaders of a military regime whose true intentions could not yet be known.

(3) The EU’s Nostra Culpa: Late February 2011 Responses to the Arab Spring

Within less than a month in early 2011, the EU witnessed the fall of two of the longest-ruling authoritarian leaders among its Mediterranean partners. Since the 1970s, the EU had officially declared its support for human rights, democracy, and the rule of law, and since the 1990s, the EU’s treaties with its “southern neighbours” had included clauses declaring that human rights was an “essential element” of the treaty and that the economic relations could be severed if human rights were not respected. The EU also had stated in several fora that respect for human rights and democracy were necessary for *long-term* stability in the region. Yet with these (relatively) clearly stated positions, the EU continued to engage in trade and security relations with the regimes that were serious abusers of human rights and that had demonstrated no serious interest in democratic reforms to enhance their “long-term” stability. Aside from political dialogue, repeated reminders, and modest grants to civil society, the EU did not invoke the essential elements clause or insist either on positive or negative conditionality. It certainly appears that the EU’s interlocutors were much more concerned about suppressing the rights of their own citizens than in listening to lessons from “normative Europe”.

Within days after the collapse of the two tyrants, EU institutions began the process of self-reflection and consideration of whether they had acted properly with their relations with the now-defunct regimes.

On 17 February 2011, the Parliament adopted a resolution criticising the EU’s approach to the Mediterranean area that had long been pursued by the Council and Commission in the Euro-Mediterranean Partnership and contrasted it with its own approach that was more broadly democratic:

whereas the promotion of respect for democracy, human rights and civil liberties is a fundamental principle and aim of the EU and constitutes common ground for the development of the Euro-Mediterranean area; whereas the Euro-Mediterranean partnership was mainly

¹¹¹⁹ European Commission, ‘Statement by Commissioner Štefan Füle on Egypt’, SPEECH/11/111, 16 February 2011. Available: <http://europa.eu/rapid/press-release_SPEECH-11-111_en.htm> [Last accessed 26 July 2016].

focused on economic reforms and was unable to bring about the necessary political and institutional reforms; whereas the Union for the Mediterranean, which was supposed to enhance the EU's policy in the region, proved ineffective to counter the growing mistrust and meet the basic needs of the people concerned,

whereas the quest for stability has often overshadowed the values of democracy, social justice and human rights in the EU's and its Member States' relations with southern neighbours in the past years; whereas human rights clauses in Association Agreements should be systematically backed up by a mechanism to implement those clauses; having regard in this context to the ongoing and necessary review of the ENP¹¹²⁰.

Rather than the economic-centred focus of the Council and Commission, the Parliament argued for the necessity of building deeper structures. The Parliament effectively called upon the EU to live up to its grand declarations on mainstreaming human rights and insisted that democracy and good governance be at the core of actual EU policy. The Parliament emphasised

that events in Egypt, and in other countries in the region, highlight again the urgent need to develop more ambitious and efficient policies and instruments as well as to strengthen their budgetary background to encourage and support political, economic and social reforms in the EU's southern neighbourhood; stresses that the ongoing Strategic Review of the European Neighbourhood Policy must reflect current developments in the region and must come up with new improved ways to meet the needs and aspirations of the peoples; calls for better coordination with the EU's other policies vis-à-vis those countries;

[Parliament reiterates] its demand for the EU to revise its democracy and human rights support policy so as to create an implementation mechanism for the human rights clause in all agreements with third countries; insists that the review of the ENP must prioritise criteria relating to the independence of the judiciary, respect for fundamental freedoms, pluralism and freedom of the press, and the fight against corruption; points out, in this regard, that the current Action Plans must be radically revised with the inclusion of clear priorities accompanied by incentives for political reforms; calls on the Council to define a set of political criteria that ENP countries must fulfil in order to be granted 'advanced status'.¹¹²¹

¹¹²⁰ European Parliament, 'Resolution of 17 February 2011 on the situation in Egypt', P7_TA-PROV(2011), (2011). Available:

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/wgme/dv/201/201103/20110309_situationegypt_epresolution_en.pdf> [Last accessed 26 July 2016].

¹¹²¹ European Parliament, 'Resolution of 17 February 2011 on the situation in Egypt', P7_TA-PROV(2011), (2011). Available:

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/wgme/dv/201/201103/20110309_situationegypt_epresolution_en.pdf> [accessed 26 July 2016].

The EP believed that declarations about democracy were not enough and that economic interests were in fact the real interests that had long prevailed. Following the collapse of Mubarak and Ben Ali, the EU had the opportunity to implement stated EU values and that real enforcement measures and conditionality should be instituted.

Shortly after the EP's 17 February 2011 resolution, almost as if in response to it, HR/VP Ashton and Commissioner Füle separately delivered speeches that read as if they were responses to the Parliament's resolution. Indeed, it sounds as if it is a *mea culpa* or, more accurately, a *nostra culpa* for the Commission's past approach to external policy, particularly with regard to Egypt and the Mediterranean.

On 23 February, speaking in Brussels, HR/VP Ashton discussed in broad and somewhat self-congratulatory terms about how the EU had dealt with the crises¹¹²². Nevertheless, she also acknowledged that the EU should have done much more, and recognised that long-term of stability could be achieved not by a singular focus on developing trade and security relations, but through broader issues:

[We] know that we need the right blend of democratic and economic reforms to build sustainable stability. Events in the region show that the 'old stability' wasn't working. That is why we need to build a new 'sustainable stability'. This will require us to tackle the political and economic aspects in an integrated manner. What these last few weeks have shown us is that political and economic reforms must go hand-in-hand. Populations are striving for political rights and freedoms, accountability and participation.

While recognising that the EU's prior approach had not been implemented, she seems not to have noticed that the "new 'sustainable stability'" was in fact the longstanding EU position that had never been implemented. Increasingly one may suspect that when the word "new" is attached to an EU policy, it is most likely to be the same old policy with the only novelty being the adding of the word "new".

On Monday of the following week, EU Commissioner Füle, whose portfolio included the EU's southern partners, directly addressed the Parliament on 28 February¹¹²³. With the benefit of historical hindsight on his speech, a benefit he obviously did not have when delivering it, we can see that he was overly optimistic about the long-term impact of the changes that had occurred.

The events unfolding in North Africa and other parts of the Arab world are of historic proportions. We are witnessing a sea change in the internal dynamics of this region. What has

¹¹²² European Union, 'Remarks by the EU High Representative Catherine Ashton at the Senior officials' meeting on Egypt and Tunisia', A069/11, 23 February 2011. Available: <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/119459.pdf> [accessed 26 July 2016].

¹¹²³ European Commission, 'Speech on the recent events in North Africa', SPEECH/11/130, 28 February 2011. Available: <http://europa.eu/rapid/press-release_SPEECH-11-130_en.htm> [accessed 26 Jul 2016].

happened over the last weeks will have profound and lasting consequences not only for the people and the countries of the region but also for the rest of the world, in particular Europe.

The toppling of former Presidents Ben Ali and Mubarak by peaceful protests mostly led by young people will remain in history as a symbol of the revival of the Arab world. For several generations, there has been a pervasive feeling of powerlessness in these countries, an alleged and, frankly, rather offensive “Arab exception” towards democracy, and a deep sense of despair watching change, freedom, modernity happening all over the planet.

This has changed irreversibly. Irrespective of any domino effect, it is now clear that all countries in the region, and all authoritarian regimes elsewhere, have to pay much more attention to the democratic aspirations and well-being of their populations.

Commissioner Füle gives credit where credit is due: to the brave people who challenged the undemocratic and brutal regimes with their own lives.¹¹²⁴ He admits that the EU, as stated by the Parliament earlier, had not always acted consistently with its own values.

we must show humility about the past. Europe was not vocal enough in defending human rights and local democratic forces in the region. Too many of us fell prey to the assumption that authoritarian regimes were a guarantee of stability in the region. This was not even Realpolitik. It was, at best, short-termism —and the kind of short-termism that makes the long term ever more difficult to build.

Here we have a candid acknowledgement that the southern “partners” with whom the EU had been dealing for years were in fact “authoritarian regimes” – a term that neither he nor the Council used when those regimes were in power. Dealing with such authoritarian regimes, he acknowledges, was “short-termism” that in the long run actually made the desired political development more difficult to achieve. This remarkable statement suggests that the EU knew full well that the regimes were in fact authoritarian and not interested in establishing human rights, but that the EU continued to deal with them because they would help “guarantee stability in the region”. This is a very candid, if indirect, acknowledgement that the EU’s relationships with authoritarian and non-democratic regimes was not to promote the long-term interests of the human rights of the Egyptian and Tunisian people nor to promote the declared long-term stabilising influence of democracy and good-governance. EU policy, Commissioner Füle admits, was to enhance short-term security interests at the expense of long-term European values. Of course, the EU was not the only international actor that talked about the importance of democracy while supporting the forces that suppressed it¹¹²⁵.

¹¹²⁴ The protestors were not protected by the EU and its powerful member states, which until the last minute continued to treat the regimes as legitimate “partners” with whom they could enter into favourable trading and security relationships.

¹¹²⁵ In 2006, five years before the Arab Spring, U.S. Secretary of State Condoleezza Rice offered a similar sentiment during a speech in Cairo:

After this candid, albeit brief, admission, the Commissioner assured the Parliament that the lesson had been learned and that there would be no going back. Henceforth, the EU “more than ever before, must be faithful to its values and stand on the side of democracy and social justice”. The changes should be welcomed “whole-heartedly”. The changes “carry the hope of a better life for the people of the region and greater respect for human rights, pluralism, social justice and the fundamental freedoms which are at the core of our values”. The values for which people gave their lives in the streets of Cairo and Tunis were “our values”. The EU’s “vital interest” should now be seen as having “a democratic, stable, prosperous, peaceful North Africa in its immediate neighbourhood”.

Officially, the EU recognised its error in having favoured short-term security over long-term stability and security founded on the values shared by the political dissidents in Egypt and Tunisia and Europeans. There should be a sea change in EU policy towards the southern Mediterranean. Füle concludes his speech by describing the massive increases of assistance that will soon be sent to Egypt, although he does not mention that the state with whom the EU was now dealing was governed by former Mubarak collaborators from the military, state security, and politics who came to power through a military seizure of power.

As mentioned earlier, between March and May of 2011 the Commission also issued two new documents in light of the Arab Spring wherein it pledged to offer benefits to Mediterranean countries with “conditionality” on their implementing human rights standards and instituting “deep democracy”¹¹²⁶.

EU policy toward Egypt during the next two years (through the end of 2013) offers a window into whether the lessons had indeed been learned and whether, using words from Füle’s 28 February speech, Europe in the future would be “vocal enough in defending human rights and local democratic forces in the region” or whether it would once again adopt a strategy of “short-termism that makes the long term ever more difficult to achieve”.

We should all look to a future when every government respects the will of its citizens – because the ideal of democracy is universal. For 60 years, my country, the United States, pursued stability at the expense of democracy in this region here in the Middle East – and we achieved neither. Now, we are taking a different course. We are supporting the democratic aspirations of all people.

Condoleezza Rice, ‘Remarks at the American University in Cairo’, 20 June 2005 Available: <<http://2001-2009.state.gov/secretary/rm/2005/48328.htm>> [accessed 25 Jul 2016]. U.S. policy did not fundamentally change after Secretary Rice’s *nostra culpa* admission.

¹¹²⁶ European Commission, ‘A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean’, COM(2011) 200 final, 8 March 2011. Available: <https://eeas.europa.eu/euromed/docs/com2011_200_en.pdf> [accessed 24 Jul 2016]; European Commission, ‘A new response to a changing Neighbourhood’, COM(2011) 303, 25 May 2011, Available: <https://eeas.europa.eu/enp/pdf/pdf/com_11_303_en.pdf> [accessed 24 Jul 2016]

b) Supreme Council of the Armed Forces (11 February 2011 to 30 June 2012)

For a brief moment, the crowd of Tahrir Square – including the political left, political right, secularists, Copts, Salafis, Muslim Brothers, and even portions of the military – felt the euphoria of a tyrant having been toppled largely through the non-violent movement of Egyptians coming together. That brief moment was not to last, as those united in the cause of bringing down Mubarak began to press their different agendas.

The five weeks following the departure of Mubarak was a perplexing period for Egypt, as contradictory signs on SCAF's ultimate intentions began to emerge. SCAF announced that it perceived itself as an interim caretaker government, yet allowed many of Mubarak's coterie to continue in office. On 13 February, SCAF announced that it would form a constitutional review committee to prepare for a referendum to be held on 19 March. Although the eight-member committee was handpicked by the military rulers, it was generally praised for including a diversity of opinions, including former opponents of Mubarak, one member of the Muslim Brotherhood, and a Coptic Christian. There was some reason for guarded optimism in Egypt. Less than two weeks later, the committee proposed a series of modest changes to the Constitution, including limitations on the president's term of office. The referendum immediately polarised the population with the Muslim Brotherhood urging a positive vote, the Coptic Christian a vote of "no", and others somewhat uncertain. The referendum was approved by more than 75% of the population, which was understood publicly as a sign of the strength of the Muslim Brotherhood.

Some Egyptians soon suspected, and with good reason as time would tell, that SCAF was less interested in playing the role of neutral, honest broker attempting to move Egypt toward a democracy, but a self-interested actor that wanted to keep Egypt ultimately under military control. Some protestors who remained in Tahrir Square were subjected to police violence on 26 February. Other protestors broke into security headquarters in different sites in Egypt to "liberate" documents that would reveal abuse. In April female protestors in Tahrir Square were arrested and accused of having loose morals because of their living in Tahrir Square with male protestors. Under the guise that the arrested women would falsely claim that they had been raped by security services, they were subjected to humiliating "virginity tests" by a military doctor who, in front of other military personnel, inserted his finger into their vaginas and then declared that they were not virgins, thereby suggesting that women engaged in protests were corrupt and immoral. One general, Abdel Fatah El-Sisi, who later would become President of Egypt, publicly defended the practice although saying it would be discontinued. SCAF launched a public media campaign against Tahrir Square protestors, just as had Mubarak, declaring that they were undermining Egypt. More protests were broken up on 9 April and 28 June. State media was once again being drafted, as during the Mubarak era, to suggest that protestors were traitors and disloyal Egyptians. The allegations prompted further resistance. On 8 July hundreds of thousands of people gathered in Tahrir Square to protest the lack of fundamental reform and the fear that SCAF was increasingly implementing the same tactics of Mubarak. Two weeks later, security forces killed hundreds of "Islamists" engaged in their own protest near the Abbasiya Square mosque. On 1 August, protestors were evicted from Tahrir Square.

During much of the year ugly allegations surfaced about Egypt's Coptic Christians being traitors to the state and several churches were attacked. In response, the Copts began a peaceful march on 9 October 2011 from the 6 October Bridge (which had played a prominent role in the January and February protests) toward the national television centre a few blocks away. The extensive video coverage shows security personnel deliberately attacking the unarmed protesters, including running them over with armoured troop carriers. Rather than reporting accurately on the events, national television reported that Copts were attacking the military and urged the people of Cairo to come out and protect the army. In December, women led protests against the increasing security crackdown. In one dramatic event, a woman wearing a black abaya (covering her full body except her face) was attacked and dragged, exposing her blue bra. One soldier brutally stomped on the chest of the helpless woman. The photo of the "blue bra girl" (as she was called) appeared on the front pages of newspapers around the world, shaping the image of military officials ruthlessly attacking unarmed and harmless protestors. Protestors were completely evicted from Tahrir Square in December. During this increasing suppression, parliamentary elections were held leading to a massive win by the Muslim Brotherhood and Salafis.

Publicly, the European Union was largely silent throughout the crackdown from February through December, although there were some exceptions. HR Ashton criticised the "sectarian" attacks on Copts on 10 March, 9 May, 10 October, and 12 October. On 10 October she said that she was "extremely concerned" by the deaths and injuries suffered by Coptic Christians on 9 October. (Ashton statement on the violence in Egypt, 10 October 2011). The statement also expressed her support for "the Prime Minister's call for calm and restraint," thereby reinforcing the official Egyptian position rather than challenging it. She noted the crucial task ahead of conducting the parliamentary elections "in a manner respectful of human rights". Lady Ashton did offer a more generalised condemnation of the violence that took place in November, but seems to have held all sides mutually responsible. Without pinning blame on the heavily armed security forces, she said that "violence must stop and the rule of law has to be maintained" (Ashton Statement on the situation in Egypt, 26 November 2011). She hoped that both the Egyptian people and Egyptian authorities "will find a way to move peacefully forward on their path toward democracy". Her comments suggest, perhaps contradictorily, that "both sides" are to blame for the violence and that "both sides" genuinely want peace and democracy". It was not until 18 December that she suggested, for the first time, that the weight of responsibility for violence should perhaps be blamed on security services rather than protestors. While urging "all parties to exercise calm and restraint" (which is much easier to say from an office building in Brussels than on a street in Cairo), she did finally "strongly condemn the use of violence against peaceful demonstrators". (Ashton Statement on the situation in Egypt, 18 December 2011). She placed responsibility on "governing authorities" to "stop the clashes". Noticeably lacking in all of the statements from March through December is any mention of conditionality, "more for more" or "less for less". Rather, the EU is offering watered-down statements to suggest its neutrality regarding the life-and-death clashes taking place throughout Egypt. It is difficult to see any significant difference in the seriousness of contemplated actions between the period preceding and following the downfall of Mubarak through the end of December 2011.

The political disputes of the first half of 2012, when Egypt remained under the SCAF, moved to some extent from the streets to indoors. In January 2012, Egyptian security authorities began raids of civil

society organisations and accused them of treachery. Catherine Ashton said that the EU “urges” Egyptian authorities to conduct such inquests “with appropriate legal procedures” and to act in a way “consistent with international standards”.¹¹²⁷

The most important issues revolved around elections and the democratic process. The Muslim Brotherhood and the Salafis had won impressive victories in the parliamentary elections of November and January 2012. The first round of presidential elections in May 2012 produced two rival candidates for the second round election in June: the Muslim Brotherhood’s Mohamed Morsi and Ahmed Shafik, a former military officer and the last Prime Minister in the Mubarak government. Egypt seemed to be reverting to its classic historical confrontation between a right wing but “secular” military and the Islamists. The SCAF was increasingly worried about the possibility of an Islamist-dominated parliament and the possible victory of a Muslim Brother for the presidency. In the midst of the final round of the presidential election, on 14 June 2012, the Mubarak-era Supreme Constitutional Court judges invalidated the January parliamentary elections and ordered that Parliament be closed. Egypt seemed headed towards a clash between Islamists and the military, with “democracy” being used by opponents as a stratagem rather than a tool to follow the will of the people. Three days later, on 17 June 2012, just before the results of the first free presidential election in Egypt’s history would be announced in Morsi’s favour, the Supreme Constitutional Court issued another ruling limiting the powers of the soon-to-be inaugurated President Morsi (whose victory would be announced officially one week later).

The EU noted favourably presidential elections that appeared to have been the freest and fairest election in Egyptian history. (Ashton Statement on the Presidential elections in Egypt, 25 May 2012). The EU nevertheless expressed its concern with the 14 June decision of the Supreme Constitutional Court, asking that there be a “clarification” as soon as possible. (Ashton Statement on the 14 June 2012 Supreme Constitutional Court decision, 15 June 2012.) She also congratulated Egypt again on the final round of the presidential elections, before Morsi’s narrow victory was announced, but again expressed her concern about the more recent decision of the Supreme Constitutional Court. (Ashton Statement on the political situation in Egypt, 20 June 2012). After Morsi’s victory was announced she congratulated the newly elected President, urging him to “reach out to all other political and social groups”. (Ashton Statement, 24 June 2012).

Although there had been serious abuses of human rights between February 2011 and June 2012, and although the EU made some tepid criticisms of events, the actions do not appear to have been followed by consequences. Conditionality was neither tried – nor even mentioned.

c) Morsi Presidency (30 June 2012 to 3 July 2013)

Mohammed Morsi was the first freely elected president of Egypt. Setting aside whatever misgivings she might have had about an Islamist politician being elected to the position of head of state, HR Ashton

¹¹²⁷ Ashton Statement on the continued crackdown on civil society in Egypt, 1 February 2012.

offered her congratulations. She “welcomed” Morsi’s election and noted that it was a “major milestone” and a “historic moment”. (Ashton Statement on the election of Mohammed Morsi as the President, 24 June 2012). Following the inauguration a week later, she again congratulated the “first democratically elected President in Egypt’s history” and looked “forward to working with him . . . as he leads the country into the next crucial state of its transition”. (Ashton Statement on the inauguration of President Morsi of Egypt, 30 June 2012). Morsi’s first state visit outside Egypt was to Brussels on 13 September 2012. In the discussions between EU officials and the new President, two of the principal themes for discussion were the Egyptian economy (including the restoration of tourism) and the democratic transition. The EU declared that “a true political and economic partnership” would help “bring about political and economic stability”. The parties agreed to meet again as a high level EU-Egypt Task Force two months later in Cairo. (Ashton Statement on meeting with Egyptian President Morsi, 13 September 2012).

The formal EU-Egypt Task Force meeting took place 14 November 2012, though informal meetings and a dinner took place the day before. The EU visitors brought with them a full-size replica of the burial chamber of Tutankhamen as a gift to the people of Egypt. In addition to the facsimile, the Europeans also brought with them pledges of money to help boost the Egyptian infrastructure. Commissioner Füle summarised the financial offering as “altogether for the years 2012-13 we are talking about almost one billion euro, out of which more than €700 million is conditioned by economic criteria, good governance and the principle of ‘more for more’”¹¹²⁸. Although Commissioner Füle declared that the “principle” of “more for more” (i.e., conditionality) – longstanding EU official policy – would underlie the financial gifts, neither the actual report of the conference nor the “fact sheet” that was released to the press made any reference to this “principle”.¹¹²⁹

While saying nothing about the principle of reciprocity, the Task Force Co-Chairs Conclusions did speak eloquently about the positive partnership and the “new era in EU-Egypt relations” and “long-term sustainable solutions”. The meeting itself would “send a strong political message in support of the democratic reform process Egypt”. The partnership was to be “based on solid co-ownership, mutual respect and complementarity of interests”. This new EU-Egypt relationship would set an “example for the region and beyond”. Egypt “underlined its commitment to continue on the path of building a modern democratic society, based on principles of rule of law, respect of human rights and fundamental freedoms”. The EU responded enthusiastically, and was particularly pleased to note “Egypt’s

¹¹²⁸ Stefan Füle, EU-Egypt: True partnership for people and transformation, 14 November 2012, Available: <http://europa.eu/rapid/press-release_SPEECH-12-820_en.htm?locale=en> [accessed 24 July 2016].

¹¹²⁹ European Union, ‘EU-Egypt Task Force fact sheet’, A 515/12, 14 November 2012. Available: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133513.pdf> [available 26 Jul 2016]; ‘EU-Egypt Task Force – Co-Chairs conclusions’ (2012). Available: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133511.pdf> [accessed 26 July 2016].

commitment to building democracy” and it “welcomed the Egyptian road map to complete the democratic transitional process”.

The week after these fine sentiments were expressed, President Morsi, without having given any advance warning to his European partners who had just praised Egypt’s ongoing transition to democracy, issued a unilateral decree on 22 November 2012 stating that neither his legislative nor executive powers could be reviewed by Egyptian courts¹¹³⁰. He also announced that those who had recently been acquitted of crimes related to the January-February uprising of 2011 would be retried. The reaction by Egyptian supporters of democracy and human rights was swift and critical. The leader of the opposition, Nobel Peace Prize winner Mohamed ElBaradei immediately criticised Morsi, whom he labelled the “new pharaoh”. Protests began immediately, and became concentrated in Tahrir Square by 25 November. The protests continued for the following eight months (until Morsi was overthrown by a coup). The EU, which had praised Egypt only the week before, issued no public criticism during the week following Morsi’s 22 November power grab. Ironically, on exactly the same day that Morsi issued his decree, the EU posted its “Fact Sheet” –poignantly dated 22/11/2012 – describing Egypt’s progress toward democratisation affirmed by the Task Force the previous week.¹¹³¹

¹¹³⁰ ‘Citing Deadlock, Egypt’s Leader Seizes New Power and Plans Mubarak Retrial’, *The New York Times*, 22 November 2012. Available: <<http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html>> [accessed 26 Jul 2016]; ‘Egypt’s Morsi assumes wide powers’, *Aljazeera*, 23 November 2012. Available: <<http://www.aljazeera.com/news/middleeast/2012/11/20121122161830842641.html>> [accessed 26 July 2016].

¹¹³¹ Delegation of the European Union to Egypt, ‘EU-Egypt Task Force Fact Sheet’ (2012). Available: <http://eeas.europa.eu/delegations/egypt/press_corner/all_news/news/2012/20121122_02_en.htm> [accessed 26 July 2016].

EU-EGYPT TASK FORCE Fact Sheet (22/11/2012)

NEW EU DIPLOMACY

1. The largest-ever meeting between the European Union and Egypt took place 13-14 November, co-chaired by the EU High Representative Catherine Ashton and Egyptian Foreign Minister Kamel Amr, as agreed with President Morsi on his recent visit to Brussels.



2. The Task Force is a new form of European diplomacy, to enhance the EU's engagement with countries in transition through the mobilization of all EU assets and working with both public and private sectors.

3. The Task Force in Cairo was on a much bigger scale than any previous such event – with more than 500 participants, committed to launching a new EU-Egypt relationship.

4. EU participants included representatives of the European External Action Service, the European Parliament, the European Commission, the European Investment Bank, the European Bank for Reconstruction and Development and Member States.

5. Over two days, participants discussed an exceptionally wide range of issues including commercial ties, economic co-operation, tourism, political reform, asset recovery, human rights, governance, infrastructure, ICT and science.

STARTING A NEW EU-EGYPT RELATIONSHIP

6. President Morsi received members of the Task Force in his first-ever meeting with senior European business leaders, European foreign ministers, European Commissioners, Members of the European Parliament, the President of the EIB and the senior leadership of the EBRD. In one of his first overseas trips, President Morsi came to Brussels and declared his wish for the EU to be Egypt's main partner.

7. The EU undertook to provide a total of nearly €5 billion (c.€3.8 billion) in the form of loans and grants for 2012-2013. The EU already provides 80% of inward investment into Egypt and the Task Force confirmed the European Union as Egypt's largest economic partner.

The next EU-Egypt Progress Report, an internal EU document, would later denounce the seizure of power and other anti-democratic moves in striking terms:

President Morsi's constitutional declaration of 22 November giving him near absolute power, the rushed adoption of a draft Constitution by the Constituent Assembly, the abrupt interruption of the dialogue on its provisions, and the President's subsequent call for a constitutional referendum have pitched the nation into a deeply divisive political crisis between supporters of the President, on the one hand and the secular liberal opposition, mainly represented by the National Salvation Front on the other¹¹³².

¹¹³² European Commission, 'Implementation of the European Neighbourhood Policy in Egypt Progress 2012 and recommendations for action' SWD(2013) 89, 2, 20 March 2013, <https://eeas.europa.eu/enp/pdf/docs/2013_enp_pack/2013_progress_report_egypt_en.pdf> [accessed 26 July 2016].

Although the Commission staff was able to characterise the events in Egypt in these striking terms, the EU's public announcements did not. Almost two weeks later, HR/VP Ashton noted the clashes taking place between protestors and security forces, and urged "calm and restraint on all sides" (Ashton Statement on the situation in Egypt, 5 December 2012). Rather than criticise Morsi sweeping assumption of powers, the High Representative urged that Egypt continue the "democratic transition" on which it had embarked. Although referencing the 13-14 November Task Force meeting, where Egypt pledged to work toward democratisation, she did not mention the 22 November decree nor Commissioner Füle's "principle" of conditionality. The EU did not say that it would cease providing aid conditional upon the return to the path toward democratisation.

On 8 December 2012, due to domestic pressure within Egypt and not by the EU conditioning aid to improvements in the democratic process, Morsi withdrew his decree. Many in the crowd at Tahrir Square did not interpret this as a change of heart, but more of a question of timing and a change of tactics.

In the midst of the troubles in Egypt, the European Union was awarded the Nobel Peace Prize on 10 December 2012. On the occasion, almost as if he were describing EU human rights policy toward Egypt, the EU Special Representative for Human Rights Lambrinidis, observed: "So on human rights day let us not point fingers but join hands for a common effort . . ."

Later in December, Egyptians went to the polls to vote in a referendum on a proposed constitution written largely by people sympathetic to the Muslim Brotherhood. "Secular" Egyptians denounced the referendum and urged others not to vote in order to protest what was understood to be part of a larger plan to bring the country firmly under the control of the Muslim Brotherhood. Only 33% of Egyptians went to the polls, a low turnout. The referendum was, nevertheless, approved. While President Morsi was taking steps to close political debate in Egypt, the EU issued another statement. Noting the very low turnout at the polls, Catherine Ashton nevertheless "welcomed" the "peaceful and orderly" way in which the referendum had been conducted. (Ashton Statement on the referendum in Egypt, 25 December 2012) "The EU and I want to stress our support for Egypt's democratic transition", she said, as if that were what was taking place in Egypt. Harkening back to the November Task Force meeting, Ashton once again claimed that it had "established a new era in our relationship where the overarching values of respect for social justice, socio-economic development, rule of law, human rights and good governance must inspire our common actions in the future"¹¹³³. Public messages to Egypt continued to emphasise the democratic transition rather than the ongoing democratic derailment.

In April an NGO named "Tamrod" launched a movement calling upon Morsi to resign. The government began a crackdown on foreign-sponsored NGOs, which evoked a protest from the EU. (Ashton State on

¹¹³³ 'Statement by the European Union Special Representative for Human Rights Stavros Lambrinidis', 10 December 2012. Available: http://eeas.europa.eu/delegations/vietnam/documents/press_corner/2012/20121210_op_en.pdf [accessed 26 July 2016].

the new NGO law in Egypt, 2 June 2013). In June, 43 employees of foreign NGOs were convicted of crimes against the state and sentenced to between one and five years of imprisonment. This, too, provoked a statement of “concern” because the convictions were a “negative signal” about the role of civil society. (Ashton and Füle Statement on the Egyptian NGO trial verdicts, 5 June 2013). Later that month *millions* of Egyptians went to the streets to protest against Morsi. Tamrod claimed to have 22 *million* signatures calling for Morsi’s resignation. Rather than back down, Morsi continued, as had Mubarak before him, to insist that he was the legal president of Egypt. On July 3, SCAF conducted a coup that was widely and broadly supported in Egypt, including by Mohammed ElBaradei, but was fiercely denounced by Islamist sympathisers. The EU, again, issued a statement in response to the events. HR Ashton referred to the “deep divisions” in Egypt, but did not use the word “coup” to describe what had just happened, although it *was* a coup. (Ashton Statement on developments in Egypt, 3 July 2013). The statement reads as if there had been an unfortunate accident rather than a decision by the military leadership to overthrow the first democratically elected president in the history of Egypt. While there had been space for the EU to denounce Morsi’s serious departures from the process of democratic transitions, it did not do so. And, when a completely undemocratic coup took place, the EU could not find the accurate word to describe what had just happened.

d) SCAF and the El-Sisi Regime (3 July 2013 to present)

While the 3 July coup was apparently supported by many Egyptians, and perhaps even a majority, it was not in any way consistent with democratic rule. On the positive side, however, the military regime immediately appointed two highly regarded *non-military* officials to positions of political importance. The acting President was Adly Mansour, a justice on the Supreme Constitutional Court. The acting Vice President became Mohammed ElBaradei, the Nobel Prize Laureate and the leader of the opposition under Morsi. On the negative side, Morsi and other leadership were arrested, accused of crimes against Egypt, and imprisoned pending trial. (Morsi subsequently received sentences including the death penalty and life imprisonment.) The EU predictably urged the “new administration [to be] fully inclusive” and “to rapidly return to the democratic process”. (Ashton Statement on developments in Egypt, 3 July 2013)

Morsi supporters immediately went to the streets and began their own protests, particularly focusing on the Rab’a al-Adawiya mosque in northern Cairo, long a centre of Islamist activities. Confrontations between Morsi supporters and opponents became violent, resulting in injury and death. Both Europeans and Americans made increasingly urgent appeals for the confrontations to end. The most dramatic event occurred on 14 August 2013, when SCAF declared a state of emergency and then massacred hundreds of Morsi supporters at the Rab’a al-Adawiya mosque, Nahda square, and elsewhere in Egypt. Vice President ElBaradei was so disgusted by the carnage that he resigned his position and fled Egypt. While chaos was breaking out in Egypt, the EU continued to issue calm words that increasingly seem to be disconnected from reality. Egyptians were advised that “confrontation and violence is not the way forward”, security forces should exercise restraint, and that all Egyptians needed to avoid “provocations”. “The country’s democratic future will depend on a dialogue among all”. The way forward includes allowing for “freedom of expression” and “peaceful protest”. (Ashton Statement on the situation in Egypt, 14 August 2013). Violent crackdowns on other protestors continued for the next

few days. Some Islamist victims of violence turned against the Copts and became perpetrators of violence. Later in the month the EU issued a memorandum “EU-Egypt relations”¹¹³⁴. The document describes recent EU policy with regard to Egypt, and expressed its “strong concern” regarding the events that “unfolded in a tragic way”. But, rather than applying the “essential elements” clause of the EU-Moroccan Association Agreement, article 28 of the ENPI Regulations, or Commissioner Füle’s “principle” of “more for more” conditionality, it repeats the prior offers of financial aid.

In December, the Muslim Brotherhood was again banned as it had been on several occasions during and after the 1950s.

During the following several months, one after another, the EU urged “both sides” to abstain from violence and to return to the process of establishing democracy.

4. Concluding Observations

The EU Court of Auditors, unusually, conducted a special study of EU aid to Egypt in the context of the Arab Spring to determine the effectiveness of the programmes¹¹³⁵. Although the Court of Auditors did not expressly state its reasons for conducting the audit, it implicitly suggests that it has done so because Egypt is of particular importance in the Arab and Muslim worlds, because it is one of the largest recipients of aid from the EU, and because it had been undergoing a transition in the context of the Arab Spring. The Court of Auditors, although fully recognising the difficulty of working with Egypt during the turbulent years, nevertheless found that “overall the Commission and EEAS have not been able to manage EU support to improve governance in Egypt effectively”¹¹³⁶. The Court of Auditors emphasised the importance of conditionality (incentive-based) funding¹¹³⁷. The Commission’s replies to the recommendations of the Court of Auditors, included within the published Audit Report, accepted the importance of conditionality¹¹³⁸. Ultimately, the Court of Auditors concluded that the EU never applied the required conditionality to grants and there were very few signs that grants had been effective. Ironically, the most effective targets of funding, direct aid to CSOs, received relatively little funding¹¹³⁹. Rather than promoting human rights effectively, Europe had sent financial aid to the regimes that fell within the time frame of the study with little actual regard to the effectiveness of the programs.

¹¹³⁴ European Commission, ‘EU-Egypt relations’, 21 August 2013. Available: <http://europa.eu/rapid/press-release_MEMO-13-751_en.htm> [accessed 26 July 2016].

¹¹³⁵ European Court of Auditors, ‘Cooperation with Egypt in the Field of Governance together with the Commission’s replies’ Special Report No 4/2013, Available: <http://www.eca.europa.eu/Lists/ECADocuments/SR13_04/SR13_04_EN.PDF> [accessed 24 July 2016]

¹¹³⁶ Ibid, 7.

¹¹³⁷ Ibid, 8, 21-22, 24, 30-31; 52.

¹¹³⁸ Ibid, 40, 49.

¹¹³⁹ Ibid, 8.

E. Morocco and the European Community

1. Historical Background of Europe and Morocco

Morocco has had longstanding ties with Europe. Two Moroccan dynasties, the Almoravids and Almohads ruled Andalusia and Morocco. Morocco also claims to be the only Arabic-speaking country that was never conquered by the Ottoman Empire (though the Nejd region of Arabia could make a similar claim). Morocco, thus, has a longer claim of independence than any other Arabic country, and has the only Middle Eastern Muslim regime other than the Ottomans to have ruled over large portions of western or southern Europe. From the end of the nineteenth century, however, as countries on the African continent and elsewhere fell under European colonial control, the Spanish and French increasingly asserted influence over portions of Morocco, with the Spanish toward the north (and in the Sahara) and the French in the remainder of the country. Morocco became a focus of inter-European rivalries in incidents provoked by the Germans in the 1905 Tangier Crisis, which led to the international conference at Algeciras, and in the 1911 Agadir Crisis, which led to the signing of the Treaty of Fez in 1912, resulting in France and Spain dividing rule over Morocco. In 1956, the same year that Tunisia's independence from France was recognised, France and Spain both recognised the independence of Morocco and evacuated the country thereafter, except for the two Spanish territories Ceuta and Melilla, which had been European colonies in the fifteenth century. (Morocco does not recognise the legality of Spanish occupation of those territories nor some nearby islands.)

Since obtaining its independence in 1956, Morocco has had three kings, Muhammad V (1956-1961), Hassan II (1961-1999), and Muhammad VI (1999-present). The kings are the most recent descendants of the Alawite dynasty that has ruled over Morocco since the 17th century. The Alawites base their legitimacy, in part, on being descendants of the Prophet Muhammad, thus making them "Sherifs". The only other ruling monarchy whose legitimacy is based, at least in part, on Prophetic descent is the Hashimite Kingdom of Jordan, which came to power not by long descent but because they were placed on the throne during the British mandate over Palestine in the 1920s. It is widely accepted in Morocco that the legitimacy of the ruling family thus has a quasi-religious basis. This is taken quite seriously by a clear majority of Moroccans.

The two European member states with which Morocco has the closest ties are France and Spain, which originates from the same type of complex relationship that many other states have with their former colonial rulers. Moroccans both resent former rule by the French and Spanish, but, at the same time, have cultural ties that are perhaps most evident in French and Spanish being the most frequently spoken non-native languages (though English continues to increase in importance). Both Hassan II and Muhammad VI received their university education in France. Hassan II arranged for his son, the crown prince, to work in the office of EEC Commission President Jacques Delors in Brussels in 1988-1989.

2. Formal Relations between the European Community and Morocco (1969-present)

a) EEC-Morocco Association and Cooperation Agreements (1969-1990)

Morocco entered into its first legal arrangement with the EEC in 1969, an Association Agreement (1969-1978)¹¹⁴⁰, followed immediately thereafter by a trade agreement¹¹⁴¹. Both documents were entirely commercial in nature and contained no provisions on human rights or democracy. In 1976, a new agreement was signed under the rubric of the EEC's Global Mediterranean Policy, the EEC-Morocco Cooperation Agreement (1978-1990)¹¹⁴². Although slightly expanded in scope over the Association Agreement, it also had no provisions relating to governance or human rights. Under the original 1996 Association Agreement, Morocco entered into separate, short-term (typically four-year) trading and fishing protocols that have been revised and renewed under the 1978 Cooperation Agreement and later 2000 Association Agreement.

b) Moroccan Application for European Community Membership (1987)

In its 1972 Global Mediterranean Policy, (see Part III above), the EEC announced that it “keeps open the door to the accession of the European Mediterranean countries to the Community”¹¹⁴³ (p. 2). Some of the Mediterranean countries that were “partners” in 1972 ultimately did become members, including Greece, Cyprus, and Malta. In 1984, taking the EEC at its word, Hassan II informally requested that the EEC open accession talks with Morocco. Three years later, on 20 July 1987, Morocco formally requested in writing the beginning of accession talks. On 1 October 1987, the Council responded “no” because Morocco was not “European”¹¹⁴⁴. The Community apparently did not explain what “European” meant or whether Morocco was being excluded for geographical, religious, historical, or cultural reasons.

If Europe were understood to be a geographical term, then it should be noted that Morocco is closer to the European continent than is Great Britain, Ireland, Iceland (which was opened to membership), Cyprus, or Malta. Moreover, the now underwater Camarinal Sill that links Morocco and Spain beneath the Strait of Gibraltar previously formed the western boundary of the once-landlocked Mediterranean Sea. To the extent that “European” referred less to geography than to a religious identity, it should be remembered that European Christianity has its origins in a Mediterranean land, just as does European

¹¹⁴⁰https://www.wto.org/gatt_docs/English/SULPDF/90820127.pdf

¹¹⁴¹<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31969R1465&from=EN>

¹¹⁴²<http://aei.pitt.edu/12754/1/12754.pdf>

¹¹⁴³ Commission Information Memo, ‘The Relations between the Community and the Mediterranean Countries’ P-48, np. Available: <http://aei.pitt.edu/30142/1/P_48_72.pdf> (in both English and French).

¹¹⁴⁴http://www.europarl.europa.eu/enlargement/briefings/pdf/23a1_en.pdf (p. 5). See also Maurice Flory, “Note Sur la demande” http://aan.mmsh.univ-aix.fr/Pdf/AAN-1984-23_55.pdf

Judaism. This is not to mention that the second largest religion in Europe after Christianity (as a whole) is Islam. The land of Palestine had a far larger importance for religion in Europe than did distant Iceland, which was not excluded for being “non-European”. If Morocco was excluded for not being European in terms of culture and history, there are additional reasons to question the decision. Southern Mediterranean countries have played a much more significant role in European culture and history than have some current EU member states. The origins of the 12th-century European Renaissance (and the subsequent Italian Renaissance) began in the translations of Arabic texts seized in Muslim al-Andalus in the 11th century¹¹⁴⁵. Modern mathematics (algebra, Arabic numerals, base-10, zero, negative numbers, and the decimal system) did not originate in Europe, but came there through Mediterranean countries. Modern chemistry, astronomy, and medicine did not originate in the brains of the medieval French, Germans, or Italians, but were imports from the countries that are insufficiently “European”. Two Muslim dynasties, the Almoravids and Almohads ruled in al-Andalus in the 11th through thirteenth centuries. Many products, commodities, and cultural touchstones that are now part of European life came from the Mediterranean, including soap (brought back by the Crusaders), troubadour love poetry, silks, gold (through Sijilmasa in Morocco), spices, and perfumes. One cannot help but think that the term “European” was being used not in a precise, technical, or geographical way, but as a way of hiding behind a *European* prejudice.

c) EC-Morocco Association Agreement (under Euro-Med) (2000-present)

The EC-Moroccan Association Agreement of 2000 (EMAA) is the single most important legal document underlying the current bilateral relationship between the European Union and Morocco, having superseded the earlier 1978 Cooperation Agreement¹¹⁴⁶. The EMAA provides the legal foundation for subsequent agreements and protocols between the parties, including, for example, the 2012 protocol on participation in EU programmes¹¹⁴⁷; a 2012 exchange of letters on agriculture and fishery products¹¹⁴⁸; and a 2013 fisheries agreement¹¹⁴⁹.

¹¹⁴⁵ Charles Homer Haskins, *The Renaissance of the Twelfth Century*. Cambridge: Harvard University Press, 1927.

¹¹⁴⁶ The technical title of this agreement is: Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L 70/2. Available at: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127906.pdf. [12 Feb 2016]. The EMAA was signed in Brussels in 1996 and came into force in 2000.

¹¹⁴⁷ Council Decision 2012/176/EU of 8 March 2012 on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, on a framework agreement between the European Union and the Kingdom of Morocco on the general principles for the participation of the Kingdom of Morocco in Union programmes [2012] OJ L 90/1. Exchange of letters 2012/497. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010PC0232&from=EN>

¹¹⁴⁸ 2012/497/EU: Council Decision of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of

The 2000 EMAA consists of 96 articles totalling 20 pages in length, with an additional seven annexes adding another 170 pages. Although issues related to trade and tariffs constitute the bulk of the EMAA, it announces its general purposes as being the promotion of free trade, political dialogue, and economic integration (Art. 1).

There are two brief provisions of the EMAA that pertain to human rights. Its preamble acknowledges “the importance which the Parties attach to the principles of the United Nations Charter, particularly the observance of human rights and political and economic freedom, which form the very basis of the association” The sole article specifically focusing on human rights provides that the “Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and an essential element shall constitute of this Agreement” (Art. 2) Although recognising that human rights is an “essential element” of the EMAA, the document itself does nothing more than embrace rhetorically the concept. The EMAA includes no additional provisions that establish human rights legal obligations, reciprocal obligations, conditional obligations, or political commitments. In fact, neither the EU nor Morocco assumed any actual responsibilities for human rights beyond their ratifications of international and regional human rights charters.

The 2000 EMAA led to the creation of two institutions for the monitoring and implementation of the agreements. These institutions are the structures for political dialogue on Human Rights in particular. The first institution is the Association Council, which consists of members of the EU Council and the European Commission on the one hand, and members of the Moroccan government on the other. The Association Council sometimes meets as a Ministerial Council, which is co-chaired by the Moroccan Minister of Foreign Affairs and the High Representative for the Common Foreign and Security Policy (CFSP). The Association Council meets in Brussels or Luxembourg once a year and prepares the annual report on progress and accomplishments. The Association Council, which has decision-making power, is a platform for political exchange within the frameworks of both EU-Morocco partnership and strategic matters of common interest. The time devoted to issues on human rights is restricted due to the limited duration of the council itself. Therefore, human rights are discussed only from a general perspective.

The Association Committee is the second institution established by the EMAA. The Association Committee meets once a year for one day in Rabat and unites senior officials from both the EU and Morocco. All Moroccan ministries are represented. The Association Committee, which brings together no less than 100 senior officials, is responsible for the on-going management of agreements and conducts a comprehensive review of reforms in different sectors. Even if the committee goes into more

Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:241:FULL&from=EN> (pp. 1-48).

¹¹⁴⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22013A1207%2801%29&from=EN>

detail than the Association Council, discussions remain general and lack depth. The issues of human rights are raised briefly at committee level.

Since 2005, around ten technical committees comprising of experts of the European institutions and the Moroccan administration hold meetings each year. The Subcommittee for Human Rights, Democratization and Governance is the entity that deals with human rights matters. This subcommittee holds annual day-and-a-half meetings alternating between Brussels and Rabat, and is an opportunity to discuss the human rights situation.

d) Morocco as a “Neighbour” (under ENP) (2004-present)

In 2004, the European Community established its new European Neighbourhood Programme (ENP) (in conjunction with the accession of ten new member states) that was divided into two components: one for eastern neighbours and one for southern neighbours. (See Part III.B.5 above) Of course the southern neighbours, including Morocco and Egypt, maintained separate and ongoing external relations with the Community through the Euro-Med policy, the Barcelona Process, and the financial instrument MEDA. The precise differences between Euro-Med and the ENP were not completely clarified and no single “coherent” or “global” strategy was offered. “The two policies were actually quite different with regard to their logic and motivation, and the relationship between them seemed unclear from the outset”¹¹⁵⁰ The newly described “Southern Neighbours”, such as Morocco, were already “Mediterranean Partners”. Rhetorically, if not substantially, the new label could not help but be seen as a downgrading of the relationship, just as if a human couple transformed their relationship from one of being “partners” to one of being “neighbours”. To add insult to injury, this downgraded description of the relationship was made unilaterally in Brussels without serious consultations with its erstwhile partners.

One of the principal forms of interaction between the Community and its Southern Neighbours established by the ENP included the Community’s drafting of a “country report”, which constituted the Community’s unilateral analysis of a variety of issues, including those related to human rights. Following the Commission’s 2004 Country Report on Morocco, it negotiated with Morocco a 2005-2010 “Action Plan”¹¹⁵¹ (that ultimately was extended to 2013). Subsequently, a new Action Plan 2013-2017 was adopted.

Thereafter, later became annual “progress reports”. The European Community then established, in consultation with its neighbours, an “Action Plan” that established a standard for the annual reviews. Morocco has had two Action Plans with the Community: 2005-2010 (extended ultimately through 2012) and 2013-2017. During the first action plan (2005-2010), Morocco and the EU decided to launch a

¹¹⁵⁰ Fernandez-Molina, *Moroccan Foreign Policy*, 114.

¹¹⁵¹ EU-Morocco ENP Action Plan 2005-2010, UE-MA 2702/05. Available at: http://www.iemed.org/docs_oficials_migracio/acords_informes_pais/MARROC/ACTION_PLAN/morocco_action_plan_eu_EN.pdf [Accessed 11 Feb 2016]

process that aimed at formulating what would result in the “advanced status” to which Morocco aspired. (See below.)

Even though the first action plan expired in 2010, the parties agreed to continue to operate under it until a new Action Plan was adopted, something that finally occurred in 2013. The 2013-2017 Action Plan is a 100-page document that outlines a broad range of goals regarding human rights and good governance (which dominate the first sections of the Action Plan), but also with regard to numerous other issues, including economics, trade, transportation, mining, and science and technology. The 2013 Action Plan was developed in light of Morocco’s “advanced status” recognition in 2008.

A new plan of action for 2013-2017 was adopted during the eleventh Association Council meeting of EU-Morocco held on 16 December 2013.¹¹⁵² This new plan is a combination of the old plan (2006-2010) and the joint document on advanced status; and offers an operational roadmap for the implementation of the advanced status, paving the way for a gradual, regulatory, and consensual rapprochement.

Morocco has wanted more than the EU was prepared to offer¹¹⁵³. Relations between Morocco and the EU reveal the Moroccan willingness to deepen its relations with the EU. The request of joining the EEC is highly symbolic and shows that Morocco is seeking more than what the EU is ready to offer it. Indeed, the Advanced Status was the result of the Moroccan willingness to draw closer to the EU and the EU’s aim to strengthen its links with Morocco. Aiming to be distinguished, Morocco was looking for a special status rewarding its implication in its relations with Europe by going beyond the bilateral association agreement of 1996 and building a closer cooperation.¹¹⁵⁴

Each year the EU provides a “progress report” on each of the countries with which it has association agreements, including Morocco. The reports do not analyse EU reform measures, but only those of its neighbours, such as Morocco. It is on the basis of the 2006-2010 Action Plan that annual monitoring and evaluation reports on ENP implementation began. While these reports were initially prepared in Brussels, the European Union Delegation in Rabat has in the last three years drafted them. The latter bases its reports on civil society contributions and the work of the Commission. The approval process of these assessment reports is conducted internally within the Commission, after which a short report on the overall assessment of the country is issued, and subsequently presented to the ambassadors of member countries in Brussels. (See discussion below.)

¹¹⁵²Council of the EU. (2013). Politique européenne de voisinage. Projet de plan d'action Maroc pour la mise en oeuvre du statut avancé (2013-2017). Available at: http://eeas.europa.eu/enp/pdf/pdf/action_plans/morocco_enp_ap_final_en.pdf [accessed 10 Mar 2016].

¹¹⁵³ “Morocco has demonstrated on more than one occasion that it has no patience with the stagnating, simple free trade area relations imposed by the EMP in 1995”. Tovas, A. (2012) The European Union and the Mediterranean Member States. In: Bindi, F. & Angelescu, I., eds., *The Foreign Policy of the European Union*, 2nd ed. Washington: Brookings Institution Press, 186-202.

¹¹⁵⁴Delort, 2.

Unsurprisingly, the principal onus for making changes in laws and practices lies on the EU's relatively less powerful "partners" rather than on the EU itself. From the perspective of the neighbours, the relatively one-way calls for transparency, democracy, human rights, the rule of law, and financial reform give hints neo-colonial paternalism, with the EU telling its neighbours through the ENP how to be more like the EU, rather than establishing a partnership of equals.

e) Morocco's "Privileged Treatment" and "Advanced Status" (2008-present)

Although Morocco's formal request for membership in the EEC was denied in 1987, it has been forcefully argued that the country has received "privileged treatment"¹¹⁵⁵ from the European Community, as exemplified in 2008 by its becoming the first state to be designated as having an "advanced status". Professor Fernandez-Molina makes a detailed argument showing that Morocco has long presented itself to the European Community as an assiduous and compliant partner that is ready to take steps to please Europeans¹¹⁵⁶. As she explains, Moroccans in high percentages would like their country to become a member of the EU and public pronouncements by Moroccan officials frequently assert that the country has close ties with it. Morocco pushed hard diplomatically to attain the recognition of having "advanced status" with the European Community, even though there is no precise privilege, benefit, or responsibility that flows from the designation. Both the EU and Morocco now frequently refer to Morocco's advanced status as if it has a concrete meaning beyond its obvious symbolic value. Morocco achieved this designation, according to Fernandez-Molina, not by making concrete adjustments to its laws, policies, and procedures (or raising its human rights standards). "Judging by Morocco's poor record on political reform and democratisation, it appears that Moroccan socialisation by the EU has not, broadly speaking, resulted in any substantial change in interests, values and identity in line with the European political norms but has remained on a more limited and superficial level"¹¹⁵⁷. Rather, Morocco attained the status by its eager willingness to *discuss* good governance topics with the European Community and to actively promote European projects. Whereas many Mediterranean states metaphorically rolled their eyes in 2008 with the announcement of yet another initiative, this time the Union for the Mediterranean (UfM), Morocco enthusiastically embraced the concept and offered to host its institutions¹¹⁵⁸.

Originating from the Association Council, the joint EU-Morocco document on strengthening bilateral relations and advanced status, aimed at the establishment of new institutions (a Higher Institute for Combatting Crime, and a joint Parliamentary Committee). The joint EU-Morocco document also explicitly lists political conditions, such as Morocco's gradual membership to certain conventions (particularly those of the Council of Europe), or undergoing legislative reforms (political, legislative and

¹¹⁵⁵ Fernandez-Molina, *Moroccan Foreign Policy*, 96.

¹¹⁵⁶ Fernandez-Molina, *Moroccan Foreign Policy*, pp. 96-155.

¹¹⁵⁷ Fernandez-Molina, *Moroccan Foreign Policy*, 101.

¹¹⁵⁸ Fernandez-Molina, *Moroccan Foreign Policy*, pp. 128-131.

administrative). However, this condition is relative due to the legal nature of the document. As Nicolas Delort notes: “the advanced status is, above all, a statement; a proclamation by two voices for better cooperation in the future”¹¹⁵⁹. In other words, the EU-Morocco joint document has no binding provision. It aims at emphasizing the strengthened cooperation between both parties and the EU’s support of reforms pioneered in Morocco. In particular, it offers a legitimate framework for Morocco to integrate the EU internal market. Morocco attained the desired “advanced status” a year later, in 2008.

Nevertheless, there is no sign that anything of major substance was conceded by either party in the negotiations leading to advanced status.

During the whole Advanced Status negotiation process no added pressure was placed on the Moroccan regime to undertake substantial political reforms in exchange for the special treatment expected from the EU. Similarly, the Joint Document did not include any concrete commitments, deadlines, benchmarks or assessment criteria. Therefore, there was arguably no serious hint of democratic conditionality in either the process or the outcome¹¹⁶⁰.

Since 2008, Morocco is recognised as having “advanced status” with the EU, which in theory opens the relationship for higher levels of political cooperation¹¹⁶¹.

3. Case Studies on the European Community and Human Rights in Morocco

a) *The European Union and the Arab Spring in Morocco (2011)*

The Moroccan case is much less complicated than that of Egypt, and presents a very different picture. Unlike Egypt, where head of state Hosni Mubarak was widely despised throughout his country, King Muhammad VI, who has ruled since the death of his father in 1999, is genuinely popular with the majority of the population and is even revered by a significant percentage. (Public opinion polls are not allowed, so it is necessary to rely on perceived sentiments.) The King, who is a billionaire and one of the richest men in Africa, is often given the sobriquet “the King of the Poor” due to his stated concern for the most impoverished of his people. Even those on the political left who might otherwise favour democratising changes, understand the difficulty of finding serious political leaders in any party that could promote the changes they might like to see implemented. Most Islamists also do not contest the King’s legitimacy. While popular movements on the left or right might push the King to support their

¹¹⁵⁹ Delort, N. (2010). *Statut avancé: passer du symbolique au pratique*. [online] Rabat: Centre d’Analyse et de Publication de l’Institut Amadeus. Available at: <http://www.amadeusonline.org/images/stories/PDF/Statut-avance-MarocUE-juillet2010.pdf?phpMyAdmin=2daacd6fce4759898390589077e6bc49> [Accessed 20 Dec 2015].

¹¹⁶⁰ Fernandez-Molina, *Moroccan Foreign Policy*, 144. Note, however, that Fernandez-Molina does see a slight advantage in Morocco’s opening to agreeing to a national action plan on human rights. *Ibid.*, 145.

¹¹⁶¹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, https://eeas.europa.eu/morocco/docs/document-conjoint_fr.pdf

favoured reforms, it is widely understood that any direct challenge to the legitimacy of the King would not be permitted by state security and would be widely unpopular in the country as a whole. Morocco has been described as, at root, a “semi-authoritarian” regime¹¹⁶². The Palace tightly controls the police and state security, which have a visible presence throughout the country, where there are sharp limits on freedom of the press, and where there is recognised and entrenched political and financial elite with a powerful influence in the country.

In mid-February 2011, after revolts had already broken out in Tunisia, Egypt, Yemen, Libya, and Bahrain, Morocco operated under a constitution that had been promulgated in 1996 under the current King’s father. Although officially a constitutional monarchy, it would be more accurate to describe Morocco as a monarchy that has sanctioned a constitution. In the country there are often said to be “three red lines”, topics that cannot be contested publicly: the religious and political legitimacy of the King, the legitimacy of Islam, and the physical integrity of the Moroccan state (meaning Morocco’s claim to sovereignty over what it calls its “southern provinces” and the EU and the UN call the “Western Sahara”)¹¹⁶³. Thus, when political demonstrations began in Morocco under the rubric of the Arab Spring in mid-February 2011, unlike all of the other countries that underwent turmoil, the legitimacy or authority of the head of state was never fundamentally challenged by the political left or the Islamist right.

While many (and probably most educated) Moroccans watched with enthusiasm the toppling of Mubarak and Ben Ali, and while many hoped for significant reforms in their own country, there certainly were no voices calling publicly for the overthrow of the King or challenging the core of the Moroccan system. When EU Commissioner Füle visited Morocco on 7 February 2011 and met with Foreign Minister Taïb Fassi Fihri, two weeks before the first Arab Spring protests began, he offered words of praise for the “magnificent” country he was visiting and praised its reforming efforts and offered no cautions or warnings¹¹⁶⁴. Speaking on behalf of the EU, he found that there was a wish to form a closer relationship with Morocco and that the two political entities were linked by centuries of a common history¹¹⁶⁵.

¹¹⁶²Kausch, *How Serious is the EU* 2008, pp. 2, 11; Fernandez-Molina, *Moroccan Foreign Policy*, 119.

¹¹⁶³The lack of freedom of expression with regards to these three, otherwise fundamental, issues, is not only reinforced by informal practices, but is formalised in the Moroccan press code. Article 41 of the legal text criminalises any expression that: “harms the Islamic religion, the monarchic regime or territorial integrity”, with imprisonment sentences ranging from three to five years and fines that oscillate from 10,000 to 100,000 MAD. To consult the Press Code (in Arabic) see: http://www.mincom.gov.ma/landing/demo/template/wordpress/media/k2/attachments/102207_25_142_3_3_2002_.pdf [27 Sept 2016].

¹¹⁶⁴http://europa.eu/rapid/press-release_SPEECH-11-82_fr.htm

¹¹⁶⁵“Je pense sincèrement que nous sommes en train de forger une relation encore plus étroite avec le Maroc et par là-même que nous démontrons au monde qu’il n’y a pas de place pour un potentiel ‘clash’ des civilisations. Tout au contraire, le Maroc et l’Union européenne sont intimement liés par des siècles d’histoire commune, un héritage partagé, une relation privilégiée et une mer commune”. Ibid.

Prior to the Arab Spring, economic and social protests had long been part of the Moroccan political landscape. Demonstrations frequently occurred throughout the country and typically consisted of local people complaining about food prices, inaccessibility of electricity or water services in rural areas, unresponsive local government officials, or of university graduates protesting the lack of employment opportunities in front of the Parliament building in Rabat. Thus protests were nothing new in Morocco. What was new in the middle of February 2011, was a group of young political activists who consciously sought to organise a public protest as part of Morocco's contribution to the Arab Spring. The young organisers called for political reform, greater openness, and increased economic opportunity for the poor and unemployed. Calling themselves the *Mouvement du 20 février*, these young people used Facebook and Twitter to call for a demonstration on 20 February in front of the Parliament building in Rabat. Inevitably, there were vastly different estimates of how many people actually gathered in front of Parliament on 20 February, with the numbers ranging from 2000 to 20,000 (with the lesser number likely being more accurate). Smaller demonstrations took place in other cities, with many in the Moroccan press describing the demonstrations in terms favourable to the regime and disparaging toward the supposedly unruly protestors.

Without addressing the substance of the protestors' demands, the state suggested that they were not to be taken entirely seriously. The 20 February movement called for additional protests to be held every following Sunday, a day of the week that would least interfere with business, traffic, or the university calendar. Accordingly, protests of similar strength occurred in Rabat and other cities in Morocco on 27 February and 6 March. Although young people associated with the 20 February movement were the backbone of organisation efforts, actors on the national political stage began to express support for reforms if not transformations. While lacking a clear target as in Tunisia and Egypt, the regime started to come under stress as uneasy coalitions began to form in support of the protestors¹¹⁶⁶.

In a dramatic move, in the context of an Arab world in turmoil and the ongoing demonstrations throughout Morocco, Muhammad VI addressed the nation by television on Wednesday, 9 March. Seated between his younger brother and his 8-year-old son, the King read a 10-minute speech¹¹⁶⁷. He said nothing about the startling events taking place in Egypt, Tunisia, Libya, Yemen, or Bahrain, nor anything about the three recent demonstrations organised by the 20 February Movement. Instead, he discussed his longstanding interest in reforms, regionalisation, and promotion of democracy. He referenced the three red lines – monarchy, religion, territory – which he characterised as being “unanimously” supported by the nation, though he added to the three “a commitment to democratic principles”¹¹⁶⁸. The most important portion of the low-key discourse was King's announcement that he

¹¹⁶⁶ See Mounah Abdel-Samad (2014). Why reform not revolution: a political opportunity analysis of Morocco 2011 protests movement”, 19 *Journal of North African Studies*, no 5, 792-809.

¹¹⁶⁷ http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/Morocco_1_King_Mohammed_VI_Speech.pdf

¹¹⁶⁸ The full text in English is: “The sacred character of our immutable values, which are unanimously supported by the nation – namely Islam as the religion of a state which guarantees freedom of worship; Imarat al-Muminin

had appointed a committee of experts to draft a new constitution. The initiative proposed by the King did not emerge from civil society or democratic movements, but was a top-down, palace-controlled, effort to seize the initiative and to circumvent any potential broader challenge to the King's authority. Rather than defying the broader movement that had brought down Mubarak and Ben Ali, Muhammad VI sought to contain it by making a restrained appeal to shared values, democracy, constitutionalism, and the rule of law.

The EU Commission responded to the King's speech the following day¹¹⁶⁹. HR/VP Ashton and Commissioner Füle jointly issued a statement where they "welcomed" the King's announcement of "extensive constitutional reform". They praised the King's "commitment to further democratization". The EU enthusiastically described the non-existent, Palace-controlled text as being "a qualitative leap in the process of reforms already initiated" and assured Moroccans that the EU "stands ready to support Morocco's efforts to implement such far-reaching reforms".¹¹⁷⁰ A week later, Commissioner Füle, speaking to the European Parliament, described the events in Morocco as being one of the "encouraging developments" of the Arab Spring¹¹⁷¹.

During the following weeks, the 20 February movement continued to hold its Sunday protests, though somewhat sapped of energy as the more traditional politicians returned to jockeying for power within the King's reform agenda. The King had successfully seized the momentum. Increasingly, and intentionally, he presented himself to the country as the arbiter of competing factions and as one who stood above the fray, rather than as heading the most powerful faction within the state that was seeking to preserve if not enhance his power and influence. The following month, on 14 April, the King pardoned 190 Islamist prisoners in a gesture to mollify one faction of the opposition. Two weeks later, on 28 April, while the drafting was continuing, a bombing took place at one of the best-known tourist destinations in Marrakesh (the Argana Café), killing 17 people. The shocking event, which riveted public attention throughout the country, had the effect of enhancing the support of many for the King and the security services, even though it did not lead to a reduction in protests.

Throughout 2011, demonstrations and protests continued in Morocco, with many in the pattern of economic protests that predated 20 February. The political protests calling for reform peaked before the King's 9 March speech and diminished thereafter, although never disappearing. On most occasions the police were relatively restrained, although on several occasions police violence against unarmed and

(Commandership of the faithful); the monarchy; national unity and territorial integrity; and commitment to democratic principles – provides solid guarantees for a historic consensual agreement and a new charter between the Throne and the People". Reference to democratic principles was a part of ongoing political discourse in Morocco and was not an innovation.

¹¹⁶⁹http://europa.eu/rapid/press-release_MEMO-11-155_en.htm

¹¹⁷⁰ One might speculate on the effect this enthusiastic pre-emptive endorsement might have had on democratization activists who were suspicious of the stage-managed process. With whom was the EU aligning itself, power or principle?

¹¹⁷¹http://europa.eu/rapid/press-release_SPEECH-11-186_en.htm

non-violent protestors broke out. As far as we are aware, the EU did not criticise police overreaction (though it noted that there had been some reports of police violence). Almost on cue, non-violent protests in Casablanca and Safi on 29 May were met by police violence when peaceful but the police with truncheons attacked noisy protesters in Casablanca. Videos of the attacks circulated on the Internet, with some showing completely unarmed protestors being repeatedly clubbed for no apparent reason other than that they were protesting¹¹⁷². On that same day, 200 kilometres away, the protestor Kamal Amari was severely beaten by the police and died four days later, giving Morocco its own martyr¹¹⁷³.

Three months after the drafting committee received its mandate, the King presented the new draft constitution to the public on 17 June and called for a nation-wide referendum to be held within two weeks. Although there was little transparency in the drafting process – including whether the palace accepted the committee’s draft or revised it to meet the King’s concerns – the larger part of the Moroccan population appeared to be pleased with the new text, even though it was not entirely clear what the differences were. The most publicised change was that the leader of the majority party in the parliament would become the presumptive head of government as Prime Minister, thus modestly reducing the power of the King to select the head of government. The Prime Minister was also to be given relatively more power to select the cabinet of ministers, though the four most important and powerful ministries would remain under the King’s control: Ministry of the Interior, Foreign Ministry, Ministry of Defence, and Ministry of Islamic Affairs (Awqaf). One of the more perceptive analyses of the new Constitution has asserted that, for all practical purposes, little had actually changed¹¹⁷⁴. In other words, the proposed new Constitution offered little more than cosmetic changes that in no way undermined the power or influence of the Moroccan elite or open the system to democratisation or improve fundamentally human rights.

To the extent that that the proposed Constitution was cosmetic rather than transformative, the EU seems to have been uninterested. On 19 June, immediately after the text of the draft Constitution was released publicly, Ashton and Füle released another statement¹¹⁷⁵. Anyone who has read this text thus far should have no difficulty guessing the response of the two EU authorities most responsible for external relations with the EU’s southern partners. They again “welcomed” the new text and found that it constituted “a significant step and signals a clear commitment to democracy and respect for human

¹¹⁷² <http://observers.france24.com/fr/20110530-manifestants-casablanca-brutalite-policiers-repression-maroc> (with links to videos).

¹¹⁷³ See Mounah Abdel-Samad (2014). Why reform not revolution: a political opportunity analysis of Morocco 2011 protests movement”, 19 *Journal of North African Studies*, no 5, 792-809.

¹¹⁷⁴ Driss Maghraoui, "Constitutional Reforms in Morocco: Between Consensus and Subaltern Politics." *The Journal of North African Studies in Conflict & Terrorism* 16, no. 4 (2011): 679-99; Marina Ottaway, "The New Moroccan Constitution: Real Change or More of the Same?" *Carnegie Endowment for International Peace*, 20 June 2011; Fernández-Molina, I. (2011b) Between the 20 February Movement and Monarchic Reformism: Who Holds the Reins of Political Change in Morocco? *Mediterranean Politics*, 16(3), 435–441.

¹¹⁷⁵ http://europa.eu/rapid/press-release_MEMO-11-424_en.htm

rights". The declared that once it is "fully implemented", apparently a foregone conclusion, "it would be a major step forward in the process of reforms already initiated by Morocco". Although the EU authorities acknowledge that the ultimate decision on the referendum must remain with the Moroccan people, the EU had nevertheless already concluded that "the proposed constitutional reform is in line with the ambitions of the Advanced Status in the relations between Morocco and the EU" and that Europe "is ready to support Morocco's efforts to implement such far-reaching reforms".

Was this immediate and enthusiastic endorsement by the EU based on a careful legal and political analysis of the draft text? Did the EU have a factual basis for asserting that the new Constitution would in fact improve democracy and human rights?

An orchestrated nationwide campaign immediately began in Morocco where the population was encouraged to support the King and vote yes for the new Constitution. Amidst accusations of voting irregularities, the Palace announced that 98.5 per cent of voters approved the new Constitution. The 20 February Movement and human rights activists noted that the campaigners supporting the new Constitution had proclaimed that it would enhance democracy and good governance. The day after the referendum 20 February thus challenged the state to investigate thoroughly the allegations of voting fraud. No investigations were undertaken.

Within hours after Morocco announced that an eyebrow-raising 98.5% of voters had cast their ballots in favour, the EU once again "welcomed" developments without hinting at the possibility of any irregularities:

We welcome the positive outcome of the referendum on the new Constitution in Morocco and commend the peaceful and democratic spirit surrounding the vote.

The reforms proposed in it constitute a significant response to the legitimate aspirations of the Moroccan people and are consistent with Morocco's Advanced Status with the EU.

The reforms include important commitments to enhancing democracy and respect for human rights; strengthening separation of powers notably by increasing the role of parliament and the independence of the judiciary; advancing regionalisation and enhancing gender equality.

Now we encourage the swift and effective implementation of this reform agenda. Moroccan citizens should remain at the centre of this process and the inclusive dialogue with their representatives should continue and grow stronger. The European Union is ready to fully support Morocco in this endeavour¹¹⁷⁶.

The EU saw exactly what it wanted to see.

¹¹⁷⁶Joint statement by High Representative Catherine Ashton and Commissioner Stefan Füle on the referendum on the new Constitution in Morocco, 2 July 2011 http://europa.eu/rapid/press-release_MEMO-11-478_en.htm

The King skilfully orchestrated events over four months. Moroccans were pleased, the 20th February Movement was marginalised, the European Union had become an enthusiastic champion of Moroccan “reforms”, and nothing substantive had changed to affect the King’s authority or to democratise the system. From the perspective of a majority of Moroccans, the entire exercise was well managed by the King and Palace. Although Moroccans looked on with interest, excitement, enthusiasm, and favour on the early days of the Arab Spring in parts of the Arab world *outside* of Morocco, and particularly Tunisia and Egypt whose rulers were widely disliked by Moroccans, there was no interest in challenging their own King nor in having their country undergo the turmoil that was increasingly associated with the uprisings elsewhere. Increasingly, the 20 February Movement was marginalised in the press and it lost public credibility. Morocco did not undergo a constitutional and democratising transformation; rather, it witnessed a four-month, well-choreographed and stage-managed political theatre. Moroccans could return to watching with interest Arab Spring events outside of Morocco, and be pleased that their system had weathered the spring storm rather than be inundated by it.

b) Human Rights in Morocco through Three Different Lenses (2004-2015)

In order to better understand how human rights is understood in the EU-Morocco bilateral context, we are comparing below three sets of annual report prepared between 2004 and 2016: the EU-Morocco Association Council annual reports (EMAC) (prepared jointly by the EU and Moroccan officials), ENP Progress Reports (prepared internally by the staff of the EEAS or Commission), and the annual reports by Human Rights Watch (HRW)¹¹⁷⁷. Thus we compare the positions articulated in the principal high-level EU-Moroccan joint forum, an internal EU assessment, and the outside view of a respected human rights NGO. ***In the discussion below we will be referring to the calendar year covered***(rather than the year in which the reports were actually published or released)¹¹⁷⁸. In addition, we will also be reporting what the 2006-2010 and 2013-2017 Action Plans for Morocco, prepared by the joint EU-Moroccan Association Council under the rubric of the ENP, say concerning the specific issues mentioned below.

We have selected six specific human rights issues for comparison: (a) freedom of expression and association; (b) elections; (c) torture and ill treatment of prisoners and detainees; (d) women’s and girls’ rights; (e) human rights defenders; and (f) transitional justice. The first five are general human rights concerns while the last is of particular relevance to Morocco. While the time frame covers the years from 2004 until 2016, we will frequently divide our discussion into three periods: pre-Arab Spring (2004-2010); the Arab Spring (2011); and the period thereafter 2012-2014. By looking at the Action Plans and reporting on human rights through these documents we can perhaps gain some insight regarding the

¹¹⁷⁷ Note, however, that the 2004 HRW (published in 2005) did not include a chapter devoted specifically to Morocco and thus has been excluded here.

¹¹⁷⁸ Thus, for example, what we identify as the 2014 HRW was published in 2015 and is called the 2015 report by HRW. We refer to calendar years in order to avoid the confusion of referring to the actual dates of publication, which sometimes are within the calendar year and sometimes not.

extent to which the EU genuinely treats human rights as universal, interdependent, and indivisible while mainstreaming them into all aspects of its external relations, or, whether the EU treats the subject less as a priority concern, or more like a diplomatic issue to be sanitized for reasons of comity between political powers. (Note that we will separately be using this same form of analysis when discussing the Moroccan/Western Sahara case below.)

HRW annual reports for calendar years 2005-2015 typically are much more critical of the practices of Morocco with regard to the compared issues than are either the ENP Progress Reports or EMAC reports. The breakdown of sections within HRW reporting on Morocco differs slightly from year to year. HRW annual reports chapters on Morocco are typically 5-10 pages in length. The reports describe the situation generally in the country and often identify some specific cases or examples, such as the prosecution and conviction of a journalist or protestor.

ENP Progress Reports, prepared internally within the EU (EEAS or Commission) are less specific and less critical of Morocco than are reports from HRW. They appear to seek positive examples more than does HRW (though the latter does include some positive examples). Reports published by the EMAC are by far the most favourable to Morocco and appear to reflect either Moroccan efforts to prevent discussion of sensitive issues or the EU's wish not to unduly offend its "southern neighbour".

(1) Freedoms of Expression and Association

There is no noticeable difference in HRW assessments regarding the freedoms of expression and association regarding the year of the Arab Spring and the periods proceeding and following. Indeed, with regard to the freedoms of expression and association in Morocco, the 2011 HRW does not even mention the Arab Spring. (It is, however, discussed elsewhere in reports on other countries in 2011.)

Although HRW does not quantify its analysis and generally does not make overall conclusions regarding status of the freedoms of expression and association, the general impression offered is that – with some specific exceptions – these freedoms are weakening. In the most recent 2015 HRW, the report begins by stating "Morocco regressed on human rights in several areas in 2015, and advanced in few"¹¹⁷⁹. The 2009 HRW reports that over that year "press freedom declined"¹¹⁸⁰ (2009 HRW, 544). In no year did HRW report that there was an overall improvement in the freedoms of expression and association in Morocco, thus suggesting an overall deteriorating environment.

HRW repeatedly notes that Morocco does allow public discussion on many issues affecting political life in the country¹¹⁸¹. Prior to the Arab Spring, HRW even used the term "blunt" to describe the allowed

¹¹⁷⁹HRW, 'World Report. Events of 2015' (HRW, 2016), 480.

¹¹⁸⁰HRW, 'WorldReport. Events of 2009' (HRW, 2010), 544.

¹¹⁸¹HRW,op.cit. (2016), p. 408; HRW, 'World Report. Events of 2014' (HRW, 2015), p. 386; HRW, 'World Report. Events of 203' (HRW, 2014), 585.

criticism of the state¹¹⁸². Nevertheless, on no occasion reported does the state allow the transgressing of the “three red lines”: the legitimacy of the king, the truth of Islam, or the integrity of the country (i.e. the Moroccan/Western Sahara). The television channel Al Jazeera was closed down in Morocco from 2010-2013 due to its perceived unfavourable reporting on the Sahara¹¹⁸³ and its Morocco bureau chief was convicted of insulting the country in a 2008 broadcast. Thus in all years over the entire period, there is no effective freedom of expression with regard to the three red lines. Journalists who are arrested, convicted, and imprisoned are typically accused of having transgressed one of these three prohibited subjects. Convictions result in imprisonment for a few months to up to seven years¹¹⁸⁴.

HRW notes that there are “thousands” of registered civil society organisations in Morocco, but repeatedly notes that associations with a human rights or political agenda may often not be allowed to register or that they are allowed to register only after many years’ delay. Prior to 2015, all Sahrawi CSOs had been denied registration. In that year the first was allowed¹¹⁸⁵. HRW also notes that there are many human rights organisations, both domestic and international, that have been active in Morocco and generally “tolerated” – again unless they cross the three red lines. There nevertheless appears to have been a deterioration in 2015, when both Amnesty International and Human Rights Watch were prohibited from working inside Morocco¹¹⁸⁶. (As will be shown below, the EMAC does not even mention this extraordinary action of prohibiting two of the world’s most renowned human rights NGOs the ability to work inside the country.)

In order to engage in public demonstrations, it is legally required to receive prior authorisation from the Ministry of the Interior, which frequently refuses to provide the necessary authorisation. Protestors, whether authorised or not, may be convicted of “disrupting the public order”, even though there are no clear guidelines or standards of what is acceptable and not. On many occasions, protestors have been severely beaten by police. The 2011 HRW report identifies some of the incidents of beatings where

¹¹⁸²HRW, ‘WorldReport. Events of 2008’ (HRW, 2009), p. 473; HRW, ‘WorldReport. Events of 2007’ (HRW, 2008), p. 512; HRW, ‘WorldReport. Events of 2006’ (HRW, 2007), p. 504; HRW, ‘WorldReport. Events of 2005’ (HRW, 2006), 473.

¹¹⁸³HRW, op.cit. (2014), 585.

¹¹⁸⁴HRW, op.cit. (2009), 500.

¹¹⁸⁵HRW, op.cit. (2016), 409.

¹¹⁸⁶Amnesty International has been unable to conduct research missions in Morocco since June 2015, when two delegates were detained and expelled from Morocco. For further information, see: Amnesty International, ‘Amnesty International Leader in Rabat to Push for Human Rights Access in Morocco/Western Sahara’ (Amnesty International, 2016). Available: <https://www.amnesty.org/en/press-releases/2016/03/amnesty-international-leader-in-rabat-to-push-for-human-rights-access-in-morocco-western-sahara/> [28 Sep 2016]. In the case of Human Rights Watch, The Moroccan government sent a letter to the organisation in September 2015; asking it to stop its activities in the country, until a high-rank meeting could be hold between HRW and the government. To our knowledge, this has not happened, with the HRW prevented from working in Morocco. See: Human Rights Watch, ‘Statement Regarding Human Rights Watch Activities in Morocco’ (HRW, 2015). Available: <https://www.hrw.org/news/2015/11/06/statement-regarding-human-rights-watch-activities-morocco> [28 Sep 2016].

police were not held accountable¹¹⁸⁷. Thus one has the impression that unruly protestors, but never unruly police, may be convicted of “disrupting the public order”.

With regard to the freedoms of expression and association, the ENP Progress Reports are much less critical and much less specific than HRW reports. Nevertheless, they do identify several of the underlying themes reported by HRW and are still considerably more vocal compared to EMAC. ENP Progress reports highlight that serious infringements of freedom of the press persist. They mention the harassment and prosecutions print and online journalists and media outlets face¹¹⁸⁸. They report every year on the press code reform project stating that its adoption remains on hold. It was not until 2014 that the government council and parliament adopted the new press code¹¹⁸⁹. The 2014 ENP progress report mentions, however, that the freedoms of journalists are still threatened by other laws such as those in the penal code and the anti-terrorist laws¹¹⁹⁰. They also comment on the use of force in dispersing protests and the arrests of protesters.

Even when an ENP Progress Report mentions progress in this domain, such as in 2009 – ironically the same year that HRW reported a deterioration – it explains how there are other limitations to the reformed laws put in place. Just as with the HRW, the ENP Progress reports point out that numerous organisations and associations continue to face difficulties getting legal registration, especially those in the Sahara, when they touch upon “sensitive” topics. Curiously, ENP Progress Reports do not identify the three sensitive topics as such.

During the Arab Spring period, the 2011 ENP Progress Report did not mention any progress when it comes to the freedoms of expression and association. It points out that freedoms of expression and press have been constitutionalised but without substantial change in the situation, as reported. It mentions that those freedoms still face obstacles, that intimidation and repression are used against journalists and the media in general, and that the new press code has yet to be adopted¹¹⁹¹. It should be noted that there is not a considerable difference between the assessment of freedoms of association and expression by the ENP Progress Reports for the periods preceding, during, and following the Arab Spring.

The EMAC, on the other hand, praises Morocco for each step taken in approaching issues of freedoms of speech and press. Even though the reports consistently made advances of encouragements and appeals for Morocco to respect those freedoms with no restrictions, they have never overtly criticized nor denounced the country’s violations of those freedoms. In the reports from 2013 until 2015, the EMAC encouraged Morocco to accelerate and strengthen its efforts in ensuring freedom of expression and the

¹¹⁸⁷ HRW, ‘World Report. Events of 2011’ (HRW, 2012) 602-603.

¹¹⁸⁸ EC, ‘European Neighbourhood Policy Progress Report. 2009, 2010, 2011, 2012, 2013, 2014 and 2015’ 5-6.

¹¹⁸⁹ EC, ‘European Neighbourhood Policy Progress Report. 2014’ (EU, 2015), 5-6.

¹¹⁹⁰ EC, *Ibid.*

¹¹⁹¹ EC, ‘European Neighbourhood Policy Progress Report. 2011’ (EU, 2012), 5.

press¹¹⁹². Nevertheless, no major change has come from the Moroccan side despite all the appeals and encouragements with the EMAC.

During the year 2015 when both Human Rights Watch and Amnesty International were barred from operating in Morocco, EMAC, without mentioning these important events, welcomed the efforts made by Morocco regarding respect for human rights and fundamental freedoms even though it stated in the same report that there was a relative slowing down of the reform process in that area. Nothing was mentioned in relation to the great infringement of forbidding two of the world's most prominent human rights organisations from operating inside the country¹¹⁹³.

The 2006-2010 Action Plan had as objective assisting Morocco in developing the Press Code and liberalising the audio-visual sector¹¹⁹⁴. The following 2013-2017 Action Plan reiterated the same points but provided more detailed goals in relation to the press and the media¹¹⁹⁵.

(2) Elections

The HRW, ENP Progress Reports, and EMAC all describe Moroccan electoral developments, but differ on their interpretations of the facts. For example, the EMAC consistently reported that elections in Morocco were generally transparent and free. From the period before the Arab Spring and after, the EMAC regularly connected the transparency of elections to the consolidation of democracy in Morocco. EMAC praised and congratulated Morocco in every report on its reportedly free and transparent elections. It seemed entirely convinced that the progress in political reform in Morocco was a true sign of the Kingdom's "leading role" in achieving democratisation. It frequently used terminology such as "the democratic consolidation process", "democratisation and modernisation", "democratic roots" when interpreting the electoral outcomes¹¹⁹⁶.

HRW commented on elections only in its 2007 report. It noted that the international observers considered the 2007 legislative elections to be clean overall, but pointed out the issue of electoral abstention and referred to how it could be attributed to a prevailing realisation of the limited power the parliament holds compared to the monarchy and the executive branch¹¹⁹⁷. Both HRW and ENP Progress Reports mentioned the issues related to electoral abstention in Morocco. Nevertheless, they differed in their interpretation of the matter. While HRW, in its only report referring to elections, went as far as explicitly linking electoral abstention to the supremacy of the King's power as it comes before that of the elected government¹¹⁹⁸, the ENP Progress Reports never drew clear links between the electoral and the

¹¹⁹² EMAC 2013, 2014, 2015

¹¹⁹³ EMAC 2015

¹¹⁹⁴ EU-Morocco, 'EU/Morocco Action Plan 2006-2010' (2005), Section 2.1.5, 6.

¹¹⁹⁵ EU-Morocco, 'EU/Morocco Action Plan 2013-2017' (2013), Section 2.5.

¹¹⁹⁶ Ibid.

¹¹⁹⁷ HRW, 'World Report. Events of 2007' (HRW, 2008), p. 510.

¹¹⁹⁸ HRW, *ibid.*

monarchical systems. They simply put into question the credibility of political parties and called for the reinforcement of the role of the parliament making sure not to challenge the real power-holders¹¹⁹⁹.

While EMAC never criticised the electoral process in Morocco, the ENP Progress Reports did. For instance, the 2007 ENP Progress Report, while proclaiming that the elections were mostly free and transparent, raised the important issue of electoral abstention. It questioned the credibility of the political parties due to the high electoral abstention and reflected upon the restructuring and reinforcement of the parliament's role¹²⁰⁰. In addition to that, the 2009 ENP Progress Report announced that there were some irregularities in the 2009 elections but noted that the electoral process progressed generally well¹²⁰¹. For the period of the Arab Spring, the 2011 ENP Progress Report reported that the elections were organised correctly and progressed calmly¹²⁰². The reports after the Arab Spring discussed the issue of the lack of effort to stimulate electoral participation and the non-appliance of various organic laws related to the electoral process. However, the 2009 EMAC did not mention anything regarding the 2009 electoral irregularities. Instead, it congratulated Morocco on improved transparency and the increase of number of women elected considering it another step towards democratisation¹²⁰³.

The 2006-2010 Action Plan made no recommendations with regard to elections. It only broadly referred to the need of taking action in regards to assisting Morocco in developing its regulatory framework governing political parties¹²⁰⁴. The 2013-2017 Action Plan, on the other hand, points out to the holding of democratic elections in conformity with international standards, the consolidation of the parliament's and government's roles and the implementation of neutral and independent electoral observation¹²⁰⁵.

(3) Torture and Ill-treatment

While much of the focus on torture and ill treatment in general has been directed to period of the “years of lead” under the reign of the King Hassan II, prisoner abuse did not stop with the beginning of Muhammad VI's reign. ENP Progress Reports, the EMAC, and HRW all note, though varying, the continuing problem of torture and ill treatment of prisoners in Morocco.

HRW identifies in its reports cases of torture carried out by Moroccan officials. They provide detailed accounts of specific instances where prisoners, terrorist suspects, and detainees have been tortured under interrogation. They even bring up confessions of detainees who have been tortured in a detention

¹¹⁹⁹ EC, ‘European Neighbourhood Policy Progress Report. 2007’ (EU, 2008), 3.

¹²⁰⁰ EC, *ibid.*

¹²⁰¹ EC, ‘European Neighbourhood Policy Progress Report. 2009’ (EU, 2010), 4.

¹²⁰² EC, ‘European Neighbourhood Policy Progress Report. 2011’ (EU, 2012), 3.

¹²⁰³ EU-Morocco, ‘EU-Morocco Association Council. EU Statement’ (17233/09, EU, 2009). Art. 22, 7.

¹²⁰⁴ EU-Morocco, ‘EU/Morocco Action Plan 2006-2010’ (2005), Section 2.1.1, 4.

¹²⁰⁵ EU-Morocco, ‘EU/Morocco Action Plan 2013-2017’ (2013), 9.

centre in Temara near Rabat, the existence of which the Moroccan state does not admit¹²⁰⁶. Some prisoners claimed to have been sent to Morocco from Western countries where they were tortured during interrogations. HRW points out that the police arrested an increasing number of Islamist militant suspects every year, reaching a total of more than a thousand by September 2008 (2008 HRW, 498). Hundreds more suspects were arrested after the terrorist attacks of 2007 and 2011 (2015 HRW, 410). Torture in the case of Sahrawi human rights' activists has consistently been reported. HRW disclosed the case of NaâmaAsfari who was charged with drunk driving and assault and was then severely beaten during an interrogation "that focused mainly on his political activism" (2008 HRW, 499).

The 2011 HRW report reveals that "some of the harshest police violence occurred at peaceful protests" in different cities throughout the Kingdom during the Arab Spring (2012 HRW, 602). The case of a protestor, Kamal Ammari, who was beaten by the police then died, was reported (2012 HRW, 602). HRW also highlights the various cases where "the defendants' allegations of torture, detention in secret jails, and the falsification of confessions" were refused for investigation by judges (2012 HRW, 604). The situation did not get any better by 2012. Juan Mendez, United Nations Special Rapporteur on Torture, claimed he had received "credible reports of beatings [by police] (with fists and sticks), application of electric shocks, and cigarette burns." He, then, concluded: "In practice, the safeguards against torture do not effectively operate because "there is no evidence" torture has happened and so the confession or declaration remains on the record and no serious effort is made to investigate, prosecute, and punish perpetrators" (2014 HRW, 589). The latter also inferred in his final report in 2013: "In cases involving State security, such as terrorism, membership in Islamist movements, or supporters of independence for Western Sahara, there is a pattern of torture and ill-treatment by police officers during the arrest process and while in detention... Many individuals have been coerced to confess and sentenced to prison on the basis of such a confession" (2014 HRW, 587). The United Nations Working Group on Arbitrary Detention (WGAD) also stated after visiting the Kingdom and the Sahara in 2013 that "Complaints received by the Working Group indicate the use of torture by State officials to obtain evidence or confessions during initial questioning" (2015 HRW, 389).

With regard to the ENP Progress Reports, they have not been outspoken about the torture issue except in one report, which was the first one of 2004. In it, cases of torture and arbitrary detentions linked to terrorism investigations have been mentioned and openly talked about. Nevertheless, subsequent ENP Progress Reports focused solely and briefly on the Moroccan standing vis-à-vis the Optional Protocol to the Convention against Torture (OPCAT), and in some reports torture was not mentioned, implicitly suggesting that it was not an issue. Torture was only mentioned once in the 2006-2010 Action Plan when the latter referred to the introduction of a proper definition of torture consistent with that of the UN Convention against Torture. The 2013-2017 Action Plan elaborates the issue more by calling for the safeguarding of detainees' rights and the guaranteeing of the moral and physical integrity of all people through the ratification of the Optional Protocol to the Convention against Torture.

¹²⁰⁶ Human Rights Watch 2014 and 2015.

While HRW is highly vocal in denouncing acts of torture and ill treatment by the Moroccan state, EMAC treats the issue generally and superficially. It is striking that, on an issue where Morocco is clearly committing serious human rights violations, EMAC does not condemn nor denounce the State's transgressions. EMAC limits its coverage of the issue at the bureaucratic level, focusing on whether the conventions and laws against torture have been adopted or not and not showing any concern for the actual implementation of the accords. EMAC praises Morocco whenever it adopts or ratifies laws and conventions against torture and welcomes its progress. After the visit of the UN Special Rapporteur on torture following the Arab Spring period, the 2013 EMAC report encouraged Morocco to take into account his recommendations but refrained from making any comments on his worrying statements concerning torture practices in Morocco that have been reported by HRW. EMAC merely welcomed the "cooperation" between the Kingdom and the UN rapporteur portraying it as a positive step towards meaningful progress and consequently downplaying the seriousness of the situation.

(4) Women's and Girls' Rights

The 2004 revisions to the Family Code¹²⁰⁷ (generally referred to as the "Moudawana" in Morocco) are widely understood to have improved formally the rights of women, though there continue to be problems with regard to its implementation. A new reform of the nationality code took place in 2007, which acknowledged the right of women to pass their Moroccan nationality to their children (as was already recognised for fathers).

The 2007 HRW report explains the new changes, but expresses concerns about the implementation of these reforms as they are being implemented at a slow pace. Concerning girls' rights, Morocco has an alarmingly high rate of child labour, one of the highest in the MENA region (2006 HRW, 471). A ban on children labour under the age of 15 has been put in place, but child labour is still widespread (2007 HRW, 502). The 2007 HRW report highlights that young girls who work as domestic servants are particularly vulnerable to abuse, with sexual abuse included. Their rights to education, medical care, and access to adequate food are denied (2007 HRW, 502). HRW highlights the failure of the government to eliminate the problem. It also points out that reservations to the CEDAW were still not lifted by 2011, nor after that except for a limited number, even though the Moroccan King announced in 2008 that the reservations would be withdrawn (2011 HRW, 575).

Reporting on the year of the Arab Spring, 2011 HRW report explains the new changes when it comes to women's rights. While significant reforms have been implemented, discriminatory provisions in relation with inheritance and the "right of husbands to unilaterally repudiate their wives" are still preserved (2012 HRW, 606). Also starting its 2011 report, HRW added a specific section in its reports about domestic workers in Morocco clearly highlighting it as a serious problem that needs to be tackled.

¹²⁰⁷ Official Gazette General Provisions SherifanDahir (Royal Edict) n° 1.04.22 issued on 12 Dou Al Hijja 1424 (3 February 2004) To Implement Law n° 70.03 as the Family Code <http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/>

During the same year, HRW added a specific section in its reports about domestic workers in Morocco clearly highlighting it as a serious problem that needs to be tackled.

For the reports issued after the Arab Spring period, HRW points out specific cases of women and girls' rights abuses. It has been very vocal in denouncing the limitations of the reforms with one clear obstacle being the judiciary's lack of cooperation. For instance, a number of judges continue allowing underage girls to marry (2015 HRW, 392). Even though HRW does not make general comments about the women's and girls' situation in Morocco, it could be drawn that, besides the major reforms of 2004 and additional ones in 2011, the advancements of their rights appear to be either coming about at a slow pace or stagnating. In September 2014, the Committee on the Rights of the Child "expressed concern that Morocco had not adopted a legislation criminalizing all forms of domestic violence, including marital rape, although violence against women and girls in the home is reported to be pervasive" (2015 HRW, 392). By 2015, there was still no law criminalising domestic violence or protecting the victims. As of domestic worker's rights, even though the number of girl domestic workers did decline during the last years, the latter are still excluded from the protections of Morocco's labour law (2016 HRW, 414).

EMAC does not show any commitment in highlighting the violations of women's and girls' rights. Rather, an approach focusing on praise and encouragements to achieve more is used in reporting on the issue. EMAC congratulates and commends Morocco whenever it adopts certain reforms such as the 2004 reform of the family code and the 2007 change in nationality code. Even though EMAC makes some references to the need to modernise the legal system and train the judiciary to accompany the reform project and urges Morocco on several occasions to further action taken in relation to women's and girls' education and general female participation in the labour force and the political life, it refrains from overtly criticising the regime in its dealings with women's and girls' rights. The references to child labour remain marginal without any elaboration on the actual situation. In some instances, as in the 2015 EMAC report, the issue is not referred to explicitly. There is only an allusion to it, perhaps, through calls for cooperation in advancing children's rights vaguely. When the issue of domestic workers is addressed, EMAC calls for its eradication but does not give further context about the abuses. It clearly makes sure not to browbeat the sensitivity of Moroccan regime. EMAC reports issued after the Arab Spring all focus on Morocco's standing in relation to the CEDAW, encouraging Morocco to withdraw its reservations and statements interpreting the convention and adopting other bills concerning the protection of women against discrimination and violence. No significant change has come so far from the Moroccan side despite all the encouragements and recommendations.

Contrarily to the EMAC, ENP Progress Reports are relatively more vocal in highlighting the various breaches of women's and girls' but mainly during the period before the Arab Spring. ENP Progress Reports are more specific in addressing the issues related to the matter and underline the gaps that exist between the law and actual practice instead of simply listing the reforms and praising Morocco for them. It offers more detailed and comprehensive accounts of the situation of women and girls, even more so than HRW. What is added in HRW reports are the specific cases of violations naming the victims and recounting their stories. The 2007 ENP Progress Report states that significant efforts have been realised when it comes to fighting violence against women. Nevertheless, the 2008 report indicates that several weaknesses in this domain continue. For instance, the law that criminalises violence against

women has yet to be adopted. By 2014, the law project concerning all forms of discrimination against women (known by its acronym APALD) was deposited in the government's general secretariat while CEDAW was still not fully adopted (2015 ENP Progress Report, 7).

Concerning child labour, the ENP Progress Reports prior to the Arab Spring were specific about the issue. They delineated statistics of underage workers showing the discrepancy between the text of the law (prohibiting children under the age of 15 from working) and the practical reality (where child labour is widespread). They also listed the series of actions undertaken by the Moroccan regime to eradicate child labour. There is a slight change in the assessment of women's and girls' rights by the ENP Progress Reports in the period during and following the Arab Spring. The coverage of the issue becomes focused on Morocco's standing vis à vis the conventions to be adopted without providing further details of the situation of women and girls. The issue of child labour was not mentioned in the 2014 ENP Progress Report.

The 2006-2010 Action Plan discussed the promotion and protection of women's and girls' rights. It focused on advancing the application of the family code reforms, the adoption of CEDAW, and the consolidation of children's rights in general. It did not refer to the specific issue of child labour (2006-2010 Action Plan, 6). The plans and goals for women's and girls' rights were more detailed and specific in the 2013-2017 Action Plan. Actions to eradicate child labour and child abuse were highlighted.

(5) Human Rights Organisations and Defenders

The 2005 HRW report included a specific section about human rights defenders in the chapter on Morocco. None of the subsequent reports includes such a section, though they did mention violations of HR defenders' rights in the sections on the justice system, law enforcement, and the freedoms of expression, association, and movement. HRW asserts that while human rights organisations based in Rabat and Casablanca are largely tolerated by Moroccan authorities, those in smaller towns and remote areas are frequently harassed. There is a special emphasis on human rights defenders in the Sahara (see further below) as they are more susceptible to harassment and are subject to additional surveillance by Moroccan authorities. HRW has been particularly outspoken about the unfavourable state of human rights defenders in Morocco.

According to HRW, arrests and violence against Sahrawi human rights defenders are very common. The 2005 HRW reveals that six of the latter have been arrested, two of whom belonged to the Moroccan Human Rights Association (AMDH) section of Lâayoune. They were tortured during interrogation (2006 HRW, 475). Another Sahrawi human rights activist, NaâmaAsfari, was arrested in Marrakech under the allegation of drunk driving and assault while his interrogation, during which he was severely beaten, focused in fact about his political activism (2008 HRW, 498). The president of the Association for Human Rights in the Rif, Chekib el-Khayari, was also arrested and served two years in prison, for "gravely insulting state institutions", before he was pardoned by the King (2011 HRW, 605). Another case of the arrest of the president of the Bouarfa section of the independent Moroccan Association for Human Rights, SeddikKebbouri, was reported. He served a prison sentence of eight months for allegedly playing a role in a May 2011 demonstration (2012 HRW, 588). The 2014 HRW report discloses the cases of two

activists in two different cities, Tangier and Casablanca, who have been sentenced to two and three years in prison respectively for having reported that they were abducted and tortured by unknown men (2015 HRW, 389). HRW asserts that this strategy deters people from filing complaints against security forces' abuse (2015 HRW, 389). Activities of human rights defenders, more specifically human rights associations, also is impeded. A historian and three other activists were charged by the authorities for having accepted foreign funding "to harm internal security," an offence punishable by up to a five year prison sentence (2015 HRW, 409). By 2015, A few well-known activists continued serving prison sentences extending from 20 years to life after a military court ruled against them in 2013 (2016 HRW, 410).

State authorities are reported to restrict Sahrawi activists from traveling abroad but this practice has seemingly decreased according to HRW (2006 HRW, 504). Furthermore, Sahrawi human rights organisations were not able to obtain legal recognition prior to 2015. The 2007 HRW states that seven AMDH members were convicted and imprisoned in Agadir and Ksar al-Kbir for "attacking sacred values" though "allegedly chanting slogans against the king during May Day marches" (2007 HRW, 511). HRW did not make general statements about the human rights defenders situation in Morocco. Nevertheless, it could easily be inferred from the several cases stated above that their situation is not a favourable one. There has not been any meaningful progress in safeguarding their rights. They are not guaranteed any sort of protection from the state and their rights are repeatedly violated.

The ENP Progress Reports, contrary to HRW, do not offer any specific cases of the state's infringement of human rights defenders' rights. It discusses their rights broadly and implicitly through the legislation of freedom of association. The reports do highlight the limitations of the latter. The ENP Progress Reports identify the violations of human rights defenders in the Sahara. Surprisingly, despite all the distressing examples stated by HRW, the ENP Progress Reports make no references to the cases of violations of human rights defenders and never explicitly criticise the Moroccan regime's treatment of them.

EMAC has been even less critical in its dealings with the matter. Its reports nevertheless encourage Morocco to enter into a dialogue with organisations and associations working in the field of human rights and take their input into account when developing major political proposals. EMAC also consistently called for the implementation and respect for laws guaranteeing the freedoms of assembly and association and requests that Morocco cease using force. Just as in the HRW and the ENP Progress Reports, EMAC asserted that human rights defenders need to be protected especially in the disputed territory of the Sahara. However, that was only stated clearly in the reports from 2008 to 2010.

For the following period, EMAC reports focused solely on advocating for the respect and safeguarding of freedoms of association and assembly generally reiterating the same points. The 2015 report noted, for example, that there were "some instances of continuing human rights violations" (2015 EMAC, 5). Unlike HRW and to a lesser extent the ENP Progress Report, EMAC did not overtly criticise Morocco's violations of the rights of human rights defenders.

The 2006-2010 Action Plan planned proposed the implementation of new laws related to freedoms of association and assembly. It also announced its commitment to encourage organisations defending the

citizens' social, political and economic rights (2006-2010 Action Plan, 33). The 2013-2017 Action Plan sets an agenda for the effective implementation of legislative laws related to the right of association and the reinforcement of managerial and organisational capacities of Moroccan associations. However, neither of the two documents explicitly states the need to protect human rights defenders.

(6) Transitional Justice

Moroccans use the term “years of lead” to describe the first thirty years of oppressive rule from the 1960s through the 1980s of the reign of Hassan II (1961-1999), when there was widespread imprisonment of political opponents, forced disappearances, and when prisoners were brutally tortured. Although Hassan II began to liberalise his regime during the 1990s, in part to pave the way for his son to become king, the legacy continues to weigh on the country. During this period there was almost no public discussion of the wide-ranging human rights abuses in Morocco against political dissenters. Although many political prisoners were released at the beginning of the 1990s, virtually no public explanation of what had happened took place and no efforts were undertaken to compensate or exonerate those who had suffered. In one of his first acts as King, the young Muhammad VI established the Independent Arbitration Commission for Compensation on 16 August 1999. This body was tasked with the responsibility of investigating cases of forced disappearances or arbitrary detention and of determining adequate compensation for the victims and their dependents. The work of this body is viewed as the initial phase of the reconciliation anticipated by the state, but also an implicit acknowledgement of the responsibility of the state. On 10 April 2004, in order to further underscore the importance of coming to terms with the human rights abuses that occurred previously and to further institutionalise the process, Muhammad VI issued a Dahir establishing the Equity and Reconciliation Commission (ERC). While it would go too far to suggest that the ERC is the equivalent of the Peace and Reconciliation Commission in South Africa, it plays a somewhat similar if less dramatic role.

Prior to 2011, HRW dedicated a special section in its reports acknowledging Morocco's steps toward acknowledging that serious human abuses had occurred. It provided details about the ERC. In addition to citing the good work the commission does, HRW nevertheless criticises the fact that those who perpetrated grave crimes in the past have gone unpunished and that some continue to hold high official positions. In addition, HRW noted the non-cooperation of public officials that hinder the resolution of a several cases. The government was also reported as being reluctant to implement the various ERC institutional reforms recommendations.

Although ENP Progress Reports and EMAC discuss the ERC in terms of what it does as an institution, EMAC reports were the most expressive of appreciation and praise for the work carried out by the ERC. Both EMAC and the ENP Progress Reports discuss the ERC's work prior to the Arab Spring. EMAC consistently encouraged the Moroccan government in its reports to implement the ERC recommendations. It therefore appears that the encouragements and proposals were not taken very seriously by the Moroccan state as both EMAC and the ENP Progress Reports reiterate the same recommendations in several reports.

For matters concerning transitional justice, the 2006-2010 Action Plan made only one reference related to that which was about the strengthening of the human rights dialogue in the Fairness and Reconciliation Commission (2006-2010 Action Plan, 6). The 2013-2017 Action plan did not make any reference to the issue.

(7) *Concluding Observations*

ENP Progress Reports and HRW are more critical of the human rights situation in Morocco than are those of the EMAC. ENP Progress Reports are the most comprehensive and detailed of the three, while HRW more sharply identifies specific cases of human rights violations and linking them to the proposed or adopted reforms.

The EU-Moroccan Association Council typically praises Morocco and offers only modest criticisms. In our judgment, the effect of their reports is to soften the reality of human rights abuses that are identified by HRW and ENP Progress Reports, thereby suggesting that the EU-Moroccan Association Council officially and repeatedly defers to official Moroccan interpretations of events rather than provides objective and serious independent observations. In addition, the EMAC generally does not consider the real-world consequences of the publicised reforms. Rather, it praises the proclaimed reforms but omits discussion of the implementation. In some instances, it correlates the adoption of certain reforms or the application of some practices, such as the holding of elections, to a direct advancement towards democracy without questioning whether the practices have a genuine democratic impact.

The recommendations in the two Action Plans, especially in the 2006-2010 period, are sufficiently vague that they provide little concrete guidance for what would constitute improvements in the specific human rights subjects. The 2013-2017 Action Plan is, however, more specific when discussing the stated topics. It extends the discussion on the latter to include a set of proposed laws and conventions Morocco should adopt. The 2013-2017 Plan also provides other specificities. For example, the later Action Plan included child labour and child abuse that are specific to Morocco instead of broadly referring to children's rights. Nevertheless, the recommendations remain general and vague with no practical agenda for their actual implementation. Moreover, the counsel the EU provides to Morocco seems to be mainly concerned with the legislative aspect of reforms assuming that the simple adoption of laws would actually improve the human rights situation.

Thus, the ENP Progress Reports and the EMACs do not analyse seriously the relationship between the Action Plans (written in advance) and whether they were in fact fully implemented. EMAC did not set a strategy for assessing the actual advancement of the objectives specified by the Action Plans. Generally, EMAC and the ENP Progress Reports do not endeavour to go beyond the legislative aspects of reforms when, in fact, a substantial gap between the adoption of laws and their implementation exists. As a result, the EU-Moroccan Association Council provides little useful guidance for Morocco or serious appraisal of the results. There seems to be a lack of coordination and rigour between the various plans and strategies that the EU is adopting for assessing and advancing human rights in Morocco.

The EU, in conjunction with EMAC, ultimately, does *not mainstream* human rights or treat them as an “*essential element*” that must be made *effective*; rather, it *diverts* attention from abuses. While there

may be value in encouraging incremental progress, the risk is that the seriousness of the problems is downplayed and that public relations ultimately are preferred over truth telling. Official announcements that things are fine, when they are not, may be counterproductive to the promotion of human rights. Morocco has been generally slow in adopting reforms, and even when it did, there were major problems linked to their practical implementation. With the relative slowing down of the reform process in relation to the area of fundamental freedoms and human rights noted by EMAC in 2015, one begins to question the effectiveness of the EU approach in advancing human rights in general in the Kingdom.

c) The Case of the Moroccan/Western Sahara

(1) Background

The question of the “Moroccan Sahara” (as it is known in Morocco) or the “Western Sahara” as it is officially identified by the United Nations, the EU, and others, is perhaps the most salient diplomatic and human rights issue confronting Morocco. The Moroccan/Western Sahara is bordered by the Atlantic Ocean on the west, Algeria on the east, Mauritania on the south, and it abuts Morocco on the north. It is on the United Nations list of 17 “Non-Self Governing Territories”¹²⁰⁸. Its area of 266,000 square kilometres is seven times larger than all other UN non-self governing territories *combined*. It is one of the least densely populated regions in the world, although its total population of more than 550,000 makes also the most populous UN non-self-governing territory. During colonial times it was occupied by Spain. Although Morocco claims that it was part of Moroccan territory for hundreds of years, it did not make an official claim for sovereignty until shortly after gaining independence in 1956. In 1975, Spain relinquished its claim to the territory.

On 6 November 1975, shortly after the Spanish departure, King Hassan II called for a “Green March” of more than 350,000 (mostly unarmed) to enter into the territory and seize it on the basis of Morocco’s traditional and historical claim. While the Green March itself was largely non-violent, it triggered a 15-year war involving Morocco, Mauritania, Algeria, and the Polisario Front (claiming to represent the indigenous Sahrawi population). Morocco successfully seized most of the claimed territory while the Polisario claims in exile that it is the legitimate political authority. The Green March is commemorated annually on 6 November with nationalistic festivities throughout the country. There is no serious public debate in the country about the legitimacy of Morocco’s claim to its “southern provinces”. As mentioned above, the legitimacy of Morocco’s claim to the Sahara, and its territorial integrity, is one of the three “red lines” that cannot be debated in Morocco. Moroccans widely believe that outsiders who might be sceptical about the historical and legal legitimacy of their claim to the Sahara are typically assumed to be either hostile to Morocco, unfairly biased (typically in favour of Algeria), or deeply misinformed. Referring to this region, one popular adage is that “Morocco is in the Sahara and the Sahara is in Morocco”.

¹²⁰⁸ <http://www.un.org/en/events/nonselfgoverning/nonselfgoverning.shtml>

The political opposition to Morocco's acquisition to the Sahara provinces continues to be led by the Polisario Front, which claims to represent the rights of the indigenous Sahrawi people. Morocco refuses to allow international human rights inspectors into this portion of the Sahara in part because it is Moroccan sovereign territory and in part because there are few (if any) human rights abuses. Most Moroccans appear to believe that assertions of human rights abuses in the region are falsely planted by enemies of Morocco who wish to undermine its legitimacy. Furthermore, for Moroccans, not only are the Sahrawi peoples' rights protected, they are among the most privileged Moroccans because of the affirmative steps that the state has taken to provide economic support and programmes such as advantageous scholarships for the young. It is official Moroccan policy that it is illegal in the country to distribute maps depicting the "Western Sahara" or to refer to it as an "occupied" or "disputed" territory. If a UN, EU, or US diplomat makes a statement about the "rights of the Sahrawi people" or the land being occupied, Morocco will immediately and forcefully protest – usually with the effect of backpedalling on the part of the UN, US, or EU. "Few analysts doubt that the Western Sahara conflict is the cornerstone around which the puzzle of Morocco's foreign policy has been constructed and structured for decades"¹²⁰⁹.

(2) *The European Union and the Sahara (2004-2015)*

Independent international human rights observers are typically unconvinced by Morocco's assertions. Human rights organisations generally reject Moroccan sovereignty claims and see the Sahara as an occupied territory that does not respect the wishes of the Sahrawi people. Such groups also have attempted to document human rights abuses directed particularly at political activists who seek independence from Morocco. In many ways, Morocco treats Sahrawi independence movements similarly to how France treated independence movements in Viet Nam, Algeria, Tunisia, and Morocco.

Members of the European Parliament also have shown some scepticism about Moroccan claims, and have modestly pressured the Commission and the EEAS to be more forceful with Morocco. It is frequently observed that EU member states themselves are divided about appropriate policies to the region, with France in particular defending Moroccan claims while "northern" states with fewer traditional links advocate challenging Moroccan claims. Internationally, Morocco refuses to engage in any discussion where its sovereignty is questioned, though it has indicated a willingness to discuss whether its "southern provinces" should be fully integrated into a unitary state or whether they might have some type of federated relationship under Moroccan sovereignty.

The European Community has not taken a strong stand with regard to the Sahara issue. Even in the situation where it presumably had the most leverage, during the negotiations for advanced status in 2008, the issue did not present itself. The

¹²⁰⁹ Fernandez-Molina, *Moroccan Foreign Policy*, 96.

Western Sahara conflict was notably absent from the Advanced Status negotiations, and was not referred to at all in the Joint Document. Such striking silence, which was already present in the 2005 ENP Action Plan, amounted to a reflection or replication of taboos within Moroccan official discourse. This can be regarded as an unintended consequence of the ENP's mild introduction of co-ownership, which in practice allowed neighbouring countries to exclude any topic they wished from bilateral dialogue or negotiations with the EU (Gillespie, 2013: 180)¹²¹⁰.

Even after Morocco attained its advanced status in 2008, the 103-page 2013-2017 Action Plan is completely silent on the salient human rights issue. We offer a similar comparison here with regard to the Sahara that was offered immediately above on other human rights issues to compare the difference in approaches of HRW, the ENP Progress Reports, and the EMAC.

This matter has been discussed in varying degrees by all of the ENP Progress Reports, EMAC, and HRW.

HRW dedicates sections in its reports to explaining what it identifies as the Western Sahara issue. The HRW reports identify serious human rights violations Moroccan authorities commit in order to silence pro-independence voices. Compared to the ENP Progress Reports and EMAC, HRW is certainly the most vocal in denouncing the infringements of human rights in the disputed territory by Moroccan authorities. The reports discuss how tighter surveillance rules and stronger police repression take place in the region. The 2011 HRW included a section about human rights violations by the Polisario. HRW also reports the relative advancements the Moroccan state implemented in relation to this issue such as legally recognising a Sahrawi human rights organisation for the first time in 2015.

HRW was very specific and vocal in recounting the human rights violations linked to the Western Sahara issue through giving detailed accounts of individual cases while EMAC remained generally vague in addressing the matter limiting itself to "showing concern" for the human rights situation in the region.

ENP Progress Reports for the period 2005 to 2007 typically are factual, focusing mainly on describing the issue and noting the developments of negotiations between Morocco and the Polisario Front with some references to the use of force and the difficulties human rights organisations face to obtain legal recognition in the disputed territory. The reports from 2008 until 2010 only mention the Sahara in light of the violations of the right to protest and of freedoms of expression and association that take place in the region. The 2011 ENP Progress Report did not mention the Sahara. For the period following the Arab Spring, the 2012 and 2013 ENP Progress Reports mention that Morocco did not accept the recommendations concerning the UN Minurso surveillance of human rights in the region and that there are continuing accounts of acts of torture related to protests in the region. They do not, however, provide any details about the situation nor do they highlight specifically the Moroccan state's infringements of human rights in that disputed territory.

¹²¹⁰ Fernandez-Molina, *Moroccan Foreign Policy*, 145.

The EMAC, on the other hand, consistently raises the Sahara issue in its reports. It focused on encouraging and supporting negotiations between the different parties involved in the conflict. It called on the Moroccan authorities and the Polisario front to cease all acts of violence and repeatedly expressed its concern about the human rights situation in the region and encouraged the improvement of the situation. It is particularly interesting that the EMAC stressed in its 2007 report that it is firmly against any kind of political exploitation of the Sahara issue. The 2012-2015 EMAC reports after the Arab Spring period repeatedly welcomed and praised the role of the National Council for Human Rights (CNDH) in its monitoring and protecting of human rights in the Sahara. It should be noted, however, that nothing stated by EMAC questions the legitimacy of Moroccan claims nor proposes any form of resolution of the conflict that is inconsistent with official Moroccan positions. In brief, EMAC reporting on the Sahara issue does not question the legitimacy of Moroccan claims to the region (though it does not officially support them either) and it encourages a negotiated resolution to the conflict, albeit on exactly the same terms proposed by the Moroccan government.

(3) The EU and the European Court of Justice on the Sahara Case (2015-2016)

A telling example of the complicated interaction of trade, human rights, and the political relations between Morocco and the EU can be seen in the serious diplomatic rift that began in late 2015 and that continues as of the time this report is being submitted. As a part of their bilateral relations, Morocco and the EU entered into a trade agreement in 2012 that led to a reduction on tariffs of many agricultural products¹²¹¹. Although EU policy is to integrate human rights issues into all agreements, the 2012 agreement implicitly included the “Western Sahara” within its terms without noting the human rights dimension of what many in the international community (but not in Morocco) see as being a Moroccan occupied territory. A case was brought before the EU’s European Court of Justice, which ruled on 10 December 2015 that the portion of the council decision pertaining to the Western Sahara was “annulled” because of the failure to address the requisite human rights concerns for the claims of the indigenous Sahrawi people of the “Western Sahara”. According to the ECJ:

The decision of 2012/497/UE of the Council, on 8 March 2012, upon the conclusion of an Agreement under the rubric of an exchange of letters between the European Union and the Kingdom of Morocco pertaining to reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, which replaced Protocols 1, 2 and 3 and their Annexes and amendments to the [2000] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part,

¹²¹¹ Council Decision 2012/176/EU of 8 March 2012 on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, on a framework agreement between the European Union and the Kingdom of Morocco on the general principles for the participation of the Kingdom of Morocco in Union programmes [2012] OJ L 90/1. Exchange of letters 2012/497.

and the Kingdom of Morocco, of the other part, is annulled insofar as it permits the application of the agreement to the Western Sahara¹²¹².

Morocco immediately protested the decision and the European Commission immediately appealed on its own behalf as well as that of Morocco. From the Moroccan perspective, a long and painfully negotiated agreement was undermined by a European institution that interfered in Moroccan internal affairs on the most sensitive political issue in Morocco. Although the Commission's appeal may be seen as agreeing with Morocco that human rights issues were not implicated, Morocco was sufficiently annoyed that it immediately broke off most of its diplomatic communications with the EU, albeit without fully explaining its reasons. By 2016 Morocco publically announced that it was breaking off diplomatic discussions with the EU. In order to calm relations, the EU's HR/VP, Federica Mogherini, travelled to Rabat and met with Moroccan officials on 4 March 2016. Although official EU external policy is that human rights should be integrated into every document and every discussion at every level, this sensitive issue was largely omitted from discussion. And, although official EU policy is that human rights are universal, interdependent, and indivisible, and that they should be fully "mainstreamed" in all aspects of EU external relations, the EU Commission and EEAS – knowing the fervour with which Morocco adheres to its claims – does not engage in discussions regarding "deep democratisation" in the Sahara, the human rights of the Sahrawi people, or the legitimacy of Morocco's acquisition of the territory.

4. Reference: Financial Assistance to Morocco 1996-2016: From MEDA to ENPI

The MEDA programme is the EC's principal financial tool to implement the EMP. In the case of Morocco, both MEDA I and MEDA II instruments showed a good balance between economic and social programmes¹²¹³. However, the formulation of the ENP did also serve as a proper opportunity to revise the funding instruments, resulting in the European Neighbourhood Policy Instrument (2007-2013). From 2014 onwards, the ENPI was replaced by the ENI (European Neighbourhood Instrument), and reinforced with the SPRING Programme in relation to the Arab Spring events.

MEDA I

Table 1. Committed and Disbursed funds through MEDA I in EUROS million

Year	Committed	Disbursed
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¹²¹²

Translated

from:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=164110> [Last accessed 19 March 2016].

¹²¹³ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 29

1995	30	-
1996	-	1
1997	236	31
1998	219	42
1999	176	54

As the table above reveals, there is a noticeable disparity between committed resources and disbursed payments. This discrepancy is explained by the late start of most projects and delays in the tendering process.

MEDA II

Tabla2. Committed and Disbursed funds through MEDA II in EUROS million

Year	Committed	Disbursed
2000	141	40
2001	120	41
2002	122	102
2003	142.7	102
2004	152	158
2005	135	213

Overall, the number of projects approved under MEDA I was 26 in the case of Morocco. For MEDA II, the figure slightly decreases to 19. In both cases, the total number of projects is higher than in Egypt. The

improved figures for MEDA II, particularly in the case of disbursements, are a partial result of improvements within the previous cycle.

Tabla 3. Total EU ODA to Morocco (2004-2014) in MillionEUROS¹²¹⁴

Year	Committed	Disbursed
2004	158.14	172.41
2005	141.76	219.36
2006	168.15	263.33
2007	190.06	225.34
2008	230.21	228.40
2009	146.08	203.35
2010	155.00	168.70
2011	156.60	152.54
2012	207.00	113.14
2013	339.90	86.60
2014	170.00	80.94

The table presents the total committed and disbursed funds from EU institutions to Morocco from 2004-2014. They take into consideration the ENPI/ENI, which is the instrument that galvanises most of the funding efforts of the European institutions towards the southern neighbours. For instance, in 2013, the ENPI accounted for 334.90 million EUROS, whereas the total committed ODA imputed to European institutions was 339.90 million EUROS. The slight variation between both figures is explained by the inclusion in the data shown in the table of the commitments for the Development Cooperation

¹²¹⁴The data included in this table has been found in the *annual reports on the European's Union development and external assistance policies* (CY 2004-2014), listed in the bibliography.

Instrument (DCI), the European Instrument for Democracy and Human Rights (EIDHR), or the Instrument for Stability (IFS), among other minor funding frames¹²¹⁵.

In the case of Morocco during the analysed period, a tipping point in terms of flow can be observed from 2010 onwards, with decreasing amounts of disbursed funds for the years following 2010.

F. Conclusion: Security, Stability, Conditionality, and Human Rights

1. Pre-Arab Spring

Prior to the outbreak of the Arab Spring in 2011, European policymakers might reasonably have assumed that authoritarian governments in the Mediterranean region could be good partners for the EU in maintaining stability and countering perceived Islamist threats. Military authoritarian governments had ruled for decades in Egypt, Syria, Iraq, Tunisia, and Algeria, and monarchies had seen enduring rule in Morocco, Jordan, Saudi Arabia, and the Gulf states. Algeria had “successfully” fought Islamist rebels, King Hussein had prevailed over the Palestinians, Saudi Arabia brutally suppressed the Meccan uprising in 1979, and Morocco had largely suppressed Islamists since the May 2003 bombings in Casablanca. Turkey was something of an odd exception in that, as of 2011, the “moderate” Islamist AKP ruling party did not appear to be fundamentally challenging the secular state over which the military had been the dominant force for almost 80 years. While EU policy makers might have thought that working with authoritarians was good practical policy, it would not have been consistent with official EU policy, which proclaimed that democracy and human rights were necessary pre-requisites for long-term security and stability.

From the signing of the Declaration on European Identity in 1973 until the signing of the Lisbon Treaty in 2007, the European Community evolved from being institutions with a predominant economic and trade focus into institutions that increasingly reflected the broad range of foreign policy interests of its member states. By the time that the Lisbon Treaty came into force in 2009, the EU had developed policies and institutions to promote, as an integral part of EU external policy, human rights as universal, interdependent, and indivisible. It declared its intention to “mainstream” human rights in all of its foreign policy interactions from young members of Delegations to high EU officials. It declared human rights to be “essential” and insisted that they must be promoted “effectively”. Moreover, the European community has stated that *long term* stability and security are dependent on effective implementation of human rights and democracy.

The European Union is founded on a strong engagement to promote and protect human rights, democracy and rule of law worldwide. Sustainable peace and stability, long-term development and prosperity cannot exist without respect for human rights and democratic institutions. This

¹²¹⁵ For a detailed explanation of the different instruments and funding frames in the domain of human rights, democratisation and rule of law deployed by the EU in Egypt and Morocco, please see the Annexes.

commitment underpins all internal and external policies of the European Union¹²¹⁶ (emphasis added).

This policy was rearticulated in the 2003 European Security Strategy (ESS) in a document entitled “A Secure Europe in a Better World”¹²¹⁷. The document was designed to identify perceived security challenges to Europe and to articulate the EU’s analysis of the nature of threats and the appropriate responses. The ESS thus served as the principal articulation of the security interest of the European Union. The 2003 ESS declared:

The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order. (emphasis added)

Thus, very much unlike the national security strategy of the United States, issued a year earlier in 2002¹²¹⁸, which emphasised the use of force to enhance its security (“To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defences, law enforcement, intelligence”), the European Security Strategy advocated the long-term promotion of democracy, good governance, and human rights as the best means of promoting security and stability. The 2003 ESS, like the earlier 1986 Declaration on Human Rights cited above, insisted that human rights and democracy were not simply European normative values, but practical and real security interests as well.

Official EU policy prior to 2011 was not actual EU policy, as Commissioner Štefan Füle candidly acknowledged in his 28 February 2011 speech following the toppling of Mubarak and Ben Ali:

we must show humility about the past. Europe was not vocal enough in defending human rights and local democratic forces in the region. Too many of us fell prey to the assumption that authoritarian regimes were a guarantee of stability in the region. This was not even Realpolitik.

¹²¹⁶ EEAS, ‘Human Rights and Democracy’. Available: <http://eeas.europa.eu/human_rights/about/index_en.htm> [accessed 16 Mar 2016]. This EEAS description appears to follow the Council ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, 25 June 2012, Luxembourg, 11855/12.

¹²¹⁷ ‘A Secure Europe in a Better World’, report, Brussels, EU, 12 December 2003. Available: <<https://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>> [accessed 1 July 2016].

¹²¹⁸ Since 1987, presidents of the United States have issued, from time to time, documents summarising the country’s national security strategy. In 2002, President George W. Bush issued ‘The National Security Strategy of the United States of America’, Washington DC, The White House, September 2002. Available: <<http://nssarchive.us/NSSR/2002.pdf>> [accessed 1 Jul 2016]. It was designed to justify the so-called “Bush Doctrine”, which described “pre-emptive war” as a legal means of self-defense. (Pre-emptive war is not accepted in international law as a legal form of self-defense. Barack Obama replaced the 2002 document after becoming president.). This strategy was the “legal” basis for the U.S.-led invasion of Afghanistan in 2003.

It was, at best, short-termism —and the kind of short-termism that makes the long term ever more difficult to build¹²¹⁹.

Füle's recognition that the EU's pre-Arab Spring policy *de facto* favoured "security" over human rights and democratisation was recognised in the academic literature as well, which was largely critical of EU policies¹²²⁰.

2. The New European Neighbourhood Policy of 2015: Backtracking on Human Rights

There appears to have been no fundamental readjustment in EU human rights policy toward the Mediterranean based on Füle's "*nostra culpa*" of 2011. As described in the cases of Egypt and Morocco above, albeit for different reasons, the EU did not fundamentally alter its policies of deploying words of support for democracy and human rights while never implementing any rigorous conditionality with regard to its partners, old or new. This too has been recognised by academic commentators¹²²¹.

Rather than implement the original EU policy, or the policy that was triumphantly promoted only four years earlier in the two 2011 documents issued during the Arab Spring (see Part III.B.5.b), the EU took a

¹²¹⁹xStefanFüle, 'Speech on the recent events in North Africa', Speech/11/130, np. Available:

<http://europa.eu/rapid/press-release_SPEECH-11-130_en.htm> [accessed 14 Jul 2016]. (See above)

¹²²⁰See, e.g., Rosemary Hollis. 'No friends of democratization: Europe's role in the genesis of the 'Arab Spring'' (2012) 88 *International Affairs* 94 ("EU policies have actually betrayed the professed European values of freedom, democracy and the rule of law rather than exporting them. And they have prioritized European prosperity and stability at the expense of both in the Arab world"); Michelle Pace, 'Paradoxes and contradictions in EU democracy promotion in the Mediterranean: the limits of EU normative power' (2009) 16 *Democratization* 55 ("The supposedly normative, long-running EU push for democracy in the MENA is at best a very slow work in progress, at worst a regression"; "The stubborn position of some of the core EU member states remains that they have other prioritized interests – security and economic – such that cooperation with authoritarian regimes on antiterrorism enforcement actions and ensuring secure access to oil prevail"); Franz Eder, 'The European Union's counter-terrorism policy towards the Maghreb: Trapped between democratisation, economic interests and the fear of destabilisation' (2011) 20 *European Security* 448 ("Instead of applying all possible means at its disposal, especially the linkage of the EU's economic power with democracy and human rights promotion . . . the EU has promoted its economic and energy security related interests").

¹²²¹AssemDandashly, 'The EU Response to Regime Change in the Wake of the Arab Revolt: Differential Implementation' (2014) 37 *Journal of European Integration* 5 ("The EU's democratization efforts have not been successful in the region due to its focus on security and stability at the expense of democracy"); Gamal M. Selim, *The International Dimensions of Democratization in Egypt: The Limits of Externally-Induced Change* (Springer International Publishing 2015) 93-95; Michelle Pace, 'The EU's Interpretation of the 'Arab Uprisings': Understanding the Different Visions about Democratic Change in the EU-MENA Relations' 52 *Journal of Common Market Studies* 981; İremAşkarKarakir, 'Limits of EU Democracy Promotion in the Arab Middle East: The Cases of Egypt and Morocco' (2014) 10 *UluslararasıHukukvePolitika*54; Raffaella A. Del Sarto, 'Normative Empire Europe: The European Union, its Borderlands, and the 'Arab Spring'' (2016) 54 *JCMS: Journal of Common Market Studies* 59-60; Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy* (Routledge 2013) 102; Vera van Hüllen, *EU Democracy Promotion and the Arab Spring: International Cooperation and Authoritarianism* (Palgrave Macmillan UK 2015) 185.

significant backward step. On 18 November 2015, the Commission and the HR/VP issued a joint communication to the Parliament and Council entitled “[New] Review of the European Neighbourhood Policy” (New ENP)¹²²². (See above) The 2015 New ENP reviews the earlier 2011 New Response to a Changing Neighbourhood, which appeared in March 2011, during the heady days of the Arab Spring¹²²³. Whereas the 2011 New Response vigorously and enthusiastically promotes the new possibilities generated by the first wave of democracy sweeping through North Africa and the Middle East, the 2015 New ENP is more sober, and perhaps even pessimistic.

The New ENP identifies one of “the most pressing needs” and the “most urgent challenge” as being stabilisation. (p. 3) Instability is, of course, not simply an issue of security, but one of poverty, perceived injustice, corruption, and lack of economic opportunity. (p. 3) While recognising the presence of these social factors, the New ENP nevertheless finds that “a large number of stakeholders including many partner countries also strongly expressed the view that the EU should increase its engagement with partners in the security sector”. (p. 4) It explicitly states that there “will be a new focus on stepping up work with our partners on security sector reform” albeit in full compliance with international human rights law. (p. 3)

Having solicited comments from third countries, the Commission’s New ENP noted that the Mediterranean partners had found EU policies to be “too prescriptive and not reflecting their respective aspirations” and that they needed “greater flexibility”. (pp. 2-3) The New ENP seeks “more effective ways... to promote democratic, accountable and good governance” (p. 3) and the programs should be tailored to an individual state’s particular needs (pp. 4, 12, 16, 19) The New ENP proposes “a more coherent effort” (pp. 3, 5, 21) and greater effectiveness (pp. 2, 3, 5, 6, 7, 8, 10, 13, 14, 15, 16, 19, 20), but without providing specific or concrete details.

Human rights promotion continues to be a recognised element of EU external policy. (pp. 5, 6, 18). However, unlike “security”, which is characterised as a “pressing need” and a “most urgent challenge”, there is no urgency or insistence that the “human rights deficit” identified in the Arab Human Development Reports be addressed promptly. The trumpeted term “deep democracy” that emerged in February 2011 and was critical in the 2011 New Response completely disappeared in the New ENP. Other aspects of existing official EU policy with regard to human rights is similarly downplayed or ignored. Although every EU Association Agreement with ENP partners provides that human rights is an “essential element” of the relationship and that violations of human rights norms constitute grounds for revoking the agreement, the New ENP makes no reference to this obligation. The concept of conditionality – such as tying economic or political benefits to compliance with human rights standards –

¹²²² Commission Communication, ‘A Review of the European Neighbourhood Policy’, SWD(2015) 500 final, 18 November 2015 <http://eeas.europa.eu/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf> [accessed 16 July 2016].

¹²²³ Commission Communication, ‘A new response to a changing Neighbourhood’, COM(2011) 303, 25 May 2011. Available: <https://eeas.europa.eu/enp/pdf/pdf/com_11_303_en.pdf> [accessed 1 July 2016].

becomes optional at best. Indeed, the New ENP seems to have abandoned conditionality in cases where the partner state does not accept it:

The incentive-based approach ('More for More') has been successful in supporting reforms in the fields of good governance, democracy, the rule of law and human rights, where there is a commitment by partners to such reforms. However, it has not proven a sufficiently strong incentive to create a commitment to reform, where there is not the political will. In these cases, the EU will explore more effective ways to make its case for fundamental reforms with partners, including through engagement with civil, economic and social actors. (p. 5)

This statement is both startling and deeply disappointing. Although acknowledging that conditionality can be effective, the New ENP finds that it does not create a "sufficiently strong incentive" to bring about a commitment to reform. With all due respect to the Commission, our review of the cases of Egypt and Morocco **have not revealed any examples where conditionality was ever seriously attempted by the EU, and the Commission cites no example where it was attempted but failed.** Indeed, as one knowledgeable observer concluded, the "EU never resorted to negative conditionality in the case of the countries on the southern shore of the Mediterranean, with the exception of endorsing international sanctions towards Libya in the 1990s"¹²²⁴. Looking at the issue from the perspective of the entire range of EU external policy, it has been observed that:

The EU has never been totally serious about using conditionality to promote reform. There are clauses in the Association Agreements (Article 2) that provide for their suspension in light of violations of human rights and democratic principles, but they have never been invoked. Indeed, in 1992 the EU sat back and did nothing when the army intervened after the first round of voting in Algeria heralded the prospect of an Islamic party taking power. The EU also did nothing when the Israelis built a security wall on Palestinian territory¹²²⁵.

For the 2015 New ENP to conclude that there was not a "sufficiently strong incentive" for third states to implement better human rights standards is entirely disingenuous because EU external policy never attempted to implement either positive or negative conditionality in its human rights policy toward the southern Mediterranean neighbours. The *nostra culpa* of the Arab Spring, along with the 2011 ENP policies, were abandoned four years later. If the EU had made a serious effort to condition economic or political benefits to human rights improvement and the effort had failed, that might be grounds for abandoning the method. Like the person who insists that riding a bicycle is too difficult, but who refuses even to touch the handlebars, the EU abandoned conditionality in the Mediterranean without ever having tried it.

¹²²⁴Rosa Balfour, 'EU Conditionality after the Arab Spring' (2012) 16 *IEMed/EuroMeSCo* 16.

¹²²⁵Fraser Cameron, *An Introduction to European Foreign Policy* (Routledge: London, 2007) 115.

VI. The European Union's human rights policy under the Cotonou Agreement

A. Introduction

The Cotonou Agreement is an international agreement concluded between the EU and its 28 member states on the one hand and 78 of the 79 member states of the African, Caribbean and Pacific Group of States (ACP),¹²²⁶ mainly former colonies of EU member states.

The promotion and protection of human rights is a priority in the EU's relations with ACP countries.¹²²⁷ Consequently, the EU thoroughly addresses matters concerning human rights in all bilateral relations with ACP states at all points and will speak against any endeavor to weaken respect for human rights and democracy in ACP states.¹²²⁸

The Cotonou Agreement has three pillars: trade, development assistance and dialogue which all will be discussed in this section of the report. The focus is on human rights conditionality and the possibility of the EU to take "appropriate measures" under the Agreement as a result of non-compliance by a state. It should be noted that only sanctions under the Cotonou Agreement are discussed. The EU can impose sanctions such as targeted sanctions, arms embargos etc without invoking the Cotonou Agreement through using the instruments under the CFSP.¹²²⁹

This chapter starts with a general discussion of the Cotonou Agreement with a focus on conditionality and the invocation of article 96 consultations and adoption of appropriate measures before discussing the EU's use of the Cotonou Agreement with regard to three African states: Guinea-Bissau, the Central African Republic and Zimbabwe. As noted above, the Cotonou Agreement does not cover only sub-Saharan Africa but also states in the Caribbean and the Pacific. However, from all perspectives (trade,

¹²²⁶ Cuba is not party to the Cotonou Agreement. South Sudan is yet to become a member of the ACP and sign the Agreement.

¹²²⁷ EU Strategic Framework and Action Plan on Human Rights and Democracy, Council of the European Union (2012) 11855/12 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 8 October 2015.

¹²²⁸ For example, on the controversial bid by President Blaise Compaoré of Burkina Faso to change the Constitution in 2014 so that he could run for a third term, the EU issued a statement on 30 October 2014 saying: 'We are following very closely the ongoing events in Burkina Faso. The European Union is very concerned about the current situation' and 'calls upon all parties to refrain from the use of violence and engage rapidly in a constructive dialogue. The European Union stands ready to step in to facilitate this process' see EUEA, 'Statement by the Spokesperson on the situation in Burkina Faso' (2014) 141030/01 <http://eeas.europa.eu/archives/ashton/media/statements/docs/2014/141030_01_en.pdf> accessed 29 September 2016.

¹²²⁹ For CFSP 'restrictive measures' in force see EUEA, 'Consolidated list of sanctions' (2015) <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf> accessed 29 September 2016.

development assistance, dialogue) states in sub-Saharan Africa are the most significant. It should also be noted that while regular political dialogue with African ACP states started in the mid-2000s, similar dialogue only commenced with Caribbean states in 2012 and with Pacific islands in 2014.¹²³⁰ Human rights have also been more of a focal issue in relation to African ACP states.¹²³¹

With very few exceptions it is also against states in sub-Saharan Africa which article 96 has been invoked. Guinea-Bissau, the Central African Republic and Zimbabwe are states against which article 96 has been invoked and appropriate measures have been adopted.

B. The Cotonou Agreement

The main instrument for human rights engagement with ACP states is the Cotonou Agreement which in June 2000 replaced the Lomé Convention. The Agreement which came into force in April 2003 has been revised in 2005 and 2010 in accordance with the revision clause (article 95) of the Agreement. The Cotonou Agreement is built on three pillars: trade, development assistance and dialogue which will be dealt with below in this order.

Article 9 of the Cotonou Agreement provides a clause for ‘Essential elements regarding human rights, democratic principles and the rule of law, and fundamental elements regarding good governance.’ It makes ‘respect for human rights, democratic principles, good governance and the rule of law’ the pillar of the partnership.¹²³²

1. EU trade relations with ACP states

ACP states received preferential trade access to the EU under the Cotonou Agreement and its predecessors. The World Trade Organization (WTO) considered that these trade preferences were not consistent with WTO rules but a waiver was in place until 31 December 2007. Following the conclusion of the Cotonou Agreement the EU thus set about finding a new trade framework which led to the negotiations for Economic Partnership Agreements (EPAs). The EU negotiated EPAs with regional groupings as follows:

- Central Africa¹²³³
- Eastern and Southern Africa (ESA)¹²³⁴
- East African Community (EAC)¹²³⁵

¹²³⁰ European Commission, ‘Evaluation of the Cotonou Partnership Agreement’ (15 July 2016).

¹²³¹ *ibid.*

¹²³² See Revised Version of the Cotonou Agreement (2010) art. 9 (2).
<http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf> accessed 29 September 2016.

¹²³³ Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon and Sao Tome and Principe.

¹²³⁴ Djibouti, Eritrea, Ethiopia, Sudan, Malawi, Zambia, Zimbabwe, Comoros, Mauritius, Madagascar and the Seychelles.

- Southern African Development Community (SADC)¹²³⁶
- West Africa¹²³⁷
- Caribbean
- Pacific.

Due to the overlapping membership of the African Regional Economic Communities (RECs) the African negotiation groups do not correspond to the membership of the RECs.

A CARIFORUM-EU EPA covering the Caribbean was the first EPA to be concluded in October 2008.¹²³⁸ An interim EPA with Papua New Guinea and Fiji is being implemented while a comprehensive EPA with the 14 states of the region is being negotiated.¹²³⁹

A Central African EPA has not been concluded but an interim EPA has been concluded with Cameroon. Congo trades with the EU under the Generalised Scheme of Preferences (GSP). Gabon as an upper-middle income country is not entitled to GSP preferences. The other members of the Central African EPA, as other least developed states, have quota-free access under the 'Everything but Arms' (EBA) scheme of the EU.¹²⁴⁰ An ESA EPA has not been concluded but an interim EPA was concluded with Madagascar, Mauritius, the Seychelles and Zimbabwe in 2009.¹²⁴¹ The EU and the EAC finalized an EPA in October 2014.¹²⁴² The EU signed an EPA with the SADC EPA group in June 2016. Other members of SADC have negotiated EPAs under the ESA and Central Africa groups. Angola may join the SADC EPA at a later stage.¹²⁴³

The slow progress in EPA negotiations is likely a result of the ACP states facing too much pressure to open up their markets to the EU without sufficient support for necessary adjustments. Negotiators from ACP states have managed to omit a considerable number of sensitive industries and subsidised

¹²³⁵ Burundi, Kenya, Rwanda, Tanzania and Uganda.

¹²³⁶ Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland.

¹²³⁷ Member states of the Economic Community of West African states + Mauritania.

¹²³⁸ European Commission, 'Trade "Caribbean"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/caribbean/>> accessed 29 September 2016.

¹²³⁹ European Commission, 'Trade "Pacific"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/pacific/>> accessed 29 September 2016.

¹²⁴⁰ European Commission, 'Trade "Central Africa"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/>> accessed 29 September 2016.

¹²⁴¹ European Commission, 'Trade "Eastern and Southern Africa (ESA)"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/>> accessed 29 September 2016.

¹²⁴² European Commission, 'Trade "East African Community (EAC)"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/>> accessed 29 September 2016.

¹²⁴³ European Commission, 'Trade "Southern African Development Community (SADC)"' (2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> accessed 29 September 2016.

agricultural products from the negative elements of EPA specified market liberalisation.¹²⁴⁴ Nonetheless, opening market prematurely translates into that the ACP countries' goods and services will find it challenging to equally compete with commodities from EU member-states.¹²⁴⁵ The potential negative consequences is most apparent for the least developed countries that even without an agreement have almost unlimited duty free access to the EU market under the EBA initiative¹²⁴⁶ and therefore lack of a clear incentive to open up their own markets.

The EPAs make reference to the Cotonou 'essential elements' and the non-execution clause discussed below.¹²⁴⁷

2. Dialogue, article 96 consultations and appropriate measures

As a separate 'pillar' within the Cotonou Agreement, the parties are obliged to engage in regular political dialogue at national, sub-regional and regional levels.¹²⁴⁸ Described as a 'key element of the new partnership',¹²⁴⁹ the objective of the dialogue is to undertake 'a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance'.¹²⁵⁰

Under article 8 of the Cotonou Agreement a regular, comprehensive and deep political dialogue is outlined. The dialogue covers all aims and objectives contained in the Cotonou Agreement including, among others, child labour, discrimination, democratic principles, the rule of law and good governance. In addition to political dialogue the EU engages many ACP states in 'policy dialogue' linked to funding.¹²⁵¹ The EU has noted that it views the political dialogue as 'an efficient way of keeping communication channels open with governments' on issues including human rights, rule of law and democracy. However a number of challenges have been highlighted:¹²⁵²

¹²⁴⁴ Gerrit Faber and Jan Orbie 'Economic Partnership Agreements between the EU and Africa: Beyond Free Trade?' in Gerrit Faber and Jan Orbie (eds) *Beyond Market Access for Development: EU-Africa Relations in Transition* (2009): 13.

¹²⁴⁵ S. McDonald, Stephen Lande, and Dennis Matanda 'Why Economic Partnership Agreements Undermine Africa's Regional Integration.' (Wilson Center & Manchester Trade Collaboration, Washington DC, 2013) 3 <<http://www.wilsoncenter.org/sites/default/files/EPA%20Article.pdf>> accessed 29 September 2016.

¹²⁴⁶ With regard to access to the EU market for ACP states see 'The Countries of Africa, the Caribbean and the Pacific (ACP)' <http://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/countries-africa-caribbean-pacific-acp_en> accessed 29 September 2016.

¹²⁴⁷ European Commission, 'Evaluation of the Cotonou Partnership Agreement'- Joint Staff Working Document (15 July 2016) 36.

¹²⁴⁸ Revised Version of the Cotonou Agreement (n 1232) art 8(6).

¹²⁴⁹ Dominique David, 'Forty years of Europe-ACP relationship' *The Courier* (European Commission, Brussels, September 2000) 14.

¹²⁵⁰ Revised Version of the Cotonou Agreement (n 1232) art 8(6).

¹²⁵¹ European Commission, 'Evaluation' (n 1247) 31.

¹²⁵² European Commission, 'Evaluation' (n 1247) 36.

geopolitical, security and economic interests may interfere and water down EU positioning in favour of human rights in a given country; little ownership and commitment by governments regarding dialogue (making it an EU-led process); lack of political will to change or improve the human rights situation; resistance by some ACP governments to address politically sensitive or taboo issues like LGBTI issues, death penalty, ICC, etc.

The Cotonou Agreement contains a non-execution clause under article 96. It lays down procedures that will be activated when a party believes that the other party has failed to comply with the essential elements of the agreement.¹²⁵³ The parties must explore every likely option for discussion under article 8,¹²⁵⁴ 'except in cases of special urgency, prior to commencement of the consultations.'¹²⁵⁵ If after dialogue a party considers that the other party did not accomplish an obligation in the essential element clause, "it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation". If the consultations fail or refused, appropriate measures may be taken which may include suspension of aid or the Agreement.

Article 96 consultations have been triggered relatively rarely.¹²⁵⁶ The first time was following a coup d'état in Niger in 1996. Article 96 consultations were also triggered with regard to another military coup in Niger in 1999 and further military coups in Comoros (1999), Guinea-Bissau (1999, 2003, 2011), Côte d'Ivoire (2000), Central African Republic (2003), Mauritania (2005), Fiji (2007), Mauritania (2008), Guinea (2009), Madagascar (2009) and Niger (2010). Article 96 has also been triggered in relation to flawed elections in Togo (1998), Haiti (2000), Côte d'Ivoire (2001), Liberia (2001), Zimbabwe (2001), Togo (2004), Guinea (2004) and Niger 2009. Article 96 has rarely been triggered in response to violations of human rights and the rule of law. The only examples are Liberia (2001), Zimbabwe (2001), Togo (2004), Guinea Bissau (2011) and Burundi (2015). Of these only the Guinea-Bissau consultations in 2011 were unrelated to flawed elections.

The last time the Council of the EU triggered article 96 was in October 2015 in response to Burundi's failure to 'respect essential elements of the Cotonou Partnership Agreement, namely human rights, democratic principles and the rule of law'.¹²⁵⁷ In March 2016 the EU decided to adopt appropriate measures entailing suspension of 'direct financial support to the Burundian administration, including

¹²⁵³ The essential elements according to art. 9 are human rights, democratic principles and the rule of law. Serious corruption can also lead to art 96 consultations see art. 97.

¹²⁵⁴ The condition for having a dialogue among the parties was in the Cotonou Agreement that came into force in 2000, however, the connection between art. 96 and art. 8 was further strengthened in the 2005 and 2010 reviewed Cotonou Agreement.

¹²⁵⁵ Revised Version of the Cotonou Agreement (n 1232) art 96 (1) (b)

¹²⁵⁶ See European Commission, 'Evaluation' (n 1247) D9.1 38-39.

¹²⁵⁷ Council of the European Union, "I/A" item note'(16 October 2015) 13105/15 <<http://data.consilium.europa.eu/doc/document/ST-13105-2015-INIT/en/pdf>> accessed 24 September 2016.

budget support'.¹²⁵⁸ The decision noted that this would not affect 'financial support to the population and [the EU's] humanitarian assistance'.

The EU has, at least in the last few years, been keen to follow the lead of regional and sub-regional bodies, in particular the African Union (AU). As the EU High Representative for Foreign Affairs and Security Policy highlighted when consultations with Burundi were opened in October 2015:¹²⁵⁹

The situation in Burundi remains very worrying. Our consultations must also contribute to the efforts of the African Union and the region to launch an inter-Burundian dialogue to find a consensual solution to the crisis in the country. It is the only way to preserve peace and consolidate democracy and the rule of law in Burundi. In Addis a few days ago, I agreed with Mrs Zuma, President of the Commission of the African Union, to work closely together to reach this objective.

When adopting appropriate measures against Burundi the High Representative said:¹²⁶⁰

The situation in Burundi remains of serious concern for the EU, though we have seen recently some glimpses of hope. Today's decision makes clear that for our relations to be fully resumed we expect a number of concrete measures to be carried out. The action we are seeking is achievable with will and determination: it builds on measures and processes already set in motion by the African Union, the East African Community and the United Nations, and welcomed by the 5 African Heads of State mandated by the African Union. In particular we believe it can support the inter-Burundian dialogue mediated by the East African Community which is key to finding a durable political solution to the crisis.

Indeed as highlighted in an EU report 'coherent response from the entire international community' and a 'willingness to engage' by the state subjected to the consultations and appropriate measures can to a large extent explain where the EU's interventions has contributed to the desired result.¹²⁶¹

Calls for example by members of the European Parliament to more aggressively apply Article 96 have not been successful. Thus members of the European Parliament have in recent years called for article 96 consultations in relation to Burundi, the Central African Republic, Eritrea, The Gambia, Mauritania,

¹²⁵⁸ Council of the European Union, 'Burundi: EU closes consultations under Article 96 of the Cotonou Agreement' - press release (14 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/14-burundi-eu-closes-consultations-cotonou-agreement/>> accessed 24 September 2016. See also Council of the European Union, 'Consultations between the EU and the Republic of Burundi under Article 96 of the Cotonou Agreement – European Union conclusions' -press release (8 December 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/12/08-burundi-conclusions/>> accessed 24 September 2016.

¹²⁵⁹ See also with regard to aligning Cathrine Ashton, 'EU policy on Madagascar to the AU and SADC position: Response of High Representative Ashton on behalf of the Commission' (23 July 2013) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2013-006634&language=EN>> accessed 24 September 2016.

¹²⁶⁰ Council of the European Union (n 1258)

¹²⁶¹ European Commission, 'Evaluation' (n 1247) 39

Nigeria, Uganda and Zimbabwe.¹²⁶² Some of these proposed resolutions have been adopted by the Parliament for example a resolution on the detention of human rights activists in Zimbabwe, adopted in February 2013, calling for the suspension of EU development assistance to be maintained. A resolution on launching consultations to suspend Uganda and Nigeria from the Cotonou Agreement in view of recent legislation furthering homosexuality was adopted by the European Parliament in March 2014.¹²⁶³ Such consultations have not been undertaken with Nigeria and Uganda. This is not surprising considering the sensitivity of the issue, not only in those two states but in Africa more broadly, and how it could impact relations with two important states in sub-Saharan Africa.

Where article 96 consultations do not result in the adoption of ‘appropriate measures’ the outcome is usually various commitments from the state that has been subjected to such consultations. In a parliamentary question in November 2014 the Commission was requested to provide information on ‘[w]hat steps will the EEAS take in the longer term to ensure that the 22 undertakings given in 2004 are honoured and that the [Truth, Justice and Reconciliation Commission’s] recommendations are

¹²⁶² European Parliament, ‘Motion for a Resolution on launching consultations to suspend Uganda and Nigeria from the Cotonou Agreement in view of recent legislation further criminalizing homosexuality’ (11 March 2014) <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2014-0255&format=XML&language=EN> accessed 29 September 2016; European Parliament, ‘Motion for a Resolution on Mauritania, in particular the case of Biram Dah Arbeid’ (16 December 2014, <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2014-0387&format=XML&language=EN>> accessed 29 September 2016; European Parliament, ‘Motion for a Resolution on Zimbabwe, notably the case of Itai Dzamará’ <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2015-0467&format=XML&language=EN>> accessed 29 September 2016; European Parliament, ‘Motion for a Resolution on Eritrea: case of Dawit Isaak’ <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-0507&format=XML&language=EN>> accessed 29 September 2016. A Motion for a Resolution on Sudan mentions article 96 but does not call for the EU to invoke it: European Parliament, ‘Motion for a Resolution on Sudan, the case of Dr Amin Mekki Medani’ <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2014-0394&format=XML&language=EN>> accessed 29 September 2016; European Parliament, ‘Parliamentary questions – Human rights in The Gambia and the Cotonou Agreement’ (13 September 2011) <<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2011-008067&format=XML&language=EN>> accessed 29 September 2016; European Parliament, ‘Motion for a Resolution on Zimbabwe on the detention of human rights activists in Zimbabwe’ (6 February 2013) <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2013-0057&format=XML&language=EN>> accessed 29 September 2016; European Parliament, ‘Motion for a Resolution on the situation in the Central African Republic’ (10 September 2013) <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0407&format=XML&language=EN>> accessed 29 September 2016.

¹²⁶³ European Parliament resolution of 13 March 2014 on launching consultations to suspend Uganda and Nigeria from the Cotonou Agreement in view of recent legislation further criminalising homosexuality (2014) 2014/2634(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0254&format=XML&language=EN>> accessed 29 September 2016.

followed.¹²⁶⁴ Vice-President Mogherini responded that the 22 undertakings ‘remain high on the agenda of the EU’s political dialogues with Togo’.¹²⁶⁵

The selection of states subjected to consultations under article 96 and eventually ‘appropriate measures’ is clearly arbitrary. A case in point is Eritrea. After years of reports of serious human rights violations the UN Human Rights Council established a Commission of Inquiry which recommended that the situation be referred to the International Criminal Court. Surely that would merit at least the initiation of consultations under article 96.¹²⁶⁶

Even where the EU’s engagement does not reach article 96 consultations there may be a strong reaction. Thus when the EU criticized new Gambian legislation with regard to homosexuality in political dialogue on 5 June 2015, President Jammeh within hours responded by requesting the EU charge d’affaires (whose term was soon coming to an end) to leave The Gambia within 72 hours, without providing an explanation.¹²⁶⁷ The EU responded in a public statement in June 2015:¹²⁶⁸

The EU Chargée d’Affaires for The Gambia is currently in Dakar for consultations with the EU’s Head of Delegation to The Gambia, who is residing there. This follows an unjustified request from the Gambian authorities that she departs before the formal end of her tour. Such an action is contrary to acceptable diplomatic norms and practices, and would affect negatively the relations between Gambia and the EU. The EU is in contact with the Gambian authorities to resolve this issue.

In February 2016 the first resident ambassador of the EU arrived in Banjul, the capital of The Gambia.¹²⁶⁹ In the meantime serious human rights violations have continued and the European Parliament in May 2016 called for a ‘public consultation’ under article 96 of the Cotonou Agreement.¹²⁷⁰

¹²⁶⁴ European Parliament ‘Question for written answer to the Commission (Vice-President/High Representative)’ (6 November 2014) <<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-008876&format=XML&language=EN>> accessed 29 September 2016.

¹²⁶⁵ Federica Mogherini, ‘Answer given by Vice-President Mogherini on behalf of the Commission’ (13 January 2015) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008876&language=EN>> accessed 29 September 2016.

¹²⁶⁶ Members of the European Parliament have called for the suspension of Eritrea from the Cotonou Agreement see e.g. European Parliament, ‘Debates, 15 September 2011’ (2011) <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20110915&secondRef=ITEM-011-03&format=XML&language=EN>> accessed 29 September 2016.

¹²⁶⁷ ‘EU to keep withholding aid from Gambia after expulsion: diplomats’ *Reuters* (17 June 2015) <<http://www.reuters.com/article/us-gambia-eu-aid-idUSKBN00X2HZ20150617>> accessed 29 September 2016.

¹²⁶⁸ EEAS, ‘Statement by the Spokesperson on the situation of the EU Chargée d’Affaires for The Gambia’ (12 June 2015) <https://eeas.europa.eu/headquarters/headquarters-homepage/3332/statement-by-the-spokesperson-on-the-situation-of-the-eu-charge-daffaires-for-the-gambia_en> accessed 29 September 2016.

¹²⁶⁹ ‘First EU ambassador arrives in Gambia on new mission’ *Global Times* (24 February 2016) <<http://www.globaltimes.cn/content/970171.shtml>> accessed 29 September 2016.

3. Funding human rights and democracy

An important element of the EU's human rights policy under the Cotonou Agreement is the provision of funding for ACP countries. The most significant EU resource is the financial instrument of the Cotonou Agreement, the European Development Fund (EDF). The EDF is funded by the EU member states every five years. It is managed by a committee with its own financial rules and does not form part of the EU budget.¹²⁷¹ The 11th EDF runs between 2014 and 2020 amounts to €30.5 billion.¹²⁷² Under the EDF a country strategy and national indicative programme is negotiated by the EU Commission with each ACP country determining the selected focal sectors for assistance, and potentially including human rights themes.

The EU equally provides financial assistance through its European Instrument for Democracy and Human Rights (EIDHR).¹²⁷³ The EIDHR was established in 1994 with the aim of supporting civil society in promoting democracy and human rights in non-EU countries including ACP states. Its total budget of approximately €1.3 billion 2014-2020 (up from €1.1 billion for 2007-2013) is significant even though it may look relatively small compared to the EDF budget of more than €30 billion.¹²⁷⁴

At the individual country level, each EU member state has its own bilateral aid programme. Most of these states have demonstrated their commitment to support human rights through their EU obligations, for instance, by complying with the May 1998 'common position' on human rights and democratization in Africa.¹²⁷⁵

With regard to EDF funding since the 8th EDF, Africa has been allocated 77 % of the funds, followed by the Caribbean (6 %) and the Pacific (2 %). Fifteen per cent were used for intra-ACP resources, including the African Peace Facility.¹²⁷⁶

An EU evaluation of the Cotonou Agreement notes:¹²⁷⁷

¹²⁷⁰ European Parliament resolution of 12 May 2016 on The Gambia (2016) 2016/2693(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0219&language=EN&ring=B8-2016-0593>> accessed 29 September 2016.

¹²⁷¹ European Commission, 'European Development Fund (EDF)' <http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments/european-development-fund_en> accessed 29 September 2016.

¹²⁷² 'European Development Fund (EDF)' (2012) <<http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=URISERV:r12102>> accessed 2 October 2015.

¹²⁷³ See Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 27 August 2015.

¹²⁷⁴ On the EIDHR see EIDHR <<http://www.eidhr.eu/whatis-eidhr>> accessed 29 September 2016.

¹²⁷⁵ Council of the European Union, Common Position 98/350/CFSP of 25 May 1998 concerning human rights, democratic principles, the rule of law and good governance in Africa (1998) L 158/1, 2.6.98.

¹²⁷⁶ European Commission, 'Evaluation' (n 1247) 25.

¹²⁷⁷ European Commission, 'Evaluation' (n 1247) 31.

Budget support is, in principle, an efficient key tool, where it is used, for establishing shared priorities and ensuring that the financial and technical resources put in place are used accordingly (Mozambique, Uganda, Burkina Faso and others). In the last decade, budget support seems to have partly lost some of its leverage, especially in the fast growing countries, due to its reduced financial weight on recipients' budgets and also due to reasons related to a change of priorities among both the partner countries and the EU Member States.

In practice it is the potential withdrawal of such support which is used as a stick in article 96 consultations.

While the focus in this section of the report is on conditionality and the application of article 96 it must be remembered that the significant assistance provided to ACP states under the EDF has made a significant contribution to the realization of human rights for many people living in these states.¹²⁷⁸

C. Three Case Studies

1. Guinea-Bissau

The Constitution of Guinea-Bissau of 1984 (as amended in 1996)¹²⁷⁹ is the basic instrument for human rights protection in the country.¹²⁸⁰ It provides for wide-ranging rights to citizens in Part II titled Fundamental Rights and Duties, covering articles 24 to 57. Guinea-Bissau has also ratified many UN and AU human rights instruments. Ratified international treaties form part of the law of the land once they have been published in the government gazette.

Guinea-Bissau has, since independence, experienced political instability, extrajudicial killings, political assassinations, *coups d'état* (with the most recent taking place in April 2012), political persecution and forced resignation from office by officials.¹²⁸¹ These developments have affected the human rights situation in the country especially after the April 2012 *coup d'état* and the withdrawal of aid for various development assistance programmes. Corruption is widespread in the country¹²⁸² and according to the

¹²⁷⁸ For a discussion of the impact of the EDF see European Commission, 'Evaluation' (n 1247).

¹²⁷⁹ Decree-Law No.11/2010 of 14 June (Guinea-Bissau, 2010) which guarantees citizens access to law and justice; Decree-Law No.4/2010 of 14 July (Guinea-Bissau, 2010), regulating the Organic Law of the Judicial Courts; Decree Law No.10/2010 of 14 June (Guinea-Bissau, 2010) approving the Regulation of the detention centers and Decree Law No. 12/2011 3 February (Guinea-Bissau, 2010), laying down minimum rules for the treatment of prisoners.

¹²⁸⁰ It has ratified the African Charter on Human and People's Rights, and many UN human rights treaties including the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

¹²⁸¹ Magdalena Sepúlveda Carmona, 'Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona Mission to Guinea-Bissau 23 February–1 March' (2014), 3.

¹²⁸² 'Corruption Perceptions Index' (2013) <<http://cpi.transparency.org/cpi2013/results>> accessed 29 September 2016.

UN Special Rapporteur on extreme poverty and human rights in the report on her mission to Guinea-Bissau, corruption weakens the state's ability to fulfill its human rights obligations.¹²⁸³

The first time the EU invoked article 96 of the Cotonou Agreement was after a *coup d'état* in September 2003. Consultations under article 96 were held in Brussels on 19 January 2004 followed by dialogue in Guinea-Bissau over the next months. The EU Council Decision in June 2004 concluding the consultations and the attached letter to the President of Guinea-Bissau highlighted the important steps taken by Guinea-Bissau to restore constitutional order including the holding of free and fair elections in March 2004 and the progress on securing the independence of the judiciary. The EU highlighted concerns 'especially with regard to the consolidation of public finances, and in particular public accounting, the collection of customs revenue and the payment of the majority of government employees.' These are hardly issues that would have given rise to article 96 consultations. However, the EU decided to closely monitor the situation over the coming 18 months and reserved the right to adopt appropriate measures if 'the authorities of Guinea-Bissau fail to honour their undertakings.'¹²⁸⁴

Following a military mutiny in Guinea-Bissau in April 2010, the EU opened article 96 consultations with Guinea-Bissau on 29 March 2011 following political dialogue over the preceding months. The EU 'noted the swift response and the positive spirit demonstrated by the representatives of the Government of Guinea-Bissau and welcomed the information provided and statements made.' The EU noted that the implementation of the undertakings by Guinea-Bissau

will reopen the way for the EU to support the process of political and economic reform in Guinea-Bissau. This process will be led by the national authorities in close cooperation with ECOWAS, the CPLP and the African Union, which have taken part in the consultations in an observer capacity, and with the support of other bi- and multi-lateral partners.¹²⁸⁵

A *coup d'état* in April 2012 meant that the situation did not improve and no EU support was provided directly to the transitional government. Instead the EU channelled support through NGOs and international organisations. In response to a question in the European Parliament in early 2013, High Representative Ashton noted: 'The EU maintains very close contacts with UNIOGBIS and with the civil society in Guinea-Bissau, including NGOs and churches. The EU never suspended its cooperation programmes in direct support of the population and of the Guinea-Bissauan civil society.'¹²⁸⁶

¹²⁸³ Magdalena Sepúlveda Carmona, (n 1281) 6

¹²⁸⁴ Proposal for a Council Decision concluding consultations with Guinea-Bissau under Article 96 of the Cotonou Agreement, (2004) COM(2004) 423 final, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004PC0423&from=EN>> accessed 29 September 2016.

¹²⁸⁵ Council of the European Union, 'Opening of consultations with the ACP side on Guinea-Bissau under Article 96 of the Cotonou Agreement – European Union Conclusions' (29 March 2011)

¹²⁸⁶ European Parliament, 'Answer given by High Representative/Vice-President Ashton on behalf of the Commission' (22 April 2013) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-002594&language=EN>> accessed 29 September 2016.

In 2014, Guinea-Bissau took a major step towards reestablishing constitutional order by conducting free, peaceful and credible legislative and presidential elections, which was assessed by all international observers, including the EU Electoral Observation Mission, as free and credible.¹²⁸⁷ This led in March 2015 to the withdrawal of the appropriate measures under article 96 of the Cotonou Agreement initiated by the EU in 2011.¹²⁸⁸ In March 2015 the EU pledged 160 million Euro 'for Guinea-Bissau to consolidate democracy, strengthen the rule of law, accelerate economic recovery and improve people's lives'.¹²⁸⁹ The EU Commissioner for International Cooperation and Development noted:

Guinea-Bissau is back on the international scene and ready to move forward, with the support of the EU. We will in the coming months finalize the programming of the 11th EDF envelope. We will align our cooperation with the priorities of the national development strategy that the Government will present today, especially in the areas of governance, security, justice, public administration, health and rural development.

The political situation in Guinea-Bissau is still not stable but the EU is working with the Economic Community of West African States (ECOWAS) to improve it.¹²⁹⁰

2. Central African Republic

Articles 1 to 17 of the Constitution of the Central African Republic (CAR) (adopted in 2004, amended in 2010) provides protection against torture; rape; cruel, inhumane, degrading or humiliating acts or treatment; arbitrary arrest or detainment among others. The CAR is party to several international human rights instruments.¹²⁹¹

However, in spite of the constitutional provisions and other frameworks for the protection of human rights in the CAR the general human rights situation in the country is worrisome. There have been reports of prevalent human rights violations since its independence from France in 1960. Major human rights violations include extrajudicial executions, torture, beatings, illegal detention, rape of suspects and prisoners; impunity, particularly among the armed forces; deteriorating conditions in prisons and detention centers; indiscriminate arrest and detention, lengthy pretrial detention, and denial of fair trial;

¹²⁸⁷ Council Decision repealing Decision 2011/492/EU concerning the conclusion of consultations with the Republic of Guinea-Bissau under Article 96 of the ACP-EU Partnership Agreement, EUROPEAN COMMISSION, Brussels COM(2015) 75 <http://eurlex.europa.eu/resource.html?uri=cellar:c91579b8-bdb7-11e4-bbe1-01aa75ed71a1.0001.02/DOC_2&format=PDF> accessed 4 September 2015.

¹²⁸⁸ *ibid.*

¹²⁸⁹ European Commission, 'A fresh start for Guinea-Bissau: EU to resume cooperation and provide new support' - press release (25 March 2015) IP/15/4663 <http://europa.eu/rapid/press-release_IP-15-4663_en.htm> accessed 29 September 2016.

¹²⁹⁰ EUEA, 'Déclaration sur les résultats de la mission présidentielle dépêchée par la CEDEAO en Guinée-Bissau' (4 September 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/9787/statement-on-the-outcomes-of-the-ecowas-presidential-mission-to-guinea-bissau_en> accessed 29 September 2016.

¹²⁹¹ They include the ICESCR; the ICCPR; the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC) and the African Charter.

corruption; and restrictions on workers' rights; female genital mutilation, discrimination against women; forced labor; and child labor.¹²⁹²

After the coup that ousted President Ange-Félix Patassé in 2003 and various human rights violations that followed it, the EU condemned the coup and invited the CAR for consultation.¹²⁹³ The consultation did not lead to a satisfying solution and the EU thereafter took measures such as suspension of economic support until a clear electoral plan was put in place.¹²⁹⁴ Appropriate measures included suspension of macro-economic support.

The government of CAR, in 2004, set in motion major strides to protect human rights. President Bozize approved the establishment of the Joint Independent Electoral Commission (CEMI) with members drawn from several political parties and civil society.¹²⁹⁵ Security forces that were suspected to have been involved in killings were arrested on the orders of the government this included the head of the presidential security forces.¹²⁹⁶ The permanent military tribunal that has not been functional became functional in December 2003 and deliberated on the human rights violations by members of the security forces. The government also decriminalized defamation, and journalists began to practice without fear and control or being told what to say by government officials.¹²⁹⁷ Furthermore, in 2004, a new constitution was passed by referendum which provides for more freedom for the press and provides that the president may only serve two terms. In 2005 elections were held which were declared free and fair by observers.¹²⁹⁸ The appropriate measures adopted by the EU were lifted in June 2005 following the elections.¹²⁹⁹

In response to a question in the European Parliament in early 2011 the EU High Representative noted that the EU was concerned about the electoral process, restrictions on movement of opposition members and arbitrary detention. She noted that the Council's Working Group on Africa had called for 'reinforced dialogue' with the CAR. The High Representative noted that the CAR authorities had responded positively and that the 'EU considers that a reinforced political dialogue provides, at this stage, the adequate and appropriate forum to address its governance concerns and to monitor progress

¹²⁹² See US Department of State, 'Diplomacy in action, Bureau of Democracy, Human Rights, and Labor 2010 Human Rights Report: Central African Republic' <<http://www.state.gov/j/drl/rls/hrrpt/2010/af/154337.htm>> accessed 29 September 2016.

¹²⁹³ Lydie Mbangi, 'Recent Cases of art. 96 Consultations' (2005) *European Center for Development Policy Management* Discussion paper no. 64c, 9.

¹²⁹⁴ *ibid.*

¹²⁹⁵ U.S. Department of State, 'Country Report on Human Rights Practices 2004 - Central African Republic' (2005) <<http://www.refworld.org/topic,50ffbce582,50ffbce5d6,4226d96820,0,USDOS,,CAF.html>> accessed 4 September 2015).

¹²⁹⁶ *ibid.*

¹²⁹⁷ *ibid.*

¹²⁹⁸ U.S. Department of State, 'Country Report on Human Rights Practices 2005 - Central African Republic' (2006) <<http://www.refworld.org/topic,50ffbce582,50ffbce5d6,441821830,0,USDOS,,CAF.html>> accessed 4 September 2015.

¹²⁹⁹ European Commission, 'Evaluation' (n 1247) 131.

in that area. Options should first be explored under that framework before additional measures could be taken.¹³⁰⁰

In 2013 President Bozizé was ousted in a coup by a coalition of rebel groups named Seleka, mostly northern Muslims, with Michel Djotodia, as the coup leader who later became the interim president.¹³⁰¹ Although Djotodia dissolved the Seleka, ex-Seleka fighters continued attacks on Christian communities which were countered by Christian anti-Balaka.¹³⁰² This resulted in an unprecedented humanitarian crisis with over one million internally displaced persons and rampant abuse of human rights. The EU strongly condemned the coup and expressed deep concern on the deterioration of the humanitarian situation in the country and expressed their desire to hold those responsible for human rights abuses accountable for their actions.¹³⁰³ The EU also called on the parties to respect the Libreville Agreement and on the Economic Community of Central African States and the AU to immediately engage the parties to subdue the crisis.¹³⁰⁴ However, article 96 was not invoked. This may be because it was viewed as inadequate in a situation of deep humanitarian crisis.

3. Zimbabwe

Zimbabwe was one time considered a rousing example for the African nations. However, Zimbabwe has become an embodiment of a dysfunctional, corrupt, and dictatorial country. The country's Constitution is the main legal framework for the protection of human rights, protecting the right to life, human dignity, freedom of association and assembly, right to fair hearing, equality and non-discrimination and many other rights.¹³⁰⁵ Yet, the legal framework in the country still includes the Official Secrets Act, the Access to Information and Protection of Privacy Act (AIPPA), and the Public Order and Security Act (POSA). All these laws limit the independence of the media, the work of civil society and political parties and even the general public to discharge their activities without fear of prosecution.

¹³⁰⁰ European Parliament, 'Answer given by High Representative/Vice-President Ashton on behalf of the Commission' (22 June 2011) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-005031&language=EN>> accessed 29 September 2016.

¹³⁰¹ European Parliament Research Service, 'Crisis in Central African Republic: The EU Response' (2014) <<http://epthinktank.eu/2014/02/02/crisis-in-central-african-republic-the-eu-response/>> accessed 1 September 2015.

¹³⁰² *ibid.*

¹³⁰³ Catherine Ashton, 'Statement by EU High Representative Catherine Ashton on the situation in the Central African Republic' (25 March 2015) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/136506.pdf> accessed 1 September 2015; See also European Parliament resolution of 12 December 2013 on the situation in the Central African Republic (2013) 2013/2980(RSP).

¹³⁰⁴ *ibid.*

¹³⁰⁵ Zimbabwe has ratified many international human rights instruments such as the ICESCR; the ICCPR; the ICEFRD; the CEDAW; the CRC and the African Charter among others.

In 2002 the EU invoked the provisions of article 96 of the Cotonou Agreement.¹³⁰⁶ This was as a result of the country's poor human rights record. From 2000 to 2002 there was prevailing violence, intimidation of the judiciary, restrictions to the right to freedom of expression, harassment of the opposition, particularly before the 2002 presidential elections.¹³⁰⁷ Following the consultations the EU decided to take appropriate measures against Zimbabwe including the suspension of the Cotonou Agreement, projects, budgetary support and the signature of the 9th EDF National Indicative Programme. The suspension of aid did not affect humanitarian aid.¹³⁰⁸

The Zimbabwean government has been almost unresponsive to human rights demands by the EU. However, in 2008 the government signed the Global Political Agreement (GPA) which is an agreement entered into by ZANU PF, MDC-T and MDC - the major political parties in Zimbabwe - after the disagreement on the presidential election, ending months of political violence, and which heralded a government of national unity.¹³⁰⁹ In the GPA, Zimbabwe committed to align its legislation and its procedures and practices to international human rights values and laws as well as allowing freedom of assembly, association and expression.¹³¹⁰ Zimbabwe also committed to draft a new constitution in accordance with article VI of the GPA and the establishment of the Zimbabwean Human Rights Commission.¹³¹¹ A new constitution was approved in a referendum in March 2013. The appropriate measures against Zimbabwe which had been in force since 2002 were finally revoked by the EU in 2012. This followed 'progress made in implementing the Global Political Agreement (GPA) by the Government of National Unity (GNU)'. The measures were suspended 'to allow the EU to work directly with the GNU to develop new assistance programmes for the benefit of the people of Zimbabwe that would come on stream under the next European Development Fund (EDF).'¹³¹² However, serious human rights violations

¹³⁰⁶ 'Consultations with the ACP side concerning Zimbabwe pursuant to Article 96 of the Cotonou Agreement' (2002) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/DOC.69086.pdf> accessed 2 September 2015.

¹³⁰⁷ *ibid.*

¹³⁰⁸ European Commission, Proposal for a COUNCIL DECISION on adapting and extending the period of application of the appropriate measures first established by Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement (Communication, 2012) COM/2012/026 final, 0012 (NLE) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0026>> accessed 2 September 2015.

¹³⁰⁹ European Parliament resolution on Zimbabwe, the case of human rights defender Itai Dzamara (2015) 2015/2710(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2015-0468&language=EN>> accessed 2 September 2015.

¹³¹⁰ *ibid.*

¹³¹¹ *ibid.*

¹³¹² EEAS, 'Delegation of the European Union to the Republic of Zimbabwe 'Restrictive Measures'(2013) http://eeas.europa.eu/delegations/zimbabwe/eu_zimbabwe/political_relations/restrictive_measures/index_en.htm accessed 1 September 2016.

have continued and have condemned by the EU delegation in Zimbabwe and the European Parliament.¹³¹³

D. Conclusion

Johan van Hecke in a debate in the European Parliament in 2000 called on the “Commission to apply unambiguous criteria for suspending aid”. He noted that “it would be particularly useful, in the framework of Article 96 of the Cotonou Convention, to compile a list of all possible infringements of this Convention. At present, I cannot shake off the impression that the Commission is applying an ad hoc approach too often, which can make it vulnerable to the accusation of applying double standards”.¹³¹⁴

Inconsistent use of article 96 is often pointed out. The EU has noted that ‘[t]he inconsistent use can be explained in part because member states with strong links to the third party concerned may argue strongly either for or against it’.¹³¹⁵ Thus it has been argued that the article 96 consultations with Zimbabwe and Burundi resulted from ‘member states with strong ties hav[ing] lobbied to invoke the clause in part in response to domestic pressures.’¹³¹⁶ One commentator notes how member state pressure can also work against the adoption of ‘appropriate measures’:

The Gambia continue to get funding from the EU because European nations like Italy and Spain say holding anymore funds from The Gambia will cause more economic hardship leading to more youths illegally migrating to Europe.

The cases of application of article 96 consultations and appropriate measures indicate that they have been most effective when supported by other relevant states and international organisations such as the African Union and relevant regional communities such as ECOWAS in the case of Guinea-Bissau. In contrast the EU retained appropriate measures against Zimbabwe for ten years against opposition from the AU and SADC. It is not clear whether the EU sanctions or SADC ‘quiet diplomacy’ or other factors contributed to the little progress that has been made. However, it is clear that the situation is still serious. So is the situation in even smaller countries such as The Gambia and Eritrea which have not

¹³¹³ EEAS, ‘Local EU Statement on the abduction of Itai Dzamara’(2015) <http://eeas.europa.eu/delegations/zimbabwe/documents/press_corner/news/2015/20150910-local-eu-statement-on-the-abduction-of-itai-dzamara_en.pdf> accessed 12 October 2015; European Parliament resolution on Zimbabwe, the case of human rights defender Itai Dzamara (2015) 2015/2710(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-20150474&language=EN>> accessed 12 October 2015.

¹³¹⁴ European Parliament, ‘Debates, 25 October 2010, Cooperation with ACP countries involved in armed conflict’ (2010) <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20001025&secondRef=ITEM-008&format=XML&language=EN>> accessed 29 September 2016.

¹³¹⁵ European Commission, ‘Evaluation’ (n 1247) 39-40.

¹³¹⁶ ECDPM, ‘The future of ACP-EU relations’ (2016) 21 Policy and Management Report, 63 <<http://ecdpm.org/wp-content/uploads/PMR21-Future-ACP-EU-Relations-PEA-January-2016.pdf>> accessed 29 September 2016.

been subjected to article 96 consultations. However, using development assistance as a stick is not necessarily effective in particular where regional support for such action is lacking.

The EU and the ACP is currently in discussion on what should replace the Cotonou Agreement after it expires in 2020.¹³¹⁷ Despite the EPAs not covering all areas currently in the Cotonou Agreement it could be argued that aid and dialogue could be regulated through bilateral agreements, or where appropriate through amendments to the EPAs, rather than using a framework that has a colonial origin with members who may not share the same interests. It should also be noted that most ACP member states are already bound by universal (UN) and regional human rights treaties. The Cotonou Agreement thus does not add much in terms of commitment for ACP states.

¹³¹⁷ See eg *ECDPM* (n 1316); Geert Laporte, 'What future for the ACP and the Cotonou Agreement?' (2012) *ECDPM* briefing note; EuropeAid, 'The ACP-EU partnership after 2020' <http://ec.europa.eu/europeaid/policies/european-development-policy/acp-eu-partnership-after-2020_en> accessed 29 September 2016; Ira Ryk-Lakhman, 'What will happen after the Cotonou Agreement expires in 2020?' (*UCL blogs*, 20 July 2016) <<https://blogs.ucl.ac.uk/law-journal/2016/07/20/suspension-of-treaties-incorporation-of-terminated-agreements-human-rights-provisions-in-economic-partnership-agreements/>> accessed 29 September 2016.

VII. Conclusions

This report has had a very ambitious goal: to analyse the role of human rights in the EU's relationship with the Eastern Partnership countries, the southern neighbours and the sub-Saharan African states. During the fairly long period of project implementation many changes have occurred that may affect thinking about the role of human rights in EU policy with respect to non-member-states. It is worthy of mention the following four factors here: 1. Among the EU member states there are some that have a doubtful record as far as their own respect for human rights and democracy. It is apparent that the EU is at pains to effectively influence members to adhere to the common values of the EU. It is open to question on what level the EU can define expectations and set standards on the fulfillment of human rights with an uneven record among the member-states. 2. The EU since its inception as an actor also in human rights could always count on the backing of the US in order to exert positive influence upon other countries to respect human rights and the foundations of democracy. Since the coming into office of the administration of President Donald Trump in January 2017 this cannot be taken for granted as Washington has indicated its willingness to develop a 'transactional' relationship with countries where values and principles may well play far less prominent role than did earlier. Without US support the EU may well feel less reassured to project human rights in its external relations. 3. With the coming departure of the United Kingdom means that for the first time the EU loses a member. This is unprecedented. Moreover, it loses a member that has significant international outreach and is one of the longest standing democracies of the world. Although this may be insufficiently convincing and anecdotal, it may indicate some loss of the attraction of the EU. There are politicians, like Prime Minister Aleksandar Vucic of Serbia that clearly pointed out: "I have told ... openly the EU is not as attractive as it used to be, but we are rational people, and we know this is the best for our country." 4. Last, but not least power relations have changed in the EU. The former well-functioning multi-level politics where the EU institutions could play the role of 'force for good' while some member-states represented different policy no longer holds necessarily. Namely, Germany has become the match maker in most prominent problems and crises to be resolved by the EU. Multi-level politics has weakened. This may result in sacrificing some of the continuity the EU institutions have developed in various areas, including their staunch treaty-based support for human rights, rule of law and democracy internally and externally alike.

These three groups of states fall into three distinct geographical regions and include more than sixty countries. The broad scope meant that some priority countries had to be chosen for closer analysis. Among the Eastern Partnership countries, the three westernmost states were selected. Ukraine, Moldova and Belarus differ considerably in their attitude towards the EU, varying from the most engaged to the most isolated country. Similarly wide-ranging differences characterize the three Eastern Partnership states in the south Caucasus. There again, the scope ranges from a state that has opted to firmly anchor in the post-Soviet space also as far as the integration of a select few... Another one is trying to maintain a complex balance between Russia and the west. However, it is precisely its record as far as human rights and democracy that raises doubts about sincerity in so far as getting closer to the West. Finally, there is one state that has left no doubt since 2003 about its wish to join the West both as

far as its values and norms and also to integrate in western institutions. Hence, both in the west and the south-west of the former Soviet Union it is necessary to work with a spectrum as far as the position of states concerning the appeal and the fostering of relations with the EU.

Similarly, the two selected countries from the southern neighbourhood displayed pronounced differences. Since the start of the Arab Spring, Egypt went through intense periods of instability and, after a failed transition to democracy, returned to a system closely resembling the former authoritarian dictatorship. On the other hand, Morocco, a country governed by a royal family, was mostly spared from the volatility of the Arab Spring and stayed overall stable. Among the sub-Saharan states three countries were selected which all lag behind in providing human rights to their citizens and in this they share the fate of many other states in that region. The variation within the regional groups allowed us to assess how the EU responds, or fails to respond, in settings that pose diverse challenges.

The first report of this work package – Deliverable 6.1 on mapping, analysing and implementing instruments – reviewed the literature about conceptualizations of human rights and democratization in the context of EU external action. An important lesson from the vast body of scholarship on the EU's ability to promote human rights through external action was that the EU's external influence operates in concentric circles: the further we move away from the EU core, the less the EU's leverage is, in terms of both its ability and its willingness to promote human rights. Most authors agree that despite the recent disappointments with the long term effects of enlargement to Central and Eastern Europe and the mixed record of the EU in the Western Balkans, enlargement is still the most potent instrument of achieving transformation in the area of democratic norms including human rights.¹³¹⁸ When it comes to states which do not have a membership perspective – the southern neighbours *de jure*, the eastern partners *de facto* – the EU's normative power is significantly diminished. Many authors addressing the EU's engagement in the southern and eastern neighbourhoods pointed out how the Member States' security and economic interests can trump human rights considerations resulting in uneven norm enforcement and the sidelining of human rights priorities.¹³¹⁹ The record looks even less appealing as we move further away from Europe, e.g. in the sub-Saharan African region. The EU tends to have a strong preference to engage with, rather than contain, partners; as a result, backtracking is hardly ever met with sanctions. Such dynamics are a combined effect of the EU's inability to influence and the partner states' lack of willingness to reform their human rights regimes. This failure damages credibility and, eventually, the effectiveness of EU action. As a result of the changing political environment marked by the global economic crisis, recent EU policy discourses about arenas of action – such as the neighbourhoods and the Western Balkans – represent a move away from the earlier analytical and

¹³¹⁸ See Susanne Fraczek, Beáta Huszka, Zsolt Körtvélyesi, 'The role of human rights in the EU's external action in the Western Balkans and Turkey', (2016) FRAME Deliverable 6.2, available at <http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-6.2.pdf>.

¹³¹⁹ See Chapter 1 in Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, 'Mapping, analysing and implementing foreign policy instruments', (2015) FRAME Deliverable 6.1, available at <http://www.fp7-frame.eu/wp-content/uploads/2016/08/11-Deliverable-6.1.pdf>.

normative focus on human rights promotion. The overall sense of ineffectiveness strengthens the disillusionment with EU capabilities and the transformative potential of its external action toolbox.

The general assessment summarized above is rarely matched and supported by adequate fieldwork analysis on how the EU's external human rights policy operates in practice. The literature review carried out as part of this work package has shown that empirical studies are in short supply. Therefore, this report undertook the task to revisit these conclusions through empirical analysis. The empirical case studies presented in this report and also the ones that have been used as background focus on the more recent period, and provided important details on the challenges of the EU's engagement in these geographical regions. Neither the eastern nor the southern neighbourhood was able to make significant progress in terms of democratic transformation and development since the early 1990s. In the southern neighbourhood, after a short period of the Arab Spring, hopes for transformation vanished quickly, and it soon became clear that most of the region is turning back to authoritarianism with many states sinking into conflict. In response to increasing destabilisation of several states in the region, the EU gave priority to stability over freedom. In the eastern neighbourhood, after failed attempts for democratisation in the 2010s, stability also became the main priority of the EU, which was further reinforced by Russia's geopolitical quest in the region. The EU could not afford to alienate these countries in the face of its rivalry with Russia.

The brief historical overview of the role of human rights in EU policies revealed that human rights were viewed in the context of security from the very beginning. While since 1986 human rights have been presented as an essential precondition of achieving peace and security, with human rights and security mutually reinforcing each other, in practice human rights have been often subordinated to security considerations when making specific policy decisions. When taking a closer look to this matter the following conclusions may be drawn. There are three closely interrelated factors that every state considers in its external relations with the European Union. These are: 1. values, principles and human rights, 2. economic costs and benefits, and 3. security. However, the three categories have to be qualified. 1. Human rights are meant broadly also extending to the general state of democracy and the rule of law. 2. Economic costs and benefits are considered in the long-run, in their accumulation and also considered in complexity. In some relationship it is about aid, in others it is about trade and again in other ones it is the prospect of the free movement of labor and potential investment that matter for the non-EU partner. 3. Security is not meant in the traditional sense of "freedom from fear" as the EU in fact does not provide for security guarantee, in spite of the step of the Lisbon Treaty that has taken a step forward in this area. It is more the potential contribution of the EU to stability of the partner states. However, many partners of the EU interpret state security as regime security/stability. They intend to preserve its power and perpetuate themselves. This is where the situation becomes complex as the EU may well contribute to economic prosperity (a stabilizing factor) and may insist on respect for human rights, including individual freedoms and political rights (a factor that may be regarded destabilizing as far as regime stability). Hence, the EU's partners in different regions have to consider various factors. They also contemplate the "alternative offers" i.e. those of other large power centres. If their concern is about the quest for stability (regime security) they will be delighted to give priority to those cooperation offers that do not want to couple economic assistance with respect for human rights and the rule of law.

Most political leaders go very far in order to preserve their power even if it violates the norms. It is suffice to mention governments that use secret service methods to monitor their political rivals, create administrative rules, which curtail their chances to win under fair conditions, including the spinning of the electoral system, or use the ages-old idea of gerrymandering. If the choice is between losing power and respect human rights and rule of law on the one hand, or staying in power and pay no respect for human rights and rule of law on the other, many leaders opt for the latter.

From the time of the adoption of the SEA, human rights became gradually integrated in the EEC's external policy with third countries at least on level of EU documents and declarations. All EC treaties starting with Lomé IV included human rights clauses. These clauses became essential elements of treaties with third countries after 1992. These allow the EU to suspend trade and cooperation agreements if partners fail their human rights commitments. With this the EU might fall in a trap. On the one hand, it may use conditionality in a manner that has negative bearing not only upon the human rights violating regime/government but also hurt the interests of the population. In extreme cases, the result may be massive human suffering. And then the question sharply emerges: Conditionality v. humanity. The practice of aid and donor organizations and their masters demonstrates the dilemma and that the choice is far from easy.

The concept of conditionality became linked with human rights with the introduction of the essential elements clauses. In 1998 respect for human rights was recognised as an objective of the EU's CFSP. From 2006 human rights had to be mainstreamed into the CFSP and in all aspects of external policies. In 2009 the Council declared that there was a real need to increase the coherence and effectiveness in human rights implementation. This impressive historical record suggests that human rights emerged as a central component of EU external action. The essential elements clause has been invoked in a number of cases concerning ACP countries.¹³²⁰ At the same time, it is questionable to what extent this progress affected EU policies and actions in reality. Most importantly, the doctrine of mainstreaming, however well it might sound, seems to be more of a stated ideal than a serious plan.

Despite the strong value-based approach to external action in the EU's discourse on the level of rhetorics, the promotion of values has not been an important factor in guiding the EU's behaviour in the eastern neighborhood. Meaningful progress of political process has not taken place in any of the two Western oriented countries of the eastern neighbourhood with EU membership aspirations, Moldova and Ukraine. The EU was not interested in assisting political transformation in the 1990s in Ukraine or Moldova and was focused on security related issues instead. It was disengaged from Moldova in the 1990s while began to show some attention from the 2000s concerning security. This has also changed during the period of project implementation. With the signing of the DCFTA and the AA, Moldova attracted more attention than before and at least the trade relations have shown Chisianu's leaning to

¹³²⁰ See, e.g., Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, 'The impact of EU trade and development policies on human rights,' (2015) FRAME Deliverable 9.2, 128, available at <http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-9.2.pdf>.

the EU. However, democracy did not automatically mean more support for the values and norms promoted by the EU. It may be a bitter feeling for some liberals that values are not always realized in the majority of the electorate for those that represent them. Its policies towards Ukraine were subordinated to its relationship with Russia, and a similar considerable influence was present in the case of Moldova. Cooperation with these two countries continued regardless of their governments' human rights performance and democratic credentials. Importantly, the EU did not use the PCA or ENP political conditionality to promote the respect of human rights. In the early 2000s, the EU continued its cooperation with Moldova's communist government and in Ukraine with president Kuchma despite worsening political situation and human rights breaches in both countries, and refused to apply negative conditionality. In Ukraine the Orange Revolution revealed the EU's half-hearted approach to Ukraine's democratisation as it got reluctantly involved on security grounds rather than for upholding democratic values. When the EU did apply negative conditionality related to the imprisonment of former Prime Minister Yuliya Tymoshenko and put forward specific demands prior to the signing of the AA, it was motivated by Ukraine steering into a pro-Russian direction rather than by normative considerations. After Ukraine decided against signing the AA, the EU worked towards finding a compromise with Yanukovich and concluding the AA. This suggested that the EU was motivated by its stand-off with Russia rather than by political conditionality and was ready to give up political conditionality for strategic and security reasons. Ukraine has become a highly contested country between Russia and the West, including the EU. Under the current conditions when in another Soviet successor state (Georgia) the popularity of western institutions has been in decline, although still high, the second most populous post-Soviet state has gained symbolic importance that cannot be betrayed and 'get lost' irrespective of its fledging record as far as rule of law, the functioning of institutions and democratic transformation. Hence, assistance to Ukraine must remain separate and even more artificially separated from the transformation of the country, good governance and the rule of law.

Similarly, in light of the pressure Russia exerted on Moldova and other neighbour countries, the EU was ready to sign the AA with Moldova, irrespective of Moldova's problematic record in human rights protection. The EU was also willing to liberalise the visa regime despite shortcomings in implementing the adopted legislative and institutional reforms. In Moldova's case, similarly to that of Ukraine, the EU's fears of a turn to Russia might explain the EU's reluctance to get involved in the events of 2009 and the EU's cooperation with the Communists despite their political record. Although the EU's support to Moldova's new, reform-oriented leadership contributed to successful legislative reforms, the events in 2014-2015 demonstrated how little the political culture has changed and how these are threatening the country's stability.

In both countries the exclusion of civil society from the process contributed to the weak record of ENP conditionality. This has changed only after the 2013-14 events when the EU began to channel large sums of financial support to Ukraine and shifted its emphasis to civil society. Thus the EU's engagement was guided primarily by security rather than normative considerations despite all the rhetoric on human rights, while made little impact in terms of promoting democratic values and human rights in two countries, which demonstrated strong interest in EU integration.

In terms of their effects on human rights, the different EU instruments made little meaningful impact in these two partner countries. Although the PCA had a positive influence on legislative approximation in Moldova, in the absence of benchmarking and of incentives as well as the EU's distant approach, it failed to become a real catalyst for democratic transformation. The ENP AP expanded the understanding of political reform as compared to the PCA for both Ukraine and Moldova, yet it missed the opportunity to establish a workable and measurable set of requirements accompanied by much needed support in both countries. As a result of the mere width of priorities and the fact that they were to be implemented alongside actions in other areas without a strict prioritisation for political including human rights reforms the AP had a weak potential to instigate reform, which was further undermined by the lack of clarity as to the rewards. AP conditionality put overwhelming focus on civil and political rights, paying the most attention to elections in Ukraine, while economic and social rights were generally neglected. It would be welcome to guarantee the economic and social rights and achieve higher standards of their respect. However, it is necessary to recognize that beyond the point of declaration the respect for social and economic rights is contingent upon state capacity, including the availability of resources. And Ukraine has not demonstrated sufficient strength in this respect, yet. In Ukraine, the EU's primary emphasis on satisfactory electoral record marginalised the role of human rights in general. Guaranteeing the latter was not set as a precondition of cooperation at any stage. The AAs with both countries contained an essential elements clause that allows the suspension of trade relations in case of 'exceptional circumstances'. What these circumstances mean were, however, not clarified. In light of this the potential to use it as a negative conditionality instrument is questionable. The 2015 AAg with Ukraine suffers from the same weaknesses as it fails to provide a shorter list of workable and measurable actions with specific deadlines, and to link them to other policy elements. Moreover, the Commission's monitoring of human rights was not linked to a revision of policy instruments or to financial and technical assistance. The Commission's evaluations were especially robust and critical vis-a-vis Moldova, both under the communist government and after 2009, in terms of their scope and depth. However, these critical reports did not result in a review of policy documents, nor was there a link with financial assistance allocation. In both states, there was no systematic link between priorities established, the results of the Commission's monitoring and the financial priorities.

Altogether, in both countries the EU's policies have been reactionary rather than guided by a coherent strategy. Especially in the Ukrainian case the lack of coherence often depended on Member States' attitude to Russia. While in both states under the various leaderships a genuine commitment to democratic reforms was mostly lacking, cooperation with the EU seemed to depend on the the leadership's pro-European course.

Belarus, the third Eastern Partner country analysed here presents a very different picture where the EU had the least potential for influence due to a very low degree of interaction with that state. In Belarus' case the EU had very few instruments available while dealing with an authoritarian dictatorship little interested in cooperation so this case is hard to compare to the other two Eastern Partner countries. Belarus has no PCA or AA with the EU, and the EU has no ENP Action Plan for the country. Diplomatic contacts on the level of the EU and its Member States are limited, and cooperation with and reliance on third partners like the US, the Council of Europe or the OSCE is also not a promising option for similar

reasons. Domestic human rights organizations are weak and are regularly harassed by the authorities. The only common feature with Moldova and Ukraine is the influence of the Russia factor on bilateral relations.

The EU has to operate in an environment where dependence from Russia and the authoritarian type of the regime mean that no genuine and sustained commitment for human rights and democracy can be expected. Political liberalization, holding free and fair elections is seen as a threat to regime stability, and the democratic track record of the country has not improved since 1995. Opposition candidates cannot make it either to the regional council or the parliament. The freedom of the media is significantly restricted, and even the abolishment of death penalty could not be achieved by the EU. Politically motivated imprisonment still exists and the regular harassment of opposition politicians, activists, as well as members of the civil society has been going on practically uninterrupted, even after the EU has suspended most sanctions against Belarus in October 2015. The only meaningful success of the EU's human rights protection work is that politically motivated killings and disappearances seem to have stopped, at least for now.

Reasons of this failure are multifold, and lie mostly outside of the EU's control. The authoritarian system of President Alexandr Lukashenko is by definition not interested in fostering democracy and human rights, as these may endanger regime security. Minsk has only been willing to make smaller concessions that can be reversed any moment and does not seek approximation to European standards. The framework to impose and carry out death sentences and take political prisoners again is in place and can be invoked at any moment. Political changes towards democratization, including political rights and media freedom, are too costly for the regime; other measures that allow an opening towards the EU are too costly considering the dependence from Russia, most importantly considering financial and economic stability as well as security. Besides, the EU has only very limited presence and entry points in Belarus; moreover, it is simply unable to counterbalance the strong military, political and economic influence of Moscow over Minsk. These Russian leverages have just become stronger since the beginning of the war in Ukraine: Russia demonstrated that it is both able and willing to use military force to prevent an unwanted political change in its direct neighbourhood.

Among such circumstances, the EU needs to realize that in terms of protecting human rights in Belarus, the achievable maximum is the gradual economic and subsequent political liberalization while Lukashenko is still on power, in order to prevent direct or subversive Russian intervention. Mainstream Belarusian domestic opposition forces tacitly support this assessment.

Two types of foreign policy instruments seem to be adaptable to this context: sanctions and high-level contacts with the regime (and the combination of the two as in the case of lifting travel bans on high-ranking officials). Both allow the EU to react to changes in the human rights situation in Belarus. Measures work best if the EU's status from the perspective of the regime is taken into account: concessions towards and contacts with European institutions serve mainly to counterbalance the reliance on Russia. However, it also limits the freedom of EU action and Belarus is very well aware of it. For a few months, Minsk started to demonstrate significant change in order to attract the attention and support of the EU. It has been trying to give the impression as if changes would have been major or even

sweeping ones. However, the change of the regime's nature has remained insignificant. On the other hand, the EU has been ready to reciprocate the steps of Belarus in this game and give the impression as if it were ready to give credit to the changes. It is open to question whether it is not a clear reflection of a geopolitical rivalry between Moscow and Brussels that lies behind. The economic and military developments in the region show that this dependence has not been weakening but it has been strengthening for the past years. Accordingly, the policy of softening sanctions that was adopted several times does not seem to offer real benefits and unnecessarily compromise the credibility and consistency of EU measures. Giving up on human rights-based conditionality and lifting the sanctions is a mistaken approach, because the EU only loses the credibility of its foreign policy without achieving much on the ground due to objective limitations. In addition, targeted measures helping civil society and political activism are important in that they can, through years, build up an alternative to the current leadership. Finally, bilateral relations focusing on economic transformation, trade relations, cross-border cooperation, border control and police cooperation, education and research, culture and environment protection could be maintained together with human rights conditionality in a way that the former do not compromise the latter, fostering the modernization and pluralization of the Belarusian society. These steps need to be done in order to carefully prepare for the post-Putin era, and preserve the sovereignty of Belarus until then.

Among the states of the south Caucasus, also members of the Eastern Partnership, a similarly complex picture can be painted. It is Georgia that represents the 'leading light' where President Mikheil Saakashvili irrespective of some missteps and populism massively reformed the country as far as modernization, democratization and westernization. Although his successors have for stability's sake strengthened the Russian vector of the country's external relations, the country may well be beyond the 'point of no return' in its course to get closer to the west. It presents a problem that since the 2008 Georgia – Russia war Moscow has updated its expectations with respect of curtailing the sovereignty of post-Soviet states. Whereas in 2008 it was Russia's demand not to aspire for NATO membership since 2013 it is any kind of approach to the West, including the EU that is resented in Moscow. However, while the Ukraine conflict seized the attention, Georgia (and Moldova) signed the PCA and the DCFTA. This may not be followed by EU accession any time soon, if ever. Still, this a starting point for the future that makes reversing Tbilisi's trend difficult for Russia without an externally induced regime change over there. However, as the elections to the Georgian parliament of October 2016 demonstrated, this would be quite difficult as Georgia has been alienated due to the Russian support to the 'statehood' of two secessionist territories, Abkhazia and South Ossetia and also as pro-Russian political forces are, understandably weak in Georgia. The country represents close to western standards as far as rule of law, respect for human rights, good governance and the elimination of corruption.

Azerbaijan represents a middle ground that tries to keep different vectors of its foreign policy in balance. However, it is precisely human rights and democracy where the most severe doubts emerge as far as Baku's performance. The Aliyev regime, also in its current incarnation, gives clear prominence to regime stability and whenever its human rights record is challenged it reacts nervously. Elections are certainly not fair, freedom of speech is massively curtailed, journalists are harassed, arrested and imprisoned. Those international institutions that have raised these matters, like the OSCE or the Council

of Europe are unwelcome. The OSCE was actually forced out of the country as far as its field mission in 2015. However, the regime of Ilham Aliyev is well aware that due to its strategic importance, including the country's rich energy resources and the pending conflict with neighbouring Armenia, the EU will continue to tone down its voice and measure its reaction to a disappointing human rights situation. This requires a thoroughly crafted diplomatic response from the EU, largely the only western institution that is present in Azerbaijan.

Armenia, the third south Caucasian state, has small GDP, a pending conflict with a militarily superior opponent, complex and heavy dependence upon the Russian Federation. Hence, in its external relations (due among others two sealed borders of its four neighbours (Turkey and Azerbaijan)) the Russian vector has prominence. And Russia, as we know, does not ask questions about respect for human rights. For the reasons above, Yerevan is much less exposed to EU interest than the two other states. The situation is not reassuring as far as human rights but Yerevan raises somewhat less concern than Baku does. The fundament of bilateral EU-Armenia cooperation, the PCA set up mutual conditionality. Armenia has to respect fundamental freedoms and human rights needs to strengthen democratic values and rule of law while in return the EU lets Armenia participate in community programmes and institutions but without the perspective of membership. However, the gap between commitment and implementation is wide and the EU remains understandably critical. As the Armenian Progress Report clearly emphasizes "awareness of international human rights instruments and Armenia's human rights obligations remained low among national institutions, including the judiciary and law enforcement bodies". However, due to Armenia's economic situation Yerevan tries not to go on a collision course with the EU either.

If human rights values and democratic principles did not take a centre stage in the EU's policies towards the Eastern neighbors despite all the rhetoric suggesting otherwise, they played an even more marginal role in the southern neighborhood where clearly security interests dominated the EU's actions. As opposed to the Eastern partner countries, countries of the Mediterranean had established institutional relations with the EC already in the 1970s (some already in the 1960s). European presence in the region goes back even further to colonial times which evokes unpleasant memories even today throughout the Middle East. What remained from the colonial period is strong cultural ties with some EU members and European economic preponderance, which is not only a legacy of the distant past, but is very much part of the present. Occasionally, those ties are too strong that has apparently resulted in collusion between authoritarian, kleptocratic regimes and the former colonial powers, with an emphasis on France (Tunisia, Algeria) and Italy (Libya).

Human rights had not been incorporated into their relations with the EU, not even at the rhetorical level, until the mid-1990s. The Euro-Arab Dialogue was launched in this early period of cooperation, in the 1970s, which was the first multilateral forum of cooperation with the Middle Eastern states, and which did comment on rights of the Palestinian people while avoided the wider topic of human rights.

The EU's relations with the Mediterranean countries can be divided into a pre- and a post-Arab Spring period. The Arab Spring events induced the EU to fundamentally revise its neighborhood policy. Although prior to the Arab Spring the European Union had maintained that security and stability could

be achieved in the long run only through respect for human rights and democracy, its policies had in reality emphasised short-term security and stability through engagement with dictators who ruled many of these countries. Since the 1970s, the EU had officially declared its support for human rights, democracy, and the rule of law, and since the 1990s, the EU's treaties with its southern neighbours had included clauses declaring that human rights was an essential element of the treaty and that the economic relations could be severed if human rights were not respected. Yet, with these clearly stated positions, the EU continued to engage in trade and security relations with the regimes that were serious abusers of human rights and that had demonstrated no serious interest in democratic reforms. Aside from political dialogue, repeated reminders, and modest grants to civil society, the EU did not invoke the essential elements clause or insist either on positive or negative conditionality. The EU was ready to cooperate with authoritarian regimes in the region for the sake of maintaining stability and countering perceived Islamist threat. After the ousting of Mubarak and Ben Ali, high EU officials acknowledged their past mistakes in having promoted the short-term economic and security interests rather than the long-term values that constituted official policy. European Commissioner Štefan Füle admitted early in the Arab Spring that the EU's actual policies of dealing with dictators had been inconsistent with EU values.

It has been frequently argued that trade and security were the main interests of the EU prior to 2010, and that values of democracy, human rights, and good governance were discussed in the margins rather than present at the core. On many occasions prior to the Arab Spring, the European Community and its predecessors stressed the strategic importance of the Mediterranean to Europe with regard to several issues: security, migration, economics and trade, and political stability, which have been the EU's main considerations for the region. The Global Mediterranean Policy, which was the first policy of the EU targeting the region launched in 1972 did not mention human rights, democracy or good governance. This was replaced by the New Mediterranean Policy in 1992 which already included respect for human rights, democratic principles and tolerance as central values of its relations with the Maghreb. However, only with the start of the Euro-Mediterranean Partnership in 1995 did human rights emerge to a priority position in relations with the European Union. The Barcelona Declaration in 1995 provides the first formal acknowledgement of the importance of human rights in a joint document between the European Community and Mediterranean non-member countries. Throughout the different meetings held under the EMP, the Barcelona Process repeated its commitment for human rights to be included in the Association Agreements with the Mediterranean partners, presenting strategies and directives on how to make human rights play an important and increasing role within the EMP. These association agreements contained human rights clauses that are identified as 'essential elements' of the treaties. The European Neighborhood Policy initiated in 2004 introduced a new mechanism to formalise and institutionalise the dialogue with the southern partner countries through the European Commission's regular country reports and by negotiating a five-year action plan on a bilateral basis. At the same time, the Barcelona Process failed to deliver results in terms of political transformation in the region. Recognising the failure of the Barcelona process, in 2008 the Union for the Mediterranean was launched as a new multilateral forum of cooperation. Yet, this focused on infrastructure and development projects as opposed to democratisation and human rights.

Thus since the 1960s and '70s the EU has been applying a plethora of instruments in the Mediterranean by introducing formal *policies* (or strategies) adopted by the Community toward the Mediterranean, through establishing various *multilateral fora* in which the policies were promoted, and through *bilateral relations* between the Community and the individual states. However, the post-Arab Spring situation in most countries of the region presents a sobering picture about the state of democracy and human rights. Although reasons for this lie outside of the EU's reach, yet such negative developments testify to the EU's inability to make a positive impact in terms of encouraging democratic transformation. Despite the EU's long history of engagement in the region and the sobering effects of the Arab Spring, there appears to have been no fundamental readjustment in EU human rights policy toward the Mediterranean since 2011. This has been the case even though, between March and May of 2011, the Commission issued two new documents in light of the Arab Spring wherein it pledged to offer benefits to Mediterranean countries with conditionality on their implementing human rights standards and instituting deep democracy. As described in the cases of Egypt and Morocco, albeit for different reasons, the EU did not fundamentally alter its policies of deploying words of support for democracy and human rights while never implementing any rigorous conditionality with regard to its partners. Our analysis of ENP progress reports and action plans of the EU–Moroccan Association Council revealed that the EU effectively diverted attention from human rights abuses. While there may be value in encouraging incremental progress, the risk is that the seriousness of the problems is downplayed and that public relations ultimately are preferred over confronting the facts and raising concerns accordingly. Morocco has been generally slow in adopting reforms, and even when it did, there were major problems linked to their practical implementation. Thus, the concept of conditionality – such as tying economic or political benefits to compliance with human rights standards – becomes optional at best, as the New ENP seems to have abandoned conditionality in cases where the partner state does not accept it. Unlike security, which is characterised as a pressing need and a most urgent challenge, there is no urgency or insistence that the violation of human rights be addressed promptly.

According to the logic of concentric circles of EU leverage, in the Sub-Saharan African region, the EU is even less able to make an influence than in the two neighborhoods. (Similar conclusion could be drawn as far as Central Asia is concerned another backwater of the EU's external relations.) The distinct feature of the EU's relations to (ACP) Sub-Saharan states is the existence of the Cotonou Agreement, which offers an established mechanism for responding to human rights violations, first initiating a dialogue and second – upon non-compliance – the cutting of development funds and macroeconomic support. The report focused on the effectiveness of human rights conditionality with regard to three Sub-Saharan African states: Guinea-Bissau, Central African Republic and Zimbabwe. Studying these three out of the ACP group is reasonable given that they are not only the most significant, but it is with these that the EU has the longest history of regular political dialogue dating back to the mid-2000s.

According to the Cotonou Agreement the EU can respond to human rights violations by invoking article 96 and initiate a dialogue with the state where atrocities occurred. If consultations do not lead to a satisfying solution or conditions do not improve, the EU can suspend economic support and withdraw EDF funds. Thus, the EU has its readily available stick to use to enforce human rights norms. Despite this the EU is facing numerous difficulties. One of the main difficulties in evaluating this mechanism is caused

by these countries being plagued by political instability. With one regime being ousted out of power after another by a coup makes all achievements temporary and short lasting. Thus, the EU works in a very unstable environment. Under such conditions it is questionable whether the typical critic voiced against the EU – that it invokes Article 96 arbitrarily and inconsistently – is not missing the mark. Namely, dialogue, using sticks and later carrots strategically presupposes at least a minimum level of political stability.

Many of the states concerned are in severe economic conditions where cutting back aid would increase hardship, as Italy and Spain argued in the case of Gambia, also voicing migration concerns. In fact, in case of deep humanitarian crises such measures are easily judged inadequate. One possible strategy under such conditions could be – as it happened in Guinea-Bissau – to channel support not through the government but NGOs and international organizations. Or alternatively the suspension of aid (the sticks) may not include humanitarian aid – as it happened in the case of Zimbabwe – although it is debatable if it is possible to neatly separate humanitarian aid from development assistance. An additional difficulty in promoting human rights is that geopolitical, security and economic interests frequently interfere with prioritizing human rights. Nevertheless, it can be argued that if there is determination and especially if it is backed up by a coherent response from the entire international community, the chances of achieving desired results increases significantly. Guinea-Bissau offers a clear example for this where measures were introduced in cooperation by the EU with such organizations as the African Union or ECOWAS.

Bearing in mind the wide range of states presented and analysed in this report it may be appropriate to remark that the EU's engagement as a global economic and political actor may well deserve global reach as far as its promotion of human rights and rule of law. However, it is the side-effect of this that the EU is engaged in states where its chance to make a difference is very limited. Whether it would be the way of breaking out of this situation to streamline EU commitment also in a declared manner is one possibility. However, the current constructive ambiguity based on reciprocity (more engagement for more advancement) may also be tempting to pursue as politics, unlike academic analysis may very well live with such ambiguities.

Policy recommendations

A. Ukraine

- Elaboration of a common strategy towards Ukraine, including a common vision regarding a long-term EU membership perspective which would create a strong incentive for political transformation on a basis of strict conditionality. The EU should speak with one voice and translate its message to all segments of the Ukrainian society.
- Establish clearer contingencies between progress in meeting set demands on political reforms and the advancement of relations between the parties in all areas of cooperation.
- Strict factoring of all incentives into political conditionality. Such incentives include visa-free travel, macro-financial assistance and gradual opening of the EU market.
- Clearer and consistent conditionality by jointly setting short-term measurable set of benchmarks to be updated and revised on a regular basis through association agendas.
- More emphasis on economic and social rights, minority rights, cultural and language rights, particularly in the view of the current conflict in East Ukraine.
- More fruitful monitoring by EU, as well as bilateral institutions which would reflect the true state of political reforms in the country, including a follow up on implementation of any new legislation or legislative amendments. The regular updating of the criteria would allow for concrete outcomes of the monitoring.
- Providing targeted financial and technical assistance linked to the benchmarks set on a regular basis. More flexibility in setting assistance priorities, as establishing a framework through country strategy papers for six years in advance can be counterproductive. The allocation of assistance should be revised periodically to take stock of the outcomes of the monitoring.
- The assistance can be channeled through extensive cooperation with other, more specialised international organisations, including the CoE and the OSCE.
- Create more publicity in Ukraine around the outcomes of the monitoring, the projects financed by the EU and the rewards on offer.
- Comprehensive cooperation with the civil society on the basis of the AA Chapter 26. The civil society representatives should participate in the policy formation, including the distribution of financial assistance and the monitoring of policy implementation and the expenditure of the assistance, as well as the dissemination of policy-related information.
- Increased funds specifically to support human rights, and increase in direct funding to civil society to stimulate bottom-up political reformation. Continuous training for judiciary and law enforcement institutions to guarantee human rights and fundamental freedoms in practice.

B. Moldova

- Elaboration of a common long-term strategy towards Moldova, including a common vision of EU membership, to create a strong incentive for political transformation on the basis of strict conditionality.
- Setting a clear and benchmarked short-term agenda on human rights, backed by adequate finance and relevant technical support. The method of setting the association agendas should be revised.
- Special emphasis on anti-corruption measures, including a campaign at all levels of Moldovan society, with enhanced participation of civil society.
- Special emphasis on economic and social rights mitigating the continuous economic hardship.
- Establishment of clear links between progress in meeting requirements for political and human rights reforms and advancement of relations between the parties in all areas of cooperation.
- Strict factoring of all incentives, including opening of the EU market, macro-financial assistance and participation in EU programmes, into human rights and democratic conditionality.
- Linking of the monitoring conducted by the Commission to the allocation of financial and technical support.
- Continuation of the practice of using financial assistance as rewards, including by linking it to further reforms and improved practice in human rights protection and observance of democratic principles.
- Systematic and comprehensive cooperation with civil society on the basis of the relevant AA chapter and the Roadmap for Engagement with Civil Society 2014-2017. The civil society should be involved at various stages of the formation, implementation and monitoring of the human rights agenda of EU-Moldova cooperation.
- Enhancement of the practice of cooperation with the CoE in improving Moldova's human rights standards.
- Increased direct funds allocated to civil society for projects across the prioritised areas relevant for human rights protection.
- Publicising the results of EU monitoring to wider Moldovan society, including through civil society.
- Financing of education projects on international human rights standards.

C. Belarus

- As long as Russia is politically willing, and militarily and economically able to maintain its assertive, interventionist, post-Crimea foreign policy, as well as Vladimir Putin is in power, significant political changes in Belarus are unlikely. The reason is that if political changes unfavorable for Moscow would take place in Minsk, Putin would most probably intervene, similarly to his actions in Ukraine, in order to prevent the decrease of Russian influence. At present, the incumbent president is the best possible (with other words: the least bad) option available, due to the fact that he is at least in firm control of the country, and based on the

experiences of the last two decades, he has masterful skills in negotiating with Moscow. Even the domestic political opposition is sharing this assessment, thus perceives the rule of Lukashenko as the “lesser bad” option compared to a Russian intervention. This position explains why there were no serious protests against him in 2015, or not even a serious challenger in the presidential election. Consequently, the achievable maximum is the gradual economic and subsequent political liberalization under the rule of Lukashenko. This should take place with, and definitely not without, him in order not to risk a Russian intervention.

- The first steps towards such a direction could be that a few opposition members and civil society activists should be allowed to make it to the local council, and thereafter also to the national parliament. However, one needs to be aware that such limited transformation may take years.
- Concerning the present EU policies, giving up on human rights-based conditionality is a mistaken approach. First, suspending conditionality would not generate any improvements at all, as it has already been demonstrated by the events since October 2015. Without human rights-based conditionality, the EU would lose its only leverage over Lukashenko. The Belarusian president would not be motivated to liberalize his own system even to the slightest extent. Instead, without conditionality he would feel being provided with a *carte blanche*. Second, suspending conditionality does not help improve the human rights situation at all, as it did not either in 2008 or since October 2015. Third, the respect for human rights and fundamental freedoms constitutes an essential precondition and motivation for transformation: human rights and fundamental freedoms is the field on which progress could be rewarded with various economic and political benefits. However, by softening conditionality, the EU only loses its own credibility, but without achieving anything lasting or structural. Fourth, it took some time until the EU has developed the use of sanctions against Belarus into a precise, tailored indicative tool with which Brussels is able to react even on minor developments. Keeping the sanctions suspended would deprive the EU of this relatively well-functioning instrument.
- The development of bilateral ties should focus on other fields, such as economic reforms, trade, cross-border cooperation, border control and police cooperation, education and research as well as culture and environmental protection. All these could well be done while keeping up human rights-based conditionality (and, if necessary, sanctions) at the same time.
- All in all, abandoning the traditional, human rights-based dual-track approach is mistaken and would prove to be ineffective. Instead, sanctions policy based on human rights and democratic freedoms, paired with support for the wider civil society should be maintained, by focusing mostly on promoting real, grassroots civil movements as well as the modernization and pluralization of the Belarusian society.
- These steps need to be done in order to carefully prepare for the post-Putin era, and preserve the sovereignty of Belarus until then. Meanwhile, a gradual, slow economic and political liberalization is the maximum the EU can achieve. Among the present geopolitical conditions, this is the best way to protect human rights and fundamental freedoms in Belarus.

D. The Mediterranean

- Although EU official policy calls for the mainstreaming of human rights and treating human rights as universal, interdependent, and indivisible, actual EU policy during and after the Arab Spring did not follow this official policy line in the Southern Mediterranean. The EU should either change its official rhetoric and policies or bring its actions into conformity with articulated EU values.
- Official EU policy calls for implementing positive conditionality (“more for more”) or negative conditionality (“less for less”) with regard to whether its “neighbours” and “partners” make progress in improving human rights standards. It is not possible to determine whether conditionality has actually been effective, because it – for all practical purposes – has not been attempted. The EU should make a clear decision whether it wishes to apply conditionality or whether it wishes to abandon the rhetoric that makes the EU appear to be incoherent and unserious.
- In some cases, high EU officials, presumably hoping to promote better bilateral relations, make positive statements about a country’s human rights record that are inconsistent with the evidence available from the European Parliament, the office of the European Commissioner for Human Rights, and many recognised NGOs and U.S. Country Reports on Human Rights. When flattering statements are made that are easily contradicted by available facts, it sends the clear message to “neighbours” and “partners” that the EU is not serious about human rights and democratisation. Countries will happily broadcast positive statements and ignore (or suppress critical comments), and thus *undermine the standing of human rights defenders and NGOs*. By making flattering statements that are contradicted by facts is *counterproductive* to the promotion of human rights.
- The EU, in accordance with its official policy, should place emphasis on protecting and supporting human rights defenders with “neighbours” and “partners”. It is the local defenders of human rights – the future Nelson Mandelas, Vaclav Havels, and Mahatma Gandhis – who are most vulnerable to fabricated or pretextual allegations and who are most likely to be future leaders. The EU has little to lose, and democracy and human rights have much to gain, by a serious and focused effort on defending genuine spokesmen and spokesmen for human rights. The EU moreover should work with EU Member States and other states (such as Norway and the United States), to have a concerted and serious effort to promote and defend genuine human rights activists, both individuals and CSOs.
- Only a tiny portion of EU funding and grants actually is targeted at human rights and democracy promotion. The percentage devoted to human rights and democracy should increase – and projects should focus on practical programs that enhance the values. The EIDHR specifically should be reinforced both in terms of areas of actions and financing.
- The EU should engage in a much more serious and deeper dialogue in human rights and democratisation in its bilateral relations, notably within 5-year Actions Plans, which are in turn responsible for directing the funding domains for the same period. If more human rights aspects

are included, CSOs have a better chance to work on them with EU funding through the ENI and other instruments.

E. ACP countries

- It is important for the EU to continuously evaluate EPAs for negative consequences in ACP partner states in particular with a view on consequences that may impact on the realisation of socio-economic rights of the residents of these states.
- Dialogue should be more transparent and focused on issues where the EU, in consultation with local civil society in partner states, think such dialogue could have an actual impact.
- The EU could also proactively seek advice from ACP partner states through the political dialogue where it and its Member States are struggling to find solutions to their own human rights problems such as with regard to migration.
- The adoption of appropriate measures should only take place when an impact assessment shows that they are likely to succeed and would not affect the general population adversely. In most instances this would require a unified approach from the EU and relevant regional organisations.

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Annex: European Community Funding Instruments

For a discussion of this issue in the text, see “European Community Funding Instruments” in Chapter VI.

A. Overview of European Community Funding Instruments

1. Introduction

One important component of the ENP has been its providing financial assistance for a variety of projects in ENP states ranging from the improvement of infrastructure, to human rights and good governance. This report will focus on the financial support provided by the EU to three Southern Partners, Morocco, Tunisia, and Egypt, between 2007 and 2015.

Financial assistance by the EU to Morocco, Tunisia, and Egypt is currently provided through different financial “instruments”: The European Instrument for Democracy and Human Rights (EIDHR), the European Neighbourhood Instrument (ENI) (formerly the European Neighbourhood and Partnership Instrument (ENPI)), the Development Cooperation Instrument (DCI), the Instrument for Stability (IFS), or the Instrument Nuclear Safety Cooperation (INSC), among other instruments that are only activated in particular cases, such as the Humanitarian Aid and Civil Protection mechanism (ECHO) or the Instrument contributing to Stability and Peace (IcSP). In terms of funds, the ENPI/ENI is the most important funding scheme in the specific context of the Southern Neighbourhood. EIDHR is, in turn, the most specific instrument in the domain of human rights.

2. The European Instrument for Democracy and Human Rights (EIDHR)

The EIDHR has operated in two separate phases: 2007-2013 and 2014-2020. The current version of the EIDHR is designed to satisfy the policies articulated in the Strategic Framework on Human Rights and Democracy adopted by the Council in 2012¹³²¹ as well as the Action Plan on Human Rights and Democracy 2015-2019 adopted by the High Representative for Foreign Affairs and Security Policy (HR/VP) in 2015¹³²². The budgeted amount for the EIDHR 2014-2020 is EUR 1,332,752,000¹³²³.

¹³²¹Council of the European Union (2012) EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf [accessed 28 May 2016]

¹³²² EC (2015) Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”, JOIN (2015) 16 final. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/joint_communication_on_human_rights_and_democracy_en.pdf [accessed 28 May 2016].

¹³²³ EIDHR. “What is EIDHR?” Available at: <http://www.eidhr.eu/whatis-eidhr> [accessed 28 May 2016]

The EIDHR is the funding instrument of the EU that focuses on thematic topics related to human rights in non-EU countries throughout the world. The EIDHR is administered by the Directorate-General for International Cooperation and Development (DEVCO), a directorate within the European Commission. The EIDHR, unlike many other EU funding instruments, does not distribute funds through states or governments, but directly to CSOs. CSOs receive funding by submitting proposals in response to calls for proposals published by DEVCO. The EIDHR is the financial arm of the Strategic Framework on Human Rights and Democracy (2012). Although DEVCO officially administers the EIDHR, EU Delegations in third countries play an important role in monitoring and emergency responses, but also in making recommendations for calls for proposals and allocating the funds. Among this myriad of institutions, the role of the EEAS is also relevant. The EU foreign affairs office is in charge of drafting the strategy papers for each country and the consultation in the selection of projects. In 2014, a new edition of the mechanism was launched, differing from its predecessor in terms of budget increases designed to improve EU responses to emergency situations, strengthening of civil society, and protecting vulnerable minority groups and promoting economic and social rights¹³²⁴. CSOs within Morocco, Tunisia, and Egypt have received funding through EIDHR.

Table 4. EIDHR Disbursement breakdown by Country (2012-2014)

EIDHR	Egypt	Morocco	Tunisia
2012 ¹³²⁵	0.92	1.08	3.23
2013 ¹³²⁶	0.98	0.61	0.74
2014 ¹³²⁷	4.15	1.37	3.3

Source: Annual Reports on the European's development and external assistance policies and their implementation for the years 2012, 2013, and 2014. Data shown in EUR million.

The EIDHR concrete actions are previewed in the Annual Action Plan for the instrument. In 2015¹³²⁸, the guiding document detailed the different tools through which the EIDHR would be put forward, which are:

- Local calls for proposals and support measures were managed by EU Delegations via the Country-based Support Schemes,
- A global call to support Human Rights priorities,
- Direct awards financing action in risky situation where the publicity of a call for proposals would be dangerous,
- Support a programme targeting media and freedom of expression,
- Grants to support university education on human rights and democracy,

¹³²⁴ EIDHR Strategy Paper 2007

¹³²⁵ 2013 Annual Report on the European Union's development and external assistance policies and their implementation in 2012.

¹³²⁶ EC (2014) SWD (2014) 258 final.

¹³²⁷ EC (2015) SWD (2015) 248 final.

¹³²⁸ C (2015) 2025 final, 3-4.

- Support to the UN OHCHR,
- Support to labour-related activities under the scope of the ILO,
- Support to the implementation of the EU Guidelines on Human Rights dialogues,
- Support for the logistical issues of the EIDHR, as evaluations, coordination meetings and auditing activities).

3. The European Neighbourhood Instrument (ENI)

The ENI was launched in 2014 and is slated to continue through 2020. The current ENI replaced the former European Neighbourhood and Partnership Instrument (ENPI), which was in existence from 2007-2013. Although the ENI and ENPI are technically separate instruments with different guidelines and mechanisms, for practical purposes they function in a similar way.

The ENI (2014-2020) and the ENPI (2007-2013) have been the policy and funding arms of the ENP¹³²⁹. Like the EIDHR, they fall within the administrative purview of DEVCO, although they are administered by different offices therein. ENI and ENPI channelled funding through regional, sub-regional, and country levels. The Strategic Country Papers set the basis for the Action Programmes in the bilateral relations between the EU and the partner countries, heralded by the EEAS. In this documentation, details such as objectives, financial allocations, and monitoring mechanisms are outlined. The third round of the instrument (2014-2020) coincided with the thorough review in 2013 of the ENP, which is based on two basic tenets: first, the principle of country differentiation, and second, incentive-based approaches. In this sense, the more recent ENI presumes a strengthening of the country-based bilateral relations that have characterised the ENP.¹³³⁰ The incentive based approach, in turn, tries to make more flexible the EU support to the volatile context of the post-Arab Spring in countries such as Egypt.

In addition to bilateral funding, the ENI also subsidises some regional and multilateral projects.

- Neighbourhood Investment Facility (NIF): The NIF is a mechanism that is put in place to finance capital-intensive infrastructure projects and other private sector venues. It gathers different lines of loans and grants, the latter coming mainly from the EU budget¹³³¹.
- Cross Border Cooperation (CBC): This cooperation happens between member states and neighbourhood partners in areas of economic integration, common problem resolution and better mobility for persons, goods and capital.¹³³²

¹³²⁹ Regulation (EU) No 1638/2006 OJ L310/1 [2006].

¹³³⁰ Regulation (EU) No 232/2014 OJ L77/27 [2014].

¹³³¹ EC (2013) NIF Activity Report 2008-2012. Overview of Activities. Available at: <http://ec.europa.eu/enlargement/neighbourhood/20150731-nif-activity-report-overview-2008-2012.pdf> [27 May 2016].

¹³³² Commission implementing regulation (EU) No 897/2014 OJ L 244/12 [2014]

- Institution building tools: Twinning, TAIEX & SIGMA
 - Twinning: Twinning is a tool for co-operation projects between public administrations of EU Member States (MS) and beneficiary countries, category under which ENP states fall. Norm diffusion, collective socialisation and good practices sharing are the underlying aims of this policy instrument.

Table 5. Twinning operations by number of events (2012-2014)

Twining*	Egypt	Morocco	Tunisia
2012	2	5	19
2013	4	14	16
2014	3	9	4

*Only ongoing projects have been considered for each year.

Source: Annual reports on Twinning, TAIEX and Sigma, as referenced in footnotes ^[9], ^[10] and ^[11].

- TAIEX: TAIEX is the Technical Assistance and Information Exchange tool used by the EU to export expertise to the European Neighbourhood countries. The underlying concept is that of integration, in which the target states are required to harmonise their legal and regulatory schemes closer to those of the Union, in an attempt to produce regionalisation, which will in turn be a catalyst for prosperity and peace.

Table 6. Number of TAIEX events in beneficiary states per year (2008-2014)

TAIEX	Egypt	Morocco	Tunisia
2008	10	13	6
2009	10	11	3
2010 ¹³³³	17	19	12
2011	0	0	0
2012 ¹³³⁴	11	19	18
2013	0	0	0
2014 ¹³³⁵	22	13	22

¹³³³ EU (2011) TAIEX Activity Report 2010. Available at: http://ec.europa.eu/enlargement/taieux/pdf/report-2010/2010lq_activity_report_en.pdf [accessed on 27 May 2016].

¹³³⁴ EC (2013) TAIEX and Twinning Activity Report 2012. Available at: http://ec.europa.eu/enlargement/pdf/taieux/11476_taiex_ibu_2012_english.pdf [accessed on 30 Jun 2016].

¹³³⁵ EC (2015) TAIEX and Twinning Activity Report 2014. Available at: http://ec.europa.eu/enlargement/pdf/financial_assistance/institution_building/2015/act-reports/taieux_twinning_2014-en.pdf [accessed on 30 Jun 2016].

Source: Annual reports on Twinning, TAIEX and Sigma, as referenced in footnotes ^[9], ^[10] and ^[11].

- SIGMA: SIGMA is the “Support for improvement in Governance and Management” multifactor initiative by the EU and the OECD. Expertise diffusion is again the objective of this instrument, focused on the field of public governance reform, namely in five areas:
 1. Civil service and public administration organisation and functioning
 2. Public finance and audit
 3. Public procurement
 4. Policy making
 5. Civil service development strategy and reform.

Table 7. SIGMA operations broken down by field of activity (2008-2012)

SIGMA	Egypt	Morocco	Tunisia
Legal framework, civil service and justice	6	10	7
Financial control and external audit	0	2	1
Public procurement	0	1	1
Policy making	6	1	0

Source: http://ec.europa.eu/enlargement/pdf/financial_assistance/institution_building/2015/act-reports/activity-report-twinning-taie-x-and-sigma_2012-en.pdf Annual reports on Twinning, TAIEX and Sigma, as referenced in footnotes ^[9], ^[10] and ^[11], p. 6.

- ENPI Specific programmes in answer to the Arab Spring (2011-2013)
 - Neighbourhood Civil Society Facility (NCSF) (2011-2013)¹³³⁶: This specific policy instrument is understood as a compliment to ENPI in the realm of civil society strengthening, covers the whole ENP region and uses technical assistance and grants as its tools.
 - SPRING Programme (2011-2013)¹³³⁷: The SPRING Programme is a specific instrument that focuses regionally on the Southern Neighbourhood and is a direct answer to upheavals and political transformations that started to take root with the developments in Tunisia and Egypt. The aim of these funds is broader than the NCSF and goes from human rights to employment policies, including, too, public sector reform and multi-sector aid more generally.

4. Other EU instruments with a Human Rights and Democracy Component

- Restrictive Measures

¹³³⁶ EC (2011) Action Fiche for Neighbourhood Civil Society Facility 2011-2013. Available at: http://ec.europa.eu/europeaid/documents/aap/2011/af_aap-spe_2011_enpi.pdf [accessed 27 May 2016].

¹³³⁷ EC (2011) Action Fiche for the Southern Neighbourhood Region Programme Support for Partnership, reforms and inclusive growth (SPRING). Available at: http://ec.europa.eu/europeaid/documents/aap/2011/af_aap-spe_2011_enpi-s.pdf [accessed 27 May 2016].

Based on article 215 of TFEU, the EU has a legal justification to stop or decrease, partially or completely, the economic and financial relations with a given third country, in the direction of putting forward the Common Foreign and Security Policy (CFSP).

- **Development Cooperation Instrument (DCI)**

Instrument covering most developing countries, except for countries eligible for the Pre-Accession Instrument (none in the Southern Neighbourhood) divided into three different components:

- Geographic component focusing on a region and covering altogether different aspects of development, such as the reduction of poverty, human rights or migration issues
 - Thematic component that focuses on 1) the management of common public goods and challenges and 2) civil society organisations
 - Pan-African Programme. It complements other instruments such as the ENI and the EDF, and supports activities of different regional scopes in Africa.
- **Instrument for Stability (IFS)**
Launched in 2007, it has the objective to give financial support to periods of crisis, where this is needed to back up mediation and confidence building in conflicts, interim administrations, rule of law strengthening and transitional justice. This instrument is, in turn, sensitive to the timing pressures that govern security concerns, making it available at a faster pace.
 - **Instrument contributing to Stability and Peace (IcSP)**
The IcSP has the objective to keep on with the peace-keeping operations, conflict prevention and the enforcing of international security.
 - **Humanitarian Aid and Civil Protection (ECHO)**
This DG of the EC manages humanitarian assistance to victims of disasters, both of a natural and man-made type. It has the general objective of safeguarding people's security and life, providing relief and protection.
 - **Instrument Nuclear Safety Cooperation (INSC)**
The objective of this instrument is to promote a high level of nuclear safety, share best practices in management and enhance the application of efficient and effective means of security.

The sum of the different funding instruments equals, conceptually and in terms of audit for the EU, the ODA that is directly coming from EU institutions and is not imputed to member states. The figures on ODA in this report break down by sector the total amount of expense that the EU has delivered to the target countries. These tables, then, present EU funds for Egypt, Morocco and Tunisia by subject rather than by instrument.

B. Egypt

Table 8. Total EU ODA to Egypt (2008-2014) in Million EUROS

Year	ODA per Capita	Total	Social infra-structures	Economic infra-structures & Services	Production	Multisector / Crosscutting	Budget Support, Food Aid, Food Security	Action relating to debt	Humanitarian Aid	Other/ Unallocated
2008 ¹³³⁸	1.94	141.18	120.06	3.1	10.51	6.63				0.88
2009 ¹³³⁹	1.74	147.01	101.74	28.11	2.28	14.03				0.85
2010 ¹³⁴⁰	1.27	103.33	40.93	58.77	0.32	3.29				0.02
2011	0.59	48.11	34.76	2.45	1.03	3.19			6.67	0.00
2012 ¹³⁴¹	1.14	92.86	35.25	52.63	1.24	3.72				0.01
2013 ¹³⁴²	0.37	29.96	19.69	3.65	0.49	5.04			1.03	0.06
2014 ¹³⁴³	1.32	102.88	68.74	3.07	7.25	23.82				0.01

Source: Annual Reports on the European Union's development and external assistance policies and their implementation. Years 2009-2015¹³⁴⁴.

Table 9. Egypt ENPI (2007-2010) in Million EUROS

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¹³³⁸ EC (2009) Annual Report on the European Community's Development and external assistance policies in 2008. Available at: https://ec.europa.eu/europeaid/sites/devco/files/annual-report-2009-ec-development-external-assistance-policies-implementation-in-2008_en_7.pdf Development and External Assistance Policies and their Implementation in 2008. [accessed 27 May 2016]

¹³³⁹ EC (2010) Annual Report on the European Community's Development and external assistance policies in 2009. Available at: https://ec.europa.eu/europeaid/sites/devco/files/annual-report-2010-ec-development-external-assistance-policies-implementation-in-2009_en.pdf [accessed 30 Jun 2016]

¹³⁴⁰ EC (2011) Annual Report on the European Community's Development and external assistance policies in 2010. Available at: https://ec.europa.eu/europeaid/sites/devco/files/annual-report-2011-ec-development-external-assistance-policies-implementation-in-2010_en.pdf [accessed 30 Jun 2016]

¹³⁴¹ 2013 Annual Report on the European Union's development and external assistance policies and their implementation in 2012.

¹³⁴² EC (2014) SWD (2014) 258 final.

¹³⁴³ EC (2015) SWD (2015) 248 final.

¹³⁴⁴ Breakdown by country/region of external aid financed on the General Commission Budget and the European Development Fund (EDF), not imputable to member states.

Egypt National Indicative Programme (NIP) (2007-2010)		
	Programmed	Committed
Support for reform in democracy, human rights and justice		
Political development, 13.0 descentralization and promotion of good governance		n/a
Promotion and protection of 17.0 human rights and involvement of civil society in protecting in environment		n/a
Modernisation of administration 10.0 of justice and enhancement of security		n/a
Subtotal	40.18 (7.2%)	39.55 (6.4%)
Developing competitiveness and productivity of the Egyptian economy		
Subtotal	219.85 (39.4%)	276.86 (44.8%)
Ensuring sustainability of the development process with better management		
Reform of education	120.0	n/a
Public health	120.0	n/a
Investment in transport, energy 58.0 and environment sectors (as interest-rate subsidies)		n/a
Subtotal	297.97 (53.4%)	302.20 (48.0%)
NIP (2007-2010)	558.0	618.0

Table 10. Egypt ENPI and Spring Programme (2011-2013) in Million EUROS

Egypt National Indicative Programme (NIP) (2011-2013)		
	Programmed	Committed
Support for reform in democracy, human rights, and justice		
Political development, 5.0		0.0

decentralisation and promotion of good governance		
Promotion and protection of human rights and involvement of civil society in protecting environment	15.0	0.0
Modernisation of administration of justice and enhancement of security	10.0	0.0
Upgrading of regulatory, institutional and legislative environment	20.0	0.0
Subtotal	49.84 (11.1%)	0.0

Developing competitiveness and productivity of the Egyptian economy

Transport sector reform	85.0	
Energy sector reform	84.0	
Trade enhancement	20.0	
Subtotal	189.03 (42.1%)	99.27 (33.2%)

Ensuring sustainability of the development process with better management of human and natural resources

Education and voluntary education training	105.0
Water sector reform	50.0
Solid waste management	20.0
Local community development	35.0

Subtotal	210.13 (46.8%)	130.36 (43.6%)
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SPRING (2011-2013)

SPRING	N/A	7.77
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Democratic transformation and institutional building		(2.6%)
SPRING	N/A	61.59
Sustainable and inclusive growth and economic development		(20.6%)

Subtotal NIP (2011-2013)	449	299
Subtotal SPRING	N/A	90
Grand Total Egypt (2007-2013)		1,077.0

Sources: European Commission (2007) National Indicative Programme 2007-2010, pp. 27-37; European Commission (2010) European Neighbourhood and Partnership Instrument – Egypt National Indicative Programme 2011-2013; European Commission (2014) European Neighbourhood and Partnership Instrument 2007-2013. Overview of Activities and Results, p. 21.

Table 11. ENI Egypt 2014 and 2015 in Million EUROS (programmed)

European Neighbourhood Instrument Egypt (2014-2015) in Million EUROS	
2014	
Expanding Access to Education and Protection for at Risk Children in Egypt	30.0
Sustainable energy and waste water and sanitation sectors, including climate change considerations	85.0
Total ENI 2014	115.0
2015	
Citizen Rights Project	10.0
Promoting Inclusive Economic Growth in Egypt	15.0
Upgrading Informal Areas Infrastructures	26.0
Fostering Reforms in the Egyptian Renewable Energy and Water Sectors	8.0
Sustainable Energy Finance Facility	46.0
Total ENI 2015	105.0

Source: Commission Implementing Decision C (2014) 7615 on the Annual Action Programme 2014 Egypt; Commission Implementing Decision C (2015) 5244 on the Annual Action Programme 2015 Egypt; Commission Implementing Decision C(2015) 2748 on the European Neighbourhood wide Action Programme 2015.

Table 12. Neighbourhood Investment Facility Egypt 2014 in Million EUROS (programmed)

Lead Institution	Finance Operation's Title	Sector	Estimated Investment (M€)	Total NIF cost estimated request (M€)

AFD	200 MW wind Farm Gulf of Suez	Energy	340.0	30.0
AFD	Transport Alexandria	Transport	n/a	10.0
AFD	Urban development Alexandria	Multisector	n/a	0.0
KfW	Water Management and Irrigation	Water & Sanitation	480.0	40.0
AFD	Centrale PV de 20 MW	Energy	100.0	10.0
AFD	Cairo Metro Line 3 Phase 4	Transport	1000.0	40.0
EIB	EPAP III/Pollution Abatement	Environment	158.0	10.0
KfW	Windpark Gulf of Suez	Energy	340.0	17.0
EIB	H2020 Kafr El Sheikh Wastewater Expansion Project	Water & Sanitation	164.0	17.0
AFD	Egypt Natural Household Gas Connection Project	Energy	800.0	68.0

Source: Commission Implementing Decision C(2014) 5750 on the European Neighbourhood wide Action Programme 2014, p. 17 (Annex 3)

Table 13. Neighbourhood Investment Facility Egypt 2015 in Million EUROs (programmed)

Lead Institution	Finance	Operation's Title	Sector	Estimated Investment (M€)	Total cost	NIF estimated request (M€)
AFD		Solar Power plant PV-20MW	Energy	53		2.8 M
KfW/AFD		Wind Power Farm 200 MW Gulf of Suez	Energy	340		30
AFD		Urban development Alexandria	Urban	45		25
KfW		Integrated Resources programme	Water Water	260		40

Source: Commission implementing decision C(2015) 2748 on the European Neighbourhood wide Action Programme 2015, p. 22

EU Financial Assistance to Egypt 1996-2016: From MEDA to ENPI

The MEDA programme is the EC's principal financial tool to implement the EMP. In the case of Egypt, both MEDA I and MEDA II instruments showed a balance between economic and social programmes¹³⁴⁵. However, the formulation of the ENP did also serve as a proper opportunity to revise the funding instruments, resulting in the European Neighbourhood Policy Instrument (2007-2013). From 2014 onwards, the ENPI was replaced by the ENI (European Neighbourhood Instrument), and reinforced with the SPRING Programme in relation to the Arab Spring events.

MEDA I (all figures in million euros)

Year	Committed	Disbursed
1995	-	-
1996	75	-
1997	203	2
1998	397	88
1999	11	67

The report giving the data in table 1 explains how MEDA I suffered from many bureaucratic problems, especially in effectively disbursing the engaged commitments. This is due, on the one hand, to the fact that the regulatory framework for MEDA I was only ready in 1999. On the other hand, long tendering procedures also explain part of the delays. However, the ECA stated in 2006 that those projects completed at the time of their reviewing had met most of their objectives¹³⁴⁶. In addition, the total number of projects under MEDA I that were agreed only scaled to 4.

MEDA II (all figures in million euros)

¹³⁴⁵ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 15.

¹³⁴⁶ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 29.

Year	Committed	Disbursed
2000	13	64
2001	-	62
2002	78	26
2003	104	57
2004	159	151
2005	110	133

Taking into consideration both MEDA I and II performance and Egypt, the European Court of Auditors (ECA) declared in the evaluation of MEDA until 2005 that the EC had focused its attention on a limited number of fields of actions, with few interventions¹³⁴⁷. At the same time, the 2006 ECA report explores the matter of ownership through budget support operations, which were on the increase in Egypt throughout the 1995-2005¹³⁴⁸. Capacity-building operations were also found to be an important factor determining the success of the MEDA programme, and in the case of the trade enhancement programme in Egypt, the whole intervention consisted of building capacity within the participating institutions. For MEDA II, the number of total projects agreed raised up to 14.

However, the overall performance of MEDA I and II in Egypt was subject to the residual impact of the EC in the government's budget, which represents less than 1% of its total budget¹³⁴⁹.

Total EU Official Development Assistance to Egypt (2004-2014)

in Million EUROS¹³⁵⁰

¹³⁴⁷ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 15.

¹³⁴⁸ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 19.

¹³⁴⁹ European Court of Auditors, 'Special Report No 5/2006 concerning the MEDA programme, together with the Commission's replies' [2006] OJ C200/1, art. 31.

¹³⁵⁰ The data included in this table has been found in the *annual reports on the European's Union development and external assistance policies* (CY 2004-2014), listed in the bibliography.

Egypt	Committed	Disbursed
2004	165.87	167.48
2005	110.80	135.20
2006	129.00	187.88
2007	139.04	161.19
2008	152.54	141.18
2009	140.03	147.01
2010	193.50	103.33
2011	131.60	48.11
2012	250.12	92.86
2013	47.24	29.96
2014	32.75	102.88

The table presents the total committed and disbursed official development assistance (ODA) figures from 2004 to 2014 that the EU institutions dedicated to Egypt. They take into consideration the ENPI/ENI, which is the instrument that galvanises most of the funding efforts of the European institutions towards the southern neighbours. For instance, in 2013, the ENPI accounted for 47.00 million EUROS, whereas the total committed ODA imputed to European institutions was 47.24 million EUROS. The slight variation between both figures is explained by the inclusion in the data shown in the table of the commitments for the Development Cooperation Instrument (DCI), the European Instrument for Democracy and Human Rights (EIDHR), or the Instrument for Stability (IFS), among other minor funding frames¹³⁵¹.

In the case of Egypt and during the analysed period, a tipping point in terms of stability of flows can be observed from 2011 onwards, with important fluctuations both in terms of committed and disbursed funds, in contrast with the more steady figures visible for the period before 2011.

¹³⁵¹ For a detailed explanation of the different instruments and funding frames in the domain of human rights, democratisation and rule of law deployed by the EU in Egypt and Morocco, please see the Annexes.

C. Morocco

Table 14. Total EU ODA to Morocco (2008-2014) in EUR million

	ODA per Capita	Total	Social infrastructure	Economic Infrastructure & Services	Production	Multisector/Crosscutting	Budget Support, Food Aid, Food Security	Action relating to debt	Other unallocated
2008	7.49	228.4	187.32	23.61	6.25	11.17	0.00	0.00	0.05
2009	6.28	203.35	116.74	60.9	4.24	5.75	15.54	0.00	0.19
2010	5.28	168.7	110.47	29.66	26.27	2.28	0.00	0.00	0.02
2011	4.77	152.54	66.94	55.99	16.57	0.6	12.43	0.00	0.00
2012	3.54	113.14	63.52	23.06	9.83	13.28	3.45	0.00	0.00
2013	2.71	86.6	54.8	14.29	7.34	6.42	3.62	0.00	0.13
2014 ¹³⁵²	2.56	80.94	45.91	0.67	31.25	2.68	0.00	0.00	0.42

Source: Annual Reports on the European Union's development and external assistance policies and their implementation. Years 2009-2015. Refer to table 5 for detailed references.

Table 15. Morocco ENPI (2007-2010) in Million EUROS

Morocco National Indicative Programme (NIP) (2008-2010)		
	Programmed	Committed
Social sector	45.3%	310 (42.9%)
Governance and human rights	4.3%	7.95 (1.1%)
Institutional support	6.1%	93.22 (12.9%)
Economic sector	36.7%	261.58

¹³⁵² EC (2015) 2015 Annual Report on the European Union's development and external assistance policies and their implementation in 2014. SWD (2015) 248 final.

		(36.2%)
Environment	7.6%	49.86 (6.9%)
NIP 2007-2010	654	722.6

Source: European Commission (2007) National Indicative Programme 2007-2010, pp. 27-37

Table 16. Morocco ENPI and Spring Programme (2011-2013) in Million EUROS

Morocco National Indicative Programme (NIP) (2011-2013)		
	Programmed	Committed
Social sector	116.1 (20.0%)	185.63 (26.2%)
Economic sector	58.05 (10.0%)	60.22 (8.5%)
Institutional support	232.2 (40.0%)	252.23 (35.6%)
Governance and human rights	87.08 (15.0%)	45.34 (6.4%)
Environment	87.08 (15.0%)	36.84 (5.2%)
SPRING (2011-2013)*		
SPRING – Democratic transformation and institution building	-	14.88 (2.1%)
SPRING – Partnership with people	-	9.92 (1.4%)
SPRING – Sustainable and inclusive growth and economic development	-	103.44 (14.6%)
Subtotal NIP 2011-2013	580.5	555.5
Subtotal SPRING	-	128

Special measures	-	25
Grand Total Morocco (2007-2013)	1234.5	1431.1

Source: European Commission (2010) European Neighbourhood and Partnership Instrument – Egypt National Indicative Programme 2011-2013; European Commission (2014) European Neighbourhood and Partnership Instrument 2007-2013. Overview of Activities and Results, p. 21. *Programmed figures for SPRING do not exist, as it is an *ad hoc* programme, in the same way as special measures.

Table 17. ENI Morocco 2014 and 2015 in Million EUROS (programmed)

European Neighbourhood Instrument Egypt (2014-2015) in Million EUROS	
2014	
Health reforms	90.0
Justice	70.0
Solar power plant	38.0
Support for the green energy sector (loans)	20.0
Total ENI 2014	118.0
2015	
Reform of the penitentiary system	5.0
Reform of the vocational training system	45.0
Boost of economic growth and competitiveness	100.0
Sustainable development and competitiveness of the private sector	30.0
Total ENI 2015	180.0

Source: EC. European Neighbourhood Policy and Enlargement Negotiations. Morocco. Available at: http://ec.europa.eu/enlargement/neighbourhood/countries/morocco/index_en.htm [accessed 18 May 2016]

Table 18. Neighbourhood Investment Facility Morocco 2014 in Million EUROS

Lead Finance Institution	Operation's Title	Sector	Estimated Investment (M€)	Total cost	NIF estimated request (M€)
AFD	Programme Nationale	Environment	80		n/a

	d'assainissement – phase II			
AFD	Création des instituts de formation aux métiers des énergies renouvelables et de l'efficacité énergétique	Social	26	10
AFD	Appui au système éducatif marocain 2	Social	n/a	n/a
KfW	Projet ATLAS - développement de 8 centrales solaires photovoltaïques	Energy	300	20
KfW	Gestion Intégrée des Ressources en Eau (GIRE/IWRM)	Water & Sanitation	n/a	n/a
KfW	Centrale de dessalement de Guelmin/Tan-tan	Environment	n/a	n/a
KfW	Projet ATLAS - développement de 8 centrales solaires photovoltaïques	Energy	300	15
EIB	Technopôles	Private sector	288	9
EIB	Centrale électrique thermo-solaire de Ouarzazate III [CSP tower]	Energy	800	50
EIB	3ème ligne d'interconnexion électrique Maroc / Espagne	Energy	n/a	n/a

Source: Commission Implementing Decision C(2014) 5750 on the European Neighbourhood wide Action Programme 2014, p. 18-19 (Annex 3).

Table 19. Neighbourhood Investment Facility 2014 in Million EUROS (programmed)

Lead Institution	Finance	Operation's Title	Sector	Estimated Investment (M€)	Total cost	NIF estimated request (M€)
AFD		Programme	Environment	80		tbd

	national d'assainissement – phase 2				
AFD	Technopolesdevelo pement	Private sector	288		9
AFD	3ème d'interconnexion elétrique Maroc/Espagne	ligne Energy	Tbd		tbd

Source: Commission implementing decision C(2015) 2748 on the European Neighbourhood wide Action Programme 2015, p. 22

D. Tunisia

Table 20. Total EU ODA to Tunisia (2008-2014) in EUR million

	ODA per Capita	Total	Social infra- structure s	Econom ic Infra- structur es& Services	Productio n	Multi- sector/ Crosscuttin g	Budge t Suppo rt Food Aid, Food Securi ty	Action relatin g to debt	Huma nitaria Aid	Other /Unallo cated
2008	5.69	57.51	44.08	1.14	10.47	1.61	0.2	n/a	n/a	0.02
2009	7.48	77.64	41.11	3.8	4.7	3.72	24.09	n/a	n/a	0.22
2010	6.66	69.82	13.98	28.64	7.92	1.15	18.07	n/a	n/a	0.05
2011	12.44	130.3 8	34.79	2.4	2.15	9.75	69.47	n/a	11.76	0.18
2012	14.05	147.2 8	19.37	0.93	7.03	56.66	63.24	n/a	n/a	0.04
2013	8.44	88.51	33.2	4.76	4.49	19.03	25	n/a	2.02	0.01
2014	17.1	181.8 1	54.74	0.92	3.67	5.57	116.8 1	n/a	0.06	0.03

Source: Source: Annual Reports on the European Union's development and external assistance policies and their implementation. Years 2009-2015.

Table 21. Tunisia ENPI 2007-2010 in Million EUROS

Tunisia National Indicative Programme (NIP) 2007-2010

	Programmed	Committed
Economic governance, competitiveness and convergence with the EU	180.0 (60.0%)	139.2 (46.4%)
Improved graduate employability	65.1 (21.7%)	59.1 (19.7%)
Sustainable development	54.9 (18.35%)	101.7 (33.9%)
Total NIP 2007-2010	300.0	300.0
Special measures	-	30.0

Source: European Commission (2014) European Neighbourhood and Partnership Instrument 2007-2013. Overview of Activities and Results

Table 22. Tunisia ENPI 2011-2013 and SPRING in Million EUROS

Tunisia National Indicative Programme (NIP) (2011-2013)		
	Programmed	Committed
Employment and social protection	55.92 (23.3%)	38.54 (9.4%)
Integration support programme II	87.12 (36.3%)	0 (0.0%)
Business competitiveness (industry and services)	79.92 (33.3%)	168.1 (55.8%)
Governance and justice	17.04 (7.1%)	0 (0,0%)
SPRING – Democratic transformation and institution building	-	29.52 (7.2%)
SPRING – Sustainable and inclusive growth and economic development	-	113.16 (27.6%)
Total NIP 2011-2013	240	255
Special measures		35
SPRING		155
Grand Total Tunisia 2007-2013	540	775

Source: European Commission (2014) European Neighbourhood and Partnership Instrument 2007-2013. Overview of Activities and Results

Table 23. ENI Tunisia 2014 and 2015 in Million EUROS

European Neighbourhood Instrument Tunisia (2014-2015) in Million EUROS	
2014	
Economic recovery	100.0
Justice reform	15.0
Strengthening the audiovisual sector	10.0
Promotion of gender equality	7.0

Improvement for living conditions in disadvantaged urban districts	28.0
Border management and international protection of migrants	3.0
Additional programme to support civil society and capacity building	6.0
Total ENI 2014	169.0
2015	
Support to private sector, vocational training and employment	32.0
Support to security reform sector	23.0
Decentralisation and integrated development of regions	43.0
Support to the integration process and Association Agreement	12.8
Support for the cultural sector	6.0
Support to economic development and social inclusion*	70.0
Total ENI 2015	186.8

Source: DEVCO. Tunisia. Available at: http://ec.europa.eu/enlargement/neighbourhood/countries/tunisia/index_en.htm [3 June 2016]

*This programme was adopted in the second part of the Annual Action Plan for Tunisia 2015 in December.

Table 24. Neighbourhood Investment Facility Tunisia 2014 in Million EUROS

Lead Institution	Finance	Operation's Title	Sector	Estimated Investment (EUR M)	Total NIF estimated cost request (EUR M)
AFD		H2020 Assainissement des zones côtières (collecte et épuration)	Water Sanitation	& 110	8
KfW		Central électrique thermo-solaire/Akarit	Energy	260	15
EIB		H2020 Mise en terril du phosphogypse à Gebès	Environment	200	20
KfW		Energy Efficiency in the Waste Water Sector	Water Sanitation	& n/a	n/a
KfW		Central Photovoltaïque (PV) Tozeur 10 MW	Energy	18,8	1,5
AFD		SUNREF (Sustainable Use of Natural Resources and Energy Facility)	Use Energy	50	5

AFD	Programme d'appui à la Social formation professionnelle et à l'insertion		n/a	n/a
AFD	Programme d'investissements communes	Multi-sector des	n/a	n/a

Source: Commission Implementing Decision C (2014) 5750 on the European Neighbourhood wide Action Programme 2014, p. 20 (Annex 3)

Table 25. National Investment Facility Tunisia 2015 in Million EUROS

Lead Institution	Finance	Operation's Title	Sector	Estimated Investment (EUR M)	Total cost	NIF estimated request (EUR M)
AFD		H2020 Assainissement des zones côtières	Water Environment	& 110		8
EIB		H2020 Mise en terril du phosphogypse à Gabès	Environment	200		20
KfW		Energy efficiency in the waste water sector	Water Environment	& 51		5
KfW		Central Solar PV -10 MW (Tozeur)	Energy	61		5

Source: Commission implementing decision C(2015) 2748 on the European Neighbourhood wide Action Programme 2015, p. 22-23.

E. EU ODA broken down by country and instrument for the period 2012-2014

Table 26. EU disbursements in Million EUROS in Egypt per applicable instruments (2012-2014)

Egypt	ENI	DCI-Thematic	IfS	ECHO	Other	INSC	Total
2012	87.55	2.45	1.86	0.00	0.00	0.09	92.86
2013	25.6	1.19	1.36	1.03	0.07	0.16	29.96
2014	93.99	1.4	1.94	0.00	1.1	0.3	102.88

Source: EC SWD (2015) 248 final, EC SWD(2014) 258 final and 2013 Annual Report on the EU's development and external assistance for 2012.

Table 27. Disbursements in Million EUROS in Morocco per applicable instruments (2012-2014)

Morocco	ENI	DCI-	IfS	ECHO	Other	INSC	Total
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		Thematic						
2012	109.39	2.34	0.00	0.00	0.00	0.33	113.14	
2013	84.02	1.84	0.00	0.00	0.13	0.00	86.6	
2014	77	2.22	0.00	0.00	0.35	0.00	80.94	

Source: EC SWD (2015) 248 final, EC SWD(2014) 258 final and 2013 Annual Report on the EU's development and external assistance for 2012.

Table 28. Disbursements in Million EUROS in Tunisia per applicable instrument (2012-2014)

Tunisia	ENI	DCI- Thematic	IfS	ECHO	Other	INSC	Total
2012	143.48	0.52	0.04	0.00	0.00	0.00	147.28
2013	86.24	0.3	0.21	2.02	0.00	0.00	88.51
2014	178.04	0.26	0.16	0.06	0.00	0.00	181.81

Source: EC SWD (2015) 248 final, EC SWD (2014) 258 final and 2013 Annual Report on the EU's development and external assistance for 2012.