



The role of human rights in the EU's external action in the Western Balkans and Turkey

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Executive Summary

This report discusses the role of human rights in the EU's enlargement policy to the Western Balkans and Turkey. 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 as well as, in more detail, the instruments of enlargement, and presented the various inconsistencies of the EU's human rights promotion in its external action. The objective of this report is to demonstrate, on the basis of three country case studies, how the EU's tools and instruments operate in the enlargement context, what human rights priorities these instruments reveal, how these priorities have changed over time and how consistent they have been, and what they reveal about the weight and place of human rights within the EU's general conditionality policy. The report will analyse which human rights issues and vulnerable groups have been prioritised in the context of conditionality requirements in EU documents or promoted by political statements or financial instruments and which have not been. The overview will also assess whether there was coherence in monitoring across instruments as well as over time. The report consists in the study of the EU's engagement in Bosnia and Herzegovina from 2000 to 2015, in Serbia from 2009 to 2015 and in Turkey from 1999 to 2015. Considering that all the three countries examined in this report are on the enlargement track, we analyse the EU's external policies and human rights conditionality in this context. The ultimate question of human rights conditionality is whether the EU consistently follows up on its own criteria, i.e. whether the incentives set for meeting the conditions are then actually handed out as rewards and in turn whether the failure to meet the requirements results in suspension or deferral of the integration process or the cutting of assistance funds. We are looking extensively at enlargement instruments and add, in all three cases, the visa liberalisation process because that played/plays an important role in the EU's human rights conditionality, despite not being an instrument specific to enlargement.

In the introduction (Chapter I) we will review the various explanations of the challenges for the EU's human rights conditionality in the Western Balkans and Turkey as presented in the literature. Several authors propose historical arguments, most importantly referring to the recent Balkan conflicts; to the weakness of state structures in certain contexts; to national identities conflicting with goals pursued during enlargement; and to the various sources of inconsistencies on the side of the EU in the enlargement context. Inconsistency arguments are central to criticism surrounding the EU's external human rights policies, a general overview and categorization of which was already presented in Deliverable 6.1. We will revisit these arguments in the concluding chapter in light of the country case studies.

Chapter II discusses the EU's human rights policy towards Bosnia and Herzegovina. The period before the Treaty of Lisbon and tools employed under the Stabilisation and Association Process (SAP) before candidacy will be analysed primarily through studying the EU's policy towards Bosnia and Herzegovina (BiH), which until today has not been able to move beyond the stage of association. BiH signed the SAA with the EU in 2008 but it was implemented only in June 2015. Given that BiH had mostly been stuck in its relations with the EU in the post-Lisbon period, it would be difficult to understand the present situation without investigating pre-Lisbon developments. Therefore, the analysis of the EU's instruments will go back to the year of 2000, the beginning of the SAP and will end in November 2015 when the last progress

report was published. Given the complexity of the Bosnian institutional context, the chapter devotes a separate part to explaining the current constitutional setup, and the general context the EU was operating in Bosnia in the 2000s. This is completed by an overview on the main human rights challenges, providing a background to the EU's human rights conditionality: the problem of refugees, minorities, ethnic segregation in schools affecting children's rights, the need for and failed attempts of constitutional reform, the prosecution of war crimes, and the problems of media freedom. This is followed by the assessment of the applied EU instruments.

The first period to be analysed spans from the beginning of the SAP in 2000 up until the signing of the Stabilisation and Association Agreement (SAA) in 2008. During this time frame the relevant instruments included the EU Road Map in 2000, the Feasibility Study in 2003, the 2004, 2006 and 2008 European Partnerships, Community Assistance for Reconstruction, Development and Stabilization (CARDS) and Instrument for Pre-Accession Assistance (IPA) documents, the SAA signed in 2008, progress reports, and EP resolutions. We review these instruments in order to establish the EU's human rights priorities and to check how consistent these priorities were across instruments and over time. During this period the EU focused on a few human rights topics such as minority rights and the rights of the Roma, refugee return, broadcasting reform which relates to media freedom, the consolidation of human rights institutions and cooperation with the International Tribunal for the Former Yugoslavia (ICTY). Among these only two became essential conditions that were only indirectly related to human rights: ICTY cooperation and the broadcasting reform. By the end of this period, there was significant progress in the creation and consolidation of human rights institutions, in the area of war crimes prosecution and refugee return. EU influence played a partial role in achieving these results. The High Representative's engagement was at least as important, and the Office of the High Representative (OHR) and the EU coordinated their actions between themselves in several issue areas, while many reforms were outcomes of the OHR's interventions. Although the focus of our analysis is human rights, it is important to bear in mind that the EU had a much wider agenda for BiH centring on post-conflict reconstruction and state building. The chapter concludes that on the whole, human rights conditions seemed to have remained of secondary importance in the EU's conditionality policy towards Bosnia. The primary focus was the stabilisation of the country and making it more functional, somewhat in contrast to the EU's rhetoric on human rights as expressed in the progress reports.

The next section of Chapter II discusses the period after 2008 when the EU's leverage over Bosnia significantly weakened. During this time, the visa liberalisation process provided a crucial window of opportunity for the EU to exert some influence. This proved to be the most effective tool among all the applied instruments in terms of human rights promotion. Therefore, we give a detailed account of the visa liberalisation process with a focus on its human rights related conditions. We also look at the more traditional tools such as the yearly progress reports, enlargement strategies, IPA documents and Council conclusions, while also analyse the special instruments that the EU employed in Bosnia in order to keep the country on the integration path, such as the Structured Dialogue on Justice, the High Level Dialogue on the Accession Process and the Compact for Growth. After the assessment of the instruments, we examine a few selected topics in terms of achieved progress. This allows us to assess the impact of the EU's human rights conditionality through the examples of anti-discrimination, children's rights, Roma

rights and media freedom. These areas have received a lot of attention from the EU since the early phase of the SAP, thus a close investigation into these areas should demonstrate the impact of EU instruments on domestic policy fields. However, we found that since the signing of the SAA in 2008, Bosnian political leaders have been reluctant to comply with EU conditions and, as a result, the EU enjoyed a relatively low degree of leverage over the country. Conditionality thus remained limited in terms of its effect on human rights performance.

Chapter III presents the case study of the EU's human rights policy towards Serbia, which allows for analysing the tools applied to accession candidates. Comparing the cases of BiH and Serbia can also reveal whether the different degrees of EU leverage lead to differences in human rights performance. Since 2011 – marking the extradition of the last remaining high profile fugitives to The Hague – Serbia has shown a strong commitment to EU integration and willingness to comply with EU conditions, primarily demonstrated by its approach to Kosovo. As a result, Serbia was awarded EU candidacy in 2012 and could open accession negotiations in 2014. Since the EU has regarded Serbia as sufficiently meeting the Copenhagen criteria, including the respect of human and minority rights, as opposed to Bosnia, a higher level of protection of human rights could be expected. To test this, we look at human rights performance on the ground as well as the reaction of the EU, through assessing the use of the various instruments. After providing a brief general background of the relations between the EU and Serbia since the fall of the Milošević regime with a view on the changing context of rule of law and democratisation, the EU's tools and instruments will be presented in a systematic way for the period of 2009-2015 with a focus on their human rights dimension: the visa liberalisation process, progress reports and enlargement strategies, the European Commission's opinions on Serbia's membership application, the Negotiation Framework, the Screening Report for Chapter 23, IPA documents, Council conclusions, dialogues between Serbia and the EU, and the European Parliament's resolutions. Given that Serbia's relations with the EU were upgraded to the highest level before actual membership, we would expect improving trends in human rights. We look in more details into conditionality concerning national minorities, Roma rights and media freedom in order to see what has been the content and the impact of EU conditionality. The analysis reveals a mixed picture about human rights performance in Serbia, with serious relapses in some areas such as freedom of expression and media freedom. Clearly, Serbia progressed on the EU integration path due largely to its efforts to improve relations with Kosovo. Now that accession negotiations have started, hopes, especially in the NGO community, are high that the process will advance reforms already initiated in key areas once Chapter 23 is open.

Chapter IV gives an account of human rights promotion through EU enlargement policy in the case of Turkey, another accession candidate country. The analysis will cover the period after Turkey was awarded candidate status in 1999 up to the publication of the 2015 Enlargement Strategy and the Progress Report in November 2015. First, we will present an overview of Turkey's accession process and its changeable relation with the EU as an enlargement country which sets the framework for the ensuing analysis. The EU's efforts to promote human rights are assessed on two levels: (1) on a more general level, we look at the instruments applied and the priorities chosen on the part of the EU and these related to the reforms taken on the Turkish side; (2) at a closer look, two specific areas will show how conditionality relates to domestic implementation. The analysis looks into the use of the following instruments: human rights

conditionality based on the Copenhagen criteria as a central instrument, accession negotiations with their human rights relevant formal and methodological elements, the Positive Agenda launched in 2012, the annual progress reports as monitoring tools as well as the accompanying enlargement strategies, financial and technical assistance. The four Accession Partnerships adopted since 2001 as well as relevant Council conclusions and EP resolutions will also be incorporated and discussed in these sub-sections. Similar to the Bosnian and Serbian cases, the visa liberalisation process will deserve special attention, given the entailed human rights requirements and the current efforts to advance the process. The overview will allow us to trace consistencies and inconsistencies on this more general level and assess developments over time. At the end of the chapter, the analysis will look into two human rights issue areas in more detail, the promotion of gender equality and the respect of minority rights. These two issue case studies will allow the assessment of the impact conditionality had on the ground, presenting a more in-depth analysis of two areas that both revolve around the concept of equality, a central feature of EU human rights policy. This enables us not only to evaluate the EU's impact, but also to lay the basis for specific policy recommendations, informing our final conclusions.

In terms of our findings about Turkey, we have seen that the incentive of starting accession negotiations triggered considerable human rights reforms in the years 1999-2005. Yet, after the launch of negotiations, reforms slowed down as the credibility of the membership perspective faded, and several chapters were blocked by Member States for unilateral reasons. Although the rapprochement between Turkey and the EU over the refugee situation since autumn 2015 has instilled new dynamics into the accession process, the current situation can be characterised as one where the enlargement-inherent power asymmetry between the EU and Turkey is changing to the benefit of Turkey. Such a shift in power relations makes it more difficult for EU to apply credible and consistent human rights conditionality and to not 'sell out' its values.

Chapter V presents conclusions by assessing the consistency and coherence of the EU's human rights policy across the three cases. All the three case studies revealed inconsistencies between the EU's rhetoric and action. We found that human rights have played an important role in the EU's conditionality policy in the two Balkan cases, but verbal commitments were often not followed by actions, which undermined the credibility of conditionality policy. In the case of Turkey, we witnessed a tension between the political decision to upgrade the country's status on the enlargement roadmap and the more consistent assessment, by the Commission, of the country's actual progress.

Real progress in terms of implementation happened in the target countries when the EU was willing to use negative conditionality such as regarding ICTY cooperation or invested financially into a policy field (IDPs, refugees and the Roma). Concerning Bosnia and Serbia, the EU has generally refrained from applying sanctions for the inadequate fulfilment of human rights criteria except for the issue of ICTY cooperation and compliance with the *Sejdić-Finci* case. By contrast, vis-à-vis Turkey, the EU did apply legitimate sanctions as part of its human rights conditionality before the opening of accession negotiations. However, after launching the talks, the unilateral blockage of chapters, especially Chapter 23, for bilateral reasons, can be seen as the key element of inconsistency in the case of Turkey.

It might be surprising that the analysis showed that the most potent tool of human rights conditionality in both Balkan states fell outside of the enlargement framework and of human rights conditionality instruments. This was visa liberalisation, and the two Balkan cases suggest that the EU could similarly use its leverage in the case of Turkey, too.

There is room for improvement in the operationalisation of human rights: the priorities set by the EU tended to be vague and blurred, keeping it unclear how progress in their implementation is to be measured. Moreover, human rights conditions are often not linked to the different stages of EU integration and are presented instead as general requirements formulated in broad terms. For a more effective conditionality policy, conditions should not only be credible but also small-scale. The EU should provide feedback in the form of sanctions or rewards on incremental changes along the EU integration path. Finally, the inconsistencies between the EU's expectations towards candidates and the performance of EU Member States might also weaken the power of conditionality, for instance in the case of the right for asylum, Roma rights and media freedom. Based on the observations made in the studies, the report concludes with a list of policy recommendations.

List of Abbreviations

AKP	Justice and Development Party (Adalet ve Kalkınma Partisi)
AP	Accession Partnership
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
CARDS	Community Assistance for Reconstruction, Development and Stabilization
CBM	Closing benchmarks
CEEC	Central and Eastern European Country
CERD	Committee on the Elimination of Racial Discrimination
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRA	Communication Regulatory Agency
CSDP	Common Security and Defence Policy
DPA	Dayton Peace Accords
DS	Democratic Party (Demokratska stranka)
DSS	Democratic Party of Serbia (Demokratska stranka Srbije)
EACRRI	European Alliance of Cities and Regions for Roma Inclusion
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIDHR	European Instrument for Democracy and Human Rights
EP	European Parliament
ESDP	European Security and Defence Policy
EU	European Union
EUD	European Union Delegation
EUFOR	European Union Force
EULEX	European Union Rule of Law Mission in Kosovo
EUPM	European Union Police Mission
EUSR	European Union Special Representative
FBiH	Federation of Bosnia and Herzegovina
FCNM	Framework Convention for the Protection of National Minorities
HDP	Peoples' Democratic Party (Halkların Demokratik Partisi)
HLAD	High Level Accession Dialogue
HLD	High Level Dialogue
HLDAP	High Level Dialogue on the Accession Process
HR	Human Rights / High Representative
ICC	International Criminal Court
ICG	International Crisis Group
ICJ	International Court of Justice
ICTY	International Tribunal for the Former Yugoslavia

IDP	Internally displaced person
IGC	Intergovernmental Conference
IMC	Independent Media Commission
IMF	International Monetary Fund
IPA	Instrument of Pre-Accession Assistance
IREX	International Research & Exchanges Board
KSGM	General Directorate on the Status of Women ((Kadının Statüsü Genel Müdürlüğü)
KSSGM	General Directorate for the Status and Problems of Women (Kadının Statüsü ve Sorunları Genel Müdürlüğü)
LGBT(I)	Lesbian, Gay, Bisexual, Transgender (and Intersex)
MEP	Member of the European Parliament
MIPD	Multi-annual Indicative Planning Document
MP	Member of Parliament
MRG	Minority Rights Group International
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NPAA	National Programme for the Adoption of the Acquis
NPM	National Preventive Mechanism
OBM	Opening benchmarks
OBN	Open Broadcast Network
OHR	Office of the High Representative
OPCAT	Optional Protocol to the UN Convention against Torture
OSCE	Organization for Security and Cooperation in Europe
PIC	Peace Implementation Council
PKK	Kurdistan Workers' Party (Partiya Karkerên Kurdistanê)
PM	Prime Minister
PSB	Public Service Broadcasting
PSC	Political and Security Committee
RCC	Regional Cooperation Council
RS	Republika Srpska (Serbian Republic)
SAA	Stabilisation and Association Agreement
SAC	Stabilisation and Association Council
SAP	Stabilisation and Association Process
SAPC	Stabilization and Association Parliamentary Committee
SDP	Social Democratic Party
SEIO	Serbian European Integration Office
SFRY	Socialist Federal Republic of Yugoslavia
SOGI	Sexual orientation and gender identity
TAIB	Transition Assistance and Institution Building
TAIEX	Technical Assistance and Information Exchange
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UPR	Universal Periodic Review
US	United States
VAT	Value added tax
VLD	Visa liberalisation dialogue
WCC	War Crimes Chamber
WP	Work Package

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I. Introduction

Enlargement is generally viewed as the EU's most efficient foreign policy instrument in terms of its ability to transform existing practices and institutional structures outside of its borders. Less is known about how it works on the ground, in specific contexts. This report aims at investigating how human rights conditionality operates in the enlargement area and what its real impact is on existing human rights practices of the target countries.

Despite the generally high leverage and the efforts of monitoring, for example through the meticulous assessment in the Commission's annual progress reports, most of the enlargement literature share the view that the EU's record is mixed at best in spreading democratic norms in a credible and effective fashion during the accession process.¹ Experiences from the Central Eastern European enlargement² have also revealed the limits of the EU's democratic conditionality, as measured by implementation and post-accession performance.³ The central question addressed by academic research on enlargement is how to explain this underperformance.⁴

Despite the impressive size of this burgeoning scholarship, most authors assess democratisation and the promotion of human rights without considering individual rights.⁵ This only allows for a relatively superficial analysis. Although there are a few authors who look into the details of human rights conditionality during the accession process, these works bring in only haphazard details about the EU's human rights conditionality (see more in following section I.A). A more systematic research is lacking, one

¹ Tina Freyburg and Solveig Richter, 'National identity matters: the limited impact of EU political conditionality in the Western Balkans' (2010) 17(2) *Journal of European Public Policy*; Gergana Noutcheva, 'Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans' (2009) 16(7) *Journal of European Public Policy* 1065-1084; Geoffrey Pridham, 'Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities' (2007) 14(3) *Democratization*.

² An equally fascinating research project could seek to assess the lessons from the CEE enlargement in light of the worrying tendencies in countries like Hungary or Poland. We will make some general references to these cases but cannot seek to carry out that assessment here.

³ Geoffrey Pridham, *Designing Democracy. EU Enlargement and Regime Change in Post-Communist Europe* (Palgrave Macmillan 2005); Florian Trauner, 'Post-accession compliance in the EU's new member states (2010) in Frank Schimmelfennig and Florian Trauner F (eds), *European Integration online Papers* 13/2 <<http://eiop.or.at/eiop/texte/2009-021a.htm>> accessed 27 July 2014; Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

⁴ Tanja A. Börzel, 'When Europeanization hits limited statehood' (2011) KFG Working Papers 30; Maria Green Cowles, James A. Caporaso and Thomas Risse-Kappen, *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001); Frank Schimmelfennig, 'The International Promotion of Political Norms in Eastern Europe: A Qualitative Comparative Analysis' (2005) Jean Monet/Robert Schuman Paper Series 5/28.

⁵ We are not looking here at the conceptual dilemmas of democracy, human rights and rule of law. For such an overview in the FRAME project, see Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' (2014) FRAME Report 3.2 <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 19 April 2016.

focusing on the *content* of the EU's human rights promotion in the Western Balkans and Turkey in the context of the current enlargement process. Therefore, this report intends to provide an analysis of human rights conditionality in its content across countries and over time, which would allow for a better understanding of why the EU often fails to achieve the desired transformative effect.

The preceding stage of present research – see Deliverable 6.1, especially its fourth chapter⁶ – presented a description of the instruments of enlargement in considerable detail, with special focus on tools targeting states of Southeast Europe. We will build on that overview and will try to avoid mere repetition by focusing on more specific questions: what human rights priorities these instruments reveal, how these priorities have changed over time, how consistent they have been with each other, and what the weight and place of human rights is within the EU's general conditionality policy. Such an analysis will be conducted by studying the EU's engagement in Bosnia Herzegovina from 2000 to 2015, in Serbia from 2009 to 2015 and in Turkey from 1999 to 2015. The ultimate question of human rights conditionality is whether human rights concerns eventually become 'make or break issues', i.e. whether failure to meet the requirements results in tangible sanctions like the suspension or deferral of the Stabilisation and Accession Process (SAP) or the cutting of assistance funds by the EU. The EU monitors a number of human rights issues, but even serious shortcomings or, more importantly, backsliding in a number of areas often do not lead to reprisals, as the example of Macedonia demonstrates.⁷ Performance concerning human and minority rights hardly improved between 2001 and 2009, still Macedonia in 2005 became an EU candidate, and the Commission recommended opening membership negotiations with the country in 2009.⁸

This report will assess human rights priorities by analysing the following questions: which human rights issues and vulnerable groups have been highlighted in the context of conditionality requirements in EU documents or promoted by political statements or financial instruments and which have not been, and whether there was coherence in monitoring across instruments and over time. The latter means whether conditions raised at a certain point were followed up during subsequent years or disappeared from the radar. For instance in the case of Croatia, minority councils were emphasized in progress reports yet were not part of the screening reports and thus the accession negotiations.⁹

Arguments of inconsistency are usually central to criticism surrounding the EU's external human rights policies (for a detailed overview and categorization, see Deliverable 6.1 Chapter II).¹⁰ Here we will first

⁶ Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, 'Report on mapping, analysing and implementing foreign policy instruments in human rights promotion' (2014) FRAME Report 6.1, 110 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 19 April 2016.

⁷ Maria Koinova, 'Challenging Assumptions of the Enlargement Literature: The Impact of the EU on Human and Minority Rights in Macedonia' (2011) 63(5) *Europe-Asia Studies* 808.

⁸ This recommendation was repeated until 2014. It was ultimately the Greek veto that put the brakes on Macedonia's EU integration process. Democratic conditions in the recent years deteriorated even more in light of events surrounding the surveillance scandal. See more on page 16 of this report.

⁹ Presentation by Dr. Simonida Kacarska, European Policy Institute, Skopje at the MAXCAP conference 'EU integration and minority protection in the Western Balkans: Mapping the way ahead,' 20-21 November 2014, Sarajevo.

¹⁰ Fraczek et al (n 6) 46.

focus on the inconsistencies of the EU's human rights policy in the Western Balkan context and in Turkey. This would be followed by an assessment of the role of human rights in the EU's conditionality policy in the current enlargement context by studying three cases: Bosnia and Herzegovina (hereinafter: Bosnia or BiH), Serbia and Turkey. Focusing on some key areas like non-discrimination, minority rights or freedom of press will allow a deeper analysis within the limits of this report and present some conclusions about the effectiveness of the human rights conditionality. Other issues such as corruption and the functioning of courts or rule of law in general, which at certain points are closely related to and might even overlap with human rights, will only be mentioned where necessary keeping in mind the focus of the case studies.

Reflecting the diversity of the instruments the EU has been using since the 1990s this report will analyse a wide variety of EU instruments. After the conflicts of the 1990s in the Western Balkans the EU was mostly present through European Security and Defence Policy (ESDP) missions in the region. The Stabilisation and Association Process (SAP), launched in 1999, provided the first comprehensive framework of the EU's engagement in the region, and offered a European perspective to the Western Balkan states.¹¹ Although the SAP presented various instruments to the EU, the tools employed during the accession process are probably the most important from a human rights point of view. In the case of Turkey, the accession process on the basis of the 1963 Ankara Agreement had progressed rather unsteadily before the eventual establishment of a customs union in 1996, and it was only after the country obtained accession candidate status in 1999 that enlargement-specific human rights conditionality became the major tool for sparking domestic change. It was by launching negotiations with Turkey and Croatia that a special negotiation chapter specifically devoted to the judiciary and fundamental rights (Chapter 23) was created in 2005, and a so called 'new methodology' was adopted that is composed of screening, benchmarking and the introduction of the suspension clause. In 2011 the EU adopted the 'New Approach' that links the opening of Chapters 23 and 24 ('Justice, Freedom and Security') to the start of the accession negotiations.¹² Therefore, it is crucial, from the perspective of human rights promotion, to investigate how instruments employed during accession process have been operating.

There are also tools available within the enlargement framework that can be applied to countries that are not yet at the stage of membership negotiations (or have not even obtained candidate status, but are defined as potential candidate countries).¹³ Such instruments employed under the SAP include conditionality expressed through feasibility studies, European partnership documents and yearly progress reports, the visa liberalisation process, the various financial instruments – the Community Assistance for

¹¹ 'Recognised during the Feira European Council in 2000 and confirmed by the Thessaloniki European Council in 2003, this European perspective is integrated into the stabilisation and association process, which is the European Union's policy in relation to the countries of the Western Balkans.' Europa.eu, 'Summaries of EU Legislation, The stabilisation and association process: the western Balkans' <http://europa.eu/legislation_summaries/enlargement/western_balkans/index_en.htm> accessed 15 September 2015.

¹² Fraczek et al (n 6) 116.

¹³ At the time of writing, Montenegro, Serbia and Turkey are conducting accession negotiations, Albania and Macedonia are candidates not yet negotiating and BiH and Kosovo fall under potential candidate countries. All these states are termed enlargement countries. See European Commission, European Neighbourhood Policy and Enlargement Negotiations 'Check current status' <http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm> accessed 8 March 2016.

Reconstruction, Development and Stabilisation (CARDS) and the Instrument for Pre-accession (IPA) – or the High Level Dialogue on the Accession Process (HLDAP) with BiH and Macedonia and the Structured Dialogue on Justice with Bosnia.

This report will investigate the enlargement instruments and their function in human rights promotion both within and outside of the context of the accession process. As regards the Western Balkans, given the relatively long timeframe since the launching of the SAP in 1999 and the involvement of five to seven countries depending on the year chosen, the post-Lisbon period will be the focus of this report by examining the EU policy towards BiH and Serbia. The period before Lisbon and tools employed under the SAP before candidacy will be also analysed through studying the EU's policy towards BiH, which until today has not been able to move beyond the stage of association. BiH signed the SAA with the EU in 2008 but it was implemented only in June 2015. Since BiH's relations with the EU in the post-Lisbon period have been mostly in a deadlock, it would be difficult to understand the present situation without investigating pre-Lisbon developments. Therefore, the analysis will go start in 2000, the beginning of the SAP for BiH and will end in November 2015.

Comparing the two Balkan cases also allows us to see whether different degrees of EU leverage lead to differences in human rights performance. Since 2011, the extradition of the last remaining high profile fugitives to the ICTY, Serbia has shown a strong commitment to EU integration and willingness to comply with EU conditions, which is primarily demonstrated by its approach to Kosovo. As a result, in 2012 Serbia was awarded EU candidacy and opened accession negotiations in 2014. Since Serbia, according to the EU, now sufficiently meets the Copenhagen criteria including the respect of human and minority rights as opposed to Bosnia, a higher level of protection of human rights could be expected. To test this hypothesis, the report will need to contrast and look into both human rights performances on the ground and the reaction of the EU, through the assessment of the use of the various instruments.

As for Turkey, the period from 1999 when Turkey was awarded candidate status until the turning of 2015/2016 will be examined in order to illustrate the changing nature of EU-Turkey relations as well as of EU leverage in the human rights field over these 16 years. We identify different sub-periods in the promotion of human rights as part of Turkey's accession process. Between 1999 and 2005, widely termed as the 'golden years', the accession process progressed hand in hand with significant human rights reforms. Soon after the official start of accession negotiations in 2005, however, both the accession as well as the reform process started to slow down. While both have not come to a complete halt since then, one can define a third period starting in 2011 marked by a concurrence of reforms and setbacks. The scope of our detailed analysis ends in 2015, with brief comments on more recent events considering that EU-Turkey relations are a matter of daily news at the moment.

The assessment of conditionality in our research can be read on three levels. First, we can identify stated priorities contained in statements and policy documents, including progress reports, enlargement strategies, Council conclusions etc. Second, we can track how these priorities shaped decisions in the relationship with a particular enlargement country (here, BiH, Serbia and Turkey). This will most importantly include benefits like progress towards accession (e.g. signing the SAA or granting candidate status) and financial benefits and measures like visa liberalization. Third, it is the domestic impact of

conditionality that ultimately counts, and also to what extent measures and (threats of) sanctions shaped local policies and practices. This latter aspect is assessed in selected case studies in sections II.E, III.C and IV.D.

1)	rhetoric, official assessment	EU documents, statements
2)	measures and sanctions	EU documents, measures
3)	impact on domestic policy	Domestic and international reports (NGOs and international organizations, in addition to the assessment of the EU itself)

Table 1. Assessing EU conditionality: Three levels of scrutiny

Before turning to the three case studies in Chapters II, III and IV, we will briefly present the current state of the literature, collecting and contrasting the relevant findings and arguments from experts of the field and we will conclude this chapter by formulating a more detailed research hypothesis.

A. Challenges and causes identified in the literature

The existing literature identifies various areas as posing a special challenge for human rights conditionality in the Western Balkans and Turkey (see also section IV.C.1). As for the Western Balkans, several authors point to the history of the region, most importantly the recent conflicts; to the weakness of state structures in certain contexts; to national identities conflicting with goals pursued during enlargement; and to the various sources of inconsistencies on the side of the EU. We will first examine these arguments mostly with a focus on the Western Balkans. More insights from the literature on Turkey will be discussed in the Turkish case study (Chapter IV) given the profound differences between the Turkish and the Western Balkan contexts.

When explaining the weak performance of the EU in promoting human rights in the Western Balkans, two sets of factors can be contrasted: the special historical, political and social characteristics of South East Europe that pose unusual challenges, mostly related to the legacy of conflicts of the 1990s and early 2000s; and the shortcomings of the approach of the EU. These fit into the rationalist framework introduced by Schimmelfennig and Sedelmeier about the EU's external governance in the enlargement context. Under this theory, conditionality resembles a rationalist bargaining process that leads to the adoption of EU norms where high and credible incentives go along with low domestic adoption costs.¹⁴ Domestic costs are considerably higher in the Western Balkans than were in the case of the Central and Eastern European countries (CEECs), largely due to the region's 'special characteristics'. This is why Western Balkan states are subject to an 'enhanced' conditionality policy, as compared to the CEECs.¹⁵ The criteria enshrined in the Stabilisation and Association Agreements put a great emphasis on democratic conditions, similarly to the Europe Agreements of the mid-1990s. The SAAs however also included additional requirements that addressed issues related to state building and reconciliation such as the

¹⁴ Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' (2004) 11(4) *Journal of European Public Policy* 661.

¹⁵ Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (2013) Sieps European Policy Analysis 11 <http://www.sieps.se/sites/default/files/2013_11epa.pdf> accessed 12 October 2014.

return of refugees, ethnic and religious reconciliation, regional cooperation and the extradition of war criminals.¹⁶ Thus at the beginning of the SAP in 1999 Western Balkan countries faced enhanced conditionality as compared to previous enlargements whereas most of these countries' institutional capacity was much more limited than that of the CEECs during their pre-accession period.

Moreover, as Bieber argues, the EU's state building in the Western Balkans' post-conflict environments resulted in the construction of 'minimalist states', which hardly fulfil functions that states ought to carry out. This is best illustrated by the example of BiH, but also applicable to the State Union of Serbia and Montenegro during its brief existence as well as to Kosovo which enjoys limited sovereignty in many areas due to international engagement of UNMIK and EULEX and because it has not been recognised by many states. Assisting post-conflict reconstruction and building future Member States at the same time proved to be a challenging task. Consequently, the EU has been unable to effectively apply accession conditionality to transform institutions and norms in the target countries.¹⁷

EU conditions often relate to statehood and identity issues in the Western Balkans, yet the EU can hardly encourage democratic change if the national identity of the respective countries contradicts the EU's requirements.¹⁸ Macedonia's (and Greece's) unwillingness to compromise on the name issue, which hampers its NATO and EU accession, is a case in point.¹⁹ Similarly, in BiH, meeting the EU's demands would have required constitutional changes, which would have undermined the power position of nationalist elites sustained by the current state structure. This significantly increases the cost of compliance thus weakening the chances of EU conditionality to succeed. Although the EU does not require a specific constitutional order, any state seeking membership should be able to formulate positions about how it intends to implement the *acquis*. The fragmented structure of BiH does not permit its institutions to function effectively and to adopt and implement EU legislation, which is why the EU has strongly promoted constitutional reform albeit so far without any success.²⁰

Between 2009 and 2014, compliance with the judgment of the European Court of Human Rights (ECtHR) in the *Sejdić and Finci* case was one of the main requirements of EU integration for Bosnia, which would allow minorities to run for the highest state offices currently reserved for the three constituent peoples: Bosniaks, Croats and Serbs. Without bringing the Bosnian constitution in line with this ruling, Bosnia could not become an EU candidate and lost some of its EU funding. This is an exceptional case of directly tying EU candidacy to meeting a specific human rights condition.²¹ Yet, this particular human rights issue would

¹⁶ Pridham (n 1); Börzel (n 4).

¹⁷ Florian Bieber, 'Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans' (2011) 63(10) *Europe-Asia Studies* 1783-1802.

¹⁸ Freyburg and Richter (n 1).

¹⁹ Both sides indicated a willingness to compromise in December 2015. See Helena Smith and Patrick Kingsley, 'Macedonian PM open to dialogue on name dispute to end 24-year row with Greece' *The Guardian* (16 December 2015) <<http://www.theguardian.com/world/2015/dec/16/macedonia-open-to-changing-its-name-to-end-24-year-dispute-with-greece>> accessed 17 December 2015.

²⁰ Vedran Džihic and Angela Wiesler, 'Incentives for Democratization? Effects of EU Conditionality on Democracy in Bosnia & Herzegovina' (2011) 63(10) *Europe-Asia Studies* 1803.

²¹ At the end of 2014 the EU decided to postpone this condition which will be explained in more detail in section II.D.

also necessitate a change in the constitutional structure that the EU long has sought for. Thus promoting human rights became a tool of encouraging constitutional change and state building, which has been the highest priority on the EU's agenda.

With regard to Turkey, it possesses stronger statehood than the Western Balkan countries, so that state building has not been such a key for the EU. The focus has been laid on democratising the existent structures, not least through rebalancing civil-military relations and curbing the influence of the military.²² The military (like the judiciary) has constituted a significant stronghold of Kemalism and the secular identity of Turkey, meaning that pertinent reforms by the Islamic-conservative Justice and Development Party (AKP) government (in power since 2002) in this regard (as well as the EU's pertinent demands) concerned upon nationhood and costs of compliance were considerable. The AKP government thus followed the strategy of gaining popular support for these reforms through subjecting the necessary constitutional amendments to a referendum in 2010.²³ Minority rights form another major area challenging national identity and sovereignty in Turkey, so that one may conclude that reforms in this field are not very likely.²⁴ The case study in Chapter IV will show, however, that certain minority rights reforms have been carried out at different points in Turkey's accession process – their nature as well as the role of EU conditionality will be discussed in the frame of a mini case study under IV.D.2.

Schimmelfennig and Sedelmeier's above-mentioned 'external incentive model' suggests that external rewards help elites to overcome domestic costs, a pattern that seems to have worked effectively in Central and Eastern Europe. Yet, its application to the Western Balkans as well as Turkey is more problematic. Conditionality can succeed in accomplishing its ultimate goal of state building only if it is linked to credible prospects of accession to the EU. However, the weaker political and institutional capacity of these states is coupled not only with greater conditionality demands but also with a growing enlargement fatigue in the EU.²⁵ This creates confusion and ambiguity with regards to EU conditionality thus reducing the chances for real compliance. With membership remaining a relatively remote perspective, the rewards of compliance in the present are limited. Lack of credibility on part of the EU can be perceived as particularly acute in the case of Turkey, as will be demonstrated in detail in Chapter IV.

Moreover, the EU is interested in real rule adoption, which goes beyond the mere *transposition* of rules, and results in the *transformation* of values, norms and practices. Such transformative effect – captured

²² See Senem Aydın-Düzgüt and Natalie Tocci, *Turkey and the European Union* (Palgrave 2015), 163ff.

²³ See Gözde Yılmaz, 'From Europeanization to De-Europeanization: The Europeanization Process of Turkey in 1999–2014' (2015) *Journal of Contemporary European Studies* 8.

²⁴ See Tanja A. Börzel and Digidem Soyaltin, 'Europeanization in Turkey – Stretching a Concept to its Limits?' (2012) KFG Working Papers 36, 12.

²⁵ Börzel (n 4); International Commission on the Balkans, 'The Balkans in Europe's Future' (2015) <<http://www.cls-sofia.org/uploads/files/Projects%20files/International%20Commission%20on%20the%20Balkans.pdf>> accessed 20 April 2015.

by the notion of Europeanisation²⁶ – does not seem to follow the formal adoption of rules if EU demands contrast with national identity, which has been the case in several countries in the Western Balkans.

This tension could be illustrated by Serbia's cooperation with the ICTY. Even though Serbia fulfilled the EU's expectations when it extradited the most wanted war criminals, its value system hardly changed, reflected by official rhetoric presenting the extraditions as necessary steps of getting closer to the EU.²⁷ Serbia's compliance in the area of LGBT rights presents a similar scenario. As Mikus in his case study about Serbia's 2010 Pride Parade explained, while 'the state communicated it as something required by the EU, it avoided open ideological confrontation with the opponents by condemning and legally sanctioning the violence as such, not as homophobic or ideology-based'.²⁸ By this rhetorical strategy, state representatives distanced themselves from the values the Pride symbolized, at the same time formally meeting the EU's demands by securing the event with heavy police presence. Some positive trends can nevertheless be observed. Changes in the party systems in Croatia and Serbia testify to the marginalisation of radical nationalism and an opening towards Europe. In Croatia, the HDZ endorsed EU integration and democratisation, while in Serbia the Serbian Progressive Party that emerged from the Serbian radicals are committed to EU integration. This suggests a gradual value transformation even if it is mostly driven by instrumental rationality.²⁹

On the other hand, while the challenges mentioned above mostly stem from special characteristics of the Western Balkan region and originate from the legacy of the conflicts (apart from the Macedonian name issue), the EU can also be blamed for various inconsistencies which weaken the credibility of its engagement and undermine its transformative potential. The various types of inconsistencies were identified in an earlier phase of the project, Table 2 summarizes these. (Note that the Table does not indicate the root cause of inconsistencies, that might be a result of politicization, systemic shortcomings, lack of engagement etc.)

Type of inconsistency	Summary	Limitations
Values and interests	Strategic interests like security considerations and economic benefits can trump human rights conditionality.	The contradiction might be a result of a false understanding of how human rights and democracy promotion features in EU policies.
Rhetoric and action	A discrepancy can exist between what the EU says it is doing (declaratory statements) and what	These might simply constitute different levels of analysis (see Table 1). Declaratory actions are also

²⁶ For 'Europeanization' and concepts like 'membership Europeanization' and 'accession Europeanization', see Börzel and Soyltin (n 24).

²⁷ Marlene Spoerri, 'Justice Imposed: How Policies of Conditionality Effect Transitional Justice in the Former Yugoslavia' (2011) 63(10) *Europe-Asia Studies* 1827.

²⁸ Marek Mikus, "'State Pride": Politics of LGBT Rights and Democratisation in "European Serbia"' (2011) 25 *East European Politics and Societies* 843.

²⁹ Andrew Konitzer, 'Speaking European: Conditionality, Public Attitudes and Pro-European Party Rhetoric in the Western Balkans' (2011) 63(10) *Europe-Asia Studies* 1853. Instrumental Europeanization and the issue of transposition vs. transformation will be highlighted for Turkey in chapters IV.C.1 in general and IV.A on gender equality in particular.

Type of inconsistency	Summary	Limitations
	it is actually doing (other instruments).	instruments whose roles should not be downplayed.
Inconsistency among third countries	The content and rigor of conditionality might vary from state to state.	The variation can reflect relevant differences among target states.
Internal and external policies	The EU sets conditions that lack legal grounds in the <i>acquis</i> .	These ‘additional’ conditions might target measures that are taken for granted in Member States or are less an area of concern.
Institutional fragmentation	The human rights agenda and general approach of the various EU bodies and Member States differ; the EU speaks with ‘too many voices’.	Internal diversity can be an asset. The Parliament, the Commission and the Council have different roles, which justifies the variation.
Inconsistency in content	The types of human rights that the EU pushes for do not show a universal and consistent approach.	Selectivity and differing emphasis can be a result of legitimate prioritisation rather than genuine inconsistency.
Reactive and proactive measures	The EU is too passive, lacking proactive measures that could ensure a consistent, autonomous human rights policy. Even where we find elements of this, the synergies are not harvested.	Expectations towards the EU as a whole might sometimes be exaggerated regarding its current capacity and the fact that it is, after all, a political organisation responsive to a democratic constituency.
Changes over time	Even if consistent priorities are applied at a given moment, these might shift with time, making it hard for target states to adjust their behaviour.	The changes might occur as a reaction to target state actions or passivity, seeking to gain leverage and push for reforms where improvement is realistic.
The depth of reforms	The EU pushes for reforms that only scratch the surface, remain formal and do not trigger real changes that are hard to be repealed.	It is true that legal reforms are not sufficient, but they are essential conditions in conditionality, and simply mark the first step in human rights conditionality.

Table 2. Types of inconsistencies in EU human rights conditionality

Source: Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, ‘Report on mapping, analysing and implementing instruments’ (2014) FRAME Report 6.1, Chapter II <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>>; Zolt Körtvélyesi, ‘Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations’ (2016) *European Yearbook of Human Rights* (forthcoming).

There is an apparent discrepancy between obligations of members and candidates, both in terms of the scope of rights and the meticulousness of the monitoring process. The EU’s fundamental rights *acquis* (Chapter 23) is broader than the list of rights related to Article 2 TEU or the EU Charter of Fundamental Rights illustrated by the issue of minority rights protection and media freedom. Moreover, the Charter constrains Member States only when they are implementing EU law, while in the case of candidates the EU can practically check any act or policy on human rights’ grounds. Although based on Article 7 TEU it is

possible to control Member States' conduct even when they act outside the scope of EU law, the process is cumbersome, as it requires unanimity in the European Council and support from the EP. Importantly, it is a mechanism that has never been used³⁰ – although note the development of 'pre-Article 7' mechanisms. By contrast, throughout the entire accession process, the Council can suspend negotiations with a candidate by a qualified majority decision.

A more rigorous monitoring of meeting fundamental rights standards was introduced at the beginning of accession negotiations with Croatia and Turkey, adding a new chapter on judiciary and fundamental rights (Chapter 23) to the negotiation and monitoring process. Furthermore, learning from the accession of Bulgaria and Romania, the EU began to use opening and closing benchmarks and, from 2012, also interim benchmarks as part of the Negotiating Framework of Montenegro, which in addition provided the possibility of suspending the whole negotiation process for Member States if they see problems regarding the rule of law chapters. There is no such provision for Turkey and there was none for Croatia, as these candidate states received their Negotiating Frameworks before the introduction of these provisions. However, in Croatia's case a monitoring clause was included in the Accession Treaty (Art. 36(1) Act of Accession), which allowed the Commission to evaluate Croatia's compliance concerning fundamental rights and judiciary even after accession,³¹ even though this clause was not invoked.³²

One field of human rights is especially problematic from the point of view of a mismatch between standards applied to candidates and Member States, namely minority rights. Although minority rights belong to the EU's human rights conditionality and are generally subject to serious monitoring, EU law does not regulate this area, apart from the existing anti-discrimination legislation, which is a rather limited approach to minority rights provision. A further issue that remains unaddressed by the EU is the problem of intersectionality: different minority positions and vulnerabilities can be crosscutting, since a single person can suffer from different types of discrimination at the same time.³³

In the area of minority rights, the EU tends to rely on external anchors such as the Council of Europe's Framework Convention, or standards set by OSCE besides its existing anti-discrimination legislation. Within this context the EU demands measures like anti-discrimination action plans, inclusion strategies, and certain citizenship policies. Yet, what is being required depends very much on the case. For instance, as Kacarska demonstrates, the content of minority rights conditionality in Macedonia was largely a result of a dynamic interaction between national level policies and the EU. Macedonia adopted the law on the use of minority languages under informal EU pressure, yet initially this was not part of official conditionality. However, after the law's adoption in 2008, the EU regularly monitored its implementation.³⁴ Similarly, the EU applied minority protection conditionality both to Serbia and

³⁰ Hillion (n 15) 8.

³¹ *ibid* 5.

³² See Fraczek et al (n 6) 143.

³³ Presentation by Lejla Somun-Krupalija, Association CRVENA/RED, at the MAXCAP conference 'EU integration and minority protection in the Western Balkans: Mapping the way ahead' 20-21 November 2014, Sarajevo.

³⁴ Simonida Kacarska, 'Minority Policies and EU Conditionality - The Case of the Republic of Macedonia' (2012) 11(2) *Journal on Ethnopolitics and Minority Issues in Europe*.

Romania, yet the content of requirements differed between the two cases. The EU supported cultural autonomy for Hungarians in Serbia but not in Romania, which can be explained by the difference in domestic dynamics within the two countries. In Serbia a consensus emerged between the Serbian government and Hungarian minority parties about the desirability of cultural autonomy as opposed to Romania where such a consensus was lacking. At the same time, the public use of minority languages and education in the minority's language were among the issues pushed by the EU in both states.³⁵ Thus these cases demonstrate that standards were an outcome of a negotiated process while compliance became a matter of political judgments in the absence of clear benchmarks.³⁶

In the case of Turkey,³⁷ its minority concept remains restrictive in that, based on the 1923 Treaty of Lausanne, only three non-Muslim population groups, i.e. Jews, Armenians and Greek Orthodox are recognized as minorities. The EU voiced its criticism and applied conditionality in this area, and there have been legal improvements, but these groups still face discrimination. Other groups (Muslim and non-Muslim) are not given minority status which has set certain limits to the EU applying international pertinent standards (which goes hand in hand with Turkey not being party to the minority-related Council of Europe treaties³⁸). Despite this fact, the situation of the Kurdish population in particular has been given high priority by the EU ever since the publication of the first EC Progress Report in 1998, arguably (also) due to security concerns. This led to a number of significant reforms being carried out, especially as regards cultural rights, which also continued when the accession process began to slow-down after 2006 and even at times of backsliding in other human rights areas since 2011. This can be linked to both the EU's influence and domestic factors, the latter of which can account for the piecemeal approach to reforms in light of their effects on national identity.

A further discrepancy often highlighted is that the EU is being driven by security or other kinds of foreign policy goals which tend to override human rights considerations.³⁹ The EU's asylum policy is an example where 'Europeanisation' hardly means improving human rights standards. On the contrary, the EU's external asylum and immigration policy in the Western Balkans has been mostly driven by the aspiration to keep immigrants away from its borders 'with little concern for human rights and international standards of refugee protection'.⁴⁰ The case study on Turkey will also pay particular attention to the EU's current

³⁵ Edina Szöcsik, 'The EU Accession Criteria in the Field of Minority Protection and the Demands of Ethnic Minority Parties' (2013) 11(2) *Journal on Ethnopolitics and Minority Issues in Europe*.

³⁶ Gwendolyn Sasse, 'Tracing the Construction and Effects of EU Conditionality' in Bernd Rechel (ed), *Minority Rights in Central and Eastern Europe* (Taylor & Francis 2009) 20.

³⁷ See in more detail section IV.D.2.

³⁸ Turkey has signed neither the 1995 Council of Europe Framework Convention for the Protection of National Minorities nor its 1992 European Charter for Regional or Minority Languages (see section IV.D.2).

³⁹ Othon Anastaskis, 'The EU's political conditionality in the Western Balkans: Towards a more pragmatic approach' (2008) 8(4) *Southeast European and Black Sea Studies*; Noutcheva (n 1).

⁴⁰ Ridvan Peshkopia, 'Asylum in the Balkans: European Union and United Nations High Commissioner for Refugees Assistance to Balkan Countries for Establishing Asylum Systems' (2005) 5(2) *Southeast European and Black Sea Studies* 213–241.

asylum policy crisis in terms of its reverberations on relations with Turkey regarding accession negotiations and especially the visa liberalisation dialogue.

In the Balkan context, tension between norms-based rhetoric and security interests could be observed in conditionality applied in relation to issues of contested stateness. While addressing remaining challenges of statehood, the EU most often makes normative claims, yet it is often driven by security considerations like in Bosnia, or special interests of Member States, which can generate tensions within conditionality policy. As Noutcheva pointed out, when the EU makes normative claims and yet is obviously motivated by security considerations, fake, partial or non-compliance can be expected from the states, which are subject to such conditionality.⁴¹ Koinova makes a similar argument regarding Macedonia where security considerations trumped concerns for human rights and democracy. As was noted above, even though Macedonia's human rights performance had not improved from the 1990s to the 2000s, still it received candidate status in 2005, and a recommendation from the Commission to start membership talks in 2009.⁴² Thus, the rhetoric of rigorous conditionality often comes into conflict with interests related to security and the aspiration to keep the affected countries on the course of European integration.⁴³

Although there is a relatively large body of literature analysing the EU's democracy promotion, only a few authors examined the *substance* of how the EU supported democratization during the accession process.⁴⁴ As this report argues, for a better understanding of this discrepancy between rhetoric and action, a more systematic approach focusing more on the content of the EU's human and minority rights promotion would be needed. Ridder and Kochenov concluded in their study on the 2004 enlargement wave that 'the EU has never reached any conceptual clarity on what constitutes a consolidated democracy'.⁴⁵ In practice, a distinction can be drawn between *acquis* conditionality, which involves the rather straightforward task of transposing the EU's *acquis communautaire*, and non-*acquis* conditionality, where the Union cannot legislate including many areas of democracy and human rights, where the EU's legal internal instruments are scarcer compared to other areas such as trade issues.⁴⁶ This problem was raised concerning the minority rights conditionality in the CEE enlargement process. Human rights have clearly become part of the *acquis* following the Lisbon Treaty, but the Charter, in its Article 51, makes it clear that this does not mean an extension of the powers of the EU.

Furthermore, the accession criteria concerning democracy, rule of law and human rights as anchored in the Copenhagen criteria provide very general and vague guidelines as to what is being exactly promoted. Democratic conditionality as was actually applied during the CEE enlargement process, was ad hoc, inconsistent and unpredictable. It was often a political question on the EU's side whether a country managed to meet democratic standards. Part of the reason was that these issues fell outside of the scope

⁴¹ Noutcheva (n 1).

⁴² Koinova (n 7) 807.

⁴³ Anastaskis (n 39).

⁴⁴ Eline De Ridder and Dimitry Kochenov, 'Democratic Conditionality in the Eastern Enlargement, Ambitious Window Dressing' (2011) 16 *European Foreign Policy Review* 589.

⁴⁵ *ibid* 592.

⁴⁶ *ibid* 590.

of the *acquis communautaire*, thus the European Commission lacked clear benchmarks and indicators for serious assessment.⁴⁷ This points to a general problem of EU conditionality not constrained to human rights issues. Several empirical case studies revealed that the EU can promote reforms effectively in particular areas where it has a consensus about its own norms, which then allows it to make clear demands.⁴⁸ The lack of a clear conditionality based on shared norms explains for instance the EU's failure to push through police reform in Bosnia as was originally intended.⁴⁹

Moreover, most studies treat democratisation, the promotion of rule of law and human rights as a single block, without looking at the individual rights, leading to rather general conclusions. The present study will mostly focus on issues of human rights, even if these often play into the two other concepts. Fair trial rights or the independence of the judiciary are rule of law requirements as well as human rights; prescribing and monitoring the recognition and implementation of political rights similarly marks an overlap between the promotion of human rights and that of democracy.⁵⁰ The three areas are closely interwoven as expressed by the ultimate expectation of 'democratic rule of law with human rights'. Monitoring human rights is a more complex but also more standardisable endeavour, as the individual rights are enshrined in the now-binding Charter of Fundamental Rights of the European Union. In addition, the Commission can and does rely on standards set by the Council of Europe such as the ECHR which was signed and ratified by all the Member States and the EU itself should be joining as well.⁵¹ Enlargement actions and documents like country progress reports thus routinely identify and monitor the implementation of a wide array of human rights, making it possible to consider separate areas of human rights and the degree of attention given to them in the priorities of different EU bodies at various times.

Koinova's examination of the EU's human rights promotion in Macedonia is among the exceptions when analysing the substance and not only the general effects of the EU's human rights conditionality. The Macedonian case falls in line with the experience of other post-conflict states in the Western Balkans, where due to the legacy of ethnic conflict, minority rights were treated as an instrument of stabilisation by the EU, and security concerns were generally prioritized over human rights issues. The various institutional and legal measures adopted by Macedonia concerning human and minority rights after signing the Ohrid Peace Agreement (an agreement brokered by the EU and signed between the Macedonian government and Albanian community representatives to stop an interethnic war in 2001) would suggest a visible improvement in the human rights area. However, when measuring

⁴⁷ De Ridder and Kochenov (n 44).

⁴⁸ Wade Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (Cambridge University Press 2004) 46; Adam Fagan, 'EU Conditionality and Governance in Bosnia & Hercegovina: Environmental Regulation of the Trans-European Road Network' (2011) 63(10) *Europe-Asia Studies*.

⁴⁹ Gülnur Aybeta and Florian Bieber, 'From Dayton to Brussels: The Impact of EU and NATO Conditionality on State Building in Bosnia & Hercegovina' (2011) 63(10) *Europe-Asia Studies* 1911.

⁵⁰ For an analytical overview of the relationship between democracy, human rights and the rule of law within the scope of the FRAME project and considering EU documents, see Deliverable 3.2: Timmer et al (n 5).

⁵¹ Although note the recent backlash triggered by the negative evaluation of the accession process by the CJEU: Court of Justice of the European Union, Opinion 2/13 (Full Court), 18 December 2014 (finding that the draft agreement on the accession is not compatible with TEU).

implementation based on monitoring of various human rights organizations, as was already noted above, performance was the same in the 2000s as in the 1990s, before the EU's engagement.⁵²

The EU tends to pay attention to the adoption of specific legal measures, which sometimes amounts to mere window dressing without meaningful implementation. A 2012 study commissioned by the EP reviewed the Commission's monitoring of human and minority rights in the EU enlargement to the Western Balkans.⁵³ Enlargement strategy papers, progress reports, European and accession partnerships, stabilization and association agreements, IPA and EIDHR programs were analysed in order to establish how the Commission has defined the priorities within this issue area, and whether it has consistently and adequately followed up on these during its monitoring process. Although the study focused primarily on minority rights and paid less attention to other kinds of human rights, it also made some general remarks about the EU's human rights monitoring practices. It noted for instance that it remained unclear how and why the Commission chose to focus on some human rights and not on others. Important rights were left out from the monitoring process, such as freedom of movement, right to privacy or right to education. In the area of minority rights, progress tended to be measured by adopting requested legislation or action plans, while monitoring rarely relied on numbers, statistics or assessment of minority organizations. Importantly, there are no clear indicators to measure progress making the conclusions of the Commission look arbitrary. Specific recommendations are usually missing as to how the political criteria of respecting minority rights could be met.⁵⁴ Many of these findings – specifically about the lack of conceptual clarity of the content of human and minority rights, clear indicators and adequate attention paid to implementation – echo the conclusions reached by Ridder and Kochenov about the CEE enlargement, and are still applicable in light of the case studies of the present report.⁵⁵

Although the 2012 EP study provides a lot of valuable information about the operation of the EU's human rights conditionality in the Western Balkans, it does not present a comprehensive analysis for two reasons. First, it examines the monitoring process by analysing mostly EU documents, which allows for an assessment of internal consistency only. It does not raise the wider issue of how external organizations and human rights watchdogs view the EU's human rights agenda and what happens if obvious human rights violations are not problematised by the EU. The only exception is the discussion on Croatia where monitoring under the Framework Convention of National Minorities and the EU's monitoring are

⁵² Koinova lists a number of these, among them torture and ill-treatment remained widespread, arbitrary arrests and detention continued, inhuman conditions in prisons led to an increase in suicides, many people who were internally displaced during the conflict in 2001 were involuntarily returned to their place of origin and were threatened and brutalized by the police, masses of people cannot receive justice in courts, harassment of journalists is widespread, etc. Koinova (n 7) 824.

⁵³ European Parliament, Directorate-General for External Policies, Policy Department, 'Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans' (2012) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET\(2012\)457114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET(2012)457114_EN.pdf)> accessed 27 October 2014.

⁵⁴ *ibid* 58-70.

⁵⁵ De Ridder and Kochenov (n 44).

compared, yet this is limited to minority rights in Croatia. Second, the real interest of the study is minority rights rather than human rights in general.⁵⁶

Examining conditionality in its content across countries and over time would allow for a better understanding of why the EU often fails achieving the desired transformative effect. The following chapters will map patterns of conditionality and present an analysis of some causes of this failure.

B. Preliminary conclusions

Human rights have undeniably played a key role in the EU's policy in the Western Balkans and Turkey as the EU's track record from the last 16 years demonstrates. Compliance with human rights conditions has become the single most important requirement of EU membership for aspirant states. A few human rights conditions have risen to the position of 'make or break issues', such as the prosecution of war crimes applied vis-à-vis Croatia, Serbia and Bosnia and Herzegovina, the respect for political rights of minorities vis-à-vis Bosnia exemplified by the requirement to comply with the ECtHR ruling on the *Sejdić-Finci* case or a new Penal Code (without criminalising adultery) vis-à-vis Turkey before the start of accession negotiations. Yet, at a closer look, some contradictions emerge.

1. Securitisation, state building and human rights

The EU Strategic Framework and Action Plan on Human Rights and Democracy from 2012 barely mentions EU enlargement even though human rights conditionality plays a key role in enlargement policy.⁵⁷ Thematic issues and vulnerable groups – more specifically minorities, refugees and anti-discrimination – which have been among the last priorities in the EU's external action as reflected by the Action Plan and the EU's demonstrated objectives at the UN,⁵⁸ have proved to be among the highest priorities in the Western Balkans and Turkey.⁵⁹ Minority rights are one of the most delicate items on list. They are not part of the EU acquis nevertheless constitute requirements within Chapter 23, and they receive more attention than in the 2004 enlargement wave. In addition, they still have a clear security aspect in the Western Balkans' post-conflict environment. The Europeanisation of minority rights in enlargement therefore can be also interpreted as 'securitisation': by presenting unresolved minority issues as security threats, it aims at achieving security directly, and is less concerned with the rights of the persons involved. As Rosa Balfour explained the EU's attitude to human rights promotion in the 1990s and early 2000s, 'human rights priorities thus need to be understood in the context of the overall objective of stabilisation and containment of the region'.⁶⁰ We expect to observe the lack of this comprehensive understanding that would avoid the common mistake of too easily contrasting security goals and human rights (often phrased as 'interests' versus 'values'). Treating security goals ('interests') and human rights goals ('values')

⁵⁶ European Parliament, 'Mainstreaming Human and Minority Rights...' (n 53).

⁵⁷ Fraczek et al (n 6) 119.

⁵⁸ See Grazyna Baranowska, Anna-Luise Chané, David D'Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki and Anna Połczyńska, 'Report on the analysis and critical assessment of EU engagement in UN bodies' (2014) FRAME Report 5.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf>> accessed 27 October 2014.

⁵⁹ *ibid.*

⁶⁰ Rosa Balfour, 'Principles of democracy and human rights' in Sonia Lucarelli and Ian Manners (eds) *Values and Principles in European Union Foreign Policy* (Routledge 2006) 122-123.

separately, and contrasting them, can weaken the normative power of human rights conditionality. Instead of understanding human rights goals as part of the overall stabilisation agenda, with the ultimate goal of building lasting regional security, the right approach would make it clear that security considerations are already part of human rights conditionality. This makes it harder to reopen questions about human rights compliance by reference to some overriding security interest.

2. Operationalization gap

We also expect an ‘operationalization gap’, meaning that human rights conditionality goals are frustrated by the inadequacy of measuring methodology as well as of the normative content of the standards. For example, in the field of minority rights, despite the growing importance of minority protection in the EU’s human rights conditionality, the lack of clear standards and indicators also meant that the content of specific criteria and the question of how to measure adequate implementation could become subject of political disputes more easily. Here the UN’s UPR reports and opinions of Advisory Committee of the Council of Europe’s Framework Convention for the Protection of National Minorities could provide guidelines for benchmarking, which the EU has already started to adopt as a practice, especially relying on the latter. The third opinion of the Advisory Committee of the Council of Europe’s Framework Convention for the Protection of National Minorities for Serbia provided the basis of the action plan Serbia has to prepare concerning minority rights, which constitutes an opening benchmark of Chapter 23.

3. Credibility of conditionality and reform ‘depth’

The credibility of the ultimate incentive of EU membership was never seriously challenged in the process leading to the accession of CEE countries. This is more problematic in the Western Balkan context and particularly for Turkey. We expect to see that the fading of the close and tangible membership perspective makes accession conditionality less powerful as compared to more tangible immediate benefits, most importantly visa liberalization.

We expect to find a general lack of regard to the ‘depth’ of state compliance. Some measures adopted under conditionality pressure can be later easily reversed, while others are more entrenched. Problems of legitimacy, standards and measurability will result in a conditionality that overprizes formal compliance (transposition) as opposed to deeper reforms changing deeper structures and attitudes (transformation). This is strengthened by the seemingly common interest of candidates and the EU to deliver achievements that can easily be presented as progress (such as adoption of laws). Ultimately, however, this approach risks the viability and stability of the achievements of conditionality.

4. Fragmentation

It is generally assumed that fragmentation, both on the level of EU institutions and between Member States and candidates, makes it harder to effectively apply conditionality. In the previous enlargement round the Commission was the main EU actor shaping the human rights agenda in enlargement policy, while the EU integration process of the Western Balkan states as well as Turkey has been marked by increased activism of the Member States. Member States can maintain a close control over the accession process of a candidate country as a result of the requirement of continuous unanimous decisions in the Council and veto power of individual Member States for bilateral reasons. The report will assess how these

aspects of nationalisation might play into the challenges of human rights conditionality in all three country cases.

The present report conducts a thorough investigation to revisit these preliminary conclusions and examine their validity. The three case studies will consider in particular at the following questions:

- 1) How have enlargement instruments been applied for the promotion of human rights? Which human rights priorities have the instruments revealed? Which, if any, human rights have featured among essential conditions, i.e. key priorities absolutely necessary for further progress on the integration path?
- 2) What has been the content of the EU's human rights conditionality and the impact of the EU's engagement in the field of human rights?
- 3) How consistent were the EU's human rights priorities across instruments and over time?
- 4) How credible was the EU's human rights conditionality i.e. whether the EU applied sanctions, or refrained from granting benefits, in case of non-compliance with human rights conditions?

II. Bosnia and Herzegovina: Tracking the EU's human rights promotion⁶¹

Peace-building and EU integration were the main goals the EU sought to accomplish in Bosnia and Herzegovina. The EU followed an integrated strategy and employed instruments belonging to different parts of the EU's institutional machinery. Furthermore, the EU acted in close cooperation with other international actors like the High Representative (HR) and NATO, and used other instruments like those of ESDP/CSDP besides the ones employed under the SAP. The HR is a position created by the Dayton Agreement (Annex 10) to oversee 'the implementation of the civilian aspects of the peace settlement'⁶² (together with its Office, the OHR, see later for more details) and represents the international actors involved in the peace settlement. The HR had a very defining role on political developments and institution building in Bosnia, and had a close division of labour with the EU while often pursuing the same goals.

Given the complexity of the Bosnian institutional context, this chapter will first sketch the general context in which the EU was operating in Bosnia in the 2000s. The highly complex institutional system is introduced, also explaining the role of both the EU and the OHR in institution building, as well as the interplay between them. This is followed by an overview of the human rights issues that were high on the international community's agenda during this period: the situation of refugees, minority rights, ethnic segregation of children in schools, war crimes prosecution and the situation of the media. We discuss the various attempts to reform the constitution in order to make the country more functional, and also to bring Bosnia's constitution in line with the ECHR. The human rights challenges identified in the first sections feature in the subchapter that provides an overview on the SAP, the instrument that has provided the main framework of the EU's relations with Bosnia since 2000. Given the long time frame, the discussion is subdivided into two subsections: the first covering developments from 2000 until 2008 when the SAA was signed, while the second discussing the period until 2015. We give a systematic analysis of the EU's tool and instruments while also trying to assess their impact on the situation of human rights. We specifically looked at minority rights, the rights of the Roma, anti-discrimination and media freedom to assess the EU's influence on Bosnia's human rights performance.

The case study draws on the academic literature, a systematic analyses of EU documents, published works of international and domestic think tanks, human rights watchdogs and international organisations, as well as interviews carried out in Sarajevo and Brussels with representatives of Bosnian civil society and the European Commission.

⁶¹ Beáta Huszka and Zsolt Körtvélyesi are the authors of this chapter. Beáta Huszka is at the ELTE University Faculty of Social Sciences in Budapest and work package leader of FRAME WP6. Zsolt Körtvélyesi is at the ELTE University Faculty of Social Sciences and at the Centre for Social Sciences of the Hungarian Academy of Sciences.

⁶² Dayton Agreements, Annex 10: Civil Implementation, Article I-1.

A. Institutional challenges in Bosnia and Herzegovina

1. The emergence of the institutional framework and human rights challenges

Originating from the Dayton Peace Accords (DPA), Bosnia is a highly decentralised state with three levels of government: that of the state, the entities and the local level, each endowed with strong power-sharing mechanisms among the three constituent nations. The two autonomous entities are the Federation of Bosnia and Herzegovina (Federation) and the Republika Srpska (Serbian Republic, hereinafter also referred to as 'RS'). In the Federation power is further devolved to ten cantons that function as mini-states with their own government, parliament, court and police.⁶³ By contrast, the Republika Srpska has municipalities at the local level yet with little competencies. Out of the ten cantons in the Federation, five have Bosniak majority, three have a Croat majority while two cantons have a mixed population of Bosniaks and Croats. The Republika Srpska is dominated by Serb majority. There is also practically a third entity, the Brčko District,⁶⁴ which has the same decision-making authorities as the other two, yet has no representation at the central level.⁶⁵

At the state level, the three-member presidency includes a Bosniak and a Croat from the Federation and a Serb from Republika Srpska, who make decisions by consensus each having a veto right. The state executive, the Council of Ministers has two thirds of its members from the Federation and one-third from the RS who belong to the governing coalition in the lower house of parliament, the House of Representatives. In the House of Representatives there are 42 members who are directly elected by proportional system, two-thirds from the Federation, one-third from the RS. There are no reserved seats of the three constituent nations, and decisions are adopted by a simple majority except for constitutional changes, which require a two-thirds majority. Members of the upper house, the House of Peoples are delegated by the entity parliaments, five Croats and five Bosniaks from the Federation and five Serbs from the RS.⁶⁶ Both houses have to approve a bill in order to pass. In addition, there exist the rules of vital national interest veto and entity veto. According to the national interest veto, any member of the Presidency and any three members of a national community in the House of Peoples can block a decision

⁶³ International Crisis Group, 'Bosnia's Future' (2014) Crisis Group Europe Report 232, 33 <<http://www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/232-bosnia-s-future>> accessed 15 November 2015.

⁶⁴ The Dayton Accords did not settle the status of Brcko but left this question open, to be finalized by arbitration. The final decision, after the interim resolution, came in 1999. As a result, the Brcko District is under the jurisdiction of neither the Federation, nor Republika Srpska, but is a separate entity, an autonomous territory or 'condominium', governed by a multi-ethnic government. For more, see, e.g., the summary of the Chief of Party of the District Management Team, Brcko District Government: William Sommers, 'Delivering Public Services in CEE Countries: Trends and Developments' (2002) 10th NISPAcee Annual Conference paper <<http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN003596.pdf>> accessed 15 November 2015.

⁶⁵ Soeren Keil, *Multinational federalism in Bosnia and Herzegovina* (Ashgate 2013) 110-111.

⁶⁶ *ibid* 95-106.

by referring to the need to defend their vital national interests. According to the entity veto, all decisions have to be supported by one third of the representatives elected from each entity in both houses.⁶⁷

While all these solutions apply to state institutions, power-sharing mechanisms were introduced also at lower levels of government. Following the so-called ‘constituent people’ decision of the Constitutional Court in 2002, imposed by High Representative Wolfgang Petritsch,⁶⁸ the parliament, the government and the presidency in the Federation also had to include Serbs among its members, while Croats and Bosniaks received representation in the RS legislature, and were included in the government and the presidency as well.⁶⁹ Besides offering seats to representatives of constituent people, entity parliaments provided guaranteed seats also to ‘others’ (anyone who is not from the three constituent nations, see more on this in section II.B.2) after 2002, four in the Republika Srpska’s 28-seat Chamber of Peoples, and seven in the Federation’s 58-seat Federation House of Peoples. The entity constitutions also granted the possibility of vital interest veto to constituent people, which can be filed by minority delegates to appeal laws that violate their vital national interests in front of the constitutional court of the entity.⁷⁰ Elements of power-sharing were also adopted at the local level, that of the cantons and municipalities. Public institutions had to grant proportional representation to all constituent peoples corresponding to their pre-war population share. Yet, this last provision was never followed up in practice.⁷¹

Experience suggests that guaranteed seats for constituent people failed to grant political representation for these communities in the entities, i.e. for Serbs in the Federation and Croats and Bosniaks in the RS. In the Federation of Bosnia and Herzegovina (FBiH) House of Peoples in the absence of a Serb electorate

⁶⁷ Birgit Bahtić-Kunrath, ‘Of veto players and entity-voting: institutional gridlock in the Bosnian reform process’ (2011) 39(6) *Nationalities Papers* 902.

⁶⁸ In the Federation only Bosniaks and Croats were named as constituent people, while the RS constitution granted self-determination rights to the Serb people in the entity. As an ICG report well summarized the crux of the problem, ‘Essentially, the constituent peoples case hinged on the question of whether the list of Bosnia’s constituent peoples in the preamble to the state constitution meant that all three nations (and the ‘others’) were constituent’ throughout Bosnia & Herzegovina or whether they were equal only at the level of the state.’ International Crisis Group, ‘Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina’ (2002) ICG Balkans Report 128, 3 <<http://www.crisisgroup.org/~media/Files/europe/Bosnia%2045.pdf>> accessed 12 April 2015.

⁶⁹ Moreover, the Court ruled in 2000 that the entities did not have the right to ‘uphold the effects of ethnic cleansing’ referring to the fact that the ethnic composition of Bosnia still reflected the realities created by ethnic cleansing during the war. The share of Serbs in the federation was at 3 per cent in 1997 as opposed to 46 per cent in 1991 while the proportion of non-Serbs in the RS fell from 17 per cent to 3 per cent during the same period. Under international pressure Bosnia’s eight largest political parties came to a consensus about the way of implementing the Court’s decision in the so called Sarajevo Agreement in March 2002, however the ultimate constitutional amendments that followed were imposed by the HR. Florian Bieber, *Post-War Bosnia, Ethnicity, Inequality and Public Sector Governance* (Palgrave Macmillan 2006) 44.

⁷⁰ International Crisis Group, ‘Bosnia: What Does Republika Srpska Want?’ (2011) Crisis Group Europe Report 214, 25 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/214-bosnia-what-does-republika-srpska-want.aspx>> accessed 12 April 2015.

⁷¹ International Crisis Group, ‘Bosnia’s Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building’ (2003) Crisis Group Balkans Report 146, 4 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/146-bosnias-nationalist-governments-paddy-ashdown-and-the-paradoxes-of-state-building.aspx>> accessed 12 April 2015.

these guaranteed seats for Serbs were filled by deputies running on the list of those majority Bosniak and Croat parties that tend to win these elections anyhow.⁷² As a Crisis Group report noted, bigger parties field minority candidates who after having been elected serve the party interests not that of the respective ethnic community. Officials often win positions earmarked for a community with the votes of another, since anyone can vote for a minority candidate, so it is far from guaranteed that the candidate will win which is supported the most by its community. What matters is the claimed ethnic identity of a candidate not how and whether he/she represents preferences of the community.⁷³

Yet, even after the ‘constituent people decision’, ‘others’ still had no representation in state institutions notably the State Presidency and the House of Peoples, which were based on parity among the three constituent nations (this problem did not apply to the lower house of parliament, the House of Representatives which was elected by proportional representation).⁷⁴ ‘Others’ were not eligible to stand for election to these two state bodies. Thus, the constitution’s promotion of group rights violated individual rights. As was pointed out by the Venice Commission in 2006, constitutional reform was necessary primarily for two reasons. The first was given on practical grounds that Bosnia’s ethnically fragmented state was dysfunctional and as a result the central government was not capable to negotiate EU membership or to implement commitments made under the SAA. This concerned an EU condition formulated at the Madrid European Council in 1995, which made it explicit that a candidate country must be able to transpose EU rules and procedures and implement them, which requires certain competencies from the state.⁷⁵ Not only complicated mechanisms of power-sharing among the three constituent peoples paralysed the state but also the fact that according to the Dayton arrangements, real power resided with the entities rather than the state in terms of financing sources and competencies, such as the army, the police, broadcasting services, taxes, etc., were all competencies of the entities, part of which was later delegated to the state. Several reforms promoted by the OHR which were not directly about constitutional reform in effect aimed at changing the power-balance between the state and the entities, such as the defence reform, the police reform, the intelligence reform, the unification of the state’s three customs services, the introduction of the VAT on the level of the state or the broadcasting reform, all of which intended to shift authority to the state away from the entities without amending the constitution.⁷⁶ However, the other reason why the constitution needed to be amended was that ethnically based voting

⁷² International Crisis Group, ‘Bosnia’s Gordian Knot: Constitutional Reform’ (2012) Europe Briefing 68, 5 <<http://www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/b068-bosnias-gordian-knot-constitutional-reform>> accessed 15 November 2015.

⁷³ ICG, ‘Bosnia’s Future’ (n 63) 21. A solution could be ethnic identification of voters, which is a practice in South Tyrol; yet, in Bosnia, this would be more problematic because of the post-conflict environment. Another way to address this problem could be basing representation on regions rather than on ethnic affiliation because most of the country consists of regions with a clear ethnic majority; although this would present the problem that there are never clear-cut ethnic boundaries. Crisis Group suggested a move towards ‘stronger territorial federalism without an explicit ethnic component.’ ICG, ‘Bosnia’s Gordian Knot’ (n 72) 12, 16.

⁷⁴ *ibid* 56.

⁷⁵ International Crisis Group, ‘Bosnia’s Dual Crisis’ (2009) Europe Briefing 57, 9 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b057-bosnias-dual-crisis.aspx>> accessed 15 November 2015.

⁷⁶ ICG, ‘Bosnia’s Nationalist Governments’ (n 71) 37.

and rights of ethnic groups were prioritized over individual rights, which infringed upon individual human rights. For this reason, the Bosnian constitution was and still is in conflict with the ECHR.⁷⁷ This is a curious fact given that according to the constitution of Bosnia and Herzegovina, the ECHR and its protocols directly apply and have priority over all other law.⁷⁸

This problem was raised in an ECtHR lawsuit filed in 2006 by Dervo Sejdić and Jakob Finci, two Bosnian citizens of Roma and Jewish ethnicity, respectively. Since they were not members of the three constituent peoples but of ‘others’, they were denied by the Constitution and the corresponding provisions of the Election Act 2001 to run for position in the Presidency and the House of Peoples, the upper house of parliament. The Court ruled in 2009⁷⁹ that this represented a violation of the prohibition of discrimination (Article 14 of the European Convention of Human Rights), the right to free election (Article 3 of Protocol No. 1) and the general prohibition of discrimination (Article 1 of Protocol No. 12).

As the Court explained its judgement, when Bosnia joined the Council of Europe in 2002 it ‘undertook to review the electoral legislation within one year, and it had ratified the Convention and the Protocols thereto without reservations.’ Furthermore, when Bosnia ratified the SAA it ‘had committed itself to amending electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments within one to two years.’⁸⁰ The easiest way addressing this issue would be to remove the ethnic categories in the presidency and the House of Peoples while ensuring that one third of candidates comes from the RS while two thirds from the Federation. However, this would disadvantage Croats who would most likely be left without representation due to their numerical minority in the Federation.

This problem raised by the *Sejdić-Finci* case concerns not only ‘others’ but also constituent people in minority position. In 2007, a case was filed against BiH at the ECtHR where a Bosniak living in the RS lodged a complaint because he could not run for the presidency post as a Bosniak living in the RS.⁸¹ In 2014 the ECtHR issued a judgement⁸² in a further case which was lodged even before the application of Sejdić and Finci, this time by a person who did not want to declare affiliation to any ethnic group and subsequently was denied the right to run for position in the Bosnian state presidency and the House of Peoples. The

⁷⁷ European Commission for Democracy through Law (Venice Commission), ‘Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative’ CDL-AD(2005)004 <[http://www.coe.ba/pdf/CDL-AD\(2005\)004-e.pdf](http://www.coe.ba/pdf/CDL-AD(2005)004-e.pdf)> accessed 15 November 2015.

⁷⁸ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina, Article II(2).

⁷⁹ *Sejdić and Finci v Bosnia and Herzegovina* Apps no 27996/06 and 34836/06 (ECHR, 22 December 2009).

⁸⁰ Registrar of the European Court of Human Rights, ‘Sejdić and Finci v. Bosnia and Herzegovina (application nos. 27996/06 and 34836/06)’ (2009) Press release <<http://hudoc.echr.coe.int/eng?i=003-2974573-3281658>> accessed 21 April 2016.

⁸¹ *Ilijaz Pilav v Bosnia and Herzegovina* App no 41939/07, application lodged on 24 September 2007 <<http://hudoc.echr.coe.int/eng?i=001-126684>> accessed on 21 April 2016> accessed 21 April 2016.

⁸² *Zornić v Bosnia and Herzegovina* App no 3681/06 (ECHR, 15 July 2014).

Court found that ‘there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 3 of Protocol No. 1 (right to free elections) to the European Convention on Human Rights.’⁸³

Altogether, the DPA which ensured that peace would last in Bosnia endowed the country with a cumbersome institutional structure that was concentrated on power-sharing between the three constituent nations. A key player of this system was the OHR, itself established by the DPA, a body that received extraordinary powers to oversee the civilian aspect of peace implementation and coordination.

2. External involvement and the role of the European Union

In 1997, responding to mounting post-war tensions in Bosnia the Peace Implementation Council (PIC) at its Bonn conference bestowed upon the OHR great authority including dismissing elected officials and imposing legislation, which are generally called the Bonn powers. Owing to these strong competencies, the OHR has played a very influential if controversial role in Bosnia (to be explained in the following sections).⁸⁴ Although the OHR responds to the PIC including more than 50 donor countries, between 2002 and 2011 the HR became double hatted by assuming also the role of the EU Special Representative (EUSR). The two had separate mandates and the Bonn powers were granted only to the High Representative and not to the EUSR, still in practice it is very difficult to disentangle the EU’s agenda from that of the OHR during this period given that the same person filled the two posts until 2011. The launching of the EU police mission (EUPM) in 2003 and the military mission (EUFOR Althea) in 2004 further reinforced the EU’s position in Bosnia.

The OHR agenda was dominated by the US despite the fact that the EU had a strong representation in the PIC Steering Board, which included both the Presidency of the EU and the European Commission, beside EU member France, Germany, Italy, the United Kingdom, while Canada, Japan, Russia, United State and the Organisation of the Islamic Conference, represented by Turkey, were also members. The promotion of human rights was not part of the mandate of the OHR (which was civilian implementation and coordination of the Dayton Peace Accords), but the OSCE was responsible for overseeing human rights protection, and the UNHCR for coordinating refugee return. Still, many actions and decision of the OHR concerned human rights, which need to be explored also because the EU closely coordinated its agenda under the SAP with the OHR, as will be explained in section II.C.

The EUSR reporting to the Political and Security Committee (PSC) was tasked with coordinating all EU presence in Bosnia, ‘ensuring coherence of CSDP activities, as well as maintaining an overview of a whole range of activities in the field of rule of law’.⁸⁵ Activities of rule of law meant tasks such as providing

⁸³ Registrar of the European Court of Human Rights, ‘Bosnia and Herzegovina must establish a political system for elections without discrimination’ (2014) Press release 217 <<http://hudoc.echr.coe.int/eng?i=003-4966520-6085939>> accessed 21 April 2016.

⁸⁴ International Crisis Group, ‘Ensuring Bosnia’s Future: A New International Engagement Strategy’ (2007) Crisis Group Europe Report 180, 5 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/180-ensuring-bosnias-future-a-new-international-engagement-strategy.aspx>> accessed 15 November 2015.

⁸⁵ Council Joint Action (2002/211/CFSP) on the appointment of the EU Special Representative in Bosnia and Herzegovina [2002] OJ L070/7.

advice to the EU Police Mission (EUPM) and the EU military mission (EUFOR Althea). EUSR was also responsible for providing political guidance to the head of the EU police mission and local political advice to EU force commander.⁸⁶ The EU Delegation, not the EUSR was responsible for overseeing the SAP.

Human rights promotion was not part of the EUSR's agenda, either. This changed in 2011, when the posts of the EUSR and the OHR were decoupled from each other, and the position of the EUSR was merged with that of the Head of the EU Delegation. This allowed for a single representation of the EU in the country. At the same time, the development of human rights was added to Peter Sorensen's mandate. (He was appointed as the EUSR from 1 September 2011 and served until 30 June 2015.)⁸⁷ Another body of the EU presence in Bosnia, EUFOR Althea has served as a military deterrent against potential unrest, while its mandate does not directly refer to human rights, either. Yet, it has carried out human rights related activities, such as seeking and detaining war crimes fugitives and creating conditions of safe return of refugees.⁸⁸ EUFOR 'has collected intelligence on criminal networks supporting war crimes indictees and carried out search operations and attempts to apprehend fugitives.' Altogether, by contributing to creating security and stability in Bosnia, EUFOR was seen as essential to creating an 'environment in Bosnia and Herzegovina that is conducive to establishing a human rights culture for the people.'⁸⁹

Similarly to EUFOR, the EU's police mission, EUPM did not have direct human rights tasks. However, Javier Solana, the High Representative of the CFSP between 1999 and 2009 made it very clear in 2002 that EUPM was responsible for the promotion of human rights.⁹⁰ Under its first mandate between 2003 and 2005 (EUPM I) it was engaged in the return of refugees, combating organized crime beside the major priority of building an accountable and independent police force in Bosnia.⁹¹ It was involved in Returnee Forums, which served as information and service points of returnees, and helped to build the BiH State Investigation and Protection Agency, which was a police agency against organised crime. EUPM II was launched in 2006 after the appropriate lessons were drawn from EUPM I, which was widely criticised for

⁸⁶ Ana E. Juncos, *EU Foreign and Security Policy in Bosnia* (Manchester University Press 2013) 130-131.

⁸⁷ Council Decision 2011/426/CFSP appointing the European Union Special Representative in Bosnia and Herzegovina [2011] OJ L188/30.

⁸⁸ Stefano Recchia, 'Beyond international trusteeship: EU peacebuilding in Bosnia and Herzegovina' (2007) Institute for Security Studies Occasional Papers 66, 14 <<https://www.ciaonet.org/attachments/9215/uploads>> accessed 21 April 2016.

⁸⁹ Jana Arloth and Frauke Seidensticker, 'The ESDP Crisis Management Operations of the European Union and Human Rights' (2007) German Institute for Human Rights Study, 41 <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_the_esdp_crisis_management_operations_of_the_eu_and_human_rights.pdf> accessed 3 December 2015.

⁹⁰ 'A professional, European police service is one that incorporates a human rights-based approach into all aspects of its work. In order to do this, the police service must reflect those standards in its own structures and practices. [...] For this reason, we will mainstream a human rights-based approach in our work. All EUPM colocators will be required to include human rights reporting in their reports from the field. In addition, EUPM will appoint one of its Legal Advisors, based in the Headquarters in Sarajevo, as the focal point for human rights issues'. Javier Solana, High Representative of the CFSP in 2002, cited: *ibid* 44.

⁹¹ European Union External Action, 'European Union Police Mission in Bosnia and Herzegovina (EUPM)' (2012) Fact sheet <http://www.eeas.europa.eu/csdp/missions-and-operations/eupm-bih/pdf/25062012_factsheet_eupm-bih_en.pdf> accessed 3 December 2015.

incompetence, ineffectiveness and was regarded more or less as a failure. This second mission primarily supported the local police in fighting organised crime and corruption, and also monitored and advised local police on human trafficking. Yet, as Crisis Group evaluated its performance in 2009, EUPM was 'not equipped to fight organised crime' and did 'not contribute to the perception of security.'⁹² The mission ended in June 2012.

In BiH the EU managed to combine the various Community and CFSP/ESDP instruments while also cooperated closely with the OHR. The military, the police missions and the OHR/EUSR also had the task to support the EU's conditionality policy within the frames of the SAP in Bosnia. Schwartz-Schilling assumed the office of the OHR/EUSR in April 2006. One of his main goals was signing the SAA with the EU, besides constitutional reform, general elections in October, educational and economic reform.⁹³ The OHR/EUSR often acted in cooperation with the Commission while exerting pressure on Bosnian decision-makers to comply with conditionality requirements during the SAP (to be explained in section II.C).⁹⁴ Moreover, between 2002 and 2006 during the term of High Representative Paddy Ashdown, 'the OHR has been more engaged in police reform than in any other issue,'⁹⁵ which was a prominent theme of EU conditionality policy through the SAP during the same period. This case also illustrates that the HR/EUSR used SAP conditionality to promote his own agenda. Paddy Ashdown pushed for the police reform also through persuading the Commission to make this as a condition of the SAP.⁹⁶ While the Dayton Agreement allowed the entities to have their own police force, the international community (represented both by the OHR and the EU) wanted a nationwide police with administrative units cutting across ethnic lines and entity borders. This was regarded as necessary as the largely ethnically based police forces were very much politicised, serving as tools of politicians obstructing the Dayton Agreement especially when it came to refugee return, and were sometimes also involved in organized crime.⁹⁷ In turn, SAP conditionality also served (EU) security goals. The European Security Strategy presented EU integration of the Western Balkans as a way to increase security.⁹⁸ In 2004 'the European Council decided that one of the initial priorities for implementation of the EU Security Strategy should be the elaboration of a comprehensive policy for Bosnia and Herzegovina'.⁹⁹

At the same time, there was a division of labour between the OHR/EUSR and the Commission. When it came to SAP conditionality requirements, the Commission was not in favour of the OHR applying the Bonn

⁹² International Crisis Group, 'Bosnia's Incomplete Transition: Between Dayton and Europe' (2009) Crisis Group Europe Report 198, 25 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/198-bosnias-incomplete-transition-between-dayton-and-europe.aspx>> accessed 3 December 2015.

⁹³ *ibid* 6.

⁹⁴ Recchia (n 88) 14.

⁹⁵ ICG, 'Ensuring Bosnia's Future' (n 84) 14.

⁹⁶ Juncos, *EU Foreign and Security Policy in Bosnia* (n 86) 132.

⁹⁷ ICG, 'Ensuring Bosnia's Future' (n 84) 14.

⁹⁸ European Union, *A secure Europe in a better world: European Security Strategy* (2003) 8 <<https://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>> accessed 15 November 2015.

⁹⁹ European Council, *European Security Strategy: Bosnia and Herzegovina/Comprehensive Policy* (2004) <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010099%202004%20INIT>> accessed 23 May 2015. Emphasis in the original omitted.

powers because it regarded the local ownership of reforms as crucial.¹⁰⁰ For instance in the case of the broadcasting reform (to be discussed in sections II.B.6 and II.C.3), the OHR stopped imposing reform measures after 2002 when it was included among conditionality requirements of the Feasibility Study (to be discussed section II.C.2). Similarly, the OHR did not impose changes in the defence reform required by NATO.¹⁰¹ Another example was the police reform in which the OHR especially under Ashdown was heavily involved, trying to push for an integrated police force, but he could not use his Bonn powers, that are limited to the HR functions and not applicable to issues of EU conditionality.¹⁰²

The hope was that EU conditionality policy will trigger change in Bosnia which would slowly make the OHR's Bonn powers and subsequently the OHR itself redundant.¹⁰³ Since 2006 the EU and the international community have been trying to close down the OHR and to replace it with a reinforced EUSR. Instead, the OHR is still in operation. The fragmented institutional structure of Bosnia, which was originally meant to ensure power sharing among the three constituent people has been paralysing the state, which is why the international community has been so keen on constitutional reform (see more on this in section II.B.4). An institutional structure more capable of reaching decisions at the state level would be the precondition of closing down the OHR once it would not be needed anymore to break political deadlock. However, EU conditionality could not provide the necessary incentives for that transition to happen.¹⁰⁴ Although the Bonn powers nowadays are much less frequently used, the OHR could still not be phased out from the Bosnian system, which would be the condition for opening the door of EU accession.

In practice, OHR actions ranged from removing officials from their position over amending constitutions and passing laws to overturning judicial decisions.¹⁰⁵ OHR decisions fall into the following eight categories that show the relevance of human rights on several levels: (1) state symbols and state level matters and constitutional issues; (2) economic issues, judicial reform; (3) the Federation, Mostar and Herzegovina-Neretva Canton; (4) removals and suspensions from office; (5) media restructuring; (6) issues related to property laws, (7) return of displaced persons and refugees and reconciliation; (8) individuals indicted for war crimes.¹⁰⁶ This list already indicates which human rights issues were on the OHR's agenda: refugee return and property restitution, media freedom, and war crimes prosecution. Education reform was a further priority not visible from the above categories but prominently featured in decisions concerning

¹⁰⁰ Ana E. Juncos, 'Member state-building versus peacebuilding: the contradictions of EU state-building in Bosnia and Herzegovina' (2012) 28(1) *East European Politics* 67.

¹⁰¹ International Crisis Group, 'Bosnia's Stalled Police Reform: No Progress, No EU' (2005) Crisis Group Europe Report 164, 3 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/164-bosnias-stalled-police-reform-no-progress-no-eu.aspx>> accessed 23 May 2015.

¹⁰² The police reform dragged on until 2008 and ultimately failed because a centralised police was never created as was originally intended by the EU. Thus Bosnia never complied with the EU criteria on the police reform, still the quality of the institution greatly improved, including police cooperation with the ICTY and national war crimes prosecutors. See Keil (n 65) 164.

¹⁰³ Recchia (n 88) 28.

¹⁰⁴ The reasons for that are manifold and discussing them is way beyond the scope of this report, however some arguments are presented in the literature review (section I.A).

¹⁰⁵ ICG, 'Bosnia's Dual Crisis' (n 75) 12.

¹⁰⁶ Office of the High Representative, High Representative decisions by topic <http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=32921> accessed 15 November 2015.

the Federation and Mostar and Herzegovina-Neretva Canton (to be explained in section II.E.2). One of the main goals of education reform was to end ethnic discrimination and segregation in schools. In addition, many decisions in the human rights field were related to institution building such as the creation of the state ombudsman office where the corresponding law entered into force at the order of the OHR in 2001.¹⁰⁷ OHR's decisions led to substantial breakthroughs in a number of areas: 'a single currency, the Central Bank, common license plates, the State Border Service, the State Investigation and Protection Agency, a state-level court and civil service agency, national emblems, military reform, freedom of movement, a value added tax, intelligence service reform, banking reform, abolition of payment bureaus, property rights and refugee return, domestic war crimes courts,' and undermining support networks of war crimes suspects.¹⁰⁸

The extensive use of the Bonn powers especially before 2007 and particularly during the term of Paddy Ashdown between 2002 and 2006 received a lot of criticisms that it was counterproductive to creating functional democracy and resembled an imperial power.¹⁰⁹ The OHR can overrule democratic institutions and remove democratically elected officials without any appeal process, can impose legislation, and can create new institutions without considering the costs.¹¹⁰ The decisions of the OHR are not subject to constitutional review and the OHR itself does not have democratic legitimacy.¹¹¹ Moreover, criticism has been raised over the right to legal remedy of people who have been removed from office by the decision of the HR,¹¹² as well as for a broader violation that might occur with the use of extensive powers and without due regard to the right, of the Bosnian people, to participate in the legislative activities of the OHR as guaranteed under Article 3 of ECHR Protocol No. 1. This second issue links back to the question of democratic legitimacy, raising issues about the functional duality of the OHR.¹¹³

Originally, the justification to use the Bonn powers was linked to concrete threats to peace and the new constitutional regime, but gradually it shifted towards the general need to push reforms. Yet, after 2007 the Bonn powers were slowly eroded. In October 2007, the HR/EUSR Miroslav Lajcak tried to push for changes in the rules of procedure in the parliamentary assembly and the council of ministers, which would

¹⁰⁷ On 3 January 2001, the Law on the Human Rights Ombudsman of BiH entered into force following the ordering of the publication of the Law by the High Representative on 11 December 2000 (Official Gazette of BiH, No. 32/00). See Office of the High Representative, Human Rights Priorities for 2002 (2002) <http://www.ohr.int/ohr-dept/hr-rol/thedept/hr-reports/hr-prior/default.asp?content_id=7411#3> accessed 15 November 2015.

¹⁰⁸ ICG, 'Ensuring Bosnia's Future' (n 84) 5.

¹⁰⁹ PIC Steering Board, 'Towards Ownership: From Peace Implementation to Euro-Atlantic Integration' (2006), cited in ICG, 'Bosnia's Dual Crisis' (n 75) 13.

¹¹⁰ ICG, 'Bosnia's Incomplete Transition' (n 92) 6.

¹¹¹ The five objectives were the resolution of state property and defence property ownership between the state and the entities, the settling of Brcko's status and thus ending its international supervision, achieving fiscal sustainability, and the entrenchment of rule of law, which also included the adoption of the National War Crimes Strategy. The two conditions were signing the SAA and 'a positive assessment of the situation of BiH by the PIC Steering Board based on full compliance with the Dayton Accords'. ICG, 'Bosnia's Incomplete Transition' (n 92) 1; ICG, 'Bosnia's Dual Crisis' (n 75) 5.

¹¹² International Crisis Group, 'Bosnia: Europe's Time to Act' (2011) Crisis Group Europe Briefing 59, 5 <[http://www.crisisgroup.org/~media/Files/europe/B59%20Bosnia%20--%20Europes%20Time%20to%20Act.pdf](http://www.crisisgroup.org/~/media/Files/europe/B59%20Bosnia%20--%20Europes%20Time%20to%20Act.pdf)>.

¹¹³ ICG, 'Bosnia's Nationalist Governments' (n 71) 35.

have made it difficult for any party or entity to block decisions. These decisions imposed by Lajcak were resisted by the RS. The PIC and the EU amidst worries about the settlement process of Kosovo's status did not back him up, which significantly eroded his authority.¹¹⁴ In September 2009 something similar happened when HR Valentin Intzko imposed eight laws by using his Bonn powers, which were defied by RS premier, Milorad Dodik. The PIC did not support the OHR, but instead the US and the EU jointly called for a meeting in Butmir in October 2009 to reform the constitution and close the OHR.¹¹⁵ The OHR was not included in those talks. Altogether, the powers of the OHR have gradually weakened in the Bosnian system. The main idea behind this on behalf of the PIC was that Bosnia should 'take responsibility for its own affairs'¹¹⁶ and, 'the essential decisions to move forward must come from within' Bosnia.¹¹⁷

Since 2006 the PIC has been planning to close the OHR each HR taking office seeking to be the last. In 2008, the PIC defined five objectives and two conditions that had to be met before the office could be closed.¹¹⁸ The Prud process initiated in the end of 2008 by Bosnian political party leaders was meant to address these conditions while also tackling constitutional reform. Among these, resolution of state and defence property, and full compliance with Dayton agreement still remain outstanding. In 2009 the European Commission made the OHR's closure and constitutional reform conditions of EU candidacy, effectively turning the PIC conditions into criteria of EU integration. However, a year later the Commission discarded the requirement of OHR closure. Constitutional reform remained a condition, but its content shifted away from efficiency towards the more concrete necessity to bring the system in line with the ECtHR ruling on the *Sejdić-Finci* case (to be discussed in section II.B.4).¹¹⁹

B. Key human rights issues in Bosnia and Herzegovina

To be able to assess the actions of the EU concerning the human rights situation in BiH, we should start with an overview of the human rights issues prevalent in the country. This section will present those human rights issues in more detail which were high on the agenda of the international community in BiH, were subject to the OHR's frequent interventions, and also featured prominently in the SAP conditionality.

1. Refugees

The war in Bosnia left 1.1 million people internally displaced (IDPs) while 1.2 million people fled to other countries. Many of these people sought refuge in Western Europe while those displaced in the region posed a potential security threat to Bosnia's neighbour countries. These were among the reasons why

¹¹⁴ ICG, 'Bosnia's Incomplete Transition' (n 92) 14.

¹¹⁵ *ibid* 9.

¹¹⁶ PIC Steering Board, 'Towards Ownership: From Peace Implementation to Euro-Atlantic Integration' (2006), cited: *ibid* 13.

¹¹⁷ ICG, 'Bosnia's Incomplete Transition' (n 92) 6.

¹¹⁸ The five objectives were the resolution of state property and defence property ownership between the state and the entities, the settling of Brcko's status and thus ending its international supervision, achieving fiscal sustainability, and the entrenchment of rule of law, which also included the adoption of the National War Crimes Strategy. The two conditions were signing the SAA and 'a positive assessment of the situation of BiH by the PIC Steering Board based on full compliance with the Dayton Accords'. See *ibid* 5.

¹¹⁹ ICG, 'Bosnia: Europe's Time to Act' (n 112) 5.

refugee return was such a high priority for the international community beside the moral cause that a situation created by ethnic cleansing could not be accepted.

Refugee return has been treated as a real priority by the PIC. Until 2007 the HRs removed 185 Bosnian officials from their position on various grounds among them obstructing refugee return, in addition to abuse of office and non-compliance with the Dayton Accords. The OHR's commitment to sustainable return was revealed also by the fact that the implementation of property laws which was mostly completed by the end of 2003 was not regarded as sufficient to fulfil the obligation of refugee return prescribed by the Bosnian constitution, i.e. Annex 7 of the Dayton Peace Accords. In addition, this was one of those rare policy fields where the international community managed to transfer responsibility to Bosnia's state institutions.¹²⁰ The national level Ministry for Human Rights and Refugees established in 2000 is responsible for ensuring the protection of human rights according to the Dayton constitution, including coordinating refugees' rights between the entities.¹²¹

The return process to ethnic majority areas had more or less finished by the mid-2000s. Progress in areas where returnees were in a minority position had been more problematic, due mostly to the lack of security and challenges to property return, beside other problems such as discrimination, access to social services, schools, or economic and employment opportunities. By 2010 around one million people returned (out of the 2.3 million), 270,000 to the RS and 740,000 to the Federation. Around half of these, 470,000 persons represented 'minority returns': 270,000 to the Federation, 172,000 to the RS and 22,000 to the Brcko District.¹²² By minority returnees we mean people belonging to one of the three constituent peoples who nevertheless were functionally a minority in their return area.¹²³ Such minorities make up approximately 10% of Bosnia's population, numbering at 3.79 million according to the 2013 population census.¹²⁴ Minority returns were most obstructed in the Republika Srpska, in order to preserve a mono-ethnic society.¹²⁵ Police reform vigorously promoted by the EU was also connected to refugee return and minority protection since the highly localised staffing and supervision of the police controlled by the entity governments was one of the major obstacles to the return process.¹²⁶ According to UNHCR there are still approx. 113,111 IDPs that would be willing to return if conditions were provided whereas the rest will probably never return after 20 years passed since the end of the conflict. Nowadays housing and the security situation is less of a problem, but the lack of jobs and ethnic discrimination are the main

¹²⁰ ICG, 'Bosnia's Nationalist Governments' (n 71) 35.

¹²¹ Initiative of Monitoring BiH's European Integration, 'Shadow Report on the Progress of Bosnia and Herzegovina's European Union Accession Process' (2013) 60 <<http://eu-monitoring.ba/en/shadow-report-on-the-progress-of-bosnia-and-herzegovinas-european-union-accession-process-2013/>> accessed 3 December 2015.

¹²² UNHCR figures from 2010, cited in ICG, 'Bosnia: What Does Republika Srpska Want?' (n 70) 24.

¹²³ Bieber, *Post-War Bosnia...* (n 69) 116.

¹²⁴ Agency for Statistics of Bosnia and Herzegovina, 'Preliminary results of the 2013 Census of Population, Households and Dwellings in Bosnia and Herzegovina' (2013) <http://www.bhas.ba/obavjestenja/Preliminarni_rezultati_bos.pdf> accessed 12 April 2015.

¹²⁵ Bieber, *Post-War Bosnia...* (n 69) 108-114.

¹²⁶ Lejla Hadzic, 'As Dayton Undergoes Proposals for Reform, the Status of Freedom of Movement, Refugee Returns, and War Crimes in Bosnia and Herzegovina' (2008) 9 *Human Rights Review* 142.

obstacles.¹²⁷ However, despite these relative successes of the return process, Bosnia ceased to be a multi-ethnic country but is made up by largely mono-ethnic regions. Reconciliation which would be needed for multi-ethnic coexistence is also prevented by very different dominant narratives and perceptions of the war of the three ethnic groups.¹²⁸

2. Minorities

Human rights violation of minorities is a problem also partially connected to minority return. There are fundamentally two types of minorities in Bosnia: constituent people in minority position who are often also returnees, and ‘others’, i.e. minorities from non-constituent groups. The Law on the Protection of Rights of Members of National Minorities names 17 national minorities belonging to the category of ‘others’: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks and Ukrainians,¹²⁹ among which Roma are the most numerous; their number is estimated at approx. 30-40,000. Politically motivated violence is mostly targeted against returnees, and this is a persistent problem that equally existed in the 2000s and continued until today, which is also frequently mentioned in EU progress reports (to be discussed in section II.C.3).¹³⁰ The Human Rights Chamber and the Human Rights Ombudsman were meant to investigate such cases of human rights violations. Yet, neither of these could cope with the amount of cases, neither could they address problems such as insecurity of returnees in their return area, a phenomenon that was only partially state-sponsored. Classical minority rights protection instruments, such as the Law on the Protection of Rights of Members of National Minorities target only non-constituent people, as constituent people are not recognised as ‘minorities’, while the power-sharing regimes introduced at different levels of government are meant to protect their rights (as was discussed in section II.A). However, it is questionable whether granting adequate political representation to constituent people in minority position and to ‘others’ as sought by the *Sejdić and Finci* case would be sufficient to address the problem of discrimination across Bosnia, ‘which remains a problem of practice and increasingly less of law’.¹³¹ (This issue will be further elaborated in section II.E.1 below.)

In general, the Bosnian constitution provides poor protection to minorities despite the fact that Bosnia signed up to the key European conventions such as the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities. The Law on the Protection of Rights of Members of National Minorities adopted in 2003 sought to provide a remedy for

¹²⁷ ICG, ‘Bosnia: What Does Republika Srpska Want?’ (n 70) 25.

¹²⁸ Majority of Serbs in the RS generally deny that what happened in Srebrenica was genocide, whereas most Bosniaks view the RS as a genocidal creation. *ibid* 23.

¹²⁹ OSCE Mission in Bosnia and Herzegovina, ‘National Minorities in BiH’ <<http://www.oscebih.org/Default.aspx?id=53&lang=EN>> accessed 12 April 2015.

¹³⁰ The 2005 Progress Report noted for instance that ‘Ethnically motivated incidents continued and were poorly investigated.’ See European Commission, ‘Bosnia and Herzegovina 2005 Progress Report’ COM (2005) 561 final (9 November 2005) SEC (2005) 1422, 24 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1422_final_progress_report_ba_en.pdf> accessed 12 April 2015.

¹³¹ Bieber, *Post-War Bosnia...* (n 69) 119.

non-constituent minorities by granting them ‘the right to protect their cultural, religious, educational, social, economic and political freedoms, needs and identities.’¹³² The EU has been mostly focused on political representation of minorities at the state level while neglecting other forms of discrimination.

A further problem remained unaddressed, which is the lack of cultural or territorial autonomy of Serbs in the Federation, or of Bosniaks and Croats living in the RS. Bosniaks and Croats living in the Federation enjoy de facto autonomy owing to the relative ethnic homogeneity of most cantons.¹³³ Yet, Croats’ representation in the state institution has been also problematic due to their minority position in the Federation, reflected by the election of Željko Komšić in 2006 and his re-election in 2010 to be the Croat member of the three member state presidency. As a Croat candidate of the multi-ethnic Social Democratic Party (SDP) he was elected mostly by Bosniak votes, so most Croats felt they have no true representation in the presidency.¹³⁴ The number of Croats has diminished over the years: in the early 1990s they constituted 17 per cent of the population of Bosnia, nowadays they are around 10 per cent. They are a minority in the Federation as well, and can be outvoted by Bosniaks, as Komšić’s election case illustrates.

3. Segregation

Ending ethnic segregation has been also among the main aspirations of OHR, especially in education, which also concerns children’s rights. High Representative, Paddy Ashdown used his Bonn powers to enforce the administrative unification of ethnically segregated schools and the implementation of the 2003 national law of education at the level of cantons. Despite his efforts, many schools remained ethnically separated in practice until today, even if they happen to function in the same school building. It has been a problem since the DPA that students learn different histories and use different curricula and often different entrances to the school buildings. School segregation initially meant to guarantee rights of minority returnees especially in the RS allowing non-Serb children to be taught according to their own curricula. This practice which hardens ethnic boundaries has been increasingly criticised by the PIC, the EU and the Co E. Educational reform and ending school segregation has been among Bosnia’s accession conditions to the Council of Europe. Bosnia was invited to join in 2002 even though it did not fulfil the entry conditions, so harmonising its laws with Co E obligations became an ex post conditionality that has been mostly ignored by politicians.¹³⁵ Moreover, the ECtHR in several of its rulings made it clear that ethnic segregation of children in schools violates Article 14 of the ECHR on the prohibition of discrimination.¹³⁶ As we will see during the analysis of SAP conditionality, progress reports and European partnerships make frequent references to these obligations towards the Co E, which aim at ensuring compliance of national legislation with the ECHR and its protocols, especially regarding elections and education. As an ICG report

¹³² OSCE Mission in Bosnia and Herzegovina (n 129).

¹³³ For more information of the 2002 constitutional amendments see *ibid*.

¹³⁴ Croat voters mostly voted for the candidates of HDZ and HDZ 1990 yet votes cast together for these two candidates was less than half Komsic received in 2010. ICG, ‘Bosnia’s Dual Crisis’ (n 75) 4.

¹³⁵ ICG, ‘Ensuring Bosnia’s Future’ (n 84) 17.

¹³⁶ See, for example, *D.H. and Others v the Czech Republic* App no 57325/00 (ECHR, 15 November 2007) and *Sampanis and Others v Greece* App no 32526/05 (ECHR, 5 June 2008). Cited in ECMI Kosovo, ‘Segregated Education in Kosovo’ (2012) Policy Brief, 2 <http://www.ecmikosovo.org/wp-content/Publications/Policy_briefs/2012-07_ECMI_Kosovo_Policy_Brief_Segregated_Education_in_Kosovo/eng.pdf> accessed 15 November 2015.

noted, all the progress Bosnia made concerning its Co E post-accession obligations was made under the imposition of the OHR especially during the term of Paddy Ashdown in the justice, education and security sector.¹³⁷ Complying with EU conditionality has not fared much better either; when EU conditionality succeeded it did so under pressure of the OHR to be discussed in the next section in more detail.

4. Constitutional reform

Most of the other issues listed here are closely related to the constitutional problems of Bosnia and the need for constitutional reform, which has been a recurring theme since 2002. The key problems were presented in section II.A.1 above, here we will briefly overview the attempts to address issues raised by the *Sejdić and Finci* case. The first one was the April package (2005/2006) that was followed by the so-called Prud process (2008/2009), then the Butmir negotiations (2009). All of them failed. During these reform initiatives 'emphasis was more on state-building than on human rights', i.e. to overcome the paralysis of the state.¹³⁸ The April package, the first initiative for reform was based on a proposal of the Venice Commission, which would have included several crucial changes, among them replacing the three member collective presidency by a weak, indirectly elected single president, and shifting executive power to the prime minister. It would have also abolished the House of Peoples and transferred its functions to the House of Representatives. Importantly, the Bosnian state would have been given sole responsibility over issues linked to European integration thus the entities' consent would not have been needed to implement reforms required by the EU. Although it was primarily a US led initiative, the Commission was also involved as it invited Bosnian parties to Brussels in November 2005 to facilitate the discussions. The role of the Office of the High Representative was rather limited as it did not take an active part in the process.¹³⁹ According to the evaluation of Bieber, 'the EU has been particularly ambivalent about constitutional reform, supporting (although not whole-heartedly) the first US-led efforts that failed in April 2006 and then subsequently stating that constitutional changes are not a requirement, but are necessary.'¹⁴⁰

As we will see in the discussion of the SAP, full compliance with the ECHR and the CoE post-accession commitments became a much emphasised criterion of EU conditionality policy after 2002, yet had become an essential condition only after the ECtHR ruling on the *Sejdić-Finci* case in 2009. In 2011, the Council of the EU made it clear that Bosnia's SAA cannot be implemented and its application for EU membership accepted until this issue has been resolved. In March 2012 the EU somewhat relaxed these conditions by regarding an appropriate change in the House of People sufficient for the SAA to come into force, while reforming the presidency would be still required for a successful application for EU membership.¹⁴¹

¹³⁷ ICG, 'Ensuring Bosnia's Future' (n 84) 17.

¹³⁸ ICG, 'Bosnia's Gordian Knot' (n 72) 2.

¹³⁹ ICG, 'Ensuring Bosnia's Future' (n 84) 10.

¹⁴⁰ Florian Bieber, 'Constitutional reform in Bosnia and Herzegovina: preparing for EU accession,' (2010) EPC Policy Brief <http://www.epc.eu/documents/uploads/1087_constitutional_reform_in_bosnia_and_herzegovina.pdf> accessed 23 September 2014.

¹⁴¹ ICG, 'Bosnia's Gordian Knot' (n 72) 7-8.

The last unsuccessful attempt for constitutional reform took place in June 2012 when the EU launched the High-Level Dialogue with the participation of Bosnian party leaders in Brussels to resolve the constitutional crisis and find ways to implement the *Sejdić-Finci* decision.¹⁴² The main obstacle is not the unwillingness of Bosnian politicians to introduce non-discriminatory rules benefitting minority citizens, but the fear that implementing the judgment will upset the present state of power sharing among the three constituent peoples, especially the preservation of the rights of the Croats. The power-sharing mechanism among the three constituent people introduced by the DPA led to this situation of violation of individual rights. Important elements of it were the ‘vital interest veto’ of the three constituent peoples and the ‘veto of the Entities’ together with the composition of the three-member presidency (one Bosniak and one Croat from the Federation and one Serb from RS) and the House of Peoples (five Bosniaks and five Croats from the Federation and five Serbs from RS), which served as key guarantees of group rights.

The scope of the issue of constitutional exclusion as confirmed in the *Sejdić and Finci* case has been further expanded by considering citizens unwilling to declare their ‘ethnic affiliation’. The ECtHR found in a 2014 judgment, the *Zornić* case, that excluding such persons from standing for elections is discriminatory and in violation of the ECHR.¹⁴³ This is fully in line with the Court’s earlier judgment in the *Sejdić and Finci* case, and further underlines the importance of building a constitutional framework that does not have ethnic exclusion at its core.¹⁴⁴

Finally, probably the most telling and institutionally entrenched discrimination problem concerns the composition of the very body tasked with supervising discrimination and other human rights violations. The three BiH ombudspersons, according to the law, should be selected from the three ‘constituent peoples’.¹⁴⁵ This reinforces the institutionally entrenched ignorance of the ‘others’ within the realm of human rights protection as well.

5. War crimes

At the joint initiative of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the OHR, in 2005 the War Crimes chamber was created in the Court of Bosnia and Herzegovina to address high profile domestic war crimes cases.¹⁴⁶ Around a hundred cases were processed by the Court up until 2013,

¹⁴² *ibid* 11.

¹⁴³ *Zornić* (n 82).

¹⁴⁴ On how this fundamental design flaw, that initially served the purpose of securing peace, has turned into the barrier to future compromises and a viable political scene in Bosnia and Herzegovina, see Jelena Džankić, ‘The Politics of Inclusion and Exclusion: Citizenship and Voting Rights in Bosnia and Herzegovina’ (2015) 22(5) *International Peacekeeping* 526-54.

¹⁴⁵ Law on the Institution of Ombudsman for Human Rights of BiH, Official Gazette of BiH, 19/02, 35/04, and 32/06. For a critique of the legal-institutional framework, see Minority Rights Group International (MRG), ‘Collateral Damage of the Dayton Peace Agreement: Discrimination Against Minorities in Bosnia and Herzegovina, Twenty Years On’ (2015) 5-6 <http://minorityrights.org/wp-content/uploads/2015/12/MRG_Brief_Bosnia_ENG_Dec15.pdf> accessed 6 January 2016.

¹⁴⁶ Human Rights Watch, ‘Looking for Justice, The War Crimes Chamber in Bosnia and Herzegovina’ (2006) 1 <<http://www.hrw.org/sites/default/files/reports/ij0206webwcover.pdf>> accessed 21 April 2016.

out of which the ICTY transferred six cases to the Court involving ten defendants.¹⁴⁷ Yet, this did not solve the many ills of war crimes prosecution in Bosnia since lower level suspects, which were the vast majority of cases had to be tried by entity, cantonal and municipal courts that often proved not to be well prepared for the task. The courts were overburdened, struggled with enormous workload, long backlogs and legal uncertainties due to lack of harmonisation of the various layers of the Bosnian legal system.¹⁴⁸ Altogether, between 2004 and 2013 214 cases were completed in Bosnia, 235 people convicted and were sentenced to a total of 2,262 years of imprisonment. In 2013 BiH still had about a 1,300 cases in backlog.¹⁴⁹

There was however another institution, the Human Rights Chamber, which offered some relief to local courts unable to handle war crimes cases. It was created by the Dayton Agreement as part of the Human Rights Commission and had jurisdiction over cases involving violation of the ECHR and other human rights treaties. The Constitution created the Human Rights Commission formed by the ombudsman and the Human Rights Chamber, which was meant to ensure that the state meets its obligations under human rights agreements.¹⁵⁰ The Human Rights Chamber took over many war crime cases from local courts, and its decisions were final and binding on all three levels of Bosnian government. One of its major contributions was the launching of investigations into the Srebrenica massacre. As it was foreseen by the Dayton Agreement, its operation ceased in 2003 and its backlog of unresolved cases was transferred to the Constitutional Court of Bosnia.¹⁵¹ The OHR was also actively engaged in preparing Bosnia for domestic war crimes prosecution by establishing the domestic War Crimes Registry, which was set up to manage and administer war crimes trials in Bosnia taken over from the Hague.¹⁵² Moreover, especially during HR Paddy Ashdown's term, the OHR was involved in eliminating the networks supporting war crimes fugitives by blocking bank accounts and sacking officials.¹⁵³

Transitional justice is clearly a human rights issue, which concerns the victims' rights after massive human rights violations to see the perpetrators punished, to know the truth, and to receive reparations. This is why the topic was included in this report under human rights. Yet, the EU did not treat war crimes related problems as a human rights but as a rule of law issue, emphasising its strong links with the effectiveness of the judiciary. As everything else, the judicial system is also very fragmented in Bosnia, there are still four judicial systems: at the state level, in the federation, in Republika Srpska and in the Brcko District. The underlying legal environment is also fragmented: the four systems are autonomous in making legislation, including the development both procedural and substantive law. There are some acts that are

¹⁴⁷ Initiative of Monitoring BiH's European Integration (n 121) 33.

¹⁴⁸ ICG, 'Ensuring Bosnia's Future' (n 84) 13.

¹⁴⁹ Initiative of Monitoring BiH's European Integration (n 121) 33.

¹⁵⁰ Bart M.J. Szewczyk, 'The EU in Bosnia and Herzegovina: powers, decisions and legitimacy' (2010) European Institute for Security Studies Occasional Papers 83, 25 <<http://www.iss.europa.eu/uploads/media/OccasionalPaper83.pdf>> accessed 16 November 2015.

¹⁵¹ Azra Somun, 'Reports on the transitional justice experience in Bosnia and Herzegovina' (2010) 1 *International Journal of Rule of Law, Transitional Justice and Human Rights* 56-63.

¹⁵² Office of the High Representative, 26th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, 1 January – 30 June 2004 (2004) <<http://www.ohr.int/?p=44731>> accessed 21 April 2016.

¹⁵³ ICG, 'Bosnia's Nationalist Governments' (n 71) 35.

crimes in one entity but only misdemeanours in others and courts apply different criminal law in different parts of the country, the entities preferring criminal law of the Socialist Federal Republic of Yugoslavia (SFRY) while the Court of BiH applies the criminal code of BiH.¹⁵⁴

6. Media reforms

Media reforms have been a policy area, which saw ‘unprecedented external intervention in the face of fierce local opposition.’¹⁵⁵ In fact, the reforms achieved in the media sector have been the result of international effort. Media freedom and pluralism steadily improved from 2002 until 2009 after which it has been deteriorating. In 2013, the media in Bosnia was characterized as ethnically and politically divided, media outlets being closely linked to and influenced by politics. (For more details, see section II.E.4 below.)

International assistance focused on four key areas: Public Service Broadcasting (PSB), the Communication Regulatory Agency (CRA), the Open Broadcast Network (OBN), and the Press Council. The OHR was active in setting up the first three. It was heavily involved in media reform until 2002 by drafting and imposing key legislation: ‘it suspended criminal prosecution of defamation and insult’, ‘instructed politicians to adopt legislation on defamation’, ‘required governments to adopt Freedom of Information Acts’, imposed a Law on Communications which set the legal foundations of broadcasting regulation and telecommunications, the PSB legislation and the Freedom of Access to Information Law in the Federation. The OHR also took part in the setting up of media regulatory institutions, such as the Independent Media Commission (IMC) which was transformed into the CRA in 2003 (see more below). From 2002 the OHR withdrew from direct interference into the media sector by shifting responsibility to local actors. The OHR’s interventions were replaced by SAP conditionality, which put strong emphasis on PSB and CRA reforms.¹⁵⁶

The Public Service Broadcasting reform had been a major focus of the OHR and a central element of EU conditionality. Under pressure from the OHR, a state-level, cross-ethnic broadcaster was created besides the two already existing entity broadcasters. The new, national broadcaster started its operation in August 2004 covering almost the entire BiH territory. According to the reform agenda, the three broadcasting services were expected to cooperate in program production, asset management and to establish a joint public broadcasting system. The goal was to overcome ethnic divisions and achieve territorial integration in broadcasting services, not least to prevent political instrumentalisation of broadcasting services. The initial steps of this reform were carried out by decisions imposed by the OHR between 1998 and 2002. After 2002 the OHR slowly withdrew from the process which was taken over by conditionality policy led by the Commission. From 2003, PSB reform became an essential condition of the SAP, as will be shown in the second half of this chapter. Although part of the required legislation was adopted in 2005 according

¹⁵⁴ Adnan Kadribasic, ‘Limited Progress in Bosnia and Herzegovina’ in Marko Kmezic (ed), *Europeanization by Rule of Law Implementation in the Western Balkans*, Institute for Democracy (Societas Civilis 2014) 80.

¹⁵⁵ Tarik Jusić and Nidžara Ahmetašević, ‘Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina’ (2013) Analitika Center for Social Research Working Paper 3/2013, 59 <http://www.analitika.ba/sites/default/files/publikacije/jusic_and_ahmetasevic_-_rrpp_bih_medassistance_31dec2013_final.pdf> accessed 12 April 2015.

¹⁵⁶ *ibid* 42.

to EU requirements, implementation has been resisted by various stakeholders. Croat parties and part of the population have refused to pay monthly fees in protest to not having a separate Croat language channel. In addition, because of the resistance of the entities, the joint PSB system integrating entity based PSBs could not have been created. As a result, even though formally the PSB legislation was introduced, which was a precondition of the SAA, it was never implemented. As an Analitika report from 2013 summarized the current state of the affairs, 'the PSB system is as dysfunctional in 2013 as it was ten years ago, and the reform process is stalled.'¹⁵⁷

The Open Broadcast Network, which turned out to be a failed project was also established and managed by the OHR until its liquidation in 2002. It had the purpose of creating a state-wide, independent television network free from the dominance of nationalist parties. The creation of the Independent Media Commission (IMC), later transferred into the Communication Regulatory Agency (CRA), a single regulator for the broadcasting and telecommunications sector, was much more of a success story. Until 2003, the CRA was directly managed by the OHR and sustained by donations primarily from the EU, after which it was transferred to a local management with a sustainable budget covered from local fees. The CRA has greatly contributed to the elimination of 'hate speech and war mongering propaganda' from TV and radio programs. Yet, the OHR had to intervene on its behalf to guard its independence against political pressure from the government, for instance in 2002 in order to ensure necessary financing for its operation, which has been anything but smooth ever since. The Council of Ministers and the Bosnian parliament have failed to appoint a new director general since 2007 and new members to the CRA council after the council's term expired in 2009, so both the director and the management have been operating by a technical mandate ever since.¹⁵⁸ The CRA has been faced with constant financial and political pressure, while lately OHR intervention and international attention has subsided, and not much has happened beyond issuing reports or protest letters, even though OSCE, Council of Europe and the European Commission monitor its independence.¹⁵⁹

The Press Council is the last important institution created under the media reform, which was set up to provide a self-regulatory framework for print media. Despite organizational and financial challenges, political pressure and intimidation, it has been operating until today with modest success indicated by the radical rise of the number of complaints in received from citizens between 2009 and 2012. The OHR did not play an important role in its creation and operation, but was rather supervised by OSCE and IMC.¹⁶⁰

Following the overview of the main human rights issues in BiH, providing a background for human rights conditionality, we will now turn to the assessment of how the EU applied the various instruments at its disposal, most importantly in the context of Bosnia's SAP.

¹⁵⁷ *ibid.*

¹⁵⁸ IREX, 'Bosnia Herzegovina Media Sustainability Index' (2016) <<https://www.irex.org/resource/bosnia-and-herzegovina-media-sustainability-index-msi>> accessed 19 April 2016.

¹⁵⁹ Jusić and Ahmetašević (n 155) 30-35.

¹⁶⁰ *ibid* 47.

C. Stabilization and Association Process (SAP) in Bosnia and Herzegovina

1. The way to SAP

Following the Dayton Accords, in December 1995 the EU adopted the *Declaration of the process for stability and good neighbourliness for South East Europe* with the aim of extending the European Stability Pact to the Western Balkan countries. Given the particular historical and political context, this initiative primarily had a stabilising objective driven by the aspiration to create lasting security in the Balkans by preventing the renewal of conflict.¹⁶¹ This launched the Royamount Process (named after the French town where the declaration was adopted) with the goal to enhance the implementation of the DPA and to present a comprehensive strategy for the entire region. At the heart of this strategy was the ‘development of cooperation between the countries of former Yugoslavia.’¹⁶² The Royamount Process was channelled into the EU’s *Regional Approach to South East Europe* introduced in 1997 promoting regional cooperation among the countries of the region.¹⁶³ According to the European Commission, ‘the objectives of the regional approach [...] were to support the implementation of the Dayton/Paris and Erdut peace agreements and to create an area of political stability and economic prosperity by establishing and maintaining democracy and the rule of law; ensuring respect for minorities and human rights; reviving economic activity.’¹⁶⁴ As part of the regional approach, the EU also sought to establish contractual relations with these countries, for which the Council set the political and economic conditions, among them the protection of human and minority rights.¹⁶⁵ The EU offered financial assistance and cooperation agreements to the participating states, yet despite its name, ‘regional approach’, it operated more on a bilateral basis while deciding which countries could be deemed as deserving cooperation agreements.¹⁶⁶ At the end, however, the Royamount Process was cut short by the unfolding Kosovo crisis and came to amounting to little more than political statements on democratisation, citizens’ dialogue and the like while lacking real initiatives and content.¹⁶⁷ These programmes nevertheless showed that from the very beginning, i.e. right after Dayton, human rights priorities were linked to security concerns. Even though

¹⁶¹ European Parliament, Dublin European Council 13 and 14 December 1996 Presidency Conclusions Presidency Conclusions: Annexes, Annex 3 <http://www.europarl.europa.eu/summits/dub2_en.htm> accessed 15 November 2015.

¹⁶² European Security Strategy (n 98) 8.

¹⁶³ Council conclusions on the principle of conditionality governing the development of the European Union’s relations with certain countries of southeast Europe, EU Bulletin 4-1997; European Commission, *Regional Approach to the Countries of South-East Europe: Compliance with the Conditions in the Council Conclusions of 29.04.1997, Bosnia-Herzegovina, Croatia, Federal Republic of Yugoslavia* (Brussels, 3 October 1997) <http://ec.europa.eu/enlargement/pdf/key_documents/9710_report_a_en.pdf> accessed 22 April 2016.

¹⁶⁴ Europa.eu, ‘The Stabilisation and Association Process’ (n 11).

¹⁶⁵ EC, *Regional Approach to the Countries of South-East Europe* (n 163).

¹⁶⁶ Stefania Panebianco and Rosa Rossi, ‘EU attempts to export norms of good governance to the Mediterranean and Western Balkan countries’ (2004) Jean Monnet Working Papers in Comparative and International Politics <<http://aei.pitt.edu/6109/1/jmwp53.pdf>> accessed 22 April 2016.

¹⁶⁷ European Stability Initiative, ‘The stability pact and lessons from a decade of regional initiatives’ (1999) <http://www.esiweb.org/pdf/esi_document_id_1.pdf> accessed 6 May 2014.

the Regional Approach was a short-lived initiative, the conditions set in that framework by the General Affairs Council meeting in April 1997 were turned into conditions of the SAP launched two years later.

	Date	Important external actor	Key components
<i>Dayton Agreement</i>	1995	US, France, UK, Germany, Russia, EU	Setting up the constitutional structure of present-day BiH
<i>Royamount Process</i>	1997	EU	Promoting regional cooperation in Southeast Europe
<i>Stability Pact for South East Europe</i>	1999-2008	EU, with US, G8 and 40 countries	Preparing countries in the region (incl. Romania and Bulgaria) for EU and NATO membership, replaced by Regional Cooperation Council (RCC)
<i>Stabilization and Association Process (SAP)</i>	1999 (launch)	EU	'Strategic framework supporting the gradual rapprochement' of WB countries to the EU, 'based on bilateral contractual relations, financial assistance, political dialogue, trade relations and regional cooperation'
<i>Feira Council</i>	1999	EU	Offer of EU membership, with Copenhagen criteria
<i>CARDS program ('Community assistance for reconstruction, development and stabilisation')</i>	2000-2006	EU	(Replaced by IPA)
<i>Thessaloniki Council</i>	2003	EU	Reaffirmation that membership is open ('potential candidates')
<i>April package</i>	2005/2006	US, Venice Commission, EU	Constitutional reform
<i>Instrument for pre-accession assistance (IPA)</i>	2006-	EU	
<i>Signing of the Stabilisation and Association Agreement (SAA)</i>	2008	EU	
<i>Regional Cooperation Council (RCC)</i>	2008-		Encouraging regional cooperation, based in Sarajevo
<i>Prud process</i>	2008/2009	EU, US	Addressing the issue of state property, census, constitutional changes, reconstructing the Council of Ministers and solving the legal status of the Brčko District
<i>Butmir negotiations</i>	2009	EU, US	Constitutional reform
<i>Adoption of visa free regime</i>	2010		
<i>Double hat merger</i>	2011		merging of the post of EU Special Representative in BiH and that of the Head of the EU Delegation

	Date	Important external actor	Key components
<i>High-level dialogue for membership</i>	2012	EU	implementation of the Sejdić-Finci judgement and an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws
<i>Compact for Growth</i>	2014	EU, GB, Germany	Increased focus on economic governance
<i>SAA enters into force</i>	June 2015		
<i>Application for membership submitted</i>	Febr. 2016		

Table 3. Chronology of important documents, instruments and processes concerning Bosnia and Herzegovina, with the most important external actors and the key facts.

After the Kosovo conflict, the EU's record in the region was generally presented as a failure. Coinciding with major political changes exemplified by the Tudjman era coming to an end in 1999 and the fall of the Milošević regime in 2000 the EU reactivated its policy under the pretext of the Stability Pact and the SAP driven primarily by the security needs on its south-eastern borders. Just as during the Royamount Process, the promotion of regional cooperation was at the heart of both initiatives. The *Stability Pact for South East Europe* was not an EU instrument but a common platform of the various international policies towards the region. It was launched on the initiative of the EU in close co-ordination with the USA and the G8, with the participation of more than 40 countries and organisations. The Stability Pact targeted not only countries of the former Yugoslavia but also Romania and Bulgaria that had already begun their accession negotiations. It was organised according to three so called working tables, one focusing on human rights and democratization, besides economic reconstruction and security. At the same time, a claimed objective of the Stability Pact – superseded in 2008 by the Regional Co-operation Council – was to prepare countries for EU and NATO integration.

Importantly, at the Feira Council in June 2000 the EU offered the perspective of membership to the Western Balkan states once they fulfil the Copenhagen criteria, already calling them potential candidates. The Zagreb EU summit in November 2000 again underlined this position while in Thessaloniki in 2003 the EU further reiterated its message that its offer of the prospect of membership was real.¹⁶⁸

Along with the Stability Pact, in 1999, the European Commission also launched the SAP offering contractual relations to the Western Balkan states modelled on the Europe Agreements with Central and Eastern Europe. In 2000 the European Commission prepared the *Road Maps* which contained the necessary steps target countries had to take for opening negotiations on the Stabilisation and Association Agreements (SAAs). The CARDS program operating between 2000 and 2006 provided the financial basis

¹⁶⁸ European Commission, 'Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union' COM/2003/0692 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0692>> accessed 6 May 2014.

of assistance of the SAP, which was replaced by the IPA program after 2006. Respect for fundamental principles such as democracy, rule of law and human and minority rights were conditions of accessing CARDS funds and *autonomous trade measures*, which were both part of the SAP. Aid programs reinforced the EU's human rights strategy, which reflected security considerations with its emphasis on cross-ethnic civil society projects, refugee return or supporting moderate leaders.¹⁶⁹ Regional cooperation and good neighbourly relations remained an important condition during the SAP while a significant share of the CARDS funds – about 10 per cent – was dedicated to financing regional cooperation activities in areas such as integrated border management, infrastructure and institution building.¹⁷⁰

2. Assessing SAP priorities

SAs are key documents of enlargement policy as they provide the contractual framework of relations between the EU and the Western Balkan countries until they reach EU membership. The agreements operate on a bilateral basis but they also promote regional cooperation, as the latter is an important SAP condition.¹⁷¹ All (political and economic) conditions, including the Copenhagen criteria, were incorporated by the Council in April 1997 into the Regional Approach. Additional conditions applying to all participating states included questions like refugee return, compliance with the peace agreements and with the ICTY, democratic reforms ensuring, e.g., the respect of human and minority rights, free and fair elections, non-discrimination of minorities, independent media, good neighbourly relations and regional cooperation. Further conditions were formulated for the individual states.¹⁷²

This section will focus on the instruments deployed by the EU under the SAP in Bosnia from 2000 to 2008. The relevant documents are as follows:

- the EU Road Map of 2000,
- the Feasibility Study in 2003,
- the 2004, 2006 and 2008 European partnerships,
- CARDS and IPA documents,
- the SAA signed in 2008,
- the 2005 and 2007 progress reports, and
- EP resolutions.

The instruments will be assessed to establish the EU's human rights priorities and to check how consistent these priorities were across instruments and over time. It is apparent from the outset that during the period leading to the signing of the SAA the number of human rights issues monitored by the EU grew substantially. However, the EU focused in fact on a few human rights topics such as minority rights and the rights of the Roma, refugee return, broadcasting reform in relation to media freedom, the

¹⁶⁹ Panebianco and Rossi (n 166).

¹⁷⁰ Alessandro Rotta and Michael C. Mozur, 'Regional Co-operation in the context of European and Euro-Atlantic Integration' in Erhard Busek and Björn Kühne (eds), *From Stabilisation to Integration, The Stability Pact for South Eastern Europe* (Böhlau Verlag 2010) 25.

¹⁷¹ Lejla Starčević-Srkalović, *The Democratization Process in Post-Dayton Bosnia and Herzegovina and the Role of the European Union* (Nomos 2009) 189.

¹⁷² European Commission, '2003rd Council meeting – General Affairs' 7738/97 (Presse 129) (Luxembourg, 29/30 April 1997) <http://europa.eu/rapid/press-release_PRES-97-129_en.htm?locale=en> accessed 6 May 2014.

consolidation of human rights institutions and ICTY cooperation. Among these, only two became essential conditions that were only indirectly related to human rights: ICTY cooperation and the broadcasting reform. By the end of this period, there was significant progress in the creation and consolidation of human rights institutions, in the area of war crimes prosecution and refugee return. While the EU influence played a role in achieving these results, the OHR's engagement was at least as important. The OHR and the EU coordinated their actions in several issue areas, while many reforms were the outcomes of the intervention of the OHR.

a) *Road Map, Feasibility Study and the first European Partnership*

The first step of the SAP process was the presentation of the *EU Road Map* in 2000 that identified eighteen conditions that were deemed necessary for opening the negotiations on the SAA. A third of these concerned steps to be taken in the fields of democracy, human rights and the rule of law. In this area the EU expected the implementation of property laws, the reinforcement of human rights institutions, through adequate funding and the implementation of their decisions, judicial and prosecutorial reform (both in the Federation and in RS), and PSB reform (both state and entity level).¹⁷³

The *Feasibility Study* published in 2003 examined whether Bosnia was prepared to start talks on the SAA, concluding that Bosnia was not yet ready and listed sixteen priorities to be pursued further. The following requirements were related to human rights:

- 'fully co-operating with the International Criminal Tribunal for the former Yugoslavia, notably in bringing war criminals to justice before the Tribunal',
- refugee return,
- 'completing the transfer of human rights bodies to state control,'
- resolving all outstanding cases of the Human Rights Chamber transferring the latter's responsibilities to the Constitutional Court,
- 'assuming full national responsibility for the State Ombudsman and making progress in the merger of State and Entity Ombudsmen,'
- 'ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure.'

It is clear from the Road Map and the Feasibility Study that the EU's human rights agenda for Bosnia during this early phase of the SAP was focused on the creation of human rights institutions, such as setting up the state level ombudsman office and transferring the tasks of the Human Rights' Chamber to the Constitutional Court. The broadcasting reform that was strongly promoted by the EU concerned the issue of media freedom, as it served to reduce political control over public media and increase professional standards. Refugee return and ICTY cooperation were expressed as additional human rights priorities.¹⁷⁴

¹⁷³ European Stability Initiative, 'Steps to be taken by Bosnia and Herzegovina to Prepare for a Launch of a Feasibility Study' (2006) <<http://www.esiweb.org/pdf/bridges/bosnia/EURoadMap.pdf>> accessed 6 May 2014.

¹⁷⁴ European Commission, 'Press release, IP/03/1563 Bosnia and Herzegovina: Commission approves Feasibility Study' (Brussels, 18 November 2003) <http://europa.eu/rapid/press-release_IP-03-1563_en.htm#file.tmp_Foot_1> accessed 6 May 2014.

The implementation of property laws was primarily emphasised because of its function in property restitution for returnees.

However, among all the requirements, the weakness of the central state structure and its inability to present a single, coherent national position in the EU negotiations was pointed out as the most important obstacle as 'BiH's core challenge'. As admitted by the Commission, every single reform that Bosnia has managed to carry out was due to the engagement of the OHR, which questioned whether Bosnia would be able to sustain the SAA.¹⁷⁵ The OHR was actively engaged in meeting the Feasibility Study requirements in every field, from setting up the Indirect Taxation Authority over facilitating the creation of state level public procurement to developing a State Government Strengthening Plan. Although these are not human rights related questions, they show the level of involvement of the OHR and how the efforts have increasingly focused on the viability of the state structure. In the human rights area, the OHR was involved in war crimes prosecution, refugee return and the broadcasting reform matching general EU priorities (as was explained in section II.B). The OHR prepared the conditions for domestic war crimes prosecution in Bosnia and supported the work of the Srebrenica Commission investigating the Srebrenica massacre. It monitored closely the return process and ensured the harmonisation of entity laws with that of the state. Together with the Commission, the OHR was lobbying the BiH legislature to act on the question of public broadcasting.¹⁷⁶

In 2004 the EU presented the first *European Partnership* for Bosnia to assist the reform process by introducing mid-term priorities with specific deadlines and planned budgetary resources.¹⁷⁷ The Partnership also served as the basis for CARDS assistance planning. The EU's regular monitoring reports claimed to 'examine the extent to which Bosnia and Herzegovina has addressed the European Partnership priorities.'¹⁷⁸ Among the thirty priorities three were mentioned in the human rights category, with altogether four sub-priorities. The cooperation with the ICTY appeared under the subheading of regional cooperation:

General priority 7	Human rights and protection of minorities
7a	<i>Ensure a level of human rights protection comparable to or better than that achieved under international supervision and demonstrate effective protection of minority rights.</i>
7b	<i>Ensure comprehensive implementation of the Law on the Rights of National Minorities, including the rights of Roma.</i>
General priority 8	Complete refugee return
8a	<i>Complete the refugee return process, facilitating refugees' economic and social reintegration.</i>

¹⁷⁵ ICG, 'Ensuring Bosnia's Future' (n 84) 21.

¹⁷⁶ High Representative for Implementation of the Peace Agreement, '26th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, 1 January – 30 June 2004' (2004) <<http://www.ohr.int/?p=44731>> accessed 22 April 2016.

¹⁷⁷ The full 280-page document was published on www.westernbalkans.info, a site maintained by the European Institute, Sofia: Directorate for European Integration, 'European Partnership for Bosnia and Herzegovina' <http://www.westernbalkans.info/upload/docs/European_Partnership_for_Bosnia_and_Herzegovina.pdf> accessed 6 May 2015.

¹⁷⁸ EC, 'Bosnia and Herzegovina 2005 Progress Report' (n 130) 3.

General priority 9	Consolidate the office of the Ombudsman
9a	Complete the merger of State and Entity Ombudsmen and ensure the functioning of the new institution.

Table 4. Human rights priorities in the document ‘European Partnership for Bosnia and Herzegovina’

Source: ‘European Partnership for Bosnia and Herzegovina’ 1

<http://www.westernbalkans.info/upload/docs/European_Partnership_for_Bosnia_and_Herzegovina.pdf>.

Under priority 7a the EU called more specifically for improving the conditions to prosecute human rights violations, ‘harmonization of BiH laws with the European Convention of Human Rights, and the implementation of the law on freedom of religion and legal status of churches and religious communities’. Comprehensive implementation of the Law on the Rights of National Minorities meant the harmonization of entity laws with that of the state and the creation of minority councils at the parliamentary assembly of BiH. Regarding the Roma the EU was asking for the preparation of a ‘Gypsy Strategy’ and ‘the holding of Gypsies Congress’. Concerning refugees, the reconstruction of refugees’ housing and the implementation of property related laws were demanded specifically, coupled with the rather vague requirement of ‘soothing their re-integration in economic and social terms’ without providing further details. Priority 9a called for the harmonization of laws and the distribution of functions between the entities and the state concerning the ombudsman office.¹⁷⁹

General priority 10	Ensure effective prosecution of war crimes
10a	Demonstrate success in apprehending ICTY inductees and in dismantling networks supporting indicted war criminals.
10b	Ensure continuous availability to ICTY of all documentation, materials and witnesses relevant to ongoing investigations and / or prosecutions.
10c	Assume administrative and financial responsibility for the War Crimes Chamber of the State Court.

Table 5. War crimes related priorities under the chapter ‘Regional and international cooperation’ in the document ‘European Partnership for Bosnia and Herzegovina’

Source: ‘European Partnership for Bosnia and Herzegovina’

<http://www.westernbalkans.info/upload/docs/European_Partnership_for_Bosnia_and_Herzegovina.pdf> 2.

The cooperation with the ICTY was thus not listed as a human rights priority but as condition of regional cooperation. The difference is also apparent in that the criteria under the human rights rubric were formulated in much more general terms. It was only in the case of the building of houses for returning refugees that the required actions were more clearly spelled out. Compared to the human rights priorities listed in Table 4 the prosecution of war crimes received more attention from the EU in the Partnership, measured by the number of activities and measures attached to this condition and by the extent of detail about how these should be implemented. The EU attached 26 measures or steps to this priority, presenting a quite detailed explanation as to how it should be fulfilled. These steps ranged from how the war crimes chamber should be created to the recruitment of prison security guards by the Ministry of Justice.¹⁸⁰

¹⁷⁹ ‘European Partnership for Bosnia and Herzegovina’ (n 177) 61-73.

¹⁸⁰ *ibid* 74-82.

The Partnership also demanded media reforms, including onto the PSB and CRA, under sectoral policies. It also addressed the problem of human trafficking under justice and home affairs, presented as an issue of border management and migration/asylum rather than a directly human rights question. Among others, Bosnia was called to implement its national anti-trafficking plan and grant protection to foreign victims of trafficking.¹⁸¹

Altogether, the Partnership highlighted the following human rights issues: the prosecution of war crimes, minority rights, rights of the Roma, refugee return, fight against human trafficking, the consolidation of the ombudsman's office and the harmonization of laws with the ECHR. Even ECHR compliance was phrased in very general terms, not specifying which laws and obligations the EU was referring to.

b) Financial priorities before 2006

The Partnership also indicated the required financial sources. Priorities of the CARDS program were defined by the international community given Bosnia's special situation of being under the supervisory authority of the OHR.¹⁸² The CARDS assistance for BiH was divided into a national and a regional program, the latter supporting the promotion of regional cooperation. Between 2002 and 2004 172.4 million Euros were allocated to the national program while 23 million for the regional. The overall CARDS assistance to Bosnia between 2000 and 2006 amounted to 502.8 million euros.¹⁸³ This was significantly less than the amount the EU spent on Bosnia between 1991 and 2001 which amounted to 4.3 billion euros. On a per capita basis Bosnia received, depending on the year, half or third of the annual amount compared to what Serbia and Montenegro received from CARDS, despite the fact that Bosnia had greater needs than its neighbours given the disproportionate war damage it suffered.¹⁸⁴ The situation was similar with IPA that replaced CARDS after 2006. In 2010 Bosnia's IPA funding on per capita basis was still the lowest in the region, 23 euro per capita, while it was 27.18 in Serbia, 29.17 in Albania, 37.29 in Kosovo, 43.64 in Macedonia and 54.63 in Montenegro.¹⁸⁵ It is also important to note that economic assistance served certain objectives, however 'was not directly linked to conditionality' since the EU apparently thought that 'economic assistance would probably not make a difference in the case of difficult state-building reforms'.¹⁸⁶ Certainly, until quite recently when the EU began to apply pressure on Bosnia to implement the ECtHR ruling on the *Sejdić-Finci* case, there had not been a precedent of cutting funds on the basis of non-compliance with conditionality requirements. The punishment was rather that the country would not be admitted to the next stage of European integration.

The reconstruction of refugee houses was the only human rights related action, which was planned to receive CARDS assistance.¹⁸⁷ Considering the overall CARDS assistance dedicated to Bosnia between 2000

¹⁸¹ *ibid* 255-270.

¹⁸² Starčević-Srkalović (n 171) 218.

¹⁸³ *ibid* 218.

¹⁸⁴ ICG, 'Ensuring Bosnia's Future' (n 84) 23.

¹⁸⁵ ICG, 'Bosnia: Europe's Time to Act' (n 112) 6.

¹⁸⁶ Recchia (n 88) 30. This particular piece of information is based on Recchia's personal interview with an unnamed EU official (Brussels, 13 July 2006).

¹⁸⁷ In the form of 8 million KM contribution to the 2005 state budget. See *ibid* 69.

and 2006, in the category of democratic consolidation the return and re-integration of refugees and IDPs and support for the media and civil society were the two human rights issues that received CARDS financing, (media under sectoral policies not human rights). Overall one third of CARDS financing was dedicated to these two human rights causes during the whole period, however between 2001 and 2006 financing priorities shifted away to other fields, such as institution building and economic and social development.¹⁸⁸ In 2005 and 2006, the biggest sums in CARDS were committed to public administration reform, investment climate, judicial reform, fight against organized crime, customs and taxation and infrastructure development.¹⁸⁹

The priority to support free and independent media meant financial assistance to two media institutions: the CRA and the PSB. Concerning the PSB the EU's goal was the '[a]ssurance of the long-term viability of a financially and editorially independent single state-wide public broadcasting system for Bosnia and Herzegovina, whose constituent broadcasters share a common infrastructure allowing efficiency and quality improvements.'¹⁹⁰ Thus media reform was fundamentally aimed at overcoming the fragmentation of the broadcasting services along ethnic lines and creating a single public broadcaster. Altogether only one of the three explicit human rights partnership priorities – refugee return – received financing from CARDS, while media was supported as a sectoral partnership priority.

During a similar period between 2002 and 2006, the EU supported human rights and democracy also through the financial instrument of European Initiative for Democracy and Human Rights (EIDHR, renamed as European Instrument for Democracy and Human Rights in 2006) totalling at approximately 16 million Euros. It covered areas, which were 'complimentary, such as civil society development, minority rights, help to victims of torture etc.'¹⁹¹ Based on the number of projects and the amount of contributions, the most important human rights priorities were children's and women's rights, international criminal justice and war victims, protection of national and ethnic minorities including the Roma and returnees, fight against torture, human rights awareness raising and education.¹⁹²

c) Monitoring progress in 2005/2006

In November 2005 the Commission recommended opening negotiations for the SAA, which officially started during the same month. In its communication to the Council the Commission followed up on the

¹⁸⁸ See table in Starčević-Srkalović (n 171) 218.

¹⁸⁹ European Commission, 'Annex 1(a) CARDS Assistance to Bosnia and Herzegovina: Multi-annual Indicative Programme 2005-6' 8
<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/mip_2005_2006_bih_en.pdf> accessed 22 April 2016.

¹⁹⁰ *ibid*, 12.

¹⁹¹ European Commission, 'Annual Action Programme For Bosnia And Herzegovina CARDS 2006' 3
<http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/bih_ap2006_en.pdf> accessed 15 November 2015.

¹⁹² European Commission, 'EIDHR Initiative Compendium, 2002-2006'
<https://ec.europa.eu/europeaid/sites/devco/files/publication-compendium-promoting-human-rights-worldwide-2000-2006_en_0.pdf> accessed 15 November 2015.

requirements formulated in the Feasibility Study recognizing that Bosnia fulfilled a number of conditions outlined there:

- refugee return,
- ‘completing the transfer of human rights bodies to state control,’
- resolving all outstanding cases of the Human Rights Chamber transferring the latter’s responsibilities to the Constitutional Court,
- ‘assuming full national responsibility for the State Ombudsman and making progress in the merger of State and Entity Ombudsmen,’
- ensuring ‘the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure’
- ICTY cooperation.¹⁹³

The Commission in its communication to the Council followed up on all of these conditions. It found that Bosnia’s compliance was satisfactory concerning the first four items:

- ‘legislation necessary to support refugee returns has been adopted’; ‘a Bosnia and Herzegovina Refugee Return Fund has been established and is in operation,’
- ‘Human rights-related competencies have been transferred from the Entity-level to the State-level, as recommended by the CoE and other international bodies,’
- ‘The Human Rights Commission has been established; it is working within the Constitutional Court and is ensuring due follow up to human rights-related cases.’¹⁹⁴

The Commission also approvingly noted that there has been progress regarding cooperation with the ICTY as a ‘substantial number of indicted war criminals have been transferred to The Hague in recent months.’¹⁹⁵ However, cooperation with the Tribunal was still not regarded as sufficient. Moreover, the Commission singled out three conditions that still had to be fulfilled by the deadline of February 2006 under the threat of suspending negotiations:

- police reform,
- the adoption of the law on public broadcasting service and
- ICTY cooperation.¹⁹⁶

¹⁹³ European Commission, ‘Bosnia and Herzegovina: Commission approves Feasibility Study’ IP/03/1563 (Brussels, 18 November 2003) <http://europa.eu/rapid/press-release_IP-03-1563_en.htm> accessed 15 November 2015.

¹⁹⁴ Emphasis added. European Commission, ‘Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina in implementing the priorities identified in the “Feasibility Study on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union (COM (2003) 692 final)”’ COM(2005) 529 final 3 <http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/com_en.pdf> accessed 15 November 2015.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*, 5.

In addition, a number of issue areas were listed where substantial progress was still required. Among these some were related to human rights such as the 'implementation of the outstanding Council of Europe post-accession obligations, in particular in the areas of electoral law and education and adoption of the legislation necessary for the establishment of a single Ombudsman in Bosnia and Herzegovina'. Adoption of the laws establishing the Data Protection Commission and the Information Society Agency were also mentioned.¹⁹⁷

Altogether, among the outstanding conditions, besides continuing ICTY cooperation and the requirement of media reform concerning broadcasting, no other human rights issue was highlighted as a strict precondition of opening negotiations on the SAA. Several human rights related requirements of the European Partnership were omitted from SAA conditionality, such as those concerning minorities and the Roma, while harmonisation of legislation with the ECHR and creation of the state ombudsman office were highlighted as important but not essential conditions.

During the SAA negotiations, the EC was the main negotiator on the EU's side, while the Delegation of the EC to BiH was responsible for the management of EU funds. The third player on the scene in Bosnia was the EUSR who operated under the European Council's foreign policy structures and had a catalysing role in pushing through specific reforms by mobilizing political support from the EU Member States. On the BiH side, the Directorate for EU integration set up in 2002 was responsible for the negotiations and coordinating the process of EU integration.¹⁹⁸ Although negotiations quickly proceeded and were for the most part agreed upon after one year, formal conclusion had to wait until the end of 2007 because Bosnia was dragging its foot over police reform. Finally, in November 2007 the main political parties adopted an action plan on police reform, which allowed for the signing of the SAA in 2008.

The *European Commission's yearly progress reports* have been among the most important instruments of conditionality in the context of the SAP and enlargement policy. The SAP reports published since 2002 were much more extensive and detailed than the previous conditionality reports. The predecessor of yearly progress reports were the conditionality reports published within the frames of the Regional Approach, which already monitored developments in the area of human rights. Already the 2002 report presented Bosnia's decentralized, ethnically based constitutional system as one of the greatest challenges to Bosnia's EU integration. In the 2006 and 2007 progress reports the EU was calling on Bosnia to reform its state structure now not only for the sake of its EU integration but also for the benefit of the respect of human rights. However, the fact that Bosnia failed to meet this condition did not prevent the EU from signing the SAA. The condition that put a break on Bosnia's progress in its relations with the EU was the lagging police reform. Starting with the 2003 report the police reform gradually became the single most important requirement posing the greatest obstacle turning into a 'make or break' condition.

¹⁹⁷ EC, 'Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina in implementing the priorities...' (n 194) 3.

¹⁹⁸ Starčević-Srkalović (n 171) 194-95.

In *SAA progress reports*, human rights were the second category of political conditions, including minority rights. A standard set of issues were being monitored which were more or less the same in all SAP countries:

Democracy and rule of law
electoral rights
Human and minority rights
International human rights law: ratification and implementation of international human rights conventions, personal data protection. ¹⁹⁹
Civil and political rights: abolishing the death penalty (which was an issue in Republika Srpska formally unresolved until today), torture and ill treatment, pre-trial detention and prison conditions, access to justice, freedom of religion, freedom of expression, freedom of assembly and association, ethnic discrimination and ethnically related incidents, discrimination on the basis of sexual orientation, state of civil society. ²⁰⁰
Economic and social rights: poverty, gender equality, women's and children's rights, people with disabilities, labour rights. ²⁰¹
Minority rights, cultural rights and the protection of minorities: implementation of the Council of Europe Framework Convention for National Minorities and of the national law on the protection of minorities, rights of non-constituent people and the Roma. ²⁰²
Regional cooperation
refugees and displaced persons, demining, property repossession of returnees, regional cooperation on refugees, indictments of war criminals to the Hague Tribunal, cataloguing persons implicated in the Srebrenica genocide, freezing of assets of ICTY fugitives, domestic war crimes trials ²⁰³
Fighting organised crime and terrorism
the persecution of human trafficking cases and the protection of victims

Table 6. EU human rights priorities in the 2005 Bosnia and Herzegovina Progress Report

Source: *Bosnia EU Progress Report, 2005, 10-25.*

The reports thus touch upon an impressive list of human rights issues. Human rights problems were addressed not only within the human rights category but also under the subheading of 'regional cooperation', 'democracy and rule of law' and 'fighting organised crime and terrorism'. In many areas shortcomings were identified. In the 2005 progress report, the Commission revisited how Bosnia met its European Partnership obligations. The report approvingly recognised that 'cooperation with the ICTY has improved and steps have been taken to support refugee return and the implementation of human and minority rights. Most CoE post-accession commitments have been met.' Now 'achieving full cooperation with the ICTY, implementing the outstanding Council of Europe post-accession obligations and establishing a single Ombudsman structure' were selected as remaining tasks. It was also added that

¹⁹⁹ EC, 'Bosnia and Herzegovina 2005 Progress Report' (n 130) 19.

²⁰⁰ *ibid* 20.

²⁰¹ *ibid* 22.

²⁰² *ibid* 24.

²⁰³ *ibid* 25.

'further efforts are required to complete the legal and administrative framework for the protection of minorities, and to ensure its implementation'.²⁰⁴

As we saw earlier, the Commission in 2005 recommended opening negotiations on the SAA with Bosnia, and there were only two human rights related areas where it strictly demanded progress under the threat of suspending negotiations: ICTY cooperation and the broadcasting reforms.²⁰⁵ As a result, even though the progress reports and partnerships monitored a wider range of human rights issues, lack of progress in most areas did not matter from the aspect of signing the SAA.

In 2006 Bosnia received its second European Partnership that was again updated in 2008. To establish how the EU's human rights priorities evolved we need to look at the range of human rights issues highlighted as key priorities or mentioned as requiring further action, from among those discussed in the 2005 Progress Report, especially since European Partnership priorities were identified based on the 2005 Progress Report. (See Table 1 in Annex: human rights related priorities in the 2005 Progress Report and the 2006 European Partnership.)

Again, in the 2006 European Partnership document, only ICTY cooperation and the broadcasting reform were listed among key priorities. In addition, among its short and medium term priorities the Partnership followed up on a number of human rights issues pointed out in the progress report:²⁰⁶

- granting full electoral rights to minorities in line with ECHR,
- abolishing the death penalty in Republika Srpska,
- meeting reporting requirements of international conventions,
- solving outstanding human rights cases,
- improving the legal framework protecting national minorities and its implementation,
- social inclusion of the Roma,
- refugee return and social and economic inclusion of returnees,
- anti-trafficking measures and protection of victims of trafficking.

Refugee return and its various aspects such as obstacles of return, the repossession of property, demining and regional cooperation on refugees were carefully monitored by the subsequent reports. This human rights issue received probably the most space in the reports (and financial assistance), besides the prosecution of war crimes.

There were also a number of topics mentioned in the Progress Report that were not followed up on in the Partnership. The Partnership touched upon media freedom only with regards to the broadcasting reform. Other aspects such as intimidation and political pressure on the media, discussed in the Progress Report, were not raised. Minority rights were addressed in the Partnership most specifically from the aspect of electoral rights. Other aspects of discrimination against minorities, e.g. in education and employment, and

²⁰⁴ *ibid* 69.

²⁰⁵ The third key condition was police reform.

²⁰⁶ Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC (2006/55/EC) [2006] OJ L35/19.

the phenomenon of ethnically motivated incidents were discussed extensively in the Progress Report but remained largely unaddressed in the Partnership. Prison conditions, right to legal aid, religious intolerance, discrimination on other basis than ethnicity such as sexual orientation, women's rights, children's rights, the situation of civil society and access to social protection were further problems raised in the Progress Report, which were not included among the Partnership priorities. Without concluding here on our assessment of this shift, the comparison suggests prioritization, i.e. that some human rights were more important for the EU than others, forming a first and a second order of human rights issues.

We will continue our review with how the Commission assessed the situation in BiH between 2005 and 2007 in progress reports and how these reflected its priorities.

3. Priorities in the progress reports of 2005, 2006 and 2007

By looking at the progress reports from 2005 to 2007, besides the topic of refugee return, the issue of minority rights received considerable attention. The 1999 conditionality report was the first to mention the problem of political representation of minorities in Bosnia, mostly referring to returning refugees who belonged to one of the constituent peoples but were in a minority position in their return area and thus suffered discrimination at the local level.²⁰⁷

After Bosnia adopted the Law on the Protection of Rights of National Minorities in 2003, the EU began to distinguish between minorities, such as the Roma and constituent people in minority position. Since 2005 the Commission started to make distinction between constituent people and 'others' drawing attention to the problem that 'the constitution of BiH has an adverse effect on the protection of minorities that do not belong to "these" constituent people' and 'the elections to both the Presidency and the House of Peoples are incompatible with Article 14' of the ECHR. Starting with 2007, progress reports critically remarked that minorities were being discriminated against in their political rights as they could not run for office in the State Presidency and the House of Peoples, which became a hot topic and an essential EU condition after the 2009 ruling of the ECtHR declaring that the Bosnian constitution discriminated against minorities. Already in 2006, the Commission recommended Bosnia to move in the direction of civic and individual rights away from ethnically based rights.²⁰⁸

Closely related to the problematic situation of all kinds of minorities – constituent people or others – the ethnicisation of Bosnia was another recurring theme of the reports with multifaceted implications to human and minority rights. The EU criticised the ethnic division of the media landscape and that the media in general showed 'lack of sensitivity towards, for example, gender, ethnicity and issues relating to vulnerable minorities'.²⁰⁹ The problem of manipulating ethnic issues by political parties and ethnic discrimination was in general repeatedly emphasized. It was pointed out that ethnic discrimination affects all spheres of life such as education, employment, housing, health and social care, pension benefits, access

²⁰⁷ Starčević-Srkalović (n 171) 194-95.

²⁰⁸ *ibid* 212.

²⁰⁹ European Commission, 'Commission Staff Working Document Bosnia and Herzegovina 2007 Progress Report' COM(2007) 663 final (Brussels, 6.11.2007) SEC(2007) 1430, 14 <http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/bosnia_herzegovina_progress_reports_en.pdf> accessed 12 April 2015.

to local services and integration of returnees to their pre-war homes. The reports also noted the prevalence of religious intolerance and the intervention of religion in politics.

Even issues that appeared to be far from this problematique – such as public broadcasting or police reform – were in fact about addressing ethnic fragmentation. The EU criticized the failure to implement the public broadcasting reform, which intended to unify the entity-based broadcasters into a single service under state authority in order to reduce ethnic divisions.²¹⁰ Similarly, the police reform was also about surpassing separation along ethnic lines in the organization of the police. Thus, such seemingly technical issues cut to the heart of Bosnia's constitutional problem, which was also a reason why the EU was pushing these reforms with such vigour.

Socio-economic rights have been also monitored, where ethnic discrimination and discrimination based on sexual orientation were stressed as outstanding issues. The Commission in the 2007 Progress Report recognized that Bosnia adopted legal provisions to protect the rights of women, children and socially vulnerable persons, however it noted also that implementation was unsatisfactory. In addition, the reports expressed concerns regarding labour rights and trade unions, where again as the source of the problem Bosnia's disintegrated institutional structure and the resulting fragmented legislation was identified, besides the sizeable informal economy. On the positive side, the EU concluded that Bosnia successfully completed the repossession of property by displaced persons.²¹¹

The Commission's assessment in the 2007 Progress Report (published in October 2007) is of special importance since the SAA was initialled in December 2007 and signed in June 2008. A comparison with the 2005 Report's findings should show us what progress the EU saw in contrast to 2005, to what extent Bosnia met the European Partnership requirements and, by the time of granting the signature, what human rights issues remained outstanding.

In the 2007 Progress Report police reform and full cooperation with the ICTY were spelled out as essential requirements, while the need for significant progress in broadcasting and public administration reform were also stressed. Thus, besides cooperation with the ICTY and broadcasting reform, which was meant to strengthen media freedom, no other human rights issue was set as a strict precondition for signing the SAA.²¹²

By comparing the 2005 and the 2007 Progress Reports, the lack of progress in the human rights field becomes apparent. There were very few improvements registered (see Table 3 in Annex). According to the 2007 Report, 'some progress has been made as regards civil society organisations', explained by the fact that 'the Council of Ministers signed an agreement on cooperation with the non-government sector and appointed a senior programming officer'. However, it was immediately added that 'civil society organisations continue to register mainly at Entity level, because the registration process at State level is perceived as more bureaucratic. Few NGOs are therefore active country-wide.' The report similarly

²¹⁰ Starčević-Srkalović (n 171) 211.

²¹¹ EC, 'Commission Staff Working Document Bosnia and Herzegovina 2007 Progress Report' (n 209).

²¹² *ibid* 5.

recorded ‘very limited progress’ with regards to economic and social rights and minority rights, cultural rights and the protection of minorities.

The only two clear success cases were the securing of property rights for displaced persons and refugees and cooperation with the ICTY.²¹³ While property return to displaced persons was deemed ‘successfully completed’, there was limited progress concerning minority rights. This meant some improvement in the security situation for returnees, with ‘isolated incidents of violence.’ In contrast to the 2005 Progress report, the 2007 Report was basically silent about the general conditions of returnees, all we could learn was that ‘many refugees and internally displaced persons (IDPs) still [do] not benefit from basic pension and health provisions.’

Cooperation with the ICTY was deemed generally satisfactory, still not reaching the level of full cooperation. The situation in all other human rights areas remained more or less the same as in 2005. The report remained silent about some problems that featured in earlier reports, such as attacks on journalists and political pressure on the media. Table 2 in Annex displays the EU’s evaluation of each human rights criterion directly cited from these two Progress Reports, where issues which registered progress were highlighted in bold.

The lack of progress in most of these areas with a few exceptions explained above posed no obstacle to upgrading Bosnia’s relations with the EU. In the area of media freedom, the public broadcasting reform was an essential condition which was not fulfilled even formally by the time the SAA was signed. The State law on the public broadcasting system was adopted in October 2005, marking the fulfilment of a condition set by the Feasibility Study for opening negotiations on the SAA. Finishing this reform – i.e. the ‘adoption and implementation of all necessary public broadcasting legislation’ – was set as a criterion for closing SAA negotiations.²¹⁴ This meant that relevant legislation also had to be adopted at the Entity level, while the ultimate goal was to bring together the three public broadcasters (the two Entity broadcasters and the nation-wide one) into a single legal entity managed through a single steering board. After SAA talks were opened by the end of 2005, continuing these legislative reforms was turned into an essential condition repeated by also European Partnerships. Among the two entities the Republika Srpska passed the relevant laws, and the Federation only did in 2008, a few months after the signing of the SAA. The full implementation, including the establishment of the Bosnia and Herzegovina Corporation of the Public Broadcasting Services remained outstanding even after the harmonisation of the State and Entity level legislation.

The EU invested heavily into the broadcasting reform, not only its political energies but also financial means. Supporting the PSB was one of the two CARDS human rights priorities, besides refugee return, as

²¹³ ‘The mandate of the Commission for Property Claims of Displaced Persons and Refugees has been extended until the end of 2007 to address residual property repossession cases. Land administration reform continued, leading to improved legal security of land property rights and a stronger real estate market.’ See *ibid* 18.

²¹⁴ European Commission, ‘Commission Staff Working Document Bosnia and Herzegovina 2007 Progress Report’ COM(2008)674 (Brussels, 05.11.2008) SEC(2008) 2693 final, 5 <http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/bosnia_herzegovina_progress_reports_en.pdf> accessed 12 April 2015.

was explained above. The original aspiration formulated in the Feasibility Study in 2003 concerning the broadcasting reform was ‘ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure.’ It can be argued that the initial ambitious goal set in the Feasibility Study – which in principle should have been met *by the start* of SAA negotiations – was moderated during the years and was replaced by demands for adopting specific pieces of legislation, which served this original goal. Although Bosnia complied with the formal conditions by passing the necessary laws, the overall goal of the reform was never reached. In 2014, the Entity laws on public broadcasting services were still not harmonised with State-level law, while ‘the adoption of the Public Broadcasting Corporation’s statute was pending’. As the 2014 EU progress report concluded, ‘the Public Broadcasting System reform has not been completed’.²¹⁵

The weakness of human rights conditions in general can be seen from the fact that media freedom was the only human rights issue in the 2007 Progress Report, which referred back to the European Partnership requirements. Moreover, it is apparent from the formulation of the specific conditions that the primary drive was not so much to improve the human rights situation in this field, most importantly freedom of expression and media freedom, as to address the fragmented structure of the state, its institutions and its people(s) through creating a unified, truly national media landscape.

Although the SAA was initialled in December 2007 and officially signed in June 2008, it was implemented only in June 2015 (for other reasons to be discussed in section II.D, focusing on the period after 2009). The overall picture shows that it was possible for Bosnia to sign the SAA with the EU without meeting even the essential conditions.²¹⁶ As we have seen the formal conditions of the broadcasting reform remained unfulfilled, not mentioning the substantial goals beyond formal requirements. We have also seen that the police reform as originally intended by the EU never happened.

Regarding human rights conditions monitored in the progress reports, the failure to improve them had no consequences. In the overall SAA conditionality process, beside the persecution of war crimes, refugee return seemed to be the most important human rights issue. Success in this area was indicated by the fact that more than a million refugees returned by October 2006, and most received back their properties. This was a serious achievement even if the numbers were probably exaggerated since many returned temporarily just to claim and then sell their properties.²¹⁷ This was an area where clear progress was registered and in which the EU invested heavily. The partial success could have meant that continued conditionality in this area could have brought substantial improvement. Yet, either because the EU was

²¹⁵ European Commission, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ COM(2014) 700 final (Brussels, 8.10.2014) SWD(2014) 305 final, 18 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf> accessed 12 April 2015.

²¹⁶ ‘1) implementation of police reform in compliance with the October 2005 agreement on police restructuring; 2) full co-operation with the ICTY; 3) adoption and implementation of all necessary public broadcasting legislation; and 4) development of the legislative framework and administrative capacity to allow for proper implementation of the SAA.’ EC, ‘Commission Staff Working Document Bosnia and Herzegovina 2007 Progress Report’ (n 214) 5.

²¹⁷ UNHCR BiH, ‘Statistical Summary: Total number of refugees and displaced persons who returned to/within Bosnia and Herzegovina’ (Sarajevo, 31 October 2006). Cited in Recchia (n 88) 18.

satisfied with the achieved level of compliance, or for other reasons, refugee return disappeared as an essential condition after 2005.

The EU signed the SAA with Bosnia in June 2008. This agreement did not contain a detailed list of human rights conditions, however, it included the respect of human rights among its essential elements, backed up by a suspension clause, in which the EU reserved itself the right to terminate the agreement in case of non-compliance with its essential elements.²¹⁸ This was a common feature of every SAA signed with each Western Balkan state, and represented a potentially powerful tool of human rights promotion.

In 2008, Bosnia's European Partnership was updated 'on the basis of the findings of the 2007 Commission Progress Report on Bosnia and Herzegovina',²¹⁹ which again declared key short term and middle term priorities (see Annex Table 3: Comparing human rights priorities in the 2007 Progress Report and the 2008 European Partnership). ICTY cooperation, adoption and implementation of the public broadcasting reform at the level of the Federation and changing the constitution so that it would allow for a better respect of human rights were mentioned in the human rights category among key priorities.

Annex Table 3 shows the shift from the requirements of the 2007 Progress Report to the conditions in the Partnership (with direct quotes from EU documents).

In the updated 2008 European Partnership, among international legal obligations, the implementation of international conventions and the harmonization of the state constitution with the ECHR were highlighted. The penitentiary system and prison conditions, the death penalty and access to justice were addressed among civil and political rights. In the social and economic rights category women's rights and children's rights were noted. The rights of the disabled and the Roma in the context of poverty alleviation and social inclusion were also addressed. The Partnership called for improving the rights of minorities and completing the return process.

At the same time, from among the issues highlighted in the 2007 Progress Report, in the 2008 European Partnership there was no mention of torture and ill treatment, freedom of expression and media freedom (apart from maintaining the demand for the broadcasting reform and CRA independence), civil society, religious intolerance and property rights. Only in the case of property rights can we assume that satisfactory progress was the reason for the omission.

The degree of detail can also inform us about the EU's priorities. From the human rights issues covered in the Partnership, it was again minority rights, the Roma and the refugees that received the most attention, while explanation on how to improve the rights of women and children was largely missing.

²¹⁸ 'Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part' (Luxembourg, 16 June 2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228868/7743.pdf> accessed 12 April 2015.

²¹⁹ 'Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC' 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0211&from=EN>> accessed 12 April 2015.

We will now more specifically look at what the numbers show, how human rights priorities were reflected in the EU's financial support granted to BiH.

4. Financial priorities between 2007 and 2009

After the CARDS program ended in 2006, the Instrument for Pre-accession (IPA) became the framework of EU financial assistance for SAP countries. Main priorities for the first three years were set in the so-called Multi-annual Indicative Planning Document (MIPD) 2007-2009 for Bosnia and Herzegovina, which claimed to follow medium term priorities and key short-term priorities of the European Partnership from January 2006.²²⁰

Among political objectives, the following areas were identified as priorities for EU intervention, most of them with clear human rights relevance:

- civil society development (empowering key actors of human rights monitoring and triggering implementation);
- media freedom (freedom of expression and political rights);
- public administration reform (key institutions for implementation of a wide array of human rights as well as important procedural guarantees);
- police reform (central actor for enforcement, protection and limiting abuse);
- reform of the judicial system (the most visible and often ultimate guarantor of human rights);
- constitutional reform aimed at ensuring Bosnia and Herzegovina becomes a functional state (the *sine qua non* of human rights guarantees);
- anti-corruption policy (remedying an important institutional shortcoming that can impede human rights efforts);
- return process of refugees (the procedure, the status and the earned rights as important human rights concerns);
- de-mining (precondition for resettlement);
- economic and social inclusion of minorities (particularly Roma) and vulnerable groups, in particular children²²¹ (targeted facilitation of exercising various human rights by members of certain groups).²²²

Thus among these political objectives, civil society, media freedom, war crimes prosecution, refugee return and minority protection were the human rights issues that were set as financial priorities. Expected results reveal more about the content of these human rights goals. Civil society development aimed at generating a permanent dialogue between authorities and the civil society so that NGOs 'become better "watchdog" and also stronger partners of the Government.' Media freedom meant strengthening the broadcasting service thus it will 'remain an independent, self-sustainable, technically efficient institution.'

²²⁰ *ibid.*

²²¹ *ibid* 14.

²²² *ibid* 8.

Thus other challenges to media freedom such as violence, intimidation and political pressure against journalists stressed by the 2005 Progress Report were again left unaddressed.

Reform of the judicial system implied more efficient prosecution of war crimes so that they ‘will be in line with international standards.’ Refugee return and protection of minorities and vulnerable groups were primarily aimed at social inclusion of returnees, minorities, children and disabled persons, presenting potentially effective tools against various aspects of discrimination discussed in the Progress Report but less elaborated upon in the Partnership document. The support for civil society became a financial priority that was completely left out from the Partnership goals. Importantly, key partnership priorities were matched with financial assistance.

2006 European Partnership priorities		2007-2009 IPA priorities ²²³
Key priorities		
	1. ‘Fully cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) in apprehending all ICTY indictees at large.’	Reform of the judicial system implied more efficient prosecution of war crimes so that they ‘will be in line with international standards.’
	2. ‘Adopt all the necessary public broadcasting legislation at State and entity level and start its implementation’	Media freedom: Strengthening broadcasting services thus these ‘remain an independent, self-sustainable, technically efficient institution
Short term requirements		
Elections	3. ‘Amend electoral legislation regarding the Bosnia and Herzegovina Presidency members and the House of Peoples delegates, to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments.’	
Human rights	4. ‘Abolish references to the death penalty in the Republika Srpska Constitution.’	
	5. ‘Implement the international conventions ratified by Bosnia and Herzegovina, including reporting requirements.’	
	6. ‘Ensure that the Human Rights Commission within the Constitutional Court addresses all unresolved human rights cases.’	
	7. ‘Further improve the legal framework on minorities so that it fully meets the requirements of the Council of Europe Framework Convention on National Minorities, and ensure its implementation throughout Bosnia and Herzegovina.’	
	8. ‘Establish the Council of National Minorities and the corresponding bodies at entity level.’	

²²³ European Commission, ‘Decision C(2007) 2255 of 01/06/2007 on a Multi-annual Indicative Planning Document (MIPD) 2007-2009 for Bosnia and Herzegovina’ 14-16 <[http://www.esiweb.org/pdf/bosnia_EC%20Multi-Annual%20Indicative%20Planning%20Document%202007-2009%20\(BiH\).pdf](http://www.esiweb.org/pdf/bosnia_EC%20Multi-Annual%20Indicative%20Planning%20Document%202007-2009%20(BiH).pdf)> accessed 12 April 2015.

	9. 'Develop and start implementing the sectoral Action Plans of the national strategy for Roma as part of comprehensive strategy of poverty alleviation.'	Social inclusion of minorities, children and disabled persons: 'Support to the economic and social integration of physically and mentally disabled. Economic and social inclusion of the Roma community.'
Regional issues and international obligations	10. 'Ensure that the Refugee Return fund is properly funded and fully operational. Contribute to ensuring the implementation of the Sarajevo Declaration. Complete the process of returnee/refugee return and achieve significant progress towards their economic and social integration.'	Social inclusion of returnees: 'Institution and capacity building for services in charge of the return process and the social inclusion of vulnerable groups, including children.'
	11. 'Address all outstanding Council of Europe post-accession requirements, in particular in the areas of education and elections.'	
Justice, freedom and security: Fighting organised crime and terrorism	12. 'Ensure the proper implementation of the national action plan for combating trafficking of human beings.'	'Part of IPA CBC programme between BiH and the Western Balkan neighbouring countries: The interventions will aim at supporting enhanced cooperation between structures that deal with matters concerning this domain, including activities such as prevention and fight against national and international organised crime, illegal migration and border security.' ²²⁴
	13. 'Take additional measures for the protection of victims of trafficking and for the adequate implementation of the witness protection legislation.'	
	14. 'Enhance the State Investigation and Protection Agency capacity in the area of fight against terrorism; reinforce international cooperation in this area, including by the proper implementation of international conventions.'	
	15. 'Adopt the law on the personal data protection and establish the Data Protection Agency.'	
Medium term priorities		
Human rights and the protection of minorities	16. 'Ensure full compatibility of national legislation with the European Convention on Human Rights.'	
	17. 'Ensure the protection of minorities in accordance with EU and international standard'	Economic and social inclusion of the minorities and the Roma community
	18. 'Implement the national strategy for Roma and its sectoral action plans.'	
Justice, freedom and security	19. 'Ensure full implementation of all measures included in the action plan against organised crime.'	'Part of IPA CBC programme between BiH and the Western Balkan neighbouring countries: The interventions will aim at supporting enhanced cooperation between structures that deal with matters concerning this domain, including activities such as prevention and fight against national and international organised crime, illegal migration and border security.'

²²⁴ *ibid.*

	n.a.	Civil society development aimed at generating a permanent dialogue between authorities and the civil society so that NGOs 'become better "watchdog" and also stronger partners of the Government.'
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Table 7. Comparing human rights priorities of the 2006 European Partnership and the 2007-2009 IPA program

Altogether, relatively few Partnership priorities were reinforced by financial support, and one financial priority (civil society) was not part of the Partnership goals. Some of the Partnership priorities required political and legislative moves rather than financial assistance (like changing electoral legislation or abolishing the death penalty, specifically priorities 3-8, 11, 16), but even these were not always independent from financial capacities (such as improving minority rights laws and their implementation). The same could be said about reforming education (priority 11). (See Table 7 above.)

In the above overview, the Commission appeared as the main actor in charge of conditionality, with the Council (and the Member States) closely behind. This does not mean that the EP is not active in shaping the EU's enlargement policy. The EP is adding both to the democratic legitimacy as well as to the fragmentation of setting, among others, human rights priorities in this context. Our overview will proceed by reviewing what the EP added to the process, if at all.

5. European Parliament resolutions

The EP as a more politicized body adopts resolutions that can influence Council decisions and Commission reports, even though they are not legally binding. They can have a signalling role, can assign high visibility and carry political weight. To best capture the human rights issues emphasized by the EP and assess how they relate to the Commission's priorities, EP resolutions published between 2002 and 2009 were scanned. The Parliament adopted more than a hundred resolutions concerning South East Europe between 2002 and 2009. Among these we counted 24 which one way or the other addressed human rights. Most of them dealt with more countries and a wide range of political and economic issues human rights being just one of the many topics addressed by these resolutions. There were however a few resolutions which were devoted to a single human rights issue. Contrasting EP resolutions to the Commission documents noted earlier, it is apparent that, at least in the case of Bosnia, the Parliament's agenda was not always reflected in the partnerships and progress reports.

One example that illustrates the (somewhat delayed) influence of the Parliament and its agenda-setting power is gender discrimination. The 2004 resolution on women in South-East Europe was among the few which focused on a single human rights issue concerning the region thus sending a strong political message about its importance not only to the states in question but also to EU institutions.²²⁵ The resolution was published in April 2004, before the Council adopted the European Partnership documents for Bosnia (June 2004 and January 2006). Still, these latter documents made no reference to the EP

²²⁵ European Parliament, P5_TA(2004)0382 Women in South-East Europe: European Parliament resolution on women in South-East Europe (2003/2128(INI)) 22 April 2004.

resolutions and, most importantly, were silent on the situation of women.²²⁶ At the same time, the Commission in its annual progress reports regularly monitored women's rights, and reflected on some of the problems highlighted by the EP resolution (without specific reference to it). The 2005 Progress Report did not go into much detail, either, but listed the legal and institutional measures Bosnia adopted for increasing gender equality, and reported about the existence of discrepancies between legislation and practice.²²⁷

In contrast to the Commission's report, the EP resolution did not simply discuss women's rights separately, in the context of gender equality, but raised the issue more specifically, in the context of increasing human trafficking and domestic violence. Furthermore, not only it identified existing problems but also pointed to negative tendencies. In addition to being stronger and more specific in framing the problem, the EP directly called on the Commission to 'to develop specific actions and projects to combat trafficking in, and violence against, women, and to insist on involving local women's organisations and initiatives'.²²⁸ Certainly, the 2005 Progress Report failed to communicate the extent and urgency of the problem, which was the central message of the resolution.

It was the 2007 Progress Report that already reflected a shift in the direction indicated by the 2004 EP resolution and discussed women's rights in the context of trafficking and domestic violence. Importantly, the protection of women's rights became a short term priority (as opposed to previous partnerships) in the 2008 Partnership document, even if it was not extensively elaborated.

In other respects, human rights priorities stressed by the EP were not much different from those of the Commission or the Council. These included the common issues that we have seen, like cooperation with the ICTY and war crimes prosecution, refugee return, the protection of minority rights with particular emphasis on rights of the Roma. Later the broadcasting reform (2006), non-discrimination in education (2007) and the issue of missing persons, LGBT rights and media freedom (2008) were added to the list. At times, the EP was more specific in raising human rights issues within the broader problem areas. In 2008 the EP raised the problem of intimidation against the media in Bosnia, whereas this issue was not mentioned in the 2008 Partnership document or the 2007 Progress Report. Yet, the 2008 Progress Report already drew attention to the growing physical violence against journalists.²²⁹

In many cases the Parliament expresses its support for the decisions, statements and actions of the Council and the Commission, while it may also change the emphasis or, as in the case of gender, highlight areas that would otherwise be largely neglected. Its role as a political body, in addition to providing support and voting on the relevant legislative documents, is also present in the language it uses, often reacting in a more open and direct way, sometimes using stronger language earlier than other bodies.

²²⁶ Council Decision of 14 June 2004 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina (2004/515/EC).

²²⁷ The 2005 progress report covers the period from March 2004 to 30 September 2005, which is why this is the relevant document to look at.

²²⁸ EP, Women in South-East Europe (n 225).

²²⁹ EC, 'Commission Staff Working Document Bosnia and Herzegovina 2007 Progress Report' (n 214) 17.

In 2006 the Parliament adopted a resolution on ‘the outlook for Bosnia and Herzegovina’.²³⁰ The title indicated, also stressed in the text, that the integration path is open, and progress largely depends on the domestic political institutions. It noted the breakdown of talks between the Bosniak, Croat and Serb representatives and called on domestic actors to strengthen their efforts to build a viable state. It mentioned priorities that were also pushed by the Commission: public administration, constitutional reform, public broadcasting, police, defence and intelligence reforms, cooperation with ICTY, return of refugees and IDPs. It also asked the government to pay more attention to the needs of rural areas, a sentence that was added later in the debate. A statement by an MEP from the political group ‘European United Left / Nordic Green Left’ interpreted this, approvingly, as mostly protecting those of orthodox faith, and criticized the parliamentary majority for a bias against the Serb community.²³¹ This shows another peculiarity of the role of EP in human rights conditionality: diversity of opinions and internal debates.

The 2006 resolution called on all parties to make sure that the upcoming elections would be free, fair and democratic, and that the results would lead to the adoption of the required reforms. As a follow-up to this, a 2007 EP recommendation to the Council, the Parliament expressed its concern over the fact that the election campaign led parties to adopt a more divisive language, including earlier moderate parties.²³²

By way of transition to the following section assessing the developments after 2009, we will conclude here by briefly looking at the activity of the EP from 2010 to 2015. Assessing the situation in BiH, the EP adopted resolutions in 2010 (‘on the situation in Bosnia and Herzegovina’), 2012 (on the 2011 Progress Report), 2013 (on the 2012 Progress Report), 2014 (on the 2013 Progress Report) and 2015 (on the 2014 Progress Report). Throughout these years the Parliament painted an accurate image of a country whose leaders are unable to compromise over key elements of the functioning of the country, impeding efforts to progress on the integration path, in a country where corruption is widespread, half of state revenues are spent on administration, unemployment is high and there is an ‘absence of common vision and political will’ as a result of ‘ethnocentric attitudes’.²³³ The 2015 resolution also expressed its ‘deep concern’ with the calls, from domestic political actors, for a referendum on the independence of Republika Srpska.²³⁴

Looking at the topics raised by EP resolutions, the picture is largely consistent throughout the recent years (Table 8). For instance, the issue of post-war reconciliation and the return of refugees, the protection of

²³⁰ European Parliament resolution on the outlook for Bosnia and Herzegovina P6_TA(2006)0065 (16 February 2006) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0065+0+DOC+PDF+V0//EN>> accessed 24 February 2016.

²³¹ Jaromír Kohlíček (GUE/NGL), Explanation of vote on the resolution on Bosnia-Herzegovina RC-B6-0095/2006, 16 February 2006

<<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20060216&secondRef=ITEM-007&language=EN&ring=P6-RC-2006-0095#4-147>> accessed 24 February 2016.

²³² European Parliament recommendation to the Council of 15 March 2007 on Bosnia-Herzegovina (2006/2290(INI)) P6_TA(2007)0077 (15 March 2007), para. 1 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2007-0077+0+DOC+WORD+V0//EN>> accessed 24 February 2016.

²³³ European Parliament resolution on the 2014 Progress Report on Bosnia and Herzegovina 2014/2952(RSP) (30 April 2015) P8_TA(2015)0182 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0182+0+DOC+PDF+V0//EN>> accessed 25 February 2016.

²³⁴ *ibid* para. 5.

war victims were always high on the agenda, while de-mining or the question of missing persons were not always mentioned.

Issues / EP resolutions	2010 res.	2012 res.	2013 res.	2014 res.	2015 res.
<i>Sejdić-Finci</i>	X	X	X	X	X
constitutional reform (institutional framework, rule of law, governance)	X	X	X	X	X
census	X	X	X	X (& IDs)	
public administration	X	X	X	X	X
police, law enforcement		X	X		X
ICTY cooperation	X	X			X
war crimes, protection of victims, sexual crimes	X	X	X	X	X
de-mining		X	X		
missing persons	X			X	X
refugees, IDPs, returnees	X	X	X	X	X
citizenship		X			
human trafficking	X	X	X	X	X
judiciary	X	X	X	X	X
access to justice (free legal aid)					X
corruption	X	X	X	X	X
conditions for the closure of the OHR	X	X	X	X	
electoral reform	X		X (Mostar)	X	
civil society	X	X		X	X (& youth)
rights defenders			X		
minorities and vulnerable groups	X		X	X	X
Roma	X	X	X	X (edu. only)	X
anti-discrimination	X	X (extremism)	X	X	X
women's rights and gender equality	X	X	X	X	X
LGBTI persons (SOGI)	X		X	X	X
freedom of expression, media freedom	X	X	X	X	X
education, desegregation	X	X	X	X (disability)	X
cultural institutions / national heritage		X	X	X	
socio-economic reforms, social protection	X	X		X	X
unemployment (esp. the young)	X	X	X (& women)	X	X
workers' rights		X	X	X	X
business environment	X	X	X	X	X

Issues / EP resolutions	2010 res.	2012 res.	2013 res.	2014 res.	2015 res.
environment	X			X	X

Table 8. Issues raised in EP resolutions on Bosnia and Herzegovina, 2010-2015

Source: European Parliament, 'Resolution on the situation in Bosnia and Herzegovina', 17 June 2010, P7_TA(2010)0238 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2010-0238+0+DOC+PDF+V0//EN>> accessed 25 February 2016; European Parliament, 'Resolution on the 2011 progress report on Bosnia and Herzegovina (2011/2888(RSP))', 14 March 2012, P7_TA(2012)0085 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0085+0+DOC+PDF+V0//EN>> accessed 25 February 2016; European Parliament, 'Resolution on the 2012 Progress Report on Bosnia and Herzegovina (2012/2865(RSP))', 23 May 2013, P7_TA(2013)0225 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0225+0+DOC+PDF+V0//EN>> accessed 25 February 2016; European Parliament, 'Resolution on the 2013 progress report on Bosnia and Herzegovina (2013/2884(RSP))', 6 February 2014, P7_TA(2014)0102 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0102+0+DOC+PDF+V0//EN>> accessed 25 February 2016; European Parliament, 'Resolution on the 2014 Progress Report on Bosnia and Herzegovina (2014/2952(RSP))', 30 April 2015, P8_TA(2015)0182 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0182+0+DOC+PDF+V0//EN>> accessed 25 February 2016.

The Parliament sometimes relied on domestic actors as in the case of the Law on Citizenship. The BiH Constitutional Court declared the provision on the automatic loss of citizenship on acquisition of a foreign citizenship unconstitutional in 2012.²³⁵ The EP in its 2012 resolution called on parliamentary action on the issue.²³⁶ The national legislature later moved to annul the clause in question, creating a regime that tolerates multiple citizenship, an important move for Bosnian citizens both inside and outside the country, considering those who left the country and those, mostly Croat and Serb residents who, as a result of the external citizenship policy of Croatia and Serbia, acquired a second citizenship.

The EP also moved, in certain cases, to push for changes in a particular area. It used the symbolic force of adopting separate resolutions devoted to, e.g., the commemoration of the Srebrenica genocide (in 2005, 2009 and 2015)²³⁷ or of the Dayton accords.²³⁸ These usually repeat the most important statements that the EU is otherwise pushing for (reconciliation, cooperation with the ICTY, prosecution of war criminals, helping victims of war and of sexual violence in particular, returnees, constitutional reform etc.).

²³⁵ Eldar Sarajlić, 'Country Report: Bosnia and Herzegovina' (revised and updated January 2013) EUDO Citizenship Observatory Country Report RSCAS/EUDO-CIT-CR 2013/7, 16 <<http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Bosnia%20and%20Herzegovina.pdf>> accessed 25 February 2016.

²³⁶ European Parliament resolution on the 2012 Progress Report on Bosnia and Herzegovina (2012/2865(RSP)) (23 May 2013) P7_TA(2013)0225, para. 35 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0225+0+DOC+PDF+V0//EN>> accessed 25 February 2016.

²³⁷ See the list in the 2015 resolution: European Parliament resolution on the Srebrenica Commemoration (2015/2747(RSP)) (9 July 2015) P8_TA-PROV(2015)0276 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0276+0+DOC+PDF+V0//EN>> accessed 25 February 2016.

²³⁸ European Parliament resolution on the 20th anniversary of the Dayton Peace Agreement (2015/2979(RSP)) (17 December 2015) P8_TA(2015)0471 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0471+0+DOC+PDF+V0//EN>> accessed 25 February 2016.

The work of the EP in the examined period proved to be important in shaping some areas of human rights conditionality on the level of raising issues, most importantly in gender equality and also in specifying human rights concerns in addition to the general assessment.

6. Conclusions

In this section we have analysed how the carrot of the SAA was used by the EU to promote human rights in Bosnia until the signing of the SAA. The EU's human rights agenda for Bosnia initially was focused on the creation of human rights institutions, such as setting up the state level ombudsman office and the transfer of the tasks of the Human Rights' Chamber to the Constitutional Court. Besides these, the broadcasting reform, refugee return and ICTY cooperation were the human rights priorities of the Feasibility Study. The first European Partnership Bosnia received in 2004 added further conditions to the list: the protection of minority rights, the rights of the Roma, the fight against human trafficking and the harmonization of laws with the European Convention of Human Rights. (The latter remains outstanding until today, to be explained further in section II.D.)

On the whole, conditions not set as essential ones were not strictly evaluated with the exception of return of refugees and IDPs. 'Implementation of the outstanding Council of Europe post-accession obligations, in particular in the areas of electoral law and education'²³⁹ was for instance a criterion the Commission set among the goals of the SAA negotiations in 2005 which had not been met by 2008 (or by today).

Whereas progress reports monitored a wide range of issues, partnership documents addressed a few selected human rights problems. Minorities, the Roma and returnees remained important priorities in light of the 2006 European Partnership. Within minority rights only electoral rights were emphasized, other aspects of discrimination, e.g. in education and employment and the phenomenon of ethnically motivated incidents, discussed extensively in the progress reports remained largely unaddressed in the partnerships. Although the demand for the broadcasting reform was framed as a condition of free media, other aspects of media freedom discussed in the progress reports such as intimidation and political pressure on journalists were not raised in the partnerships. The 2007-2009 IPA priorities were consistent with the existing agenda, they focused on broadcasting reform, war crimes prosecution, refugee return and social inclusion of minorities, primarily the Roma and other vulnerable groups such as children and disabled persons. Only civil society development was a new item compared to the partnership priorities.

Looking at the institutional context domestically, many requirements that the EU set for the country could be met only with the strong engagement of the OHR, as it happened with war crimes prosecution and refugee return, but also conditions falling outside the human rights package like taxation. In several areas the EU's conditionality combined with the OHR's efforts resulted in progress, most importantly in the case of refugee return, war crimes prosecution or the consolidation of human rights institutions. The legislation necessary for the establishment of a single ombudsman in Bosnia and Herzegovina was an EU requirement which was adopted in March 2006, creating the legal background for merging the three ombudsman institutions. Although the appointment of the ombudspersons dragged on until 2008, jeopardizing the

²³⁹ EC, 'Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina in implementing the priorities...' (n 194) 3.

implementation of the law, the three institutions were finally merged and the entity offices stopped operating in 2010.

There was not much progress in other human rights areas which were monitored in the progress reports, as demonstrated by a comparison between the 2005 and 2007 Progress Reports. The failure to address the problems pointed out in the progress reports had no major consequences on SAA negotiations, which created tensions between the EU's strong rhetoric on human rights as expressed in the progress reports and its actions. Although Bosnia's European Partnership was updated in 2008 'on the basis of the findings of the 2007 Commission Progress Report on Bosnia and Herzegovina',²⁴⁰ a number of issues were omitted from the Partnership, which were problematized in the 2007 Progress Report, such as torture and ill treatment, freedom of expression and media freedom (apart from maintaining the demand for the broadcasting reform and CRA independence), civil society and religious intolerance. The 2008 European Partnership significantly broadened the human rights agenda where the EU expected improvements as compared to the previous partnerships, such as concerning the penitentiary system and prison conditions, the death penalty and access to justice, women's and children's rights. Yet, this did not affect the signing of the SAA, which was already initialled and was to be signed a few months later. The extent to which these new criteria were followed up subsequently will be assessed in the following sections. On the whole, human rights conditions seemed to have remained of secondary importance in the EU's conditionality policy towards Bosnia, with the primary focus on stabilising the country and making it more functional.

Considering that the negotiations leading to the adoption of the SAA are the initial stage of EU accession, the EU's human rights agenda expressed in this framework looks low on ambitions. It focused on a few strategically important human rights issues with clear security implications. At the same time, the EU's efforts were not without positive effect while pursuing these goals, especially concerning human rights institutions, refugee return and war crimes prosecution.

According to Schimmelfennig and Sedelmeier, the credibility of conditionality policy – the expectation that rewards will be withdrawn in case of non-compliance – seriously affects the effectiveness of rule adoption. During the analysed period, the credibility of the EU's conditionality policy was compromised concerning the broadcasting reform. The Feasibility Study set the condition of 'ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure', which was a very ambitious requirement for *opening* SAA negotiations. This criterion was not fulfilled by the start of negotiations in November 2005, and this did not change by the time the SAA was signed in 2008. After 2008 the EU dropped this issue from essential conditions even though it has not been fulfilled until today.

Bosnia seems to have gotten away with this kind of approach of 'complying without complying' with an essential condition while still reaping the reward, in this case obtaining an SAA. (Although the SAA was implemented only seven years later, in June 2015, the reasons for this delay, that we will discuss in the next section, lie elsewhere, namely Bosnia's lack of compliance with the *Sejdić-Finci* case.) Such 'reluctant

²⁴⁰ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC (2008/211/EC) OJ L80/18, 20.

compliance' means rule adoption without implementation, where some formal changes are introduced which are *just* not enough for reaching the originally desired effect, in this case establishing a functioning joint public service broadcasting system. Similar tactics have been followed in Bosnia in other policy fields as well, for example concerning anti-discrimination (to be discussed in section II.E.1). As the Serbian case study will demonstrate, even accession candidates can apply this strategy successfully.

While we were focusing on human rights, it is important to keep in mind that the EU had a much wider agenda for the country centring on post-conflict reconstruction and state building.

The EU compromised on key human rights conditions, most importantly the national broadcasting reform, faced with the political realities of Bosnia and motivated by the will to keep the country on the track of EU integration. Applying strict conditionality is difficult in a country whose politicians are not too keen on EU integration. This proved to be a challenge even before 2008 although this was the period when the EU had considerable leverage over Bosnia demonstrated by its aspiration to obtain an SAA. After 2008 the EU seems to have lost its influence over Bosnia. The only window of opportunity was presented by the visa liberalization process which proved to be the most effective tool among the instruments applied during this period in terms of human rights promotion, which we will assess in the next section.

D. EU Instruments between 2009 and 2015

1. Visa liberalisation: conditionality in 2009-2010

In line with Schimmelfennig and Sedelmeier's theory,²⁴¹ one cause for the low effectiveness of SAP conditionality is that it presents an early stage of membership, accession being a distant possibility, rather than a credible and direct offer. Visa liberalization, on the other hand, was a tangible benefit that had more leverage. In May 2009 the Commission published its first assessment of BiH's visa progress and, as a result, Bosnia was not included in the first group of countries to enjoy visa free travel to the EU. In a year following this initial assessment, the country made remarkable progress in a number of areas. The Bosnian parliament adopted important laws in urgent procedure related to border control, military equipment, international legal aid in criminal matters, prevention of money laundering and financing of terrorist activities. Police bodies reached an agreement to exchange information, removing another obstacle to effective fight against organized crime. Bosnia also accelerated the process of introducing biometric passports that became available in October 2009, and adopted a law in September 2009 to establish an anti-corruption body. In May the Commission set mid-2010 as the date of presenting its proposal for lifting the visa obligation for Bosnia if it fulfils the necessary criteria. This case demonstrates well how the perspective of tangible benefits can motivate the otherwise uncompromising Bosnian politicians to cooperate and reach difficult agreements.²⁴²

Many in the EU, especially in the EP, were lobbying to include Bosnia in the first wave of visa liberalization together with Macedonia, Serbia and Montenegro. Leaving out Bosnia seemed problematic especially

²⁴¹ Schimmelfennig and Sedelmeier (n 14).

²⁴² Beata Huszka, 'The next enlargement round – the Balkan challenge' (2010) CEU Centre for EU Enlargement Studies Policy Paper, 23.

given that the delay affected mainly ethnic Bosniaks since many Serbs and Croats hold Serbian and Croatian passports. Some even suggested that the EU could offer a fast-track EU membership with visa-free travel for all Bosnians, in return for a new constitution.²⁴³ The European Commission assisted Bosnia through the ‘visa liberalisation dialogue’ to meet obligations concerning different areas of the visa road map. Finally, in December 2010 visas were abolished for Bosnian and Albanian citizens.

Even though visa liberalisation is not directly linked to human rights or enlargement, it proved to be a key stage in EU conditionality that had direct consequences in the human rights field, too. The EU enjoyed strong leverage because Bosnia, most importantly its political leadership(s), was very motivated to have the visa obligation lifted. This type of constructive enthusiasm has been lacking during the SAP partially because of the distant perspective of achieving EU membership. In addition, the conditions were quite technical and clear which also made compliance more transparent. Thus visa liberalisation represented an effective instrument for the promotion of human rights, much more than tools of enlargement, not only in Bosnia, but also in Serbia and Turkey (see chapters III, IV).²⁴⁴ The visa roadmap Bosnia received in June 2008 included 42 benchmarks in different areas of rule of law. Human rights related benchmarks concerned the following issues: right of asylum; data protection; accessing identity documents especially by refugees, IDPs and Roma; freedom of movement (removing obstacles of return of refugees); anti-discrimination legislation and minority protection.²⁴⁵ Human trafficking was also addressed in the subcategory of fighting organised crime.

Remarkably, Bosnia complied with all the listed requirements by the end of the process. We will now look at the human rights related conditions comparing what the EU expected and what measures were adopted as a result in order to establish to what extent Bosnia fulfilled the visa liberalisation requirements.

a) Refugees and human trafficking

The EU was particularly calling for ‘implementing the Law on Movements and Stay of Aliens and Asylum of 2008,’ and ‘providing adequate infrastructure and strengthening responsible bodies, in particular in the area of asylum procedures and reception of asylum seekers.’²⁴⁶ Bosnia adopted the necessary bylaws on asylum, standards on asylum centres and travel and identification documents for refugees, and began to create the necessary infrastructure by November 2009.²⁴⁷ The May 2011 post-visa liberalisation assessment report approvingly noted that ‘the responsible national authority was ready to issue travel documents for refugees if an application is submitted’, and that progress was made on the construction

²⁴³ Charles Crawford, ‘Bosnia: ethnic disarmament’ *TransConflict* (1 October 2009)

<www.transconflict.com/2009/10/bosnia-ethnic-disarmament/> accessed 15 November 2015.

²⁴⁴ ‘Visa liberalisation with Bosnia and Herzegovina, Roadmap’ (5 June 2008) 2 <<http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Bosnia.pdf>> accessed 23 January 2015.

²⁴⁵ *ibid* 7.

²⁴⁶ *ibid* 8.

²⁴⁷ European Commission, ‘Updated Assessment of the implementation by Bosnia and Herzegovina of the roadmap for visa liberalisation’ (27 November 2009) 10-11 <<http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Bosnia%202009%20Visa%20Road%20Map%20assessment%20-%20November.pdf>> accessed 23 January 2015.

of a reception centre.²⁴⁸ Bosnia also amended its law on the movement and stay of aliens and asylum seekers in order to align it more closely with EU and international standards, and adopted a new migration and asylum strategy and an action plan. According to the Commission's evaluation in 2013, 'the capacity of the asylum system seemed sufficient to cope with the current number of asylum applications'.²⁴⁹ In general the Commission was satisfied with Bosnia's progress in the area of asylum after the lifting of the visa regime.

The EU also asked for the adoption and implementation of 'an updated national action plan to combat trafficking in human beings and ensuring sufficient human and financial resources.' Responding to this requirement, Bosnia adopted an action plan for 2008-2012 and ratified, in January 2008 (entry into force: May 2008), the Council of Europe Convention on Action against Trafficking in Human Beings. The action plan focused on victim identification and assistance, protecting victims as well as witnesses. In line with Bosnia's commitments under the Convention against Trafficking, EU continued to push for compliance, e.g., asking for the harmonization of entity level legislation concerning the criminal offense of human trafficking.⁽²⁵⁰ Yet, in 2014 human trafficking was still not a criminal act in the Criminal Code of the Federation.²⁵¹) The 2011 post visa liberalisation monitoring report in general praised Bosnia's performance in this field.²⁵² After 2012, a new strategy and action plan was adopted and the number of victims identified started to grow, which was welcomed by the EU in the monitoring reports. The EU was also calling for a database on trafficking victims as a remaining condition.²⁵³

b) Institutional requirements and anti-discrimination

On the institutional level, the EU asked for the establishment of the data protection agency and for making the Ombudsman Office of Bosnia and Herzegovina operational, which also meant closing the entity ombudsman offices. The data protection agency was made operational by the end of 2009, and the entity ombudsman offices were phased out of the system in 2011.

Discrimination can be a result of missing documents excluding larger groups of people from access to services. Resolving the issue of how displaced persons and refugees can acquire identification documents

²⁴⁸ European Commission, 'Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010' (1 June 2011) SEC(2011) 695 final, 5 <http://www.esiweb.org/pdf/schengen_white_list_project%20-%20post%20visa%20lib%20mon%20mech%20-%2030%20may%202011.pdf> accessed 23 January 2015.

²⁴⁹ European Commission, 'Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010' COM(2013) 836 final, 5.

²⁵⁰ EC, 'Updated Assessment of the implementation by Bosnia and Herzegovina of the roadmap for visa liberalisation' (n 247).

²⁵¹ Human Rights Council, 'Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/3 (25 July 2014) 6 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/097/53/PDF/G1409753.pdf?OpenElement>> accessed 22 April 2016.

²⁵² EC, 'Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries...' (n 248) 5.

²⁵³ *ibid* 6.

was thus made a human rights priority. Vulnerable groups such as refugees and Roma often lacked official documents that were necessary for having access to any public service. In the case of refugees who fled because of the war recovering original documents could be a serious challenge since many of their documents were destroyed, or because it was difficult to obtain the original documents at the place of birth from where the person fled. In BiH there was no facilitated procedure for displaced people or refugees to receive identification documents before the visa liberalisation process. Beside giving papers to refugees, the registration of Roma was also an important achievement of the visa liberalisation process. By 2014 the number of stateless Roma has decreased from an estimated 4,500 in January 2012 to an estimated 792 in April 2014.²⁵⁴

In the area of citizens' rights including protection of minorities, one of the EU's conditions was the anti-discrimination law, which was adopted in July 2009 and came into force in August 2009. This also necessitated the strengthening of the ombudsman office as well since following the entry into force of this law, the State-level Ombudsman Office had exclusive competence to deal with complaints in the area of fight against discrimination.

The adoption of the anti-discrimination law and the creation of the state ombudsman office represented the first steps to address the problem of discrimination. As the EU's assessment report noted, most cases of discrimination recorded were related to areas of work and judicial protection, yet there was no information on the follow-up of these cases. Ethnically motivated incidents were another issue that had to be addressed here. In 2008 there was 'a large number' of such incidents, yet there was no system of monitoring or follow-up on such cases. The EU put pressure on Bosnia to introduce 'a formal system for collection of information related to ethnically motivated incidents'. In addition, preparations were made to gather data on other forms and cases of discrimination. 'The Ministry of Human Right and Refugees of Bosnia and Herzegovina has been tasked to produce a methodology with the aim to follow and register all cases of discrimination, and annually report on ethnically motivated incidents to the Council of Ministers of Bosnia and Herzegovina. The first report [was] expected to be produced in the first quarter of 2010.'²⁵⁵

However, based on a shadow report from 2014, the state-level database on discrimination cases was still not created, and the promised awareness raising campaign regarding legal remedies was not launched either. This might explain the low number of discrimination complaints, which would mostly concern LGBT and national minorities and refugees.²⁵⁶ (See more on this in section II.E.1.)

c) Minority protection, the Roma and unfulfilled promises

The protection of minorities was generally regarded as being fulfilled by the adoption of the law on the protection of minorities at the state and entity level, plus by the functioning of national minority councils.

²⁵⁴ EC, 'Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report' (n 215) 21.

²⁵⁵ European Commission, 'Updated Assessment of the implementation by Bosnia and Herzegovina of the roadmap for visa liberalisation' 19 April 2010 <<http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Bosnia%20assessment%2019%20April%202010.pdf>> accessed 25 January 2015.

²⁵⁶ Initiative of Monitoring BiH's European Integration (n 121) 51.

On the other hand, there were limited results of implementing the Roma strategy, mostly with regards to registration and schooling.²⁵⁷ A very direct result of the visa liberalisation conditionality was the registration of Roma with the goal of assessing their needs, which began in November 2009.

In April 2010 the EU evaluated that Bosnia fulfilled obligations set for visa liberalisation in the area of fundamental rights. Creating a state level personal data protection office and making it operational, issuing ID cards to refugees, adopting the law on antidiscrimination, establishing the ombudsman at the state level, taking the first steps towards setting up the system of collecting data on ethnically motivated incidents and creating a registry of Roma and their needs were all the result of the visa liberalisation process.²⁵⁸ There were further reports published within the frames of a follow up mechanism launched in the beginning of 2011 on whether the countries continued to comply with the benchmarks covering border management, document security, combating organised crime and corruption, fundamental rights, as well as the effective implementation of readmission agreements.²⁵⁹

In the second report the EU criticised Bosnia over Roma rights; namely that progress was achieved only in the area of housing but not concerning education, health care or employment, and because there was no mechanism to monitor the implementation of the Roma action plan.²⁶⁰ The EU also kept calling for creating the database of cases of discrimination and raising awareness among citizens. It seems though that compliance with these conditions have not been that important from the aspects of sustaining the visa free regime for Bosnia since meeting these criteria in the area of anti-discrimination and Roma rights remains outstanding until today. In the context of the post-visa liberalisation monitoring process, data protection, minority rights apart from the Roma, and anti-discrimination were not followed up.

The last report published in February 2015 did not contain anything about fundamental rights concerning BiH, but exclusively focused on the problem of growing asylum requests and illegal migration from the region to the EU,²⁶¹ showing concern for its current security issues more than for human rights problems in the target country. Thus the EU carried out partial monitoring of conditions while accepted Bosnia's partial fulfilment of the criteria.

2. Structured Dialogue

As we have seen, some fundamental rights issues quietly slipped off the visa liberalisation agenda. Some of these were picked up by a new instrument, while other problems were mentioned in the regular progress reports, as before. This instrument was the structured dialogue on justice, launched in 2011, that was however not primarily designed for the promotion of human rights. The EU launched a structured

²⁵⁷ EC, 'Updated Assessment of the implementation by Bosnia and Herzegovina of the roadmap for visa liberalisation' (n 247).

²⁵⁸ EC, 'Updated Assessment of the implementation by Bosnia and Herzegovina of the roadmap for visa liberalisation' (n 255).

²⁵⁹ EC, 'Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries...' (n 248) 5.

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

dialogue on justice reform with Bosnia in 2011 focusing on judicial reform and other rule of law issues some of which pertain to human rights such as war crimes prosecution and human trafficking.²⁶² In October 2013 this structured dialogue was broadened with the issues of anti-discrimination and the BiH Ombudsman.²⁶³

The goal was that Bosnia progresses in these areas despite the general stalemate of the SAP.²⁶⁴ Rule of law reforms became also part of the new Compact for Growth agenda of the EU introduced at the end of 2015 (see further in the next section). The EU offered enhanced economic assistance to Bosnia and the implementation of the SAA in exchange for designing a coordination mechanism and implementing rule of law reforms where anti-corruption became high priority, thus giving teeth to the structured dialogue.

3. High Level Dialogue on the Accession Process and Compact for Growth

In 2010 it was already clear that BiH would not start its EU membership negotiations any time soon, and the EU had to come up with alternative means to assist the country. Interim Sub-Committee meetings were established by the Interim Agreement, which focused on the European partnership criteria. In June 2012 the EU launched a *High Level Dialogue on the Accession Process* (HLDAP) with Bosnia in order to prepare the country for the accession negotiations by explaining the conditions and the methodology of the process. The June 2012 meeting produced a joint conclusions and a Roadmap for EU integration, which included the requirements that were needed for the implementation of the SAA and for a successful membership application. Here the key issues were the implementation of the *Sejdić-Finci* judgement and institutional reforms that would allow the country to ‘speak with one voice’, i.e. ‘an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws.’²⁶⁵

Within the framework of the HLDAP the EU intensively assisted Bosnia’s political leadership to find a solution to the implementation of the *Sejdić-Finci* ruling. However, the dialogue soon reached a deadlock. ‘Due to a lack of a political agreement on addressing the implementation of the judgment, the Commission cancelled the third meeting of the High Level Dialogue originally scheduled for April 2014.’²⁶⁶ In February 2014 Enlargement Commissioner Stefan Füle ended the facilitation efforts after Bosnian leaders failed to come to an agreement.²⁶⁷ In addition, the EU often changed its mind over the past few years regarding

²⁶² European Commission, ‘Communication from the Commission to the European Parliament and the Council, “Enlargement Strategy and Main Challenges 2012-2013”’ COM(2012) 600 final (Brussels, 10.10.2012) 10 <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> accessed 12 April 2015.

²⁶³ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ (n 215) 4.

²⁶⁴ Interview with Adnan Kadribasic, National Legal Officer, Human Rights Section, Human Dimension Department OSCE Mission to Bosnia and Herzegovina (Sarajevo, March 2015).

²⁶⁵ EC, ‘Communication, “Enlargement Strategy and Main Challenges 2012-2013”’ (n 262).

²⁶⁶ European Commission, ‘Commission Staff Working Document, Bosnia and Herzegovina 2013 Progress Report’ COM(2013) 700 final (Brussels, 16.10.2013) SWD(2013) 415 final, 7 <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf> accessed 12 April 2015.

²⁶⁷ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ (n 215) 18, 4.

this particular conditionality requirement, which might have greatly diminished the effectiveness of this measure. The 2013 Enlargement Strategy still presented compliance with the *Sejdić-Finci* ruling as a condition of full access to IPA funds.²⁶⁸ By contrast, the 2014 Progress Report talked about the partial cancellation of these funds i.e. rural development projects, as a result of the lack of agreement on an EU coordination mechanism between the State and the entities, without mentioning the *Sejdić-Finci* case.²⁶⁹ Moreover, by endorsing the British-German initiative for Bosnia in November 2014, the ‘Compact for Growth’, the EU seems to have dropped this particular condition for the time being, even though it had been one of the essential conditions after 2010.

Recognising the failure of conditionality, by the British-German initiative the EU seems to be embarking on an economic growth centred program for Bosnia under the name ‘Compact for Growth’, with functionality of government institutions, economic and social reforms, and the rule of law becoming the corner stones of EU conditionality. These principles were agreed by the leaders of Bosnia’s political parties and adopted by the country’s parliament in February 2015.²⁷⁰ In May 2015 the EU General Affairs Council approved the activation of the SAA by June 1, to be followed by a reform agenda to be drawn up by the Bosnian government about economic, rule of law and good governance measures including the effective coordination mechanism on EU matters. Thus, since the summer of 2015 the EU-Bosnia relations have gotten a new momentum after the precious deadlock of six years. The EU set ‘[m]eaningful progress in the implementation of the Reform Agenda’ as the necessary criterion for the EU to consider an EU membership application from Bosnia and Herzegovina, which Bosnia submitted in February 2016.

As a recent analysis noted, ‘the breakthrough occurred without Bosnia making any concrete positive moves and required reforms’.²⁷¹ Instead, based on the German-UK initiative all that the EU required of Bosnia at this point was a declaration pledging commitment to EU integration. Even this proved to be quite a challenge for Bosnian leaders who finally in February adopted a vaguely worded text, after which in March 2015 EU foreign ministers decided to give the green light for the implementation of Bosnia’s SAA in June 2015.²⁷² After the SAA entered into force, specific reform action plans had to be drafted with the assistance of the IMF and the World Bank, to be followed by negotiations about the coordination mechanism on EU matters. The latter is necessary for the implementation of EU funded projects as Bosnia

²⁶⁸ ‘Given that no solution has yet been found on the implementation of the *Sejdić-Finci* ruling and that the EU coordination mechanism has not been established, the same level of EU preaccession funds cannot be maintained. The Commission has decided to postpone further discussions on IPA II until the country is back on track in the EU integration process. In the absence of tangible progress, Bosnia and Herzegovina risks losing significant IPA funds.’ European Commission, ‘Communication from the Commission to the European Parliament and the Council, “Enlargement Strategy and Main Challenges 2013-2014”’ (Brussels, 16.10.2013) COM(2013) 70 final, 19 <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> accessed 12 April 2015.

²⁶⁹ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ (n 215) 18, 9.

²⁷⁰ Toby Vogel, ‘The end of conditionality in Bosnia-Herzegovina?’ (Balkans in Europe Policy Blog, 16 March 2015) <<http://www.suedosteuropa.uni-graz.at/biepag/node/151>> accessed 12 April 2015.

²⁷¹ Srecko Latal, ‘Bosnia Exults as EU Activates Stability Deal’ (BIRN, 21 April 2015) <<http://www.balkaninsight.com/en/article/bosnia-makes-historic-step-towards-eu>> accessed 12 April 2015.

²⁷² Elvira M. Jukic and Srecko Latal, ‘Brussels Clears Bosnia’s Route to EU’ (BIRN, 16 March 2015) <<http://www.balkaninsight.com/en/article/bosnia-s-path-to-eu-unlocked>> accessed 2 October 2015.

shares responsibility in the management of such projects. The EU will positively evaluate Bosnia's EU membership application only if all these proceeded successfully.²⁷³

After six years of pressing Bosnia on harmonising the constitution with the *Sejdić-Finci* judgement, the EU 'set aside' or postponed this condition for later stages of EU integration. Although the EU could now be easily accused of compromising on human rights, many inside and outside of Bosnia welcome this decision, which can break the stalemate since 2008.²⁷⁴ The argument of Judge Bonello who wrote a dissenting opinion to the *Sejdić-Finci* judgement reflects similar feelings. He acknowledged that Bosnia was not a liberal democracy based on the protection of individual rights. Yet its constitution, which truly violated these rights, was meant to maintain power sharing among the three constituent people thus preserving the stability of the country. In his opinion, the ECtHR was not the right venue to overwrite this constitutional order, which was created to preserve peace, also because in exceptional situations such as that of Bosnia the enforcement of human rights could be the trigger for war rather than the conveyor of peace.²⁷⁵

Given the inability of the incumbent institutions to handle the wave of protests in February 2014 and the floods later that summer, coupled with the fact that the state was on the brink of bankruptcy, it seemed justified for the EU to act to prevent social collapse, which ultimately could lead to the deterioration of the security situation. Thus based on the British-German initiative, constitutional reform is not, for the time being, an essential condition, but will be required once Bosnia starts accession negotiations. What the EU demands now are social and economic policy reforms addressed in the Compact for Growth. Tackling unemployment will be a primary target and a condition in exchange for international economic assistance.²⁷⁶

Certainly, the EU's handling of the *Sejdić-Finci* issue has been very inconsistent, even if some aspects of this inconsistency can be welcomed, as was explained above. Yet, there were further problems related to the EU's human rights conditionality, which suggests that the EU was less concerned about human rights but rather had a 'ticking the box' approach.

During the preparation of the census, which took place in 2013, questions on ethnicity were limited to three options: one could identify either as a Serb, a Croat or a Bosniak. Some NGOs protested that forcing people into these three categories amounted to social engineering, and to imposing social reality on the ground. Importantly, phrasing this question this way was also in conflict with the ruling of the ECtHR. The EU did not back these protesting voices but was eager to be done with the census, which was an essential

²⁷³ Srečko Latal, 'Bosnia Exults as EU Activates Stability Deal' (BIRN, 21 April 2015) <<http://www.balkaninsight.com/en/article/bosnia-makes-historic-step-towards-eu>> accessed 2 October 2015.

²⁷⁴ See European Stability Initiative, 'Lost in the Bosnian labyrinth, Why the *Sejdić-Finci* case should not block an EU application' (ESI discussion paper, 7 October 2013) <http://www.esiweb.org/pdf/esi_document_id_143.pdf> accessed 2 October 2015.

²⁷⁵ *Sejdić and Finci* (n 79), dissenting opinion of Judge Bonello.

²⁷⁶ Interview with Adnan Huskic, Friedrich Naumann Foundation (Sarajevo, 30 March 2015).

condition in the 2012 EU Progress Report. In addition, the census as it was carried out was marked by many irregularities to an extent that its validity could be seriously questioned.²⁷⁷

Similarly, initial threats from the EU that without changing the constitution the results of the 2014 elections could not be recognised because these would be in conflict with the ECHR also faded after the elections.²⁷⁸ The EUSR Peter Sorensen when pressed in April 2013 on the question of whether the EU would recognise the 2014 elections did not give a clear answer.²⁷⁹ The EU invited the leaders of the main political parties and not the democratically elected leaders of the institutions to HLDAP that was meant to address the implementation of the *Sejdić-Finci* case. This fact raises doubts whether the EU shows adequate respect for the institutions it claimed it wanted to strengthen.²⁸⁰

4. Progress reports and enlargement strategies (2010-2015)

The EU's human rights priorities for Bosnia between 2010 and 2015 can be established based on the yearly progress reports, enlargements strategies and Council conclusions. IPA priorities are also telling with respect to where the EU allocates its funding. (We will review the latter in the following section.) It is difficult to establish the EU's human rights priorities solely from EU progress reports as the issues monitored in these reports are standardised over time and across countries. The issues are the following:

international human rights instruments;	women's rights;	refugees and internally displaced persons;
access to justice;	children's rights;	property rights;
torture and ill treatment;	vulnerable groups (people with disabilities);	labour rights;
freedom of expression and media;	anti-discrimination policies (LGBT rights);	<i>prosecution of war crimes;</i>
freedom of assembly and association;	respect for and the protection of minorities and cultural rights;	<i>human trafficking;</i>
freedom of religion;	rights of the Roma minority;	<i>personal data protection;</i>
civil society;		<i>missing persons.</i>

Table 9. List of human rights priorities in EU progress reports

Entries outside the human rights section italicized.

²⁷⁷ According to Census Monitor, based on a 500,000 people sample research, around 20% of census forms in the BiH 2013 Census can be considered invalid. See Initiative of Monitoring BiH's European Integration (n 121) 60; Author interview NGO representative (Sarajevo, 30 March 2015).

²⁷⁸ 'The Sejdić-Finci question' (The Economist, 9 October 2013) <<http://www.economist.com/blogs/easternapproaches/2013/10/bosnia>> accessed 2 October 2015.

²⁷⁹ 'For the European Union [...] you are not living up to the standards that are a prerequisite for us to put our contractual relationship with you into place, namely the Stabilization and Association Agreement. And therefore you are not in a position to credibly apply for membership with us. That answers your question about whether we [would] recognize the elections.' Oscar Fernandez, Valery Perry and Kurt Bassuener, 'Making the Market on Constitutional Reform in BiH' (Democratization Policy Council, March 2015) 3 <<http://www.democratizationpolicy.org/making-the-market-on-constitutional-reform-in-bih-in-the-wake-of-the-eu-initiative->> accessed 2 October 2015.

²⁸⁰ Interview with Adnan Huskic, Friedrich Naumann Foundation (Sarajevo, 30 March 2015).

The last four issues – war crimes, human trafficking, data protection and missing persons – are covered outside of the human rights section, yet are included here in the analysis because these clearly constitute human rights matters. All of these issues are examined in detail in the reports. Enlargement strategies are published alongside the progress reports. As they highlight the most important issues, it is revealing which human rights issues are selected for being included in the strategies. Based on these we can reconstruct how human rights related essential conditions changed over the years.

In 2010 the harmonisation of the Constitution with the ECtHR (i.e. the implementation of the *Sejdić-Finci* case), the adoption of the state-level census law and closing the OHR were singled out as essential conditions. In 2011 meeting the condition of the closure of the OHR was quietly dropped, while the other two conditions remained, and a new one was added (the adoption of a State Aid Law). The requirement of ‘an effective coordination mechanism on EU matters’ was already mentioned in the report in 2011, yet became an explicit condition in 2012, when harmonisation of the constitution with the *Sejdić-Finci* judgement and adopting the state-aid law were named as the most crucial outstanding conditions. After the state aid law was adopted in 2012, and the census was conducted in 2013, harmonisation of the constitution with the ECHR and effective coordination mechanism remained outstanding requirements in 2013. The EU cut IPA funds for Bosnia by 54% in 2013 because of the lack of agreement on the implementation of the *Sejdić-Finci* case and the coordination mechanism.²⁸¹ As was explained above, at the end of 2014, implementing the judgement of the ECHR was suddenly dropped, and social, economic and rule of law reforms entered the agenda of essential conditions while the effective coordination mechanism stayed.

Table 11 demonstrates more widely how human rights priorities changed across enlargement strategies and IPA documents between 2010 and 2015. Although the fact that an issue is highlighted in enlargement strategies shows its relative importance, the key question is what happens if the EU formulates criticisms concerning certain human rights, but national authorities neither heed to these criticisms nor do they follow them. In the case of BiH, the EU does not seem to apply punishment, as part of human rights conditionality, unless the issue at hand is one of the essential conditions. Among these only the *Sejdić-Finci* case touched upon human rights concerns, and even this was postponed as a condition last year.

The tables show the EU’s priorities, their level of consistency across instruments (including IPA) and time (note that this approach cannot identify the impact of conditionality).

²⁸¹ European Commission, ‘Memo, EU-BiH: After the 3rd round of High Level Dialogue on Accession Process’ (Brussels, 10 October 2013) <http://europa.eu/rapid/press-release_MEMO-13-874_en.htm> accessed 2 October 2015.

Essential conditions	
2010	Constitutional reform, by harmonisation the constitution with the ECHR Adoption of the state-level census law Making progress towards meeting the conditions which have been set for the closure of the Office of the High Representative (OHR)
2011	Harmonisation of the Constitution with the ECHR (i.e. implementation of the <i>Sejdić-Finci</i> case) Adoption of the state-level census law Adoption of the State Aid Law
2012	Implementation of the <i>Sejdić-Finci</i> judgement Establishment of an effective coordination mechanism on EU matters Implementation of the country's State Aid obligations ²⁸²
2013	Harmonization of the constitution with the <i>Sejdić-Finci</i> judgement of the ECHR Establishing an EU coordination mechanism ²⁸³
2014	'Setting up a well-functioning coordination mechanism on EU matters' Strengthening public administration ²⁸⁴
2015	'Meaningful progress in the implementation of the Reform Agenda aimed at tackling the difficult socio-economic situation and advancing the judicial and public administration reforms' 'Establishing an effective coordination mechanism on EU matters' ²⁸⁵

Table 10. Essential conditions in the human rights area, enlargement strategies, Bosnia and Herzegovina, 2010-2015

	2010	2011	2012	2013	2014	2015
Torture and ill-treatment		X			IPA	
Prison conditions		X	X		IPA	
Access to justice	X	X	X		IPA	
Freedom of expression and media freedom	X IPA	IPA X	X	X	X IPA	X
Freedom of assembly and freedom of association						
Freedom of thought, conscience and religion						

²⁸² EC, 'Communication, "Enlargement Strategy and Main Challenges 2012-2013"' (n 262).

²⁸³ EC, 'Communication, "Enlargement Strategy and Main Challenges 2013-2014"' (n 268).

²⁸⁴ European Commission, 'Communication from the Commission to the European Parliament and the Council, "Enlargement Strategy and Main Challenges 2014-2015"' (Brussels, 8.10.2014) COM(2014) 700 final, 25 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> accessed 12 April 2015.

²⁸⁵ European Commission, 'EU Enlargement Strategy 2015' COM(2015) 611 final, 15 <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_strategy_paper_en.pdf> accessed 15 February 2016.

	2010	2011	2012	2013	2014	2015
Women's rights and gender equality	X	IPA X	X IPA	IPA	IPA	
Children's rights	X IPA	IPA X	X IPA	IPA	X IPA	
Right to education		IPA	IPA	IPA	IPA	
Socially vulnerable and people with disabilities	IPA	IPA X	IPA	IPA	IPA	
Anti-discrimination	X	X	X	X	X IPA	X
LGBT			X	X	X	X
Labour and trade union rights	X	IPA X	IPA	IPA	IPA	
Social rights		IPA X	X IPA	IPA	IPA	
Property rights						
Minority rights	X IPA	IPA	X IPA	X IPA	X	X
Roma	X IPA	IPA X	X IPA	X IPA	X IPA	X
Refugees, IDPs, returnees	X IPA	IPA X	X IPA	X IPA	X IPA	
War crimes	X	IPA X	X IPA	X IPA	X	
Civil society	X IPA	IPA	X		IPA	
Human trafficking	X	X	X			
Personal data protection	X	X	X			
Missing persons					IPA	

Table 11. Human rights priorities of enlargement strategies and IPA, Bosnia and Herzegovina, 2010-2015

Sources: EU enlargement strategies from 2010 to 2015.²⁸⁶

²⁸⁶ European Commission, 'Enlargement Strategy and Main Challenges 2010-11' COM(2010) 660 final <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/strategy_paper_2010_en.pdf> accessed 15 February 2016;
European Commission, 'Enlargement Strategy and Main Challenges 2011-12' COM(2011) 666 final <http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/strategy_paper_2011_en.pdf> accessed 15 February 2016;
European Commission, 'Enlargement Strategy and Main Challenges 2012-13' COM(2012) 600 final <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> accessed 15 February 2016;
European Commission, 'Enlargement Strategy and Main Challenges 2013-14' COM(2013) 700 final <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> accessed 15 February 2016;
European Commission, 'Enlargement Strategy and Main Challenges 2014-15' COM(2014) 700 final <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> accessed 15 February 2016;
EC, 'Communication, EU Enlargement Strategy 2015' (n 285).

As we can see in Table 10 the EU put forward critical remarks and/or called for action regarding all the selected twenty human rights related issue areas that we have identified based on *progress reports*. Whereas progress reports became longer over the years including their human rights section, the number of issues highlighted in *enlargement strategies* was lower, and even decreased especially from the year of 2012 to 2013. In 2010 and 2012 access to justice, minority rights, war crimes, anti-discrimination and LGBT rights, social rights, rights of the Roma, refugees and IDPs, media freedom, children’s rights, women’s rights, civil society, human trafficking and personal data protection were discussed in the strategies. In 2013 and 2014 these fourteen highlighted subjects were cut back to six: minority rights, war crimes, anti-discrimination and LGBT rights, Roma rights, refugees and IDPs, and media freedom, (in 2015 to five, the same list of issues without mentioning war crimes prosecution). Children’s rights were put on the agenda in 2014 but not in 2013. Access to justice, social rights, women’s rights, civil society, human trafficking and personal data protection were omitted in 2013, 2014 and 2015. Freedom of assembly and association, freedom of religion, property rights, and missing persons did not appear in enlargement strategies and were only mentioned in progress reports between 2010 and 2015.

This implies that there is a list of ‘first order’ and ‘second order’ of human rights issues on the EU’s agenda:

‘First order’ issues	‘Second order’ issues	‘Third order’ issues
minority rights,	children’s rights,	freedom of religion,
war crimes,	vulnerable groups (i.e. disabled persons),	freedom of assembly and association,
media freedom,	access to justice,	property rights,
Roma rights,	social rights,	missing persons.
antidiscrimination & LGBT rights,	women’s rights,	
Refugees and IDPs.	civil society,	
	human trafficking,	
	personal data protection,	
	torture and ill treatment,	
	labour rights.	

Table 12. Categories of human rights priorities based on enlargement strategies, Bosnia, 2013-2014

The visa liberalisation also had the so called first order issues at its focus including rights of refugees, IDPs and Roma, anti-discrimination and minority protection among its priorities.

The overall assessment of the human rights situation by the EU has been also changing. In 2012, the Commission drew overall a positive picture of Bosnia’s human rights performance in the enlargement strategy. It concluded that ‘respect for human rights and protection of minorities is broadly ensured’ and added, as usual, that major international human rights conventions have been ratified, yet ‘implementation remains uneven’.²⁸⁷ It further assessed that civil and political rights, economic and social rights and respect for and the protection of minorities and cultural rights were broadly respected and ensured. Although this overly optimistic tone was somewhat moderated in the subsequent reports, the EU approvingly stated even in 2014 that ‘the legal and institutional framework for the observance of

²⁸⁷ EC, ‘Communication, “Enlargement Strategy and Main Challenges 2012-2013”’ (n 262) 59.

human rights is in place and the main elements of international human rights laws have been incorporated into the legal system.’ Such a positive evaluation is surprising considering further details of the strategies, which show a huge discrepancy between existing laws and practice. The implementation of existing human rights instruments seems to be secondary if civil and political, social and economic, and minority rights can be regarded as broadly respected and ensured with very limited implementation.

The tone clearly changed with the 2015 Progress Report. Here the EU emphasized that the ‘legal and institutional framework for the observance of human rights requires substantial improvements’.²⁸⁸ The Report critically noted that ‘no progress was achieved over the past year in addressing country wide reforms conducive to creating the conditions for the effective exercise of some human rights’.²⁸⁹ It prominently also talked about backsliding in the area of the freedom of expression.²⁹⁰

This change can be explained by the shift in the EU’s perception of its own role: that its leverage is growing over Bosnia.²⁹¹ The country has adopted a new reform agenda and the SAA entered into force. This represents a new contractual obligation and provides a stronger basis for the EU to raise human rights issues as well. While preparing the 2015 Progress Report, human rights questions were assessed in the context of a possible opinion the Commission has to prepare when Bosnia applies for membership. (As the Commission expected, Bosnia did submit its application for EU membership in February 2016.)²⁹²

The sequencing of *Sejdić-Finci* conditionality has changed. Although it did not disappear, it will be assessed later, in the context of the Commission’s opinion on Bosnia’s membership application. This altogether means that fundamental rights will be very thoroughly examined once Bosnia submits its application.²⁹³

5. IPA priorities

Here we will be looking at the financial component of EU conditionality, and assess how human rights priorities played out in the context of EU decisions on IPA. Setting priorities for funding is an important element of conditionality. As Lana Pasic noted, ‘BiH has received more per capita [international] aid than any European country under the Marshall Plan’.²⁹⁴ (Note that this includes non-EU contributions, too.)

²⁸⁸ European Commission, ‘Commission Staff Working Document, Bosnia and Herzegovina 2015 Report’ SWD(2015) 214 final (Brussels, 10.11.2015) 30 <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf> accessed 15 February 2016.

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

²⁹¹ Interview at the European Commission (Brussels, December 2015).

²⁹² Rodolfo Toe, ‘Bosnia Files EU Membership Application’ *Balkan Insight* (15 February 2016) <<http://www.balkaninsight.com/en/article/bosnia-submits-its-eu-application-02-15-2016>> accessed 15 February 2016.

²⁹³ Interview at the European Commission (Brussels, December 2015).

²⁹⁴ Lana Pasic, ‘Bosnia’s Vast Foreign Financial Assistance Re-examined: Statistics and Results’ *Balkananalysis.com* (21 June 2011) <<http://www.balkananalysis.com/bosnia/2011/06/21/bosnia%E2%80%99s-vast-foreign-financial-assistance-re-examined-statistics-and-results/>> accessed 23 February 2016.

In principle, IPA priorities are identified based on enlargement strategies. Our assessment in Table 11 shows, however, that IPA priorities only partially overlap with highlighted issues in the enlargement strategies. In 2007-2009 the following issues were included among IPA priorities:

- media (i.e. support for Public Service Broadcasting (PSB), contributing to its digitalisation, and the Communication Regulatory Agency (CRA)),
- civil society (i.e. ‘CSOs become better “watchdog” and also stronger partners of the Government’),
- returnees, refugees, minorities and vulnerable groups: Roma, children and the disabled, focusing on their social and economic inclusion.²⁹⁵

For 2009-2011, the political goals of EU financial support remained largely the same, with emphasis on the media and civil society as well as on mine victims (and demining), minorities and vulnerable groups.²⁹⁶ In the period 2011-13, human rights causes were prioritised under the banner of social development not fundamental rights. These included social and economic rights such as anti-poverty measures, increasing employment, strengthening social protection system for vulnerable groups, including the Roma. Support for war crimes prosecution was also emphasised as part of justice sector reform. Thus highlighted issue areas were: war crimes, social rights, right to education, labour rights, vulnerable groups, Roma, refugees and internally displaced people, children and youth, women, people with disabilities, or elderly people.²⁹⁷

The Commission Implementing Decision on the National Programme for Bosnia and Herzegovina under IPA (2011) shows the coordinated effort of several international bodies to improve the institutional framework in the country. The EU’s priorities and spending are harmonized with UN (its Development Programme), the World Bank and the European Investment Bank. Funds allocated to BiH projects include Tempus grants in the area of education, the Regional Housing Programme and the Civil Society Facility.²⁹⁸ The relevant IPA priorities for years 2011, 2012 and 2013 were the rule of law (justice sector reform, fight against organised crime and corruption), public administration reform (professionalizing civil service,

²⁹⁵ EC, ‘Decision on MIPD 2007-2009 for Bosnia and Herzegovina’ (n 223) 15-16.

²⁹⁶ European Commission, ‘Decision C(2009) 5114 of 01/07/2009 on a Multi-annual Indicative Planning Document (MIPD) 2009-2011 for Bosnia and Herzegovina’ 12 <http://ec.europa.eu/enlargement/pdf/mipd_bosnia_herzegovina_2009_2011_en.pdf> accessed 23 February 2016.

²⁹⁷ European Commission, ‘Instrument for Pre-Accession Assistance (IPA), Multi-annual Indicative Planning Document (MIPD) 2011-2013, Bosnia and Herzegovina’ 21-22 <http://ec.europa.eu/enlargement/pdf/mipd_bih_2011_2013_en.pdf> accessed 23 February 2016.

²⁹⁸ European Commission, ‘Annex II to Commission Implementing Decision amending Commission Implementing Decision C(2012)9679 of 13.12.2012 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2012’ 2 <<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&fP0pdcg9xPH22W2KJbr9w8a7UWnazQGdiMBzoap7tIWyEZEdggz+n4JOVUqYppXe7kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>>> accessed 23 February 2016.

strengthening governance) and social and economic development (small and medium enterprises, unemployment, education system, transport and environment infrastructure).²⁹⁹

The institutional challenges that touch upon the fundamental question of constitutional structure came to the forefront in the process. Strengthening local ownership meant that the country was to decide on the final list of projects to be financed in the 2011 programme, a process that eventually failed due to the lack of compromise between the two Entities.³⁰⁰ This problem continued in the following years.³⁰¹ The frustration of the Commission's efforts to accelerate the process only increased. The 2013 document notes the non-implementation of the *Sejdić-Finci* judgment in the context of the lack of compromise among local decision-makers:

there has been no progress in the implementation of the Sejdić-Finci judgement of the European Court of Human Rights which is essential for BiH to advance on the EU path. It is becoming increasingly difficult to justify providing pre-accession funds to a country whose political representatives are not willing to reach consensus necessary to move forward on the pre-accession path. Without such consensus, there is a strong risk that pre-accession assistance will not produce the expected results. The Commission has therefore decided to prepare a reduced 2013 national programme for Bosnia and Herzegovina of just under EUR 42 million instead of EUR 87 million.

The EU's sanction to halve the financial support was thus a direct result of human rights conditionality that was nevertheless cast in practical terms emphasizing efficiency and institutional capacity rather than discrimination and exclusion. This might indicate that the *Sejdić-Finci* judgment became a key condition also as a result of its place at the intersection of human rights (after all, it is a court decision under the ECHR) and institution-building (requiring constitutional reform that is necessary to establish a potent national state structure that is able to deliver on the path to integration and beyond).

The overall process could be described as a large cut combined with the growing importance of the justice reform and flood recovery (latter counted under 'Acquis related and other Actions', Figure 1).

²⁹⁹ European Commission, 'Annex to Commission Implementing Decision amending Commission Implementing Decision C(2011)9104 of 5.12.2011 adopting a National Programme for Bosnia and Herzegovina under the IPA - Transition Assistance and Institution Building Component for the year 2011' 1 <<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&fP0pdcg9xPH22W2KJbr9w8a7UWnazQGdiMBzoap7tIW5SVAw47eF02NzJLXFBE77kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>> accessed 23 February 2016.

³⁰⁰ *ibid* 3. To be more precise, the project itself 'almost failed', with the complete failure of the local consensus building. EC, 'Annex II to Commission Implementing Decision...' (n 298) 2.

³⁰¹ EC, 'Annex II to Commission Implementing Decision...' (n 298) 3.

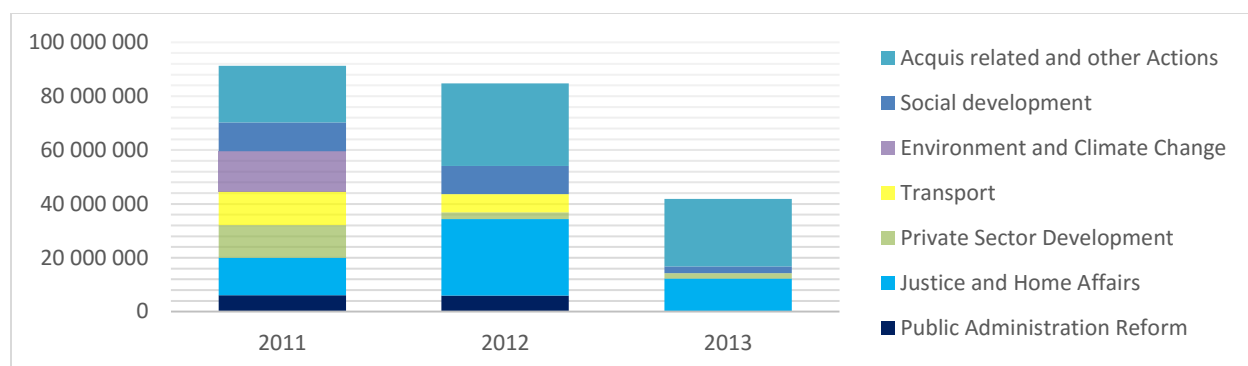


Figure 1. Total IPA EU contribution, 2011-2013, million EUR

Source: European Commission, 'Annex to Commission Implementing Decision amending Commission Implementing Decision C(2011)9104 of 5.12.2011 adopting a National Programme for Bosnia and Herzegovina under the IPA - Transition Assistance and Institution Building Component for the year 2011' 18; 'Annex II to Commission Implementing Decision amending Commission Implementing Decision C(2012)9679 of 13.12.2012 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2012' 16-18; 'Annex III to Commission Implementing Decision amending Commission Implementing Decision C(2013)9626 of 19.12.2013 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2013' 14-15.

Table 13 shows in more detail how the distribution of the various components has changed, with the overall funding decreasing from 91 to 42 million euros and the flood recovery percentage jumping from 7 to 46%.³⁰²

Total IPA EU contribution	2011		2012		2013	
	EUR	%	EUR	%	EUR	%
Public Administration Reform	6,112,000	7%	6,000,000	7%		
Justice and Home Affairs	13,844,000	15%	28,348,000	33%	12,253,000	29%
Private Sector Development	12,118,052	13%	2,500,000	3%	2,000,000	5%
Transport	12,500,000	14%	6,800,000	8%		
Environment and Climate Change	14,951,000	16%				
Social development	10,693,100	12%	10,500,000	12%	2,500,000	6%
Acquis related and other Actions, including:	21,061,848	23%	30,622,995	36%	25,163,402	60%
Confidence Building (2011) / Mine Action (2013)	9,216,000	10%		8%	2,650,000	6%
Flood recovery	6,550,000	7%	16,390,000	19%	19,300,000	46%
TOTAL	91,280,000	74%	84,770,995	100%	41,916,402	100%

Table 13. Total IPA EU contribution, 2011-2013, EUR

(last two data rows – Confidence Building, Mine Action and Flood Recovery – to be counted under 'other actions')

³⁰² For more on the EU's financial assistance in the region as a response to the May 2014 floods, see European Commission, 'Commission Implementing Decision of 17.12.2014 adopting a special measure on flood recovery and flood risk management in Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo*, Montenegro, the Republic of Serbia and Turkey' <http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2014/special_measure_on_flood_recovery_and_flood_risk_management.pdf> accessed 23 February 2016.

Source: European Commission, 'Annex to Commission Implementing Decision amending Commission Implementing Decision C(2011)9104 of 5.12.2011 adopting a National Programme for Bosnia and Herzegovina under the IPA - Transition Assistance and Institution Building Component for the year 2011' 18; 'Annex II to Commission Implementing Decision amending Commission Implementing Decision C(2012)9679 of 13.12.2012 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2012' 16-18; 'Annex III to Commission Implementing Decision amending Commission Implementing Decision C(2013)9626 of 19.12.2013 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2013' 14-15.

If we discern priorities from the size of funds allocated, they show an emphasis on the protection of vulnerable groups. This focus is apparent in areas like justice and home affairs (prison conditions) and social development (Roma: housing, education, employment, health care), in addition to horizontal issues.³⁰³ Taking account of the fundamental institutional shortcomings on the receiving side, the Programme also foresaw, under the 'Other Actions' rubrique, 'measures to support confidence building and reconciliation'. This included demining and the protection of cultural heritage (for 2011).³⁰⁴ The judicial reform seeking to improve the independence, efficiency, effectiveness and transparency of the judiciary could be seen as an element that touches upon all levels of human rights and rule of law issues, with the potential to help implementation and institutional guarantees on all justiciable rights. More specifically the IPA support relied on the adoption of the National War Crimes Strategy concerning the processing of war crimes.³⁰⁵ For annual comparison of the programme topics see Table 14.

	2010	2011	2012	2013	2014	2015
Public administration and civil service						
public administration reform	X	X	X		X	X
Justice and Home Affairs						
justice reform	X	X	X	X		X
fight against corruption and organized crime	X		X	X	X	
processing of war crimes	X		X			
law enforcement	X	X	X			X
de-mining				X		
missing persons	X		X		X	
Social and economic development						
labour conditions			X			
employment		X			X	
education		X	X		X	
social inclusion		X			X	
Roma				X		
Other						
cultural heritage		X				

Table 14. Human rights related priorities in IPA programs for Bosnia and Herzegovina, 2011-2015

Source: European Commission, 'Annex to Commission Decision C(2010)5308 of 28/07/2010 adopting a National Programme for Bosnia and Herzegovina part I under the IPA – Transition Assistance and Institution Building Component for the year 2010' C(2010)5308 final

³⁰³ EC, 'Annex to Commission Implementing Decision...' (n 299) 13 and 16.

³⁰⁴ *ibid* 14.

³⁰⁵ EC, 'Annex II to Commission Implementing Decision...' (n 298) 4-5.

<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2010/ipa_2010_part_i_financing_proposal_en.pdf> accessed 25 February 2016; European Commission, 'Annex to Commission Implementing Decision of 5.12.2011 adopting a National Programme for Bosnia and Herzegovina under the IPA – Transition Assistance and Institution Building Component for the year 2011', C(2011)9104 final

<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2011/comm_native_c_2011_9104_1_en_annexe.pdf> accessed 25 February 2016; European Commission, 'Annex III to Commission Implementing Decision of 19.12.2013 adopting a National programme for Bosnia and Herzegovina under the IPA Transition and Institution Building Component for the year 2013' C(2012)9679

<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2013/ipa_2013_23590_bih_national_programme.pdf> accessed 25 February 2016; European Commission, 'Commission Implementing Decision of 17.12.2014 adopting a Country Action Programme on Bosnia and Herzegovina for the year 2014' C(2014) 9853 final

<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2014/ipa-2014-037662-037663-bih-action-programme.pdf> accessed 25 February 2016; European Commission, 'Commission Implementing Decision of 7.12.2015 adopting a Country Action Programme on Bosnia and Herzegovina for the year 2015' C(2015) 8777 final
<http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2015/ipa_2015-037888-bosnia_and_herzegovina_action_programme.pdf> accessed 25 February 2016.

The thematic overview of the programmes shows the constant interest in financing ongoing reforms of public administration, the judiciary and law enforcement, with other priority areas not necessarily appearing in the programmes for every year. The issues identified show that in the case of the first order issues (Table 12), all six were among IPA priorities in 2013 and/or 2014, and several second order issues were also included (civil society, women, children, disabled people, social rights, right to education, and labour rights). In the latest IPA strategy access to justice, prison conditions and torture and ill treatment were also added to the list.

Following the move to halve financial support, allocations remained at this lower level for the period 2014-17. The Commission argued that 'full-scale support is not justifiable' due to the lack of political commitment, while emphasizing that the EU is 'not walking away' and continues to pursue goals related to what it calls the 'fundamentals of the EU integration process': 'rule of law, democracy, fundamental rights, economic governance, and the legacy of the past'.³⁰⁶ The priorities reflect this 'minimum package'.

	2014	2015	2016	2017	Total
a. Reforms in preparation for Union membership	11	17	18	18	64
<i>Democracy and governance</i>			31		31
<i>Rule of law and fundamental rights</i>			33		33
b. Socio-economic and Regional development	24.7	11.7	13.7	13.7	63.8
<i>Competitiveness and innovation: local development strategies</i>			63.8		63.8
c. Employment, social policies, education, research and innovation, promotion of gender equality, and human resources development	4	11	11	12	38

³⁰⁶ Furthermore, after 2013 'it is becoming increasingly difficult to justify providing pre-accession funds to a country whose political representatives are not willing to reach consensus necessary to move forward on the pre-accession path. Without such consensus, there is a strong risk that pre-accession assistance will not produce the expected results.' European Commission, 'Indicative Strategy Paper for Bosnia and Herzegovina (2014-2017) adopted on 15/12/2014' 8-9 <http://ec.europa.eu/enlargement/pdf/news/annexe_acte_autonome_nlw_part1v1.pdf> accessed 23 February 2016.

<i>Education, employment and social policies</i>	38				38
TOTAL	39.7	39.7	42.7	43.7	165.8

Table 15. Indicative IPA II allocations per policy areas and sectors, million EUR, Bosnia and Herzegovina

Source: 'Indicative Strategy Paper for Bosnia and Herzegovina (2014-2017) adopted on 15/12/2014', 27

<http://ec.europa.eu/enlargement/pdf/news/annexe_acte_autonome_nlw_part1v1.pdf> accessed 23 February 2016.

The emphasis on vulnerable groups remains an important goal in the period 2014-17, including women's rights and gender equality (women trafficking, women's participation in the labour market, and family violence). Increasing social inclusion of Roma, refugees and internally displaced persons were also highlighted as key problems to be addressed. These vulnerable groups have faced enduring problems with access to health care, since social protection rights and pension rights between the entities are non portable remaining one of the main obstacles to sustainable return.³⁰⁷ In addition, problems of media freedom were stressed, i.e. political pressure and intimidation against journalists, as well as fragmentation of media along ethnic lines. Right to education of vulnerable children and civil society development were also problematised. Altogether, the following issue areas were prioritised for action under IPAIL: prevention of torture and ill treatment, prison conditions, access to justice, rights of the socially vulnerable, refugees and internally displaced persons, minorities, the Roma, anti-discrimination, women's rights, children's rights, right to education, social and labour rights, freedom of expression and the media, civil society, and missing persons.³⁰⁸

Altogether conditionality linked to the *Sejdić-Finci* judgment was present and resulted in a serious fall-back in 2013 and after. It is also apparent that this particular condition was framed not primarily as a human rights condition. It was more about the lack of effective and efficient governance, a source of growing frustration in the EU. (The lack of institutional capacity is emphasized also in the context of the method of allocating funds: as the Commission noted, Bosnia is not ready to move from direct to indirect management of EU assistance.³⁰⁹) Flood recovery was another element that seemed to limit the impact of conditionality, with the channelling of an increasing portion of IPA funds into this area. The priorities identified were in partial overlap with priorities expressed outside the IPA framework, as we have seen earlier, potentially weakening consistency.

³⁰⁷ *ibid* 4-5.

³⁰⁸ 'For the protection of fundamental rights, support will be provided, among others, for monitoring and evaluation systems for human rights; mechanisms to prevent and eliminate torture, ill treatment, hate speech, gender and all other types of violence and pain-infliction in prisons. A further focus will be on improving legal aid and minorities' access to justice, including Roma and other vulnerable groups; and on supporting of non-discrimination, gender equality, diversity, non-violent communication into education curricula, employment environments, health centres/institutions etc. With respect to freedom of expression and the media, assistance will support building up technical capacity, and provide training and expertise to the relevant media bodies in order to develop investigative journalism and to improve professional journalistic standards.' *ibid* 4-5.

³⁰⁹ *ibid* 7.

6. Council conclusions

Council conclusions were not very revealing about the EU's human rights priorities. These focus mostly on essential conditions and ongoing political processes, thus touch upon human rights just in very general terms and mostly referring to the *Sejdić-Finci* case while discussing Bosnia and Herzegovina. Between 2010 and 2015 only in December 2013 did the Conclusions mention other human rights related issues such as war crimes, freedom of expression, including intimidation of journalists, and discrimination, especially against the Roma.³¹⁰ In 2015 the Council adopted two conclusions on Bosnia, in March and October,³¹¹ but none referred to human rights issues, and focused instead on the new reform agenda.

The table below provides a summary of human rights related content of Council Conclusions between 2010 and 2015 in reverse order.

Dec. 2014	Implementation of the <i>Sejdić-Finci</i> ruling ³¹²
Apr. 2014	Reaching out actively to civil society and youth and taking into account the needs of the citizens; focusing on socio-economic issues, in particular tackling the very high unemployment ³¹³
Dec. 2013	<i>Sejdić-Finci</i> , war crimes, freedom of expression, including addressing intimidation of journalists, and on tackling discrimination, including of Roma. ³¹⁴
Oct. 2013	<i>Sejdić-Finci</i> ³¹⁵
July 2013	<i>Sejdić-Finci</i> ³¹⁶

³¹⁰ Council of the European Union, 'Council conclusions on Enlargement and Stabilisation and Association Process General Affairs Council meeting' (Brussels, 17 December 2013) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/140142.pdf> accessed 12 April 2015.

³¹¹ Council of the European Union, 'Outcome of Proceedings, Council Conclusions on Bosnia and Herzegovina, Foreign Affairs Council' (12 October 2015) <<http://data.consilium.europa.eu/doc/document/ST-12891-2015-INIT/en/pdf>> accessed 30 October 2015; Council of the European Union, 'Council conclusions on Bosnia and Herzegovina' (16/03/2015) Press Release <<http://www.consilium.europa.eu/en/press/press-releases/2015/03/16-council-conclusions-on-bosnia-and-herzegovina/>> accessed 30 October 2015.

³¹² Council of the European Union, 'Council conclusions on Bosnia and Herzegovina, Foreign Affairs Council meeting' (Brussels 15 December 2014).

³¹³ Council of the European Union, 'Council conclusions on Bosnia and Herzegovina Foreign Affairs Council meeting' (Luxembourg, 14 April 2014) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142215.pdf> accessed 30 October 2015.

³¹⁴ Council, 'Council conclusions...' 17 December 2013 (n 310).

³¹⁵ Council of the European Union, 'Council conclusions on Bosnia and Herzegovina Foreign Affairs Council meeting' (Luxembourg, 21 October 2013) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/139070.pdf> accessed 30 October 2015.

³¹⁶ Council of the European Union, 'Council conclusions on Bosnia and Herzegovina Foreign Affairs Council meeting' (Brussels, 22 July 2013) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138261.pdf> accessed 30 October 2015.

Dec. 2012	<i>Sejdić-Finci</i> ³¹⁷
June 2012	<i>Sejdić-Finci</i> and divisive ethnic rhetoric ³¹⁸
Dec. 2011	<i>Sejdić-Finci</i> ³¹⁹
March 2011	<i>Sejdić-Finci</i> ³²⁰
Dec. 2010	<i>Sejdić-Finci</i> ³²¹

Table 16. Human rights priorities in Council Conclusions, Bosnia and Herzegovina, 2010-15

7. Conclusions: stated priorities

In this section we reviewed the EU's instruments from 2009 until 2015 in order to establish the EU's human rights priorities. Thus we looked at the 'usual' tools such as visa liberalization, yearly progress reports, enlargement strategies, IPA documents and Council conclusions, while also analysed special instruments the EU employed in Bosnia in order to keep the country on the integration path, such as the Structured Dialogue on Justice, the High Level Dialogue on the Accession Process and the Compact for Growth.

During this period, the political environment in Bosnia was not conducive to the EU's reform agenda including on human rights. The EU was in a difficult position to promote reforms as Bosnian political leaders in general seemed not interested in EU integration thus complying with the EU's conditions. Among all the instruments the visa liberalization seemed to be the most effective tool from the point of view of the advocacy of human rights. Creating a state level personal data protection office and making it operational, issuing ID cards to refugees, adopting the law on antidiscrimination, establishing the ombudsman at the state level, taking the first steps to collect data on ethnically motivated incidents and creating a registry of Roma and their needs were all the result of the visa liberalization process. Apart from the visa liberalization process, which gave an impetus to quite a number of reforms, the rest of the instruments applied in the enlargement framework remained largely ineffective. Although the missing

³¹⁷ Council of the European Union, 'Council conclusions on enlargement and stabilisation and association process, 3210th General Affairs Council meeting' (Brussels, 11 December 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/134234.pdf> accessed 30 October 2015.

³¹⁸ Council of the European Union, 'Council conclusions on Bosnia and Herzegovina 3179th Foreign Affairs Council meeting' (Luxembourg, 25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131175.pdf> accessed 30 October 2015.

³¹⁹ Council of the European Union, 'Council conclusions on enlargement and stabilisation and association process 3132nd General Affairs Council meeting' (Brussels, 5 December 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224285/evidence-eeas-council-conclusions-enlargement-dec-2011.pdf> accessed 30 October 2015.

³²⁰ Council of the European Union, 'Council conclusions on Bosnia and Herzegovina 3076th Foreign Affairs Council meeting' (Brussels, 21 March 2011) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/120066.pdf> accessed 30 October 2015.

³²¹ Council of the European Union, 'Council conclusions on enlargement/stabilisation and association process 3060th General Affairs Council meeting' (Brussels, 14 December 2010) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/118487.pdf> accessed 30 October 2015.

parts of the anti-discrimination reform were put on the agenda of the Structured Dialogue on Justice, this did not lead to any breakthrough until the end of 2015 (to be discussed in the next section). The High Level Dialogue that focused on the implementation of the *Sejdić-Finci* judgement and institutional reforms was called off by the Enlargement Commissioner in early 2014 because of its failure. The recently launched Compact for Growth agenda which only implicitly concerns human rights as it rather requires economic, public administration and rule of law reforms is yet to be implemented, nevertheless for the time being it managed to reenergize Bosnia's EU integration process.

In the context of general conditionality towards Bosnia, human rights apart from electoral rights of minorities have not been among the highest priorities. During the last five years institutional reform depicted as an effective coordination mechanism on EU matters, public administration reform, and harmonization of the constitution with the *Sejdić-Finci* judgement of the ECtHR were listed among essential conditions, while reform of the justice sector has been the main aspiration of the Structured Dialogue on Justice. Although the call to implement the *Sejdić-Finci* judgement is a human rights related requirement which concerns the electoral rights of minorities, in reality it marginalized other aspects of minority rights protection which are much more relevant to the everyday experience of minorities. This condition became a high priority on the EU's agenda because it would require changes in the structure of state institutions the EU had long sought for. The EU presented an overall positive picture of the human rights situation in Bosnia in its yearly progress reports until 2014. This radically changed into a highly critical evaluation in 2015, showing that the EU decided to apply human rights conditionality more seriously than before.

While seeking to determine the EU's human rights priorities for Bosnia, based on a review of progress reports and enlargement strategies a so called first order and second order of human rights issues could be established. Among first order issues featured minority rights, war crimes prosecution, media freedom, Roma rights, antidiscrimination and LGBT rights, refugees and IDPs, while the second order included children's rights, access to justice, social rights, women's rights, civil society, human trafficking, personal data protection, torture and ill treatment, freedom of assembly and association, freedom of religion, vulnerable groups (i.e. disabled people), labour rights, and property rights.

Financial priorities expressed through the IPA program only partially overlapped with highlighted issues in the enlargement strategies. While all of the six so called first order issues were among IPA priorities in 2013 and/or 2014, several second order subjects were also included such as civil society, women, children, disabled people, social rights, right to education, and labour rights. It is visible from this list of priorities that social and economic rights featured high among IPA human rights targets. In the latest IPA strategy access to justice, prison conditions and torture and ill treatment were also added to the list. Importantly, IPA support was halved for Bosnia in 2013 and was kept at a lower level even afterwards. By considering all these instruments, it can be concluded that the EU followed a balanced approach to civil and political versus social and economic rights in Bosnia.

The following section will scrutinise the impact of the EU's engagement in four areas: anti-discrimination, children's rights, Roma rights and media freedom, in order to shed some light on the operation of the instruments in practice.

E. Assessing the impact

So far the report focused on what the EU stated and did, without considering the results in terms of progress achieved on the ground. The next four sections (1-4) will focus on a few selected issues in order to assess the impact of the EU's human rights conditionality. We chose four topics: anti-discrimination, children's rights, Roma rights and media freedom. These have received a lot of attention from the EU since the early phase of the SAP. Examining these areas should show how the EU's instruments could influence domestic policy fields when a country has been reluctant to comply with the EU conditions.

We will first look at anti-discrimination reform where EU intervention was relatively successful. Conditionality did achieve the formal requirement of adopting legislative and institutional reform, even though implementation has been lacking so far, for a variety of reasons. This also means that despite what is generally described as a partial success, the situation of vulnerable groups has hardly improved. Moving beyond formal rule adoption seems to be a real challenge for the EU in general while promoting human rights reforms.

1. Anti-discrimination

Minority issues are discussed in the progress reports in four, partly overlapping categories: respect for and the protection of minorities and cultural rights, refugees and internally displaced persons, rights of the Roma and antidiscrimination including LGBT rights. Roma are clearly an ethnic minority still their situation is discussed separately. Besides ethnic minorities classified under the label of 'others', there are constituent people in local minority position many of whom are returnees or IDPs (as most local minorities were driven away during the war which created ethnically homogenous regions in Bosnia, see section II.B.1). In the progress reports, the section on antidiscrimination puts great emphasis on the situation of LGBT persons, nevertheless the principle of anti-discrimination is being mentioned in the sections discussing other groups as well such as ethnic/national minorities, Roma, and women mostly.

The section explicitly devoted to minority rights is focused predominantly on the implementation of the *Sejdić-Finci* case thus on minorities' inability to practice their political right to run for the highest state offices, beside addressing the issues of cultural rights and the operation of national councils. Discrimination in other areas that affect the lives of minority members got less attention. These include discrimination at the level of entities and locally in terms of political representation, and participation in the labour force. In the assessment of a 2011 Minority Rights Group summary,

members of the dominant ethnic group are usually hired over anyone else and there is favouritism towards war veterans and families of those killed during the war. Access to health care is based on pre-war residency which means that people displaced from the Federation do not have access to health care in RS and vice versa. At times, minorities and non-dominant constituent peoples are refused service. People are also entitled to pensions based on their pre-war residency. Pupils in

*minority areas frequently face a hostile environment in schools that do not provide an ethnically neutral setting.*³²²

Most of these problems have prevailed until today, (at least until the end of 2015). The 2010 EU Progress Report addressed the problem of discrimination in access to employment against returnees. However, this issue disappeared from the progress reports by 2014, which still mentioned discrimination against refugees and returnees when it came to access to social rights and basic services yet left out employment. At the same time, during the 2014 UPR, OSCE-BIH stated that ‘lack of employment remained the main impediment to sustainable returns.’³²³ Discrimination in employment against minorities and returnees deserves attention also because access to health care, pensions and other social benefits is often connected to employment. Thus ethnic discrimination in the labour market, concerning access to health care and in the education sector are the most pressing problems people in minority position face on a daily basis, more so than their inability to run for the state presidency. As was mentioned before, the 2015 Progress Report adopted a much more critical tone than the previous reports and acknowledged other problems as well by pointing out that ‘sustainable return continues to be hampered by the lack of employment opportunities’.³²⁴ It also noted the returnees’ difficult access to health care services, adding that ‘progress in eliminating the “two schools under one roof” phenomenon continues to be slow and the number of mono-ethnic schools has not decreased. The common core curriculum is not yet applied throughout the country.’³²⁵

Hate incidents against returnees is another pressing challenge that has not been recognised by EU progress reports until 2014, which mentioned hate crime only in relation to LGBT.³²⁶ The United Nations High Commissioner for Refugees (UNHCR) stated during the 2014 UPR process that ‘hate incidents left returnees feeling extremely insecure, undermining their ability to exercise rights such as freedom of movement.’³²⁷ By contrast the 2015 progress report noted that ‘hate incidents targeted returnees, LGBTI persons or were ethnically motivated. Information about hate crime acts is not systematically collected or tracked.’³²⁸

³²² Minority Rights Group International, ‘World Directory of Minorities and Indigenous Peoples, Bosnia and Herzegovina Overview, 2011’ <<http://www.minorityrights.org/2471/bosnia-and-hercegovina/bosnia-and-hercegovina-overview.html>> accessed 12 April 2015.

³²³ Human Rights Council, ‘Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Bosnia and Herzegovina’ A/HRC/WG.6/20/BIH/2 Working Group on the Universal Periodic Review, Twentieth session (18 August 2014) 9 < <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/WG.6/20/BIH/2&Lang=E>> accessed 22 April 2016.

³²⁴ EC, ‘Commission staff working document, Bosnia and Herzegovina 2015 Report’ (n 288) 26.

³²⁵ *ibid* 26.

³²⁶ OSCE, ‘Tackling Hate Crimes: An Analysis of Bias-Motivated Incidents in Bosnia and Herzegovina with Recommendations’ (13 November 2012) 9, 13 <http://www.oscebih.org/documents/osce_bih_doc_2012111310235235eng.pdf> accessed 12 April 2015.

³²⁷ HRC, ‘Compilation, Bosnia and Herzegovina’ A/HRC/WG.6/20/BIH/2 (n 323) 7.

³²⁸ EC, ‘Commission staff working document, Bosnia and Herzegovina 2015 Report’ (n 288) 26.

When it comes to the return process, property restitution to returning refugees has been regarded a success. It could be added, however, that temporary occupation of the homes of IDPs and returnees is a common problem where the temporary occupant has the right to receive compensation. This in many cases have undermined the rights of displaced persons to exercise their right to return. In 2014 'there were approximately 410 cases pending before the Court of Bosnia and Herzegovina with the former Commission for Real Property Claims of Displaced Persons and Refugees as respondent, but that no action had been taken since the commission's mandate expired in 2009'.³²⁹

The principle of anti-discrimination is enshrined in the Bosnian constitution. The formulation of the clause was inspired by Article 14 of the ECHR, providing an open ended list of the different bases of discrimination and, as a result, discrimination is prohibited on all grounds. The implementation of this all-encompassing rule is hampered by the weaker legislative guarantees.

There are various pieces of legislation providing for equality of different groups of society, such as the Law on the Rights of National Minorities, framework laws on education, the Election Law. Yet, the 2003 Law on Gender Equality was the first legislative act that defined different areas of discrimination such as education, employment, public life, media, etc. beyond serving the general function of prohibiting discrimination. This law was the first in Bosnia to differentiate between direct and indirect forms of discrimination while also creating positive obligations for state institutions to fight discrimination such as introducing gender mainstreaming.³³⁰

Yet, none of these laws contained any provisions for those wanting to seek a legal remedy, which has been a major contribution of the law on anti-discrimination adopted in 2009. Although the law was passed under EU pressure in the frames of the visa liberalisation process, there was also a significant domestic mobilisation behind it. In 2007 100 NGOs, based in Bosnia, in cooperation with the relevant parliamentary committee, prepared an NGO draft law. This was taken into consideration in the drafting process by the Ministry of Human Rights and Refugees (MHRR) in 2008. The law was meant to be in line with the relevant EU directives, the Race Equality Directive 2000/78/EC, and the Employment Equal Treatment Directive 2002/73/EC.

During the parliamentary process the greatest concern for MPs was enacting anti-discrimination based on sexual orientation, i.e. allowing homosexual couples to legally marry and adopt children. At the end, the version adopted by the parliament left out the following basis for discrimination: 'marital and family status, pregnancy or maternity age, health status, disability, genetic heritage, gender, sexual orientation or expression.'³³¹ As Adnan Kadribašić noted, omitting these other elements meant to cover up 'the intent to delete any ground which would relate to sexual orientation or gender identity.'³³² Ironically, even

³²⁹ HRC, 'Compilation, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/2 (n 323) 11.

³³⁰ Adnan Kadribasic, 'Developing Equality Legislation in Divided Societies: The Case of Bosnia and Herzegovina' (2013) 10 *The Equal Rights Review* 65.

³³¹ In other pieces of legislation in Bosnia, gender, disability, health status, pregnancy and maternity and age were already prohibited grounds for discrimination. See *ibid* 65.

³³² *ibid*.

though this amendment to the original draft was adopted in both houses in parliament, the final version of the law published in the Official Gazette in 2009 did include sexual orientation and sexual expression among the prohibited grounds, while still left out age and disability.³³³

Not including these statuses in the list of prohibited grounds has been criticised in every EU progress reports since the passing of the law. However, the wording of the law implies that the list is open ended, plus other grounds of discrimination are prohibited by other pieces of legislation. As of 2015, the necessary amendments are still outstanding as protection based on age and disability still does not feature in the law, and the provisions of the general law were not transposed into sectoral laws on labour regulation and higher education.³³⁴

The law established procedures of litigation of discrimination cases, during which a person can file a lawsuit at the municipal court, and the burden of proof lies with the alleged offender that is the respondent, which is also a novelty in the Bosnian civil proceedings where the general rule is that the plaintiff has to provide all the evidence to support an alleged breach. Even though the legal basis was created for fighting discrimination, the reality so far has been that judicial enforcement is largely lacking. There were altogether two cases in the five years after the law's adoption where a final judgement on discrimination was handed down. Potential victims are unaware of the existing protection mechanisms in the absence of awareness raising campaigns. Discrimination is still widespread 'recorded particularly in education (two schools under one roof), employment (i.a. on the basis of political affiliation, ethnicity, mobbing and sexual harassment), social and health care (i.a. people with disabilities, Roma). Certain categories of people are exposed to multiple discrimination, such as persons with disabilities, Roma, LGBT people, returnees, etc.'³³⁵ The ethnic quotas based on the last census ensuring parity among constituent people for access to jobs in certain sectors such as public service, leadership positions, armed forces police and judiciary also imply discrimination against 'others'.³³⁶

The Ministry of Human Rights and Refugees was tasked with devising a methodology for collecting data on discrimination after the law's adoption, yet this obligation is still outstanding, as well as the yearly reports of the said Ministry required by the law. The Human Rights Ombudsman of Bosnia and Herzegovina also received an active role in the implementation of the law, in assisting victims, initiating investigations and providing recommendations. So far, the Ombudsman has been quite passive in addressing systemic problems resulting in discrimination, and paid attention only to litigable cases. As was

³³³ According to Kadribašić, no one among the experts who closely monitored the process knows how this could happen. The final list of grounds was the following: 'of (their) race, skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance' Article 2, BiH Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09, published on 28 July 2009, entered into force on 5 August 2009. Source: *ibid*.

³³⁴ EC, 'Commission staff working document, Bosnia and Herzegovina 2015 Report' (n 288) 26.

³³⁵ Sarajevo Open Centre, 'Declaration, UPR Pre-Session on Bosnia and Herzegovina' (Geneva, October 2014) <<http://soc.ba/site/wp-content/uploads/2014/10/Statement-Bosnia-and-Herzegovina-08OCT2014.pdf>> accessed 12 April 2015.

³³⁶ Kadribasic (n 330) 74.

expressed during the UPR in 2014 by the Committee on the Elimination of Racial Discrimination (CERD) ‘racial and ethnic-based discrimination remained alive in the country’s society and mechanisms for monitoring acts of ethnic-based discrimination and violence remained virtually non-existent.’³³⁷

As was mentioned above, anti-discrimination was included in the Structured Dialogue in 2013 indicating that the issue was high on the EU’s agenda. As we have seen, it was also used as a benchmark during the visa liberalisation process. Even though the follow-up reports of the visa liberalisation shifted their focus away from fundamental rights to issues more closely tied to border security and immigration, the Structured Dialogue picked up the thread dropped from the visa reports. Accordingly, the EU demanded that the law be amended to include age and disability as well as a definition of ‘sexual orientation and gender identity in line with internationally agreed terminology’.³³⁸ In the absence of these definitions, the interpretation of these terms is left to the judges, prosecutors and attorneys. It also drew attention to the low level of discrimination cases adjudicated thus calling for awareness raising campaigns so that people get acquainted with legal procedures and remedies.

The EU also urged for establishing the required data collection and sharing system on discriminatory practices.³³⁹ The 2014 EU progress report also critically remarked that ‘sexual orientation and gender identity are not included as grounds for hate crime in the criminal law of the Federation’, while also noted that such crimes have proliferated in the recent period targeting LGBT.³⁴⁰ At the same time, the prevalence of hate crimes was not mentioned until 2014 (only in 2015) concerning other vulnerable groups that are also common targets of hate crimes: minority returnees and Roma.³⁴¹

Effective implementation is hampered by the fact that the Anti-Discrimination Law has not been transposed to other laws such as the labour law and law on higher education, as a result for instance the new labour law of the FBiH does not mention sexual orientation among the grounds of discrimination. The necessary harmonization should have been carried out within 90 days following the adoption of the law, similarly to the database of information about discrimination, which should have been created with the same deadline.

³³⁷ HRC, ‘Compilation, Bosnia and Herzegovina’ A/HRC/WG.6/20/BIH/2 (n 323) 11.

³³⁸ Most sources, including General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights in its footnote 25, refer to the Yogyakarta Principles. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ E/C.12/GC/20 (2 July 2009) 10, fn. 25 <www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc> accessed 22 April 2016. The Yogyakarta Principles is a non-binding document drafted by human rights expert. Its introduction provides for the relevant definitions: ‘The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity’ (March 2007) 6 <http://www.yogyakartaprinciples.org/principles_en.pdf> accessed 12 April 2015.

³³⁹ European Commission, ‘Plenary meeting of the “Structured Dialogue on Justice and Additional Rule of Law Matters between the European Union and Bosnia Herzegovina” Sarajevo, Bosnia and Herzegovina (13-14 May 2014) Recommendations by the European Commission’ 8 <<http://europa.ba/Download.aspx?id=1431&lang=EN>> accessed 12 February 2016.

³⁴⁰ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ (n 215) 20.

³⁴¹ OSCE, ‘Tackling Hate Crimes’ (n 326) 9, 13.

As was mentioned above, there have been very few anti-discrimination cases reaching the courts. The BiH Ombudsman has not initiated any actions concerning LGBT rights as of 2014.³⁴² Altogether, the 2014 UPR report concluded that the Law on Gender Equality has not been implemented,³⁴³ and the implementation of the Law Prohibiting Discrimination in BiH has been limited, as reflected by the low number of cases brought before courts, the lack of data on discrimination, the widespread and institutionalised discrimination against members of ethnic and national minorities³⁴⁴ and the lack of a strategy to combat discrimination in a systematic manner.³⁴⁵ As Human Rights Watch noted '[d]iscrimination, threats, and attacks against lesbian, gay, bisexual and transgender people and activists remained a concern', while 'the lack of prosecutions and public condemnation of such incidents' creates an atmosphere of impunity where public authorities such as the courts and the police seem complicit in these crimes.³⁴⁶

By way of background, from the EU's side the move to include anti-discrimination in the Structured Dialogue was also meant to counterbalance the difficulties with the reform of the judiciary, which did not yield the expected results. Quite recently the European Commission threatened Bosnian leaders because of the failure to adopt the justice sector reform with suspending funding for paying the salaries of more than 140 employees, which was part of the IPA support for war crimes processing. Part of the reason why the reform strategy is so hard to adopt is that Republika Srpska government is reluctant to accept the creation of an appeals court on the state level, which it considers as an institution undermining RS autonomy.³⁴⁷

In conclusion, formal compliance (the adoption of laws, above all of the Anti-discrimination Law and setting up the state ombudsman office) was an outcome of the visa liberalisation process and the structured dialogue. There was also serious domestic mobilisation from the part of local stakeholders (100 NGOs, a parliamentary committee and the Ministry of Human Rights and Refugees) that were trying to push this agenda forward already before the EU's engagement. Their efforts were reinforced by the EU embracing this issue; without the EU's involvement it is doubtful that the law would have been passed. It seems that the EU can successfully advance human rights issues already backed up by a supporting coalition on the domestic side. Yet, this has been only a partial success as six years after its adoption this law still has not been implemented.

³⁴² Sarajevo Open Centre, 'The human rights of LGBT persons in Bosnia and Herzegovina, Contribution to the Progress report of BiH's EU integration' (2014) <<http://eu-monitoring.ba/en/the-human-rights-of-lgbt-persons-in-bosnia-and-herzegovina/>> accessed 22 April 2016.

³⁴³ HRC, 'Summary, 25 July 2014' (n 251) 4; 'Report for Universal Periodic Review – Second Cycle, Bosnia and Herzegovina, Informal Coalition of Non-governmental Organisations', February 2014, 14.

³⁴⁴ This was the opinion of OSCE BiH and MRG during the UPR.

³⁴⁵ HRC, 'Summary, 25 July 2014' (n 251) 4; 'Report for Universal Periodic Review – Second Cycle, Bosnia and Herzegovina, Informal Coalition of Non-governmental Organisations', February 2014, 14.

³⁴⁶ HRC, 'Summary, 25 July 2014' (n 251) 5.

³⁴⁷ Denis Dzidic, 'Reform Justice or Lose Funds, EU Tells Bosnia' *Balkan Insight* (Sarajevo, 22 Apr 2015) <<http://www.balkaninsight.com/en/article/jean-eric-paquet-no-funding-without-justice-sector-reform>> accessed 12 April 2015.

2. Education and children's rights

Children's rights is a recurring theme from the early 2000s where the big issue of concern for the international community was the ending of ethnic segregation in schools. EU priorities followed a similar path, e.g. the 2005 Enlargement Strategy report mentioned the goal of overcoming the ethnic fragmentation of the Bosnian education system.³⁴⁸ Children's rights were also an IPA priority between 2007 and 2009, were included among short-term priorities in the 2008 European Partnership, and were part of the Enlargement Strategy in 2013.

Despite the EU's sustained attention to this subject and the OHR's frequent interventions in this issue area especially during Ashdown's term, it is hard to see any improvement over the past 15 years. The 2014 Progress Report noted the continued existence of divided schools in some parts of the Federation and mono-ethnic schools across the country, which for instance led to some Bosniak parents boycotting schools in the Republika Srpska in the absence of available education according to the Bosniak curricula.³⁴⁹

The shadow report on Bosnia's EU accession notes the dominance of ethnically homogeneous schools, with ethnocentric curricula of local majorities, hate speech against minorities in textbooks, and mounting tensions in cantons which operate as 'two schools under one roof' accommodating Bosniak and Croat sections. The adoption of a unified, national curriculum, a move yet to happen, would be the first step to resolve these problems. Some preparations have been carried out in this direction.³⁵⁰

After the adoption of the law on antidiscrimination, based on that law there was a 'two schools under one roof' case where the Federation Supreme Court found that the separation of Bosniak and Croat children amounted to unacceptable ethnic segregation.³⁵¹ Despite sustained efforts, including litigation by domestic NGOs and success in the courtroom, implementing school desegregation remains a daunting task, due to resistance from the political leadership.³⁵² It is an additional problem that 'minorities are directly neglected in the education system because they have a choice of Croat, Serb or Bosniak programs in schools.'³⁵³ This affects not only 'others' such as the Roma, but sometimes also constituent people in minority position in the Republika Srpska.

School segregation should be an area of special concern for actors like the EU as maintaining ethnically divided schooling and curricula will perpetuate the divisions along ethnic lines. Also, from a human rights

³⁴⁸ European Commission, 'Communication from the Commission – 2005 enlargement strategy paper' COM (2005) 561 final (Brussels, 9.11.2005) 17 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005DC0561>> accessed 12 April 2015.

³⁴⁹ EC, 'Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report' (n 215) 12.

³⁵⁰ The BiH Agency for Preschool, Primary and Secondary Education, is working on a common core curriculum, based on which existing curricula could be revised. Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/1 (8 August 2014) 8.

³⁵¹ Denis Dzidic, 'Bosnia's Segregated Schools Maintain Educational Divide' *Balkan Insight* (Sarajevo, 13 February 2015) <<http://www.balkaninsight.com/en/article/bosnia-s-segregated-schools-maintain-educational-divide>> accessed 12 April 2015.

³⁵² *ibid.*

³⁵³ Initiative of Monitoring BiH's European Integration (n 121) 40.

point of view, the issue is unequivocal. International human rights bodies dealing with racial discrimination, like the Committee on the Elimination of Racial Discrimination (CERD) at the UN level or the Advisory Committee established under the Council of Europe Framework Convention on National Minorities, have all condemned school segregation in BiH.³⁵⁴ The CERD stressed that ‘segregated education in the territory of the State party perpetuates non-integration, mistrust and fear of the “other”’.³⁵⁵ The resolution adopted by the Council of Europe Committee of Ministers on the implementation of the Framework Convention listed ending school segregation as an issue for immediate action.³⁵⁶

There was another aspect of children’s rights that received considerable attention especially in 2013. Delays by the parliament to adopt amendments to the Law on a Single Reference Number, in line with the relevant ruling of the Constitutional Court of Bosnia and Herzegovina made it for a period impossible to register newly-born children. This prevented many new-born children from gaining access to health and social benefits and travel documents for several weeks. As a result of MPs' failure to adopt a new law on personal numbers, a baby requiring special medical treatment was unable to travel to Germany for an urgent operation. This prompted large protests in Sarajevo in June 2013. Finally, in November the necessary changes to the law on ID numbers were adopted in the House of Peoples, yet by the time the baby seeking operation in Germany had died. While the EU Progress Report published in October 2013 took notice of this problem,³⁵⁷ the issue has not been addressed in other EU documents as an urgent matter.

3. Roma rights

Roma rights were included in progress reports and enlargement strategies from the beginning of the SAP and received financial support from EIDHR between 2002 and 2006, and IPA since 2007.³⁵⁸ Roma rights

³⁵⁴ For a summary, see: MRG, ‘Collateral Damage of the Dayton Peace Agreement’ (n 145) 9.

³⁵⁵ Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the Convention, Bosnia and Herzegovina’ CERD/C/BIH/CO/7-8 (23 September 2010) para 11 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/BIH/CO/7-8&Lang=En> accessed 3 February 2016.

³⁵⁶ To ‘take as a matter of priority all necessary steps to eliminate segregation in education, in particular through accelerating the work to abolish all remaining cases of “two schools under one roof” and replace them with integrated education’. Committee of Ministers, ‘Resolution CM/ResCMN(2015)5 on the implementation of the Framework Convention for the Protection of National Minorities by Bosnia and Herzegovina’ (12 May 2015) <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResCMN%282015%295&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>> accessed 3 February 2016.

³⁵⁷ ‘The Parliamentary Assembly of Bosnia and Herzegovina failed to adopt amendments to the Law on a Single Reference Number on time, due to political divergences. This has prevented several thousand newborn children from obtaining health and social benefits and travel documents and has led to large demonstrations.’ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2013 Progress Report’ (n 266) 8.

³⁵⁸ European Commission, ‘Decision C(2007) 2255 of 01/06/2007 on a Multi-annual Indicative Planning Document (MIPD) 2007-2009 for Bosnia and Herzegovina’ 14-16 <[http://www.esiweb.org/pdf/bosnia_EC%20Multi-Annual%20Indicative%20Planning%20Document%202007-2009%20\(BiH\).pdf](http://www.esiweb.org/pdf/bosnia_EC%20Multi-Annual%20Indicative%20Planning%20Document%202007-2009%20(BiH).pdf)> accessed 12 April 2015.

were highlighted in each and every enlargement strategy in our examined time period between 2010 and 2015.

Previously, European partnerships also repeatedly addressed this topic. The 2004 European Partnership required the preparation of a 'Gypsy Strategy' which was met in 2005 when the BIH Council of Ministers adopted the BIH Strategy for Roma. Both the 2006 and 2008 European Partnerships preparing Bosnia for signing the SAA called for the adoption and implementation of sectoral action plans of the national strategy for the Roma, which became a requirement among short term and medium term priorities. An action plan on the educational needs of the Roma was already adopted before the EU began to demand the sectoral action plans in 2006. It was only in July 2008 that the Council of Ministers adopted BIH Action Plan on Roma issues in the fields of employment, housing and health care, a month after Bosnia signed the SAA with the EU. Further important milestones from the Bosnian side constituted in Bosnia joining the Decade of Roma inclusion 2005-2015 in 2008 and revising the Action Plan on Roma Education in 2010.

In April 2011 the EU adopted the EU Framework for National Roma Integration strategies up to 2020 focusing on housing, health care, education, employment and anti-discrimination. This set the guidelines for Roma strategies not only for the Member States but also to enlargement countries, which additionally were also called on to 'pay particular attention to facilitating access to personal documents and registration with the local authorities'.³⁵⁹ Accordingly, all Member States and enlargement countries have to adopt national Roma strategies. In December 2013 the Council also adopted a recommendation on effective Roma integration measures, which becoming part of the EU *aquis* also applies to enlargement states.

Importantly, the EU promotes Roma rights in South East Europe also with a view on stopping Roma migration from the region to EU Member States, many of whom come as asylum seekers. The EU Factsheet on the Roma in Southeast Europe explaining the EU framework of assisting Roma inclusion in the region stresses that 'the [present]situation favours the migration of some Roma seeking asylum without success in EU countries. Enlargement countries will have to demonstrate strong political will at national and local level to improve Roma's social inclusion and effectively fight against their discrimination. They also need to take measures to tackle abuse of the asylum system in the EU.'³⁶⁰

The EU provides financial support for Roma inclusion through IPA projects and EIDHR programs while it also works with national authorities while devising Roma strategies and action plans, and follows up and monitors their implementation. The EU conducts Roma seminars also with the enlargement states since 2011 organised by the Commission with all relevant stakeholders.³⁶¹ 85% of IPA money given to Bosnia

³⁵⁹ European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, "National Roma Integration Strategies: a first step in the implementation of the EU Framework" COM/2012/0226 final <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0226>> accessed 12 April 2015.

³⁶⁰ European Commission, 'EU Enlargement Factsheet, The Roma in Southeast Europe' <http://ec.europa.eu/enlargement/pdf/publication/2014/20140408_factsheet_roma_in_southeast_europe_en.pdf> accessed 12 April 2015.

³⁶¹ *ibid.*

for Roma programs during the period of 2007-2013 was dedicated to housing, while the rest for social inclusion and institutional support.³⁶²

After the overview of how the Roma were present in EU measures targeting BiH, we should inquire how these action plans and strategies improved the situation on the ground, if at all. Both the 2005 EU Progress Report and the 2010 Enlargement Strategy talk about persistent discrimination against the Roma and their hard living conditions. Concerning the effectiveness of the action plans, the 2013 Enlargement Strategy noted critically that the implementation of the Roma action plans remained limited. One exception is the area of housing where significant progress was recorded, i.e. 'building new housing units and upgrading existing Roma settlements'. In the 2014 UPR report it was stated that 'so far, 600 housing units have been built-refurnished, and currently another 150 housing units are under construction from the IPA funds'.³⁶³ Yet this has not addressed the problem of forced evictions without offering alternative housing, which continues to be a constant danger that many in the Roma community are facing.³⁶⁴ During the 2014 UPR, the issues raised included the dire housing conditions of Roma refugees and IDPs who were living in informal settlements as well as their vulnerability to evictions.³⁶⁵ In addition, according to a monitoring report ordered by the Commission, housing projects tend to be expensive and ineffective in light of the scale of needs.³⁶⁶

Besides housing, one area where progress was pronounced is access to civil registration. The number of stateless people in Bosnia (the majority of whom are Roma) has decreased significantly from the estimated 4500 in January 2012 to 792 in April 2014.³⁶⁷ By September 2015 only 77 people at risk of statelessness remained to be registered.³⁶⁸

The EU called for 'strengthened efforts' in the field of education, health and employment, areas without considerable improvement.³⁶⁹ Despite the adoption of a Revised Action Plan on Roma Education in 2010 which was welcomed by the EU, the problem pointed out in the 2007 Progress Report that only around 30% of the Roma children complete primary education could have been cited in 2014 as well, as the share of Roma children attending primary school remained exactly the same, as opposed to national average of

³⁶² EPRD Consortium, 'Thematic Evaluation on IPA Support to Roma Communities' (11 June 2015) Final Report, 126-131

<<http://www.evropa.gov.rs/Documents/Home/DACU/12/193/Thematic%20Evaluation%20on%20IPA%20Support%20to%20Roma%20Communities%20-%20Final%20Report.pdf>> accessed 12 April 2015.

³⁶³ HRC, 'National report, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/1 (n 350) 8.

³⁶⁴ Initiative of Monitoring BiH's European Integration (n 121) 41.

³⁶⁵ HRC, 'Compilation, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/2 (n 323) 9.

³⁶⁶ EPRD Consortium, 'Thematic Evaluation...' (n 362) 126-131.

³⁶⁷ European Commission, 'Commission Staff Working Document, Bosnia and Herzegovina 2010 Progress Report' SEC(2010) 1331 (Brussels, 9 November 2010) 18 <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf> accessed 12 April 2015.

³⁶⁸ EC, 'Commission staff working document, Bosnia and Herzegovina 2015 Report' (n 288) 30.

³⁶⁹ EC, 'Enlargement Strategy and Main Challenges 2014-15' (n 286).

93%.³⁷⁰ There was some improvement in the enrolment of Roma children in pre-school education in two cantons, yet the overall rate was still at a striking 1.5% as opposed to the national average of 13%.

Altogether, in 2014 the Independent Expert on minority issues concluded that, 'while on paper Roma action plans in education, employment, health and housing provided excellent aims and expected measures, the implementation of projects had been insufficient to date, resulting in a lack of significant impact on the ground.'³⁷¹

4. Media freedom

The EU was heavily engaged in media reforms from the beginning of the SAP, in cooperation with the OHR. (See also section II.B.6). The 2003 Feasibility Study already included media freedom among its 16 conditions for opening negotiations on the SAA, even though the EU during this initial period was mostly focused on institution building such as the creation of the nationwide broadcasting service.³⁷² Media freedom also became one of the two major human rights related areas of CARDS assistance (the other being refugee return). Here again the emphasis was on institution building, namely on support for PSB and CRA with the primary aim of overcoming the fragmentation of media services along ethnic lines.³⁷³ In 2005 the European Commission recommended opening SAA negotiations with Bosnia, and the implementation of the law on broadcasting services became an essential condition.³⁷⁴ It was subsequently included among the 2006 European Partnership's key priorities, and was maintained as an essential condition in the subsequent yearly progress reports.³⁷⁵

The 2005 Progress Report already noted other problems as well, such as physical attacks and political pressure on the media, although this aspect was not addressed in the European Partnerships or financial instruments. The IPA priorities between 2007 and 2009 again had media freedom among the declared goals, applying in practice a similarly narrower focus, limited to carrying out the broadcasting reform.³⁷⁶ Despite the adoption of the law at the state level in 2005, the media remained ethnically divided even by 2007, as the public broadcasting law was not passed in the Federation. The 2008 European Partnership again called for the adoption of the required public broadcasting legislation in the Federation, and for the implementation of the broadcasting reform, while also demanded the strengthening of the independence

³⁷⁰ Initiative of Monitoring BiH's European Integration (n 121) 41.

³⁷¹ HRC, 'National report, Bosnia and Herzegovina' A/HRC/WG.6/20/BIH/1 (n 350) 5.

³⁷² European Commission, 'Press release, IP/03/1563 Bosnia and Herzegovina: Commission approves Feasibility Study' (Brussels, 18 November 2003) <http://europa.eu/rapid/press-release_IP-03-1563_en.htm#file.tmp_Foot_1> accessed 15 February 2016.

³⁷³ EC, 'Annex 1(a) CARDS Assistance to Bosnia and Herzegovina' (n 189).

³⁷⁴ ICG, 'Ensuring Bosnia's Future' (n 84) 21.

³⁷⁵ Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC (2006/55/EC) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0055&from=EN>> accessed 15 February 2016.

³⁷⁶ *ibid* 14.

of the CRA.³⁷⁷ All these were put forward as essential conditions of the SAA. Yet, the issue of implementation has not been resolved ever since.³⁷⁸ In 2013 the EU Progress Report similarly pointed out that ‘the Entity laws on public broadcasting services remain to be harmonised with State-level law. The adoption of the Public Broadcasting Corporation’s statute is pending.’³⁷⁹ Thus, the public broadcasting reform remains outstanding even though it was, in theory, an essential condition for signing the SAA.

Other aspects of media freedom were increasingly criticized by the EU, such as growing political pressure on the media, ethnic bias and intimidation and threats against journalists. There were 45 incidents against journalists in 2013, compared with 47 in 2012, including physical assaults and death threats. As the Ombudsman evaluated the situation in 2014: ‘Attacks on journalists and human rights defenders were increasingly frequent. Most cases of attacks on the latter remained unresolved.’³⁸⁰ A key problem is the climate of impunity surrounding such attacks, as the police and the judiciary tends to treat such as cases not as criminal acts but as misdemeanours.

Another problem is political influence while nominating and appointing members of management and chief editors of public media.³⁸¹ ‘Public broadcasters are under constant pressure as political parties try to install pliant management and dictate coverage.’³⁸² Defamation was decriminalised in 2003, yet journalists have been subject to hundreds of civil lawsuits for defamation by politicians where the defendant has to prove his/her innocence. Politicians rarely follow through the proceedings but use these civilian lawsuits as an instrument of threat and pressure.³⁸³ According to Freedom House, since local budgets fund regional, cantonal, and municipal media the latter are under pressure from authorities who try to influence editorial policies.³⁸⁴

According to the European Fund for the Balkans, Bosnia probably adopted laws and institutions that protect media freedom best in the region, thanks to international activism.³⁸⁵ Generally, the legal guarantees are present in Bosnia, but implementation is largely lacking. The EU 2015 Progress Report

³⁷⁷ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC (2008/211/EC) 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0211&from=EN>> accessed 15 February 2016.

³⁷⁸ European Commission, ‘Conclusions on Bosnia and Herzegovina (extract from the Communication from the Commission to the Council and the European Parliament “Enlargement Strategy and Main Challenges 2010-2011” COM(2010)660 final’ <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/conclusions_bosnia_en.pdf> accessed 15 February 2016.

³⁷⁹ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2014 Progress Report’ (n 266) 16.

³⁸⁰ HRC, ‘Summary, 25 July 2014’ (n 251) 3.

³⁸¹ IREX, ‘Europe and Eurasia Media Sustainability Index 2014: Bosnia and Herzegovina’ 19 <https://www.irex.org/sites/default/files/u105/EE_MSI_2014_Bosnia.pdf> accessed 3 February 2016.

³⁸² Freedom House, ‘Nations in Transit 2014: Bosnia and Herzegovina’ <<https://freedomhouse.org/report/nations-in-transit/2014/bosnia-and-herzegovina>> accessed 3 February 2016.

³⁸³ IREX, ‘Bosnia and Herzegovina’ (n 381) 19.

³⁸⁴ Freedom House, ‘Nations in Transit 2014: Bosnia and Herzegovina’ (n 382).

³⁸⁵ European Fund for the Balkans, ‘Media freedom and integrity in the Western Balkans: Recent developments’ (2015) 6 <<http://balkanfund.org/wp-content/uploads/2015/03/Media-freedom-and-integrity-in-the-Western-Balkans-Recent-developments.pdf>> accessed 3 February 2016.

noted that ‘although the legal provisions are generally in place, the institutional and political environment is not conducive to creating the conditions for full freedom of expression.’³⁸⁶ The past two years brought changes for the worse even in the legal domain.³⁸⁷ The recently adopted Law on Public Peace and Order in February 2015 in Republika Srpska ‘criminalises social media postings that disturb public order or contain indecent, offensive or insulting content,’ thus has the potential to provide basis for clamping down on online social media, with a serious chilling effect. The OSCE condemned the law, ‘as it paves the way for legal restrictions to online free expression and free media’, while the EU Delegation to BiH also reacted by warning of ‘arbitrary implementation.’³⁸⁸

Thus it can be argued that media freedom is a human rights issue in which the EU invested heavily especially in terms of institution building using almost all available instruments, without bringing about the desired effects. The 2015 EU Progress Report on Bosnia devoted the largest space to freedom of expression and media freedom underlining the weight of this priority. The lack of sensible improvement despite the generally adequate laws and institutions is mostly due to resistance from the part of Bosnia’s political forces and the ethnic fragmentation of the institutional structure.

The level of media freedom has considerably worsened since 2009. As the EU summarized the situation in its 2013 Progress Report, intimidation and threat against journalists continued, the media was polarised along ethnic lines, the CRA still lacked institutional, political and financial independence, while the public broadcasters were under political influence as they were financed from municipal and cantonal budgets.³⁸⁹

On a wider outlook, Bosnia fits the regional trend, and the situation is comparable to that in Serbia or Macedonia. The European Fund for the Balkans noted in 2015:

*Several high-profile cases are evidence of this decline [of media freedom in the region]. In Bosnia in December 2014, police raided an internet portal after the publication of a recording that embarrassed the Bosnian Serb ruling party. In Macedonia, a series of wiretapped conversations released by the opposition this year has put the government on the defensive as it seeks to dismiss evidence that it has routinely monitored and pressured reporters and editors. And in Serbia, Aleksandar Vučić, the prime minister, has been publicly denouncing publications whose coverage displeases him, and attacking EU officials who he claims are behind the coverage.*³⁹⁰

The most recent Human Rights Watch country summary on Bosnia and Herzegovina (from January 2016) concludes that ‘[j]ournalists continued to face threats and intimidation’, citing 52 registered ‘cases of violations of media freedom and expression, including 4 physical attacks and death threats, and 12 cases

³⁸⁶ EC, ‘Commission staff working document, Bosnia and Herzegovina 2015 Report’ (n 288) 22.

³⁸⁷ Such as the Law on Electronic Communication which could seriously weaken the independence of the regulator CRA and the new media law in the Republika Srpska, adopted in February 2015. See IREX, ‘Bosnia and Herzegovina’ (n 381) 19.

³⁸⁸ European Fund for the Balkans, ‘Media freedom and integrity in the Western Balkans’ (n 385) 13.

³⁸⁹ EC, ‘Commission Staff Working Document, Bosnia and Herzegovina 2013 Progress Report’ (n 266) 16.

³⁹⁰ European Fund for the Balkans, ‘Media freedom and integrity in the Western Balkans’ (n 385) 5.

of threats and pressure’. State responsibility also lies in the ineffective response, as ‘police investigations rarely yield results.’³⁹¹

Several institutions monitor media freedom and the independence of the media in quantitative terms, too, allowing a good first approximation of the defining trends. Overall, Bosnia’s ranking is in line with the regional average. What is more striking from the aspect of conditionality is the trends that the numbers show. All of the four cited indexes register stagnation after a considerable decline. Freedom House rates the media situation in Bosnia ‘partially free’, having assigned increasing scores to Bosnia from 2008 to 2014 indicating less media freedom.³⁹²

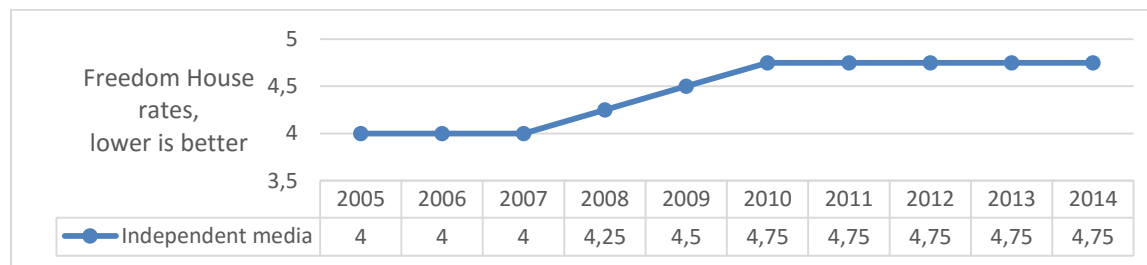


Figure 2. Freedom House Independent Media rates for Bosnia, 2005-2014

Source: Freedom House, *Nations in Transit 2014, Bosnia and Herzegovina* <<https://freedomhouse.org/report/nations-transit/2014/bosnia-and-herzegovina>>.

Similarly, Reporters Without Borders and IREX also have assigned worsening scores to Bosnia since 2009.

	2009	2010	2011	2012	2013	2014	2015
IREX Media Sustainability Index ³⁹³	2.81	2.59	2.22	1.97	2.02	2.04	
Reporters Without Borders ranking ³⁹⁴	39	47	-	68	68	66	66
Freedom House, press freedom index	47 (PF)	48 (PF)	48 (PF)	48 (PF)	49 (PF)	50 (PF)	

Table 17. Media freedom indicators for Bosnia, 2009-2015

³⁹¹ Human Rights Watch, ‘Bosnia and Herzegovina, Country Summary’ (2016) 4 <<https://www.hrw.org/sites/default/files/bosnia.pdf>> accessed 3 February 2016.

³⁹² The ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the lowest. See Freedom House, ‘Nations in Transit 2014: Bosnia and Herzegovina’ (n 382).

³⁹³ ‘IREX designed the MSI to measure the strength and viability of any country’s media sector. The MSI considers all the factors that contribute to a media system—the quality of journalism, effectiveness of management, the legal environment supporting freedom of the press, and more—to arrive at scores on a scale ranging between 0 and 4. These scores represent the strength of the media sector components and can be analyzed over time to chart progress (or regression) within a country.’ Unsustainable media means ‘Country does not meet or only minimally meets objectives. Government and laws actively hinder free media development, professionalism is low, and media-industry activity is minimal.’ Sustainable means: ‘Country has media that are considered generally professional, free, and sustainable, or to be approaching these objectives. Systems supporting independent media have survived multiple governments, economic fluctuations, and changes in public opinion or social conventions.’ IREX, ‘Bosnia and Herzegovina’ (n 381) 19.

³⁹⁴ Reporters Without Borders, ‘World Press Freedom Index’ <<https://index.rsf.org/#!/>> accessed 3 February 2016.

IREX Media Sustainability Index (higher is better), Reporters Without Borders ranking and Freedom House press freedom index (lower is better); IREX Media Sustainability Index, 0-4, 0: unsustainable, 4: sustainable; Freedom House Press Freedom Scores: Free (F): 0-30; Partly Free (PF): 31-60; Not Free (NF): 61-100.

Here the negative trends are noteworthy, otherwise Bosnia fits the regional landscape. According to IREX, EU member Croatia and Romania did not fare much better with their 2.42 and 2.2 average scores respectively, or accession candidate Montenegro with 2.29 in 2014. Bosnia was put in the same category with these countries of similar scores.³⁹⁵ Serbia and Macedonia (1.4) received considerably worse evaluation even though they are both candidates, Serbia (1.9) negotiating its EU membership since January 2014 (see more on media freedom in Serbia in Chapter III).

This is not merely a post-Yugoslav phenomenon; the enduring problems (except for the ethnic fragmentation of the institutions) can be easily identified in some EU Member States as well. The total dominance of public media by the government and the media regulating agency is an old story in EU Member State Hungary which received almost the same score from Reporters Without Borders as Bosnia in 2014 (Hungary: 26.73, Bosnia: 26.86).³⁹⁶ Hungary ranked just two places higher than Bosnia, 64th as opposed to Bosnia's 66th, while another EU Member State Croatia ranked 65th. Maybe physical assaults on journalists are not that common in most parts of the EU, there are exceptions also to this rule, such as in Greece, where 'physical attacks have become systematic throughout the country. Death threats are growing.'³⁹⁷ Yet pressure through civil lawsuits, financial means (like a special tax designed for one of the largest, independent TV company, RTL Klub in Hungary, or withholding government advertisements from unfriendly outlets), pressure through the secret service in Romania or the implicit threat against journalists that they can lose their jobs if do not follow the government's political line are quite widespread, just to name a few issues. Altogether, it is difficult to induce change concerning an area where the situation is more or less the same in some EU Member States.

This is not to say that media constitutes an isolated case either in the region or in Bosnia. A related area that is central to political opinion formation is freedom of assembly and association. We have witnessed a decline in this field, too. This became most apparent during the 2014 February protest wave that spread through several towns of Bosnia when the police used excessive force against the protestors on several occasions and beat up journalists that reported about the demonstrations. The authorities apply further informal measures to make it hard to organise protests by putting pressure on protest organisers or by threatening directors of public companies if their employees are found in protest meetings.³⁹⁸

³⁹⁵ Table from IREX, 'Bosnia and Herzegovina' (n 381) 19.

³⁹⁶ The higher the number the worse the media situation is according to Reporters Without Borders' World Press Freedom Index.

³⁹⁷ Reporters Without Borders, 'World Press Freedom Index 2014: The European Union and the Balkans', <<http://rsf.org/index2014/en-eu.php>> accessed 3 February 2016.

³⁹⁸ HRC, 'Summary, 25 July 2014' (n 251) 8; Interview with Srdjan Dizdarevic, former president of the Helsinki Committee in BiH (Sarajevo, 31 March 2015).

F. Conclusions

In order to evaluate the EU's impact, four issue areas were chosen for investigation. Three of these were among the highest priorities, anti-discrimination, Roma rights and media freedom, and one, children's rights, ranked lower on the EU's agenda, yet was targeted by quite a few instruments during the selected years.

EU pressure through the visa liberalization conditionality provided a crucial impetus to the anti-discrimination reform, resulting in the adoption of the law on anti-discrimination and the creation of the state level ombudsman office, while the Structured Dialogue on Justice has followed up on further implementation. Although the legal basis was created for fighting discrimination, in reality it has so far been hardly implemented. The low level of jurisprudence shows the lack of judicial implementation and that potential victims are unaware of the existing protection mechanisms. The Ministry of Human Rights and Return still has not started collecting data on discrimination, while the Human Rights Ombudsman of Bosnia and Herzegovina has been quite passive in addressing systemic problems resulting in discrimination. Importantly, the anti-discrimination law has not been transposed to other laws such as the labour law and law on higher education. At the same time, the EU also applied selective pressure on Bosnia in this field, as it put overwhelming emphasis on political rights of minorities to run for the highest state offices (*Sejdić-Finci* case) while neglected other dimensions of discrimination, such as political representation at the level of the entities or locally, and employment. Lately, there has been a change in the EU's approach and these aspects were addressed by the 2015 Progress Report.

Concerning children's rights the main issue of concern for the international community has been how to end ethnic segregation in schools. Despite the EU's sustained attention to this subject and frequent interventions by the OHR, this remains an outstanding problem. Roma rights have been an area where the EU has used its complete arsenal of instruments with a strong focus on social and economic rights. Beside putting a great emphasis on Roma issues in progress reports, enlargement strategies and visa liberalisation documents, the European Commission provides financial support for Roma inclusion through IPA projects and EIDHR programs. The Commission also works with national authorities while devising Roma strategies and action plans, following up and monitoring their implementation. Progress was recorded concerning housing and the registration of people, while education, health and employment continued to be fields without notable improvement. At the same time, in the absence of references to statistics and numbers in the progress reports, it is hard to establish current trends.

Media freedom has been also an area which saw heavy engagement from both the OHR and the EU. Similarly to the OHR, the EU was also involved in institutional reforms of the media primarily concerning broadcasting services and the CRA as was explained in section B.6. In spite of the EU's intensive engagement and of it being an essential condition for signing the SAA in 2008, the full implementation of the public broadcasting reform remains outstanding. For the last five years increasing attention has been paid to other aspects of media freedom such as the growing political pressure on the media, ethnic bias and intimidation as well as threats against journalists. Generally, the legal provisions guaranteeing media freedom have been adopted in Bosnia, yet they are hardly implemented, and the last two years actually mark steps backward regarding certain legal developments. The EU 2015 Progress Report also pointed

out the backsliding in this area. Overall, media freedom is a human rights issue in which the EU invested heavily especially in terms of institution building using almost all available instruments, but these have not brought about the desired effects.

These case studies indicate that EU pressure was instrumental in setting off domestic reform in some of these areas, such as concerning anti-discrimination, Roma rights and media freedom. As was argued in this chapter, the EU's influence through the visa-liberalisation process was key in adopting the law on anti-discrimination and creating the state level ombudsman office. The media legal framework was largely established by international assistance, that of the OHR and the EU. In the area of Roma rights, the EU called for strategies and action plans that managed to improve some aspects of marginalisation of the Roma, especially related to housing and registration. Yet, most of these positive results were confined to formal measures, such as adopting legislation, strategies and action plans or setting up institutions, with very little implementation. Since the signing of the SAA in 2008, Bosnian political leaders have been reluctant to comply with EU conditions as a result the EU enjoyed a very low degree of leverage over the country. Consequently, conditionality remained limited in terms of its effect on human rights performance. The anti-discrimination law remained largely non-implemented, there has been virtually no improvement in the area of children's rights, while media freedom deteriorated in the recent period. Some progress was achieved in the area of Roma rights, yet the enduring problems related to employment, health care and education remained more or less the same. Given that the EU's relations with Bosnia were in a deadlock until 2015 these meagre results are not that surprising. Now that Bosnia's EU integration process received a new momentum, the EC also seems to take human rights conditionality more seriously than before. However, fundamentally, it depends on Bosnia's commitment to EU integration whether EU conditionality can trigger more substantial changes in the near future.

III. Serbia: The EU's human rights agenda between 2009 and 2015³⁹⁹

This chapter will review the EU's human rights policy towards Serbia by analysing the various tools and instruments that are at the disposal of the EU in the context of the enlargement process. After providing a brief general background of relations between the EU and Serbia since the fall of the Milošević regime with a view on democratisation and the rule of law, the EU's tools and instruments will be presented in a systematic way for the period of 2009-2015. The instruments will be introduced with a focus on their human rights dimension: the visa liberalisation process, progress reports and enlargement strategies, the European Commission's opinions on Serbia's membership application,⁴⁰⁰ the Negotiation Framework, the Screening Report for Chapter 23, IPA documents, Council conclusions, dialogues between Serbia and the EU, and the European Parliament's resolutions. In the second half of this chapter, three human rights issues will be analysed in more detail: minority rights, Roma rights and freedom of expression and media freedom. By looking at how specific instruments of the EU were applied to these issue areas that have been high priorities on the EU's agenda, and how the situation of these human rights changed during the examined time period we attempt to assess the EU's influence. The study will build on the general framework outlined in the introduction, looking at the different levels of prioritization (rhetoric, measures, and impact) and assessing the consistency and credibility of EU actions.

The chapter relies on the academic literature, a systematic analyses of EU documents, published works of international and domestic think tanks, human rights watchdogs and international organisations, as well as interviews carried out in Belgrade and Brussels with representatives of Serbian civil society, the Delegation of the EU and the European Commission.

A. General background: the two key obstacles

After more than a decade of authoritarian rule by Milošević marked by the conflicts of the 1990s, democratic transition in Serbia came belatedly in October 2000, when the democratic opposition coalition overturned Milošević's rule during general elections. The EU immediately abolished economic sanctions against Serbia, promised financial help, offered a favourable trade agreement and invited Serbia to join to participate in the SAP. Negotiations towards the SAA began in 2005 with the state union of Serbia and Montenegro, which disintegrated in 2006. Although the SAP's political conditionality included a range of issues such as constitutional, judicial, public administration reform, or the improvement of various human rights, the condition of ICTY cooperation set under the enlarged Copenhagen criteria of regional cooperation, good neighbourly relations and international obligations determined Serbia's EU integration

³⁹⁹ The author of this chapter is Beáta Huszka in collaboration with Zsolt Körtvélyesi. Beáta Huszka is at the ELTE University Faculty of Social Sciences in Budapest and work package leader of FRAME WP6. Zsolt Körtvélyesi is at the ELTE University Faculty of Social Sciences and at the Centre for Social Sciences of the Hungarian Academy of Sciences.

⁴⁰⁰ There were two of these, one published in 2011 which substituted the regular EU progress report and recommended granting candidate status to Serbia. The second one the Commission issued in 2013 in which it recommended the opening of accession negotiations.

process until 2011 when the last high profile war criminals were captured.⁴⁰¹ War crimes prosecution was set as ‘a symbolic measure’ of facing the past and embracing liberal democratic values.⁴⁰² After this requirement was largely fulfilled by 2011, normalisation of relations with Kosovo became the main criterion of EU accession. Altogether, since the fall of the Milošević regime, cooperation with the ICTY and the normalisation of relations with Kosovo have been the two key issues defining the EU’s relations with Serbia.⁴⁰³

These two challenges greatly influenced not only Serbia’s EU integration prospects, but also domestic politics. The political front against Milošević – the 18 parties allied under the Democratic Opposition of Serbia (DOS) – won the 2000 parliamentary elections and formed a coalition that quickly disintegrated because of opposing views on The Hague cooperation of Koštunica, the then president of the Federal Republic of Yugoslavia and Đinđić, the Serbian prime minister. Đinđić who was willing to take bold steps to extradite war criminals was assassinated in March 2003. This event showed that old structures originating from the Milošević era still held considerable influence, and more specifically revealed the government’s failure to establish rule of law and assert civilian control over the state security services deeply implicated in war crimes and organised crime, which were behind the prime ministers’ murder.⁴⁰⁴ The government already in November 2001 tried to introduce reforms of the security services, which in protest erected roadblocks forcing the government to back down. The next attempt to initiate changes to the security sector came in early 2003 that related also to combating organised crime and cooperating with the ICTY, which directly led to Đinđić’s assassination.⁴⁰⁵ These unreformed security agencies continued to control parts of the media, economy and political life in Serbia.⁴⁰⁶ According to Mendelski, influential criminal groups, part of the security forces, the business and political elites, the prosecutor’s office and the judiciary constituted the ‘mafia-state networks’ that outlasted the rule of Milošević.⁴⁰⁷

Thus while examining the situation of human rights in Serbia this general context of democratisation and rule of law needs to be taken into account, which was heavily burdened by the legacy of the Milošević era. Domestic dynamics of cooperation with the ICTY provided a prism of the general state of the rule of law, as was demonstrated by Ostojić.⁴⁰⁸ Cooperation with The Hague was the first essential step the Serbian government took to prove its European orientation during the term of the Đinđić government,

⁴⁰¹ Jelena Subotić, ‘Explaining Difficult States: The Problems of Europeanization in Serbia’ (2010) 4 *East European Politics and Societies* 595-616, 560.

⁴⁰² Mladen Ostojić, *Between Justice and Stability: The Politics of War Crimes Prosecutions in Post-Milošević Serbia* (Ashgate 2014) 1.

⁴⁰³ See Bernhard Stahl, ‘Another “strategic accession?” The EU and Serbia (2000–2010)’ (2013) 3 *Nationalities Papers* 447-468.

⁴⁰⁴ Many of the Serbian paramilitaries who overlapped with state security services moved into ordinary organised crime after the wars. Subotić (n 401) 611.

⁴⁰⁵ Timothy Edmunds, ‘Intelligence agencies and democratisation: Continuity and change in Serbia after Milošević’ (2008) 1 *Europe-Asia Studies* 25-48, 36.

⁴⁰⁶ Dejan Anastasijevic, ‘What’s Wrong With Serbia?’ *ESI* (Belgrade, 31 March 2008) <<http://www.esiweb.org/index.php?lang=en&id=310>> accessed 7 April 2016.

⁴⁰⁷ Martin Mendelski, ‘They Have Failed Again! Donor-Driven Promotion of the Rule of Law in Serbia’ (2013) 61 *Südosteuropa* 79-113, 96.

⁴⁰⁸ Ostojić (n 402).

when it extradited Milošević in 2001. Yet sustaining this policy required a change of the internal order, which was not possible 'with an unreformed police and military apparatus that had been the main prop of the Milošević regime' and while security services maintained close links with organised crime.⁴⁰⁹ Ostojić also showed how the police continued to obstruct the work of the domestic war crimes prosecution throughout the decade by often giving false statements in order to shield fellow policemen, many of whom were directly implicated in war crimes. Similarly, the Supreme Court of Serbia kept overturning the judgments of the War Crimes Chamber (WCC) responsible for processing domestic war crimes cases. The judges' obstructionism was not due to political pressure but mainly to the fact that the majority of them were appointed under Milošević. The government led by the Democratic Party (DS) by and large addressed this problem through the 2009 reform of the judiciary, which terminated the Supreme Court and created the Court of Appeal in its place, thus removing judges of the Supreme Court from office. Yet, this reform happened as a result of political change in 2008, which unseated the nationalist government led by Koštunica replacing it with a reformist, pro-EU coalition.⁴¹⁰ While Đinđić was unable to reign in elements of the old regime in the military, police, secret services and the judiciary, Koštunica left them in place out of fear of a possible coup d'état.⁴¹¹

Therefore, what kind of government was in power greatly determined Serbia's approach to cooperation with The Hague, to the EU and to dealing with the legal and security structures inherited from the past. After Đinđić's murder, Serbia took a conservative-nationalist turn during the 2004-2008 premiership of Koštunica. According to Anastasijevic during these four years, 'Milošević's nationalist ideology and his policies have been rehabilitated and incorporated into the political mainstream'.⁴¹² Former Milošević loyalists 'flocked to Koštunica's DSS (Democratic Party of Serbia)', and 'had significant support among the army, old communist political elites, the Orthodox Church, establishment intelligentsia, and the largely unreformed and professionalised media'.⁴¹³ Cooperation with the international war crimes tribunal was admittedly not a priority of the government and was limited to 'voluntary surrenders', which were based on deals under which the state guaranteed assistance to suspects and their families if they gave themselves up voluntarily. As portrayed by the official discourse, the generals indicted to The Hague fulfilled a patriotic duty for their country, because the extraditions were necessary for EU integration. This allowed Belgrade to avoid confronting the crimes or the victims. Thus the indictments and the trials hardly had the social effects that the EU desired, resulting in what Subotić called 'strategic quasi compliance'.⁴¹⁴ When the EU began to demand more forcefully the extradition of the two highest ranking Serbian war criminals, Mladić and Karadžić especially after the capture of Gotovina in 2005, the limits of the strategy

⁴⁰⁹ Vesna Pešić, 'The nationalism of an impossible state' (*Peščanik*, 18 July 2008) <<http://pescanik.net/serb-nationalism/>> accessed on 7 April 2016.

⁴¹⁰ Ostojić (n 402) 176-183.

⁴¹¹ Subotić (n 401) 610.

⁴¹² Anastasijevic (n 406).

⁴¹³ Subotić (n 401) 612.

⁴¹⁴ Subotić (n 401) 604.

of 'voluntary surrenders' became apparent, and the SAA negotiations were suspended over Serbia's lack of cooperation with the Hague Tribunal.⁴¹⁵

Another issue that dominated the agenda of the various governments after 2000 was that of Kosovo. During Koštunica's term, national interests related to Kosovo were presented as incompatible with the goal of EU integration.⁴¹⁶ The prime minister made it clear on several occasions that Serbia would not give up on Kosovo for the sake of EU accession. He seemed unwilling to compromise during the talks in Vienna in 2006/2007 on Kosovo's status, an effort led by Ahtisaari, the UN Special Envoy. In 2006 the government drafted a new constitution that defined Kosovo as part of Serbia, providing a strait jacket for any future Serbian government negotiating Kosovo's status.⁴¹⁷ Altogether, Serbia's lack of cooperation with the ICTY and its uncompromising stance on Kosovo sent a message that EU integration was not a real priority. While SAA negotiations came to a halt in 2006, the Vienna talks about the status of Kosovo led nowhere in 2006/2007, as Serbia rejected the Ahtisaari plan. It was also in 2006 that Montenegro decided in a referendum to leave the state union with Serbia. In February 2008 Kosovo declared its unilateral independence, which represented a turning point in Serbian domestic politics and Serbia's relations with the EU. The government collapsed and new elections were called, which brought to power a coalition committed to EU integration, composed by the DS and the Socialist Party of Serbia (SPS). The EU boosted the chances of pro-EU forces during the election campaign by offering the signature of the SAA in April 2008, just two weeks before the elections. The new government continued pressing the Kosovo issue: it submitted a question on the legality of Kosovo's declaration of independence declaration that was later the basis of an International Court of Justice (ICJ) advisory opinion;⁴¹⁸ recalled Serbian ambassadors from countries that recognized Kosovo;⁴¹⁹ and called on Kosovo Serbs to boycott the new Kosovo institutions and EULEX, the EU's rule of law mission in Kosovo. However, the fact that both Kosovo and EU integration became declared goals of the government represented a shift and meant that, despite the strong rhetorical and symbolic moves, functional cooperation with the international community was established.⁴²⁰ In November 2008 Serbia agreed to the operation of the EULEX in Kosovo under the UN's auspices.⁴²¹

⁴¹⁵ European Commission, 'Commission Staff Working Document – Serbia 2006 Progress Report' SEC (2006)1389 (Brussels, 08.11.2006) 5 <http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/sr_sec_1389_en.pdf> accessed 10 September 2015.

⁴¹⁶ Jelena Obradović-Wochnik and Alexander Wochnik, 'Europeanising the "Kosovo Question": Serbia's Policies in the Context of EU Integration (2012) 5 *West European Politics* 1170.

⁴¹⁷ *ibid.*

⁴¹⁸ By virtue of Art. 96 a Member State cannot request an advisory opinion. In the case of the Kosovo opinion, it was the General Assembly that formally submitted the question, after a vote on 8 October 2008. See UN General Assembly, 'Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law' A/RES/63/3 (A/63/L.2) (8 October 2008) <<http://www.icj-cij.org/docket/files/141/14799.pdf>> accessed 25 February 2016.

⁴¹⁹ Most of who were reinstated in their positions a few months later.

⁴²⁰ *ibid* 1173.

⁴²¹ 'EC: Serbian EULEX conditions accepted' B92 (8 November 2008) <http://www.b92.net/eng/news/politics.php?yyyy=2008&mm=11&dd=07&nav_id=54810> accessed 8 April 2016.

Cooperation with The Hague also accelerated from 2008 after the new government took office, which allowed for the apprehension of the most wanted war criminals, Karadžić in 2008, and Mladić and Hadžić in 2011. This showed that regime change and the state of democratic institutions greatly conditioned the arrest and extradition of indictees.⁴²² Still impediments to domestic prosecution of war crimes remained. The WCC while trying domestic war crimes cases focused on the immediate perpetrators of crimes and failed to prosecute high ranking suspects, which according to human rights NGOs served to obscure the link to the political and military elite. This allegation could be further supported by the fact that the WCC presented crimes committed in Kosovo by Serbian forces as isolated incidents portraying the perpetrators as members of paramilitary organisations as opposed to state security units. This contrasted with the view presented by the ICTY, which held the former leadership of Yugoslavia accountable for inflicting violence on the Albanian population. These limitations were a reminder that the WCC was constrained by the political environment in Serbia and depended on political support for continuing its operation. For these reasons, Ostojić argued that war crimes trials in Serbia had a very limited effect on transitional justice in terms of vindicating the victims' rights for the punishment of perpetrators and establishing the truth.⁴²³

Closely related to war crimes prosecution is the general state of the judiciary, which is the most important guarantor of rule of law and more specifically to the protection of human rights. The Milošević era was characterised by the lack of independent judiciary and the general dominance of the executive. After 2000, the judicial system underwent a series of legal changes, and Serbia attracted significant foreign assistance for judicial reform, not only from the EU Commission but also from the US. Although as was explained above, Koštunica was reluctant to cooperate with the Hague Tribunal, he did introduce reforms of the judiciary under EU pressure. During his term, the adoption of the new constitution was an important milestone in 2006. Also in 2006, the government adopted the Judicial Reform Strategy until 2011 with the explicit purpose to facilitate the EU association process, which focused on enhancing judicial efficiency. Nevertheless, these legislative reforms did not indicate necessarily a qualitative upgrade of the system, represented by the Venice Commission's negative opinion about Serbia's new constitution.⁴²⁴ More specifically, the Venice Commission criticised the new constitution for weakening judicial independence and increasing the risks of its politicization.⁴²⁵ The Judicial Reform Strategy was also criticised by the EU for further undermining judicial independence by not presenting clear and transparent criteria for the reappointment of judges, thus providing room for exerting political influence over dismissal and appointment for members of the judiciary.⁴²⁶ It should be noted here that there has been no lustration of

⁴²² Ostojić (n 402) 218.

⁴²³ Ostojić (n 402) 189, 196, 198.

⁴²⁴ Mendelski (n 407) 92.

⁴²⁵ European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia' CDL-AD(2008)006-e <<http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD%282008%29006-e>>; cited in Mendelski (n 407) 99.

⁴²⁶ European Commission, 'Serbia 2007 Progress Report, Accompanying the Document Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2007-2008' COM (2007) 663 final (Brussels, 06.11.2007) <http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/serbia_progress_reports_en.pdf> accessed 12 April 2016. Cited in Mendelski (n 407) 99.

judges, which allowed for continuity with the old regime as most judges could remain in office after 2000. Moreover, Verica Barač, former president of the Anti-Corruption Council claimed in 2011 that ‘there was striking continuity in the work of the prosecution after the period of the Milošević regime’.⁴²⁷

A more substantial restructuring of the judiciary came after 2008, which reduced the number of courts by third, and created the State Prosecutorial Council in 2008, the High Judicial Council and the Judicial Academy in 2009 and several bodies to fight organised crime.⁴²⁸ A set of new laws were adopted related to the appointment and the training of judges, prosecutors and court assistants, which aimed to strengthen judicial impartiality and professionalism. Although these reforms overall improved judicial education and training, the reorganisation of the court network significantly reduced the number of judges and prosecutors leading to insufficient human resources.⁴²⁹ At the same time, the 2009 amendment of the law on the organisation of courts, which imposed a reappointment of judges and prosecutors created non-transparent and arbitrary conditions, and led to the dismissal of one third of judges and prosecutors. This measure which was strongly criticized also by the EU, was finally overturned by the Constitutional Court in 2012.⁴³⁰ These efforts to reform the judicial system in 2009-2010 failed at the end, which is why consequently a new five-year reform strategy was adopted in order to improve judicial independence, accountability, and efficiency.⁴³¹

The legislative activism of new government formed in 2008 also gave an impetus to a series of human rights reforms. Trying to make up for the legislative deficit of Koštunica’s term, the new reformist cabinet enacted many laws under emergency procedure.⁴³² Without providing a full list some important laws can be highlighted here, such as the law on anti-discrimination and the act on association, which were long overdue. The law on the gender equality, personal data protection, freedom of information, political parties, single electoral roll, national councils of national minorities, the basis of the education system, which set the foundations of inclusive education can be further mentioned. In 2009, Serbia also ratified the European Social Charter and passed a number of health related laws.⁴³³ Some of these had been long demanded by the EU, such as the law on anti-discrimination and ratification of the Social Charter were highlighted from 2005, the first progress report on Serbia.⁴³⁴ This wave of legislation which meant the adoption of 160 new laws was the result of government change but also of the EU visa-liberalisation

⁴²⁷ Mendelski (n 407) 102.

⁴²⁸ Mendelski (n 407) 96.

⁴²⁹ Belgrade Centre for Human Rights, ‘Human Rights in Serbia 2009’ (Belgrade, 2010) 29-35 <<http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2009-in-Serbian-and-English-2010.pdf>> accessed 7 April 2016.

⁴³⁰ Mendelski (n 407) 101.

⁴³¹ Freedom House, ‘Nations in Transit 2016: Serbia’ <<https://freedomhouse.org/report/nations-transit/2016/serbia>> accessed 12 April 2016.

⁴³² This affected negatively the quality of legislation.

⁴³³ Belgrade Centre for Human Rights, ‘Human Rights in Serbia 2009’ (n 429) 29-35.

⁴³⁴ Monika Bokšová, ‘The Impact of EU Human Rights Commitments on Its Trade Negotiations, Case Study: Serbia’ (2014) 1 *Současná Evropa* 51.

process in 2008/2009 which required the passing of numerous legislation, such as on data protection, anti-discrimination, minority rights, etc., which will be explained in more detail in the next section.

Further important aspects of the rule of law are anti-corruption and the fight against organised crime where serious shortcomings remained. During Koštunica's period both petty and political corruption was widespread in Serbia. The latter was epitomised by the term state capture by Vesna Pešić, by which she meant the uncontrolled power of and undue influence of party elites over public companies, institutions, courts and public prosecution.⁴³⁵ However, after 2008 the pro-EU, reformist government led by the DS also continued this practice of filling the judiciary with its loyalists, and further increasing party control over public institutions and the media. The first serious steps against corruption, such as jailing Serbia's most powerful oligarch while launching proceedings against several others were taken by prime minister Vučić's, who entered office in 2012 as the head of a coalition government led by the Serbian Progressive Party (SNS).⁴³⁶ Despite these initial moves and his strong anti-corruption rhetoric, the director of Serbia's Anti-Corruption Agency recently claimed that the fight against corruption in Serbia was not institutionalised but rather targeted certain individuals. He also argued that the situation of corruption has not improved under the SNS governments, despite the party's anti-corruption campaign promises. In addition, none of the 24 privatisation cases of alleged corruption have been resolved, which have been in the focus of attention of the European Commission since 2011.⁴³⁷ It seems that corruption has been an endemic problem during the last 16 years irrespective of what kind of government was in office. Trends concerning organised crimes have been similar. Although due to some legal changes progress was recorded after 2008 in terms of police operations, reflected also by the growing number of indictments and convictions, still the effectiveness of investigations has been insufficient so far as there has been a low number of convictions relative to that of accusations while there are continuing links of politics and business to organised crime.⁴³⁸

Altogether, progress in the rule of law area has been uneven since 2000. According to Mendelski, it was evident that the EU's demands as expressed in European partnerships and progress reports were the main force behind legal changes concerning the judiciary and human rights.⁴³⁹ Judicial capacity has improved significantly as a result of legislative reform and foreign financial and technical support, however judicial impartiality and independence hardly changed. The Commission's 2015 country report on Serbia plainly

⁴³⁵ Vesna Pestic, 'State Capture and Widespread Corruption in Serbia' (2007) CEPS Working Document 262.

⁴³⁶ Miskovic, the owner of Delta Holding, Serbia's biggest private company was arrested in 2012. He was accused of illegally earning more than 30 million euros from the privatisation of road companies. For more, see: Sasa Dragojlo, 'Vucic Not Tackling Serbia's Corruption, Experts Say' *Balkan Insight* (8 April 2016) <<http://www.balkaninsight.com/en/article/vucic-s-government-made-no-promised-progress-on-tackling-corruption-04-07-2016>> accessed 8 April 2016. See also: Milada Anna Vachudova, 'EU Leverage and National Interests in the Balkans: The Puzzles of Enlargement Ten Years On' (2014) 1 *Journal of Common Market Studies* 122–138.

⁴³⁷ Dragojlo, 'Vucic Not Tackling Serbia's Corruption, Experts Say' (n 436).

⁴³⁸ Mendelski (n 407) 105.

⁴³⁹ Mendelski (n 407) 90.

noted that in practice judicial independence was not guaranteed.⁴⁴⁰ As Mendelski argued, while reform motivated by external actors, such as the EU could promote formal changes, it could not disrupt informal links between the political and business elites and the judicial sector. For a qualitative change, these informal channels of influence have to be tackled that originate in the political and judicial culture.⁴⁴¹ The situation of human rights reflected similar trends, that is the adoption of formal legislative measures are followed by weak and sporadic practical implementation, which will be the subject of the remaining parts of this chapter. Altogether, while analysing developments in human rights this general context of the rule of law has to be taken into account, which presented obvious constraints on progress in the human rights field. Without independent judiciary, it is difficult to raise the level of protection of human rights, similarly under conditions of endemic corruption and organised crime. It is unsurprising for instance, that media freedom has hardly progressed as compared to the early 2000s, given that free media represents an important institutional check on executive power similarly to the judiciary and independent institutions (see more on this in section III.C.3).⁴⁴²

It will be further demonstrated throughout the chapter that these two most essential conditions – ICTY cooperation until 2011 and normalisation of relations with Kosovo after – became the major and arguably the only measurements of Serbia’s progress of EU accession, effectively marginalising other elements of declared political conditionality of the EU. Serbia could reach candidate status and open accession negotiations without substantial progress related to other aspects of the rule of law, such as judicial independence or media freedom. From 2009 to 2015, the EU through its various tools and instruments such as progress reports and enlargement strategies systematically scrutinised Serbia’s performance related to the various aspects of the rule of law. However, despite the frequent rhetorical reproaches, lack of progress or even negative tendencies in some of these areas did not affect the EU’s decisions to upgrade its relations with Serbia.

Serbia’s EU integration process gained a real momentum after the ICJ concluded in July 2010, that Kosovo’s declaration of independence did not violate international law.⁴⁴³ (As was noted above, by 2011 Serbia mostly fulfilled the requirement of ICTY cooperation, so it could finally aspire to become an EU candidate.) After the ICJ’s ruling on Kosovo’s independence declaration, unfavourable to Serbia, the uncompromising insistence on the ‘Kosovo is Serbia’ policy seemed increasingly futile and unsustainable. Under EU pressure and with the assistance of the EEAS, a dialogue was launched between Belgrade and Pristina in March 2011 first about practical issues, such as freedom of movement, civil registries, and the

⁴⁴⁰ European Commission, ‘Commission Staff Working Document, Serbia 2015 Report’ SWD(2015) 211 final (Brussels, 10.11.2015) 11 <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf> accessed 5 February 2016.

⁴⁴¹ Mendelski (n 407) 106.

⁴⁴² In 2002 Serbia received the score of 4.5 and 4.25 in 2015 from Freedom House on media independence, indicating similar levels of media freedom, where scores can range from 1 to 7 higher numbers showing less media freedom. Freedom House, ‘Nations in Transit 2015: Serbia’ <<https://freedomhouse.org/report/nations-transit/2015/serbia>> accessed 8 April 2016.

⁴⁴³ International Court of Justice, ‘Accordance with international law of the unilateral declaration of independence in respect of Kosovo (2010) (Summary of the Advisory Opinion)’ ICJ Summary 2010/2 <<http://www.icj-cij.org/docket/files/141/16010.pdf>> accessed 23 July 2015> accessed 23 July 2015.

mutual acceptance of diplomas.⁴⁴⁴ This technical dialogue was upgraded after the May 2012 general Serbian elections to the level of the prime ministers, which has been facilitated personally by the former High Representative, Catherine Ashton after October 2012, which led to the historic ‘First agreement of principles governing the normalisation of relations’ on 19 April 2013.⁴⁴⁵ Negotiations with the Kosovo government progressed significantly under the government coalition of the SPS and SNS, which took office in 2012. While SPS was the heir of Milošević’s party, the SNS split from Šešelj’s Serbian Radical Party in 2008.⁴⁴⁶ Its leaders have been close associates of Milošević, Vučić himself serving as minister of information from 1998 to 2000 during the Kosovo conflict. Despite initial negative expectations because of its leaders’ past, the new government was willing to meet EU conditions more boldly than its predecessors, especially its compromises on Kosovo were unprecedented. At the same time, the last four years could be characterised by increasing authoritarian tendencies, and worsening democratic governance, which left their mark also on the state of human rights, the judiciary and independent institutions, which will be explained more in section III.C.3.

In the meantime, the EU rewarded Serbia, approving a visa free regime to Serbian citizens in December 2009, and in October 2010 the Council invited the Commission to present its Opinion on Serbia’s application for EU membership, which Serbia submitted in December 2009. In June 2010 the Member States agreed to send the SAA to their parliaments for ratification, which was previously suspended until the condition of full cooperation on war crimes prosecution was fulfilled.⁴⁴⁷

In October 2011, the European Commission in its Opinion on Serbia’s membership application defined the requirements of candidacy and of opening accession talks, all linked to the country’s relations with Kosovo. For candidacy, Serbia was asked to continue the dialogue with Pristina and implement the agreements reached earlier. For starting the membership negotiations the bar was set higher, and Serbia was required to allow Kosovo to participate in regional organizations; to cooperate with EULEX ‘in all parts of Kosovo’ (e.g. ensuring it operates freely in the north); to agree with Pristina on telecommunications and diplomas; and to respect the Energy Community Treaty.⁴⁴⁸ (Political conditionality related to human

⁴⁴⁴ Leon Malazogu and Florian Bieber, ‘The Future of Interaction Between Prishtina and Belgrade’ (2012) Project on Ethnic Relations, 21-23 <http://d4d-ks.org/assets/2012-10-17-PER_DialogueENG.pdf> accessed 10 May 2015.

⁴⁴⁵ European External Action Service, ‘EU relations with Serbia’ <http://eeas.europa.eu/serbia/index_en.htm> accessed 11 April 2016.

⁴⁴⁶ SNS has been in power since 2012. During the first cabinet the government was led by prime minister Dačić, a socialist candidate, yet the coalition was dominated by the SNS. During the early elections held in 2012 the SNS managed to strengthen its support and position, and formed a coalition government led by prime minister Vučić from the Progressive Party. President Nikolić who has served since 2012 is the president of the SNS.

⁴⁴⁷ European Commission, ‘Commission Staff Working Paper – Analytical Report Accompanying the document “Communication from the Commission to the European Parliament and the Council, Commission Opinion on Serbia’s application for membership of the European Union Brussels”’ SEC(2011) 1208 (Brussels, 12.10.2011) 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/sr_analytical_rapport_2011_en.pdf> accessed 3 March 2015.

⁴⁴⁸ ‘The Commission recommends that the European Council should grant Serbia the status of candidate country, taking into account progress achieved so far and on the understanding that Serbia re-engages in the dialogue with Kosovo and is moving swiftly to the implementation in good faith of agreements reached to date. [...] The Commission therefore recommends that negotiations for accession to the European Union should be opened with

rights as was represented by the visa liberalisation documents and in the Opinion will be analysed in detail in section III.B.)

In December 2011 the European Council added two more conditions for Serbia's candidate status. This meant that two prerequisites of opening accession negotiations – full cooperation with EULEX in the north and letting Kosovo participate in regional bodies – were turned into conditions of candidacy. This shifting of goalposts was a result of the influence of Germany, the UK and the Netherlands, EU Member States that were the most sceptical about Serbia.⁴⁴⁹

Despite the move, Serbia continued its efforts to fulfil the EU's demands and continued the dialogue with Pristina with the help of the EEAS. In February 2012 Belgrade and Pristina managed to agree on Kosovo's representation in regional forums and institutions. Accordingly, Kosovo was to be represented with a star attached to its name 'Kosovo*' with a footnote referring to UNSC resolution 1244 and the ICJ opinion on Kosovo's declaration of independence.⁴⁵⁰ After controversies regarding the precise interpretation of this agreement, which for months kept Serbia away from regional forums where Kosovo was present, it was finally implemented in September 2012. Deals were reached between March 2011 and February 2012 in a number of further areas: integrated border management, customs and trade issues, freedom of movement, civil registries, and the mutual acceptance of diplomas.⁴⁵¹ The European Commission in its 2011 annual progress report recommended candidate status for Serbia after Mladić and Hadžić had been finally captured. Still, in December 2011 the European Council decided against upgrading Serbia's status,⁴⁵² and under Germany's pressure postponed the decision to March 2012 when the candidate status was finally granted. The reason was the unfolding violence on the Kosovo-Serbia border, for which the EU held Serbia accountable.⁴⁵³

From the EU's side normalisation of relations with Kosovo became the main condition of Serbia's further integration prospects. The exact content of 'normalisation' has remained ambiguous until today. EU foreign ministers in December 2012 set 'a visible and sustainable improvement of relations with Kosovo'

Serbia as soon as it achieves further significant progress in meeting the following key priority. Further steps to normalise relations with Kosovo in line with the conditions of the Stabilisation and Association Process by: fully respecting the principles of inclusive regional cooperation; fully respecting the provisions of the Energy Community Treaty; finding solutions for telecommunications and mutual acceptance of diplomas; by continuing to implement in good faith all agreements reached; and by cooperating actively with EULEX in order for it to exercise its functions in all parts of Kosovo.' European Commission, 'Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final (Brussels, 12.10.2011) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0666>> accessed 4 April 2015.

⁴⁴⁹ International Crisis Group, 'Kosovo and Serbia: A Little Goodwill Could Go a Long Way' (2 February 2012) Crisis Group Europe Report 215, 5, 11 <<http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/215-kosovo-and-serbia-a-little-goodwill-could-go-a-long-way.aspx>> accessed 15 March 2015.

⁴⁵⁰ Malazogu and Bieber (n 444) 21-23.

⁴⁵¹ In order to learn more about the details of these agreements, see *ibid*.

⁴⁵² EC, 'Communication, Enlargement Strategy and Main Challenges 2011-2012' (n 448).

⁴⁵³ Simon Taylor, 'Council postpones Serbia's candidate status' *European Voice* (9 December 2011) <<http://www.europeanvoice.com/article/2011/december/council-postpones-serbia-s-candidate-status/72918.aspx>> accessed 5 September 2015.

as the key priority, which Serbia needed to fulfil before accession talks could be opened. According to the Council's expectations, 'this process should gradually result in the normalisation of relations between Serbia and Kosovo'.⁴⁵⁴ What exactly normalisation meant in practice was left benignly in the dark, yet, as we have seen, the Council did list some specific requirements of what the 'improvement of relations' should entail. Tying Serbia's accession process ever closer to the Kosovo question, the Council concluded that 'the normalization of relations between Belgrade and Pristina will also be addressed in the context of the framework for the conduct of future accession negotiations with Serbia', meaning that a separate negotiation chapter will be devoted to issues pertaining to Kosovo.⁴⁵⁵

On 19 April 2013 an agreement was signed in Brussels between the governments of Serbia and Kosovo regulating the status of the north of Kosovo. According to the agreement, Serbia accepted Pristina's jurisdiction over the whole territory of Kosovo, including the north, which until then with its Serb majority population had functioned de facto under Belgrade's authority. At the same time, the agreement also provided for the creation of the association of Serbian municipalities.⁴⁵⁶

The agreement marked the beginning, rather than the end, of the normalisation process, since the details of the implementation still had to be agreed upon, while many previously signed agreements had not been carried out or remained only partly implemented. Nevertheless, recognising its importance, in the same month the European Commission published its Opinion about Serbia's application for membership and recommended opening accession negotiations. In December 2013 Serbia received the Screening Report of chapter 23 and in January 2014 membership negotiations were officially opened. The last landmark agreement between the two governments came in August 2015, which included deals on: the arrangement for the Mitrovica Bridge in the divided town of Mitrovica; energy; telecommunications; and 'the general principles and main elements of the Association of Serbian Municipalities'.⁴⁵⁷ This last point foresees the creation of a legal entity defined by a statute endowed by powers in healthcare, education, urban and rural planning and economic development, among others, circumscribing a form of ethnic territorial autonomy for Serbs in Kosovo.

B. Assessing the priorities at the level of EU instruments

Just like in the case of BiH, the analysis of human rights conditionality will start by a detailed overview of the EU instruments and an assessment of EU priorities in the light of these. We will then, in section C, proceed to measuring the impact of EU measures. The instruments sheds light on the division of labour

⁴⁵⁴ Council of the European Union, 'Council Conclusions on Enlargement and Stabilization and Association Process' 3210th General Affairs Council meeting (Brussels, 11 December 2012) 11, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/134234.pdf> accessed 10 March 2015.

⁴⁵⁵ *ibid.*

⁴⁵⁶ The Brussels Agreement, under its official name the First Agreement of Principles Governing the Normalization of Relations. See 'Text of historic agreement between Serbia and Kosovo' *European Voice* (19 April 2013) <<http://www.europeanvoice.com/page/3609.aspx?&blogitemid=1723>> accessed 15 September 2013.

⁴⁵⁷ European External Action Service, 'Statement by High Representative/Vice-President Federica Mogherini following the meeting of the EU-facilitated dialogue' 150825_02 (Brussels, 25/08/2015) <http://eeas.europa.eu/statements-eeas/2015/150825_02_en.htm> accessed 10 October 2015.

between different EU actors. The Commission conducted the visa liberalisation process; similarly, the progress reports, opinions, screening reports were drafted by the Commission, while the EEAS has been responsible for managing the dialogue between the Serbian and the Kosovo governments. However, the work of the EEAS and EC in Serbia cannot be neatly divided. When it comes to the EU Delegation, work on the political and administration sections belongs to the EEAS, while activities related to implementation of the EU funds belong to the EC. However, the Delegation's political section, which is under the EEAS, feeds into the Commission's progress reports. Although the reports and opinions are drafted by the Commission, the Council makes the final decisions, on granting candidate status or opening accession negotiations, to be confirmed by the European Council. The EP adopts yearly resolutions on Serbia and conducts parliamentary dialogues, yet, its agenda setting power is less direct than that of the Commission.

1. Visa liberalisation (2008-2009)

We will start by looking at the visa liberalisation conditionality. Although this process started before our examined time period, the monitoring of conditions has continued even after the visa regime was lifted in 2009. The visa liberalisation provided an impetus for several human rights reforms, which were subsequently followed up by other instruments. We investigated the content of EU demands and assessed what has been achieved concerning each human rights related condition of the visa roadmap. As the EU granted visa liberalisation to Serbian citizens in 2009 and has not repealed it so far, Serbia in principle fulfilled (and still fulfils) the necessary criteria. We studied EU conditions and Serbia's performance more specifically in the following areas: **the right for asylum, combatting human trafficking, the protection of personal data, freedom of movement and anti-discrimination**. Although the protection of **national minorities** and the **Roma** were also part of the conditionality requirements in the visa roadmap, we discuss these in more detail in latter sections of the chapter due to their relevance for other instruments. After screening the various instruments, the EU applied in Serbia for human rights promotion, at the end of the chapter we present three case studies, about national minorities, Roma rights and media freedom. The impact of EU instruments and the performance of Serbia will be investigated concerning Roma rights and media freedom in more detail. While analysing implementation, we consulted other sources as well than EU documents, such as reports of the ombudsman, local and international human rights NGOs and the Council of Europe.

Visa liberalisation represents a key tool of human rights promotion because rewards are clear, specific and short term, which resulted in a high degree of compliance even in the case of Bosnia (see Chapter II). Just to name a few achievements, setting up the data protection commissioner's office, adopting anti-discrimination legislation and a Roma strategy until 2015 were all the direct outcomes of the visa-liberalisation process in Serbia. In the visa roadmap a separate block of conditions was dedicated to 'external relations and fundamental rights', and other sections also contained human rights related requirements.⁴⁵⁸ Here all conditions concerning human rights will be examined based on the visa roadmap and the subsequent assessment and monitoring reports. The EU published two assessment reports, in

⁴⁵⁸ European Stability Initiative, 'The visa roadmaps' <<http://www.esiweb.org/index.php?lang=en&id=352>> accessed 10 October 2015.

November 2008 and in May 2009, and five post visa liberalisation monitoring reports between 2009 and 2015. Present report also assesses implementation, reviewing whether the conditions have been fulfilled.

The dialogue on visa liberalisation with Serbia was launched in January 2008, and the visa regime was lifted in December 2009. As was discussed in the chapter about BiH, visa roadmaps are mostly concerned with Justice and Home Affairs (JHA) *acquis* – such as the introduction of bio-metric passports, progress in the fight against organised crime, corruption and illegal migration – yet contain also a list of human rights criteria, concerning the **right to asylum, combatting human trafficking, personal data protection, freedom of movement, anti-discrimination and the protection of minorities including the Roma**.⁴⁵⁹ As Kacarska argued, however, these human rights related conditions were outliers in the overall visa liberalisation conditionality geared towards the justice, freedom and security *acquis*, that was also represented by less scrutiny and attention devoted to these issues by the EU. Importantly, there were no on-the-ground peer missions conducted related to the fourth block of the visa liberalisation road map related to fundamental rights as opposed to the first three, indicating their secondary importance.⁴⁶⁰

a) *Asylum policy*

In the area of asylum policy which was part of the section on ‘illegal migration including readmission’ Serbia was called on to ‘adopt and implement legislation in the area of asylum in line with international standards (1951 Geneva Convention with New York Protocol) and the EU legal framework and standard’; and to ‘provide adequate infrastructure and strengthen responsible bodies, in particular in the area of asylum procedures and reception of asylum seekers’.⁴⁶¹

Accordingly, Serbia adopted a new law on asylum which entered into force in April 2008. The May 2009 assessment report generally praised Serbia’s asylum system, approvingly noting that the implementation of the law was progressing and the asylum system was ‘fully functional’.⁴⁶² However, already the second post-visa liberalisation report in 2011 referred to some shortcomings, as it called on Serbia to ‘consider establishing an Asylum Office, set up a system to process asylum seekers’ biometric data and enhance conditions for integrating asylum-seekers’. It also pointed to the need for ‘further steps [to] align the legislation on legal migration with the EU *acquis*’.⁴⁶³

⁴⁵⁹ *ibid.*

⁴⁶⁰ Block 1: document security, Block 2: Illegal migration, including readmission, Block 3: Public order and security, Block 4: External Relations and fundamental rights. See European Commission, ‘Visa liberalisation with Serbia roadmap’ 4-5 <<http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Serbia.pdf>> accessed 10 October 2010; Simonida Kacarska, ‘Losing the Rights along the Way: The EU–Western Balkans Visa Liberalisation’ (2015) 3 *European Politics and Society* 363-378, 366.

⁴⁶¹ EC, ‘Visa liberalisation with Serbia roadmap’ (n 460) 4-5.

⁴⁶² European Commission, ‘Updated Assessment of the implementation by Serbia of the roadmap for visa liberalisation’ (Brussels, 18 May 2009) 10 <<http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Serbia%20updated%20visa%20dialogue%20assessment%2018%20May.pdf>> accessed 10 October 2015.

⁴⁶³ European Commission, ‘Second report on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010’ SEC(2011) 1570 final (Brussels, 7.12.2011) 9 <[http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/1570/CO_M_SEC\(2011\)1570_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/1570/CO_M_SEC(2011)1570_EN.pdf)> accessed 10 October 2015.

By contrast, a year later in August 2012 the UNHCR declared Serbia a non-safe country due to shortcomings in the asylum system, such as ‘in numbers of personnel, expertise, infrastructure, implementation of the legislation and government support’ while also in capacities of asylum centres.⁴⁶⁴ These existing problems were revealed by the growing influx of asylum applicants. According to the UNHCR, Serbia was unable to process asylum seekers according to international and EU norms, indicated also by the fact that until the publication of the UNHCR’s report in 2012 ‘there has not been a single recognition of refugee status since April 2008’.⁴⁶⁵ The UNHCR thus concluded that Serbia does ‘not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure’, which is why ‘Serbia should not be considered a safe third country’.⁴⁶⁶

By August 2012, the European Commission arrived at similar conclusions in its third post-visa liberalisation monitoring report; noting that Serbia ‘has not made progress’ in the field of migration, the legislative framework ‘remains to be effectively implemented’, and asylum centres have insufficient capacity.⁴⁶⁷ Although according to the Commission ‘the legislative framework largely met EU standards’, Serbia was called on ‘to align its legislation with EU *acquis* on legal migration, notably on the right to family reunification, long-term residence and the conditions of admission of third country nationals for studies’.⁴⁶⁸ The report also noted that asylum claims were still processed by a temporary body at the border police, while the Asylum Office which was supposed to be the first instance body was still not established.⁴⁶⁹ The 2013 post-visa liberalisation report drew similar conclusions (while the last report as of February 2015 was completely dedicated to the problem of growing number of asylum applications from the region itself, among them from Serbia to the EU thus did not have anything to say about the implementation of the right to asylum).⁴⁷⁰

⁴⁶⁴ ‘Serbia As a Country of Asylum’ (UNHCR, August 2012) 23 <<http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf>> accessed 10 October 2015.

⁴⁶⁵ ‘Serbia As a Country of Asylum’ (UNHCR, August 2012) 23 <<http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf>> accessed 10 October 2015.

⁴⁶⁶ *ibid* 4.

⁴⁶⁷ European Commission, ‘Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.8.2012 COM(2012) 472 final, 9 <http://www.esiweb.org/pdf/schengen_white_list_project%20-%203rd%20report%20on%20post-visa%20liberalisation%20monitoring.pdf> accessed 10 October 2015.

⁴⁶⁸ European Commission, ‘Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.8.2012 COM(2012) 472 final, 9 <http://www.esiweb.org/pdf/schengen_white_list_project%20-%203rd%20report%20on%20post-visa%20liberalisation%20monitoring.pdf> accessed 10 October 2015.

⁴⁶⁹ European Commission, ‘Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.8.2012 COM(2012) 472 final, 9 <http://www.esiweb.org/pdf/schengen_white_list_project%20-%203rd%20report%20on%20post-visa%20liberalisation%20monitoring.pdf> accessed 10 October 2015.

⁴⁷⁰ European Commission, ‘Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.11.2013 COM(2013) 836 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0836:FIN:EN:PDF>> accessed 10 October 2015; European Commission, ‘Fifth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 25.2.2015 COM(2015) 58

The establishment of the Asylum Office in January 2015 has not so far changed the picture. According to the numbers of the Belgrade Centre for Human Rights, out of the 50,467 people who sought asylum in Serbia after the Asylum Act came into force in 2008, until May 2015 only three people were granted refugee status and one subsidiary protection.⁴⁷¹ The statistics of the UNHCR show five cases of granted asylum in the first half of 2015 and a single case in 2014.⁴⁷² At the same time, Serbia made progress to improve conditions for third country nationals transiting the country in terms of providing shelter and humanitarian supplies.⁴⁷³ In light of all this, the question arises how could the asylum system been regarded as ‘fully functional’ in 2009. That Serbia’s asylum system did not meet international and EU standards became very apparent during the EU’s migration crisis in 2015, yet as we have seen it was quite visible already in 2012. This, however, did not prove to be a sufficient reason for sanctioning Serbia one way or the other by the EU, despite the fact that asylum reform was part of the visa liberalisation conditionality.

b) Human trafficking

Within the block ‘Public order and security’ the EU set the condition for Serbia ‘to implement the strategy to combat trafficking in human beings by adopting and implementing an action plan including a timeframe and sufficient human and financial resources.’⁴⁷⁴ In line with this call, Serbia adopted a strategy in 2009 and an action plan for the period of 2009-2011 defining specific measures, clarifying responsibilities, time frames and monitoring criteria, and also appointed members of the Council to combat trafficking in human beings and a National Coordinator. All this was welcomed by the EU. Serbia also ratified the Council of Europe’s convention against trafficking in human beings in March 2009.⁴⁷⁵ The Centre for Human Trafficking Victims Protection was created in order to have a more coordinated approach to identifying victims of human trafficking.

At the same time, a new strategy and action plan have not yet been adopted to combat human trafficking, while the legal framework is not adequately implemented, and as a result victims are still being punished for offences that are a consequence of their exploitation.⁴⁷⁶ It was concluded in all subsequent assessment reports that ‘Serbia remains a country of origin, transit and destination for trafficking in human beings’.⁴⁷⁷

final <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20150225_5th_post-visa_liberalisation_report_with_western_balkan_countries_en.pdf> accessed 10 October 2015.

⁴⁷¹ Belgrade Centre for Human Rights, ‘Asylum in the Republic of Serbia’ (Belgrade, June 2015).

⁴⁷² UNHCR, Regional Statistics on Asylum Seekers, Regional Representation in South-Eastern Europe, 2015 <<http://www.unhcr.rs/media/REGIONAL-STATISTICS-ON-ASYLUM-SEEKERS-RRSE-2015.xlsx>> accessed 25 February 2016; UNHCR, Regional Statistics on Asylum Seekers, Regional Representation in South-Eastern Europe, 2014 <http://www.unhcr.rs/media/REGIONAL_STATISTICS_ON_ASYLUM_SEEKERS_RRSE_2014.xlsx> accessed 25 February 2016.

⁴⁷³ EC, ‘Commission Staff Working Document, Serbia 2015 Report’ (n 440) 6.

⁴⁷⁴ EC, ‘Visa liberalisation with Serbia roadmap’ (n 460) 6.

⁴⁷⁵ EC, ‘Updated Assessment of the implementation by Serbia...’ (n 462) 18.

⁴⁷⁶ Milan Aleksić (ed), ‘prEUgovor – Report on Progress of Serbia in Chapters 23 and 24’ (Belgrade Centre for security Policy 2015) 8 <http://www.bezbednost.org/upload/document/preugovor_2015_%5beng%5d.pdf> accessed 3 February 2016.

⁴⁷⁷ European Commission, ‘Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.11.2013 COM(2013) 836

While the Commission recognised some progress with regards to investigations launched into human trafficking cases and conducting awareness raising campaigns, Serbia was still among the top ten of countries recorded in the EU with regards to the number of criminals involved in human trafficking. In addition, Serbia still was to develop a ‘victim-oriented approach’ focusing on identifying and providing assistance and protection to victims.⁴⁷⁸ Presenting some numbers in EU reports illustrating recent trends in human trafficking would have been helpful to see whether these reforms have done anything to decrease the scale of this problem.

c) Data protection

Personal data protection constituted part of the section on ‘Judicial co-operation in criminal matters’ in the EU roadmap. Serbia was required to create the necessary legal and institutional framework, by national legislation, setting up the relevant authority and by signing, ratifying and implementing ‘relevant international conventions, such as the Additional Protocol of the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data’.⁴⁷⁹ In October 2008 Serbia adopted a new law on personal data protection, and in December ratified the Additional Protocol to the Council of Europe’s convention on personal data protection.⁴⁸⁰ The office of the Commissioner for Information of Public Importance was set up in 2004, which, as a result of the 2008 law, received new powers and competencies of personal data protection, besides dealing with the protection of freedom of information.⁴⁸¹

After the visa regime was liberalized, this particular condition was not monitored any longer: none of the post-visa liberalization reports addressed the issue of data protection. However, the Commission’s yearly progress reports did review data protection and repeatedly noted that the legal framework was still not in line with EU standards.⁴⁸²

As the Belgrade Centre for Human Rights concluded in its 2014 report, legislation still needs to be aligned with relevant EU directives⁴⁸³ and with the Council of Europe’s convention on data protection, while the

final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0836:FIN:EN:PDF>> accessed 10 October 2015.

⁴⁷⁸ European Commission, ‘Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010’ Brussels, 28.11.2013 COM(2013) 836 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0836:FIN:EN:PDF>> accessed 10 October 2015.

⁴⁷⁹ EC, ‘Visa liberalisation with Serbia roadmap’ (n 460) 6. This refers more precisely to the ‘Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows’ <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181>> accessed 10 October 2015.

⁴⁸⁰ See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181/signatures?p_auth=OtkC2M1G> accessed 10 October 2015.

⁴⁸¹ EC, ‘Updated Assessment of the implementation by Serbia...’ (n 462) 17.

⁴⁸² European Commission, ‘2014 Serbia Progress Report’ (October 2014) 49 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf> accessed 11 October 2015.

⁴⁸³ Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995) OJ L281/31-50 <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>>.

Draft Action Plan for Chapter 23 prepared by the Serbian government ‘indicate the lack of state interest in regulating personal data protection’.⁴⁸⁴

Thus in this area we see formal and even there only partial compliance with the EU’s conditions. The law on data protection was adopted, the relevant authority created and the Council of Europe Convention ratified, yet the latter remains to be implemented in the domestic legal system, while legislation still has to be harmonized with the EU’s standards. Many other laws containing provisions relevant to personal data protection have not been aligned with the Personal Data Protection Act (PDPA), such as the Act on Labour-Related Records⁴⁸⁵ or the Act on Detectives.⁴⁸⁶ Even existing legislation for protecting personal data is not sufficiently implemented. Media regularly mistreats sensitive personal data during ongoing investigations by publishing the personal data of people suspected of crime and under investigation, as well as information about their personal and family lives without legal consequences. Such data can be made available only by cooperation of the relevant authorities while ‘using personal data for other than the original purpose’ can carry a criminal charge.⁴⁸⁷

In December 2014 a ‘major breach of the right to personal data protection’ happened when all the personal data of those owning free shares of public companies were openly published on the Privatization Agency’s website. The authorities’ lack of reaction to such instances suggests that they do not take personal data protection guarantees seriously.⁴⁸⁸ The Screening Report as of 2013 called on Serbia to harmonize its data protection legislation with the *acquis*, prepare transpositions to other relevant laws, and ‘ensure sufficient financial and human resources to the Commissioner for Information of Public Importance and Personal Data Protection’.⁴⁸⁹

d) Citizens’ rights and the protection of minorities

This section concerned freedom of movement and citizens’ rights including the protection of national minorities and the Roma. Serbia was called on to ensure freedom of movement to all citizens and to provide full access to travel and identity documents, especially to minorities, IDPs and refugees. Regarding citizens’ rights Serbia was asked to:

- *adopt and enforce legislation to ensure effective protection against discrimination;*
- *specify conditions and circumstances for acquisition of Serbian citizenship;*
- *ensure investigation of ethnically motivated incidents by law enforcement officers in the area of freedom of movement, including cases targeting members of minorities;*

⁴⁸⁴ Belgrade Centre for Human Rights, ‘Human Rights in Serbia 2014’ (Belgrade, 2015) 167 <<http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2015/03/Human-Rights-in-Serbia-2014.pdf>> accessed 11 October 2015.

⁴⁸⁵ Sl. glasnik RS, 46/96, 101/05.

⁴⁸⁶ Sl. glasnik RS, 104/13.

⁴⁸⁷ Belgrade Centre for Human Rights, ‘Human Rights in Serbia 2014’ (n 484) 167.

⁴⁸⁸ *ibid.*

⁴⁸⁹ European Commission, ‘Screening report Serbia, Chapter 23 – Judiciary and fundamental rights’ MD 45/14 (15.05.14) <http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf> accessed 11 October 2015.

- *ensure that constitutional provisions on protection of minorities are observed;*
- *implement relevant policies regarding minorities, including Roma.*⁴⁹⁰

The Commission in its May 2009 assessment report found that Serbia largely met the benchmarks related to these conditions. Regarding identification documents, the challenge has been giving papers to refugees, IDPs and unregistered Roma. At the publication of the report in May 2009, 97,000 people with refugee status and between 209,000 and 226,000 IDPs resided in Serbia. Refugee status can be given to people who are from the republics of the former Yugoslavia, while refugees from Kosovo can be recognised as IDPs. Efforts have been made to register refugees, IDPs and Roma people and to provide them with identity documents.⁴⁹¹ In December 2014, ‘there were 3 868 stateless persons or persons at risk of statelessness in Serbia, who were mostly Roma without birth registration or personal identity documents’.⁴⁹² (See more on this in section C.2 on Roma rights). At the same time, we do not learn from the post-visa liberalization monitoring reports how many people were in need of documents in 2008 and how many received documents in the following years.

Ethnically motivated incidents were also monitored during the visa dialogue. Here it was concluded that such incidents mainly target the Roma, but their overall level was ‘not high’, and the investigations by police were generally satisfactory, though further efforts were needed on behalf of the courts to bring the perpetrators to justice.⁴⁹³ No numbers have been published about ethnically motivated incidents either by EU or the Council of Europe’s Advisory Commission’s report, to support these claims, so it is difficult to assess the scale of this problem and the trend of incidents during the last five years.

Concerning the Roma, the EU recognised positive developments, the adoption of a new national strategy for improvement of the situation of the Roma in 2009, to be implemented until 2015.⁴⁹⁴ The drafting of the strategy was followed by two action plans, in 2009 and 2013. At the same time, the assessment report from May 2009 laconically noted that ‘the current demolition of settlements, which will not be legalised, without providing appropriate housing in other locations raises some doubts as regards the will and ability to fully implement the objectives of the strategy and related actions plans in the area of housing’.⁴⁹⁵

The 2011 follow up report similarly criticised Serbia on implementation of Roma rights, although also acknowledged significant progress in some areas, particularly related to basic education, enrolment in schools, civil registration and access to health care. At the same time, education and the labour market

⁴⁹⁰ EC, ‘Visa liberalisation with Serbia roadmap’ (n 460) 7-8.

⁴⁹¹ EC, ‘Updated Assessment of the implementation by Serbia...’ (n 462) 10.

⁴⁹² ‘Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia from 16 to 20 March 2015,’ 12 <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2798638&SecMode=1&DocId=2302808&Usage=2>> accessed 10 October 2010.

⁴⁹³ EC, ‘Updated Assessment of the implementation by Serbia...’ (n 462) 24.

⁴⁹⁴ This was the second Roma strategy in Serbia, the first one was adopted in 2005.

⁴⁹⁵ EC, ‘Updated Assessment of the implementation by Serbia...’ (n 462) 24.

access for the Roma remained particularly challenging.⁴⁹⁶ Implementation of Roma rights will be discussed in more detail in section C.2.

Concerning citizens' rights, there was essentially no follow-up on anti-discrimination and the protection of minorities other than the Roma in the post visa liberalisation monitoring reports. Yet these two issues were among the highest human rights priorities of the EU in light of the other instruments to be reviewed in the following section.

e) Anti-discrimination

The anti-discrimination reform that was launched by the visa liberalisation process continued after 2009, and was monitored in the EU's yearly progress reports. Fulfilling the requirements related to anti-discrimination in the visa roadmap, Serbia adopted in March 2009 a new anti-discrimination law, and established a new Equality Commissioner. One of the main achievements of this new legislation was the shifting of the burden of proof in discrimination cases from the plaintiff to the defendant. This was a framework law that was complemented with further pieces of anti-discrimination legislation 'such as on gender equality or prevention of discrimination of persons with disability, as well as with explicit anti-discrimination provisions contained in many others laws'. In the field of criminal law, the Criminal Code was amended in 2012 to include 'hate motive as an aggravating circumstance that should be taken into consideration during sentencing if a crime has been committed as a result of hatred based on race, confession, nationality or ethnicity, gender, sexual orientation or gender identity'.⁴⁹⁷

On the institutional level, the Commissioner for the Protection of Equality attained a central role to play in combatting discrimination. He was empowered to provide recommendations and initiate misdemeanour and civil court proceedings. He also monitors whether 'public administration and public services are not in breach of citizens' rights, the rule of law and principles of good governance'.⁴⁹⁸ The Advisory Committee on the Framework Convention for the Protection of National Minorities in its third opinion published in 2014 'regretted, however, that, in contrast with the provisions on the prohibition of discrimination in the field of labour, education and the provision of public services, this Law does not include detailed provisions with respect to discrimination in the areas of housing and social protection'.⁴⁹⁹ Particularly affected by discrimination in these fields are the Roma.

⁴⁹⁶ EC, 'Second report on the post-visa liberalisation monitoring for the Western Balkan countries' (463) 10.

⁴⁹⁷ Decade of Roma Inclusion Secretariat Foundation, 'Civil Society Monitoring on the Implementation of the National Roma Integration Strategy and Decade Action Plan in Serbia, 2012-2013' (2014) 44 <http://www.romadecade.org/cms/upload/file/9773_file13_sr_civil-society-monitoring-report_en-1.pdf> accessed 10 October 2015.

⁴⁹⁸ *ibid* 8.

⁴⁹⁹ Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Third Opinion on Serbia' ACFC/OP/III(2013)006 (Strasbourg, 23 June 2014) 15 <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Serbia_en.pdf> accessed on 30 August 2014.

The 2014 Anti-Discrimination Action Plan of the government set specific goals and measures of combatting discrimination. As the Belgrade Centre for Human Rights' yearly report explained, the main aims of the Action Plan are to:

- *reduce the number of cases of discrimination in labour and employment by improving the legal framework and applying affirmative measures for vulnerable social groups;*
- *reduce and eliminate cases of discrimination in the system of education at all levels;*
- *provide training for public sector staff to prevent their discrimination against members of the public from vulnerable social groups;*
- *define guidelines for fighting against discrimination in local self-government units.*⁵⁰⁰

Furthermore:

*The Action Plan outlines activities to prevent discrimination of particularly vulnerable social groups in the fields of health and social protection and (social) housing. The Action Plan also envisages amending the legal framework to prevent discrimination with respect to marriage, family relations and inheritance of persons belonging to vulnerable social groups and the opening of a public debate on the recognition of the institute of civic same-sex partnerships and on the recognition of the inheritance rights of same-sex partners. The Action Plan also envisages strengthening the culture of tolerance via the media.*⁵⁰¹

As its adoption is very recent, it seems early to either conclude on its impact or find independent assessments of the results.

Minority rights which were also left out from the post visa liberalisation report have also been rigorously monitored by EU progress reports and have been generally among the highest human rights priorities of the EU's various tools and instruments (to be discussed in section C.1).

f) Overall assessment

Altogether while human rights conditions constituted an important part of the visa liberalisation process that the EU used as an opportunity to push through a number of reforms, Serbia met only part of these criteria, while leaving a number of them unfulfilled. In general, compliance was formal and constituted in adopting legislation, strategies and action plans and setting up institutions.

Concerning the right for asylum, Serbia fulfilled half of the EU's demands by adopting most (though not all) of the required pieces of legislation. Yet, the other half concerning the provision of an infrastructure that was adequate was clearly missing, and this seems to be more decisive, as in practice the system does not appear to be functioning. By 2012 Serbia had not granted a single refugee status, and even the one-digit numbers in 2014-15 show major shortcomings. With regards to combatting human trafficking Serbia formally met again only part of the EU's conditions as it adopted the required action plan, yet in light of the results, actual impact remained limited.

⁵⁰⁰ Belgrade Centre for Human Rights, 'Human Rights in Serbia 2014' (n 484) 283.

⁵⁰¹ *ibid.*

In the area of data protection, the institutional setup was created and the relevant Council of Europe convention was ratified. After this the EU had not monitored this issue anymore in the context of the visa liberalisation process, even though serious shortcomings remained. Even the formal EU harmonisation of the existing legislation was not completed. There are serious shortcomings in the implementation of the Personal Data Protection Act, and Serbia also failed to harmonise other regulations with the Act.

Concerning citizens' rights and the rights of minorities, most attention was devoted to registering refugees, IDPs and Roma and to Roma rights in general, while anti-discrimination reform and the protection of national minorities were not monitored. In the area of Roma rights Serbia adopted a Roma Strategy, an action plan and began providing documents for unregistered Roma persons. At the same time, the demolition of illegal Roma settlements continued without providing appropriate alternative housing possibilities. The post-visa liberalisation reports did not monitor block four of the visa roadmap related to fundamental rights in any of the Western Balkan countries, which again proved that their focus was primarily on security.⁵⁰² Moreover, Kacarska demonstrated that the visa liberalisation process in practice even led to human rights violations, specifically related to the prohibition of discrimination. After the lifting of the visa regime, there was a growing number of asylum applications to the EU, the majority of them from Macedonia and Serbia. As some Member States, such as Belgium threatened the Western Balkan countries with suspension of the visa-free regime, their border police were put under increasing pressure to control the movement of their citizens. As the officials of EU Member States maintained that the majority of false asylum seekers were Roma and Albanian, the issue came to be framed in ethnic terms, practically asking Serbia to treat such people differently. Thus, the unintended consequence of the visa liberalisation was the increasing practice of discrimination owing to the EU's pressure on the Western Balkan governments to control their borders. This definitely ran against the conditionality on anti-discrimination, which as was pointed out was not monitored in the post visa liberalisation reports. In general, the EU carried out partial monitoring of the conditions of the Visa Roadmap and was more or less satisfied with Serbia's partial compliance, indicated by the fact that although the EU did criticize Serbia on a number of these issues, this kind of partial compliance did not constitute enough of a reason to suspend the visa free regime. The possibility of such reprisal emerged only when asylum applications from Serbia and other countries in the region started to increase dramatically, but even then it was not applied. All this supports Kacarska's point that human rights were just formally but not substantially goals of the visa liberalisation.⁵⁰³ It should be also noted, that all of these human rights criteria continued to be monitored in the yearly progress reports and other documents, to be discussed in further sections.

2. Progress reports and enlargement strategies (2010-2015)⁵⁰⁴

The European Commission's yearly progress reports reviewed Serbia's performance in terms of legislation and policies based on the SAA and the European Partnership priorities. As was noted in the introduction, Serbia initialled the SAA on 7 November 2007, signed it on 29 April 2008, but its ratification began only in 2010 because Serbia's inadequate cooperation with ICTY. Until the SAA came into force on 1 September

⁵⁰² Kacarska, 'Losing the Rights along the Way' (n 460) 370.

⁵⁰³ Kacarska, 'Losing the Rights along the Way' (n 460) 371-373.

⁵⁰⁴ We began by reviewing the 2010 progress report because this was the first such report after the coming into force of the Treaty of Lisbon, which represents the starting point of our analysis.

2013, the Interim Agreement provided the main framework of relations of Serbia with the EU. The SAA defined the EU's expectations and Serbia's commitments on a wide range of political, trade and economic issues. Importantly, it also contained a human rights clause similarly to every SAA signed with the Western Balkan states, by including the respect for democratic principles and human rights and ICTY cooperation among essential elements of the agreement. Thus, the SAA assigned a similar role to human rights as to ICTY cooperation in the overall conditionality policy for Serbia.⁵⁰⁵ Yet, as was pointed out in the case of Bosnia, apart from this human rights clause, the SAA did not present a detailed list of human rights conditions. By analysing progress reports and enlargement strategies, we can observe more clearly the EU's human rights agenda set based on the Copenhagen political criteria.⁵⁰⁶ Since in the progress reports all human rights issues are discussed extensively, we looked at enlargement strategies for the years of 2010 and 2012 as these summarise the main findings of the progress reports thus better reflect the EU's priorities. In 2011, instead of the regular enlargement strategy and progress report, the Commission published its rather brief Opinion on Serbia's application for membership, which we also consulted.

The structure of human rights monitoring in progress reports changed after 2012 when Serbia became an EU candidate. Starting from 2013, fundamental rights issues have been discussed in detail as part of the section on Chapter 23, while in the beginning of the reports the Copenhagen political criteria have been reviewed, among them those related to human rights and the protection of minorities under the title 'Political criteria: Human rights and the protection of minorities'. We looked at this particular section on the political criteria in progress reports for the years of 2013, 2014 and 2015 beside the enlargement strategies. For the year 2014, the priorities were the same in the enlargement strategy and the progress report, the text of the sections on political criteria being identical.

By reviewing enlargement strategies and progress reports, we established the EU's human rights priorities during the examined period (Table 19). The following list of human rights and vulnerable groups were emphasized the most during the examined six years among prioritized issues (highlighted in bold in Table 19): freedom of expression including freedom and pluralism of the media, non-discrimination, LGBTI, respect for and protection of minorities and cultural rights, refugees and IDPs, and Roma rights. In addition, a number of issues received also a lot of attention (highlighted in italics in Table 19): the ombudsman, right to fair trial, prison conditions, gender equality and women's rights, rights of the child, war crimes prosecution. Yet these were emphasised somewhat less than the first group. By contrast, freedom of movement, right to privacy, right to education, right to asylum were *never* prioritized, while freedom of thought, conscience and religion, freedom of assembly and association, labour and trade union rights, rights to property, data protection and human trafficking were mentioned rarely, thus also seem to be of lower significance.

⁵⁰⁵ Article 2, Stabilisation and Association Agreement between the European Communities and their Member States of the One Part, and the Republic of Serbia, of the Other Part <http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf> accessed 11 April 2016.

⁵⁰⁶ European Commission, 'Commission Staff Working Document, Serbia 2008 Progress Report' SEC(2008) 2698 final (Brussels, 05.11.2008) 6 <http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/serbia_progress_report_en.pdf> accessed 11 April 2016.

We also indicate essential conditions (Table 18) in order to see to what extent human rights featured among these. From 2011, after Serbia fulfilled cooperation with the ICTY, the normalization of relations with Kosovo became the key priority repeated as an essential criterion each year. In 2013 independence of key institutions, media freedom, anti-discrimination policy, and the protection of minorities were also listed as essential conditions. In 2014, human rights conditionality in general was set as an essential condition of further progress since the drafting of the action plans on Chapter 23 and 24 became the prerequisite of opening the first chapters of the accession negotiations. In 2015 no human rights related criteria were included among essential conditions.

Date	Documents	Essential conditions
2010	Enlargement Strategy, Country Conclusions ⁵⁰⁷	ICTY cooperation; Normalization with Kosovo; Judicial and public administration reform; Fight against organised crime and corruption.
2011	Commission opinion ⁵⁰⁸	Normalisation with Kosovo.
2012	Enlargement Strategy, Country Conclusions ⁵⁰⁹	Normalisation with Kosovo.
2013	Progress Report highlighted HR issues ⁵¹⁰	Normalisation with Kosovo; Rule of law: particularly judicial reform and anti-corruption policy, independence of key institutions, media freedom, anti-discrimination policy, the protection of minorities and the business environment; Commitment to regional cooperation and reconciliation.
2014	Progress Report highlighted HR issues ⁵¹¹	Action plans for Chapters 23 and 24; Normalisation with Kosovo.
2015	Enlargement Strategy and Progress Report Highlighted HR issues ⁵¹²	Judicial reform; Fight against corruption and organised crime; Economic reforms.

Table 18. Essential conditions in the human rights area, Serbia, 2010-2015

	2010	2011	2012	2013	2014	2015
Observance of international human rights law				X	X	
Freedom of movement						
<i>Ombudsman</i>		X		X	X	X
<i>Right to fair trial</i>	X		X	X	X	X
Prohibition of torture and ill treatment	X		X			
Right to privacy						
<i>Prison conditions</i>	X	X	X	X	X	
Freedom of thought, conscience and religion	X		X			
Freedom of expression incl. freedom & pluralism of the media	X	X	X	X	X	X
Freedom of assembly and association	X	X	X			

⁵⁰⁷ European Commission, 'Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011' COM(2010) 660 final (Brussels, 9.11. 2010) 48-49 <http://aei.pitt.edu/44755/1/com2010_0660.pdf> accessed on 30 August 2014.

⁵⁰⁸ EC, 'Commission Staff Working Paper – Analytical Report Accompanying the document...' (n 447) 3.

⁵⁰⁹ EC, 'Communication, "Enlargement Strategy and Main Challenges 2012-2013"' (n 262) 44.

⁵¹⁰ European Commission, 'Commission Staff Working Document, Serbia 2013 Progress Report' SWD(2013) 412 final (Brussels, 16.10.2013) 4 <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/sr_rapport_2013.pdf> accessed on 30 August 2014.

⁵¹¹ In 2014 the summary of findings in the beginning of the progress report was identical with the annex on Serbia in the enlargement strategy.

⁵¹² EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 17-18; EC, 'Communication, EU Enlargement Strategy 2015' (n 285) 19-20.

	2010	2011	2012	2013	2014	2015
Labor and trade union rights			X			
Anti-discrimination	X	X	X	X	X	X
Socially vulnerable and disabled persons	X			X	X	X
LGBTI	X		X	X	X	X
Right to education						
Right to property	X	X	X			
Gender equality and women's rights	X		X	X	X	
Rights of the child	X		X	X	X	
Respect for and protection of minorities and cultural rights	X	X	X	X	X	X
Roma rights	X	X	X	X	X	X
Refugees, IDPs	X	X	X	X	X	X
Right to asylum						
Protection of personal data	X				X	
Human trafficking	X					
War crimes prosecution		X	X	X	X	X
Missing persons				X	X	

Table 19. Human rights priorities in EU documents, Serbia, 2010-2015

Sources: 2010 EU enlargement strategy, country conclusions;⁵¹³ 2011 Commission opinion;⁵¹⁴ 2012 EU enlargement strategy, country conclusions;⁵¹⁵ 2013 EU Progress Report highlighted HR issues;⁵¹⁶ 2014 EU Progress Report highlighted HR issues;⁵¹⁷ 2015 EU Enlargement Strategy and Progress Report Highlighted HR issues.⁵¹⁸

3. The European Commission's opinion on Serbia's application

In April 2013, the Commission published its Opinion about Serbia's application for membership in which the EC recommended opening accession negotiations with Serbia.⁵¹⁹ The Commission mentioned visible and sustainable improvement of relations with Kosovo as a top priority. Since this was a crucial document allowing for the opening of accession negotiations, it is revealing in terms of what human rights issues it emphasized. These were the independence of key institutions, media freedom, anti-discrimination policy, LGBTI, national minorities, and the Roma.⁵²⁰ The Commission in this Opinion summarised the main

⁵¹³ EC, 'Communication, Enlargement Strategy and Main Challenges 2010-2011' (n 507) 48-49.

⁵¹⁴ EC, 'Commission Staff Working Paper – Analytical Report Accompanying the document...' (n 447) 3.

⁵¹⁵ EC, 'Communication, "Enlargement Strategy and Main Challenges 2012-2013"' (n 262) 44.

⁵¹⁶ EC, 'Commission Staff Working Document, Serbia 2013 Progress Report' (n 510) 4.

⁵¹⁷ In 2014 the summary of findings in the beginning of the progress report was identical with the annex on Serbia in the enlargement strategy.

⁵¹⁸ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440); EC, 'Communication, EU Enlargement Strategy 2015' (n 285) 14, 19-20.

⁵¹⁹ This was the second of such opinion published by the Commission, the previous one in 2011 before Serbia was granted candidate status. See European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo*' (Brussels, 22.4.2013) 8-9 <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

⁵²⁰ Besides monitoring the ultimate key condition of Kosovo ('assesses steps taken to address the key priority of improving relations with Kosovo'), 'the report also presents and assesses recent efforts to step up the EU reform

developments concerning these human rights topics mostly recognising the achievements of Serbia, and only in a few cases formulated criticisms and called for further action. Tables Table 19-Table 24 list the key quotes from the Commission's opinion, by themes.

Freedom of the media
'the decriminalisation of defamation [...] was a significant development;'
'an ad hoc commission was set up in January 2013 and tasked with shedding light on the cases of unsolved murders of journalists;'
[Regarding the implementation of the media strategy]: 'a working group was set up aiming at harmonising the legislative framework;'
'Two laws are under preparation: the law on public information and media, which should guarantee transparency of funding and regulate media concentration, this is needed because self-censorship is still widespread and the law on electronic media, which would cover electronic media and public broadcasters.'

Table 20. Human rights issues in the Commission's Opinion on Serbia's application: Freedom of the media

Source: European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo*' (Brussels, 22.4.2013) <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

The Opinion listed and welcomed the formal elements of compliance like legislative changes and institutional developments, while widespread self-censorship was the only criticism put forward concerning media freedom.

Anti-discrimination
'where the overall legal framework is broadly in place but its implementation as well as enforcement remain to be improved.'
'The recognition as aggravating circumstance of certain 'hate' crimes motivated on grounds such as ethnic origin, religion or sexual orientation [...] is a welcome development.'
'A comprehensive Strategy on fighting discrimination for the period 2013-2018 is being prepared and actively consulted with stakeholders to be followed by Action Plans for its implementation.'
'A number of provisions of the 2009 Serbian Anti-Discrimination Law are not in line with the EU 2001 Anti-Discrimination Directive and preparations for such alignment have started.'

Table 21. Human rights issues in the Commission's opinion on Serbia's application: Anti-discrimination

Source: European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo*' (Brussels, 22.4.2013) <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

agenda and examines with particular attention the latest developments in the areas of rule of law, particularly judicial reform, anti-corruption policy and the fight against organised crime, independence of key institutions, media freedom, anti-discrimination policy, protection of minorities and improvement of the business environment. *ibid.*

In the case of anti-discrimination, the criticisms concerned the implementation and enforcement of the existing anti-discrimination legislation, while it was also pointed out that the anti-discrimination law still had to be harmonised with the EU 2001 Anti-Discrimination Directive.

LGBT rights
'Regarding the protection of the Lesbian, Gay, Bisexual and Transsexual (LGBT) population, activities have stepped up. There has been overall a more active processing of discrimination cases against LGBT population.'
'A first ruling from the Novi Sad Appellate Court has been delivered regarding discrimination in the work place based on sexual orientation.'
'The Commissioner for Equality remained particularly active in the promotion of LGBT population rights.'
'Overall, a number of awareness raising activities were organised on anti-discrimination issues and specifically on LGBT rights, targeting particularly law enforcement officers and social workers.'

Table 22. Human rights issues in the Commission's opinion on Serbia's application: LGBT rights

Source: European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo*' (Brussels, 22.4.2013) <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

In the case of the LGBT rights there was no criticism formulated, and the assessment of the Commission read more like a pat on the back.

Protection of minorities
'Serbia has undertaken, in preparation of the 2014 elections to the Minority Councils, a revision of the 2009 Law on the National Minority Councils, in order to address some of the shortcomings.'
'Serbia also took steps to improve the implementation of the legal framework throughout its territory (TV broadcast in Romanian in Eastern Serbia, optional Romanian language classes, still no religious service in Romanian, in Sandzak teaching in Bosniak language was introduced, in South Serbia textbooks were provided in Albanian, internship opportunities in the state administration for Albanians, Bosniaks and Roma).'

Table 23. Human rights issues in the Commission's opinion on Serbia's application: Protection of minorities

Source: European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo*' (Brussels, 22.4.2013) <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

We also find no criticism regarding minority rights.

The Roma
'Serbia continues to actively follow up the operational conclusions of the joint Serbia-Commission Roma seminar of June 2011.'

'On civil documentation, the two necessary laws to ensure the registration or subsequent registration of 'legally invisible' persons are now in place and new procedures for their registration have started as of December 2012.'

'Affirmative action measures have increased in the education sector and further development of the pedagogical assistants system - 175 persons so far - is being considered.'

'Measures on supporting employment opportunities for Roma have continued.'

[Regarding health care], '75 Roma women health mediators are working under the Social Affairs and Labour Ministry framework and Roma can now register at the social care centre if they do not have a permanent address.'

[With regards to housing and forced evictions], 'Serbia has started preparations to incorporate into the national legislation the relevant international standards.'

'Further sustained efforts, including financial, are needed to ensure the full implementation of the Serbian Roma Strategy and address the difficult situation of the Roma population who are frequently victims of intolerance, hate speech and even physical attacks.'

Table 24. Human rights issues in the Commission's opinion on Serbia's application: The Roma

Source: European Commission, 'Joint Report to the European Parliament and the Council on Serbia's progress in achieving the necessary degree of compliance with the membership criteria and notably the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo *' (Brussels, 22.4.2013) <http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf> accessed 11 November 2015.

Concerning the Roma, while recognising the efforts Serbia had made in different areas, such as the registration of persons, education, employment, health care and housing, ongoing hate speech and violence targeting Roma people were pointed out as critical remarks.

4. 2014 Negotiating Framework Serbia⁵²¹

The Negotiating Framework, adopted in January 2014, outlined the main principles of the accession negotiations with Serbia. It did not provide a detailed account of the various criteria, but highlighted the most important areas, including human rights issues. Among the Copenhagen political criteria beside judiciary reform, fight against corruption and organised crime, and public administration reform, the following human rights issues were emphasized:

- Roma;
- implementation of minority rights legislation;
- media freedom;
- anti-discrimination;
- LGBT.⁵²²

The rule of law chapters, and the chapter on Kosovo (Chapter 23, 24, and 35), received a special place in the negotiation framework: 'Regarding chapters 23, 24 and 35 if negotiations lag behind the progress of

⁵²¹ Conference on Accession to the European Union – Serbia, 'Ministerial Meeting Opening the Intergovernmental Conference on the Accession of Serbia to the European Union, General EU Position' (Brussels, 21 January 2014) 6, 9 <http://www.seio.gov.rs/upload/documents/pristupni_pregovori/neg_frame.PDF> accessed 11 November 2015.

⁵²² 'Special attention should be given to the rights of vulnerable groups, particularly the Roma, as well as to the effective implementation of legislation on the protection of minorities, the non-discriminatory treatment of national minorities throughout Serbia, and tackling discrimination on the basis of sexual orientation.' See *ibid* 7.

other chapters, the Commission will ask a third of the Member States to open or close other negotiating chapters.’ This practice of giving priority to the rule of law chapters was established during Croatia’s accession negotiations.

As a result, the rule of law including human rights and issues concerning Kosovo are the key priorities over which the EU can block the entire negotiation process. Although accession talks were officially launched in January 2014, negotiations on the first two chapters –financial control, and the normalization of relations with Kosovo - started only in December 2015, while the rule of law chapters were not opened until the end of 2015 and, as a result, we could not assess them as part of the present report.

5. Screening Report of Chapter 23⁵²³

The screening report of chapter 23, published in 2013, is a key document in that it compares Serbian legislation with the EU acquis, and identifies shortcomings regarding each human rights issue. It is based on this comparison that the EU defines the opening and closing benchmarks of Chapter 23. It gives insight to the content of the requirements applied to specific rights, and since the Screening Report reviewed all human rights, it does not capture the importance of various human rights. It is thus difficult to see which rights were treated as priorities. The present study will refer to the Screening Report while analysing the content of particular conditionality requirements, such as concerning personal data protection (III.B.1), minority rights or Roma rights (III.C.1).

The screening report in general concluded that the legal and institutional framework was in place, but problems were related to administrative capacity on human rights and practical implementation. It demanded action concerning a number of human rights issues:

- It called on Serbia to fully align its legal framework and institutions on the prohibition of torture with international standards;
- to strengthen the capacities of the Ombudsman;
- to improve prison conditions and reduce ill treatment by the police;
- to fully respect religious freedoms;
- better protect journalists from threats and violence, and to improve the legal framework of media freedom by implementing the Media Strategy;
- adopt the anti-discrimination action plan and measures to improve gender equality;
- focus on ending discrimination against LGBT,
- pass a law on protecting persons with mental disabilities;
- improve the protection of rights of children;
- ensure access to justice by granting free legal aid;
- adopt an action plan on a better implementation of the existing provisions protecting national minorities;
- adopt a strategy and action plan on the Roma with the aim to improve registration of people, respect international standards on forced evictions, and dedicate more resources to the education and health care of the Roma;

⁵²³ EC, ‘Screening report Serbia, Chapter 23’ (n 489).

- provide full access for refugees and IDPs to documentation and housing;
- adequately prosecute hate crimes;
- bring legislation on personal data protection in line with the *acquis*.⁵²⁴

Following up on the Screening Report on Chapter 23, the Serbian government drafted an action plan to carry out its recommendations, which was adopted by the Commission in September 2015.⁵²⁵ The action plan sets out specific measures to promote particular human rights, with specific deadlines, some of which expired in 2015.⁵²⁶ Although no systematic information is available on whether and to what extent the government met the goals set in the action plan, some objectives were clearly not fulfilled, for instance in the area of free legal aid a new law was to be adopted during the third quarter of 2015, which has not happened so far.⁵²⁷ Yet, it would be too early to provide an assessment of this action plan. Based on the Screening Report of Chapter 23, the Serbian government also prepared an action plan on the judiciary, which was approved by the EU at the end of 2015. This action plan foresees amending the constitution with the aim to increase judicial independence, which is one of the weakest points of the rule of law in Serbia. The 2015 Commission report on Serbia noted that the constitution and laws provide room for political influence on the judiciary while government authorities tend to put pressure on courts through publicly commenting on trials, while often information is leaked to the press friendly to the government about ongoing investigations.⁵²⁸ Judicial reform has been a recurring essential condition in progress reports and enlargement strategies, without which the effective protection of human rights cannot be guaranteed.

6. IPA 2010-2015: financial priorities

While establishing the EU's human rights priorities, it is also important to see where the EU channels its money. We examined IPA priorities by looking at the IPA annual national programmes for the period of 2010-2013, the IPA Multi-annual Indicative Planning Document (2011-2013) for the Republic of Serbia under IPA I, and the Annual Country Action Programme for Serbia for 2014 and 2015 under IPA II. We also consulted government documents displaying the projects financed from the national IPA programmes.

During the 2007-2013 IPA budget period, there was no separate budget line for fundamental rights yet human rights issues were supported as part of the sector of social development. From 2007 to 2013 14,2% of all IPA financing was spent on social development focusing on employment, human resources development, the protection of minorities, anti-discrimination policies and early education, improving

⁵²⁴ EC, 'Screening report Serbia, Chapter 23' (n 489) 32-40.

⁵²⁵ Republic of Serbia, 'Action Plan for Chapter 23, draft,' April 2015, Negotiation Group for Chapter 23, <<http://www.mpravde.gov.rs/files/Action%20Plan%20Ch%2023%20Third%20draft%2020.04.2015..pdf>> accessed 3 February 2016.

⁵²⁶ Tanjug, 'EC adopts Serbia's draft Action Plan for Chapter 23' B92 (25 September 2015) <http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=09&dd=25&nav_id=95564> accessed 30 September 2016.

⁵²⁷ Aleksić (n 476) 16.

⁵²⁸ Freedom House, 'Nations in Transit 2016: Serbia' (n 431).

conditions of vulnerable groups, such as the Roma, IDPs, migrants and refugees (12% for 2011-2013).⁵²⁹ Thus IPA support concentrated on social, economic and minority rights when it came to human rights.⁵³⁰ During the period of 2011-2013, the EU adopted a balanced approach to supporting various sectors through IPA, almost all categories among them social development receiving 12% each, except for the sector of Environment, Climate Change & Energy which had a 14% share of all funding. Besides IPA, Serbia also received support through EIDHR program around € 1.2 million for the period 2007-2013, focusing on 'strengthening the role of civil society in promoting human rights and democratic reform, in supporting the peaceful conciliation of group interests and consolidating political participation and representation.'⁵³¹ For 2015 the EU called for proposals at € 2 million under EIDHR.⁵³²

In 2010 the IPA program targeted only three human rights related causes: improving the penal system that is prison conditions (€ 5.5 million), civil society development (€ 2 million) and integration of returnees and refugees (€ 1.8 million).⁵³³ 26 projects, with a total budget amounting to € 174.8 million, were approved under the Financing Agreement for 2010, 5.3% of which was spent on the mentioned human rights related programs.⁵³⁴

In 2011 the implementation of anti-discrimination policies (€ 2.2 million) and minority protection, supporting IDPs, refugees and returnees (€ 7 million), and persons with mental disabilities and mental illness (€ 4.7 million) were the objectives of the IPA annual program.⁵³⁵ Projects also aimed at the preparation of labour market institutions for the implementation of European employment policy. Anti-discrimination policies of the program were mainly dedicated to children, women, the elderly and

⁵²⁹ European Court of Auditors, 'EU Pre-accession Assistance to Serbia, Special Report' 9 <http://www.eca.europa.eu/Lists/ECADocuments/SR14_19/QJAB14019ENN.pdf> accessed 15 February 2016.

⁵³⁰ European Commission, 'Annex, Instrument for Pre-accession Assistance (IPA) Multi-annual Indicative Planning Document MIPD 2011-2013, Republic of Serbia' 22 <http://ec.europa.eu/enlargement/pdf/mipd_serbia_2011_2013_en.pdf> accessed 11 November 2015.

⁵³¹ European Commission, 'Instrument for Pre-accession Assistance (IPAI) 2014-2020, Serbia Civil Society Facility and Media Programme 2014-2015' 10 <http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2014/multi-country/ipa_ii_2014-031-605.07_2015-037-653.07-csf-and-media-serbia.pdf> accessed 3 February 2016.

⁵³² WelcomEurope, 'EIDHR – Country-Based Support Scheme – Serbia – 2015' <<http://www.welcomeurope.com/appel-projet-europeen/consulter+6518.html>> accessed 3 February 2016.

⁵³³ European Commission, 'Commission Decision on adopting a National Programme on Serbia under the IPA-Transition Assistance and Institution Building Component for the year 2010' C/2010/2409, 6 <http://ec.europa.eu/enlargement/pdf/serbia/ipa/2010/adopted_documents_np_serbia_2010.pdf> accessed 11 November 2015.

⁵³⁴ 'Projects in the national programmes for the Republic of Serbia 2007-2013, Projects under the financing agreement for the national programme for IPA 2010' <<http://www.evropa.gov.rs/Evropa/ShowDocument.aspx?Type=Home&Id=545>> accessed 11 November 2015.

⁵³⁵ European Commission, 'Commission Implementing Decision of 8.7.2011 adopting a National programme on Serbia under the IPA – Transition Assistance and Institution Building Component for the year 2011' 4-10 <http://ec.europa.eu/enlargement/pdf/serbia/ipa/2011/comm_native_c_2011_4972_1_en_decision_execution_c_ommision.pdf> accessed 9 December 2015.

IDPs.⁵³⁶ Altogether € 32.1 million was spent on social development, which represented around 18% of the € 178.5 million total funding during 2011.

In 2012 besides promoting labour rights, Roma were an emphasised target of IPA assistance within the sector of social development, worth of € 24.1 million. Concerning the Roma, the goal was supporting the implementation of the Roma strategy 'in the areas of access to basic rights and civic participation, labour market, education, health, social welfare, adequate housing and job creation.'⁵³⁷ Moreover, as 'the main focus of the sector as whole is poverty reduction among and social inclusion of the vulnerable and minority groups who are often faced with multiple factors of exclusion,' women, youth with behavioural problems, persons with disabilities or minority issues, are given 'special consideration' by these programs.⁵³⁸ In addition, improvement of living conditions of IDPs and returnees and their sustainable return to Kosovo (€ 15.2 million) and strengthening media freedom (€ 3 million) were also IPA objectives in 2012 (the latter meant support for 'aligning of the legal framework in the media sector with EU standards according to the Serbian Media Strategy, implementation of the new laws, as well as strengthening freedom of expression and increased professionalism of journalists').⁵³⁹ In 2012 Serbia received €144.12 million IPA support, with 29.3% spent on these various human rights causes.

For the year 2013 human rights related issues were targeted as part of supporting justice and home affairs, social development and civil society. In total € 196.6 million was allocated to Serbia in 2013, out of which € 2.5 million was spent on the Civil Society Facility, € 23.02 million on justice and home affairs and € 23.6 million on social development, amounting to 25% of the overall funding.⁵⁴⁰

Within the sector of justice and home affairs, human rights related goals concerned improvement of the prison system, implementation of anti-discrimination policies and the protection of minorities, the implementation of asylum policies, and legal aid and assistance to IDPs, refugees and returnees. Minority councils, improvement of conditions for migrants, refugees and IDPs and proper treatment of all prisoners were supported as part of the program targeting the justice sector, just like the rights defenders of LGBTI people to provide free legal aid.⁵⁴¹

⁵³⁶ 'Projects in the national programmes for the Republic of Serbia 2007-2013' (n 534).

⁵³⁷ European Commission, 'Sector fiche – IPA National programmes / Component I' 11-16 <http://ec.europa.eu/enlargement/pdf/serbia/ipa/2012/pf_6_social_development.pdf> accessed 9 December 2015.

⁵³⁸ *ibid.*

⁵³⁹ 'Projects within the financing agreement for the national programme IPA 2012, for component I – Transition assistance and institution building' 5 <<http://www.evropa.gov.rs/Documents/Home/DACU/12/104/105/106/109/projects%20IPA%202012.pdf>> accessed 17 December 2015.

⁵⁴⁰ European Commission, 'Annex A – National programme for Serbia under the IPA – Transition Assistance and Institution Building Component for the year 2013' <http://ec.europa.eu/enlargement/pdf/serbia/ipa/2013/national_programme_for_serbia_2013.pdf> accessed 17 December 2015.

⁵⁴¹ EC, 'Sector fiche – IPA National programmes / Component I' (n 537) 25-26.

As part of social development, EU provided support for the protection of minorities, anti-discrimination and education. Social inclusion measures aimed at supporting children, elderly and people with disabilities; ‘enhancing education and social welfare measures and effective community services’ to marginalised and vulnerable groups, and ‘support[ing] implementation of the Roma Strategy through further improvement of living and housing conditions among the Roma population living in informal settlements, and through improving access to and quality of health services for the Roma population.’

Expected results also included the improvement of ‘effectiveness of Serbian unemployment policy for unemployed people with disabilities’.⁵⁴² Thus labour rights, right to education, children’s rights, women, Roma, IDPs and refugees, and socially vulnerable and disabled persons, national minorities, prison conditions and LGBTI were set as financial objectives of social development in 2013.

IPA II started in 2014. For the year 2014, the Annual Country Action Programme adopted by the Commission included the following human rights objectives: the fight against human trafficking, improved living conditions of IDPS and returnees, adequate capacities for accommodation of asylum seekers, social inclusion of Roma through further investment in sustainable housing solutions, better access of Roma pupils to the education system, strengthening national Roma inclusion mechanisms at local level, and improving general access to education. Total EU contribution amounted to € 115 million, out of which € 5.6 million was allocated to addressing trafficking in human beings and support for IDPS and refugees, while € 19.4 million to education, employment and social policies targeting the youth and the Roma. Thus 21.7% was dedicated to human rights related issues.⁵⁴³

In 2015 the EU allocated a € 216.1 million to Serbia, out of which € 4.5 million was aimed at civil society support. Within the rule of law and fundamental rights section, improving prison conditions and war crimes prosecution were the human rights related causes that received financing (as part of the € 12,1 million earmarked for Action 5 ‘Support for the Justice Sector’).⁵⁴⁴

IPA targets have to follow enlargement strategies yet in reality focus on a few issue areas that are selected together with the country’s government in question (see Table 19). This means in practice that IPA programs concentrate on a few areas from among those highlighted by the enlargement strategy. There were also a few IPA objectives – human trafficking and right to asylum – that were not among the issues emphasised in enlargement strategies. Right to education projects also received IPA financing yet this goal

⁵⁴² European Commission, ‘Commission Implementing Decision of 18.12.2013 adopting a National programme for Serbia under the IPA Transition Assistance and Institution Building Component for the year 2013,’ Brussels, 18.12.2013 C(2013) 9450 final, 18 <http://ec.europa.eu/enlargement/pdf/serbia/ipa/2013/national_programme_for_serbia_2013.pdf> accessed 9 December 2015.

⁵⁴³ European Commission, ‘Commission Implementing Decision of 11.12.2014 adopting an Annual Country Action Programme for Serbia for the year 2014’ C(2014) 9422 final (Brussels, 11.12.2014) <<http://ec.europa.eu/enlargement/pdf/serbia/ipa/2014/ipa-2014-serbia-action-programmes.pdf>> accessed 11 November 2015.

⁵⁴⁴ European Commission, ‘Commission Implementing Decision of 9.12.2015 adopting a Country Action Programme for Serbia for the year 2015’ C(2015) 9015 final (Brussels, 9.12.2015) <<http://ec.europa.eu/enlargement/pdf/serbia/ipa/2015/ipa-2015-serbia-action-programmes.pdf>> accessed 15 February 2016.

in itself was never an enlargement strategy priority, and was only mentioned in relation to the Roma community.

The overview has supported the conclusion that the stated human rights priorities of the EU only partially overlap with the priorities discernible from IPA documents and spending.

7. EU-Serbia dialogues

The EU embarked on a number of dialogues with Serbia through three major forums following the entry into force of the SAA on the 1 September 2013. The Stabilization and Association Council (SAC) is the main political body overseeing the implementation of the SAA, with the participation of the Serbian Prime Minister and the High Representative of the Union for Foreign Affairs and Security Policy and the President of the European Commission. So far it had two meetings, similarly to the Stabilization and Association Committee (SA Committee) which assists the SAC at the expert level and includes representatives of the Serbian government, such as the deputy director of the Serbian European Integration Office (SEIO), and of the European Commission's Directorate General for the Enlargement. The Stabilization and Association Parliamentary Committee (SAPC) is a forum of Serbian parliamentary deputies and members of the European Parliament. It already held three meetings since November 2013.⁵⁴⁵

The first Parliamentary Committee meeting in November 2013 emphasized the importance of the **anti-discrimination** reform, called on Serbia to protect the **rights of minorities** including guaranteeing the competencies of minority councils and to continue economic and social inclusion of the **Roma**. It also noted the situation of **LGBT** and praised the work of **independent institutions**, among them that of the Ombudsman, the Commissioner for Information of Public Importance, and the Commissioner for Protection of Equality.⁵⁴⁶ The second meeting in 2014 reflected on the same list of issues, that is **anti-discrimination; LGBT rights; national minority** protection with a focus on minority councils and cultural rights including 'education, access to the media, proportional representation in public administration and right to use minority languages'; **Roma rights** notably the registration process and economic inclusion of the Roma. Yet, this document also mentioned **media freedom** by 'draw[ing] attention to the challenges of media freedom in Serbia', while also pointed to the importance of cooperation with **civil society** organizations that plays a special role 'in guaranteeing fundamental rights and freedoms'.⁵⁴⁷ The third such meeting as of March 2015 devoted quite a space to problems of **media freedom** despite the adoption

⁵⁴⁵ Ministry of Foreign Affairs of the Republic of Serbia, 'EU and Regional Cooperation – Stabilisation and Association Agreement' (14 August 2013) <<http://mfa.rs/en/foreign-policy/eu/cooperation-between-the-republic-of-serbia-and-the-european-union-on-sectoral-policies/12447-stabilisation-and-association-agreement>> accessed 5 November 2015.

⁵⁴⁶ European Union – Serbia Stabilisation and Association Parliamentary Committee, '1st Meeting, Declaration and recommendations' (Belgrade, 15 November 2013) <<http://www.europarl.europa.eu/document/activities/cont/201311/20131118ATT74607/20131118ATT74607EN.pdf>> accessed 5 November 2015.

⁵⁴⁷ European Union – Serbia Stabilisation and Association Parliamentary Committee, '2nd Meeting, Declaration and recommendations' (Strasbourg, 26-27 November 2014) <<http://www.europarl.europa.eu/document/activities/cont/201411/20141127ATT94142/20141127ATT94142EN.pdf>> accessed 5 November 2015.

of a set of media laws in 2014 that was generally welcomed by the EP, beside mentioning again **national minorities, the Roma, and LGBT**. This declaration also commented on **war crimes prosecution** ‘welcome[ing] recent arrests and processing of the war crimes in Serbia’.⁵⁴⁸

While the SAC as the highest-level forum of bilateral dialogues focuses on the most important political developments and devotes most attention to the Belgrade–Pristina relations, in the SA Committee political criteria among them those related human rights have been reviewed in more detail. The first SA Committee meeting which was held in in March 2014, emphasized the importance of **independent regulatory and control bodies** and called on the authorities to follow up on their findings. This point emerged also in the 2014 Progress Report of the Commission, which drew attention to authorities’ disregard of the Ombudsman’s recommendations. It further welcomed the adoption of the **anti-discrimination** strategy and underscored the importance of protecting **minorities, the Roma and LGBT** people. As it was revealed from the joint press release of the first SA Committee meeting, the EU focuses on social inclusion of the Roma also because it sees it as a means to stop the flow of unfounded asylum applicants to the EU.⁵⁴⁹

The second SA Committee in February 2015 stressed **anti-discrimination, LGBT, women’s rights and the Roma, minority rights, media freedom and personal data protection**.⁵⁵⁰ Table 25 highlights the human rights priorities as reflected by the dialogue also shedding some light on the content of the EU’s human rights conditions.

Anti-discrimination
effective implementation of the action plan
Serbia should reduce discrimination against LGBTI, including ‘the peaceful holding of the Pride Parades’ promote gender equality and reduce violence against women, which seem to be an enduring problem in Serbia; Serbia was asked to take measures to tackle domestic violence and gender inequality at the work place
fight discrimination of Roma children
Protection of minorities
in the area of ‘education, use of minority languages, access to media and to religious services in minority languages, and adequate representation in public administration’ (following the FCNM Advisory Committee recommendations; to be addressed in the action plan Serbia has to prepare as a benchmark of opening Chapter 23)
revision of the law on national minority councils (in line with the 2014 decision of the Constitutional Court)

⁵⁴⁸ European Union – Serbia Stabilisation and Association Parliamentary Committee, ‘Third Meeting, Declaration and recommendations’ (Belgrade, 19-20 March 2015) <https://trackingenlargement.files.wordpress.com/2015/03/serbia-recommendations_3sapc_final_en.pdf> accessed 11 November 2015.

⁵⁴⁹ European Integration Office, Serbia, ‘The EU-Serbia Stabilisation and Association Committee held its first meeting’ (04.03 2014) <<http://www.seio.gov.rs/news.101.html?newsid=1647>> accessed 5 November 2015.

⁵⁵⁰ European Commission and European Integration Office, Serbia, ‘Joint Press Release, The EU-Serbia Stabilisation and Association Committee held its second meeting’ (Belgrade, 26 February 2015) <http://www.seio.gov.rs/upload/documents/Vesti/2015/SSP_eng_full.pdf> accessed 11 November 2015.

new Roma strategy focusing on education, housing and employment, and ‘with a view of over-representation of Roma among Serbian asylum seekers to the EU’
sustained efforts to improve the situation of refugees and displaced persons
Freedom of expression and media freedom
welcoming the media package legislation in August 2014 meant to increase the transparency of the media ownership and funding
lack of transparency ‘over media ownership and sources of media advertising and funding,’ ‘accompanied by a tendency to self-censorship in the media’
‘deteriorating conditions of exercise of freedom of expression’, affecting not only the journalists but ‘independent bodies, human rights defenders’
public authorities should react and condemn hate speech and threats
‘provide information on the implementation of the media package from August 2014’ outlining how the government intends to improve conditions guaranteeing freedom of expression
Data protection
harmonise ‘constitutional and legislative framework with Community Law and other European and international legislation on privacy’

Table 25. Actions the EU asked for in the SA Committee meeting, February 2015

Source: EU Delegation Serbia, ‘Meeting agenda on action plans chapter 23/24, March 2015’ on file with the author.

8. Council conclusions

The list below includes conclusions of the General Affairs Council and the European Council between 2010 and 2015 that addressed Serbia, and highlights which human rights issues were mentioned by these, if any. These are probably the most important political documents of the EU defining strategic directions and setting the main priorities of the EU’s agenda. This also means that Council conclusions deal with only the most important political issues.

Council conclusions	Human rights priorities
October 2010	full cooperation with ICTY ⁵⁵¹
December 2011	ICTY cooperation ⁵⁵²
February 2012	respect for and the protection of minorities ⁵⁵³
December 2012	Roma rights, protection of minorities, anti-discrimination, LGBT rights, women’s rights ⁵⁵⁴

⁵⁵¹ Council of the European Union, ‘Press release, 3040th Council meeting’ General Affairs (Luxembourg, 25 October 2010) <<http://data.consilium.europa.eu/doc/document/ST-15349-2010-INIT/en/pdf>> accessed 11 November 2015.

⁵⁵² European Council, ‘Conclusions’ (9 December 2011) 5 <<http://data.consilium.europa.eu/doc/document/ST-139-2011-REV-1/en/pdf>> accessed 11 November 2015.

⁵⁵³ Council of the European Union, ‘Council conclusions on Enlargement and the Stabilisation and Association Process’ 3150th General Affairs Council meeting’ (Brussels, 28 February 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/128255.pdf> accessed 11 November 2015.

⁵⁵⁴ Council of the European Union, ‘3210th General Affairs Council meeting Brussels’ (11 December 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/134234.pdf> accessed 11 November 2015.

June 2013	none ⁵⁵⁵
December 2013	media freedom, rights of the Roma, the protection of minorities, anti-discrimination, women's rights, LGBT rights ⁵⁵⁶
December 2014	Roma rights, the protection of minorities with a specific focus on education, use of minority languages, access to media and religious services in minority languages, anti-discrimination, LGBT rights, women's rights, and freedom of expression ⁵⁵⁷
December 2015	freedom of expression and the media, the Roma, the protection of minorities, tackling discrimination on the basis of sexual orientation or gender identity ⁵⁵⁸

Table 26. Human rights priorities in Council conclusions, 2010-15

Altogether, EU-Serbia dialogues and Council conclusions focused on a few selected issues that were the most important for the EU from the aspect of its conditionality policy towards Serbia. These were minority protection and Roma rights, anti-discrimination, media freedom and LGBT rights. In addition, Council conclusions and the last SAC meeting also stressed women's rights, and until 2011 emphasized war crimes prosecution.

9. European Parliament resolutions

The European Parliament's resolutions are non-binding instruments of the EU, which express 'a political desire to act in a given area.'⁵⁵⁹ At the same time, EP resolutions are not without significance when it comes to the enlargement process since the EP's consent is required for the accession treaty to be signed giving a practical veto right to the Parliament over a new member's accession. Moreover, through its influence over the EU's budget – the EP has to approve the EU's multiannual financial framework (MFF) and decides together with the Council about the EU's annual budget – it can shape the financial aspects of enlargement. In addition, the Parliament's Committee on Foreign Affairs appoints standing rapporteurs for all candidate and potential candidate countries, and regularly consults with the Commissioner for Enlargement Negotiations, high-level government officials, experts and civil society representatives. As was mentioned above, the EP also engages in dialogue with parliaments of candidate and potential

⁵⁵⁵ European Council, 'Conclusions' (27/28 June 2013) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137634.pdf> accessed 11 November 2015.

⁵⁵⁶ General Affairs Council, 'Council Conclusion on Enlargement and Stabilisation and Association Process' (17 December 2013) 10 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017952%202013%20INIT>> accessed 11 November 2015.

⁵⁵⁷ Council of the European Union, 'Council conclusions on Enlargement and Stabilisation and Association Process, General Affairs Council meeting' (Brussels, 16 December 2014) 7 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146326.pdf> accessed 11 November 2015.

⁵⁵⁸ Council of the European Union, 'Outcome of Proceedings' 15356/15 ELARG 73 COWEB 150 (Brussels, 15 December 2015) 12 <<http://data.consilium.europa.eu/doc/document/ST-15356-2015-INIT/en/pdf>> accessed 11 November 2015.

⁵⁵⁹ European Parliament, 'Fact Sheets on the European Union, The Enlargement of the Union' <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_6.5.1.html> accessed 19 November 2015.

candidate states. For all these reasons, the EP's resolutions, which the Parliament publishes each year responding to Commission's progress reports, do have an influence on EU policy, including the EU's human rights priorities.⁵⁶⁰

The relevance of the EP's activities was revealed in 2004 when ethnically motivated violence was on the rise in Vojvodina, the northern province of Serbia.⁵⁶¹ The weak response of the police until October 2004, marked by the low number of perpetrators arrested and by light sentences, indicated that authorities who did not see solving this problem as a priority. The EP issued a resolution on the harassment of minorities in Vojvodina in 2004,⁵⁶² and sent a fact-finding mission, which published its report in January 2005.⁵⁶³ In September 2005 it issued another resolution in which it condemned the violence and called for the restoration of Vojvodina's pre-1990 autonomy. The resolution reflected the view according to which central authorities mostly ignored the incidents and have failed to react properly, thus on such bases demanded more autonomy for Vojvodina.⁵⁶⁴ Beside the EP, other international actors also got involved such as the Hungarian government and the Council of Europe, which raised their voice several times in 2004 against the incidents.⁵⁶⁵ Altogether, international attention was needed for central authorities to take firm action, after which the frequency of incidents dropped sharply.

Between 2003 and 2009 the EP's priorities centred on ICTY cooperation, minority rights, anti-discrimination and media freedom as reflected by its resolutions during that period (see Table 4 in the Annex). From 2011 resolutions discuss a wider range of human rights subjects (Table 27).⁵⁶⁶

⁵⁶⁰ *ibid.*

⁵⁶¹ Various organizations presented different numbers of incidents, which reflected not only their political leanings but also the difficulty of defining what exactly can be called an incident. The Provincial Secretariat for Regulations, Administration and National Minorities recorded 206 incidents between December 2003 and November 2004. The Ombudsman for Vojvodina counted 76 incidents between January and September 2004. Florian Bieber and Jenni Winterhagen, 'Ethnic Violence in Vojvodina: Glitch or Harbinger of Conflicts to Come?' (2006) ECMI Working Paper 27, 3-4 <http://www.ecmi.de/download/working_paper_27.pdf> accessed 24 October 2014.

⁵⁶² European Parliament, 'Resolution on harassment of minorities in Vojvodina' P6_TA(2004)0016 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2004-0016+0+DOC+PDF+V0//EN>> accessed 24 October 2014.

⁵⁶³ European Parliament, 'Report of the Fact-finding mission by the European Parliament ad hoc delegation to Voivodina and Belgrade (28-31 January 2005)' (March 2005) <http://www.europarl.europa.eu/intcoop/euro/id/dsee/reports/2005_01_31_vojvodina_en.pdf> accessed 19 November 2015.

⁵⁶⁴ European Parliament, 'European Parliament resolution on the defence of multi-ethnicity in Vojvodina' P6_TA(2005)0369 (29 September 2005) <<http://eur-lex.europa.eu/Notice.do?val=433738:cs&lang=mt&pos=1&phwords=&checktexte=checkbox>> accessed 19 November 2015.

⁵⁶⁵ The Secretary General, the Committee of the Ministers of the CoE and the Parliamentary Assembly of the CoE addressed the problems in Vojvodina in 2004 in several resolutions. See Committee of Ministers, ResCMN(2004)12 (17.11.2004); Parliamentary Assembly, 'Functioning of the democratic institutions in Serbia and Montenegro' Resolution 1397 (2004).

⁵⁶⁶ EP resolutions always respond to the previous year's progress report, which is why we looked at resolutions from 2011 to 2015.

2011 ⁵⁶⁷	2012 ⁵⁶⁸	2013 ⁵⁶⁹	2014 ⁵⁷⁰	2015 ⁵⁷¹
Media freedom	Media freedom	Media freedom	Media freedom	Media freedom
IDPs				
	Right to asylum			
Roma	Roma	Roma	Roma	Roma
War crimes prosecution	War crimes prosecution	War crimes prosecution	War crimes prosecution	War crimes prosecution
Missing persons		Missing persons	Missing Persons	Missing persons
Ill treatment				
Right to privacy				
National minorities	National minorities	National minorities	National minorities	National minorities
Property rights (restitution)	Property rights (restitution)	Property rights (restitution)	Property rights (restitution)	Property rights (restitution)
Women	Women	Women	Women	
	Children			Children
Anti-discrimination	Anti-discrimination	Anti-discrimination	Anti-discrimination	Anti-discrimination
		People with disabilities		
LGBT	LGBT	LGBT	LGBT	LGBT
Labour and trade union rights	Labour and trade union rights	Labour and trade union rights	Labour and trade union rights	Labour and trade union rights
Prison conditions				
	Ombudsman	Independent institutions	Independent institutions	Independent institutions
			Human trafficking	

Table 27. Priorities in European Parliament resolutions assessing the progress of Serbia, 2011-2015

By comparing human rights issues highlighted by EP resolutions and EU progress reports, there are some overlaps but also pronounced differences. While EP resolutions also put a great emphasis on themes that have been a priority of almost every EU instrument – media freedom, national minorities, Roma rights, anti-discrimination and LGBT rights – there are some human rights subjects, i.e. labour and trade union

⁵⁶⁷ European Parliament, 'European Parliament resolution of 19 January 2011 on the European integration process of Serbia' 6-9 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0014+0+DOC+XML+V0//EN>> accessed 19 November 2015.

⁵⁶⁸ European Parliament, 'European Parliament resolution of 29 March 2012 on the European integration process of Serbia' (2011/2886(RSP)) 7-12 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0114+0+DOC+XML+V0//EN>> accessed 19 November 2015.

⁵⁶⁹ European Parliament, 'European Parliament resolution of 18 April 2013 on the 2012 Progress Report on Serbia' (2012/2868(RSP)) 8-11 <[http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2013/04-18/0186/P7_TA\(2013\)0186_1_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2013/04-18/0186/P7_TA(2013)0186_1_EN.pdf)> accessed 19 November 2015.

⁵⁷⁰ European Parliament, 'European Parliament resolution of 16 January 2014 on the 2013 progress report on Serbia,' (2013/2880(RSP)) 6-9 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0186+0+DOC+XML+V0//EN>> accessed 19 November 2015.

⁵⁷¹ European Parliament, 'European Parliament resolution of 11 March 2015 on the 2014 Progress Report on Serbia' (2014/2949(RSP)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0065+0+DOC+XML+V0//EN>> accessed 19 November 2015.

rights and property rights that the EP clearly treats as priorities unlike the European Commission. The Commission's progress reports also discuss these issues yet in the main body of the text not among priorities. Besides EP resolutions, no other EU instrument has mentioned these two subjects as priorities.

The EP resolutions every year repeated the EP's concern with labour and trade union rights and drew attention to the fact that despite constitutional guarantees labour and trade union rights still remained limited, and called on Serbia to further enhance these rights.⁵⁷² At the same time, the Commission's progress reports maintained that labour and trade union rights were guaranteed by the Constitution and broadly respected.⁵⁷³ Nevertheless, the progress reports also contain critical remarks similar to that of the EP, for instance that the social dialogue remains weak and the consultation of social partners irregular.

The topic of property rights is in effect about the right to restitution of property confiscated by Communist authorities after World War II, which has been addressed differently by the EP than the Commission. The main difference between how the EP and the Commission have treated this subject is in their approach to its minority aspect. The 2012 and 2014 EP resolutions explicitly discussed restitution in the context of minority rights, while in 2012 the EP resolution also connected it to the issue of collective guilt (to be explained below). In 2012 the EP urged Serbia 'to ensure continuity of restitution of private property without any kind of discrimination, especially on ethnic grounds; welcome[d] the fact that the Act on Rehabilitation which has been adopted solves controversial issues concerning collective guilt and that individual responsibility prevails in this law; call[ed] on the government to guarantee efficiency and non-discrimination in the process of implementation of the Act on Restitution and the Act on Rehabilitation'.⁵⁷⁴ In 2014 the EP called 'for improvements in order to eliminate discrimination in existing laws and practices concerning property restitution for members belonging to national and ethnic minorities.' The EU Commission never mentioned the problem of collective guilt in the context of restitution (or in any other context) and in general avoided addressing the problems of restitution concerning national minorities in Serbia.

Here at issue were ethnic Hungarians and Germans who were excluded from the restitution process by a law on restitution the Serbian parliament adopted in September 2011.⁵⁷⁵ Those who had served in occupying forces during WWII and their descendants were denied the possibility of restitution, which applied to practically all male Germans and Hungarians of military age at the time as a result of mandatory drafting. In addition, Hungarians of three villages – Csúrog, Zsablya and Mozsor – were collectively declared guilty of war crimes in 1944, thus their descendants were also automatically excluded from restitution. The Hungarian government threatened to block Serbia's EU integration process in the autumn of 2011 over these issues and tried to lobby for including these problems in the Progress Report in October

⁵⁷² *ibid.*

⁵⁷³ EC, '2014 Serbia Progress Report' (n 482) 48.

⁵⁷⁴ EP, 'Resolution of 29 March 2012 on the European integration process of Serbia' (n 568) 7-12.

⁵⁷⁵ 'Law on Property Restitution and Compensation' (Zakon o vraćanju oduzete imovine i obeštećenju, Official Gazette RS no. 72/2011). Ethnic Germans were also affected but there are hardly any left in Serbia. However, their descendants living outside of Serbia can also file claims for rehabilitation and restitution.

2011, albeit unsuccessfully.⁵⁷⁶ This controversy was resolved in December 2011 when Serbia modified the law on rehabilitation to address Hungary's concerns.⁵⁷⁷ The principle of collective guilt was removed from the law and only persons found guilty of war crimes by a court or administrative organ on an individual basis were denied restitution, and even such people could request rehabilitation. Subsequently, the process of restitution and rehabilitation was regularly monitored by EP resolutions, with a general reference to ethnic minorities without mentioning Hungarians or Germans specifically.

10. Conclusions

By reviewing all these instruments, it becomes visible where the EU put its moral weight, political pressure and money. Some issues emerge as clear priorities targeted by almost each of these instruments, which can be called the 'first order' issues. These are the protection of minorities and the Roma, mentioned in all documents, and supported by IPA programmes. Freedom of the expression and the media, anti-discrimination and LGBT rights were emphasised by most of the instruments. EU-Serbia dialogues and Council Conclusions were also mostly concentrated on these five subjects. The 2015 EU Progress Report again highlighted these issues in its discussion of the overall situation of human rights in Serbia, while also adding persons with disabilities, persons with HIV/AIDS and the persecution of hate crimes to this list of priorities.⁵⁷⁸

There is also a 'second order' of human rights themes, right to fair trial, prison conditions, gender equality and women's rights, rights of the child, refugees and IDPs and the prosecution of war crimes that were high on the agenda of quite a few instruments. Among these women's rights and gender equality stands out that has received increasing attention from the EU during the last few years, reflected also by Council conclusions and EU-Serbia dialogues that have treated it as a priority.

Finally, there are a few topics that have been rarely prioritised, such as freedom of movement, right to privacy, freedom of thought, conscience and religion, freedom of assembly and association, labour and trade union rights, socially vulnerable and disabled persons, right to education, property rights, right to asylum, protection of personal data, and human trafficking. These are the issues that were not high on the EU's agenda considering all these instruments.

At the same time, the EU did not completely neglect these 'lower priority' subject areas either. The yearly progress reports and the Screening Report on Chapter 23 addressed all of them in detail. A few of these, such as freedom of movement and right to asylum were emphasized and meticulously monitored during the visa liberalisation process. Moreover, some aspects of freedom of movement such as registration of the Roma and refugees have been closely followed up by progress reports as part of the rights of Roma

⁵⁷⁶ Imre Szilágyi, 'A vajdasági magyarok és a szerbiai vagyon-visszaszármaztatási törvény' ['Hungarians of Vojvodina and the Serbian law on restitution'] (2011) HIIA Papers T2011/27 <http://www.balkancenter.hu/pdf/Tanulmányok_2011.pdf> accessed 23 September 2014.

⁵⁷⁷ 'Law about rehabilitation,' (Zakon o rehabilitaciji, objavljen u 'Sl. glasniku RS', br. 92/2011 od 7. decembra 2011. Godine.).

⁵⁷⁸ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 17.

and refugees and IDPs. Religious freedom was monitored in the context of minority rights. Others, such as labour and trade union rights and property rights received a lot of attention in EP resolutions.

The EU's human rights priorities have also evolved over time. While the 'first order' issues were treated as priorities during the entire period examined, the number of instruments focusing on them has increased gradually, especially during the last two years. Some human rights, such as women's rights and gender equality seem to have become more important over the years, while the role of the ombudsman has also received more emphasis. By contrast, some issues seem to have lost their significance, such as freedom of assembly and association, freedom of thought, conscience and religion or property rights. These had been listed among priorities in enlargement strategies until 2012, thereafter their importance subsided.

Before moving on to how actual human rights performance shaped conditionality, we close our assessment of priorities with a table that illustrates the different orders of priorities. Table 28 provides a quick overview of the various human rights goals, with the 'least prioritized' issues in bold and 'second order' issues italicized. The visa liberalisation was the first instrument examined here which constituted a strong tool of human rights promotion, because conditions were clear and the rewards imminent. Since the fulfilment of these criteria was directly tied to the liberalised visa regime, it was worth to investigate to what extent Serbia met these requirements. Such an analysis of the visa liberalisation process also allowed for looking at the content of EU conditions and evaluating to what extent Serbia fulfilled these.

The EU's demands included formal actions such as the adoption of legal measures, strategies and action plans, yet implementation was also part of the requirements. We concluded that Serbia's compliance was partial, mostly comprising of adopting legislation, strategies, action plans, while in general implementation including setting up functioning institutions remained limited. Even meeting the necessary legal requirements remained incomplete such as in the area of data protection or asylum where the adopted laws were not harmonised with EU *acquis* or with other relevant pieces of domestic legislation. Concerning the right for asylum, Serbia adopted most (though not all) of the required legislation, yet failed to set up a functioning infrastructure. Monitoring by the EU was also sporadic, since concerning citizen's rights and the rights of minorities, most attention was devoted to registering refugees, IDPS and Roma and to Roma rights in general, while anti-discrimination and the protection of national minorities were not followed up in the post visa liberalisation reports, nor was data protection. Thus the EU carried out partial monitoring of the conditions of the Visa Roadmap and accepted Serbia's partial compliance, which did not constitute a sufficient reason to suspend the visa free regime. The visa liberalisation conditionality even contributed to human rights violations in terms of increasing discrimination against marginalised groups by border police. Thus, human rights protection was rather a nominal than a substantial goal of the visa liberalisation focused the most on security issues, which explains the EU's half-hearted approach to human rights monitoring.

At the same time, the visa liberalisation gave an impetus to a number of human rights reforms, which continued to be monitored in the yearly progress reports and addressed by other instruments. A number of important laws were drafted because of the visa liberalisation process, such as the law on anti-discrimination, asylum, and data protection. Serbia also set up the office of equality commissioner,

adopted the action plan on human trafficking and a Roma strategy and ratified the Council of Europe's convention against trafficking in human beings and the Additional Protocol to the Council of Europe's convention on personal data protection in order to meet the visa liberalisation requirements. The Commissioner for Information of Public Importance whose office was set up in 2004 received new powers and competencies of personal data protection also as a result of the visa liberalisation conditionality.

	2010 ES-CC	2011 CO	2012 ES-CC	2013 ES-PR	2013 CO	2014 NF	2014 PR	2015 ES-PR
Observance of international human rights law				X		X	X	
Freedom of movement								
Ombudsman		X		X, EP, DP		X	X, EP, DSA	X
Right to fair trial	X		X	X, IPA		X	X	X
Prohibition of torture and ill treatment	X,	EP	X			X		
Right to privacy		EP						
Prison conditions	X, IPA	X, EP,	X,	X, IPA			X	
Freedom of thought, conscience and religion	X		X					
Freedom of expression incl. freedom & pluralism of the media	X, EP	X, EP	X, EP, IPA	X, EP, CC	X	X	X, EP, DP, DSA, CC	X, CC
Freedom of assembly and association	X	X	X					
Labour and trade union rights		EP, IPA	X, EP, IPA	EP, IPA			EP	
Anti-discrimination	X	X, EP, IPA	X, EP, CC	X, EP, DP, CC, IPA	X	X	X, EP, DP, DSA, CC	X, CC
Socially vulnerable and disabled persons	X	IPA	IPA	X, EP, IPA			X	X
LGBTI	X	EP	X, EP, CC	X, EP, DP, CC, IPA	X	X	X, DP, DSA, CC	X, CC
Right to education			IPA	IPA			IPA	
Right to property	X	X, EP	X, EP	EP			EP	
Gender equality and women's rights	X	EP, IPA	X, EP, CC, IPA	X, EP, CC, IPA			X, CC	CC
Rights of the child	X	EP, IPA	X	X, IPA			X, EP	
Respect for and protection of minorities and cultural rights	X	X, EP, IPA	X, EP, CC, IPA	X, EP, DP, CC, IPA	X	X	X, EP, DP, DSA, CC	X, CC
Roma rights	X, EP	X, EP	X, EP, CC, IPA	X, EP, DP, CC, IPA	X	X	X, EP, DP, CC, IPA	X, CC
Refugees, IDPs	X, EP, IPA	X, EP, IPA	X, IPA	X, IPA			X, IPA	X
Right to asylum			EP	IPA			IPA	
Protection of personal data	X						X	
Human trafficking	X			EP			IPA	
War crimes prosecution	CC	X, EP, CC	X, EP	X, EP			X, EP	X
Missing persons		EP		X, EP			X, EP	

Table 28. Human rights priorities in EU documents, Serbia, 2010-2015

*Legend:**X: priorities of the examined instruments;**EP: included in EP's resolution in the relevant year;**IPA: priorities in IPA;**DP: priorities in parliamentary dialogue;**DSA: priorities in the dialogue in the stabilisation and association committee;**CC: priorities in Council conclusions.**Sources:**2010 ES: 2010 Enlargement strategy, country conclusions;⁵⁷⁹**2011 CO: 2011 Commission opinion,⁵⁸⁰**2012 ES-CC: 2012 EU enlargement strategy, country conclusions,⁵⁸¹**2013 ES-PR: 2013 EU Enlargement Strategy and Progress Report highlighted HR issues;⁵⁸²**2013: 2013 April EC opinion on Serbia's membership application,⁵⁸³**2014 NF: January 2014 Negotiation Framework,⁵⁸⁴**2014 PR : 2014 EU Progress Report highlighted HR issues,⁵⁸⁵**2015 ES-PR: 2015 EU Enlargement Strategy and Progress Report Highlighted HR issues.⁵⁸⁶*

⁵⁷⁹ EC, 'Communication, Enlargement Strategy and Main Challenges 2010-2011' (n 507) Annex 2: Conclusions of the Progress Reports on Croatia, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Serbia, Kosovo, Turkey and Iceland.

⁵⁸⁰ EC, 'Commission Staff Working Paper – Analytical Report Accompanying the document...' (n 447) 7-8.

⁵⁸¹ EC, 'Communication, "Enlargement Strategy and Main Challenges 2012-2013"' (n 262) 59.

⁵⁸² EC, 'Commission Staff Working Document, Serbia 2013 Progress Report' (n 510) 4.

⁵⁸³ EC, 'Joint Report on Serbia's progress... (n 519) 8-9.

⁵⁸⁴ Conference on Accession to the European Union – Serbia, 'Ministerial Meeting..., General EU Position' (n 521) 6, 9.

⁵⁸⁵ In 2014 the summary of findings in the beginning of the progress report was identical with the annex on Serbia in the enlargement strategy.

⁵⁸⁶ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 17-18; EC, 'Communication, EU Enlargement Strategy 2015' (n 285) 14, 19-20.

C. Performance in the human rights field

Given that Serbia's relations with the EU were upgraded to the highest level before actual membership, we would expect improving trends in human rights. Serbia in principle has sufficiently met the Copenhagen criteria and among them the respect of human rights and the protection of minorities, which is the condition of launching accession negotiations. To see how human rights conditionality reflected the human rights situation on the ground, we need to move beyond the approach of the previous section that looked at consistency and coherence on the level of stated goals in EU documents. The present section will assess human rights conditionality by contrasting it to the actual trends and changes that shaped the domestic human rights scene in Serbia.

A precursory view of the field shows striking contradictions. Looking at general human rights performance, according to human rights NGOs, the situation in Serbia has worsened for the last few years – the time when Serbia became a candidate and started accession negotiations.⁵⁸⁷ In the assessment of the Freedom House, Serbia's overall democracy score declined from 2010 to 2016, and gradually followed negative tendencies during the last two years.⁵⁸⁸ The trends have been similar concerning media freedom, while judicial independence has stagnated at a low level since 2008.⁵⁸⁹

Similarly, the Belgrade Centre for Human Rights concluded in their yearly human rights report which is the most detailed, systematic and comprehensive such analysis published in the country, that 'the human rights situation in Serbia deteriorated in 2013 over 2012, particularly as regards the freedom of expression, social and economic rights, views on rule of law principles and discrimination', while 'in 2014 compared to the previous year, particularly in respect of social and economic rights, freedom of expression, the status of independent regulatory authorities and the judicial reform.'⁵⁹⁰ Freedom of expression and media freedom worsened during the recent period according to all the important international media watchdogs such as Freedom House, Reporters Without Borders or IREX (see section 3 below). Not only human rights NGOs were of such an opinion. The EU's Progress Report as of 2014 similarly underlined negative trends regarding the freedom of expression and 'independent bodies, human rights defenders and independent journalists'.⁵⁹¹

The worsening tendencies in the area of social and economic rights were reconfirmed by the Ombudsman's report from 2013. It reiterated that 'the exceptionally high unemployment rate and the aggravated economic situation have continued to deteriorate the material basis for the exercise of the citizens' economic, social and cultural rights.'⁵⁹² Many employers fail to pay the contributions to health and pension insurance funds provided for under the law, while 'the authorities did not act upon such an illegal evasion', as a result 'the affected worker (and his/her dependents) will be stripped off the

⁵⁸⁷ Interview at Yucom, Belgrade Centre for Human Rights and Praxis (Belgrade, March 2015).

⁵⁸⁸ We looked at Freedom House scores from 2010 to 2016. The scores of 2016 were published in the spring of that year thus reflect conditions of the previous year, which still fits the frames of our analysis.

⁵⁸⁹ Freedom House, 'Nations in Transit 2015: Serbia' (n 442).

⁵⁹⁰ Belgrade Centre for Human Rights, 'Human Rights in Serbia 2013' (Belgrade, 2014) 2 <<http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2014/04/Human-Rights-in-Serbia-2013.pdf>> accessed 15 May 2015; Belgrade Centre for Human Rights, 'Human Rights in Serbia 2014' (n 484).

⁵⁹¹ EC, '2014 Serbia Progress Report' (n 482) 3.

⁵⁹² Protector of Citizens, Serbia, '2013 Annual Report' (2014) 9 <<http://www.ombudsman.rs/attachments/2013%20Annual%20Report%20of%20the%20Protector%20of%20Citizens.pdf>> accessed 12 February 2016.

right to health insurance, or/and pension.’⁵⁹³ There were many reports about violations of union rights, workers being paid less than the minimum wage and many not receiving salaries for months.⁵⁹⁴ For the year 2014 the same negative trends continued according to the Ombudsman.⁵⁹⁵ The Ombudsman himself came under increasing attacks from tabloid media and government officials, which will be discussed in more detail in section III.C.3 on media freedom.

The bleak picture of human rights fits into the wider context. Democratic development and the rule of law have followed a similarly negative trajectory, especially since 2014. After the general elections that year, a new coalition government was formed by SNS and SPS. The two parties got 202 of the 250 seats. This concentration of power contributed to the gradual deterioration of democratic governance, rule of law and human rights. While this overwhelming support let the government move forward with normalising its relations with Kosovo and some fiscal and economic reforms, it moved to crack down on potential critics, such as NGOs, independent media, independent institutions or political parties. The government’s growing intolerance of any checks on its power explains the worsening conditions of media freedom, independent institutions and the lack of judicial independence.⁵⁹⁶

In the meantime, Serbia made important steps in moving forward with EU integration as it officially started accession negotiations in January 2014 and opened the first negotiation chapters in early 2016. Both milestones were preceded by important agreements with the Kosovo government. After signing the Brussels Agreement in April 2013, Serbia received the date of launching the EU accession talks. In May 2015, the Enlargement Commissioner explicitly linked the actual start of the membership talks to concrete results in the normalisation process with Pristina.⁵⁹⁷ The agreement reached with Pristina on the association of Serbian municipalities in August 2015 allowed for the opening of the first negotiation chapters.⁵⁹⁸ Altogether, even though the respect for human rights and the judiciary reform were set as essential conditions in the progress reports, they did not carry the same weight in the EU’s conditionality policy as the normalisation process with Pristina (or previously ICTY cooperation). While, based on the SAA, the whole integration process could be put on hold because of insufficient progress in democratic principles and human rights, the EU never resorted to suspending or delaying the process on such grounds. By contrast, it did apply negative conditionality concerning ICTY cooperation and the normalisation process with Kosovo.⁵⁹⁹ This variation in the EU’s approach suggests that in practice the EU prioritises the Kosovo question over human rights, at least for the time being, because that issue has a security relevance for the EU. Once Chapter 23 will be open for negotiations, lack of compliance with a single condition from the area of rule of law, that includes human rights questions, could prevent the EU from closing the chapter. This might slow down the accession process, but it would mean a more consistent and comprehensive conditionality policy. Yet, so far the EU has never

⁵⁹³ *ibid.*

⁵⁹⁴ *ibid.*

⁵⁹⁵ Protector of Citizens, Serbia, ‘Regular Annual Report of the Protector of Citizens for 2014’ Ref. No. 7919 (14 March 2015) 3 <<http://www.ombudsman.rs/attachments/Annual%20Report%202014.pdf>> accessed 12 February 2016.

⁵⁹⁶ Freedom House, ‘Nations in Transit 2015: Serbia’ (n 442).

⁵⁹⁷ ‘Hahn Conditions Serbia’s EU Talks on Kosovo,’ *Balkan Insight* (Belgrade, 8 May 2015) <<http://www.balkaninsight.com/en/article/xserbia-eu-talks-depend-on-progress-with-kosovo>> accessed 12 April 2016.

⁵⁹⁸ Freedom House, ‘Nations in Transit 2015: Serbia’ (n 442).

⁵⁹⁹ See the introductory section of this chapter.

linked any rule of law conditions to incremental stages along the accession path, except for the requirement of cooperation with the Hague Tribunal.

For our study, we selected three human rights issues, national minorities, Roma rights and media freedom in order to look at the content of EU conditionality and assess its impact. These three subject areas were supported every year by almost every EU instrument applied during the time period examined, and we classified them earlier as 'first order' priorities. The analysis will try to isolate the specific effects of the EU's actions and studies the implementation, or lack thereof, of conditions and their results.

1. Protection of national minorities

Serbia is an ethnically diverse country where minorities constitute around 20% of the population.⁶⁰⁰ Based on the 2011 census, Serb constitute 83 per cent of the population of Serbia, if counted without Kosovo, the rest being Hungarians (3.5%), Roma (2.1%), Bosniaks (2%), Croats (0.8%), Montenegrins (0.5%), Albanians (0.5%), Vlachs (0.5) and Romanians (0.4%). The northern province of Vojvodina is more multi-ethnic than the rest of the country where the share of the majority population of Serbs is only 66%.

The situation of minorities has been influenced by the general political context in Serbia and more specifically by the state of democratic institutions (section III.A). The law on national minorities and the law on national minority councils constitute the main building blocks of the legal framework of minority protection. Both laws were passed under the pro-EU DS-led governments, in 2002 and 2009 respectively.⁶⁰¹ The main provisions of the law on national minorities were also enshrined in the new Serbian constitution adopted in 2006. The law on national minorities, adopted in 2002, provides a sound legal basis for the protection of minority rights and grants minorities de facto cultural autonomy through allowing minorities to set up their elected minority councils, through which they can 'exercise their rights of self-government regarding the use of language and script, education, information and culture'.⁶⁰² The same law provided for setting up national councils, the main bodies of minority self-governance. Yet, there had been no progress, during Koštunica's time, on the adoption of the additional law on the election of minority councils. That law, regulating the status, work and election of national councils, was passed only in 2009, when the new coalition government accelerated reforms in order to comply with the EU's conditions. Minority councils were first elected in 2010.

In principle, minorities are granted far-reaching rights in Serbia, including the right to preserve their language, culture and national identity; to receive education in their mother tongue until high school; to use their national symbols; to obtain public information in their languages; and to have appropriate representation in the public sector. Problems as usual arise at the level of implementation that often

⁶⁰⁰ Minority Rights Group International, 'Serbia' <<http://minorityrights.org/country/serbia/>> accessed 12 April 2016.

⁶⁰¹ Law on Protection of Rights and Freedoms of National Minorities, Official Gazette of FRY No. 11., 27 February 2002; Law on National Councils of National Minorities, Official Gazette of RS, No 72/2009.

⁶⁰² See Art. 19 of the Law on Protection of Rights and Freedoms of National Minorities, Official Gazette of the Federal Republic of Yugoslavia (FRY), No. 11, 27.02.2002, translated by the OSCE Mission to FRY. Functioning of minority councils is regulated in greater detail in the National Councils of National Minorities Act (NCNMA, Sl. glasnik RS, 72/09.).

falls short of the rights granted on paper.⁶⁰³ As the Advisory Committee of the FCNM pointed out, minority protection with respect to supporting minority cultures and use of minority languages is at a higher standard in Vojvodina than in other parts of Serbia. Education up to the level of secondary schools in minority languages is broadly available, however in some cases the lack of adequate textbooks or the absence of political will of local authorities to apply the relevant law 'prevent the greater use of these opportunities'.⁶⁰⁴

Following Đinđić's death in late 2003 and throughout the year of 2004, ethnically motivated violence increased in Vojvodina.⁶⁰⁵ This coincided with the electoral success of the Serbian Radical Party, that have gained the highest share of the votes in Vojvodina during the December 2003 parliamentary and the September 2004 local elections. Although the radicals could not pull together a government coalition at the national level, the minority government formed by Koštunica in 2004 enjoyed the outside support of the SPS, the party led by Milošević's loyalists. These political developments represented a nationalist turn after the four years rule of the Đinđić (Živković after March 2003) government, and were somewhat surprising considering that during the 1990s Vojvodina was mostly spared from ethnic violence.⁶⁰⁶

Since the SNS came to power in 2012, several minority rights protection provisions were repealed by the Constitutional Court. The changes concerned the competencies of minority councils and the autonomy of Vojvodina (to be discussed in more detail below). This new activism of the Court fits into the recent negative trend in the area of democracy and rule of law, including human and minority rights.

Recent steps like media privatization and the elimination of television license fees foreseen by the 2014 media reform package (see in Section 3) can undermine minority media, which could not survive without state support. Violent inter-ethnic incidents continue to occur despite the fact that their number has declined from former levels. While minorities are by and large adequately represented at the local level where they live in concentrated areas, they continue to be underrepresented in state-level public institutions, especially Bosniaks and Albanians who are 'almost entirely absent from state-level administrations even in the areas where they are the majority population at local level'.⁶⁰⁷ Such problems have to be addressed in the action plan Serbia has to prepare as an opening benchmark of Chapter 23.⁶⁰⁸

EU progress reports and EP resolutions regularly point out these shortcomings and draw attention to the need for 'consistent implementation of the legislation throughout Serbia especially in the areas of education, the use of languages, and access to media and religious services in minority languages', and improvement of 'national minorities' representation in public administration bodies'.⁶⁰⁹ The

⁶⁰³ Beata Huszka, 'Decentralisation of Serbia: The Minority Dimension' (2007) CEPS Policy Brief 137 <<http://aei.pitt.edu/7530/1/no137.pdf>> accessed 22 April 2016.

⁶⁰⁴ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 6, 8, 9, 44.

⁶⁰⁵ Bieber and Winterhagen (n 561).

⁶⁰⁶ With the exception of some Croat villages, such as Hrtkovci. Humanitarian Law Center, *Human Rights Violations in the Territory of former Yugoslavia 1991-95* (1997) 83-105.

⁶⁰⁷ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 6, 8, 9, 44.

⁶⁰⁸ Serbia has to prepare two action plans on Chapter 23, one specifically devoted to minority rights. While the general action has been already adopted, the action plan on minority rights

⁶⁰⁹ EC, '2014 Serbia Progress Report' (n 482) 49.

Commission in its progress reports had long been urging Serbia to pass the law on minority councils, before it was adopted in 2009, and generally supported granting cultural autonomy to minorities.⁶¹⁰ The Screening Report of Chapter 23 repeated the same demands related to better implementation, while also asked for amending the Law on National Minority Councils required by a Constitutional Court decision as of 2014 (to be discussed below). The Screening Report also called for the preparation of an action plan on implementing existing minority rights provisions, taking into account the recommendations issued in the third Opinion of the Advisory Committee on Serbia in the context of the Framework Convention for the Protection of National Minorities.⁶¹¹

Implementation is hard to measure, and the EU makes no reference to numbers, statistics, or numerical targets, while monitoring these issues, that could serve as indicators to set standards and measure progress. This problem was pointed out by the study commissioned by the EP in 2012. Yet, the monitoring process carried out both by the EC and the EP has not changed.⁶¹² For instance, the Commission's progress reports track trends in ethnic incidents without mentioning numbers. By contrast, the progress reports regularly publish the number of complaints related to minority issues received by the provincial ombudsman.

Both the EC and the EP devotes considerable attention to the functioning of minority councils: the election of minority councils, the practical implementation of competencies granted by law, and the problems of individual minority councils such as that of Bosniaks and Albanians. As was noted above, the EU has been urging Serbian authorities to amend the law on national councils, which is necessary in light of a January 2014 ruling of the Constitutional Court. The Court invalidated many competencies of minority councils, including the one to found institutions and to take decisions in areas relevant to the preservation of minorities' identity, yet 'do not regard culture, education, official use of minority languages and scripts or information', and their right to initiate proceedings before the Constitutional Court.⁶¹³ Other competencies were partially deemed unconstitutional. For instance, minority councils no longer have the right to appoint members of management boards. These included directors of schools where most of the classes are taught in minority language. These councils are entitled no more to cooperate with 'state authorities of foreign states'.⁶¹⁴ Tamás Korhétz, head of the Hungarian National Minority Council at the time noted:

Some of the repealed provisions ensured such collective minority rights that the National Council of the Hungarian National Minority has been enjoying and enforcing legally for several years, therefore this decision reduces the acquired level of minority rights. ... These repealed

⁶¹⁰ Szöcsik (n 35) 120.

⁶¹¹ EC, 'Screening report Serbia, Chapter 23' (n 489).

⁶¹² European Parliament, Directorate-General for External Policies, Policy Department, 'Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans' (2012) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET\(2012\)457114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET(2012)457114_EN.pdf)> accessed 27 October 2014.

⁶¹³ Case No. IUz 882/2010; 'Minority councils protest court ruling in Serbia,' *SETimes* (13 February 2014) <http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/02/13/feature-01> accessed on 23 September 2014.

⁶¹⁴ Belgrade Centre for Human Rights, 'Human Rights in Serbia 2014' (n 484).

*provisions primarily refer to our rights related to the management of educational institutions primarily attended by Hungarians.*⁶¹⁵

Adding, however, that the

*Constitutional Court's decision affirms the administrative competencies in general of directly elected national councils, the right of national councils to become founders of public educational and cultural institutions. It should be emphasized that the rights and competencies of national councils in the fields of culture and official language use have remained entirely untouched.*⁶¹⁶

The legislature is yet to bring the law in line with the Constitutional Court's decision, a requirement also set by the EU.

The EU regularly monitors regional developments affecting minorities, specifically the situation in Vojvodina, Presevo valley and Sandzak. Vojvodina, an autonomous province in Serbia's north is home to 25 ethnic groups including Hungarians, Serbia's largest ethnic minority.⁶¹⁷ Serbia's Bosniak minority resides in the southwestern region of Sandzak,⁶¹⁸ while Albanians live in concentrated areas in Presevo valley, in southern Serbia. The EU closely follows political developments surrounding the autonomy of Vojvodina, which is seen as a beacon of minority protection. Nevertheless, in general, the EP has been much more outspoken about its support for Vojvodina's autonomy than the Commission. When in July 2012 the Constitutional Court eliminated 22 competencies of the Autonomous Province of Vojvodina,⁶¹⁹ the Progress Report simply noted this fact without evaluation.⁶²⁰ By contrast, the EP expressed its concern 'about the legal and political uncertainty regarding the autonomy of Vojvodina'.⁶²¹

⁶¹⁵ Tamás Korhecz, 'Statement of Dr Tamás Korhecz, president of HNMC concerning the decision of the Constitutional Court on the constitutionality of the Law on National Councils' (20 January 2014) <<http://archiv.mnt.org.rs/en/6-Sajtokozelemlenyek/913-Statement-of-Dr-Tamas-Korhecz-president-of-HNMC-concerning-the-decision-of-the-Constitutional-Court-on-the-constitutionality-of-the-Law-on-National-Councils>> accessed 15 May 2015.

⁶¹⁶ *ibid.*

⁶¹⁷ Serbs make up 66 per cent of Vojvodina's population, while Hungarian, the largest minority community 13%. Statistical Office of the Republic of Serbia, '2011 Census of Population, Households and Dwellings in the Republic of Serbia, Population, Ethnicity, Data by municipalities and cities' <<http://media.popis2011.stat.rs/2012/Nacionalna%20pripadnost-Ethnicity.pdf>> accessed 15 May 2015.

⁶¹⁸ Around 140.000 Bosniaks live in Serbia, who constitute appr. 60 per cent of the three municipalities of Sandzak. Source: Serbian census 2011. Appr. 60 000 Albanian live in Presevo valley's three municipalities constituting 66% of the local population. See International Crisis Group, 'Southern Serbia: In Kosovo's Shadow' (27 June 2006) Policy Briefing 43, 3 <<http://www.crisisgroup.org/en/regions/europe/balkans/serbia/b043-southern-serbia-in-kosovos-shadow.aspx>> accessed 15 May 2015.

⁶¹⁹ 'A Vajdaság helyzetéről tárgyalt az unió bővítési biztosával Pásztor István' *Vajdaság Ma* (7 November 2012) <<http://www.vajma.info/cikk/vajdasag/14372/A-Vajdasag-helyzeterol-targyalt-az-unio-bovitesi-biztosaval-Pasztor-Istvan.html>> accessed 15 May 2015.

⁶²⁰ European Commission, 'Commission Staff Working Document, Serbia 2012 Progress Report' COM(2012) 600 final (Brussels, 10.10.2012) 17 <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf> accessed on 30 August 2014.

⁶²¹ European Parliament, 'European Parliament resolution of 18 April 2013 on the 2012 Progress Report on Serbia' (2012/2868(RSP)) 8-11 <[http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2013/04-18/0186/P7_TA\(2013\)0186_1_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2013/04-18/0186/P7_TA(2013)0186_1_EN.pdf)> accessed 19 November 2015.

In December 2013 the Constitutional Court found a number of provisions of Vojvodina's statute unconstitutional. At the same time the Serbian parliament still has to adopt a law on Vojvodina's own resources, an obligation set by the constitution. In response, the EP raised its voice in 2014 for the protection of Vojvodina's cultural diversity, and called on the government not to weaken the autonomy of Vojvodina but 'to submit the law on the competences and financing of the Autonomous Province of Vojvodina without any further delay.'⁶²² In contrast to the EP, the Commission did not urge Serbia to act regarding Vojvodina's autonomy, only stated that '[t]he law on Vojvodina's resources has yet to be adopted as prescribed by the Constitution'.⁶²³

Concerning Presevo Valley and Sandzak, the EU focuses not only on how minority rights concerning culture, education and language use are implemented in practice, but also on structural causes of discrimination affecting minorities who live in these two, traditionally disadvantaged regions. Reflecting this structural approach, investments and infrastructure development in these regions are recognised as key in fighting discrimination against Albanians and Bosniaks who suffer from higher rates of unemployment and poverty than the Serbian average.

Indicating the central role minority rights play in the human rights conditionality of the EU towards Serbia, the latter now has to prepare a separate action plan on minority rights as a benchmark of opening Chapter 23 beside the general action plan applying to the whole chapter. The action plan serves the purpose of having a more detailed and broader programme of minority protection than that contained in Chapter 23, which would also take into account recommendations of the Council of Europe.⁶²⁴ Altogether, the action plan will focus on the implementation of already existing minority rights legislation, such as proportional representation in the public sector, a better practice of language rights and expanding possibilities of education in minority languages.

2. Roma rights⁶²⁵

Roma rights are discussed separately from minority rights in EU documents, reflecting a different approach to Roma rights than to minority rights in general. While the protection of national minorities centres on cultural rights such as language use, education in minority languages, and the practice of culture, in the case of the Roma the focus is on improving socio-economic conditions, thus support is geared towards the promotion of social and economic rights. The main guidelines of the protection of the Roma were set in the EU Framework for National Roma Integration Strategies. This required all Member States and enlargement countries to adopt national Roma strategies (see more on the general framework in the chapter on Bosnia and Herzegovina, section II.E.3).⁶²⁶ The EU Framework was developed against the backdrop of growing Roma migration to Western Europe from Central-Eastern

⁶²² European Parliament, 'European Parliament resolution of 16 January 2014 on the 2013 progress report on Serbia,' (2013/2880(RSP)) 6-9 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0186+0+DOC+XML+V0//EN>> accessed 19 November 2015.

⁶²³ EC, '2014 Serbia Progress Report' (n 482) 49.

⁶²⁴ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499).

⁶²⁵ During 2011 census 147,604 persons declared themselves to be Roma, although unofficial estimates put the real number between 250,000 and 500,000. *ibid*.

⁶²⁶ 'EU Enlargement Factsheet, The Roma in Southeast Europe', <http://ec.europa.eu/enlargement/pdf/publication/2014/20140408_factsheet_roma_in_southeast_europe_en.pdf> accessed on 30 August 2014.

and Southeast Europe.⁶²⁷ When Roma migration from Serbia and Macedonia accelerated after the liberalisation of visa regimes, even legal migration of Roma citizens from these states was restricted under EU pressure, threatening with the reintroduction of visa requirements.⁶²⁸ The visa liberalisation contributed to racial profiling on the borders and led to restrictions of the freedom of movement and even legal migration for citizens of Roma origin.⁶²⁹ Commenting on EU policies concerning the Roma in the Western Balkans, Müller sees a possible contradiction in the EU's action: while the EU's progress reports stress discrimination against the Roma in the Western Balkan countries, EU Member States maintain that Roma can have no legitimate claim for asylum. He also underlined that the EU and the Member States do not take into consideration that many Roma refugees fled Kosovo because of the war and have often nothing to return to while they have to face poverty and discrimination upon return.⁶³⁰ Altogether the EU pursued the double policy of keeping Serbian and Macedonian Roma outside of its borders by implicitly encouraging discriminatory practices in border inspection regimes, at the same time it kept criticising these states for discriminating against the Roma and put pressure on the authorities to improve their socio-economic conditions.

According to the 2011 population census there are 147,604 Roma in Serbia, however the Council of Europe estimates their number at 600,000, and unofficial estimates put the real number between 250,000 and 500,000.⁶³¹ About 23,000 are IDPs from Kosovo, and 17% of these Roma IDPs did not have identity cards or birth certificates in 2011.⁶³² In 2013 around 30,000 people mostly Roma lived without documents in Serbia, which means they did not have access to education, health care, social security or political participation.⁶³³ This concerns homeless individuals or those that do not have a temporary or permanent residence registered, including thousands of Roma living in informal settlements and their children who are also not registered at birth. Around 10 per cent of Serbia's 210,000 IDPs from Kosovo are Roma while '15 000 to 20 000 Roma have been unable to register as displaced persons due to a lack of documentation and/or lack of access to the relevant procedures'.⁶³⁴ Importantly, most Roma in Serbia live in illegal settlements what makes them particularly vulnerable.⁶³⁵

The Roma were a priority of all instruments during the examined period thus the EU used its whole arsenal of instruments to support the Roma. In addition to the tools analysed above, three Roma seminars were held in Serbia, in 2011, 2012 and 2015, which strongly influenced IPA programming and contributed to placing such a high emphasis on Roma issues. Importantly, a significant share of IPA financing has been dedicated to Roma support. According to an assessment report from 2015 (prepared by the EPRD Consortium, financed and published by the Commission), IPA programming changed from 2012/2013 onwards – primarily in Serbia, Bosnia Herzegovina and Albania. As the report concluded, 'this was characterised by more IPA funding for Roma, with a more strategic focus and better sequencing. This is partly due to the Roma Seminars, Progress Reports and the more explicit link

⁶²⁷ Stephan Müller, 'European Framework for National Roma Policies and the Roma in the Western Balkans' (2013) 10(1) *European Yearbook of Minority Issues Online* 397-398.

⁶²⁸ Kacarska, 'Minority Policies and EU Conditionality' (n 34).

⁶²⁹ *ibid.*

⁶³⁰ Müller (n 627) 398, 412.

⁶³¹ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 3.

⁶³² EPRD Consortium, 'Thematic Evaluation...' (n 362) 11, 70.

⁶³³ Decade of Roma Inclusion Secretariat Foundation, 'Civil Society Monitoring' (n 497) 10.

⁶³⁴ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 9.

⁶³⁵ EC, 'Sector fiche – IPA National programmes / Component I' (n 537) 16.

between accession prospects and the need to address Roma human rights.⁶³⁶ Roma became a high priority of IPA II as well. The objective of the Commission for IPA II is to 'shift in focus from policy and institution building' to 'projects directly making an impact on the lives of individual Roma persons'.⁶³⁷

According to the mentioned IPA Roma Communities assessment report, 'Serbia has so far received by far the highest allocation of funds for Roma inclusion of all IPA countries, both in absolute terms, and as a share of total IPA funds'.⁶³⁸ The main reason for that is allocations for displaced people and the return process. 20% of IDPs from Kosovo living in Serbia and still in need are Roma. In total 57 million euros were dedicated to Roma inclusion measures from the IPA budget for Serbia from 2007 to 2013, which represented 4 per cent of all IPA funding for Serbia even if some of this money covered support for the state institutions and IDPs.⁶³⁹ Its greatest share, 26% was devoted to housing, 22% to education, 21% to IDPs, 19% to social inclusion and social services, 6% to employment, while the rest to anti-discrimination, civil society, civil documentation and economic development. At the same time, some apparent gaps could be identified in IPA financing, such as health, gender issues, culture, and political participation. The assessment report noted that some of these gaps are logical as they result from donor coordination, such as SIDA and the World Bank providing support for health projects. Others, such as gender or political participation are more difficult to account for.⁶⁴⁰ Despite suffering discrimination on multiple levels, Roma women were not targeted specifically by any projects or actions under IPA (at least until 2013).

Regarding impact, in the area of housing, results were assessed as 'insignificant' in light of the scale of actual needs.⁶⁴¹ At the same time, education projects were evaluated positively which might have a positive influence over time.⁶⁴² In addition, IPA support was key in providing free legal aid to Roma helping to register a substantial number of people without certificates and identity documents.⁶⁴³

The IPA Roma Communities assessment report is especially critical about the lack of local ownership, the weak role of civil society actors, the lack of prioritization capacity from state government bodies, as well as a general lack of information, i.e. no reliable statistics that could guide evaluation. One recognized way to tackle this problem is identifying local good practices. For instance, the 'Roma Seminars' are meetings organized by the European Alliance of Cities and Regions for Roma Inclusion (EACRRI), a network of more than a hundred regions and municipalities from almost thirty countries. The Alliance was 'set up by the Council of Europe's Congress of Local and Regional Authorities with the support of Special Representative of the Secretary General for Roma Issues'.⁶⁴⁴ EU enlargement goals can largely benefit from such initiatives helping local ownership through supporting Roma

⁶³⁶ EPRD Consortium, 'Thematic Evaluation...' (n 362) 11.

⁶³⁷ *ibid*, 19.

⁶³⁸ *ibid*, 31.

⁶³⁹ *ibid*, 9.

⁶⁴⁰ *ibid*, 206-211.

⁶⁴¹ 'In the last ten years 200 Roma IDP families have received income generation grants, 280 families received construction material packages, 80 families received village houses, 60 families benefited from social housing in protected environment (...). For a population of 17 to 20,000 IDP Roma, this is a small contribution to the overall needs.' *ibid* 76.

⁶⁴² *ibid*, 44.

⁶⁴³ *ibid*, 7.

⁶⁴⁴ European Alliance of Cities and Regions for Roma Inclusion, 'About Us' <<http://www.roma-alliance.org/en/page/33-about-us.html>> accessed on 30 August 2014.

participation in local politics (which is central, for instance to the joint CoE/EU program ROMACT) as well as local know-how.⁶⁴⁵

The importance of sharing local experiences, models and good practices, as a more practical tool of Roma inclusion, cannot be underestimated. Successful local examples can become national policies and can vitalize conditionality as well, including thematic goals like special focus on the women and the youth or fighting anti-gypsyism.⁶⁴⁶ More importantly, this should not be limited to norm transfer from EU Member States to non-members, but inside non-member countries as well. As part of model-setting the Congress of Local and Regional Authorities awards Dosta! Congress Prizes to 'strengthen the role of local authorities in the field of Roma and minority rights' protection'.⁶⁴⁷

The conclusions of the 2015 Roma Seminar highlight issues similar to those voiced by the European Commission in its 2015 Progress Report, albeit with more optimism and less specificity about the existing challenges. The priorities concern the role of state institutions and the media, availability of data, civil registration (with registration of now 'legally invisible' persons ending by the end of 2015), closing the education and employment gap, social protection and healthcare, housing and freedom of movement. Under the latter heading, the abuse of the visa-free regime, more information to Roma communities, the Readmission Agreement (EU-Serbia) and the post-readmission integration are mentioned in both documents.⁶⁴⁸ It is hard not to see this element as an intrusion of the EU security considerations into the human rights realm.

Serbia adopted in 2010 a Roma strategy until 2015, which was accompanied by two action plans, in 2010 and 2013.⁶⁴⁹ The adoption and implementation of the Roma action plans has been at the centre of the EU's conditionality concerning Roma rights. The measures foreseen by the action plans aimed to address problems of registration, housing, health care, unemployment and education, priority areas set under the EU Framework for National Roma Integration Strategies. The 2014 EU Progress Report welcomed the starting of the implementation of the second action plan in June 2013, and recorded some positive results such as concerning the registration of people without documents. Among the successes, it also noted some institutional developments such as better cooperation with local authorities on providing housing and other forms of assistance. The 2014 Progress Report similarly to the 2012 Report mentioned that 170 teaching assistants and 75 health mediators were working with Roma people. Otherwise, the reports never bring any data or statistics, which would illuminate existing trends, that are hard to recognise as more or less the same problems are repeated each year: the

⁶⁴⁵ Council of Europe Office in Belgrade, 'First National Seminar in Serbia on Roma Inclusion facilitated sharing of experiences and good-practices' (2015) <http://www.coe.org.rs/eng/news_sr_eng/?conid=3668> accessed on 30 August 2015.

⁶⁴⁶ As underlined by Denis Huber, Executive Secretary of the Chamber of Regions and Head of the Department for Cooperation, Administration and External Relations of the Congress of Local and Regional Authorities: Denis Huber, 'Opening statement, First Serbian National Seminar' (Belgrade, 12 June 2015) <http://www.roma-alliance.org/uploads/bloc334/opening_statement_by_denis_huber___serbian_national_seminar.pdf> accessed on 30 August 2015.

⁶⁴⁷ Congress of Local and Regional Authorities, 'Dosta! – Congress Prize for Municipalities' <http://www.coe.int/t/congress/files/topics/dosta/default_EN.asp> accessed on 30 August 2015.

⁶⁴⁸ Social Inclusion and Poverty Reduction Unit, Government of the Republic of Serbia, 'Operational Conclusions, Seminar: Social Inclusion of the Roma in the Republic of Serbia' (Belgrade, 18 June 2013) <http://socijalnoukljucivanje.gov.rs/wp-content/uploads/2014/05/Operational-conclusions-Roma-seminar-2013-ENG_11-September-FINAL-Serbia.doc> accessed on 30 August 2015.

⁶⁴⁹ *ibid*, 206-211.

continuation of forced evictions, the high dropout rate of Roma children from schools, and the poor access of the Roma to health care and employment.⁶⁵⁰

The 2015 Progress Report noted that in most areas progress was slow and uneven, yet good results had been achieved with regard to civil registration.⁶⁵¹ Under pressure of the European Commission and civil society representatives, in 2012 the Serbian parliament adopted an amendment to the Law on Non-Contentious Procedure, allowing persons who have not been registered at birth to file a petition with a court to determine their date and place of birth. In addition, the Ombudsman initiated amendment to the laws regulating the issuance of identity documents so that people without legal residence would be also registered at birth. Despite the adoption of these laws, in practice implementation has been patchy.⁶⁵² As the 2014 EU Progress Report pointed out '[t]he legal provision allowing social welfare centres to be used as a temporary address for registration purposes is implemented unevenly across the country.'⁶⁵³ Moreover, as the Advisory Committee for the FCNM noted, despite the enactment of the Law on Social Housing in 2009, which gave priority to socially vulnerable groups, including Roma, the most vulnerable, among them Roma without identity documents cannot benefit from this system.⁶⁵⁴ Nevertheless, a higher rate of registration led to better access to health care among the Roma, reflected by a growing number of Roma with the health insurance coverage.⁶⁵⁵ In the area of education, one success of the action plan was the increased number of Roma students in secondary schools and university. However, monitoring takes into account the number of enrolled students and does not keep track of the school drop-out rate for Roma children, which remains high.⁶⁵⁶ At the same time, the segregation of Roma students persists in the primary education system.⁶⁵⁷

Moreover, parallel to the ongoing housing programs, forced evictions have continued until today. From 2009 to November 2013 there were 19 larger forced evictions in Belgrade that affected over 2,800 Roma. The majority of the evictions were conducted without providing acceptable alternative accommodation. In cases where alternative accommodation was granted, it was inadequate as Roma were placed in metal containers on the outskirts of city. The Commissioner for the Protection of Equality issued an opinion in 2012 that 'Roma living in container settlements are discriminated against by the City of Belgrade authorities with regards to the contractual obligations imposed on them.'⁶⁵⁸ Most of these eviction cases concern Roma who fled from Kosovo or were repatriated from Western Europe under readmission agreements. Many of these IDPs did not receive accommodation in collective centres and nor assistance from the state. One of the IPA priorities in 2014 was to provide

⁶⁵⁰ EC, 'Commission Staff Working Document, Serbia 2012 Progress Report' (n 620) 18; EC, '2014 Serbia Progress Report' (n 482) 50.

⁶⁵¹ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 58.

⁶⁵² Decade of Roma Inclusion Secretariat Foundation, 'Civil Society Monitoring' (n 497) 10.

⁶⁵³ EC, '2014 Serbia Progress Report' (n 482) 50.

⁶⁵⁴ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 21.

⁶⁵⁵ Previous research indicated that people without documents had limited access to health care. See Dorit Nitzan Kaluski et al, 'Health insurance and accessibility to health services among Roma in settlements in Belgrade, Serbia – the journey from data to policy making', (2014) *Health Policy and Planning* 1-9.

⁶⁵⁶ Slobodan Cvejić, 'Faces and Causes of Roma Marginalisation Experiences from Serbia' in Julia Szalai and Violetta Zentai (eds), *Faces and Causes of Marginalization of the Roma in Local Settings* (Central European University Centre for Policy Studies 2014) 111.

⁶⁵⁷ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 21.

⁶⁵⁸ Decade of Roma Inclusion Secretariat Foundation, 'Civil Society Monitoring' (n 497) 8.

remedy to this problem, i.e. help to finance housing for IDPs and returnees from readmission and help them to start small businesses.⁶⁵⁹ Moreover, the authorities have so far avoided 'legalizing several hundred old Roma settlements that have existed for over 50 years', which reflects the attitude of the political elite towards the Roma.⁶⁶⁰

The EU in the 2014 Progress Report called on Serbia to respect international standards on forced evictions and relocations.⁶⁶¹ A number of international legal documents contain provisions about the right to adequate housing, such as the UN's International Covenant on Economic, Social and Cultural Rights or the Council of Europe's European Social Charter, both of which Serbia is a signatory. Importantly, Serbia's Housing Law obliges the state to 'take measures to create favourable conditions for housing construction and provide conditions for solving housing problems of socially vulnerable persons in accordance with the law' (Article 2). At the same time, no protection is granted for persons that settled illegally on land or in buildings.⁶⁶² The continuation of forced evictions casts doubts about the intentions of the state authorities, even if such behaviour is nothing new even in the EU Member States, such as Italy, France or Hungary.

Altogether, the EU's pressure definitely contributed to progress in some areas, such as the Roma's increased access to identity documents, social housing, and the employment of education staff and health mediators. However, it is still difficult for the Roma to get out of the vicious cycle of low education reducing their chances for employment, which in turn keeps them in poverty as a result.⁶⁶³ Unsurprisingly, despite some improvements, Roma remain the most discriminated minority in Serbia, (which is also true in many EU Member States).⁶⁶⁴ Everyday prejudice is indicated by the fact that 60 per cent of racist violent attacks are targeting the Roma.⁶⁶⁵

On the whole, it is difficult to tell how life conditions of the Roma have changed since 2010, because the same problems are being repeated year by year in various EU documents. Progress reports do not specify the impact of the policies, what progress was made and to what extent. In addition, they do not assess the quality and feasibility of the Roma action plans.⁶⁶⁶ While the 2011 Opinion of the Commission on Serbia's application optimistically reported about positive developments related to health, education and housing, the 2015 progress report noted that 'Roma continue to face difficult living conditions and discrimination in access to social protection, health, employment and adequate housing'.⁶⁶⁷ Similarly, the Screening Report of Chapter 23 as of 2013 demanded '[c]omprehensive socio-economic measures such as on education, health, employment and housing in order to improve the situation of the Roma and tackle exclusion'.⁶⁶⁸ At the same time, 2014 Negotiation Framework

⁶⁵⁹ EC, 'Annual Country Action Programme for Serbia for the year 2014' (n 543) 22.

⁶⁶⁰ Decade of Roma Inclusion Secretariat Foundation, 'Civil Society Monitoring' (n 497) 8.

⁶⁶¹ *ibid* 16.

⁶⁶² *ibid*.

⁶⁶³ Cvejić (n 656) 122.

⁶⁶⁴ Slobodan Cvejić, Marija Babović and Gazela Pudar, *Human Development Study – Serbia 2010* (United Nations Development Programme Belgrade 2011).

⁶⁶⁵ Advisory Committee on the FCNM, 'Third Opinion on Serbia' (n 499) 25.

⁶⁶⁶ Müller (n 627) 405, 409.

⁶⁶⁷ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 58.

⁶⁶⁸ EC, 'Screening report Serbia, Chapter 23' (n 489).

recognised the active measures Serbia has taken in the area of education, health care, and employment of the Roma.⁶⁶⁹

Yet again, without providing numbers and statistical indicators, any discussion of the Roma's situation seems meaningless since even tendencies are hard to detect. As the same problems are repeated each year, it becomes quite clear what the challenges are, or what measures have been introduced. Yet, the exact effect of these measures and to what extent they manage to improve things on the ground in the various areas are hard to establish. It would be imperative to evaluate existing trends in order to see what difference the adopted strategies, action plans and IPA money are making.

3. Media freedom

The media reform in 2014 also came in response to EU conditionality – the adoption of the Public Information and Media Act, the Electronic Media Act and the Public Media Services Act, which were obligations set under the 2011 media strategy ('Strategy for the Development of the Public Information System in the Republic of Serbia').

The strategy's aims are to eliminate state ownership of any media and move to project based financing, to protect media pluralism and ensure transparency in media ownership. Only one law, the advertising act remains to be adopted, otherwise formally all the goals of the strategy have been met. However, despite the adoption of these laws encouraged by the EU, major concerns remained, which are unrelated to the legal framework, but rather to informal restrictions.⁶⁷⁰ Chief among these are the state's reluctance to withdraw from media ownership and the major gaps between the letter of the law and practice:

Persistent problems rather relate to the concrete implementation of the laws, the courts' handling of media cases, or, to a lesser extent, to conflicting laws. The Capital City Law is, for instance, directly at odds with the Public Information Law, as it allows the city of Belgrade to own media outlets, whereas the latter forbids this.⁶⁷¹

Moreover, for the implementation of these laws the necessary bylaws have not been passed yet, which have to be prepared in 200 days after the laws' adoption.⁶⁷² As the 2015 EU Progress Report noted, despite the recently enacted media laws, 'opaque ownership, unregulated financing, covert and open political and economic influence on the media and money channelled to favoured media from various state sources continue to be features of the media environment.'⁶⁷³

In addition to demands to adopt these media laws, EU conditions concerned the protection of journalists against political pressure, threats and violence, all which contribute to self-censorship.⁶⁷⁴ The EU also called on Serbia to investigate and convict those involved in media campaigns relying on 'anonymous leaked sources, detailing investigations, announcing arrests and quoting investigation

⁶⁶⁹ Conference on Accession to the European Union – Serbia, 'Ministerial Meeting..., General EU Position' (n 521) 6, 9.

⁶⁷⁰ Konrad-Adenauer-Stiftung, 'Media freedom in Serbia' <<http://www.kas.de/wf/en/71.13626/>> accessed on 30 August 2015.

⁶⁷¹ *ibid.*

⁶⁷² IREX, 'Europe and Eurasia Media Sustainability Index 2015: Serbia' 4 <https://www.irex.org/sites/default/files/u105/E%26E_2015_MSI_Serbia.pdf> accessed 3 February 2016.

⁶⁷³ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 18.

⁶⁷⁴ EC, 'Screening report Serbia, Chapter 23' (n 489).

documents', which 'undermine trust in judicial institutions, violate personal data laws and challenge the presumption of innocence.'⁶⁷⁵ Concerning freedom of expression and media freedom in 2014, the EU recorded deteriorating conditions in Serbia, while in 2015 it simply concluded that there was no progress. Freedom House recorded negative trends since 2006, while for 2014 it reported about further worsening of freedom of speech and independence of the media compared to the previous year, 'even as the authorities adopted legislation designed to make media ownership and financing more transparent'.⁶⁷⁶ In other words, the situation got worse while, in principle, Serbia was meeting the EU's formal conditions. As the Ombudsman put it: 'The set of new media laws, which met with approval both in the country and abroad, has still not achieved the desired results in practice'.⁶⁷⁷

Serbia received the label of partially free for its media from Freedom House, while Reporters without Borders in 2015 assigned it the rank of 67th out of 180 countries putting it behind Bosnia and Herzegovina. It also means that Serbia fell back 13 places in a year. According to IREX assessment, the worsening score from 2013 to 2014 was due to 'stagnation or further deterioration of media independence, professionalism, and the media economy'.⁶⁷⁸ Although libel was decriminalised in 2012, newspapers continue to be sued, now for insult instead of libel, 'which remains a criminal offence although it is not punishable with imprisonment'.⁶⁷⁹ Journalists tend to be threatened with lawsuits and especially investigative journalists are often threatened while their outlets are put under financial pressure.⁶⁸⁰ Threats and attacks on journalists is still a frequent problem, partially owing to inadequate response from the authorities.⁶⁸¹

	2009	2010	2011	2012	2013	2014	2015
IREX	2.35	2.07	2.06	1.9	1.92	1.9	1.8
Reporters Without Borders ranking	62	85	80	80	63	54	67
Freedom House Press freedom index	35 (PF)	33 (PF)	35 (PF)	36(PF)	37(PF)	40(PF)	40 (PF)

Table 29. NGO media indicators on Serbia, 2009-2015

IREX Media Sustainability Index, 0-4, 0: unsustainable, 4: sustainable;⁶⁸² Freedom House Press Freedom Scores: Free (F): 0-30 / Partly Free (PF): 31-60 / Not Free (NF): 61-100

⁶⁷⁵ EC, '2014 Serbia Progress Report' (n 482) 52.

⁶⁷⁶ Freedom House, 'Nations in Transit 2014: Serbia' <<https://freedomhouse.org/report/nations-transit/2015/serbia>> accessed 3 February 2016.

⁶⁷⁷ Tanjug, 'World Press Freedom Day marked' B92 (4 May 2015) <http://www.b92.net/mobilni/eng/index.php?nav_id=93989> accessed 3 February 2016.

⁶⁷⁸ IREX, 'Serbia' (n 672) 107.

⁶⁷⁹ International Press Institute, 'Out of Balance: Defamation law in the EU in the context of press freedom, Key findings: criminal defamation' <<http://www.freemedia.at/ecpm/key-findings/criminal-defamation-laws.html>> accessed 3 February 2016.

⁶⁸⁰ IREX, 'Serbia' (n 672) 110.

⁶⁸¹ Konrad-Adenauer-Stiftung (n 670).

⁶⁸² 'IREX designed the MSI to measure the strength and viability of any country's media sector. The MSI considers all the factors that contribute to a media system—the quality of journalism, effectiveness of management, the legal environment supporting freedom of the press, and more—to arrive at scores on a scale ranging between 0 and 4. These scores represent the strength of the media sector components and can be analyzed over time to chart progress (or regression) within a country.' Unsustainable media means 'Country does not meet or only minimally meets objectives. Government and laws actively hinder free media development, professionalism is low, and media-industry activity is minimal.' Sustainable means: 'Country has media that are considered generally professional, free, and sustainable, or to be approaching these objectives. Systems supporting independent media have survived multiple governments, economic fluctuations, and changes in public opinion or social conventions.' IREX, 'MSI Serbia – 2015 Introduction' <<https://www.irex.org/resource/serbia-media-sustainability-index-msi>> accessed on 30 August 2015.

Sources: IREX MSI Serbia <<https://www.irex.org/resource/serbia-media-sustainability-index-msi>>; Reporters Without Borders, 'World Press Freedom Index' <<https://index.rsf.org/#!/>>; Freedom House, 'Nations in Transit, Serbia' <<https://freedomhouse.org/report/nations-transit/2014/serbia>>

In 2014 Serbian authorities had a confrontation not only with independent media outlets but also with the OSCE representative on Freedom of the Media, Dunja Mijatović. After the floods in May 2014 leading to deaths, the government introduced a state of emergency, which allowed the authorities to detain people for allegedly spreading panic over social media. Websites, blogs were removed from the internet, including the portal of *Peščanik*, *Vaseljenska*, *BKTV News* and *Teleprompter*, while blog posts were censored. The OSCE criticized the government and called an end to arresting and harassing individuals for what they were writing. Prime Minister Vučić responded by saying that OSCE was deceived and demanded an apology.⁶⁸³ However attacks against webportals publishing critical stories about the government, such as *Peščanik* and the website of the daily newspaper *Kurir* continued. The Ombudsman also drew attention to the phenomenon that criticism of the authorities is often removed from publicly available media and journalists are under pressure not to criticize the government.⁶⁸⁴

Prime Minister Vučić also clashed with the European Commission over media freedom. When the independent BIRN media agency brought an investigative report about how after the flooding of the Tamnava mine the contract of renovation was given to a consortium which had no experience of such work thus significantly increasing the costs, Vučić called the journalists liars who acted by EU support. Maja Kocijancic, spokesperson for the European Commission for Neighbourhood Policy and Enlargement Negotiations, expressed surprise by Vučić's accusations, and repeated that the 'EU expects the Serbian authorities to ensure an environment supporting freedom of expression and of media. Media criticism (such as that of BIRN) is essential to ensure the proper accountability of elected governments.'⁶⁸⁵

However, the EU communicated mixed messages about media freedom to the Serbian government. Despite the fact that the EU progress reports repeatedly and systematically formulate serious concerns regarding freedom of expression and media freedom, Johannes Hahn the EU Commissioner for European Neighbourhood Policy and Enlargement in February 2015 questioned the validity of claims about self-censorship and demanded 'evidence and not rumours'.⁶⁸⁶ He seemed not fully aware of the content of the report published by his own department while showing a very different approach to

⁶⁸³ Confrontations with the OSCE Office did not end there, in December 2015 Vucic said that 'the first great orchestrated attack with falsehoods on the government of Serbia' also came from Dunja Mijatovic, and specified that it happened after last year's floods in Serbia.' Tanjug, 'Lavrov, Vucic praise relations, criticize OSCE media office' *B92* (4 December 2015) <http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=12&dd=04&nav_id=96268> accessed on 30 January 2016.

⁶⁸⁴ Marko Kmezić, 'Media freedom in Serbia criticized in the EU Progress Report' (*Balkans in Europe Policy Blog*, 13 October 2014) <<http://www.suedosteuropa.uni-graz.at/biepag/node/97>> accessed on 30 January 2016.

⁶⁸⁵ BIRN, 'Serbia PM Slams EU, Alleging BIRN "Lies"' *Balkan Insight* (Belgrade, 10 January 2015) <<http://www.balkaninsight.com/en/article/serbia-pm-slams-eu-alleging-birn-lies>> accessed on 30 January 2016.

⁶⁸⁶ BIRN, 'Hahn Demands Proof of Serbia Media Censorship' *Balkan Insight* (Belgrade, 17 February 2015) <<http://www.balkaninsight.com/en/article/hahn-calls-for-evidence-on-media-censorship-in-serbia>> accessed on 30 January 2016.

human rights than that of the Commission. Nevertheless, his spokesperson had to explain the conflicting messages, clarifying that the EU was 'still committed to media freedom'.⁶⁸⁷

While there is political pressure on journalists which is a manifestation of censorship in the form of cancellation of TV programs, withdrawal of articles from the press, changing editorial policies, several tabloids act as mouthpiece of the government such as *Informer* leaking confidential information about 'ongoing investigations, personal data, information on the circumstances of a person's private life'.⁶⁸⁸

As the Ombudsman highlighted in his 2013 annual report:

*No proceedings have ever been conducted to determine the sources of such information, which is available only to authorised officials, and to punish the instigators of such actions for unauthorised disclosure of official secrets and other criminal offences, infringements and disciplinary infractions. The information reported by the media is, as a rule, selective and one-sided, remarkably timed to coincide with ups and downs of political processes and arrangements, and systematically directed against specific individuals.*⁶⁸⁹

In addition, as the 2015 EU Report concluded, '[t]hreats and violence against journalists remain of concern. Criminal charges and final convictions are rare. The overall environment is not conducive to the full exercise of freedom of expression'.⁶⁹⁰

Altogether, even though the EU has put a lot of energy into media reform in Serbia, the results were limited at best. Despite improving the legal framework, conditions of media freedom have worsened. The reasons certainly include the lack of clear European standards. EU law, primarily the EU Directive on Audio Visual Media Services does regulate media freedoms, but set standards of a single EU media market. Thus 'European regulations regarding the freedom of expression are either meagre or refer to the case law of the relevant institutions, such as the European Court of Human Rights'.⁶⁹¹ Conflicting messages coming from the Commissioner and the Commission staff questioned the EU's commitment to the importance of media freedom. All in all, Prime Minister Vučić managed to start membership talks even as he accused the EU of financing investigative journalists to undermine him.⁶⁹²

Recent tabloid media smear campaigns against the Ombudsman also revealed how some media is being used as a political tool to pressure the Ombudsman who has been consistently trying to hold government officials and institutions to account. After Janković, the Citizen's Ombudsman submitted his yearly report to the parliament in April 2014, in which he criticised the authorities for the state of human rights in Serbia, the tabloid newspaper, *Informer* suggested the Ombudsman's implication in a murder of his friend who committed suicide in 1993. Not only tabloid outlets but the interior minister

⁶⁸⁷ Gordana Andric, 'EU Still "Committed to Balkan Media Freedom"' *Balkan Insight* (Belgrade, 19 February 2015) <<http://www.balkaninsight.com/en/article/eu-committed-to-balkan-media-freedom>> accessed on 30 January 2016.

⁶⁸⁸ Ivana Nikolic, 'Serbian Govt and Press Lead Campaign against BIRN' *Balkan Insight* (Belgrade, 16 January 2015) <<http://www.balkaninsight.com/en/article/serbian-govt-and-press-lead-campaign-against-birn>> accessed 5 February 2016.

⁶⁸⁹ Protector of Citizens, Serbia, '2013 Annual Report' (n 592) 11.

⁶⁹⁰ EC, 'Commission Staff Working Document, Serbia 2015 Report' (n 440) 18.

⁶⁹¹ Belgrade Centre for Human Rights, 'Human Rights in Serbia 2014' (n 484) 183.

⁶⁹² Sasa Dragojlo, 'Democracy Declining in Balkans, Warns Freedom House' *Balkan Insight* (12 April 2016) <<http://www.balkaninsight.com/en/article/democracy-declining-in-balkans-freedom-house-report-04-11-2016>> 13 April 2016.

also supported these allegations stating that he will see with the prosecutor whether it was legally possible to reopen the case.⁶⁹³

As was stressed in the introduction of this chapter, the worsening environment of media freedom is part of a general authoritarian turn in Serbia represented by measures, which aim at suppressing criticism against the government, such as attacks on the Ombudsman or exerting political pressure on the judiciary.⁶⁹⁴ This is what Florian Bieber called the ‘authoritarian temptation’ in the region, which is paradoxically seem to be reinforced by the EU accession process as it requires and rewards a strong leadership which can deliver on commitments and promotes a pro-EU rhetoric.⁶⁹⁵ The events could also be interpreted as part of a regional tendency of undue government influence on the media. Péter Bajomi-Lázár traces the trends of party colonization of the media. He argues that one needs to look beyond the direct impact on content. An often-neglected element of party influence over the media is the fact that politicians not only get control over substance, i.e. what appears in the media, but also get access to sources in the wider sense, including financial gains.⁶⁹⁶ This means that media freedom is not only important from the perspective of freedom of expression and the independence of opinions present in the public discourse, but more broadly as well, for the quality of democracy measured by the fair competition of political forces. The colonization of the media poses a problem because of the clientelism, the oligarchic structures and the corruption element it involves. The fact that politicians might realize that media capture might not pay off and can prove to be counterproductive in a strict party political logic as well does not mean that the political influence gained by this move does not continue to be exploited by other means.

Bajomi-Lázár identifies seven conditions of media freedom, and concludes that five of these are harder to change [attitudinal condition (citizens), professional condition (journalists), entrepreneurial condition (owners), economic condition (advertising revenue), external condition (including the EU)], while two can be especially important for short-term changes, the institutional framework of the media and politicians’ behaviour towards media. Media colonization creates, as much as can be a result

⁶⁹³ Dragan Popovic, ‘Serbia’s Angry Leaders Turn on Ombudsman’ *Balkan Insight* (29 April 2015) <<http://www.balkaninsight.com/en/article/serbia-s-angry-leaders-turn-on-ombudsman>> accessed 11 October 2015. The Ombudsman also came under attacks in January 2015 when he filed criminal charges against two members of the military police who accompanied the prime ministers’ brother during the Belgrade Pride Parade in September 2014, ‘on suspicion that they attacked members of a special police unit called the Gendarmerie while they were on duty’. Maja Djuric, ‘Serbian Ombudsman “Targeted by Media Attacks”’ *Balkan Insight* (20 April 2015) <<http://www.balkaninsight.com/en/article/serbian-ombudsman-targeted-in-media-attacks>> accessed 11 October 2015.

⁶⁹⁴ Pressure on the judiciary results from systemic flaws on the one hand, such the laws and Constitution allowing for political influence. Yet, it has been also a continuing practice, illustrated by the attempt in 2015 to remove the Chief War Crimes Prosecutor Vukčević from his position before his term expired. It was widely believed that his resoluteness to investigate Serbian war crimes explained such efforts. See Freedom House, ‘Nations in Transit 2015: Serbia’ (n 442).

⁶⁹⁵ Florian Bieber, ‘The Authoritarian Temptation’ (15 March 2014) <<https://fbieber.wordpress.com/2014/03/15/the-authoritarian-temptation/>> accessed 15 May 2015.

⁶⁹⁶ Bajomi-Lázár presents his approach as a combination of two traditions of research: ‘that of media scholars focusing on media freedom and working under the assumption that political actors seek control over the media in order to manage information, and that of political scientists studying political parties’ relationship to the state and the extraction of state resources’. Péter Bajomi-Lázár, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014) 229.

of, entrenchment. Bajomi-Lázár argues that single-party governments are more likely to colonize.⁶⁹⁷ In this sense, the government in Serbia with its absolute majority in parliament is a good illustration of such colonisation effect. This finding also underlines that a piecemeal approach to media freedom that tries to separate this issue from wider problems of democratic party competition fails to consider important elements of the equation. His conclusions point to the importance of guarantees for media freedom that fall outside the traditional scope of conditionality and legal reform: ‘proportional electoral laws that favour coalition governments, and party laws that improve party funding and internal party democracy may ultimately restrain parties’ needs and opportunities to colonise the media, and hence may be conducive to higher levels of media freedom and lower levels of party/media parallelism.’⁶⁹⁸

These findings suggest that factors in the penumbra of media regulation should be equally important in seeking, as part of enlargement conditionality, a sustainable framework guaranteeing media freedom, an idea not fully embraced by EU conditionality.

D. Conclusions

In this section we conducted a closer analysis of three areas – minority rights, Roma rights and media freedom – in order to assess the operation of EU conditionality in practice and assess its impact.

The situation of minorities has been mostly dependent on the will of government that was in power and the general state of democratic institutions. Progress on minority rights suffered setbacks under governments moving in a nationalist or authoritarian direction, indicated by the stalling of reforms during Koštunica’s term or the series of decisions of the Constitutional Court repealing some minority rights provisions since the SNS came to power in 2012. In addition, the nationalist political backlash in late 2003/2004 contributed to the rise of ethnic incidents in Vojvodina showing a climate of growing intolerance.

The foundations of the legal framework were laid down in 2002 before Serbia joined the SAP, before the EU’s more intense engagement through its conditionality policy. The law on national minority councils, long demanded by the EU, was adopted only in 2009, after a pro-EU government entered office in 2008 while it was delayed while Koštunica was prime minister. It is difficult to show a clear connection between the law’s adoption and EU pressure, as other factors might have played a role such as the Alliance of Vojvodina Hungarians’ close links to the DS at the time. Yet, the European orientation of the DS-led government certainly contributed to passing the legislation required by progress reports and European partnership documents. In Mendelski’s view, it was clear that EU conditionality was the main force behind legal changes launched by the government after 2008.⁶⁹⁹

Although minority rights legislation is well advanced in Serbia, implementation has been uneven and incomplete. EU instruments from 2010 drew attention to the enforcement, also in the focus of the Screening Report of Chapter 23. The government has to draft an action plan on minority rights based

⁶⁹⁷ The actual picture is more complex: ‘one-party colonisation of the media is more likely to occur 1) under single-party governments; 2) under parties with highly centralised decision-making structures; 3) under unified parties with a high degree of party discipline; 4) under parties or governments with a strong ideological agenda; 5) under parties that try to gain popular support by means of denying opposition networks access to resources; and 6) under charismatic leaders who are 7) personally intolerant of critical media.’ *ibid* 233.

⁶⁹⁸ *ibid* 236.

⁶⁹⁹ Mendelski (n 407) 90.

on these comments, as compliance with an opening benchmark of Chapter 23. In addition, the Commission called on Serbia to amend the law on national minority councils in order to bring it in line with the constitution. The Commission has also addressed structural causes of discrimination against minorities, which require social and economic development measures from the state. Despite the EU's practical approach to minority protection and its focus on implementation, it is hard to establish the EU's contribution. The hardship does not only come from distinguishing the causes of changes. The absence of numerical indicators that would demonstrate existing trends means that certain changes are hard to be established with accuracy. Impact assessment has been generally missing from monitoring minority rights and Roma rights.

Concerning Roma rights, it can be established that the EU did contribute to progress in some areas. These include the Roma's increased access to identity documents, social housing, and the employment of education staff and health mediators. Despite the adoption of the Roma strategy and the subsequent action plans, and even with the biggest share of IPA money spent on Roma support, it is difficult to tell whether the Roma fare better as a result of these measures that were introduced under EU pressure. The only exception here is the registration of previously undocumented people, where it is fairly easy to measure progress. It would be an imperative to evaluate existing trends in order to see whether the adopted strategies, action plans and IPA money make any difference.

Security interests concerning Roma migration have played a significant role in shaping the EU's Roma policies. This distorted the human rights centred approach and, in some cases, led to inconsistencies between the EU's normative rhetoric and its actions. The EU has followed a dual strategy. It sought to stop Roma immigration through requiring strengthened border inspection regimes from Western Balkan countries. At the same time, it also put pressure on the governments to improve the overall situation of the Roma living in the target countries, through the various strategies, action plans and IPA programs. This is not to claim that, ultimately, human rights goals cannot serve security goals. They should contribute to regional security, after all. Yet, the picture that we get raises the doubt that a human rights centred policy is driven by very direct security considerations.

The situation concerning freedom of expression and media looks the bleakest of the prioritized human rights areas, despite the fact that the EU assigned high priority to media freedom and targeted it with all its instruments. The conditions of free expression deteriorated in the last few years, despite Serbia's formal compliance with the EU's requirements, and despite the EU's growing criticism of Serbia for its crack down on media freedom, with political pressure and censorship. This was accompanied by growing attempts by the authorities to undermine independent institutions, such as the Ombudsman or the courts. Furthermore, the negative trend of media freedom is only the reflection of the downward trajectory of democratic governance in general, characterised by the Serbian government's efforts to undermine checks and balances. This supports the argument that authoritarian governments severely limit the effectiveness of EU conditionality.⁷⁰⁰

A few areas can be identified, from 2009 to 2015, where progress was most probably connected to EU pressure. Concerning media freedom, the decriminalisation of defamation in itself was a significant development (noting nevertheless the possibility of applying other legal sanctions) as well as the fact that an ad hoc commission on the cases of unsolved murders of journalists was set up in January 2013.

⁷⁰⁰ Schimmelfennig and Sedelmeier (n 14) 663.

The commission brought charges against several former security agency members.⁷⁰¹ The new media laws brought the legislative framework more in line with European standards, even if these, as we have seen, are not yet being implemented. The adoption of the anti-discrimination legal framework in 2009, followed by a strategy and an action plan, also indicated progress, although implementation is yet to be seen. The visa liberalisation process was instrumental in launching this reform. The recognition of hate crimes motivated on grounds of ethnic origin, religion or sexual orientation as an aggravating circumstance was also a significant measure introduced by the 2012 amendments to the Criminal Code, as part of the anti-discrimination reform.⁷⁰² This was also relevant from the aspect of LGBT rights.⁷⁰³ Lately, there have been efforts targeting the LGBT community that can increase visibility of this vulnerable group. Police personnel received special training on working with homophobic violence. Pride parades were held two years in a row and the parliament held events related to LGBT rights. In addition, the legal processing of cases against LGBT people has been more active, including by the Commissioner for Equality.⁷⁰⁴ The prospect of EU integration could play a role in improving the lot of LGBT people, by contributing to a change in the values of the society. Research revealed a connection between supporting of EU integration and views more sympathetic to gay people.⁷⁰⁵

All of these measures (on media freedom, anti-discrimination, LGBT) were introduced under heavy pressure from the EU. In addition, the registration of people without documents, housing programs for the Roma, and the employment of health mediators and educational staff for the Roma all happened at the EU's insistence and with its assistance. Concerning the prison system, new laws were adopted on alternative measures and sanctions, which had been called for in the EU's progress reports. In some areas, however, not much has changed despite EU demands. Free legal aid has been an EU requirement since 2007, but it has still not been introduced. According to the government's action plan on Chapter 23, the new law of free legal aid should have been adopted by the third quarter of 2015.⁷⁰⁶ Concerning freedom of religion, the Ombudsman called for a transparent and consistent system of registration of churches in 2009. This has been repeated in EU progress reports ever since, to no avail. In the field of data protection, harmonisation of the legislation with EU standards has been long outstanding.⁷⁰⁷

There has been a general consensus between local human rights watchdogs and the EU in the main points of criticism on Serbia's human rights performance. There was one glaring exception, the violation of social and economic rights of workers. While this was regarded as one of the most pressing human rights problems in Serbia by domestic NGOs and the Ombudsman, it was picked up by EU progress reports only in relation to certain vulnerable groups such as Roma, IDPs or women. The issue did not appear as a general problem for workers, only some aspects were discussed in the context of informal economy. The EU certainly did not treat this issue with the same weight as domestic human rights organisations.

Overall, Serbia could progress on the EU integration path, despite its mixed human rights record, because of its efforts to improve relations with Kosovo. Now that accession negotiations were opened,

⁷⁰¹ EC, 'Joint Report on Serbia's progress... (n 519) 8-9.

⁷⁰² *ibid.*

⁷⁰³ Zorica Mršević, 'Homophobia in Serbia and LGBT Rights' (2013) *Southeastern Europe* 74.

⁷⁰⁴ *ibid.*

⁷⁰⁵ *ibid.*

⁷⁰⁶ Aleksić (n 476) 35.

⁷⁰⁷ *ibid.*

there is a growing expectation that human rights issues will improve as well. The media community expects that the process will advance reforms already initiated in key areas, including media freedom. Human rights defenders also view the accession talks as a unique opportunity, seeing an ally in the EU while furthering their agenda. Under recurrent attacks from the government, these organisations can lobby the EU through the EU Delegation in Belgrade or the Commission in Brussels. The Commission can incorporate these views in the progress reports and can indirectly put pressure on the Serbian authorities. Human rights NGOs are also consulted during the drafting process of the action plans on Chapter 23. At the same time, there are fears that if Serbia continues to deliver on the Kosovo issue, the EU will close its eyes on human rights violations and relapses in the rule of law area. So far, the EU in practice has prioritised the normalisation process with Kosovo over rule of law reforms and human rights, revealing an inconsistency between the EU's strong normative rhetoric and its actions.

The human rights community is also concerned that the government can get by with partial or fake measures, by adopting unrealistic action plans that remain unimplemented because of unrealistic goals, deadlines and lack of financing.⁷⁰⁸ In the 2013 Progress Report the Commission gave too much credit for legal measures while it tended to neglect the question of implementation, an approach criticized by human rights NGOs. The Commission has since acknowledged the importance of having realistic and credible action plans in terms of timing and cost projection. Yet, the general action plan for Chapter 23, which had been prepared already, was regarded as overly ambitious, even 'impossible to implement', casting doubt about its seriousness.⁷⁰⁹

Membership negotiations officially started in January 2014, but the first two chapters were only opened in December 2015, almost two years later. These were Chapter 32 on financial control and Chapter 35 on normalisation of relations with Kosovo.⁷¹⁰ The rule of law chapters are still waiting to be opened. It remains to be seen to what extent the EU is able to learn from the failures of the largely formal approach, and if it will set measurable benchmarks and will follow up on these in a consistent manner.

⁷⁰⁸ Interview with Vesna Petrovic, Belgrade Centre for Human Rights (Belgrade, 23 March 2015).

⁷⁰⁹ Interview with Milan Antonijević, Lawyers' Committee for Human Rights (YUCOM) (Belgrade, 23 March 2015).

⁷¹⁰ Council of the European Union, 'Second meeting of the Accession Conference with Serbia at Ministerial level – First two chapters opened' (Brussels, 14 December 2015) Press Release <<http://www.consilium.europa.eu/en/press/press-releases/2015/12/14-accession-conference-serbia/>> accessed 5 February 2015.

IV. Turkey⁷¹¹

A. Introduction

This study gives an account of human rights promotion through EU enlargement policy in the case of Turkey. Building on the mapping exercise of relevant enlargement instruments carried out in Deliverable 6.1, chapter IV,⁷¹² this chapter intends to analyse how these instruments have been applied with regard to Turkey and in how far EU enlargement policy thus contributed to the promotion of human rights within the country and along which priorities. As Senem Aydın-Düzgit and Natalie Tocci have very recently put it: ‘No other dimension has so directly and powerfully influenced the shape and pace of EU-Turkey relations as democracy and human rights. On its side, the EU has acted as the major external driver of political reforms in Turkey, or the lack thereof.’⁷¹³

It is the aim of this case study to highlight how EU enlargement policy has affected the human rights situation in Turkey, which tools have been deployed, which priorities have been set, and – by way of example – which impact could be achieved. In terms of temporal scope, the analysis will cover the period after Turkey has been awarded candidate status in 1999 up to the publication of the 2015 Enlargement Strategy and Progress Report in November 2015. Where it seems expedient we will also include some remarks on Turkey’s path towards candidacy on the one hand and some outlooks on the currently changing relationship between Turkey and the EU on the other. To start with, section B will give an overview of Turkey’s accession process and its changeful relation with the EU as an enlargement country, thus setting the framework for the whole analysis. The promotion of human rights through enlargement policy will then be treated in the ensuing sections on two levels: first, the instruments applied and the priorities chosen on the part of the EU and the reforms taken on the Turkish side will be assessed on a general level, illustrating also developments over time as well as consistencies and inconsistencies that occurred (section C); secondly, the analysis will look into two human rights issue areas in more detail, namely the promotion of gender equality (section D.1) respectively minority rights (section D.2). On this level, questions of impact on the ground will be discussed with regard to the two issue areas as mini case studies. Going in-depth on these selected issues, which both revolve around the concept of equality, having become a central feature of EU human rights policy, will allow not only to evaluate EU impact along these, but also to lay the basis for specific policy recommendations, which will flow into the case study conclusion (section E) as well as final over-all conclusion (chapter IV).

Methodologically, this case study draws on the results of a literature review, an analysis of legal and policy documents (both from the EU and Turkey) as well as interviews carried out in Ankara and Istanbul in autumn 2015 with representatives of the EU Delegation to Turkey, the Turkish Ministry of EU Affairs as well as Turkish civil society (NGOs, universities, think tanks).

B. Turkey as an EU enlargement country

Turkey’s EU accession process in many ways constitutes a special case, in which democracy and human rights issues have played a significant role ever since Turkey’s application for membership in 1987.

⁷¹¹ The author of this chapter is Susanne Fraczek. Susanne Fraczek is a researcher at the Ludwig Boltzmann Association – Institute of Human Rights.

⁷¹² Fraczek et al (n 6).

⁷¹³ Aydın-Düzgit S and Tocci N, *Turkey and the European Union* (Palgrave 2015) 155.

Going back to this point in time, since which Turkey can be considered an enlargement country, this chapter aims to outline, as a basis for the ensuing analysis, what in literature has been called ‘a bumpy road’,⁷¹⁴ a ‘stumbling journey’⁷¹⁵ or, even more pronounced, a ‘tortuous path’.⁷¹⁶ At the outset, it shall be stressed that enlargement matters are governed by the general principle of unanimity of Council decisions,⁷¹⁷ which means that all Member States have to give their approval at various stages of a country’s accession process in order for it to proceed. This fact and its implications have become particularly visible in the case of Turkey, as will be shown on the following pages.

1. From application to candidacy (1987-1999)

Turkey’s eligibility for becoming a member of the European Union was already indirectly implied in the 1963 Association Agreement, establishing the first contractual relationship between the then European Economic Community and Turkey,⁷¹⁸ the Ankara Agreement. Its Article 28 included the following provision on the possibility of future membership:

As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.⁷¹⁹

Even though a customs union, foreseen as the third and final stage of association,⁷²⁰ had not been realised by then, the Turkish government under Prime Minister Turgut Özal formally applied for EU membership on 14 April 1987. The European Commission presented its Opinion on Turkey’s application more than two years later, on 20 December 1989, with the, by comparison with other applicant countries, long period being ironically interpreted by Tatham as potential evidence for ‘the Community’s enthusiasm for Turkish membership’.⁷²¹ In view of both internal factors (priority being given to the implementation of the Single European Act of 1986 over new accessions)⁷²² as well as Turkey’s economic and political situation (still problematic after the 1980 military coup, despite developments in both fields),⁷²³ the Commission concluded negatively on Turkey’s application, yet

⁷¹⁴ Tatham A F, *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 157.

⁷¹⁵ Hale W, ‘Human Rights and Turkey’s EU Accession Process: Internal and External Dynamics, 2005-2010’ (2011) *Volume 16: South European Society and Politics* (Routledge 2011) 323-333.

⁷¹⁶ Aydın-Düzgit and Tocci 2015 (n 713) 24.

⁷¹⁷ See Article 49 Treaty on European Union: ‘The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament ...’. While, on this basis, unanimous consent by the Council is necessary to take steps in the accession process, the European Commission functions as the primary interlocutor with the candidate country and can be considered the driving actor in enlargement policy (see Deliverable 6.1, 123).

⁷¹⁸ See Aydın-Düzgit and Tocci 2015 (n 713) 10.

⁷¹⁹ Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) Official Journal of the European Communities No L 361/173, 31.12.77, Article 28, <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=616> accessed 5 December 2015.

⁷²⁰ See *ibid* Article 5.

⁷²¹ Tatham 2009 (n 714) 144.

⁷²² Commission of the European Communities, *Commission Opinion on Turkey’s request for accession to the European Communities*, SEC (89) 2290 final/2, Brussels, 20 December 1989, 3, <<http://aei.pitt.edu/4475/1/4475.pdf>> accessed 21 December 2015.

⁷²³ *ibid* 4: ‘Turkey’s economic and political situation, as far as the Commission can evaluate it in the last quarter of 1989, does not convince it that the adjustment problems which would confront Turkey if it were to accede to the Community could be overcome in the medium term’. *ibid* 8: ‘Although there have been developments in

‘without casting doubt on its eligibility for membership of the Community’.⁷²⁴ EU-Turkey relations in the following years were directed towards establishing the customs union, which the Commission had also underlined as a measure for intensifying relations in its Opinion.⁷²⁵ In December 1995 negotiations were finalised and the customs union was established in the beginning of 1996.⁷²⁶

The following year, 1997, however, brought a deterioration of the relationship. In its Agenda 2000 the European Commission attested considerable shortcomings in the field of human rights in Turkey⁷²⁷ (as well as persistent economic problems) and did hence not recommend to include the country under the same enlargement framework like the other (CEEC) applicants. Even though the chapter on Turkey in the Agenda 2000 does not explicitly mention the Copenhagen criteria, it was clear that these criteria, adopted by the European Council in Copenhagen in 1993, had been determined as the reference framework for a country’s EU accession process and would hence be applied to Turkey, too. They comprise, next to economic pre-conditions and the ability on part of the candidate to assume the obligations of membership, certain political criteria to be met by the applicant country: ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.⁷²⁸ These criteria had been complemented by the need for good neighbourly relations by the European Council in Essen 1994 for the associated CEEC,⁷²⁹ which the EC in the Agenda 2000 extended as a condition to all applicant states: ‘before accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries’.⁷³⁰ Taken up by the European Council of Luxembourg in December 1997,⁷³¹ the good neighbourliness condition became a significant aspect in Turkey’s accession process, above all with regard to the Cyprus issue, as will be explained further below.

The Luxembourg European Council followed the Commission’s view of unsatisfying political and economic conditions and – while confirming Turkey’s eligibility for membership – did not grant

recent years in the human rights situation and in respect for the identity of minorities, these have not yet reached the level required in a democracy’.

⁷²⁴ *ibid* 8.

⁷²⁵ *ibid* 8.

⁷²⁶ See Association Council Decision 1/95 of 22.12.1995 on implementing the final phase of the Customs Union, Official Journal L 035, 13.02.1996, <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213(01):EN:HTML)> accessed 21 December 2015.

⁷²⁷ ‘Despite political recognition of the need for improvement and certain recent legislative changes, Turkey’s record on upholding the rights of the individual and freedom of expression falls well short of standards in the EU’. (European Commission, *Agenda 2000: For a stronger and wider Union*, Bulletin of the European Union, Supplement 5/97, 56, <http://ec.europa.eu/agriculture/cap-history/agenda-2000/com97-2000_en.pdf> accessed 27 February 2016).

⁷²⁸ European Council (1993) *Copenhagen European Council, 21 and 22 June 1993, Conclusions of the Presidency*, SN 180/1/93 REV 1, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72921.pdf> accessed 18 December 2015, 13. These political criteria have to be sufficiently fulfilled before accession negotiations are started, as was clarified by the European Council in Luxembourg in December 1997 (European Council (1997) *Luxembourg European Council 12 and 13 December 1997, Presidency Conclusions*, SN400/97, Paragraph 25 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0008.htm> accessed 18 December 2015).

⁷²⁹ See Tatham 2009 (n 714) 218f.

⁷³⁰ See European Commission 1997 (n 727) 51.

⁷³¹ European Council (1997) *Luxembourg European Council 12 and 13 December 1997, Presidency Conclusions*, SN400/97, 1, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0008.htm> accessed 18 December 2015).

candidate status.⁷³² This decision ‘pointing at Turkey’s democratic deficiencies’⁷³³ was taken up negatively by the Turkish government, which perceived the country to be treated in a discriminatory way in comparison to the other applicant countries moving ahead much quicker in the process.⁷³⁴ As a consequence, relations worsened and political dialogue came to a halt.⁷³⁵ The Luxembourg European Council had, however, underlined the importance of a European strategy to be elaborated ‘to prepare Turkey for accession’⁷³⁶ (without being tantamount to a pre-accession strategy, like had been developed for the CEEC in 1994) and the Commission came up with initial proposals for it in March 1998.⁷³⁷ On the basis of the Luxembourg Conclusions, this proposed strategy consisted also in the approximation of laws and in financial co-operation.⁷³⁸ With the European Council in Cardiff in June of the same year welcoming the Commission’s proposals⁷³⁹ and with better prospects on financial support for Turkey under the strategy,⁷⁴⁰ some slight improvement in attitudes towards each other could be observed.⁷⁴¹ This was also reflected in the fact that first technical meetings were held between the Commission and Turkish officials on the implementation of the European strategy.⁷⁴²

The 1998 Cardiff summit had also spelled out the Commission’s task of reporting on Turkey’s progress in harmonising its legislation and practice with the *acquis*, basing reporting not only on the Luxembourg Conclusions (and thus the European strategy), but also directly on Article 28 Association Agreement, thus referring to the membership possibility⁷⁴³ (see above), which could also be interpreted as a favourable move. The Commission’s first Progress Report on Turkey was published as ‘Regular Report on the Turkey’s progress towards accession’ in autumn 1998, together with the first round of reports for the then 11 candidate countries. While one can argue that this integrated Turkey among the other enlargement countries and signified a step out of the ‘special category’ created by the Luxembourg summit,⁷⁴⁴ it still meant that Turkey became subject to monitoring without formally

⁷³² European Council 1997 (n 731) 4.

⁷³³ Aydın-Düzgüt and Tocci 2015 (n 713) 18.

⁷³⁴ *ibid*, 18; Tatham 2009 (n 714) 149.

⁷³⁵ See Tatham 2009 (n 714) 149.

⁷³⁶ European Council 1997 (n 732) 4.

⁷³⁷ See European Commission (1998) *Communication from the Commission to the Council. European Strategy for Turkey - The Commission’s initial operational proposals*, Brussels, 4 March 1998, COM(1998) 124 final, <<http://aei.pitt.edu/4356/1/4356.pdf>> accessed 18 December 2015.

⁷³⁸ *ibid* 1.

⁷³⁹ European Council (1998) *Presidency Conclusions - Cardiff, 15 and 16 June 1998*, SN 150/1/98 REV 1, 24, <http://www.consilium.europa.eu/en/european-council/conclusions/pdf-1993-2003/CARDIFF-EUROPEAN-COUNCIL-15-AND-16-JUNE-1998-PRESIDENCY-CONCLUSIONS/> accessed 14 December 2015.

⁷⁴⁰ The Commission in its Communication of March 1998 (n 737) had pointed to the urgent need for the Council to adopt the regulation for a Special Action for Turkey (*ibid* 1), which was recalled by the Cardiff European Council. The Commission shortly thereafter proposed a concrete regulation under the European strategy, which, however, was only adopted in April 2000 (see European Commission (2000), Regular Report on Turkey’s progress towards accession, 8 November 2000, 8, http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/tu_en.pdf accessed 14 December 2015). Until then, the realisation of financial assistance for Turkey (which the Union had previously pledged) was prevented by Greece’s resistance (see Tatham 2009 (n 714) 310).

⁷⁴¹ See Eralp A, ‘Turkey and the European Union’ in Martin L G, Keridis, D. (eds), *The Future of Turkish Foreign Policy* (MIT press 2004) 71-82, 73; Tatham 2009(n 714) 150.

⁷⁴² See European Commission (1998) *Regular Report on Turkey’s progress towards accession*, 17 December 1998, COM(98) 711, 8, http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/turkey_en.pdf accessed 18 December 2015.

⁷⁴³ European Council 1998 (n 739) 22 and 24.

⁷⁴⁴ See Eralp 2004 (n 741) 74.

participating in the enlargement process. The 1998 Regular Report did not assert significant progress, especially with regard to the Copenhagen political criteria:

... the evaluation highlights certain anomalies in the functioning of the public authorities, persistent human rights violations and major shortcomings in the treatment of minorities ... The Commission acknowledges the Turkish government's commitment to combat human rights violations in the country but this has not so far had any significant effect in practice.⁷⁴⁵

Similarly, the 1999 Regular Report, published on 13 October 1999, concluded: 'Recent developments confirm that, although the basic features of a democratic system exist in Turkey, it still does not meet the Copenhagen political criteria. There are serious shortcomings in terms of human rights and protection of minorities.'⁷⁴⁶ The Commission did not include a recommendation whether Turkey should be awarded candidate status or not in the Report. It reflected, however, on the earthquake of 17 August 1999, which had severely affected Turkey (and which was followed by another one hitting Greece in September) as well as on the improvement in Greek-Turkish relations.⁷⁴⁷

The rapprochement between Greece and Turkey, which had not only been induced by the common tragic experiences and increased cooperation in their aftermath, but also by policy shifts in the Greek government,⁷⁴⁸ was one factor for change in EU-Turkey relations. This change, as Eralp analyses, 'mainly emanated from the EU rather than from Turkey'.⁷⁴⁹ It was also considerably brought about by a change in government in Germany, where Gerhard Schröder took over as Chancellor from Helmut Kohl and exhibited a more open policy towards Turkey's membership aspirations.⁷⁵⁰ These political shifts on part of the EU paved the way for Turkey obtaining the long-sought candidate status at the European Council of Helsinki in December 1999. As put by Eralp, 'Helsinki marked the end of the decade-old impasse in the Turkey-EU relationship, which had been to the advantage of neither side.'⁷⁵¹ While, with regard to the political criteria, the Commission's Regular Report had found a number of areas of concern and only some concrete reform steps (judicial amendments, anti-torture measures, moves towards abolishing death penalty),⁷⁵² the European Council in Helsinki concluded with a more positive overall tone:

The European Council welcomes recent positive developments in Turkey as noted in the Commission's progress report, as well as its intention to continue its reforms towards complying with the Copenhagen

⁷⁴⁵ European Commission Regular Report 1998 (n 742) 21.

⁷⁴⁶ European Commission (1999) *Regular Report on Turkey's progress towards accession*, 13 October 1999, 46, http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/turkey_en.pdf accessed 14 December 2015.

⁷⁴⁷ *ibid* 7.

⁷⁴⁸ See Tatham 2009 (n 714) 150; Aydın-Düzgit and Tocci 2015 (n 713) 19.

⁷⁴⁹ Eralp 2004 (n 741) 78.

⁷⁵⁰ For more details see Kirisci K, 'Turkey and European Union: The Domestic Politics of Negotiating Pre-Accession' (2005), *Macalester International* Vol. 15, Article 10, <<http://digitalcommons.macalester.edu/macintl/vol15/iss1/10/>> accessed 15 December 2015, 49; Tatham 2009 (n 714) 150f. For further geopolitical influences and strategic reasoning, see Eralp 2004 (n 741) 78f; Günay C, *Geschichte der Türkei: von den Anfängen der Moderne bis heute* (Böhlau Verlag GmbH & Co. KG 2012) 356f; and Aydın-Düzgit and Tocci 2015 (n 713) 18f.

⁷⁵¹ Eralp 2004 (n 741) 77.

⁷⁵² See European Commission Regular Report 1999 (n 746) 9ff.

criteria. Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States.⁷⁵³

Kirisci highlights the fact that the Turkish government briefly before the Copenhagen summit had followed the call by the European Court of Human Rights for a stay of the death penalty which had been handed out to Abdullah Öcalan, leader of the PKK, earlier in 1999. This, he argues, ‘was taken by the EU, which required the lifting of the death penalty as a precondition for pre-accession, as a very positive and symbolically important gesture’, thus significantly contributing to the awarding of candidate status.⁷⁵⁴ The Council’s formulation above made it clear, though, that, due to lacking compliance with the Copenhagen criteria, accession negotiations would not be opened at that time right away. Still, the Helsinki summit formed a turning point, as will be illustrated in the next section.

2. From candidate status to the opening of accession negotiations (1999-2005)

Alongside candidate status, the European Council in Helsinki 1999 stipulated the creation of a pre-accession strategy for Turkey, ‘with emphasis on progressing towards fulfilling the political criteria for accession with particular reference to the issue of human rights’⁷⁵⁵ (as well as the resolution of the Cyprus dispute) and the elaboration of an Accession Partnership, to be complemented by a National Programme for the Adoption of the Acquis.⁷⁵⁶ Together with the Commission’s monitoring, these enlargement instruments, having been devised for the other candidates already in 1997, became crucial for the domestic reform process and significantly contributed to the functioning of human rights conditionality, as will be further elaborated in section C.1.

The first Accession Partnership (AP), prepared by the Commission during 2000, was adopted by the Council in March 2001⁷⁵⁷ and was followed by the first Turkish National Programme for the Adoption of the Acquis (NPAA) of the same month.⁷⁵⁸ The AP defining short and medium term priorities for reform and the NPAA further detailing these priorities and commitments on part of the Turkish government⁷⁵⁹ were subsequently complemented by a special pre-accession funding instrument adopted by the Council in December 2001.⁷⁶⁰

⁷⁵³ European Council (1999) *Helsinki European Council 10 and 11 December 1999: Conclusions of the Presidency*, Helsinki, 11 December 1999, para. 12, <<http://www.consilium.europa.eu/en/european-council/conclusions/pdf-1993-2003/HELSINKI-EUROPEAN-COUNCIL--PRESIDENCY-CONCLUSIONS-10-11-DECEMBER-1999/>> accessed 5 December 2015.

⁷⁵⁴ Kirisci 2005 (n 750) 66. The Commission’s Regular Report had also dedicated much attention to Öcalan’s trial and the death sentence against him (see European Commission Regular Report 1999 (n 746) 5ff).

⁷⁵⁵ European Council 1999 (n 753) para. 12.

⁷⁵⁶ *ibid.*

⁷⁵⁷ Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, Official Journal of the European Communities L 85/13, 24.3.2001, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001D0235>> accessed 18 December 2015.

⁷⁵⁸ Turkish National Programme for the Adoption of the Acquis 2001 (Decision of the Council of Ministers No. 2001/2129), <http://www.ab.gov.tr/index.php?p=195&l=2> accessed 15 December 2015.

⁷⁵⁹ For more on the interplay of AP and NPAA as instruments and the basis for programming of EC assistance see Deliverable 6.1 (n 712) 113.

⁷⁶⁰ Council Regulation (EC) No 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey, Official Journal of the European Communities L 342/1, 27.12.2001, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2500&from=EN> accessed 15 December 2015. Exploring why this regulation was adopted only two years after the Helsinki summit had envisaged it and which implications a

The years 2001-2005 have been portrayed widely in academic literature as a period of profound reforms being carried out by the Turkish government, which were stimulated to a large extent by the EU enlargement process and the respective political discourse in Turkey.⁷⁶¹ On the basis of the NPAA, 2001 saw 34 amendments to the Constitution being passed by the Turkish Grand National Assembly, which, until 2004, were followed by eight so-called harmonisation packages for aligning Turkish laws with the EU acquis. Aydın-Düzgit and Tocci state that ‘the most extensive process of progressive and democratic change in Turkey’s Republican history had been launched’, which some, as they point out, called a ‘quiet revolution’.⁷⁶² Hence, this period of reform and the impact of EU policy on the promotion of human rights in general, and respectively of gender equality and minority rights in particular, will deserve to be discussed in more detail in sections C and D. Yet, it shall be mentioned here that the changing political situation in Turkey also played a significant role.

While the coalition government between the Democratic Left Party, the Motherland Party and the Nationalist Movement Party could take an important, much debated step in August 2002 with the abolishment of the death penalty⁷⁶³ and the granting of certain cultural rights to minorities, it became increasingly divided over reform questions along the EU path and called early elections for November 2002.⁷⁶⁴ Achieving a landslide victory, the Islamic-conservative Justice and Development Party (Adalet ve Kalkınma Partisi, AKP) was in the position to form a single-party government and embarked on a clear EU accession course.⁷⁶⁵ The new AKP government succeeded in reaching a broad consensus on the membership objective not only among political actors, but also within Turkish society, thus also increasing its legitimacy as a political force (especially vis-à-vis the secular, Kemalist establishment).⁷⁶⁶ This enabled it to implement the reforms foreseen in the AP and NPAA, following the aim of moving forth in the process and starting accession negotiations at the earliest possible date.

The new government’s expectations of receiving such a date at the European Council meeting in Copenhagen in December 2002 were, however, not fulfilled. While commending Turkey on the reforms taken in line with the AP’s key priorities, the European Council urged the government ‘to address swiftly all remaining shortcomings in the field of the political criteria, not only with regard to legislation but also in particular with regard to implementation.’⁷⁶⁷ As for accession negotiations, it concluded: ‘If the European Council in December 2004 ... decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay.’⁷⁶⁸ Thus obtaining merely ‘a date for a date’,⁷⁶⁹ the new government was rather disappointed as it ‘had lobbied very hard

separate instrument had would go beyond the scope of this paper. For more on the nature of the instrument in comparison to the other pre-accession aid programmes see Tatham 2009 (n 714) 314f.

⁷⁶¹ See e.g. Eralp 2004 (n 741) 79 ff; Günay 2012 (n 750) 357; Aydın-Düzgit and Tocci 2015 (n 713) 30 and 33.

⁷⁶² Aydın-Düzgit and Tocci 2015 (n 713) 160.

⁷⁶³ For peace-time offences, while it was abolished for all circumstances through a further constitutional amendment in 2004 (see chapter III, table 1).

⁷⁶⁴ See Kirisci 2005 (n 750) 50.

⁷⁶⁵ See Aydın-Düzgit and Tocci 2015 (n 713) 28.

⁷⁶⁶ See Günay 2012 (n 750) 358; Aydın-Düzgit and Tocci 2015 (n 713) 28 and 162. Kubicek argues along the same lines, adding: ‘For the AKP then, the costs of reform were relatively low...’. (Paul Kubicek, ‘Political Conditionality and European Union’s Cultivation of Democracy in Turkey’ (2011) 18 *Democratization* 910-931, 917f).

⁷⁶⁷ European Council (2002) *Copenhagen European Council, 12 and 13 December 2002, Presidency conclusions*, 15917/02, 5, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/73842.pdf> accessed 18 December 2015.

⁷⁶⁸ *ibid.*

⁷⁶⁹ Kirisci 2005 (n 750) 51.

for a clear and unequivocal date'.⁷⁷⁰ Yet, as underlined by a number of authors, the outcome of the Copenhagen summit did not result in a slow-down in reforms in Turkey, but rather functioned as an incentive for intensifying efforts.⁷⁷¹ This has been attributed to a conditional date being still a move forward⁷⁷² as well as to the fact that the European Council at the same time decided to considerably increase pre-accession financial assistance for Turkey.⁷⁷³ It also tasked the Commission with elaborating a revised Accession Partnership,⁷⁷⁴ which was adopted by the Council in May 2003.⁷⁷⁵ Correspondingly, the Turkish government came up with a new National Programme for the Adoption of the Acquis in June 2003.⁷⁷⁶

With these new dynamics sparked, 2003 and 2004 saw far-reaching legal reforms being carried out (through further constitutional amendments and harmonisation packages as well as inter alia a new penal code) in order to meet the Copenhagen political criteria (see sections C and D). On the basis of a favourable recommendation by the Commission,⁷⁷⁷ accompanying its October 2004 Progress Report, the Brussels European Council in December 2004 confirmed that 'Turkey sufficiently fulfil[ed] the Copenhagen political criteria'.⁷⁷⁸ It hence decided for negotiations to be opened in October 2005 and tasked the Commission to draft a negotiating framework.⁷⁷⁹

This envisaged date could be kept and accession negotiations between Turkey and the EU (as well as between Croatia⁷⁸⁰ and the EU) were officially launched in an Intergovernmental Conference (IGC) on

⁷⁷⁰ *ibid* 68.

⁷⁷¹ See Senem Aydın and E. Fuat Keyman, 'European Integration and the Transformation of Turkish Democracy' (EU-Turkey Working Papers CEPS No. 2/August 2004), 16, <<http://aei.pitt.edu/6764/>> accessed 15 December 2015; Kirisci 2005 (n 750) 68.

⁷⁷² See Aydın-Düzgüt and Tocci 2015 (n 713) 21 for the connection between this 'upgrade' in relations and further Greek-Turkish rapprochement during 2002.

⁷⁷³ See Aydın and Keyman 2004 (n 771) 16; European Council 2002 (n. 767) 6.

⁷⁷⁴ *ibid*.

⁷⁷⁵ Council Decision 2003/398/EC of 19 May 2003, on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey, Official Journal of the European Communities L 145/40, 12.6.2003, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003D0398>> accessed 18 December 2015.

⁷⁷⁶ Turkish National Programme for the Adoption of the Acquis 2003 (Decision of the Council of Ministers Dated 23 June 2003 No. 2003/5930) <http://www.ab.gov.tr/index.php?p=196&l=2> accessed 16 December 2015.

⁷⁷⁷ European Commission (2004) *Communication from the Commission to the Council and the European Parliament: Recommendation of the European Commission on Turkey's progress towards accession*, Brussels, 6 October 2004, COM(2004) 656 final, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004DC0656>> accessed 18 December 2015.

⁷⁷⁸ European Council (2004) *Brussels European Council 16 and 17 December 2004, Presidency conclusions*, 16238/1/04 REV 1, 6, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf> accessed 18 December 2015. The European Council made its decision dependent on Turkey bringing certain political criteria laws previously adopted into force (see in detail chapter IV.C.1.a)).

⁷⁷⁹ *ibid* 6.

⁷⁸⁰ Croatia had applied for EU membership in February 2003 and had been a candidate since June 2004 (see Deliverable 6.1 (n 712) 114). The 2004 Brussels European Council also decided to commence negotiations with Croatia on the basis of a negotiating framework to be elaborated by the Commission, but had set a nearer preliminary date than for Turkey, in this case 17 March 2005. Yet, Croatia could not meet the condition of full cooperation with the International Criminal Tribunal for the former Yugoslavia until then, therefore both countries started their negotiations simultaneously on 3 October 2005.

3 October 2005.⁷⁸¹ The 2004 European Council had - while underlining the common objective of the candidate countries' accession – pointed to the open-ended nature of the negotiation process, 'the outcome of which cannot be guaranteed beforehand'.⁷⁸² This was reiterated in the Negotiating Framework as adopted by the Council and presented at the ICG.⁷⁸³ While the same wording was also taken up into the Negotiating Framework for Croatia,⁷⁸⁴ it can be argued that the EU – adding in the case of Turkey also an additional explicit reference to the criterion of the EU's absorption capacity⁷⁸⁵ – directed these 'unprecedented degree of self-protecting clauses'⁷⁸⁶ mainly towards Turkey. The same goes for the introduction of specific suspension clauses into the two Negotiating Frameworks as safeguard provisions with regard to the Copenhagen political criteria (for more detail see section C.2 on accession negotiations).⁷⁸⁷ Tatham describes this 'specification of conditionality in the continuance of negotiations' as 'a direct warning sign to Turkey'.⁷⁸⁸

There were two other major novelties in the Negotiating Frameworks for Turkey and Croatia: the creation of a specific negotiation chapter 23 'Judiciary and fundamental rights' and a new two-stage methodology for each chapter, with the first 'screening' phase primarily looking at the status of concordance of national legislation with the EU *acquis*. The resulting Screening Report has to be unanimously adopted by the Council, together with, as the case may be, opening benchmarks for the respective chapter. These provisions will be discussed in more detail with regard to negotiations with Turkey on human rights areas in section C.2.

As explored in Deliverable 6.1,⁷⁸⁹ it should be noted here again that the negotiation methodology has been further developed over the last years, with the so-called new approach being first applied to Montenegro in 2012. This new approach increases the focus on the so-called 'rule of law' chapters, i.e. chapter 23 and 24 ('Justice, Freedom & Security'). While it is formally not applicable to Turkey's negotiation procedure, the principal idea of 'anchoring the rule of law at the centre of the accession

⁷⁸¹ The fact that Turkey signed the Additional Protocol to the Association Agreement in July 2005, extending the Agreement to the 10 countries having joined the Union in 2004, surely played a highly important role in political terms for enabling the commencement of negotiations. See also chapter IV.B.2, n 796.

⁷⁸² European Council 2004 (n 778) 7.

⁷⁸³ Council of the European Union (2005) *Accession negotiations with Turkey: General EU Position*, Brussels, 12 October 2005, 12823/1/05 REV 1, <http://www.ab.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/NegotiatingFrameowrk/Negotiating_Frameowrk_Full.pdf> accessed 21 December 2015.

⁷⁸⁴ Negotiating Framework with Croatia (Luxembourg, 3 October 2005) point 11, http://ec.europa.eu/enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf accessed 1 February 2016.

⁷⁸⁵ Council of the European Union 2005 (n 783) 5. This criterion of the Union's capacity to absorb new members had already been defined by the 1993 Copenhagen European Council (European Council 1993 (n 728) 13), yet assumed an increasingly greater role after the 2004 enlargement, while evidently being beyond the influence of the enlargement countries (see also Tatham 2009 (n 714) 231).

⁷⁸⁶ Aydın-Düzgüt and Tocci 2015 (n 713) 33.

⁷⁸⁷ European Council 2004 (n 778) 8; Negotiating Framework with Croatia (n 784) point 12; Negotiating Framework with Turkey (Luxembourg, 3 October 2005), point 12, <http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf> accessed 18 December 2015.

⁷⁸⁸ Tatham 2009 (n 714) 154.

⁷⁸⁹ See Deliverable 6.1 (n 712) 116ff.

process⁷⁹⁰ and of putting ‘fundamentals first’⁷⁹¹ does reverberate on the EU’s enlargement policy towards Turkey, too. This will be further elaborated on throughout section C.

3. A decade of negotiations (2005-2015)

Turkey’s negotiation process started with the screening phase launched in October 2005 and completed one year later.⁷⁹² However, since then not all Screening Reports have been adopted by the Council, with chapters 23 and 24 among the ones pending up to the present day. This also means that no opening benchmarks have been (officially) set for these chapters, which implies that the negotiation process cannot move on in this respect. For a further discussion of this stalemate and the implications on the promotion of human rights, see section C.

Even though a revised Accession Partnership was adopted by the Council in January 2006⁷⁹³ and the first negotiation chapter (26 – Science and research) was opened and provisionally closed in June,⁷⁹⁴ Turkey’s accession process – and the pace of reforms⁷⁹⁵ – started to slow down during this year. While at first sight it seems astounding that the momentum faded away so shortly after the start of negotiations, this changing of the tide can be accounted to a number of factors, both in the EU and the domestic arena, influencing each other. One major factor lay in Turkey-Cyprus relations. Turkey, despite having signed the Additional Protocol to the Association Agreement (extending this Agreement to all the new Member States of 2004, including Cyprus) in July 2005,⁷⁹⁶ did not fully implement it and

⁷⁹⁰ EC, ‘Enlargement Strategy and Main Challenges 2012-2013’ (n 262) 4.

⁷⁹¹ EC, ‘Enlargement Strategy and Main Challenges 2013-2014’ (n 268) 2. See most recently EC, ‘Communication, EU Enlargement Strategy 2015’ (n 285) 5.

⁷⁹² See Tatham 2009 (n 714) 154.

⁷⁹³ Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, Official Journal of the European Union L 22/34, 26.1.2006, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006D0035>> accessed 18 December 2015.

⁷⁹⁴ See European Commission, European Neighborhood Policy and Enlargement Negotiations - Turkey <http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm> accessed 18 December 2015.

⁷⁹⁵ See the critical assessment in European Commission (2006) *Commission Staff Working Document Turkey 2006 Progress Report*, Brussels, 8 November 2006, COM (2006) 649 final, <http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/tr_sec_1390_en.pdf> accessed 18 December 2015.

⁷⁹⁶ See European External Action Service, Treaties Office Database <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyid=1561>> accessed 18 December 2015. While formally the signature of the Additional Protocol had not been made a condition for the opening of negotiations in October 2005, the Council had ‘welcomed the declaration of Turkey to sign [it] prior to the actual start of accession negotiations’ (European Council 2004 (n 778)). The EC Progress Report 2005 states that ‘Turkey was expected’ to sign the Protocol (European Commission (2005) *Turkey 2005 Progress Report*, Brussels, 9 November 2005, COM (2005) 561 final, 4, <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1426_final_progress_report_tr_en.pdf> accessed 18 December 2015). Politically, the signature of the Protocol had thus contributed significantly to the launching of negotiations. Not surprisingly therefore, its non-implementation has hence resulted in a disruption of the process due to political reasons. See also the Declaration of the European Community and its Member States of 21 September 2005 calling for ‘full, non-discriminatory implementation of the Additional Protocol’ and projecting that Turkey’s ‘[f]ailure to implement its obligations in full will affect the overall progress in the negotiations.’ (Council of the European Union (2005) *Enlargement: Turkey, Declaration by the European Community and its Member States*, Brussels, 21 September 2005, 12541/05 (Presse 243) para.3 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/86300.pdf> accessed 4 February 2016).

upheld trade restrictions vis-à-vis Cyprus, which is still true at the date of writing.⁷⁹⁷ 2006 was characterised by controversies about this issue. Aydın-Düzgit and Tocci point out:

*Insofar as Turkey has linked its extension of the customs union to southern Cyprus to progress in the Cyprus peace progress or at the very least to the lifting of the EU's isolation of northern Cyprus – a promise unkept by the EU since the 2004 failure of the of the UN-sponsored Annan Plan – the Cyprus quagmire has become increasingly entangled with EU-Turkey relations.*⁷⁹⁸

This was primarily visible in the fact that the Council – upon recommendation of the Commission⁷⁹⁹ – on 11 December 2006 took the decision that eight negotiation chapters would not be opened and that no chapter would be provisionally closed ‘until the Commission verifies that Turkey has fulfilled its commitments related to the Additional Protocol’.⁸⁰⁰ These eight chapters are: 1 – Free movement of goods, 3 – Right of establishment and freedom to provide service, 9 – Financial services, 11 – Agriculture and rural development, 13 – Fisheries, 14 – Transport policy, 29 – Customs union and 30 – External relations.⁸⁰¹ This decision, endorsed by the European Council on 14/15 December,⁸⁰² started the trend that accession negotiations were blocked in an increasing number of ways. While, however, the freezing of the eight mentioned chapters signified an official suspension based on a decision of the Council, the following years saw a further politicisation of the process through unilateral vetoes on the part of Member States. In 2007 France under the new President Nicolas Sarkozy blocked the opening of four further chapters⁸⁰³ and since 2009 Cyprus – in reaction to Turkey’s on-going objection to implement the Additional Protocol to the Ankara Agreement – has been vetoing six more chapters, among these the rule of law chapters 23 and 24.⁸⁰⁴ At the time of writing, out of the 35 chapters, 15 chapters have been opened since 2006, with only one of these provisionally closed, and three chapters could be opened ‘provided that Turkey fulfils the technical criteria’ (i.e. the opening benchmarks which have been determined in these cases).⁸⁰⁵ Among these openable chapters is chapter 19 ‘Social policy

⁷⁹⁷ European Commission (2015) *Commission Staff Working Document Turkey 2015 Progress Report*, Brussels, 10 November 2015, COM(2015) 216 final, 26, <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf> accessed 18 December 2015.

⁷⁹⁸ Aydın-Düzgit and Tocci 2015 (n 713) 34.

⁷⁹⁹ See European Commission (2006) *Communication from the Commission to the Council - Accession negotiations with Turkey*, Brussels, 29 November 2006, COM(2006) 773 final, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0773&from=en>> accessed 21 December 2015.

⁸⁰⁰ Council of the European Union (2006) *Press Release - 2770th Council Meeting, General Affairs and External Relations – General Affairs*, Brussels, 11 December 2006, 16289/06 (Presse 352) 7 and 8, <http://europa.eu/rapid/press-release_PRES-06-352_en.htm?locale=en> accessed 21 December 2015.

⁸⁰¹ *ibid* 8.

⁸⁰² See European Council (2006) *Brussels European Council 14/15 December 2006, Presidency Conclusions*, 16879/1/06 REV 1, 3, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/92202.pdf> accessed 21 December 2015.

⁸⁰³ These were: 17 – Economic and monetary policy, 22 – Regional policy, 33 – Financial and budgetary provisions, 34 – Institutions (see Aydın-Düzgit and Tocci 2015 (n 713) 34; confirmed by interviews in November 2015). After the election of François Hollande as President in 2012, the French veto on chapter 22 was lifted and the negotiations on it were started in 2013. A similar shift followed only recently with regard to chapter 17, which was opened for negotiations on 14 December 2015 (see below).

⁸⁰⁴ The other chapters are: 2 – Freedom of movement of workers, 15 – Energy, 26 – Education and culture, 31 – Foreign, security and defence policy (see Aydın-Düzgit and Tocci 2015 (n 713) 34; confirmed by interviews in November 2015).

⁸⁰⁵ See <http://avrupa.info.tr/eu-and-turkey/accession-negotiations/what-is-the-current-status.html> accessed 19 December 2015.

and employment', which is relevant to the issue of equal opportunities / anti-discrimination and will hence be treated in more detail in section C.2.

Looking back on the process after 2006, the political moves on the part of some EU Member States (notably Germany under Chancellor Merkel and France under President Sarkozy), accompanied also by a changing rhetoric about Turkey's prospective membership,⁸⁰⁶ were coupled with a decreasing pace in negotiations as well as reforms carried out by Turkey (see section C.1.b). Aydın-Düzgüt and Tocci underline that political and public discourse in the EU, increasingly calling in question the objective of Turkey eventually becoming a member, had a considerable effect on the slowing-down of accession talks: 'Indeed it is notable that although the political decision to grant Turkey candidacy was taken in 1999, the public debates that have followed have continued to focus on whether Turkey should join the EU rather than on how Turkey's accession could take place.'⁸⁰⁷

On the Turkish side, support for EU accession started to decrease right after the launch of negotiations (against the background of the Negotiating Framework being formulated as outlined above, the Cyprus issue becoming a stumbling block and the critical – political and public - discourse within the EU). Euroscepticism grew during 2006 not only among the political opposition and the military,⁸⁰⁸ but also the general public. Turkish society's increasing disbelief in their country's eventual EU membership, as outlined by Aydın-Düzgüt and Keyman on the basis of both Eurobarometer and national data,⁸⁰⁹ reduced the societal legitimacy of accession-induced reforms and resulted in 'Turkish citizens ... becoming increasingly estranged from the European project'.⁸¹⁰

It shall not go unmentioned that the AKP government, which had gained political legitimacy from the EU accession process since 2002, officially held on to a pro-EU reform agenda. Yet, with growing domestic opposition to this path and decreased EU credibility, it shifted its focus more to the national context.⁸¹¹ The AKP could strengthen its legitimacy by winning the 2007 parliamentary elections, in which, as pointed out by Kubicek, EU accession had not played much of a role (which also held for the ensuing 2011 elections, bringing the AKP more electoral backing and its third term in office).⁸¹²

⁸⁰⁶ The interviews carried out for this analysis confirmed that it was around this time that identity issues became increasingly voiced by EU politicians and media (see also Hale 2011 (n 715) 323). The emphasis on the open-ended nature of negotiations was linked to the idea of a 'privileged partnership' instead of membership by Member States like Germany, France and Austria at that time (see Yılmaz G, 'From Europeanization to De-Europeanization: The Europeanization Process of Turkey in 1999–2014' (2015) *Journal of Contemporary European Studies* (Routledge 2015) 5).

⁸⁰⁷ Aydın-Düzgüt and Tocci 2015 (n 713) 38.

⁸⁰⁸ See Yılmaz 2015 (n 806) 6f.

⁸⁰⁹ See Aydın-Düzgüt S, and Keyman F,E, *EU-Turkey Relations and the Stagnation of Turkish Democracy* (Global Turkey in Europe Working Paper IAI, IPC Stiftung Mercator, GMF 2012/2) 4 <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=156275>> accessed 15 December 2015.

⁸¹⁰ *ibid.* The Transatlantic Trends surveys by the German Marshall Fund demonstrate a similar picture of decreasing public support in Turkey for EU membership over the last years (see e.g German Marshall Fund of the United States, *Transatlantic Trends 2011*, 4, <<http://www.gmfus.org/publications/transatlantic-trends-2011>> and *Transatlantic Trends 2013*, 23, <<http://trends.gmfus.org/files/2013/09/Country-summaries-edit2.pdf>>, both accessed 8 April 2016).

⁸¹¹ See Yılmaz 2015 (n 806) 7f.

⁸¹² See Kubicek P, 'The European Union and political reform in Turkey: moving beyond conditionality' in Cengiz F, and Hoffmann L, (eds.), *Turkey and the European Union: Facing new challenges and opportunities*, (Routledge 2014) 204.

Müftüler-Baç speaks of ‘new wave of authoritarianism through the electoral hegemony’ of the AKP and sees that ‘a Pandora’s box’ had been opened by political liberalisation in Turkey since 1999:

... the process of political changes to fulfill the political aspects of the EU’s accession criteria pushed the conflict between the secularists and religious conservatives in Turkey that has long been suppressed into the open. ... the institutional changes that aimed at further democratizing Turkey unleashed conservative reactionary forces in the Turkish society...⁸¹³

In spite of Turkey elaborating a comprehensive Programme for Alignment with the Acquis for the years 2007-2013, that ‘aim[ed] at achievement of harmonization with the acquis communautaire during the period 2007-2013 with a perspective of full membership to the EU’,⁸¹⁴ and the Council adopting another revised Accession Partnership on 18 February 2008, complemented again by a Turkish NPAA in 2008, not very much progress was achieved. Aydın-Düzgit and Tocci write that ‘the down-turn in Turkey’s accession process came with a derailment of the country’s democratization.’⁸¹⁵ Although there have been some reforms in the field of human rights and democracy, as will be highlighted in more detail in sections C.1.b) and C.1.c), they seem to have become ‘detached from the accession process’.⁸¹⁶ At the same time, EU institutions kept raising concerns about backsliding phenomena on political criteria issues (notably freedom of expression, freedom of the media, women’s rights – see section C.1.c) for more detail),⁸¹⁷ accession negotiations came to ‘a virtual political and technical stalemate’⁸¹⁸ and the relationship between Turkey and the EU turned increasingly sour.

In order to bring a change to the deteriorating relations with Turkey and to invigorate the stagnating accession process the European Commission launched the so-called Positive Agenda in May 2012.⁸¹⁹ It was designed not to replace accession negotiations, but to allow for a renewed engagement outside of these and included areas which belonged to the chapters on hold, including ‘political reforms and fundamental rights’.⁸²⁰ Thus providing a way to circumvent the blockages, the Positive Agenda enabled the Commission and Turkey to, on a technical level, carry out meetings of the working groups established under it also during the second half of 2012⁸²¹ when Cyprus held the EU Presidency and Turkey froze official relations with the EU. Sceptical voices saw the Positive Agenda in danger of

⁸¹³ Meltem Müftüler-Baç, ‘The Pandora’s box: democratization and rule of law in Turkey’, *Asia Europe Journal*, March 2016, Volume 14, Issue 1, 62.

⁸¹⁴ Turkey’s Programme for Alignment with the Acquis (2007-2013) i, http://www.ab.gov.tr/files/Muktesebat_Uyum_Programi/En/Introduction.pdf accessed 19 December 2015.

⁸¹⁵ Aydın-Düzgit and Tocci 2015 (n 713) 163.

⁸¹⁶ *ibid.*

⁸¹⁷ See e.g. European Commission (2011) *Commission Staff Working Document Turkey 2011 Progress Report*, Brussels, 12 October 2011, COM(2011) 666, <http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf> accessed 18 December 2015; Council of the European Union (2011) *Conclusions on Enlargement and Stabilisation and Association Process*, 5 December 2011, 18195/11, <<http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2018195%202011%20INIT>>, accessed 18 December 2015.

⁸¹⁸ Morelli V L, *European Union Enlargement: A Status Report on Turkey’s Accession Negotiation* (CRS Report for Congress August 5 2013) 7, <<https://www.fas.org/spp/crs/row/RS22517.pdf>> accessed 21 December 2015.

⁸¹⁹ See European Commission, ‘Positive EU-Turkey agenda launched in Ankara’, MEMO/12/359, Brussels, 17 May 2012, [http://europa.eu/rapid/press-release MEMO-12-359_en.htm](http://europa.eu/rapid/press-release_MEMO-12-359_en.htm) accessed 4 February 2016.

⁸²⁰ *ibid.*

⁸²¹ See Morelli 2013 (n 818) 12.

becoming ‘another disappointment and waste of time in the long history of EU-Turkey relations’,⁸²² given that it may meet its aim of accelerating reforms, but would hardly be able to overcome vetoes in the Council based on national policies. While the Progress Reports 2013 and 2014 both made reference to the Positive Agenda in that it ‘continued to support and complement accession negotiations through enhanced cooperation’,⁸²³ there is no mention to be found of it anymore in the Progress Report 2015. As for the EU-Turkey working group on chapter 23 created right after the launch of the initiative in 2012, section C.3 will give a specific account.

What the Positive Agenda had brought about was some movement in the field of visa liberalisation, also comprised under the ‘areas of joint interest where progress is both needed and feasible’⁸²⁴ and which it was thus supposed to address. The Commission prepared a roadmap for visa liberalisation⁸²⁵ containing certain requirements Turkey has to fulfil for visa-free travel to the EU for its citizens. This roadmap was handed over to the Turkish government and the visa liberalisation dialogue thereby launched on 16 December 2013, with Turkey on the same day signing a readmission agreement with the EU as a pre-condition.⁸²⁶ Even though, as explained earlier (and in Deliverable 6.1⁸²⁷), the visa liberalisation dialogue does not form part of the accession process and thus cannot be considered an instrument of enlargement policy, there are interlinkages between the processes. Since the visa liberalisation roadmap for Turkey contains a specific block of fundamental rights requirements, these will be discussed in more detail in section C.6 in terms of progress achieved so far as well as possible conjunctions with future negotiations on chapter 23.

In early 2013 the accession process gained slight impetus again by France lifting its hold on chapter 22 (Regional policy) and by the prospect of opening negotiations on this chapter in June.⁸²⁸ However, the Gezi Park protests in May and June and the harsh reaction by the Turkish police and the government put EU-Turkey relations under considerable strain. Meetings were cancelled and communication with Ankara worsened. The European Commission, on the other hand, notably through Commissioner for Enlargement and Neighbourhood Policy Štefan Füle, while equally condemning the excessive use of

⁸²² Demiral, N ‘Positive agenda for Turkey-European Union relations: what will it bring or what will it take?’ *Procedia - Social and Behavioral Sciences* 143 (2014) 1011 – 1014 (p. 1012).

⁸²³ European Commission (2013) *Commission Staff Working Document Turkey 2013 Progress Report*, Brussels, 16 October 2013, COM(2013) 700 final, 3 <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/tr_rapport_2013.pdf> accessed 18 December 2015, and European Commission (2014) *Commission Staff Working Document Turkey 2014 Progress Report*, Brussels, 08 October 2014, SWD(2014) 307 final, 3 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf> accessed 18 December 2015.

⁸²⁴ European Commission 2012 (819).

⁸²⁵ Roadmap toward a visa-free regime with Turkey <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf> accessed 19 December 2015.

⁸²⁶ See European Commission (2013) *Press Release - Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey*, Brussels, 16 December 2013, Press Release IP/13/1259, <http://europa.eu/rapid/press-release_IP-13-1259_en.htm> accessed 21 December 2015. The readmission agreement aims at establishing procedures for the return of irregular migrants having entered the EU from Turkey (and vice versa).

⁸²⁷ See Deliverable 6.1 (n 712) 120.

⁸²⁸ See Morelli 2013 (n 818) 13. See also Hurriyet Daily News ‘EU opens new chapter, Turkey wants more’, 5 November 2013, <<http://www.hurriyetdailynews.com/eu-opens-new-chapter-turkey-wants-more.aspx?PageID=238&NID=57361&NewsCatID=351>> accessed 20 December 2015.

force by the police and requesting ‘swift and transparent investigation’,⁸²⁹ advocated for increased EU engagement and dialogue, especially with regard to chapters 23 and 24.⁸³⁰ The Council in June eventually decided to formally open chapter 22, yet to postpone the resumption of actual accession talks to a later point.⁸³¹ The latter happened in the Accession Conference at Ministerial level held on 5 November 2013,⁸³² which – up to December 2015 – would remain the only one during this two years period. The start of negotiations on chapter 22 did not give much momentum to the accession process and did not improve the relationship between Turkey and the EU distinctly. Despite the adoption of the 4th Judicial Reform Package in spring 2013 containing a number of human rights provisions (see section C.1.c), the Gezi Park incidents, as pointed out by Morelli, had ‘served to further alienate those in Europe who remain skeptical of Turkey’s ability and willingness to meet the requirements established in all the chapters of the acquis’.⁸³³

This could also not be outweighed by the peace process with the Kurdistan Workers’ Party (Partiya Karkerên Kurdistanê PKK) launched by the AKP government at the beginning of 2013,⁸³⁴ even though it was welcomed and supported by EU actors.⁸³⁵ Furthermore, restrictions on the freedom of media introduced by the Turkish government in 2013-14 as well as observed interference with the judiciary⁸³⁶ have increased criticism and distrust. While both Turkey and the EU have been holding on to the enlargement process, Morelli summarizes that

⁸²⁹ European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle (2013) *EU-Turkey bound together*, Conference of Ministry for EU Affairs “Rethinking Global Challenges: Constructing a Common Future for Turkey and the EU” Istanbul, Turkey, 7 June 2013, SPEECH/13/517, 2, http://europa.eu/rapid/press-release_SPEECH-13-526_en.htm accessed 20 December 2015.

⁸³⁰ See European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle (2013) *Crucial moment in EU-Turkey relations*, Debate on Turkey at the Plenary Session of the European Parliament, Strasbourg, 12 June 2013, SPEECH/13/526, http://europa.eu/rapid/press-release_SPEECH-13-526_en.htm accessed 20 December 2015.

⁸³¹ See Council of the European Union (2013) *Press release 3251st Council meeting - General Affairs*, Brussels, 25 June 2013, 11443/13 (Presse 287) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/137614.pdf> accessed 21 December 2015.

⁸³² Council of the European Union (2013) *Accession Conference at Ministerial level opens negotiations with Turkey on Chapter 22 - Regional Policy and Coordination of Structural instruments*, Brussels, 5 November 2013, 15694/13 (Presse 451) <http://data.consilium.europa.eu/doc/document/ST-15694-2013-INIT/en/pdf> accessed 7 December 2015.

⁸³³ Morelli 2013 (n 818) 15.

⁸³⁴ See Ensaroğlu Y, ‘Turkey’s Kurdish question and the Peace Process’, *Insight Turkey Vol 15./2*, 2013, 7-17 <http://file.insightturkey.com/files/pdf/20130415155719_15_2_2013_ensaroglu.pdf> accessed 21 December 2015, 14.

⁸³⁵ See e.g. European Union (2013) *Joint Statement by EU High Representative Catherine Ashton and Commissioner Štefan Füle on Abdullah Öcalan’s call on the PKK to lay down arms and withdraw beyond Turkey’s borders*, Brussels, 21 March 2013, A 160/13 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136433.pdf> accessed 21 December 2015.

⁸³⁶ In the wake of alleged corruption cases within the government (which consequently was re-built) the government took measures against an alleged ‘parallel structure’ by the Gülen movement within the police and the judiciary, suspected of planning a judicial coup (see European Commission 2014 (n 823) 9).

it has been suggested that Europe's disinterest, skepticism or in the case of a few, outright opposition to Turkey's membership, along with the perceived EU foot-dragging in the accession negotiations have reinforced a growing ambivalence in Turkey about its future in the EU.⁸³⁷

This is also reflected in the recent assessment of Aydın-Düzgit and Tocci: 'While the [AKP's] elite pledged a rhetorical commitment to full membership, they also highlighted that Turkey-EU relations had come to a standstill due to the negative and discriminatory approach of the EU'.⁸³⁸ They further argue that, after the AKP had won the 2007 election and had gained more support domestically, its dependency on the EU and its reform agenda decreased. 'The reactions of the government to EU criticisms of the state of democracy in Turkey are indicative of the weakened reputation of the EU in that country.'⁸³⁹ Certainly, the Euro crisis unfolding after 2008 has also affected both the waning attractiveness of the Union in Turkish eyes as well as the discourse within the Union, in which the enlargement agenda lost attention.

The Turkish government on its side came forth with a new European Union Strategy in September 2014,⁸⁴⁰ which consists of three components: political reform process, socio-economic transformation and EU communication. On the basis of the Strategy and as an update to the 2008 NPAA, two National Action Plans for EU Accession for the periods 2014-2015 and 2015-2019 were adopted in October respectively December 2014.⁸⁴¹ As for chapter 23 'Judiciary and fundamental rights', they outline a number of envisaged measures in reference to unofficial information on the opening benchmarks, which will be discussed in section C.2. Commissioner Füle welcomed the new strategic approach on the Turkish side,⁸⁴² whereas the Progress Report 2014 sounded somewhat more reserved: 'The Commission looks forward to the concrete follow-up by Turkey of its recently adopted EU strategy, which aims to reinvigorate Turkey's accession process.'⁸⁴³ After the Action Plans were elaborated, the then new Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn welcomed these and appreciated 'that the European Convention for Human Rights and the EU acquis will serve as the references for political reforms'.⁸⁴⁴ The latest Progress Report from November

⁸³⁷ Morelli 2013 (n 818) 14.

⁸³⁸ Aydın-Düzgit and Tocci 2015 (n 713) 29.

⁸³⁹ *ibid.*

⁸⁴⁰ Republic of Turkey, Ministry of EU Affairs (2014), *Turkey's New European Union Strategy*, http://www.ab.gov.tr/files/pub/turkeys_new_eu_strategy.pdf accessed 22 December 2015.

⁸⁴¹ Republic of Turkey, Ministry of EU Affairs (2014), *National Action Plan for EU Accession Phase-I*, <http://www.ab.gov.tr/files/napisonwebeng.pdf> and Republic of Turkey, Ministry of EU Affairs (2014), *National Action Plan for EU Accession Phase-II*, <http://www.ab.gov.tr/files/pub/nap-ii-en.pdf> both accessed 22 December 2015.

⁸⁴² See European Commission (2014), *EU-Turkey: Need to tackle challenges in judicial system*, Brussels, 3 October 2014, STATEMENT/14/298, <http://europa.eu/rapid/press-release_STATEMENT-14-298_de.htm>, accessed 18 December 2015

and Delegation of the European Union to Turkey, 'EU-Turkey: Meeting with Minister V.Bozkir in Brussels' <<http://avrupa.info.tr/resource-centre/news-archive/news-single-view/article/eu-turkey-meeting-with-minister-vbozkir-in-brussels.html>> accessed 18 December 2015.

⁸⁴³ European Commission 2014 (n 823) 2.

⁸⁴⁴ European Commissioner for Enlargement and Neighbourhood Policy Johannes Hahn (2014) *EU-Turkey: Important milestones leading to new opportunities*, Brussels, EU-Turkey Joint Parliamentary Committee, European Parliament, 11 November 2014, SPEECH/14/1621, <http://europa.eu/rapid/press-release_SPEECH-14-1621_de.htm> accessed 4 February 2016.

2015, however, only contains one brief reference to the Action Plans in the area of public procurement rules.⁸⁴⁵

The new attempt to improve relations with the EU and to step up the accession efforts launched by the Turkish government in 2014 might also be deducted from the fact that it discontinued publishing its own Progress Report. This had been done in 2012 and 2013 as, in the words of then Minister for EU Affairs Bağış, a ‘response to those who claim that Turkey’s progress on the EU path has virtually come to a halt’⁸⁴⁶ and as a ‘challenge to the skewed mentality in Europe’.⁸⁴⁷ Like the elaboration of Turkey’s own reports and the rhetoric accompanying it could be seen as emblematic of the trough in the relationship with the EU, so could the decision to stop doing this be regarded as a sign for an attempted rapprochement.⁸⁴⁸

Turkey’s relationship with the EU has been widely characterized as having a cyclical nature which is determined by both dynamics in Turkey and the EU interlocking with each other.⁸⁴⁹ The accession process at the time of writing (December 2015) has been running for 16 years, with negotiations having been going on for 10 years – a time frame which alone exhibits Turkey’s ‘singularity’⁸⁵⁰ in comparison to other candidate countries. What makes it also stand out is the continuing uncertainty about eventual membership: ‘while Turkey’s European integration has progressed, paradoxically the prospects for full membership have dimmed.’⁸⁵¹ The virtuous cycle that the accession process brought about in the early years has been replaced by vicious interactions, as has been outlined in this section and has been attested broadly by others before.⁸⁵²

4. New dynamism?

At the time of writing the question remains whether the developments of 2015, which triggered a revived engagement with Turkey on part of the EU, can induce ‘yet another reversal’ as envisaged before⁸⁵³ and re-invigorate the accession process. The high number of refugees entering the EU since the summer of 2015, mainly coming via Turkey, and the ensuing asylum policy crisis within the Union

⁸⁴⁵ European Commission Progress Report 2015 (n 797) 37.

⁸⁴⁶ Republic of Turkey, Ministry of EU Affairs (2012), *2012 Progress Report prepared by Turkey*, 3, http://www.ab.gov.tr/files/ilerlemeRaporlari/2012/2012_tr_progress_report_en.pdf accessed 22 December 2015.

⁸⁴⁷ Hürriyet Daily News ‘Turkey prepares its own EU progress report for first time’, 31 December 2012, <http://www.hurriyetdailynews.com/turkey-prepares-its-own-eu-progress-report-for-first-time-.aspx?pageID=238&nid=38023> accessed 22 December 2015.

⁸⁴⁸ This turn appears to be linked also to the replacement of Minister Bağış at the end of 2013. At the presentation of the new EU Strategy in September 2014, the then-Minister Volkan Bozkır was reported to have expressed regret about the earlier Turkish Progress Reports saying ‘Turkey’s own progress reports do not have any value regarding the system’, while still warning of an ‘inappropriate tone’ in the forthcoming EC Progress Report (Hürriyet Daily News ‘EU Minister promotes Turkey’s new EU strategy’, 18 September 2014 <<http://www.hurriyetdailynews.com/eu-minister-promotes-turkeys-new-eu-strategy.aspx?pageID=238&nid=71910>> accessed 22 December 2015). Controversy about the quality of the EC Progress Reports still exists, as will be illustrated in chapter IV.C.4.

⁸⁴⁹ See e.g. Öniş Z, ‘Domestic Politics, International Norms and Challenges to the State: Turkey-EU Relations in the Post-Helsinki Era’ (2003) 4 *Turkish Studies* (Routledge 2010) 35; Günay 2012 (n 750) 362; Aydın-Düzgit and Tocci 2015 (n 713) 29.

⁸⁵⁰ Aydın-Düzgit and Tocci 2015 (n 713) 35.

⁸⁵¹ *ibid* 49.

⁸⁵² See e.g. Aydın-Düzgit and Keyman 2012 (n 809) 17; Aydın-Düzgit and Tocci 2015 (n 713) 29ff.

⁸⁵³ Aydın-Düzgit and Tocci 2015 (n 713) 31.

have caused EU leaders to turn their attention to Turkey's role in controlling the refugee movements and to enter into dialogue with the Turkish President and government for possible joint efforts to deal with the situation. Turkey itself hosts more than 2 million Syrian and Iraqi refugees, which the Progress Report 2015 qualified as 'the largest refugee population in the world' and 'a major challenge' for the country.⁸⁵⁴ A high number of refugees are to be found in the Kurdish regions in the east and south-east of Turkey which aggravates the difficult socio-economic situation there.⁸⁵⁵ During 2015 Turkey has seen not only two elections (the last one being conducted on 1 November, since the AKP did not succeed in forming a government following the June election) and the breakdown of the peace process between the government and the PKK with the ceasefire collapsing in July,⁸⁵⁶ but also the traumatic bomb attacks on a peace rally in Ankara on 10 October, killing almost 100 people.⁸⁵⁷ The situation before the November elections was marked by increased insecurity, with attacks targeting the pro-Kurdish Peoples' Democratic Party (Halkların Demokratik Partisi HDP) as well as media outlets,⁸⁵⁸ and further restrictions on the freedom of media,⁸⁵⁹ which has been identified as an area of growing concern due to backsliding over the last two years.⁸⁶⁰ The latest Enlargement Strategy, which together with all the 2015 Progress Reports was published by the EC only after the Turkish elections on 10 November 2015, reads:

Turkey's progress on reforms has however been held back by a context of repeated elections and political confrontation. Significant shortcomings affected the judiciary. The situation regarding freedom of expression and freedom of assembly continued to deteriorate. ... The EU stands ready to re-engage with Turkey on the entire spectrum of our shared agenda. Turkey needs to reinvigorate reforms in the areas of rule of law and fundamental rights. It is imperative that the peace talks resume without delay. The Commission looks forward to work on these key priorities with the new government following the elections on 1 November. The European Council also concluded that the accession process needs to be reenergised with a view to achieving progress in the negotiations in accordance with the negotiating framework and the relevant Council conclusions.⁸⁶¹

It has been against this background of a difficult domestic situation in Turkey – characterised also by a further deepening political and societal polarization⁸⁶² – and repeated criticism by the EU on the one

⁸⁵⁴ European Commission 2015 Progress Report (n 797) 7.

⁸⁵⁵ *ibid* 25.

⁸⁵⁶ See International Crisis Group 'A New Cycle Begins in Turkey-PKK Conflict', 11 August 2015, <<http://blog.crisisgroup.org/europe-central-asia/2015/08/11/a-new-cycle-begins-in-turkey-pkk-conflict/>> accessed 21 December 2015. Since then, violence has escalated in the south-east (see BBC News 'Turkey kills 70 Kurdish militants, vowing to prevent 'chaos'', 19 December 2015 <<http://www.bbc.com/news/world-europe-35142586>> accessed 21 December 2015) and allegations of 'gross human rights violations' have been voiced (Today's Zaman 'Rights activist Kaya: Gross human rights violations committed in Cizre', 13 September 2015, http://www.todayszaman.com/monday-talk_rights-activist-kaya-gross-human-rights-violations-committed-in-cizre_399006.html accessed 21 December 2015.).

⁸⁵⁷ See BBC 'Ankara attacks: Turkey in mourning after blasts kill almost 100', 11 October 2015, <http://www.bbc.com/news/world-europe-34498497> accessed 21 December 2015.

⁸⁵⁸ European Commission 2015 Progress Report (n 797) 8.

⁸⁵⁹ *ibid.* 25. See also Günay C, *Nach den Wahlen - eine 'Neue Türkei'?*, OIIP Policy Paper 9/2015, <http://www.oaip.ac.at/fileadmin/Unterlagen/Dateien/Publikationen/Policy_Paper/Die_Tuerkei_nach_den_Wahlen_9_15.pdf> accessed 3 February 2016, 12.

⁸⁶⁰ See e.g. European Commission Progress Report 2014 (n 823) 15 and European Commission Progress Report 2015 (n 797) 5.

⁸⁶¹ European Commission 2015 (n 791) 16.

⁸⁶² See Günay 2015 (n 859) 11f and 17.

hand and continually expressed commitment to the accession process on the other hand that the refugee situation inside the Union has lead Member State politicians and EU officials to take up an intensified dialogue with the Turkish government since summer 2015. This resulted in the EU-Turkey summit of 29 November, termed by the EU as ‘an important step in developing EU-Turkey relations and contributing to managing the migration crisis.’⁸⁶³ In the latter field Turkey and the EU agreed on a Joint Action Plan⁸⁶⁴ which shall ‘bring order into migratory flows and help to stem irregular migration’⁸⁶⁵ and which will be accompanied by a Refugee Facility for Turkey funded with initially € 3 billion.⁸⁶⁶

Following up on the implementation of this Joint Action Plan, two further EU-Turkey summits were held on 7 and 18 March 2016 in order ‘to build an EU response to migratory pressures’.⁸⁶⁷ During these meetings, new proposals from the Turkish side were discussed and another agreement was reached on 18 March, revolving around the joint decision ‘to end the irregular migration from Turkey to the EU’.⁸⁶⁸ This entails that migrants coming from Turkey into Greece will be returned to Turkey while for every returned Syrian, one Syrian will be resettled to the EU.⁸⁶⁹ This way people should be discouraged from crossing the Aegean Sea illegally, yet it cannot be overlooked that a legal way of entering the EU through resettlement is limited to Syrian citizens. The EU-Turkey statement underlines that the return ‘will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion’.⁸⁷⁰ It stresses the respect of the non-refoulement principle and that asylum applications will be handled on an individual basis in line with the Asylum Procedures Directive and in cooperation with UNHCR.⁸⁷¹

This passage may have been included in reaction to previous concern expressed by UNHCR about potential blanket returns (which would obviously contradict international law) when the new plans were first discussed in early March.⁸⁷² Yet, only shortly after the new agreement, UNHCR criticised its

⁸⁶³ Council of the European Union ‘EU Enlargement – Turkey’ <http://www.consilium.europa.eu/en/policies/enlargement/turkey/> accessed 21 December 2015.

⁸⁶⁴ See European Commission - Fact Sheet ‘EU-Turkey Joint Action plan’, Brussels, 15 October 2015, MEMO/15/5860 <http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm> accessed 21 December 2015. This Joint Action Plan as such does not make any reference to Turkey’s accession process, but builds on the visa liberalisation dialogue. The EU pledges to increase financial assistance for fulfilment of the visa roadmap requirements, see also chapters IV.C.5 on financial assistance and IV.C.6 on the visa liberalisation dialogue.

⁸⁶⁵ International Summit ‘Meeting of heads of state or government with Turkey - EU-Turkey statement, 29/11/2015’, Statements and Remarks 870/15, 29/11/2015, point 7, accessed 7 December 2015.

⁸⁶⁶ *ibid* point 6.

⁸⁶⁷ European Council ‘Timeline - response to migratory pressures’, <<http://www.consilium.europa.eu/en/policies/migratory-pressures/history-migratory-pressures/>> accessed 9 April 2016.

⁸⁶⁸ International Summit ‘EU-Turkey statement, 18 March 2016’, Press release 144/16, 18/03/2016, 1, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 9 April 2016.

⁸⁶⁹ See *ibid* points 1 and 2.

⁸⁷⁰ *ibid* point 1.

⁸⁷¹ See *ibid*. In accordance with the Asylum Procedures Directive an asylum application may be declared inadmissible if the applicant entered the Union from a safe third country (see European Commission (2016) *Six Principles for further developing EU-Turkey Cooperation in tackling the Migration Crisis*, Press release IP/16/830, Brussels, 16 March 2016, <http://europa.eu/rapid/press-release_IP-16-830_en.htm> accessed 9 April 2016).

⁸⁷² See UNHCR ‘UNHCR expresses concern over EU-Turkey plan’, News Stories, 11 March 2016, <<http://www.unhcr.org/56dee1546.html>> accessed 9 April 2016.

premature implementation and missing legal safeguards as well as the now mandatory detention of migrants and refugees in the Greek so-called hotspots (installed for registration purposes in 2015).⁸⁷³ UNHCR therefore discontinued bringing people to these centres, thus following the international NGO Médecins Sans Frontières in halting cooperation after the March agreement.⁸⁷⁴ The agreement – which also foresees a doubling of the earmarked funds under the Refugee Facility until 2018⁸⁷⁵ – was strongly criticised by Amnesty International, too, calling it ‘a historic blow to rights’ as Turkey cannot be considered a safe third country. This view was also taken by Human Rights Watch mainly due to Turkey not having a full-fledged asylum procedure for non-European refugees.⁸⁷⁶ Since Turkey’s asylum system and migration management also form part of the visa liberalisation dialogue (VLD), these issues will be further discussed with regard to human rights requirements in section C.6. There we will also elaborate on the fact that the agreement of 18 March included a further acceleration of the visa liberalisation process with a view to completing it by June 2016.⁸⁷⁷

With regard to the accession process, Turkey and the EU stated at the November 2015 summit that the process ‘needs to be re-energized’⁸⁷⁸ and agreed to open chapter 17 (‘Economic and monetary policy’) in an Intergovernmental Conference on 14 December 2015.⁸⁷⁹ It is worth noting at this point that the Commission had submitted a Draft Common Position for this chapter to the Council already in June, thus providing the basis for deciding on the opening of the chapter at the 25–26 June 2015 European Council meeting.⁸⁸⁰ The European Council did not take this decision in June, yet in the course of ensuing developments this option became more tangible, notably with German Chancellor Merkel explicitly supporting this step (and preparations for opening chapters 23 and 24) during her visit to Ankara in October 2015.⁸⁸¹

It can and has been argued that the agreement reached by Turkey and the EU on the Joint Action Plan and the opening of chapter 17 were the results of a trade-off.⁸⁸² What has been much discussed in

⁸⁷³ See Reuters ‘UNHCR says won’t work in Greek ‘detention centres’ in swipe at EU-Turkey deal’, 23 March 2016, <<http://uk.reuters.com/article/uk-europe-migrants-greece-unhcr-idUKKCN0W00S3>> accessed 9 April 2016.

⁸⁷⁴ See *ibid.* and Médecins Sans Frontières, ‘Greece: MSF ends activities inside the Lesbos ‘hotspot’’, 22 March 2016, <<http://www.msf.org/article/greece-msf-ends-activities-inside-lesvos-%E2%80%99Chotspot%E2%80%99D>> accessed 9 April 2016.

⁸⁷⁵ See EU-Turkey statement 18/03/2016 (n 868) point 6.

⁸⁷⁶ See Human Rights Watch ‘Q&A: The EU-Turkey Deal on Migration and Refugees’, 3 March 2016, <<https://www.hrw.org/news/2016/03/03/qa-eu-turkey-deal-migration-and-refugees>> accessed 9 April 2016.

⁸⁷⁷ See EU-Turkey statement 18/03/2016 (n 868) point 5.

⁸⁷⁸ EU-Turkey statement 29/11/2015 (n 865) point 2.

⁸⁷⁹ *ibid.* point 4. It was also decided to hold regular summit meetings twice a year from now on (see *ibid.* point 3).

⁸⁸⁰ See Hürriyet Daily News, ‘European Commission: Open new Turkey-EU chapter’, 13 June 2015, <<http://www.hurriyetdailynews.com/european-commission-open-new-turkey-eu-chapter.aspx?pageID=238&nID=83926&NewsCatID=338>> accessed 21 December 2015.

⁸⁸¹ See euobserver ‘Merkel pushes for Turkey EU membership talks’, 19 October 2015, <https://euobserver.com/enlargement/130735> accessed 21 December 2015.

⁸⁸² See Dimitar Bechev and Natalie Tocci, ‘What they didn’t tell you at the EU-Turkey summit’, 1 December 2015 <<https://euobserver.com/opinion/131330>> accessed 7 December 2015; Today’s Zaman, ‘Academic Aydın-Düzgit: Turkey-EU agreement not ethical, a step backward in relations’, 6 December 2015, http://www.todayszaman.com/monday-talk_academic-aydin-duzgit-turkey-eu-agreement-not-ethical-a-step-backward-in-relations_406256.html accessed 10 December 2015; Asli Aydintasbas, ‘Turkey: EU partner or buffer state?’, 2 December 2015, <http://www.ecfr.eu/article/commentary_turkey_eu_partner_or_buffer_state> accessed 21 December 2015, who quotes European officials saying that the ‘re-energizing’ approach was a ‘by-product’ in this deal.

recent months is to what extent the EU would be ready to make compromises with Turkey and whether its security interests would trump its fundamental values, in that democracy and human rights questions would be left aside.⁸⁸³ This is a burning question which remains to be answered by the EU in the coming months and around which this analysis attempts to present some observations as well as to eventually formulate some recommendations by way of an outlook (see section E).

At the resumption of accession negotiations on 14 December the Turkish Minister for European Affairs Volkan Bozkır spoke of ‘a sign that a new phase has begun’⁸⁸⁴ in the enlargement process, which was echoed by Luxembourg Minister for Foreign and European Affairs Jean Asselborn on behalf of the Presidency of the Council welcoming that ‘fresh impetus had been given to this process’.⁸⁸⁵ Scholars and commentators have, however, expressed doubt whether the autumn of 2015 can be regarded as a turning point in Turkey’s enlargement process and, with it, the domestic reform course. Bechev and Tocci argue that

*... the general political climate in Turkey does not suggest a growing convergence with EU norms and standards. ... It is not by rationing one accession chapter every year or two that the EU can hope to reverse the political tide in Turkey and reacquire the role of a catalyst for democratic reform.*⁸⁸⁶

Currently, it has been argued by some Turkish and EU scholars, Turkey is seen by the EU more as a strategic partner than an enlargement country, which also reverberates on the EU’s positioning on human rights issues within Turkey.⁸⁸⁷ Revolving around upgrading the customs union, visa liberalisation and cooperation in security, migration and energy policies, the focus appears to be on ‘partly converging interests – not values’.⁸⁸⁸ This is corroborated e.g. by a statement by Luxembourg’s Minister Asselborn as representative of the Presidency of the Council, saying after the ICG on 14 December 2015 that ‘[t]he European Union needs a strategic partner like Turkey on a good number of international issues’.⁸⁸⁹ It was only when the topic of jailed journalists was raised in a question that he

⁸⁸³ See Dimitar Bechev and Natalie Tocci, ‘What they didn’t tell you at the EU-Turkey summit’, 1 December 2015, <https://euobserver.com/opinion/131330> accessed 7 December 2015; Today’s Zaman, ‘Academic Aydın-Düzgit: Turkey-EU agreement not ethical, a step backward in relations’, 6 December 2015, http://www.todayszaman.com/monday-talk_academic-aydin-duzgit-turkey-eu-agreement-not-ethical-a-step-backward-in-relations_406256.html accessed 10 December 2015; see also Arisan Eralp October 2015 ‘Sophie’s choice for the European Union: Realpolitik or Values? Inshallah both’, 7.

⁸⁸⁴ Presidency of the Council of the European Union Grand-Duché de Luxembourg ‘EU-Turkey Intergovernmental Conference – Jean Asselborn announces the opening of Chapter 17 on economic and monetary policy’, 14 December 2015, <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/12/14-cig-ue-turquie/index.html> accessed 21 December 2015.

⁸⁸⁵ *ibid.*

⁸⁸⁶ Dimitar Bechev and Natalie Tocci, ‘What they didn’t tell you at the EU-Turkey summit’, 1 December 2015, 2, <https://euobserver.com/opinion/131330> accessed 7 December 2015.

⁸⁸⁷ See Today’s Zaman, ‘Academic Aydın-Düzgit: Turkey-EU agreement not ethical, a step backward in relations’, 6 December 2015, http://www.todayszaman.com/monday-talk_academic-aydin-duzgit-turkey-eu-agreement-not-ethical-a-step-backward-in-relations_406256.html accessed 10 December 2015. See also the ‘three lenses for EU-Turkey relations’ influencing the significance given to human rights and democracy questions in Aydın-Düzgit and Tocci 2015 (n 713) 172 ff.

⁸⁸⁸ Dimitar Bechev and Natalie Tocci 2015 (n 886) 2.

⁸⁸⁹ Presidency of the Council of the European Union Grand-Duché de Luxembourg ‘EU-Turkey Intergovernmental Conference – Jean Asselborn announces the opening of Chapter 17 on economic and monetary policy’, 14 December 2015, <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/12/14-cig-ue-turquie/index.html> accessed 21 December 2015.

made a general reference to the applicability of the Copenhagen Criteria. Commissioner Hahn on his part included a brief reference to the shortcomings identified in the 2015 Progress Report in his speech, adding: “We hope that the new Turkish government will be eager to drive a set of comprehensive reforms, particularly in areas such as freedom of speech and the press as well as the independence of the judiciary.”⁸⁹⁰ How vocal the EU will (continue to) be on human rights requirements will depend on both how consistently Turkey will be perceived as an enlargement country and to what extent EU-Turkey relations will be determined by realpolitik. As commented by European Council on Foreign Relations fellow Aydintasbas, “[i]t is true that the deal brings Turkey closer to Europe – though not necessarily as a potential EU member, but more as a ‘special friend’ who can provide a bulwark against the influx of refugees.”⁸⁹¹ However, following Bechev’s and Tocci’s analysis, which has been substantiated by the interviews carried out in Turkey at the end of November 2015, if the next year brings some political momentum, notably through a settlement of the Cyprus question and the unfreezing of chapters 23 and 24, this could sustainably revitalize the accession process and the reform momentum in Turkey,⁸⁹² so that a ‘virtuous dynamic may be set in motion once again’.⁸⁹³ This will essentially depend on the EU adhering to a consistent and credible human rights policy both vis-à-vis Turkey and internally. This means not only sticking to a human rights discourse in relations to Turkey, but also keeping up with it in action – be it in accession negotiations, the VLD or in dealing with the refugee situation as the most acute human rights challenge for the EU. As these dimensions have become even more entangled through the new March agreement, the stakes are considerably high now. EU-Turkey relations seem to be interlinked with the EU’s identity as a community of values more than ever and may be regarded as putting the latter to the test.

The following analysis attempts to trace the significance of human rights promotion in/through EU enlargement policy towards Turkey since 1999 and to lay the basis for specific recommendations for EU policy in the presence and near future.

C. The promotion of human rights in Turkey through EU enlargement policy – instruments and priorities

*Democracy and human rights have been a recurrent theme in the long-standing relationship between the European Union and Turkey. More than any other issue, they have acted as a litmus test for the relationship as a whole, deeply conditioning its cyclical ups and downs over the decades.*⁸⁹⁴

Following this assessment by Aydın-Düzgüt and Tocci, who attribute primary significance to the field of democracy and human rights in their comprehensive 2015 analysis of the ‘curious love affair’ between the EU and Turkey,⁸⁹⁵ it can be said that the virtuous and vicious cycles outlined in the preceding chapter cannot only be foremost observed in this field. What is more, progress in this field – or lack

⁸⁹⁰ *ibid.*

⁸⁹¹ Asli Aydintasbas, ‘Turkey: EU partner or buffer state?’, 2 December 2015, http://www.ecfr.eu/article/commentary_turkey_eu_partner_or_buffer_state accessed 21 December 2015.

⁸⁹² See Dimitar Bechev and Natalie Tocci 2015 (n 886).

⁸⁹³ Aydın-Düzgüt and Tocci 2015 (n 713) 31.

⁸⁹⁴ *ibid* 155.

⁸⁹⁵ *ibid* 1.

thereof – has also directly affected the relationship, which precisely underlines the interconnection and the two-way dynamics.

Looking at Turkey's human rights situation and the EU's influence on it in the period since the award of candidate status in 1999, one can differentiate between two or three sub-periods. While the time up to the beginning of accession negotiations in 2005 (or shortly afterwards in 2006) has concordantly been identified in literature (and by interview partners) as a period of remarkable reforms and improvements (termed i.a. as 'Turkey's silent revolution'⁸⁹⁶ or the 'golden age'⁸⁹⁷), it is not so clear if and into which intervals the time span since then can appropriately be subdivided. Some authors treat the whole period since 2006 as one characterized by deceleration of the accession process as well as of democracy and human rights reforms in Turkey.⁸⁹⁸ Others see a third phase of renewed effort at political reform launched in 2010 with the AKP government tabling a democratisation package⁸⁹⁹ respectively after the AKP's third election victory in 2011 with ensuing reforms, notably through six judicial reform packages until mid-2014.⁹⁰⁰ This resumption of reforms has to be seen, however, against simultaneous back-sliding phenomena in some areas over the last years – or, as stated by Yılmaz, 'instances of de-Europeanization simultaneously with Europeanizing reforms',⁹⁰¹ in contrast to the previous periods of 'progressing Europeanization' respectively 'selective Europeanization'.⁹⁰² This development suggests indeed to treat the recent years as a separate phase (while 2015/2016, as sketched earlier, may bring about another change in relations, in negotiations and, perhaps, in reforms promoting human rights).

The present analysis of the EU's relevant enlargement instruments applied towards Turkey and the human rights priorities they reveal (this section) as well as the leverage exhibited in the two selected issues areas (section D) will come back to these different periods (the 'golden years' 1999-2005; the slowdown 2006-2010; the concurrence of reforms and setbacks 2011-2015), thus illustrating the shifts in the pace of human rights reforms in Turkey and the EU's influence in more detail.

Before delving into this analysis, it is worth giving a brief overview at this point on the major human rights reforms and improvements in Turkey during these three periods, which will be referred to in the ensuing sub-chapters.⁹⁰³

⁸⁹⁶ *ibid* 160.

⁸⁹⁷ Kubicek in Cengiz and Hoffmann 2014 (n 812) 195. This term was also repeatedly mentioned in the interviews.

⁸⁹⁸ See Aydın-Düzgüt and Keyman 2012 (n 809) 7; Aydın-Düzgüt and Tocci 2015 (n 713) 162 ff.

⁸⁹⁹ See Hale 2011 (n 715) , 331.

⁹⁰⁰ Yılmaz 2015 (n 806) 9.

⁹⁰¹ *ibid*.

⁹⁰² *ibid* 2.

⁹⁰³ This summary draws on Aydın and Keyman 2004 (n 771); Republic of Turkey, Ministry of Foreign Affairs, Secretariat General for EU Affairs (2007), *Political Reforms in Turkey*, <<http://www.ab.gov.tr/files/pub/prt.pdf>> accessed 29 February 2016; Hale 2011 (n 715); Aydın-Düzgüt and Keyman 2012 (n 809) the EC Progress Reports 2012-2015, United Nations Office of the High Commissioner of Human Rights, Status of Ratification Interactive Dashboard <<http://indicators.ohchr.org/>> accessed on 7 February 2016, and Council of Europe, Treaty list for a specific State - Turkey <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR?p_auth=j4nOr3cO> accessed 11 February 2016.

The 'golden years' 1999-2005	2000	<ul style="list-style-type: none"> ▪ Signature of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights
	2001	<ul style="list-style-type: none"> ▪ 34 constitutional amendments (i.a. abolition of death penalty in peace times, shortening pre-trial detention, revisions to enhance freedom of expression and association) ▪ New Civil Code (i.a. improvements with regard to gender equality, protection of children)
	2002	<ul style="list-style-type: none"> ▪ 3 harmonisation packages (with further reforms i.a. on minority rights (right to broadcast in languages other than Turkish), freedom of expression and association) ▪ Ratification of UN Convention on the Elimination of All Forms of Racial Discrimination (Signature 1972) ▪ State of emergency lifted in southeast Turkey (provinces Diyarbakir and Sirnak)
	2003	<ul style="list-style-type: none"> ▪ 4th and 5th harmonisation packages (i.a. anti-torture measures, strengthening freedom of press, freedom of association, rights of non-Muslim minorities, enabling retrial of cases where European Court of Human Rights found a violation) ▪ Ratification of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights ▪ 6th harmonisation package (i.a. enhancing freedom of expression (repealing Art. 8 Anti-Terror Law on propaganda against the indivisibility of the state), expanding broadcasting rights in different languages) ▪ 7th harmonisation package (i.a. civilian control over the military, anti-torture provisions, freedom of association and assembly, right to learn in languages other than Turkish)
	2004	<ul style="list-style-type: none"> ▪ Further constitutional amendments (i.a. abolition of death penalty in all circumstances, strengthening gender equality, expanding freedom of press, supremacy of international human rights treaties over domestic legislation) ▪ 8th harmonisation package (i.a. harmonising abolishment of death penalty, curtailing certain powers of the National Security Council) ▪ Abolition of State Security Courts ▪ New Law on Associations ▪ New Penal Code
	2005	<ul style="list-style-type: none"> ▪ Amendments to the new Penal Code (some improvements as to freedom of expression) ▪ New Law on Disabled People ▪ Signature of Optional Protocol to the UN Convention against Torture
The slowdown 2006-2010	2006	<ul style="list-style-type: none"> ▪ 9th harmonisation/reform package⁹⁰⁴ (on political criteria, but no outright human rights legislation)
	2007	<ul style="list-style-type: none"> ▪ Signature of UN Convention on the Rights of Persons with Disabilities

⁹⁰⁴ The terminology used in official documents, media reports and literature varies: 9th harmonisation package vs. 9th reform package. Whether this can be considered a sign of the EU starting to lose its role as anchor for political reforms already at this point could not be examined in the framework of the present study.

	2008	<ul style="list-style-type: none"> ▪ New Law on Foundations (with provisions on property rights of non-Muslim foundations) ▪ Amendment of Criminal Code (Art. 301 on insulting Turkish identity: prosecution limited)
	2009	<ul style="list-style-type: none"> ▪ Ratification of UN Convention on the Rights of Persons with Disabilities
	2010	<ul style="list-style-type: none"> ▪ Democratisation package (i.a. constitutional provisions on women's and children's rights, rights of the elderly and disabled, data protection, establishment of an Ombudsman Institution, right to appeal to the Constitutional Court with regard to fundamental rights and freedoms)
Reforms vs. setbacks 2011-2015	2011	<ul style="list-style-type: none"> ▪ Signature of Council of Europe Convention on preventing and combating violence against women and domestic violence ▪ Ratification of Optional Protocol to the UN Convention against Torture (OPCAT) ▪ Amendment to Law on Foundations (extending property rights of non-Muslim foundations)
	2011-14	<ul style="list-style-type: none"> ▪ 6 judicial reform packages (3rd (2013) and 4th (2014): improvements on reduction of pre-trial detention freedom of expression, access to justice, fight against impunity in torture cases)
	2012	<ul style="list-style-type: none"> ▪ Ratification of Council of Europe Convention on preventing and combating violence against women and domestic violence ▪ Law on the Protection of Family and Prevention of Violence against Women ▪ Establishment of National Human Rights Institution and Ombudsman Institution
	2013	<ul style="list-style-type: none"> ▪ Democratisation package announced by government (permission of private education and of political activity in languages other than Turkish, of use of non-Turkish letters, provisions against hate crime) ▪ Law on Foreigners and International Protection
	2014	<ul style="list-style-type: none"> ▪ Democratisation package passed by parliament ▪ Action Plan on Prevention of Violations of the European Convention on Human Rights
	2015	<ul style="list-style-type: none"> ▪ Ratification of Optional Protocol to UN Convention on the Rights of Persons with Disabilities (signed 2009)

Table 30. Main human rights reforms in Turkey from 1999 to 2015

With the reform process slowing down since 2005, Hale in 2011 attested that the government is 'still left ... with a large unachieved agenda' and especially referred to minority rights, freedom of speech and women's rights.⁹⁰⁵ Four years later and despite some democratisation efforts by the Turkish government, this assessment still holds, if one follows the 2015 EC Progress Report.

In order to examine in the ensuing sub-chapters the enlargement policy instruments used for the promotion of human rights in Turkey this paper will build on the general overview of these tools presented in Deliverable 6.1.⁹⁰⁶ The aim of this paper and the following section is to apply the findings

⁹⁰⁵ Hale 2011 (n 715) 327.

⁹⁰⁶ See Deliverable 6.1 (n 712) chapter IV, 110ff.

gathered there to the case of Turkey. In assessing how human rights topics have figured in the instruments deployed vis-à-vis Turkey and trace possible inconsistencies we will therefore follow the logic developed during the 6.1 mapping exercise. After discussing instruments and priorities in the Turkish case on a general level first, we will then look even closer into the two issue areas of gender equality and minority rights and try to carve out the EU's impact in these mini case studies (section D). With the temporal scope of the analysis ranging from 1999-2015, the EU's instruments to be examined on their implications specifically on Turkey are: human rights conditionality based on the Copenhagen criteria as central instrument (sub-section 1); accession negotiations with their human rights relevant formal and methodological elements (sub-section 2); the Positive Agenda launched in 2012 (sub-section 3); the annual Progress Reports as monitoring tools as well as the accompanying Enlargement Strategies (sub-section 4); financial and technical assistance (sub-section 5). The four Accession Partnerships adopted since 2001 as well as relevant Council conclusions and European Parliament resolutions will not be treated as tools in separate chapters, but incorporated in the other sub-sections. Even though not an instrument of enlargement policy, the visa liberalisation process will be treated at some length, too, given the entailed human rights requirements and the current efforts to advance the process (sub-section 6).

1. Human rights conditionality

As elaborated in Deliverable 6.1,⁹⁰⁷ enlargement-specific human rights conditionality, based on the Copenhagen political criteria 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities',⁹⁰⁸ has been acknowledged as the very strong and important EU policy tool to bring about pertinent reforms in the enlargement countries. Key as it is, it at the same time has its limits and needs certain scope conditions to unfold its power, which has been discussed at length in Europeanization literature⁹⁰⁹ and which has also already been highlighted in the overall introduction in section I.A (basically, high and credible incentives need to go along with low domestic adoption costs).⁹¹⁰ This section aims at investigating how human rights conditionality has worked in the case of Turkey, whether it is still working and what would be needed to make it work better.

The nature of pre-accession conditionality in general and human rights conditionality in particular has been explained in Deliverable 6.1⁹¹¹ in some detail and shall be summarized here by underlining its essential features: positive conditionality through an incentive system of reforms being rewarded with more cooperation / advancement in the accession process; a focus on norm transfer, i.e. adoption of the *acquis communautaire* by the enlargement country (yet with increasing attention also on

⁹⁰⁷ See Deliverable 6.1 (n 712) 125f.

⁹⁰⁸ European Council 1993 (n 728) 13.

⁹⁰⁹ On the basis of Schimmelfennig and Sedelmeier 2004 (n 14) see e.g. Börzel T, and Soyaltin D, *Europeanization in Turkey - Stretching a Concept to its Limits?*, KFG Working Paper No. 36, February 2012, (Freie Universität Berlin) 10ff; Dimitrova A, 'Speeding up or Slowing down? Lessons from the Last Enlargement on the Dynamics of Enlargement-Driven Reform' in Avci G, and Çarkoglu A, (eds.), *Turkey and the EU: Accession and Reform* (Routledge 2013) 21f; or Kubicek in Cengiz and Hoffmann 2014 (n 812) 196.

⁹¹⁰ See also Ulrich Sedelmeier 'Success and Challenges of the EU's Eastern Enlargement: the Persistent Power of Conditionality?' (Presentation held at the workshop EU Enlargement 2004, 10 Years after: Politics and Law, 5 May 2014, Institute for European Integration Research, University of Vienna) 2, naming a credible membership perspective and not too high domestic adjustment costs as 'favourable conditions' for effective conditionality, which has come under challenge in both the Western Balkans and Turkey (ibid 7).

⁹¹¹ See Deliverable 6.1 (n 712) 121ff.

enforcement of norms); the Copenhagen political criteria have to be sufficiently fulfilled for accession negotiations to be launched and fully achieved for a country to join the Union; the exact content of these conditions, notably as regards respect of human rights and protection of minorities, is mainly subject to the EC's interpretation and application; thus human rights conditionality shows an evolving character over time (which can be perceived either as bringing about more clarity and traceability through concretisation of the vague criteria, or as introducing additional conditions or admission restrictions along the way); rule of law issues, and under these human rights, are treated with increased scrutiny since 2010, leading thereby to stricter conditionality in this regard for the present candidates and potential candidates than in previous enlargements.⁹¹² As explained in the Introduction (I.A) and summarized in Table 2, inconsistencies can be of various types, and several of these can be identified in how conditionality is applied in the Turkish case.

While the 2007 Treaty of Lisbon with the incorporation of the EU Charter of Fundamental Rights into primary law has provided some more grounding to the Copenhagen criteria and orientation for both the EC and the enlargement countries, human rights requirements in enlargement practice go beyond the Charter, notably with regard to minority rights and media freedom (areas of particular importance in the case of Turkey, as will be shown). Hence, the criticism that enlargement countries are subject to a stricter human rights regime than Member States, which had already been brought forward in the context of the 5th enlargement round, is still valid (see also section I.A). This face of internal-external inconsistency (see Table 2 sketching the different types of inconsistency) plays a considerable role in EU-Turkey relations in connection with the EU's waning credibility, all the more when human rights standards come into jeopardy within the Union or at its borders, like in the present refugee situation.⁹¹³ Credibility of the accession process and hence of conditionality in Turkey's case have also suffered from its 'objectivity frame'⁹¹⁴ being diminished, in that negotiations on a considerable number of acquis chapters have been blocked by Member States out of political reasons. Naming the example of Turkey and the fact of still pending benchmark reports (i.e. Screening Reports), Hillion states:

Enlargement of the Union is thus being high-jacked by some Member States using their relative power vis-à-vis applicants to settle bilateral issues to their advantage. ... The enlargement process is thus not as de-politicised and objective as it has sometimes been portrayed to be.⁹¹⁵

While this phenomenon of nationalisation of the enlargement process and the resulting loss of predictability does not only affect Turkey, none of the other enlargement countries is faced with the same amount of political hurdles and such an unclear membership perspective, despite confirmed eligibility.⁹¹⁶ This layer of inconsistency across enlargement policy, i.e. in the EU's treatment of the different enlargement countries (see Table 2, has repeatedly been depicted by Turkish politicians as a form of discrimination, resulting in the protracted, 'open-ended' accession process.⁹¹⁷

⁹¹² While, as outlined in section IV.B.2, the new approach to chapters 23 and 24 and the methodology under it is technically not applicable to Turkey, the high importance given to rule of law matters since then has also translated into Turkey's accession process, as will be illustrated further below.

⁹¹³ This was very much reflected in the interviews conducted with stakeholders in Ankara and Istanbul.

⁹¹⁴ Dimitrova 2013 (n 909) 20, who points to the Commission's role as gatekeeper framing the negotiation process as 'technical and objective'.

⁹¹⁵ Hillion C, *The Creeping Nationalisation of the Enlargement Process*, 6 SIEPS Paper (Swedish Institute for European Policy Studies 2010) 22f.

⁹¹⁶ See also Aydın-Düzgüt and Tocci 2015 (n 713) 49.

⁹¹⁷ See *ibid* 18 and 29.

The third form of inconsistency which this case study on Turkey seeks to investigate is inconsistency between rhetoric and actual performance due to a discrepancy between self-declared values, i.e. human rights for this analysis, and other foreign policy interests. This inconsistency dimension has been identified elsewhere as the most prominent challenge for EU policy towards its partner countries⁹¹⁸ (although, as things look currently, the internal-external inconsistency with a further loss of credibility may come to a head). There is a direct link between this rhetoric vs performance kind of inconsistency and human rights conditionality: the latter can only function as a tool of external human rights governance, if the incentives set for meeting the conditions are then really handed out as rewards. Equally, one expects that, should the defined conditions not be fulfilled, i.e. the human rights record not be improved, this will be criticized and no rewards will be given to the country in question, despite potential other EU interests at play. Whether human rights conditionality has in this sense been consistently applied throughout Turkey's accession process or instances of inconsistency could be observed, will be discussed on the basis of the reviewed literature in the following sub-sections, moving along the different periods laid out above.

a) *The 'golden years' 1999–2005*

With its recognition as a candidate state in 1999, the EU introduced a strict conditionality mechanism and linked the improvement of Turkey's institutional ties with the EU to compliance with the Copenhagen political criteria. In other words, the declaration of its candidacy status, which offers a credible membership perspective, constituted an important incentive for Turkey to transform its democracy.⁹¹⁹

While Özer refers to the political criteria *sensu largo* and writes about democratic changes, her assessment equally holds for human rights conditionality. As already pointed out in section B.1, Turkey's problematic human rights record had played an important role in the EU's objection over the preceding 12 years to grant it candidate status, yet conditionality only became fully effective with candidacy being awarded and Turkey thus moving one step further. The promise that accession negotiations would be opened when the Copenhagen political criteria would be sufficiently met turned into an important driver for reforms, or, using Özer's words on political conditionality as such, 'an engine of Europeanisation of Turkish democracy and human rights regime.'⁹²⁰ In line with Schimmelfennig's and Sedelmeier's external incentives model, Özer sees the effectiveness of political conditionality reflected in Turkey's radical reforms in the period 1999-2004 and rooted in the credibility factor as well as low domestic adoption costs.⁹²¹ She states that both the coalition government in power until 2002 and – all the more – the following new AKP government expected the benefits they would gain from compliance with EU norms to be higher than the costs.⁹²² Positive public opinion and support of civil society for EU membership also constituted a significant 'push-factor', triggering, as Özer puts it, 'additional pressure on the government to break its resistance to the adoption of important reforms in politically quite costly areas like abolition of capital punishment, broadcasting and education in

⁹¹⁸ See FRAME Policy Brief October 2014 <http://www.fp7-frame.eu/wp-content/materiale/policy_brief/01-FRAME%20Policy%20Brief%20No%20%201%20--%2017%20November%202014.pdf> accessed 29 February 2016, 5; Deliverable 6.1 (n 712) 55ff.

⁹¹⁹ Özer, Y, 'The EU's Impact on Democratisation in Turkey: Europeanisation through Political Conditionality' in Nas Ç, and Özer Y, (eds.), *Turkey and the European Union: Processes of Europeanisation* (Ashgate 2012) 51.

⁹²⁰ Özer 2012 (n 919) 45.

⁹²¹ *ibid* 56f.

⁹²² *ibid* 58.

minority languages, decriminalising adultery.⁹²³ The broad consensus on the EU course that the AKP government could achieve also among the political opposition and thus the reduction of veto-players⁹²⁴ clearly added to favourable scope conditions for human rights conditionality to become effective during this period.⁹²⁵ Rumelili describes the working of EU conditionality on the domestic political players as follows:

*The momentum of the 1999–2004 period had resulted from a coalition of political elites united by the attractive prospect of EU membership. Those who were sceptical of political reform were induced by the carrot of EU membership while those who were already supportive of political reform were further empowered.*⁹²⁶

The fact that reforms were only implemented after the adoption of the first Accession Partnership (AP) in March 2001, starting with the 34 constitutional amendments in that year, underlines the importance of other instruments (the AP providing a roadmap, but arguably also the creation of a pre-accession funding instrument at the end of 2001), too, at least in support to the conditionality tool. Both the AP 2001 and the reviewed AP of 2003 with their short- and medium term priorities have been evaluated as having ‘acted as a catalyst’⁹²⁷ for the human rights reforms during the ‘golden years’ period.

Kubicek in his analysis of political reform in Turkey and the role of conditionality moves very much along the same lines with regard to all the needed variables being in place in the ‘golden age’ and concludes: ‘Turkey, in many respects, was a textbook case of how these factors aligned in a manner conducive to the conditions-compliance dynamic envisioned by conditionality.’⁹²⁸ He states that the human rights reforms introduced during that period all responded to ‘concerns ... highlighted by the EU as a shortcoming in Turkey’s democratic and human rights record and something that would have to be rectified in order for Turkey to meet the political requirements of the Copenhagen criteria and begin accession talks.’⁹²⁹ With human rights reforms revolving notably around the abolition of capital punishment, the prevention of torture, freedom of expression and association (also for Kurds),⁹³⁰ issues which had been addressed in the EC’s Progress Reports since 1998,⁹³¹ Kubicek argues that, ‘[a]lthough

⁹²³ *ibid* 58.

⁹²⁴ See also Kubicek in Cengiz and Hoffmann 2014 (n 812) 197. Cengiz and Hoffmann argue that initial reforms in 2001 and 2002 were introduced by the coalition government despite high adoption costs with strong veto players in the military, the judiciary and the bureaucracy and that the credible EU commitment gained with candidacy ‘helped the government to keep these counter-forces at bay’ (Cengiz F, and Hoffmann L, ‘Rethinking Conditionality: Turkey’s European Union Accession and the Kurdish Question’ (2013) *Journal of Common Market Studies* Volume 51, Number 3, 416–432, 426). They, hence, identify the credible membership perspective as the necessary and sufficient factor (*ibid.* 417), which they further substantiate with the post-2005 developments, as will be shown in section IV.C.1.b).

⁹²⁵ See also Dimitrova 2013 (n 909) 22, who, drawing on experiences from the 5th enlargement round, concludes: ‘...the most important scope condition for EU conditionality to work was a general political commitment by all political parties ... to EU accession.’

⁹²⁶ Rumelili B, ‘Turkey: Identity, Foreign Policy, and Socialization in a Post-Enlargement Europe’ (2011) *Journal of European Integration* (Routledge 2011) 244.

⁹²⁷ Robert P, Hansen A, et al., *Thematic Evaluation on Judiciary and Fundamental Rights in Turkey - Final Report* (IBF International Consulting 2011) 20, http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2012_turkey_jhr_final_report.pdf accessed 21 December 2015.

⁹²⁸ Kubicek in Cengiz and Hoffmann 2014 (n 812) 196.

⁹²⁹ *ibid* 195.

⁹³⁰ See also Table 1 above.

⁹³¹ See also chapter IV.C.4 on the Progress Reports as a monitoring instrument.

it is hard to demonstrate 100% conclusively, there is much evidence to suggest that ... EU policy has been decisive in sparking reforms in Turkey.⁹³²

Aydın-Düzgüt and Tocci underline that, with accession negotiations not having been taken up right away in 1999, in the ensuing years ‘the EU institutions, and notably the European Commission, exerted unprecedented efforts aimed at guiding Turkey’s political transformation’⁹³³ – which was not the result of EU conditionality alone, but critically hinged on ‘the EU’s external anchor ... empowering domestic actors to push for reforms’.⁹³⁴ With the credibility of conditionality being strengthened at the Copenhagen European Council meeting in December 2002 through setting a conditional date for deciding about the start of negotiations in 2004,⁹³⁵ 2003 saw an acceleration of the reform momentum with four harmonisation packages being passed and, as summarized by Aydın and Keyman, ‘aiming at improving the most-criticised aspects of Turkish democracy, such as limits to freedom of speech and expression, freedom of association, torture and mistreatment along with the strong influence of the military on domestic politics’.⁹³⁶ In the run-up to the December 2004 Brussels summit, where the European Council was to decide on accession negotiations, the pace of reforms stayed high during 2004 bringing further constitutional amendments and a number of relevant legal changes, notably a new Penal Code.⁹³⁷

Even though implementation problems occurred⁹³⁸ and were also referred to in the October 2004 Progress Report (‘implementation of reforms remains uneven’),⁹³⁹ the Commission attested substantial progress and recommended that accession negotiations be opened.⁹⁴⁰ This recommendation was, however, made conditional⁹⁴¹ on the setting into force of six pieces of political criteria legislation with considerable human rights implications, which had either not been adopted (Code of Criminal Procedure, law on judicial police, law on execution of punishments and measures)⁹⁴² or not entered into force by that time (Law on Associations, Penal Code, Law on Intermediate Courts of Appeal).⁹⁴³ With the three pending laws having been passed in time, the European Council in Brussels in December 2004 followed the Commission’s assessment and recommendation, stating: ‘Turkey sufficiently fulfils the Copenhagen political criteria to open accession negotiations provided

⁹³² Kubicek P, ‘Political Conditionality and European Union’s Cultivation of Democracy in Turkey’ (2011) 18 *Democratization*, 917.

⁹³³ Aydın-Düzgüt and Tocci 2015 (n 713) 161f.

⁹³⁴ *ibid.*, 162.

⁹³⁵ See chapter IV.B.2.

⁹³⁶ Aydın and Keyman 2004 (n 771) 16.

⁹³⁷ The new Penal Code contained important provisions with regards to gender equality, as will be illustrated in chapter IV.D.1.

⁹³⁸ See Kirisci 2005 (n 750) 56.

⁹³⁹ European Commission (2004) *Regular Report from the Commission on Turkey’s Progress towards accession*, Brussels, 6 October 2004, COM(2004) 656 final, 53 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf> accessed 16 December 2015.

⁹⁴⁰ European Commission (2004) *Communication from the Commission to the Council and the European Parliament: Recommendation of the European Commission on Turkey’s progress towards accession*, Brussels, 6 October 2004, COM(2004) 656 final, 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004DC0656>> accessed 18 December 2015.

⁹⁴¹ The Commission used the wording ‘provided that’ (*ibid.* 3).

⁹⁴² *ibid.*

⁹⁴³ *ibid.*

that it brings into force these [six] specific pieces of legislation.⁹⁴⁴ It gave the Commission the task to closely monitor ‘the political reform process and its full, effective and comprehensive implementation, notably with regard to fundamental freedoms and to full respect of human rights’.⁹⁴⁵ Turkey fulfilled the condition of setting into force these crucial laws and consequently negotiations were officially opened on 3 October 2005, as had been envisaged by the Brussels European Council – which again can be regarded as consistent application of human rights conditionality.⁹⁴⁶

Aydın and Keyman furthermore point out that, next to reforms on the legislative level, conditionality also promoted the creation of new institutional structures during this period. The most relevant ones in terms of human rights protection were the human rights boards established on provincial and sub-provincial level and responsible for taking up human rights complaints and referring them to the prosecutor’s offices.⁹⁴⁷ With a view to securing implementation of legal reforms along the political criteria, the establishment of an inter-ministerial Reform Monitoring Group in 2003 shall not go unmentioned, either, which, according to Aydın and Keyman, was given a specific human rights task in ensuring the investigation of alleged human rights violations.⁹⁴⁸

Beside legislative and institutional reforms, the effect that EU human rights conditionality and all the accompanying tools had on Turkish civil society and public discourse has also been depicted in literature:

By helping to create a strong language of rights in the country, the EU started to play an important role in furthering the change in state-societal relations and provided legitimacy for a vast amount of civil society organisations calling for a more democratic Turkey and demanding recognition of cultural/civil rights and freedoms.⁹⁴⁹

The different forms of impact of the EU’s policy will be further exemplified with regard to gender equality and minority rights in sections D.1 and D.2 respectively. At this point, it can be summarized that the EU’s decision of December 2004 to open negotiations and the actual launch of these in October 2005 – in the logic of positive conditionality – rewarded the transformative legal reforms introduced in Turkey in the previous years. In the following section, we shall continue exploring the working of human rights conditionality after the opening of accession negotiations and the reasons for its soon and rather unexpected waning.

b) The slowdown 2006-2010

As has been sketched in section B.3, soon after the official launch of accession negotiations in October 2005 the pace of Turkey’s accession process started to slow down, which could be observed from 2006 onwards. It has been mentioned that this development can be attributed to a number of factors, with

⁹⁴⁴ European Council Presidency Conclusions 2004 (n 778) 6.

⁹⁴⁵ *ibid* 5.

⁹⁴⁶ On the significance of Turkey signing the Additional Protocol to the Ankara Agreement, see section IV.B.2, n 796.

⁹⁴⁷ See Aydın and Keyman 2004 (n 771) 22f.

⁹⁴⁸ See *ibid* 23. In the wake of the government’s new strategic approach to EU accession of 2014 (see section IV.B.3), the Reform Monitoring Group was transformed into the Reform Action Group in November 2014, tasked not only with monitoring, but also actively advancing reforms, i.a. by drafting bills (see Republic of Turkey, Ministry of EU Affairs, Press Statement ‘First meeting of Reform Action Group’, Ankara, 8 November 2014 http://www.ab.gov.tr/files/000etkinlikler/2014/11/08/rag_press_statement.pdf, accessed 7 January 2016).

⁹⁴⁹ Aydın and Keyman 2004 (n 771) 17.

Turkey's refusal to apply the Additional Protocol to the Association Agreement also on Cyprus and the ensuing decision by the Council to block six pertinent negotiation chapters being counted among the main factors.⁹⁵⁰

In parallel to the accession process losing momentum from 2006 onwards and EU-Turkey relations becoming more problematic, the democratic and human rights reform process also slowed down. How these developments were interrelated has been the matter of much debate and, as Kubicek points out, 'the subject of a type of chicken and egg argument',⁹⁵¹ which illustrates once more the cyclical dynamics in EU-Turkey relations. No matter if one sees the trigger for the virtuous cycle turning into a vicious one in 'a number of Member States [getting] cold feet about Turkey's full membership'⁹⁵² at the moment when it moved one step closer or in changing domestic dynamics at that time leading to fewer reforms being passed,⁹⁵³ it can be stated that EU human rights conditionality significantly lost in power vis-à-vis Turkey. This can be and has been explained by both the ultimate incentive of EU membership becoming less credible (reflected in an increasingly doubtful political and public discourse in the EU, additional protective clauses in the Negotiating Framework as well as the blockage of chapters and the politisation of negotiations) and higher domestic costs of compliance (due to the previous broad consensus on the EU course being lost and a political polarisation occurring primarily around reforms affecting national identity).⁹⁵⁴ Aydın-Düzgit and Keyman state that changes in these two aspects – credibility of conditionality and domestic factors, which had interlocked so successfully in the preceding period – since 2005 have again coupled, yet in a negative way 'in which lack of conditionality feeds into political stagnation which in turn moves Turkey and the EU further away from one another.'⁹⁵⁵ As we will illustrate, authors examining the weakening of human rights conditionality in Turkey since 2006 are divided on how the two dimensions weigh against each other and whether decreased credibility of external incentives or domestic factors have been decisive for the slow-down in reforms.

Yet, similar to the accession negotiations,⁹⁵⁶ the reform process in Turkey did not come to a complete halt in this period. In terms of complying with EU demands on the basis of the Copenhagen criteria, however, the AKP government's approach after 2005 has been described as selective alignment⁹⁵⁷ or cherry-picking,⁹⁵⁸ with Turkey's 'democratization [having] been far more erratic than during the golden period.'⁹⁵⁹ As can be seen from Table 30 above and as has been substantiated by Cengiz and Hoffmann in more detail,⁹⁶⁰ human rights related reforms have decreased in quantity since 2006 and turned

⁹⁵⁰ See e.g. Günay 2012 (n 750) , 361.

⁹⁵¹ Kubicek in Cengiz and Hoffmann 2014 (n 812) 201.

⁹⁵² Aydın-Düzgit and Tocci 2015 (n 713) 163.

⁹⁵³ See e.g. Yilmaz 2015 (n 806) 6f, demonstrating the rise of the Euroskeptics after 2005, starting with changes in the senior military in 2006 and a subsequent deterioration in relations between the military and the AKP government.

⁹⁵⁴ See e.g. Hale 2011 (n 715) 326, and Kubicek in Cengiz and Hoffmann 2014 (n 812) 198f, on these two changing key factors.

⁹⁵⁵ Aydın-Düzgit and Keyman 2012 (n 809) , 17.

⁹⁵⁶ Between 2006 and 2010 13 chapters have been opened (with one provisionally closed), see http://ec.europa.eu/enlargement/pdf/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/overview_negotiations_tr_en.pdf accessed 4 January 2016.

⁹⁵⁷ See Sedelmeier 2014 (n 910) 7 and 9.

⁹⁵⁸ See Yilmaz 2015 (n 806) 5.

⁹⁵⁹ Aydın-Düzgit and Tocci 2015 (n 713) 173.

⁹⁶⁰ See Cengiz and Hoffmann 2013 (n 924) 421, graphically demonstrating the trend in democratic reforms in general as well as Kurdish minority rights reforms in particular over the timeline 1995-2011.

‘patchier’.⁹⁶¹ Progress could be achieved in some areas, notably with regard to property rights of non-Muslim minorities’ foundations (an area of longstanding EU concern)⁹⁶² and the government’s approach towards Alevis and Kurds, which shifted more towards dialogue in 2009. Yet, neither the ‘Alevi Opening’ nor the ‘Kurdish Opening’ of that year had concrete, sustainable effects and both initiatives were abandoned soon afterwards.⁹⁶³ Rather, the government subsequently focused on initiating a ‘democratization package’ with constitutional amendments, which it brought to Parliament in spring 2010 and had it confirmed in a national referendum in September. While the focus of the package lied on strengthening civilian control over the military and on judicial reforms, it entailed also some specific human rights provisions (i.a. on women’s and children’s rights, rights of the elderly and disabled, data protection).⁹⁶⁴ Furthermore, the package laid the constitutional basis for the establishment of an Ombudsman Institution and for individual applications to the Constitutional Court in case of human rights violations.⁹⁶⁵ Hale asserts that the package, ‘for all its shortcomings, was to be an important step forward, and it had been warmly welcomed as such by the EU’.⁹⁶⁶ Interestingly, as also pointed out by Hale,⁹⁶⁷ the government did not use the term ‘harmonisation’ (with EU law/standards) as in the earlier period anymore, but replaced it by ‘democratisation’. At first sight this appears to reflect a more concrete notion of commitment to political reforms, whereas in fact it is a much vaguer concept that leaves a wide margin of interpretation.

Another measure taken during this period was the 2008 amendment of Article 301 of the new Penal Code, which sanctions insulting ‘Turkish identity’ and state institutions and has been much criticized by the European Commission for limiting freedom of speech.⁹⁶⁸ However, while the prosecution of this criminal offence was subjected to certain restrictions and the maximum penalty lowered, Aydın-Düzgit and Keyman find that ‘the changes were largely cosmetic, only temporarily decreasing the number of proceedings brought under the Article and leaving open the possibility for its abuse in the future.’⁹⁶⁹ Beyond this infamous Article, other provisions of the 2004 Penal Code limiting freedom of expression (equally retained from the old Code) also continued to exist.⁹⁷⁰ In addition, amendments introduced to the Anti-Terror Law in 2006 proved problematic in terms of freedom of expression and the media as well as restricting procedural rights of suspects.⁹⁷¹ As will be outlined below (section c), freedom of expression can be defined as the area where backsliding effects would show clearest over the ensuing

⁹⁶¹ Aydın-Düzgit and Tocci 2015 (n 713) 165.

⁹⁶² Improvements in this field were brought about by the new Law on Foundations adopted in 2008 (and later amended in 2011), see also chapter IV.D.2.

⁹⁶³ See also chapter IV.D.2.

⁹⁶⁴ See Hale 2011 (n 715) 329.

⁹⁶⁵ See *ibid* 330.

⁹⁶⁶ *ibid* 330. See also European Commission (2010) *Commission Staff Working Document Turkey 2010 Progress Report*, Brussels, 9 November 2010, COM(2010) 660 <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf> accessed 18 December 2015, 8: ‘a step in the right direction ... address[ing] a number of priorities of the Accession Partnership’.

⁹⁶⁷ See *ibid* 331.

⁹⁶⁸ See *ibid* 327. This provision constitutes a legacy from the old Penal Code taken over into the new Penal Code in 2004.

⁹⁶⁹ Aydın-Düzgit and Keyman 2012 (n 809) 9.

⁹⁷⁰ See in detail Aydın-Düzgit and Keyman 2012 (n 809) 9, on Article 215 (praising a crime), Article 216 (inciting to enmity), Article 318 (discouraging persons from military service).

⁹⁷¹ See European Commission Progress Report 2006 (n 795) 6.

years up to the present day, resting on ‘broadly construed notions of national security, public order and national unity’⁹⁷² in constitutional and legal provisions.

Overall, the period 2006-2010 saw limited legal reform, which, as Aydın-Düzgüt and Keyman state, ‘mostly served the interests of the ruling political elite, with no particular reference to the EU.’⁹⁷³ The stagnating accession process and its decreased credibility after 2006 combined with the fact that the AKP government grew stronger after winning the elections in 2007⁹⁷⁴ and did not need to resort to EU accession as a legitimating factor anymore as had been the case before.⁹⁷⁵ Also, Euroskepticism grew in Turkey (among political actors as well as the public) and the domestic agenda became more significant for the government, so that, as Yılmaz concludes, ‘the primary factor behind the reforms in this period was the political preferences of the AKP’.⁹⁷⁶

This view is supported by Kubicek who finds ‘it is harder for the logic of conditionality to work’,⁹⁷⁷ with the EU-rooted incentive for reform diminishing on the one hand and costs for compliance increasing on the other hand due to a growing secular-religious divide, in which ‘the EU found itself caught in the middle, often subject to attack by AKP’s opponents who believed it was siding with the AKP’.⁹⁷⁸ Kubicek links this weakening of conditionality also to widening criticism and demands on part of the EU, ‘add[ing] more and more to the Turks’ to-do list, with the final goal – how strong must ‘democracy’ and the ‘rule of law’ and other criteria be in order to gain membership – being decidedly unclear.’⁹⁷⁹ As he points out, with the reform process slowing down after 2005 and the EU’s focus shifting to actual implementation of adopted legal reforms, the EC Progress Reports became more critical and harsher in tone in their assessment of the Turkish human rights situation around 2007/2008.⁹⁸⁰ Yet, despite more explicitly voiced criticism, the EU’s leverage through conditionality (as well as its policy of linkage with civil society, as Kubicek also illustrates) encountered limits, which he traces back to both domestic political factors (in particular the consensus on reforms breaking down) and membership becoming less credible for Turkey, so that ‘the public soured on the EU, and ... the incentive to comply with EU demands declined.’⁹⁸¹

⁹⁷² Aydın-Düzgüt and Tocci 2015 (n 713) 167.

⁹⁷³ Aydın-Düzgüt and Keyman 2012 (n 809) 17.

⁹⁷⁴ Kubicek points to the fact the EU did not figure much in these elections (and the ones in 2011) see Kubicek in Cengiz and Hoffmann 2014 (n 812) 204.

⁹⁷⁵ See also Aydın-Düzgüt and Keyman 2012 (n 809) 4f.

⁹⁷⁶ Yılmaz 2015 (n 806) 8f.

⁹⁷⁷ Kubicek in Cengiz and Hoffmann 2014 (n 812) 204.

⁹⁷⁸ *ibid* 200. See also Kalaycıoğlu E, ‘The Turkish-EU Odyssey and Political Regime Change in Turkey’, in Avci G, and Çarkoğlu A, (eds.), *Turkey and the EU: Accession and Reform* (Routledge 2013), on the positioning of the AKP government and the political opposition and the ‘deepening of the kulturkampf in Turkey’ (69), to which, as he argues, EU actors contributed by seemingly supporting the AKP as the only pro-EU party.

⁹⁷⁹ Kubicek 2011 (n 932) 922.

⁹⁸⁰ See *ibid* 918f; European Commission (2007) *Commission Staff Working Document Turkey 2007 Progress Report*, Brussels, 6 November 2007, COM(2007) 663 final, 63 <http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf> accessed 18 December 2015; European Commission (2008) *Commission Staff Working Document Turkey 2008 Progress Report*, Brussels, 5 November 2008, COM(2008) 674, 71 <http://ec.europa.eu/enlargement/pdf/press_corner/key_documents/reports_nov_2008/turkey_progress_report_en.pdf> accessed 18 December 2015.

⁹⁸¹ Kubicek 2011 (n 932) 925.

Saatçioğlu in her 2010 endeavour to measure EU conditionality and Turkish compliance arrives at similar conclusions. She finds that in the period from 2002 to 2009 the EU consistently called on Turkey to meet the political criteria, thus exerting pressure for democratic and human rights reforms. However, ‘the significance and credibility of these messages were lowered each time the EU brought other criteria to the table’,⁹⁸² she argues, referring to the criteria of the EU’s absorption capacity and Turkey establishing good neighbourly relations (esp. with Cyprus). What is more, Saatçioğlu highlights the ‘domestic political instrumentality’⁹⁸³ of the reforms carried out during that period by the AKP government, calculating in terms of surviving as a party vis-a-vis the secular establishment gaining electoral support.⁹⁸⁴ While not dismissing the significance of external rewards for inducing reforms in the earlier period, she – looking at the slow-down, yet continuation of reforms in the time after 2005 – concludes: ‘In the end, it seems that domestic politics holds the key to understanding governments’ response to EU pressure represented by conditionality.’⁹⁸⁵

The government’s re-orientation after 2005 – concentrating less on EU accession criteria and turning more to the domestic arena, with the reforms becoming more dependent on domestic preferences – appears uncontested in literature, yet the conditions under which this happened have been assessed rather differently. While most authors (following the external incentive model) see a rise in domestic adoption costs caused by growing political cleavages in the country after 2005 and identify this as one reason for diminished EU conditionality towards Turkey,⁹⁸⁶ Cengiz and Hoffmann⁹⁸⁷ question this causality and identify the other factor, credible EU commitment, as the only decisive one. They in particular argue that adoption costs for the AKP government have continuously decreased through its repeated election victories, broadening its support base, as well as through the loss of power of veto players, induced by reforms especially in civil-military relations. While these reforms had been part of EU conditionality, too, they did not accelerate other democratic reforms, so that in the case of Turkey Cengiz and Hoffmann conclude that ‘weak veto players and low adoption costs constituted *neither* necessary *nor* sufficient conditions’⁹⁸⁸ for EU conditionality to work. Also, in their analysis of reforms in Turkey after 2006 they find

*a potential side-effect of conditionality: in the absence of credible commitment, those in power in EU candidates may apply conditionality selectively and strategically to increase their own powers in the system. Such selective adoption might not always lead to a more democratic regime.*⁹⁸⁹

Börzel and Soyaltin consider such selective changes ‘largely related to the extent to which EU conditionality helps domestic actors gain or hold political power’⁹⁹⁰ and uphold this for the AKP government’s policy, too. Looking at both the Western Balkans and Turkey, they come up with

⁹⁸² Saatçioğlu B, *Unpacking the Compliance Puzzle - The Case of Turkey’s AKP under EU Conditionality*, KFG Working Paper No. 14, June 2010 (Freie Universität Berlin) 13.

⁹⁸³ *ibid* 26.

⁹⁸⁴ See *ibid*, 21f.

⁹⁸⁵ *ibid* 26.

⁹⁸⁶ See e.g. Hale 2011 (n 715), Aydın-Düzgit and Keyman 2012 (n 809), Özer in Nas and Özer 2012 (n 919), Kubicek in Cengiz and Hoffmann 2014 (n 812).

⁹⁸⁷ Cengiz and Hoffmann 2013 (n 924) 417 ff (see also n 897 on their reasoning with regard to the period 1999-2005).

⁹⁸⁸ *ibid* 417.

⁹⁸⁹ *ibid* 429.

⁹⁹⁰ Börzel and Soyaltin 2012 (n 909) 7.

additional scope conditions for conditionality: power (a)symmetries, a source of inconsistency we identified in Deliverable 6.1⁹⁹¹; regime type, domestic incentives, degrees of (limited) statehood.⁹⁹² In the case of Turkey, economically and politically powerful, the asymmetrical power logic of the accession process⁹⁹³ can cause tensions, all the more with doubtful EU commitment and with Turkey perceiving other foreign policy options.⁹⁹⁴ The more authoritarian a regime is, the less successful will EU human rights conditionality be, especially if it ‘challenges dominant identity constructions’,⁹⁹⁵ which can be perceived in Turkey in demands for freedom of religion and minority rights. Despite diminished credibility and high domestic costs, conditionality may work in Turkey, ‘if EU policies align with the political preferences and survival strategies of political elites’.⁹⁹⁶ Finally, while attesting Turkey stronger statehood than the other enlargement countries, Börzel and Soyaltin⁹⁹⁷ assume the degree of statehood to be of relevance in the case of Turkey, too: EU conditionality is expected to rather have an impact in areas of strongest statehood in Turkey, where ‘necessary resources are available and national sovereignty is not challenged’ (again making reforms with regard to e.g. comprehensive minority rights not too likely).

What all mentioned authors share, no matter which conditions for the success of human rights conditionality they identify or how they weigh these against each other, is the view that the domestic perception of the credibility of the EU membership incentive is key. As a consequence, diminished credibility since 2006 has negatively affected the power of conditionality, even though, according to Sedelmeier it is ‘although diminished, ... surprisingly resilient’.⁹⁹⁸ For Turkey he sees this resilience in continuing selective alignment in areas where ‘the EU conditions fit AKP goals’.⁹⁹⁹ How resilient it has been in the human rights field over the recent years with, in the words of Yilmaz, a ‘trend of retrenchment or de-Europeanization’¹⁰⁰⁰ occurring will be discussed in the next section.

c) The concurrence of reforms and setbacks 2011-2015

While selective reforms have continued to be launched since 2011, the last five years can be depicted as a separate period, following Yilmaz’s assessment: the country in this period started exhibiting instances of de-Europeanization, i.e. ‘domestic change in contrast to the EU demands for accession’.¹⁰⁰¹ The AKP government gained an absolute majority again in the general elections in 2011¹⁰⁰² and since then has focused largely on judicial reform. This started with two judicial reform packages in 2011, implementing the constitutional amendments in the field of the judiciary introduced

⁹⁹¹ See the discussion of the symmetry argument in Deliverable 6.1 (n 712) 58-59.

⁹⁹² *ibid* 10ff.

⁹⁹³ Wanting to join the ‘club’, the candidate countries have to adopt the EU *acquis* and fulfil conditions, which evidently creates an asymmetry in power.

⁹⁹⁴ See also Dimitrova 2013 (n 909) 22f, pointing into the same direction.

⁹⁹⁵ Börzel and Soyaltin 2012 (n 909) 11.

⁹⁹⁶ *ibid* 12.

⁹⁹⁷ They underline that ‘the institutional and administrative capacity of states and degrees of statehood in general play a crucial role in mitigating the transformative power of the EU.’ (*ibid* 12).

⁹⁹⁸ Sedelmeier 2014 (n 910) 1.

⁹⁹⁹ *ibid* 7.

¹⁰⁰⁰ Yilmaz 2015 (n 806) 1.

¹⁰⁰¹ See *ibid* 2 and 9ff.

¹⁰⁰² See <http://www.bbc.com/news/world-europe-13740147> accessed 11 February 2016.

by the democratization package of 2010.¹⁰⁰³ They were to be followed by four further packages until 2014, with especially the 4th judicial reform package of 2013 bringing considerable human rights improvements. Tackling previous European Court of Human Rights (ECtHR) rulings against Turkey, the reforms foresaw more freedom of expression, mainly in restricting pertinent provisions in the Penal Code, improved access to justice and the fight against impunity in cases of torture.¹⁰⁰⁴ As these reforms were in line with EU demands,¹⁰⁰⁵ the Commission commended ‘moves towards compliance with EU standards’,¹⁰⁰⁶ whereas it also identified the need for further changes as well as a ‘consistent track record of implementation’.¹⁰⁰⁷ So, while being selective, these reforms in the judicial field can be regarded as cases of Europeanization, yet younger legislation and government measures (esp. in the context of its confrontation with the Gülen movement¹⁰⁰⁸) have raised concerns about independence and impartiality of the judiciary and the separation of powers.¹⁰⁰⁹ The latest Progress Report of November 2015 finds ‘no progress’¹⁰¹⁰ in the functioning of the judiciary and that ‘judges and prosecutors have been under strong political pressure’.¹⁰¹¹ While, in general, increasing the independence, impartiality and efficiency of the judiciary has of course human rights implications (in terms of access to justice as well as procedural rights), the years since 2011 in total saw only piecemeal reforms promoting human rights, accompanied by backlash phenomena in certain areas.

On the positive side, one can name the ratification of the Optional Protocol to the UN Convention against Torture (OPCAT) in 2011 and of the Council of Europe Convention on preventing and combating violence against women and domestic violence in 2012¹⁰¹² as well as, implementing the constitutional amendments of 2010, the eventual creation of both the National Human Rights Institution (NHRI) and the Ombudsman Institution in 2012. Establishment of these had been on the EU’s ‘wish-list’ since the Accession Partnership 2006.¹⁰¹³ However, not fully aligned to European standards¹⁰¹⁴ and due to

¹⁰⁰³ See Republic of Turkey, Ministry of Justice, Directorate General for EU Affairs ‘Judicial Reform Packages’ <<http://www.abgm.adalet.gov.tr/eng/absurecindeturkyargisi/judicialreformpackages.html>> accessed 11 February 2016.

¹⁰⁰⁴ See European Commission Progress Report 2013 (n 823) 46, 47 and 50. The 3rd judicial reform package of 2012 had also been significant in that it resulted in reduced pre-trial detention (see *ibid* 45).

¹⁰⁰⁵ See Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, 7 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0157&from=EN>> accessed 18 December 2015 (under 3.1 Short-term priorities) and e.g. EC Progress Report 2011 (n 817) 18.

¹⁰⁰⁶ European Commission Progress Report 2013 (n 823) 7.

¹⁰⁰⁷ *ibid* 13.

¹⁰⁰⁸ See section IV.B.3 n 836.

¹⁰⁰⁹ See European Commission Progress Report 2014 (n 823) 13.

¹⁰¹⁰ European Commission Progress Report 2015 (n 797) 14.

¹⁰¹¹ *ibid* 9: ‘Significant reassignments and dismissals in the police, civil service and judiciary continued’, as part of the government’s programmatic fight against the ‘parallel structure’.

¹⁰¹² Turkey, hosting the pertinent session of the Committee of Ministers, was among the first states to sign the so called Istanbul Convention on that very day and the first country to ratify it (see Council of Europe, Treaty office ‘Chart of signatures and ratifications of Treaty 210 Council of Europe Convention on preventing and combating violence against women and domestic violence’ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=mX4sY9Kj> accessed 18 February 2016). See also section IV.D.1.

¹⁰¹³ See Accession Partnership 2006 (n 793) 35f and Accession Partnership 2008 (n 1005) 6f (under 3.1 Short-term priorities, respectively).

¹⁰¹⁴ See European Commission (2012) *Commission Staff Working Document Turkey 2012 Progress Report*, Brussels, 10 October 2012, COM(2012) 600, 9 <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf> accessed 18 December 2015.

limited authority as well as independence, both institutions have been subject to criticism not only from the Commission,¹⁰¹⁵ but also from within Turkey.¹⁰¹⁶ In 2014, the NHRI was designated as National Preventive Mechanism for the prevention of torture and ill-treatment under OPCAT, yet this was much criticised by Turkish human rights organisations due to the NHRI's persistent lack of capacities and independence.¹⁰¹⁷ According to the EC's Progress Report 2015 the NPM 'is not yet functional'.¹⁰¹⁸

In 2013 the Law on Foreigners and International Protection was adopted, widening the possibility to receive international protection in Turkey and thus establishing a new asylum system in the country, yet with some shortcomings. This Law and its significance for the visa liberalisation process as well as implications for the present refugee situation will be discussed in section 6.

Another positive development in this recent period was the adoption of the Action Plan on Prevention of Violations of the European Convention on Human Rights (ECHR) in March 2014, which the Commission welcomed as 'a significant step towards aligning Turkey's legal framework with ECtHR case-law'.¹⁰¹⁹ While the Action Plan itself does not refer to EU accession or relations,¹⁰²⁰ it – as confirmed by interviews with the EU Delegation in Ankara – can be regarded as having been elaborated due to EU persistence. The issue of non-compliance with the ECHR has not only been covered in the EC Progress Reports ever since 1998 (following the reporting standard for all enlargement countries), but has also been reflected in the Accession Partnerships of 2006 and 2008 naming comprehensive compliance with the Convention (in particular through application by the judiciary) as well as full implementation of ECtHR judgements under the short-term priorities.¹⁰²¹ While one could conclude on a slow effectiveness of accession conditionality in this respect when looking at the classical enlargement instruments only, it has to be stressed that there is a linkage here to the visa liberalisation process launched in 2013. The fundamental rights requirements contained in block 4 of the visa liberalisation roadmap will be discussed in more detail in section 6, still it should be mentioned here that they comprise also compliance with the provisions of the ECHR and the ECtHR case law 'so as to

¹⁰¹⁵ See Progress Report 2015 (n 797) 10 and 62.

¹⁰¹⁶ See e.g. Aydın-Düzgün and Keyman 2012 (n 809) 7 or Arisan Eralp N, *The Situation of Fundamental Freedoms in Turkey* (Evaluation Note, TEPAV April 2015) 4 on the NHRI. In spring 2014, the Chief Ombudsman Ömeroğlu himself publicly deplored the insufficient authority of his institution (see *Hürriyet Daily News* 'Turkish ombudsman complains of insufficient authority', 17 April 2014 <<http://www.hurriyetdailynews.com/turkish-ombudsman-complains-of-insufficient-authority.aspx?pageID=238&nID=65157&NewsCatID=338>> accessed 18 February 2016).

¹⁰¹⁷ See e.g. Human Rights Foundation of Turkey (2015) *National Preventive Mechanism - Evaluation Report*, Ankara, July 2015, 4 and 18, <http://tihv.org.tr/wp-content/uploads/2015/08/5.-U%C3%96M-Rapor-II-ing.pdf> accessed 19 February 2016.

¹⁰¹⁸ European Commission Progress Report 2015 (n 797) 62. Similarly, the UN Subcommittee on Prevention of Torture, after visiting Turkey in October 2015, called for 'concrete action by adopting a specific law that provides the NPM with a strong mandate and makes it fully operational, functional, independent and well-resourced' (United Nations Office of the High Commissioner of Human Rights, UN experts encourage Turkey to fulfill commitments through effective detention monitoring body <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16589&LangID=E>> accessed 19 February 2016).

¹⁰¹⁹ European Commission Progress Report 2014 (n 823) 15.

¹⁰²⁰ See Action Plan on Prevention of ECHR Violations, <http://www.inhak.adalet.gov.tr/eng/announced/actionplan.pdf> accessed 19 February 2016. However, Turkey's new European Union Strategy of September 2014 explicitly includes implementation of the Action Plan under upcoming reform steps (see Republic of Turkey, Ministry of EU Affairs 2014 (n 840)841, 7f).

¹⁰²¹ See Accession Partnership 2006 (n 793) 36 and Accession Partnership 2008 (n 1005) 7.

ensure the right to liberty and security, the right to a fair trial and freedom of expression, of assembly and association'.¹⁰²² This appears to have had a considerable triggering effect on the elaboration of the Action Plan. At the same time, as disclosed by unofficial information, one of the chapter 23 opening benchmarks was envisaged to consist in 'an action plan for the further implementation of legislation on fundamental rights'.¹⁰²³ The Turkish government also relates the 2014 Action Plan, even though somewhat less comprehensive in scope, to this unofficial benchmark.¹⁰²⁴ So, the elaboration of the Action Plan may be considered as a case of accession and visa liberalisation conditionalities interlocking with each other. The Action Plan 'does not envisage revision of all relevant provisions of the Anti-Terror Law or of the Criminal Code that have been used to limit freedom of expression',¹⁰²⁵ yet does foresee that the notorious Art. 301 of the Criminal Code be revised.¹⁰²⁶ The implementation of the Action Plan remains an open issue, as stated by the EC in both its 2014 report on progress the visa liberalisation process¹⁰²⁷ and its regular Turkey Progress Report of 2015.¹⁰²⁸ The latter also points explicitly to the need for the scope of the Action Plan to be extended and to legislation having been adopted in contradiction to it (internal security package of March 2015, see below).¹⁰²⁹

Mentioning areas of backsliding since 2011, the EC's Progress Report of that year was pivotal in that it turned out very critical,¹⁰³⁰ voicing serious concern for a number of persistently problematic human rights areas, most notably freedom of expression,¹⁰³¹ women's rights / gender equality¹⁰³² and minority rights.¹⁰³³ As also depicted by Kubicek, '[m]ost of these issues had been raised in previous EU reports, but the general tone of the 2011 report ... is appreciably more critical'.¹⁰³⁴ The EC concluded that 'the

¹⁰²² Roadmap towards a visa-free regime with Turkey (n 825) 17.

¹⁰²³ See Republic of Turkey (2014), *National Action Plan for EU Accession Phase-I* (n 841) 97. Even though these benchmarks have not officially been communicated to Turkey, the Turkish decision-makers had obviously known about them earlier (see chapter IV.C.2 on negotiations), so that the decisive incentive can rather be perceived in the visa liberalisation process, all the more in view of the continuous political blockage of chapter 23.

¹⁰²⁴ See Republic of Turkey, Ministry of Justice, Directorate General for EU Affairs 'Chapter 23: Chapter of Judiciary and Fundamental Rights' <<http://www.abgm.adalet.gov.tr/eng/fasillar/chapter23.html>> accessed 19 February 2016.

¹⁰²⁵ Progress Report 2014 (n 823) 51. Another issue not tackled is the right to conscientious objection for conscripts, which Turkey does not recognize (ibid 56).

¹⁰²⁶ Action Plan on Prevention of ECHR Violations (n 1020) 28, stipulating in this regard also 'awareness raising activities with a view to achieving unity in practice'.

¹⁰²⁷ European Commission (2014) *Report from the Commission to the European Parliament and the Council on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap*, Brussels, 20 October 2014, COM(2014) 646 final, 33 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/turkey_first_progress_report_en.pdf> accessed 19 February 2016.

¹⁰²⁸ European Commission Progress Report 2015 (n 797) 22.

¹⁰²⁹ ibid 61f.

¹⁰³⁰ With EU-Turkey relations becoming more and more difficult (see chapter IV.B.2), the Report was met with harsh negative reactions from the Turkish government (see e.g. Hürriyet Daily News 'Prime Minister Erdoğan lashes out at EU over latest progress report, Cyprus', 16 October 2011 <<http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=pm-warns-to-cut-talks-with-eu-greek-cyprus-2011-10-16>> accessed 18 February 2016) while gaining praise from parts of the opposition (see Hürriyet Daily News 'Turkey's main opposition says gov't needs EU report's advices', 14 October 2011 <<http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=turkeys-main-opposition-says-gov8217t-needs-eu-report8217s-advices-2011-10-14>> accessed 18 February 2016).

¹⁰³¹ See Progress Report 2011 (n 817) 27.

¹⁰³² ibid 31.

¹⁰³³ ibid 38.

¹⁰³⁴ Kubicek in Cengiz and Hoffmann 2014 (n 812) 203.

[government's] declared commitment to EU accession was not sufficiently reflected in the implementation of the national programmes'.¹⁰³⁵ Given, in particular, numerous journalists being arrested, the EC observed a 'high number of violations of freedom of expression',¹⁰³⁶ which was also reflected in the Council Conclusions of 5 December 2011 stating:

*The restrictions in practice on the freedom of the media, the large number of legal cases launched against writers, journalists, academics and human rights defenders, and frequent website bans all raise serious concerns that need to be addressed.*¹⁰³⁷

The backsliding in this area had also been explicitly criticized by the European Parliament earlier in 2011, having lamented 'the deterioration in freedom of the press'¹⁰³⁸ – which it would reiterate over the following years. One of the most pronounced pieces of EP criticism was its resolution of 15 January 2015 on freedom of expression in Turkey, which was adopted in reaction to a wave of arrests of journalists and media executives in December 2014. In this resolution the EP '[c]ondemns the recent police raids and detention'¹⁰³⁹ and '[e]xpresses its concern over backsliding in democratic reforms, and in particular the government's diminishing tolerance of public protest and critical media'.¹⁰⁴⁰ On part of the Commission, High Representative for Foreign Affairs and Security Policy Mogherini and Commissioner for European Neighbourhood Policy and Enlargement Negotiations Hahn also issued a statement on the December 2014 arrests, which happened only shortly after they had visited Turkey. It read:

*[T]his operation goes against the European values and standards Turkey aspires to be part of and which are the core of reinforced relations. We recall that any further step towards accession with any candidate country depends on the full respect for the rule of law and fundamental rights. ... We expect that the strong EU commitment given by our Turkish counterparts during our visit to be translated into deeds.*¹⁰⁴¹

This criticism was not at all well received by President Erdoğan,¹⁰⁴² who was reported to reply: 'The EU should mind its own business and keep its own opinions to itself. ... We have no concern about what

¹⁰³⁵ Progress Report 2011 (n 817) 11.

¹⁰³⁶ *ibid* 25.

¹⁰³⁷ Council of the European Union 2011 (n 817).

¹⁰³⁸ European Parliament (2011) *European Parliament resolution of 9 March 2011 on Turkey's 2010 progress report*, Strasbourg, 9 March 2011, P7_TA(2011)0090, point 8 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0090+0+DOC+XML+V0//EN>> accessed 19 February 2016.

¹⁰³⁹ European Parliament resolution of 15 January 2015 on freedom of expression in Turkey: Recent arrests of journalists, media executives and systematic pressure against media (2014/3011(RSP)) point 1, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0014+0+DOC+XML+V0//EN> accessed 11 February 2016.

¹⁰⁴⁰ *ibid* point 3.

¹⁰⁴¹ High Representative for Foreign affairs and Security Policy Mogherini and Commissioner for European Neighbourhood Policy and Enlargement Negotiations Hahn (2014) *Joint statement on the police raids and arrests of media representatives in Turkey*, Brussels, 14 December 2014, STATEMENT/14/2640, http://europa.eu/rapid/press-release-STATEMENT-14-2640_en.htm accessed 14 February 2016.

¹⁰⁴² The former prime minister had won Turkey's first direct presidential election on 10 August 2014, achieving an absolute majority of votes (see The Guardian, 'Erdoğan emerges victorious in Turkish presidential elections amid low turnout' 10 August 2014 <<http://www.theguardian.com/world/2014/aug/10/turkey-presidential-election-erdogan>> accessed 17 February 2016).

the EU might say, whether the EU accepts us as members or not.¹⁰⁴³ This gives an indication of both the even further declining influence of the EU and the amount of estrangement from it among Turkish political leaders, which had grown since 2011 and in particular around the Gezi Park protests in 2013 (as will be demonstrated below).¹⁰⁴⁴

Going along with Yilmaz,¹⁰⁴⁵ freedom of expression and freedom of press can hence be counted among the areas of de-Europeanization, in that, in spite of EU criticism and demands for more freedoms, domestic action moved to the opposite and led to divergence. This can be further substantiated by referring to the most recent Freedom House reports. In the Turkey country report to its report *Freedom of the Press 2015*, Freedom House demonstrates a decline in press freedom over the past 5 years.¹⁰⁴⁶ With scores going continually down since 2010, moving press status in Turkey from partly free to not free in 2013,¹⁰⁴⁷ the report summarizes:

*Conditions for media freedom in Turkey continued to deteriorate in 2014 after several years of decline. The government enacted new laws that expanded both the state's power to block websites and the surveillance capability of the National Intelligence Organization (MİT). Journalists faced unprecedented legal obstacles as the courts restricted reporting on corruption and national security issues. The authorities also continued to aggressively use the penal code, criminal defamation laws, and the antiterrorism law to crack down on journalists and media outlets.*¹⁰⁴⁸

Sketching 'a climate of increasing self-censorship and media polarization'¹⁰⁴⁹ due to political influence and intimidation, the report also mentions the 2014 amendments to the Internet Law, which allow for administrative blockage of websites.¹⁰⁵⁰ Freedom House elaborates on these restrictions also in its later special report *Freedom on the Net 2015*, the Turkey country section of which furthermore mentions bans on social media as well as charges being brought against social media users for criticizing the President, the government or public officials during 2015.¹⁰⁵¹

This latest Freedom House report also refers to the internal security package of March 2015 which brought further restrictions on freedom of expression and right to privacy by allowing for more

¹⁰⁴³ BBC News 'Turkey media arrests: Erdogan rejects EU criticism', 15 December 2014, <http://www.bbc.com/news/world-europe-30484729> accessed 17 February 2016.

¹⁰⁴⁴ Aydın-Düzgit and Tocci 2015 (n 713) 163, summarize: 'Striking in this respect is the disdain with which Turkish leaders began reacting to EU criticism of Turkish democratic shortcomings. ... In Turkish eyes, European double standards and unkept promises have undermined the EU's right to meddle in Turkish domestic affairs and lecture Turks about their political deficiencies.'

¹⁰⁴⁵ See Yilmaz 2015 (n 806) 10.

¹⁰⁴⁶ See Freedom House 'Turkey – 5-Year Decline in Press Freedom' <<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 February 2016.

¹⁰⁴⁷ *ibid.* The scores are based on numerical rankings derived from a broad range of questions about the legal, political and economic environment (for more details see Freedom House 'Freedom of the Press 2015 Methodology' <<https://freedomhouse.org/report/freedom-press-2015/methodology>> accessed 11 February 2016).

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ *ibid.*

¹⁰⁵⁰ *ibid.* The Progress Report 2015, in its new methodology of highlighting one issue area, contains a longer section on freedom of expression, in which it refers to further changes to the Internet Law in 2015 as 'a significant step back from European standards' (22) and in general finds 'serious backsliding ... over the past two years' (22).

¹⁰⁵¹ See Freedom House 'Turkey' <<https://freedomhouse.org/report/freedom-net/2015/turkey>> accessed 11 February 2016.

surveillance measures.¹⁰⁵² Extending in general the powers of the law enforcement agencies without foreseeing adequate oversight by the judiciary or parliament, the package was criticised by both the European Parliament and the Commission for falling short of European standards.¹⁰⁵³ Similarly, the Council after the last EU-Turkey Association Council meeting on 18 May 2015 ‘expressed concern with undue interference by the executive in the judiciary ... and restrictions on access to information’.¹⁰⁵⁴ In the latest Progress Report of November 2015, the EC also emphasized that the package was ‘at odds with the action plan for the prevention of violations of the European Convention on Human Rights’,¹⁰⁵⁵ which evidently calls in question the government’s full commitment to the Action Plan.

This very recent example of de-Europeanization, which has also widened the police’s authority to use weapons,¹⁰⁵⁶ links in with another field of persistent EU concern: disproportionate use of force by law enforcement agencies, especially with regard to infringing the right to assembly.¹⁰⁵⁷ While this issue has continually been on the agenda and criticized by the EU,¹⁰⁵⁸ the Gezi Park protests in May and June 2013 constituted a particularly critical case of excessive use of force, which considerably strained EU-Turkey relations. Having started as a rally against government plans to erect a new building in Istanbul’s Gezi Park, the protests soon turned into demonstrations against government policy as such – all the more in view of the occurring police violence and the government’s reaction – and spread out across the country. The EC Progress Report 2013 states:

*At several instances the police used excessive force against demonstrators. Six people died, including one policeman, thousands were injured, some of them severely, over 3 500 were taken into police custody, of whom over 112 remained in detention on judge’s decision. ... Out of that figure 108 persons were detained on suspicion of being a member of a terror organisation.*¹⁰⁵⁹

While there was considerable international media coverage, the freedom of the Turkish media to report on the protests was under strain. The Progress Report speaks of fines being handed out for broadcasting from Gezi Park,¹⁰⁶⁰ social media users being taken in custody¹⁰⁶¹ and widespread self-censorship.¹⁰⁶²

¹⁰⁵² See *ibid.*

¹⁰⁵³ See Today’s Zaman ‘EU warns security package measures must adhere to universal human rights’, 29 March 2015, http://www.todayszaman.com/anasayfa_eu-warns-security-package-measures-must-adhere-to-universal-human-rights_376648.html accessed 21 December 2015; see also European Commission Progress Report 2015 (n 797) 9.

¹⁰⁵⁴ Council of the European Union (2015) *EU-Turkey Association Council*, Brussels, 18 May 2015, Press release 299/15 <<http://www.consilium.europa.eu/en/press/press-releases/2015/05/18-eu-turkey-association-council/>> accessed 21 December 2015.

¹⁰⁵⁵ European Commission Progress Report 2015, 56.

¹⁰⁵⁶ See Today’s Zaman ‘EU warns security package measures must adhere to universal human rights’, 29 March 2015, http://www.todayszaman.com/anasayfa_eu-warns-security-package-measures-must-adhere-to-universal-human-rights_376648.html accessed 21 December 201; see also Progress Report 2015, 62.

¹⁰⁵⁷ See e.g. European Commission Progress Report 2015 (n 797) 22.

¹⁰⁵⁸ See e.g. European Commission Progress Reports 2011 – 2015 treating the issue as one of concern, both with regard to police arrests and detention as well as police action during demonstrations.

¹⁰⁵⁹ European Commission Progress Report 2013 (n 823) 5.

¹⁰⁶⁰ *ibid.* 32.

¹⁰⁶¹ *ibid.* 52.

¹⁰⁶² *ibid.*

EU reactions to the events were mixed and ranged from meetings being cancelled and communication intermitted to all the more efforts being taken to maintain the dialogue on democracy and human rights. European Commissioner for Enlargement and Neighbourhood Policy Füle, who propagated more engagement with Turkey in order to enhance human rights, did at the same time not shun from explicit criticism in his public statements about the incidents. Attending a conference on future EU-Turkey relations in Istanbul at the beginning of June 2013 (as part of his attempt to invigorate the accession process, see section B.3) and having talked to Gezi Park protesters the day before, he opened his speech with the following words:

Before speaking about our common future ... we cannot ignore the present. ... The duty of all of us, European Union Members as much as those countries that wish to become one, is to aspire to the highest possible democratic standards and practices. These include the freedom to express one's opinion, the freedom to assemble peacefully and freedom of media to report on what is happening as it is happening. ... Excessive use of force by police against these demonstrations has no place in such a democracy.¹⁰⁶³

Demanding investigations and accountability to be ensured, the Commissioner clearly linked progress in the accession process with human rights promotion: 'Energising the EU accession process and strengthening democracy by respecting rights and freedoms are two sides of the same coin'.¹⁰⁶⁴ While expressing EU commitment to the process and pledging 'all possible efforts'¹⁰⁶⁵ on his side for opening chapters 23 and 24 soon, he 'call[ed] on Turkey 'not to give up on its values' of freedom and fundamental rights'.¹⁰⁶⁶ One week later, Commissioner Füle reiterated all this in front of the European Parliament, hinting also at explicit talks with Prime Minister Erdoğan (President from August 2014) behind closed doors about the authorities' conduct being 'a crucial element for reenergising the accession process'.¹⁰⁶⁷ All these statements refer directly to the logic of human rights conditionality being applied also in this crisis situation. Yet, Commissioner Füle also clearly pointed to the fact that the EU's leverage suffered from the blockage of chapter 23:

How come when we talk so much about fundamental rights and freedoms, the Minister of Justice is asking me again and again: 'where is the screening report of Turkey that I can use for further reforms?' ... How do we ensure that the EU remains the benchmark for reforms in Turkey?¹⁰⁶⁸

Perceiving the moment to be very crucial, the Commissioner strongly called for steps towards opening negotiations on chapter 23 and more EU engagement with Turkey on human rights, not less, stressing: 'This is as much in our genuine interest as it is in Turkey's'.¹⁰⁶⁹

In this European Parliament debate on 12 June 2013, the High Representative of the Union for Foreign Affairs and Security Policy Catherine Ashton joined in with a similar assessment:

This is not the moment to disengage from Turkey but to engage more closely. And for Turkey to engage more closely with the EU too. ... Our relationship with Turkey gives us a real

¹⁰⁶³ European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle, 7 June 2013 (n 829) 2.

¹⁰⁶⁴ *ibid* 2.

¹⁰⁶⁵ *ibid* 4.

¹⁰⁶⁶ *ibid* 5.

¹⁰⁶⁷ European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle, 12 June 2013 (n 830) 3.

¹⁰⁶⁸ *ibid* 2.

¹⁰⁶⁹ *ibid*.

*opportunity to influence it, if we use it. We need to make the most of all the tools we have. And Turkey needs to work with us. It is clear to me that the case for engagement is doubly compelling now.*¹⁰⁷⁰

The European Parliament in its ensuing, highly critical resolution voiced ‘deep concern at the disproportionate and excessive use of force by the Turkish police in its response to the peaceful and legitimate protests’¹⁰⁷¹ and ‘warn[ed] the Turkish Government against taking harsh measures against the peaceful protesters’.¹⁰⁷² It, however, did not include any recommendation or call on the Commission or the Council for specific action in terms of Turkey’s accession process.

The Gezi Park incidents were both a sign of the growing estrangement between the EU and Turkey as well as another contributing factor for it. This was not only reflected in the critical reactions from EU institutions and Member States, but also in the Turkish government’s response to this criticism. Having rejected Commissioner Füle’s support for the protests at the Istanbul conference and referring once more to Turkey being discriminated against in the accession process,¹⁰⁷³ Prime Minister Erdoğan also made it clear that he did not recognize the European Parliament’s resolution.¹⁰⁷⁴ Fuelled by the AKP’s turning away from Europe – and more towards the (Middle) East – since 2011 (strengthened by its third election victory) and embarking on an increasingly authoritarian path,¹⁰⁷⁵ this alienation can be identified as one reason why human rights conditionality, even though repeatedly invoked by the Commission, did not particularly work during and after Gezi Park.¹⁰⁷⁶

The EU’s weak leverage can, however, again also be linked to further decreasing credibility of the whole accession process. Most importantly, the calls of the EC for more human rights engagement with Turkey by ending the blockage of chapter 23 have not been reacted upon by the Member States.¹⁰⁷⁷ One could ask whether this missed opportunity – i.e. not getting down to officially and

¹⁰⁷⁰ European Parliament (2013), 15. *Situation in Turkey (debate)*, Strasbourg, 12 June 2013 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130612+ITEM-015+DOC+XML+V0//EN>> accessed 15 February 2016.

¹⁰⁷¹ European Parliament (2013) *European Parliament resolution of 13 June 2013 on the situation in Turkey*, Strasbourg, 13 June 2013, 2013/2664(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0277+0+DOC+XML+V0//EN>> accessed 21 December 2015.

¹⁰⁷² *ibid.*

¹⁰⁷³ See Hürriyet Daily News ‘Turkish PM Erdoğan and EU Commissioner Füle in crossfire over Gezi Park protests’, 7 June 2013 <<http://www.hurriyetcdailynews.com/turkish-pm-erdogan-and-eu-commissioner-fule-in-crossfire-over-gezi-park-protests.aspx?pageID=238&nid=48441>> accessed 15 February 2016.

¹⁰⁷⁴ See Yilmaz 2015 (n 806) 12.

¹⁰⁷⁵ See Günay 2015 (n 859) 14f, who traces this development towards a competitive authoritarian regime and speaks of the AKP noticeably turning away from the path of democratisation (‘spürbare Abkehr der AKP vom Weg der Demokratisierung’) since 2011.

¹⁰⁷⁶ In light of the EU’s repeated demands for swiftly investigating into human rights violations around Gezi, it should not go unmentioned that the Progress Report of October 2013 gives an account of the Ministry of Interior having launched investigations against 164 police officers and having suspended 30 (see European Commission Progress Report 2013 (n 823) 6). Furthermore, both the Ombudsman Institution and the National Human Rights Institution (NHRI) received a number of applications related to Gezi Park (see *ibid.* 49). On the basis of these, the Ombudsman Institution published a report in December 2013 ‘in which it found disproportionate use of force’ (European Commission Progress Report 2014 (n 823)), followed by the NHRI in November 2014 (see European Commission Progress Report 2015 (n 797) 62). While the EC in 2014 referred to a total number of 329 investigations launched, it at the same time indicated that most were still pending and some being hampered, thus calling again for ‘[i]ndependent, prompt and effective investigations into all allegations’ (European Commission Progress Report 2014 (n 823) 50).

¹⁰⁷⁷ See also chapter IV.C.2 on negotiations as a tool.

formally tackle the tricky issues at a time when it seemed most needed – did not in fact contribute to further backsliding in the following years – with the EU, through not using certain tools, further losing out on its role as external anchor for reforms. The Positive Agenda launched by Commissioner Füle in 2012 in an attempt to by-pass the blockage and deal in a special working group with chapter 23 issues did obviously not turn out as a strong enough tool to compensate for the stalemate in negotiations (for more detail see section 3). What can be concluded from all the interviews conducted for this research with Turkish stakeholders, is that there is a general perception that the EU (status November 2015) does not play any further role in Turkish human rights policy. Not taking a clear, constructive stance and not prioritizing democracy and human rights over other issues in the post-Gezi period (as it would be in line with the new approach on negotiations with the other candidates) has in any case caused (additional) disappointment with basically pro-EU and pro-democracy actors in Turkey. With various, heterogeneous groups of Turkish civil society coming together in the Gezi Park protests – united by ‘a growing frustration with what they felt to be the government’s authoritarian style of governance’¹⁰⁷⁸ – the EU appears to have missed out on giving this, as Aydın-Düzgit and Tocci put it, ‘vibrancy of Turkish democracy’¹⁰⁷⁹ sufficient backing. Consequently, they find that in this period of further growing polarisation in the country the ‘absence of a credible EU accession process has been extremely harmful. The EU is no longer the umbrella under which diverse political and societal forces in Turkey find joint refuge’.¹⁰⁸⁰

Forming an alliance with civil society groups had been of particular importance previously in the field of gender equality, where EU conditionality had interlocked with demands from the women’s rights movement. As touched upon above, the period since 2011 has also seen some backsliding phenomena in this area. We will look into these in more detail in section D.1.

The field of minority rights, on the other hand, can be named as one in which further selective reforms were taken during this period, despite persistent shortcomings. Having always figured prominently in EU Progress Reports (see section 4), minority rights were described as an area of restrictive government policy with many reform needs by the EC in its critical 2011 Progress Report.¹⁰⁸¹ Next to improvements for non-Muslim community foundations, slow, but steady progress could be observed since 2011 specifically in terms of cultural rights.¹⁰⁸² In this respect, the democratization package which the Turkish government announced in autumn 2013 and which was adopted by parliament in March 2014 brought in particular more freedoms in using languages other than Turkish as well as provisions against hate speech.¹⁰⁸³ Having arguably been tabled in connection with the peace talks with the PKK launched at the beginning of 2013 (although this had been renounced by the government),¹⁰⁸⁴ these

¹⁰⁷⁸ Aydın-Düzgit and Tocci 2015 (n 713) 171.

¹⁰⁷⁹ *ibid.*

¹⁰⁸⁰ *ibid* 170.

¹⁰⁸¹ See European Commission Progress Report 2011 (n 817) 38.

¹⁰⁸² See chapter IV.D.2.on minority rights.

¹⁰⁸³ See Turkey Agenda ‘What is in Turkey’s ‘democratization package’?’, 3 March 2014, <http://www.turkeyagenda.com/what-is-in-turkey-s-democratization-package-292.html> accessed 16 February 2016. It has to be underlined that the new provisions sanctioning hate speech do not pertain to discrimination on the basis of sexual orientation or identity. While as of December 2015 Turkey generally lacks anti-discrimination legislation, the human rights of LGBTI individuals remain a particularly acute matter of concern (see European Commission Progress Report 2015 (n 797) 67f).

¹⁰⁸⁴ See Kurban D, *Not a Roadmap for Peace – Erdoğan’s Democratisation Package Defies Kurdish Expectations*, SWP Comments 35, November 2013, 2 <<https://www.swp->

reforms signified important improvements for the Kurdish minority, even though following again ‘the gradualist approach of prior reforms, thereby leaving room for further improvement’.¹⁰⁸⁵ We will treat the EU’s impact in the field of minority rights in more detail in section D.2.

The 2014 democratization package can be seen as another example of selective Europeanization and hence of a weakened, though resilient human rights conditionality at play. Kurban underlines that it was ‘not a coincidence that Erdoğan announced the democratisation package two weeks before the release of the progress report’¹⁰⁸⁶ in autumn 2013. At the same time, others have pointed to the fact that, like with other pieces of legislation, the AKP government did not give sufficient room to parliamentary debate and consultation with civil society and other stakeholders.¹⁰⁸⁷ The EC Progress Report 2014 states: ‘An inclusive and consultative approach to law-making remains the exception rather than the rule’,¹⁰⁸⁸ which reflects both the AKP projecting itself as the only democratizing or reform force and the deepening political and societal divisions.

In this post-2011 context of profound domestic polarization, increased room for manoeuvre for the AKP government¹⁰⁸⁹ and further loss of credibility of the EU’s enlargement policy towards Turkey connected with growing estrangement from the EU, domestic change processes – be they of Europeanizing or de-Europeanizing character – have been hinging on the AKP’s preferences.¹⁰⁹⁰ As put by Kubicek: ‘Absent a strong role for the EU, the fate of political reform lies with the AKP’.¹⁰⁹¹ The party’s inclinations, its discourse and actions have given rise to much debate both in Turkey and the EU, with criticism being voiced about its real commitment to human rights and democratic values.¹⁰⁹² While for this study, which aims at an assessment of the EU’s policy, we will not follow on to an analysis of the AKP’s political texture, the government’s disposition and goals are of course a key factor in how the EU can further deploy human rights conditionality vis-à-vis Turkey.¹⁰⁹³ We will come across this fact

berlin.org/fileadmin/contents/products/comments/2013C35_kun.pdf accessed 16 February 2016> accessed 29 February 2016. To which extent the explicit EU criticism voiced around Gezi Park and the expressed conditionality of further negotiations influenced the government in tabling the package cannot reliably be assessed here. In any case had the Council in June 2013 predicated the commencement of chapter 22 negotiation talks on the presentation of the next Progress Report and an ensuing Council decision (see Council of the European Union 2013, Press release 11443/13 (n 831)). How strong the actual effect of EU human rights conditionality in this regard was would need further in-depth analysis.

¹⁰⁸⁵ Kurban 2013 SWP (n 1084) 2.

¹⁰⁸⁶ *ibid* 8.

¹⁰⁸⁷ See Yilmaz 2015 (n 806) 9; Kubicek in Cengiz and Hoffmann 2014 (n 812) 206.

¹⁰⁸⁸ European Commission Progress Report 2014 (n 823) 9. Similarly, the Council in May 2015 criticized ‘frequent changes to key legislation without due consultation of stakeholders’ (Council of the European Union 2015 (n 1054)).

¹⁰⁸⁹ See Müftüleri-Baç M, ‘Turkey’s 2015 Elections: A New Beginning for Turkey’s European Union Accession Goal, or the End of a Dream?’ Commentary 24 -Global Turkey in Europe, July 2015, 2 <<http://www.iai.it/en/pubblicazioni/turkeys-2015-elections-new-beginning-turkeys-european-union-accession-goal-or-end>>: ‘Recent years in Turkish politics witnessed the AKP using its electoral hegemony to socially engineer the country in line with its own wishes, and to push controversial legal changes that the opposition parties were unable to stop due to the AKP’s parliamentary majority.’

¹⁰⁹⁰ See Kubicek in Cengiz and Hoffmann 2014 (n 812) 204; Yilmaz 2015 (n 806) 12.

¹⁰⁹¹ Kubicek in Cengiz and Hoffmann 2014 (n 812) 204.

¹⁰⁹² See *ibid* 205, outlining some of the debate. See also Kurban November 2013 (n 1084) 8, who speaks of the ‘government’s selective embrace of democratic principles of equality and human rights’.

¹⁰⁹³ This is all the more so since the AKP regained absolute majority in the November 2015 elections and was able to form a single-party government again (after it had intermediately lost the majority in June 2015 and had to try to form a coalition government, without succeeding).

again when looking closer into the two issue areas gender equality and minority rights and the topic of impact later in this study (section D). In the following sub-chapters we shall first examine some of the EU's other enlargement instruments and their human rights related usage towards Turkey. We will continue with one of the most debated tools, which these days – when give-and-take discourse flourishes and the EU is suspected of 'selling out' its values in relation to Turkey – receives even more attention: conduct respectively non-conduct of accession negotiations on human rights issues.

2. Accession negotiations

As outlined in Deliverable 6.1,¹⁰⁹⁴ starting and conducting accession negotiations can be regarded as an instrument for promoting human rights in an enlargement country, closely linked to positive political (and under it human rights) conditionality.¹⁰⁹⁵ The general features of these negotiations as well as the specific features and tools they entail in terms of human rights promotion have been described in detail there. In this section, we shall highlight the ways in which these tools (marked in the text) are applied vis-à-vis Turkey and shall tackle in particular the state of affairs in and the specificities of the Turkish case, placing a strong focus on chapter 23 'Judiciary and fundamental rights', but also discussing chapter 19 'Social policy and employment'.

The EU officially launched accession negotiations with Turkey ten years ago in the first Intergovernmental Accession Conference on 3 October 2005. It was discussed in detail in section 1.a) how the prospect of opening negotiations – once the EU would consider the political Copenhagen criteria to be sufficiently fulfilled – acted as a driver for reform in Turkey after it had gained candidate status in 1999. This prospect functioned as a credible and tangible incentive, a milestone within reach on the path to the 'carrot of carrots', EU membership. With this milestone being then reached, the momentum soon ebbed away, as has been illustrated in section 1.b). The Negotiating Framework that was, as part of the General EU Position on the negotiations, formally presented to Turkey at the first Accession Conference in 2005 contains new clauses (regarding the open-ended nature of negotiations, the EU's absorption capacity criterion) which were perceived by Turkey as specific 'protection shields' and caused some disappointment (see sections B.1 and B.2). The EC in the Negotiating Framework for Turkey (and the one for Croatia) also for the first time foresaw a special safeguard clause, which allows for negotiations to be suspended '[i]n the case of a serious and persistent breach in Turkey of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded'.¹⁰⁹⁶ Interestingly, this wording omits reference to 'respect for and protection of minorities' as contained in the Copenhagen criteria (while adding the principle of liberty).¹⁰⁹⁷ One could speculate whether the reason behind this was the restrictive approach Turkey has towards the definition of minorities and minority rights (see section D.2), yet this cannot be substantiated as the genesis of this clause was beyond the scope of this study.

¹⁰⁹⁴ See Deliverable 6.1 (n 712) 132ff.

¹⁰⁹⁵ The launch and the whole process of negotiations in this sense follows the reward logic (or should ideally follow it). Conversely, can the not taking up of negotiations, their delay or suspension be understood as a negative tool or sanction (see Deliverable 6.1 (n 712) 121).

¹⁰⁹⁶ Negotiating Framework with Turkey, point 5. Deviating from the general principle of unanimity in enlargement matters (Art. 49 TEU, see above n 717) the Council can decide on such a suspension of negotiations by qualified majority (see also Deliverable 6.1 (n 712) 136, for inconsistency with the comparable Art. 7 TEU on sanctions against a Member State violating the founding values of the Union, which requires unanimity).

¹⁰⁹⁷ See European Council 1993 (n 728) 13.

The Negotiating Frameworks for Turkey and Croatia brought to further relevant novelties: first, the *acquis* was re-grouped into 35 negotiation chapters, including the newly created chapter 23 'Judiciary and fundamental rights'; and second, a new two-stage methodology of how negotiations were to be carried out and benchmarking as an instrument were introduced. In the first so-called 'screening' phase each negotiation chapter is examined by the Commission together with the candidate country as to the country's preparedness for accession (mainly looking at the concordance of national legislation with the EU *acquis* and at institutional set-up), which results in the drafting of a Screening Report on the respective chapter by the Commission. The Screening Report must unanimously be adopted by the Council, which, on the basis of the EC's recommendation, may decide on opening benchmarks (OBM) to be fulfilled before the said chapter can be opened for negotiations. Only after approval by all Member States can the Screening Report and the benchmarks officially be transmitted to the candidate and be published. It has to be mentioned, though, that in the cases of Croatia and Turkey the opening benchmarks were/are not included in the Screening Reports, but presented to the governments separately. Lack of transparency and public accessibility in this respect has led to considerable criticism, which may be why for Montenegro and Serbia the Commission later incorporated the opening benchmarks into the Screening Reports.¹⁰⁹⁸

Only when the opening benchmarks have been met and this is confirmed by the Commission and the Council, the second phase can be launched by both Turkey and the EU elaborating Positions on the chapter in question and subsequently opening the actual negotiations on the chapter in another Accession Conference. The EU Common Position determines closing benchmarks (CBM, again to be adopted with unanimity by the Council) which have to be met in order to provisionally close the chapter (the achievement of the closing benchmarks has again to be unanimously confirmed by the Council). Until not all chapters have reached this stage, a chapter may be opened again, if necessary. Only after negotiations on all chapters have been finalized can the whole negotiation process be concluded (following the 'nothing is agreed until everything is agreed' principle).¹⁰⁹⁹ So, clearly there is no automatism and the steps where Turkey moves forward in negotiations are bound in this methodology to defined conditions (OBM, CBM) as well as moments of approval by the Council, which in this logic then hands out the reward for fulfilling the conditions.

It has to be underlined that, as elaborated in detail in Deliverable 6.1,¹¹⁰⁰ in 2012, when launching negotiations with Montenegro, the EU started to apply the so-called new approach which further strengthened the focus on rule of law issues and hence also human rights. The new negotiation methodology foresees that chapters 23 and 24 ('Justice, Freedom & Security'), constituting the 'rule of law' chapters, are treated with particular attention in that they should be opened at the very beginning of negotiations and closed last, thus giving the candidate country enough time to carry out reforms and develop an implementation track record in these central fields. Also, in order to support the focus on implementation, the instrument of interim benchmarks has been introduced for these chapters (for which closing benchmarks can thus only be defined at a later stage of the negotiations).

¹⁰⁹⁸ See Deliverable 6.1 (n 712) 133f.

¹⁰⁹⁹ European Commission, Directorate General for Enlargement (2011) *Understanding Enlargement - The European Union's enlargement policy*, Brussels, June 2011 <http://ec.europa.eu/enlargement/pdf/publication/understanding_enlargement_en.pdf> accessed 17 December 2015.

¹¹⁰⁰ See Deliverable 6.1 (n 712) 116f and 133ff. The new approach had been elaborated by the EC in its Enlargement Strategy 2011 and endorsed by the Council in December 2011 (see *ibid* 116).

The Commission has to report on these chapters to the Council twice a year and a new special suspension clause conditions the pace of over-all negotiations on progress in the area of rule of law.¹¹⁰¹ These innovations are formally not applicable to Turkey's negotiation procedure, since the Negotiating Framework from 2005 has not been adapted to these later developments. Still, in all its over-arching enlargement strategy papers since 2012 the Commission has – based on the Copenhagen criteria – been '[p]utting the rule of law at the centre of enlargement policy'¹¹⁰² and has in this context been clearly focusing on fundamental rights in all enlargement countries. The EU Enlargement Strategy published in November 2015 (which for the first time is conceptualised not as an annual, but a medium-term strategy until the end of the Commission's mandate in 2019) reaffirms the focus on the 'fundamentals first' principle, under which human rights issues are given a prominent position.¹¹⁰³ The Commission again addresses the issue of insufficient practical implementation of largely existing fundamental rights legislation, naming freedom of expression as a particularly challenging area.¹¹⁰⁴ Accordingly, it again refers to the new approach to chapters 23 and 24 by reiterating:

*This approach prioritises reforms in these fields, ensuring they are addressed at an early stage of the accession process. This allows the countries maximum time to build up, before accession, a track record of concrete results ensuring the sustainability of reforms.*¹¹⁰⁵

The new approach leads to increased scrutiny and thereby stricter conditionality on rule of law issues and under these human rights. While in the case of Turkey, which is evidently far beyond the 'early stage', chapter 23 has yet not been opened,¹¹⁰⁶ this does not mean that the issues under it have not been tackled in other ways (see also section 3 on the Positive Agenda), with the Commission giving them increased attention by using or devising other tools. At the same time, it has repeatedly recommended over the last years (arguably in reaction to the perceived backsliding trend in Turkey) that preparations for the opening of the chapter should be stepped up. As illustrated in section 1.c), in the context of the Gezi Park incidents Commissioner Füle explicitly called on the EU 'to start negotiations on the relevant chapters (23 and 24) as quickly as possible', pointing to the fact that this would provide an 'additional platform' for dialogue on 'EU values and principles'.¹¹⁰⁷ The 2014 EC Progress Report emphasized that '[w]ork on a number of negotiating chapters [among these, chapter 23] has been interrupted over the years, due to lack of consensus among Member States'.¹¹⁰⁸ It concluded that opening negotiations on chapters 23 and 24 'is in the interest of both Turkey and the EU' and 'would provide Turkey with a comprehensive roadmap for reforms in this essential area'.¹¹⁰⁹ This was reiterated in both the new EU Enlargement Strategy and the 2015 Turkey Progress Report,

¹¹⁰¹ See Accession Document 23/12 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union' (Brussels, 29 June 2012), http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf accessed 24 February 2016.

¹¹⁰² European Commission 2012 Enlargement Strategy (n 790) 4.

¹¹⁰³ See EC, 'Communication, EU Enlargement Strategy 2015' (n 285) 5. Under the 'fundamentals first' principle 'rule of law, fundamental rights, strengthening democratic institutions, including public administration reform, as well as economic development and competitiveness' are defined as 'key priorities' (ibid.).

¹¹⁰⁴ ibid 6.

¹¹⁰⁵ ibid 31.

¹¹⁰⁶ Also the past three years since the introduction of the new approach in 2012 have not seen any movement towards the opening of chapter 23 becoming more likely. At the turn of 2015/2016 there are some signs that things may shift, at least in the medium term (see section IV.B.4).

¹¹⁰⁷ European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle, 12 June 2013 (n 830) 2.

¹¹⁰⁸ EC, 'Communication, "Enlargement Strategy and Main Challenges 2014-2015"' (n 284) 4.

¹¹⁰⁹ ibid, 1 and 2.

where the wording was even somewhat reinforced through stating that '[o]pening benchmarks ... still need to be defined.'¹¹¹⁰

While the screening meetings on chapter 23 were already held in 2006,¹¹¹¹ the pertinent Screening Report is still pending, as it has not yet been approved by the Council. It was not possible in the frame of this research to analyse the discussions and voting within the Council on this matter, however, it is clear that since 2009 Cyprus manifestly has been blocking progress on chapter 23 (see section B.3). Whether it is joined by other Member States could not be established. Consequently, the chapter 23 opening benchmarks have so far not officially been determined, either. Hillion concludes that '[a]s a result, the candidate is uninformed of what it takes for the chapters in question to be opened'.¹¹¹² He criticizes 'Member States using the benchmark methodology to stall negotiations without giving clear indications as to what is required for the process to start moving again',¹¹¹³ pointing to the detrimental effect the political (bilateral) instrumentalisation has on the predictability of negotiations. The adoption and publication of the Screening Report and the opening benchmarks, in the technical logic of the negotiating procedure, should not be subject to any conditions, the methodology does not foresee this. In the screening phase, being merely the first stage, there is technically no room for conditions (the procedure does not foresee a communication of any such conditions to the candidate country). The adoption of the Screening Report and the OBM thus shall also not be regarded as a reward, but rather as a technical step in order to provide orientation for both the candidate country and the EU as to where reforms are needed. Conditionality of negotiations depends on the formulation of OBM (and later CBM). Holding Screening Reports and OBM 'hostage' for (bilateral) political reasons indeed appears to be undermining the credibility of the whole negotiating procedure. For chapter 23, there does not seem to be dissent among the Member States on the content of the OBM. Rather, the reasoning for Cyprus for not 'unleashing' the report appears to be solely the unsolved Northern Cyprus issue.¹¹¹⁴

However, while there has been much debate about this stalemate, both politically and in academia, it has to be pointed out that unofficial information on what these chapter 23 benchmarks would (probably) be has reached the Turkish government, as can be seen from the Ministry of Justice outlining them on its website as follows (referring to the 'Draft Post-Screening Report'):¹¹¹⁵

1. *Preparation of a Judicial Reform Strategy Paper aiming to strengthen the independence, impartiality and effectiveness of judiciary*
2. *Establishment of the Ombudsman Institution and Independent Human Rights Presidency*
3. *Preparation of an Action Plan For Ensuring Better Implementation of the Fundamental Rights*
4. *Review of the Legislation on Freedom of Expression and Foundations in line with the European Convention on Human Rights and ECHR jurisprudence*
5. *Submitting the Corruption Prevention Strategy to the Commission in order to develop efficient legal and institutional framework to combat corruption*
6. *Approval of Optional Protocol to the Convention against Torture*

¹¹¹⁰ EC Progress Report 2015 (n 797) 4.

¹¹¹¹ See Republic of Turkey, Ministry of EU Affairs, December 2012 (n 846) 12.

¹¹¹² Hillion 2010 (n 915) 22f. As shall be illustrated shortly, Turkey, however, proves not to be so uninformed.

¹¹¹³ *ibid.*

¹¹¹⁴ Again, it could not be found out whether other Member States are also blocking the report.

¹¹¹⁵ Republic of Turkey, Ministry of Justice, Directorate General for EU Affairs 'Chapter 23' (n 1024).

The National Action Plans for EU Accession elaborated by the Turkish government in 2014 also make reference to these envisaged benchmarks (though with a different numbering order), clarifying that the NHRI (2.) should be ‘independent, adequately resourced’ and ‘in accordance with relevant UN principles’.¹¹¹⁶ With regard to the Action Plan on fundamental rights (3.) they contain the following additional paragraph:

*The action plan should include measures that would ultimately secure the full respect of the rights and the freedoms guaranteed under the ECHR and the case-law of the ECtHR including legislative measures, as necessary. Turkey should also provide evidence of a track record of progress on fundamental rights.*¹¹¹⁷

It was in August 2007 that the draft Screening Report (together with the benchmarks list) was unofficially passed on to the Turkish Ministry of Justice, as this emerges from the introductory part of the Ministry’s Judicial Reform Strategy 2009.¹¹¹⁸ Hence, the elaboration of this strategy as well as many of the reform measures taken over the years (e.g. Law on Foundations in 2008, ratification of OPCAT in 2011, establishment of the Ombudsman and NHRI in 2012) can be considered as answering to these benchmarks. So, despite not having been adopted by the Council and thus made obligatory, they have unfolded some conditionality effects.

This fits in to some extent with what has been highlighted by the European Stability Initiative with regard to the role of ‘chapter opening’:

*There is in fact no evidence that ‘chapter opening’ produces change – Turkey shows this best in recent years – that progress in ‘un-opened’ chapters is faster or slower than in ‘opened’ ones. A country can make all the reforms and then ‘open and close’ all chapters at the very end (Croatia did this in many key policy fields). It can open many chapters and make no progress for years.*¹¹¹⁹

While not speaking out against the technicalities of negotiation methodology as such, their relevance is confronted with the necessity ‘that the EU spells out clearly, publicly, fairly, and strictly ... WHAT the basic and fundamental rights and standards should be in a country that wants to join’,¹¹²⁰ regardless of negotiations opened or vetoed. Müftüler-Baç and Keyman argue along similar lines, seeing the possibility for progress, even if chapter 23 is not opened: ‘Both the European Commission and Turkey could work towards the Turkish compliance with the acquis on these chapters’ which, ‘however, would require political commitment and will on the part of both the EU and Turkey and this common political will could only be erected if these two parties see a common future.’¹¹²¹

¹¹¹⁶ Republic of Turkey (2014), *National Action Plan for EU Accession Phase-I* (n 841) 97, and Republic of Turkey (2014), *National Action Plan for EU Accession Phase-II* (n 841) 139.

¹¹¹⁷ *ibid.*

¹¹¹⁸ See Republic of Turkey, Ministry of Justice (2009) *Judicial Reform Strategy*, 9, <http://www.abgm.adalet.gov.tr/eng/pdf/Judicial%20Reform%20Strategy.pdf> accessed 24 February 2016.

¹¹¹⁹ European Stability Initiative ‘Enlargement reloaded – ESI proposal for a new generation of progress reports’, 31 January 2014, <http://www.esiweb.org/rumeliobserver/2014/01/31/enlargement-reloaded-esi-proposal-for-a-new-generation-of-progress-reports/> accessed 24 February 2016.

¹¹²⁰ *ibid.* Emphasis in the original.

¹¹²¹ Müftüler-Baç M, and Keyman E, ‘Turkey’s Unconsolidated Democracy: The Nexus between Democratisation and Majoritarianism in Turkey’, in Aydın-Düzgüt et.al. (eds.), *Global Turkey in Europe III – Democracy, Trade, and the Kurdish Question in Turkey-EU Relations* (Edizioni Nuova Cultura 2015) 121-130, 129.

Working together on harmonisation with the EU acquis in the human rights field is also something that happens within the visa liberalisation dialogue (VLD). Given the central role of the VLD at the present moment (see section 6), there may indeed be progress in spite of chapter 23 remaining un-opened for the time being. The 2014 Action Plan on Prevention of Violations of the European Convention on Human Rights, which, as argued in section 1.c), has been mainly triggered by the respective VLD benchmark, does foresee legislative changes. However, while being related by the Turkish government also to the chapter 23 benchmark no. 3,¹¹²² the 2014 Action Plan is clearly more limited in scope than the one envisaged in the unofficial chapter 23 benchmark.¹¹²³ The above mentioned National Action Plans for EU Accession (for 2014-2015 and 2015-2019), referring to the envisaged chapter 23 benchmarks, are broader and provide a range of reform measures in terms of (primary and secondary) legislation, institution-building and strategy development.¹¹²⁴ It has to be noted, however, that implementation of the National Action Plan for EU Accession 2014-2015 is delayed (e.g. the Law on Anti-Discrimination and Equality foreseen for the first half of 2015¹¹²⁵ has not been adopted yet).¹¹²⁶

Having said all this, it still appears of high significance that the blockage of chapter 23 be removed as soon as possible in order to re-establish credibility of the negotiation process, but mostly to have the possibility to engage with Turkey on the 'tricky issues'. This way the implementation of the two National Action Plans could probably also be accelerated. In one of his first speeches Commissioner Hahn said about negotiations with Turkey on chapters 23 and 24: 'To encourage and support reforms on the rule of law and fundamental rights, we must be consistent and use the most effective and constructive tool at our disposal to improve things on the ground, namely the opening benchmarks for these two chapters.'¹¹²⁷

Obviously, in light of the screening phase having been completed almost ten years ago, the draft Screening Reports from 2006 would need to be updated in order to move ahead. The EU Enlargement Strategy published on 10 November 2015 points to preparations being re-launched and 'plans to submit updated preparatory documents ... by spring 2016.'¹¹²⁸ This may mean that the formerly suggested benchmarks will be updated (with new 'to-dos' being added) or at least fine-tuned to present needs. Thereby, the EU could directly address the backsliding that has happened in some human rights areas over the last years.

Whether, once the chapters are opened, the methodological novelties introduced around the two chapters through the new approach could be applied to Turkey, too, remains doubtful. Blockmans sees the possibility to apply interim benchmarking to Turkey, too, and advises the Member States to do so

¹¹²² See Republic of Turkey, Ministry of Justice, Directorate General for EU Affairs 'Chapter 23' (n 1024).

¹¹²³ This seems only logical since the VLD benchmark is itself narrower (see chapter IV.C.6, also for the EC's criticism on the Action Plan omitting certain issues as well as later legislation being in contradiction to it).

¹¹²⁴ See Republic of Turkey (2014), *National Action Plan for EU Accession Phase-I* (n 841) 98ff, and Republic of Turkey (2014) *National Action Plan for EU Accession Phase-II* (n 841) 140ff.

¹¹²⁵ See Republic of Turkey (2014), *National Action Plan for EU Accession Phase-I* (n 841) 98.

¹¹²⁶ The delay in implementing this phase I National Action Plan was confirmed during interviews with the EU Delegation in Ankara, which had just completed an analysis.

¹¹²⁷ European Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn 2014 (n 844) . See similar also Arisan Eralp April 2015 (n 1016) 5.

¹¹²⁸ European Commission 2015 EU Enlargement Strategy (n 791) 16. During the interviews with the EU Delegation in Ankara at the end November 2015 it was confirmed that the Commission was about to launch the review process of the Screening Reports and benchmarks, in order to ideally be prepared to open the two chapters in 2016. Yet, again the interlinkage with the Cyprus settlement was emphasized.

in order to ‘determine the course of reforms at all stages of the accession negotiations’.¹¹²⁹ He, however, does not elaborate on how this could be done technically (with the Negotiating Framework of 2005 not foreseeing the new approach special rules for chapters 23 and 24) and politically (with a revision of the Negotiating Framework, adding stricter rules, seeming not very viable). Most of the stakeholders interviewed for this study did not see any leeway for changing the methodology at this point.

When accession negotiations with Turkey about human rights are discussed, it is very often overlooked that, next to chapter 23, there is another chapter that is of relevance: chapter 19 ‘Social policy and employment’, which notably also pertains to equal opportunities between men and women as well as anti-discrimination at large (focusing on employment aspects). For this chapter the Screening Report, dating from 4 September 2006, was adopted and was officially handed over to the Turkish government on 19 January 2007.¹¹³⁰ The Screening Report itself (again following the old methodology) does not contain the in this case two OBM, yet the Turkish National Action Plans make reference to them as (summarized):¹¹³¹

1. *Ensure that full trade union rights are respected in line with EU standards and the relevant ILO Conventions*
2. *Provide the Commission with an action plan for the gradual transposition, implementation and enforcement throughout the country of the *acquis* (as necessary) in each area covered by this Chapter for the benefit of the entire workforce ... a gender mainstreaming approach needs to be adopted, with particular attention to be given to women’s participation in the labour market.*

Chapter 19 is in general openable (i.e. not blocked by Council decision or Member State veto), however, while the second benchmark has been fulfilled (the Turkish government submitted an action plan already in 2010),¹¹³² the first one remains contested. Despite two laws on union rights having been passed in 2012, the EC still considers legislation not to be fully in line with EU rules: hurdles are perceived primarily in the lacking right to strike for civil servants and restricted access for trade unions to collective bargaining.¹¹³³ The National Action Plan for EU Accession phase I foresees legislative amendments in this respect, as well as mentioning also under this chapter the adoption of the Law on Anti-Discrimination and Equality and a Strategy Paper and Action Plan on social policy towards Roma citizens until July 2015,¹¹³⁴ both of which are, as outlined, still wanting.

To sum up, in the case of chapter 19 progress in negotiations primarily rests with Turkey, in that it takes concrete steps on the basis of its National Action Plans for EU Accession towards meeting the outstanding benchmark – following thereby the regularly invoked logic that it ‘can accelerate the pace of negotiations by advancing in the fulfilment of the benchmarks’.¹¹³⁵ As far as chapter 23 is concerned, on the other hand, it is paramount that the Screening Report is updated by the EC, that it is adopted

¹¹²⁹ Steven Blockmans *EU-Turkey Relations: Turning vicious circles into virtuous ones*, CEPS Policy Brief No. 317, 26 March 2014, <https://www.ceps.eu/system/files/PB%20317%20SB%20on%20Turkey%20final.pdf> accessed 24 February 2016.

¹¹³⁰ See Republic of Turkey (2014), *National Action Plan for EU Accession Phase-I* (n 841) 84.

¹¹³¹ See *ibid.* and Republic of Turkey (2014) *National Action Plan for EU Accession Phase-II* (n 841) 127.

¹¹³² See Republic of Turkey, Ministry for EU Affairs ‘(Chapter 19) Social Policy and Employment’ <http://www.ab.gov.tr/?p=84&l=2> accessed 24 February 2016.

¹¹³³ See EC Progress Report 2015 (n 797) 52.

¹¹³⁴ See Republic of Turkey (2014) *National Action Plan for EU Accession Phase-I* (n 841) 85 and 89.

¹¹³⁵ EC Progress Report 2015 (n 797) 4.

by the Council and that in connection therewith opening benchmarks are determined (which ideally, for the sake of transparency, should be comprised directly in the Screening Report). This said, Turkey in this regard can of course support movement to happen by following along the reform path as laid out by the government in the recent National Plans for EU Accession. Still, political relations will certainly continue to constitute a major factor, between Turkey and EU Member States, but also amongst Member States – where Germany’s current commitment to enhancing accession negotiations with Turkey may turn out considerably influential. Again, in these endeavours it is of utmost importance to move towards opening chapter 23 and to eventually have this formal entry point of engaging with Turkey on fundamental rights issues, in order for the EU to re-establish not only the credibility of the negotiation process, but also to refute accusations of forgetting about human rights in Turkey in the present crisis situation.

3. Positive Agenda

In 2012 the European Commission reacted to the stalemate in accession negotiations (no chapter had been opened since 2010)¹¹³⁶ and launched the so-called Positive Agenda in order to revive the dialogue with Turkey. Based on an initiative by European Commissioner for Enlargement and European Neighbourhood Policy Štefan Füle, the EC had proposed the Positive Agenda in its Enlargement Strategy for 2011-2012, thus coupling its explicit criticism in the 2011 Progress Report with the endeavour ‘to launch a new virtuous circle in the accession process’ and ‘enable a more constructive and positive relationship’.¹¹³⁷ Endorsed by the Council in December 2011, the Positive Agenda was not thought to replace negotiations, but to open up the possibility of engaging with the Turkish government and administration on ‘areas of joint interest where progress is both needed and feasible’¹¹³⁸ despite negotiation chapters being on hold. These areas included a number of chapter 23 and 24 issues, amongst these ‘political reforms and fundamental rights’.¹¹³⁹ At the launching event on 17 May 2012, Commissioner Füle pointed to the fact that eight working groups would be set up, with the one on judiciary and fundamental rights – ‘clearly the most essential of all’¹¹⁴⁰ – having its first meeting right on that day. In this kick-off meeting of the chapter 23 working group Commissioner Füle expressed his regret about the blockage of the chapter:

*I agree with those that believe it is important to have chapter 23 opened as early as possible, so that Turkey and the European Union have a process within which progress can be made. I regret to say that to date this has not been possible. However, the positive agenda offers an avenue that will indeed allow us to go ahead.*¹¹⁴¹

¹¹³⁶ See Delegation of the European Union to Turkey ‘Accession Negotiations - What is the current status?’ <<http://avrupa.info.tr/eu-and-turkey/accession-negotiations/what-is-the-current-status.html>> accessed 21 December 2015.

¹¹³⁷ EC, ‘Communication, Enlargement Strategy and Main Challenges 2011-2012’ (n 448) 19.

¹¹³⁸ European Commission (2012) *EU-Turkey: Commissioner Štefan Füle to launch positive agenda*, Brussels, 16 May 2012, MEMO/12/358, http://europa.eu/rapid/press-release_MEMO-12-358_en.htm?locale=en accessed 4 February 2016.

¹¹³⁹ European Commission 2012 MEMO/12/359 (n 819).

¹¹⁴⁰ *ibid.*

¹¹⁴¹ Delegation of the European Union to Turkey ‘Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy - Speech at the Chapter 23 Kick-Off Meeting with Turkey - Launch of the Positive Agenda with Turkey’, Ankara, 17 May 2012, <http://avrupa.info.tr/resource-centre/news-archive/news-single-view/article/stefan-fuele-european-commissioner-for-enlargement-and-european-neighbourhood-policy/speech.html> accessed 24 February 2016.

Placing fundamental rights at the beginning of his speech (while the order within chapter 23 is normally judiciary – anti-corruption – fundamental rights) and dedicating a large part of it to them, he stated that ‘Turkey needs a framework which would define what the country wishes to achieve in terms of fundamental rights’ and in this context supported the action plans being under elaboration.¹¹⁴² He then covered a wide range of specific human rights issues, including protection of persons belonging to minorities (tackling in particular language and education rights) and women's rights, on which he underlined: ‘every step needs to be taken to implement the recent law on violence against women; also, to improve the situation on the ground of women in Turkey as regards education, employment and political representation’.¹¹⁴³ It seems furthermore noteworthy that Commissioner Füle also addressed the EU ban on discrimination on the ground of sexual orientation, saying: ‘The time has come for Turkish law to align itself.’¹¹⁴⁴ Pointing towards the idea of a dialogic approach behind the Positive Agenda again at the end of his speech, he emphasized, arguably trying to establish common ground again after the critical 2011 Progress Reports and the accompanying discord:

*... we are not here to criticise; we are here as partners to do all we can to guide your reforms, to help you adopt European standards. We try to provide analysis and assistance tailored to your needs: among other things, eight peer assessment reviews related to all areas of chapter 23 took place last year.*¹¹⁴⁵

These peer assessment missions became an instrument considerably used for chapter 23 issues.¹¹⁴⁶ They were to link in with technical talks under the chapter 23 working group carried out by the Turkish Ministry of EU Affairs and the EC Directorate General Enlargement on lower bureaucratic level.¹¹⁴⁷ The two sides came together for a second working group meeting in Brussels in November 2012, held in spite of Turkey having frozen its official relations with the EU during the Cypriot presidency in the second half of 2012.¹¹⁴⁸ For the Turkish Ministry of EU Affairs it was particularly important to stress that the Positive Agenda was to complement, not substitute the accession negotiations¹¹⁴⁹ and that the purpose of the working group meetings was ‘to strengthen the existing mechanisms for cooperation with the Commission ... and thus, to open as many chapters as possible within a short period of time once the political blocks before our accession process are removed.’¹¹⁵⁰

During 2013 the working group on chapter 23 did not convene. The precise reasons for this could not be established within the frame of this study. One could speculate whether it was the worsening relationship between Turkey and the EU especially around the Gezi Park protests in May and June 2013 that prevented further meetings throughout the year (maybe they were among the ones cancelled as

¹¹⁴² He referred to a general action plan on fundamental rights and another one on implementation of ECtHR judgements at that time (see *ibid.*).

¹¹⁴³ *ibid.*

¹¹⁴⁴ *ibid.*

¹¹⁴⁵ *ibid.*

¹¹⁴⁶ See for all the assessment missions carried out on rule of law matters between 2003 and 2014 Delegation of the European Union to Turkey ‘Accession Negotiations – Peer review reports’ <http://www.avrupa.info.tr/en/ue-and-turkey/accession-negotiations/peer-review-reports.html> accessed 24 February 2016.

¹¹⁴⁷ See Republic of Turkey, Ministry for EU Affairs ‘Meeting of the Working Group on Chapter 23 is Held’ <http://www.ab.gov.tr/index.php?p=47690&l=2> and ‘Chapter 23 Working Group Meeting’ <http://www.ab.gov.tr/index.php?p=48297&l=2> both accessed 24 February 2016.

¹¹⁴⁸ See *ibid.* and Morelli 2013 (n 818) 12.

¹¹⁴⁹ See Morelli 2013 (n 818) 11.

¹¹⁵⁰ Republic of Turkey, Ministry of EU Affairs 2012 (n 846).

a result of the crisis in relations).¹¹⁵¹ It could however also be that Bechev was right in calling the Positive Agenda ‘essentially an institutional trick intended to circumvent the Cyprus issue’¹¹⁵² and that after the end of the Cypriot presidency momentum was lost again.

At any rate, a third meeting of the chapter 23 working group was eventually held on 17 June 2014, attended again by Commissioner Füle. In his opening speech he pointed to the EC’s ‘strong insistence on continuing engagement with the Turkish partners’¹¹⁵³ on chapter 23 issues and explained:

It is not about comparing the exact language of the particular pieces of the Turkish legislation with the existing EU laws. It is about ensuring that the basic principles and standards of the EU are followed in a way that safeguards the European values...¹¹⁵⁴

He also touched on ‘recent turbulences’ and called Turkey’s commitment to carry out further reforms ‘indispensable’.¹¹⁵⁵ Referring once more to a number of peer review missions on specific topics under chapter 23 implemented in 2014, Commissioner Füle expressed hope that the experts’ reports ‘will be used as a roadmap for the future reforms in the area of judiciary and freedom of expression.’¹¹⁵⁶ Interestingly, the 2014 reports on freedom of expression are available not only on the website of the EU Delegation (EUD) to Turkey,¹¹⁵⁷ but also on the website of the Ombudsman institution.¹¹⁵⁸ However, the versions differ: on the EUD website one can find the final version, taking into account government criticism on the submitted reports on the one hand and developments until the end of 2014 on the other, including the police raids against journalists in mid-December.¹¹⁵⁹ The two experts’ reports on the website of the Ombudsman seem to be earlier versions. It could not be established why the Ombudsman website does not provide the final, consolidated version of the reports, so that it is left to mere speculation if this has anything to do with the disclosed request for revision by the Turkish ministries or the inclusion of the highly controversial arrest wave of December 2014.

¹¹⁵¹ The fact that Turkey in December 2012 for the first time published its own Progress Report can also be rated as emblematic of the deterioration in the relationship (see chapter IV.B.3.).

¹¹⁵² Bechev D, *EU-Turkey Relations: A Glimmer of Hope?*, Global Turkey in Europe Commentary 3, July 2012, 1, http://ipc.sabanciuniv.edu/en/wp-content/uploads/2012/07/GTE_C_03.pdf accessed 24 February 2016.

¹¹⁵³ European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle (2014) *Opening remarks of Commissioner Füle at the EU-Turkey working group on Chapter 23*, Ankara, 17 June 2014, SPEECH/14/473, 1, <http://europa.eu/rapid/press-release_SPEECH-14-473_en.htm> accessed 21 December 2015.

¹¹⁵⁴ *ibid.*

¹¹⁵⁵ *ibid.*

¹¹⁵⁶ *ibid.*

¹¹⁵⁷ See Delegation of the European Union to Turkey ‘Accession Negotiations – Peer review reports’ <http://www.avrupa.info.tr/en/eu-and-turkey/accession-negotiations/peer-review-reports.html> accessed 24 February 2016.

¹¹⁵⁸ See KDK Ombudsman Institution ‘International Reports’ http://www.ombudsman.gov.tr/en/custom_page-376-international-reports.html accessed 24 February 2016.

¹¹⁵⁹ See Benedek W, Nyman-Metcalf K, *Report on the findings and recommendations of the Peer Review Mission on Freedom of Expression* (Istanbul and Ankara, 12-16 May 2014) 5 http://avrupa.info.tr/fileadmin/Content/Files/File/Docs/Turkey_report_rev_WB_KNM_final_Jan_2015.pdf accessed 24 February 2016. The report discloses that the Ministries of EU Affairs and Justice ‘criticized parts of [the first version] and requested a meeting in Brussels to discuss their criticisms and request for updates, which took place on 27 November 2014.’ It states that comments were taken into account ‘wherever it contributes to the quality and purposes of the report’. (*ibid.*).

It appears that, with the new Commission taking up office in November 2014, the Positive Agenda and its working groups have ceased to be applied as an instrument in relations with Turkey.¹¹⁶⁰ While the Progress Reports 2013 and 2014 had both referred to it as a form of ‘enhanced cooperation’,¹¹⁶¹ it is not mentioned in the Progress Report 2015 anymore. Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn in his first speech in Turkey in front of the EU-Turkey Joint Parliamentary Committee, in which he strongly focused on negotiations on chapter 23 (and 24) through determining opening benchmarks (see section 2), only briefly addressed the Positive Agenda: ‘Through the positive agenda initiated by the previous Commission, our relations have been sustained in many areas over the past couple of years.’¹¹⁶²

The effectiveness of the Positive Agenda in general and the working group on chapter 23 in particular as EU policy tools is difficult to assess in terms of concrete leverage. It certainly was a means to keep communication channels open to at least some extent during difficult times and as such deserves credit. What the EC was able to achieve in the human rights field concretely through the chapter 23 working group is hard to tell. It could not be established whether there was any causality between the Positive Agenda activities and the government tabling the 2013 democratisation package, which, as was shown, indeed focused on cultural rights – a topic Commissioner Füle had highlighted in launching the chapter 23 working group. At any rate, looking at the backsliding since 2012 and the fact that during the difficult year 2013 there appear to have been no activities of the working group, it can be argued that the impact was limited and that the Positive Agenda did not prove to be a strong enough tool to compensate for the stalemate in negotiations. Some have commented that it was not taken seriously enough both in Turkey and among Member States, thus not gaining sufficient support.¹¹⁶³ Yet, the Positive Agenda’s effect may in the very least turn out to be an indirect one, through bringing some movement into the visa liberalisation process and implanting considerable fundamental rights requirements there (see section 6).

4. Progress Reports and Enlargement Strategies

As elaborated in Deliverable 6.1,¹¹⁶⁴ systematic EC monitoring, revolving primarily around the annual Progress Reports, has turned into a powerful instrument in the EU’s enlargement policy since first applied in 1998. While human rights related features of this tool as well as criticism voiced against it have been depicted on a general basis there and shall not be repeated here, this chapter will look into the Progress Reports on Turkey from 1998 to 2015 in order to identify which human rights issues have been prioritized by the EC over the course of time. Also, we shall examine whether the criticism on the reports as highlighted in Deliverable 6.1 also holds for the case of Turkey.¹¹⁶⁵ Finally, this section will conclude with some methodological remarks.

¹¹⁶⁰ Its discontinuation (without officially announcing it) was also hinted at in interviews with the EU Delegation to Turkey.

¹¹⁶¹ European Commission Progress Report 2013 (n 823) 3, and European Commission Progress Report 2014 (n 823) 3.

¹¹⁶² European Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn 2014 (n 844).

¹¹⁶³ See EUinside ‘Enlargement Process is not Frozen but Freezing’, 20 November 2015 <http://www.euinside.eu/en/analyses/the-enlargement-process-is-not-frozen-it-has-frozen> accessed 24 February 2016.

¹¹⁶⁴ See Deliverable 6.1 (n 712) 147ff.

¹¹⁶⁵ See *ibid* 148f.

Table 31 presents an overview of the human rights areas covered in the 18 Progress Reports on Turkey from 1998 to 2015.¹¹⁶⁶ It aims at visualizing which areas have been given particular attention (in relation to others), which were treated only briefly and at which points which issues came up, disappeared or changed in concept.

¹¹⁶⁶ As mentioned earlier, in 1998 Turkey was included into the EC's monitoring mandate introduced by the 1997 enhanced pre-accession strategy without being a candidate country at that time. Consequently, the Turkish government pointed to unequal treatment of Turkey and did not attach high value to the Progress Reports 1998 and 1999 (see Eralp 2004 (n 741) 74f).

HR issue	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
International protection instruments	X	X	X	X	x	x	X	X	X	X	X	X	X	X	X	X	X	X
Capital punishment	X	X	x	X	X	X	X	x	X									
Torture, disappearances and extra-judicial executions	X	X	X (Torture and ill-treatment)	X (Torture and ill-treatment)	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Prison conditions	X	X	X	X	X	x	X	X	X	X	X	X	X	X	X	X	X	X
Freedom of expression (incl. media since 2006)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Freedom of press	X	X	x	X	X	X	X	X										
Freedom of association	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Freedom of assembly	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Status of women	X	X																
Equal opportunities			X (men + women)						X (men + women)	X (broad)	X	X	X	X	X	X	X	X
Gender equality + women's rights (incl. VaW)				X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Children's rights		x	x	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Rights of persons with disabilities				X	x	x	X	X	X	X	X	X	X	X	X	X	X	X
Anti-discrimination + rights of LGBT individ.									X	x	X	X	X	X	X	X	X	X
Freedom of religion (thought + conscience since 2011)	X	x	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Minority rights (incl. cultural rights since 2004)	X Kurds	X Kurds	X Kurds	X (Roma/Kurds)	X (Roma/Kurds/ IDPs)	X	X	X	X	X	X	X	X	X	X	X	X	X
Right to asylum	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Table 31. Human rights (HR) priorities in EC Regular/Progress Reports on Turkey 1998-2015

Bold marking: treated in more length in comparison to other issues; lowercase marking: mentioned, but with 1-2 sentences only. (For complete references see bibliography.)

To start with, the application of international human rights instruments has been a topic in all Progress Reports since 1998, however, did not figure so prominently in the early years. From 2004 onwards, the EC has been including a fairly comprehensive section on treaties acceded to and/or ratified as well as, in particular, ECtHR judgements against Turkey and their execution. This section has diminished somewhat in size since 2011.

Capital punishment, obviously, was a major issue in the early years with the EU exerting considerable pressure on Turkey to abolish it. This happened gradually (see Table 30 above) until 2004 and hence this issue ceased to be covered after 2006 (with the Progress Reports 2005 and 2006 just briefly acknowledging its recent abolition).

The complex of torture, ill-treatment, disappearances and extra-judicial killings as well as prison conditions has been a matter of concern throughout the years, yet the focus was more evident until 2009. If one looks closer, disappearances and extra-judicial killings ceased to be reported around 2004/2005, yet the issue of insufficient investigations into such human rights violations in the past comes up in later reports. Furthermore, the fight against impunity in torture cases started to be systematically addressed from 2004 onwards (which seems in line with more emphasis being put on implementation after legal reforms).

As for the fundamental freedoms of expression, press, association, assembly, one can observe that these have been considered in all Progress Reports since 1998, but with particular emphasis between 2002 and 2005 (with freedom of assembly, in comparison to the other freedoms, gaining a little less attention). Freedom of expression can be found to have been continuously high on the EC's agenda, which specifically applies to the 2015 Progress Report containing – in line with the new reporting methodology applicable to all enlargement countries (see below) – a detailed analysis of freedom of expression as a pilot area.

The coverage of women's rights / gender equality / anti-discrimination is somewhat more unsteady, also due to changes in concepts. While the Progress Reports 1998 and 1999 had addressed the 'status of women' and had not talked of gender equality, a new paragraph on equal opportunities was introduced under economic, social and cultural rights in 2000, which referred to 'gender disparity'¹¹⁶⁷ as well as, in one sentence, to violence against women. From 2001 onwards, the section was termed gender equality, continuing to comprise also violence against women. At any rate, during those early years, the relevant passages were rather short and the main emphasis of the reports lay on other issues, as Table 31 illustrates. In 2003, attention on gender equality and related matters seems to have grown, with the Progress Report 2004 placing then a clear emphasis on this issue area, also bringing in women's rights as a separate heading.¹¹⁶⁸ While the Progress Reports of the ensuing years varied in terminology and structuring, it can be summarized that women's rights / gender equality have been given much attention henceforth, with a little shift since 2013, however, in favour of other issues (freedom of expression, freedom of thought, conscience and religion, minority rights).

¹¹⁶⁷ European Commission (2000) *Regular Report from the Commission on Turkey's Progress towards Accession*, Brussels, 8 November 2000, 18, <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/tu_en.pdf> accessed 18 December 2015.

¹¹⁶⁸ This was also a reflection of the 2004 constitutional amendments and the new Penal Code, through both of which gender equality / women's rights have been strengthened (see chapter IV.D.1).

Also under the heading of economic and social rights – cultural rights were re-grouped with minority rights – rights of persons with disabilities were defined as a standalone paragraph for the first time in 2004 and have been treated systematically as such since then. Similarly, children’s rights also figure under this heading and have at times, by comparison, received particular attention (in 2007, 2010, 2011).

The broader notion of anti-discrimination appears as a separate section in the Progress Report 2006,¹¹⁶⁹ becoming coupled with equal opportunities in 2007, thus lending the latter arguably a wider scope. In this context, also the rights of LGBT people gained in attention, being more explicitly addressed for the first time in the 2008 Report. Their rights have stayed on the agenda since then, with slightly more prominence given to them since 2013 (even though still less than compared to e.g. women’s rights).

As can be seen in Table 31, minority rights have constituted a priority for the EC from the very beginning of monitoring and throughout the years (with somewhat less attention only in 2000 and 2001). Discussing mainly the situation and rights of the Kurdish population group in the early years, the scope of this issue broadened later on to not only include the Roma community, but also other minority groups. With cultural rights coming in here from 2004 onwards, too, the minority rights section becomes quite extensive at this stage. Obviously, these sections interlink also with the section on freedom of religion which was also given a high degree of attention by the EC (even though not as continuously as minority rights). What can be said for both issue areas alike is that the EC in the Progress Report 2015 – in comparison to the one from 2014 – has shortened the pertinent passages. This again may be due to the focus being largely put on freedom of expression.

Finally, it shall be noted that the right of asylum as such and Turkey upholding the geographical limitation on the Geneva Convention¹¹⁷⁰ was already addressed in the first Progress Report of 1998.¹¹⁷¹ Later on, the topic of asylum and the situation of asylum-seekers was treated with largely consistent attention (coming together with migration issues), yet the notion of ‘right of/to asylum’ was not used from 2000 onwards. At the same time, the EC has kept calling for legislative harmonisation over all the years.

To sum up, it can be concluded that, roughly speaking, up to the middle of the examined period, i.e. up to 2005/2006, the EC placed some priority on civil and political rights in its monitoring of Turkey’s human rights performance. Freedom of expression and freedom of media have formed an area of continual attention, with the last two Progress Reports from 2014 and especially 2015 putting particular emphasis on these areas. At about 2004/2005, economic and social rights gained in prominence, notably by gender equality issues becoming treated at more length. Over the last years, the EC has embarked on a broader equality-based approach with regard to anti-discrimination matters. This fits in with minority rights becoming also wider in scope, while they – coupled with cultural rights – have consistently ranked highly within the Progress Reports.

¹¹⁶⁹ Discrimination issues had figured in earlier Progress Reports, yet not too systematically, which is why this is not indicated in Table 2.

¹¹⁷⁰ Meaning that it applies the Convention only to refugees coming from Europe, see in detail chapter IV.C.6 on the visa liberalisation dialogue.

¹¹⁷¹ See European Commission Regular Report 1998 (n 742) 20 and 44.

This overall assessment of human rights priorities in Progress Reports and their development over time is confirmed when looking, by way of example, into the Enlargement Strategies of the years 2000 (as the year after Turkey's obtaining candidate status), 2004 and 2006 (as the years of shifts as outlined above), 2011 (with a very critical Progress Report) and 2013 (a low point in EU-Turkey relations, with the Gezi Park incidents). Examining the conclusions and recommendations these documents contain for Turkey, one can conclude which issues have been accentuated respectively (see Table 31).

In 2000, one paragraph was dedicated to civil and political rights (mentioning death penalty, torture and ill-treatment, prison conditions, freedom of expression as well as freedom of association and assembly as well as freedom of religion) whereas there was only one generic sentence on non-improvements in the field of economic, social and cultural rights situation, which particularly pointed to cultural rights.

The 2004 Enlargement Strategy Paper itself does not contain conclusions on Turkey, but refers to the accompanying separate *Communication Recommendation of the European Commission on Turkey's progress towards accession* requested by the Council for the 2004 decision on the start of accession negotiations. In therefore analysing the assessment of the political criteria in this document, it can be summarized that on the one hand the civil and political rights still figure prominently, with freedom of expression being highlighted, while on the other hand further issues come onto the agenda too, notably women's rights.

The main challenges identified for Turkey in the 2006-2007 Enlargement Strategy showed a similar pattern of priorities, which was also reflected in the annexed country conclusions throwing a spotlight on freedom of expression, rights of non-Muslim religious communities, women's rights, trade union rights.

The general conclusions and recommendations chapter of the Enlargement Strategy 2011-2012 in the case of Turkey stressed the importance of 'guaranteeing core fundamental rights',¹¹⁷² but did not point to any specific human rights issues. Other passages of the Strategy, however, prioritized freedom of expression, freedom of religion and women's rights, while underlining again that '[s]ignificant further efforts are required to guarantee fundamental rights in most areas'.¹¹⁷³

In 2013 the focus in the Strategy was shifted more towards a thematic structure, so that key challenges were discussed in an overarching way for all enlargement countries. While of course they also contained references to Turkey, we shall - for the purpose of demonstrating the priorities set for Turkey specifically - concentrate only on the annexed conclusions per country. The following can be observed: while the 2013 Progress Report presented a fairly balanced account of the different issue areas, with comparably some more attention being given to minority rights and freedom of religion (see Table 31), the Strategy on the one hand to some extent reflected this approach, but on the other hand dedicated considerable space to the Gezi Park protests and the excessive use of force on part of the police. This spotlight seems very logical given that the Strategy, constituting the Commission's communication tool to the Council, repeatedly calls for opening benchmarks to be agreed upon and

¹¹⁷² European Commission Enlargement Strategy 2011 (n 1137) 25.

¹¹⁷³ *ibid* 72.

communicated to Turkey at the earliest possible point ‘so as to enhance the EU’s dialogue with Turkey in areas of vital mutual interest and to support ongoing reform efforts’.¹¹⁷⁴

HR issues highlighted	2000	2004	2006	2011	2013	2015
Death penalty	x	x				
Torture and ill-treatment	x	x	x		x (excessive use of force)	
Prison conditions	x					
Freedom of expression	x	x	x	x	x (incl. freedom of the media)	x
Freedom of association and assembly	x	x (assembly)			X	x (assembly)
Freedom of religion	x	x	x	x	x (incl. freedom of conscience)	
Women’s rights		x	x	x	X	x
Children’s rights					X	x
Rights of LGBT individuals					X	x
Trade union rights		x	x			
Cultural rights	x	x			x	
Minority rights		x	x		x	x (Roma)
Anti-discrimination						x

Table 32. Human rights (HR) priorities in EC Enlargement Strategies 2000,¹¹⁷⁵ 2006,¹¹⁷⁶ 2011,¹¹⁷⁷ 2013,¹¹⁷⁸ 2015¹¹⁷⁹ and the EC Recommendation on Turkey’s progress towards accession of 2004¹¹⁸⁰

Complementing this analysis by examining the current EU Enlargement Strategy published in November 2015 and for the first time extending to a multi-annual period (i.e. until 2019), it can be observed that the overarching character of the Strategy has been strengthened not only in the temporal sense, but also with regard to the fundamental issues it is focused on (rule of law, fundamental rights, economic development and competitiveness, functioning of democratic institutions and public administration reform) across all enlargement countries.¹¹⁸¹ It still comprises an annex summarizing the main findings from the country reports, though, which in the case of Turkey refers strongly to backsliding as regards freedom of expression and freedom of assembly. Incomplete

¹¹⁷⁴ European Commission Enlargement Strategy 2013 (n 791) 22.

¹¹⁷⁵ European Commission (2000) *Enlargement Strategy Paper - Reports on progress towards accession by each of the candidate countries*, Brussels, 8 September 2000, COM (2000) 700 final, 60f, <http://aei.pitt.edu/44638/1/strategy_2000.pdf> accessed 18 December 2015.

¹¹⁷⁶ European Commission (2006) *Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2006-2007*, Brussels, 08 November 2006, COM(2006) 649 final, 11 and 53, <http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf> accessed 18 December 2015.

¹¹⁷⁷ European Commission Enlargement Strategy 2011 (n 1137) 72f.

¹¹⁷⁸ European Commission Enlargement Strategy 2013 (n 791) 21f.

¹¹⁷⁹ European Commission EU Enlargement Strategy 2015 (n 791) 28f.

¹¹⁸⁰ European Commission *Recommendation on Turkey’s progress 2004 (n 940)* 3.

¹¹⁸¹ Note that the EC ‘will continue to adopt annual communications to take stock of progress, draw conclusions, make recommendations on thematic or country issues and propose adjustments to the overall strategy as necessary.’ (European Commission EU Enlargement Strategy 2015 (n 791) 13.

enforcement of ECHR rights and ECtHR case law and the ‘urgent need’¹¹⁸² for legislation against discrimination are also raised as critical points. The rights of women, children, LGBTI individuals and Roma are mentioned explicitly in this context.

Turning to some of the critical remarks about the Progress Reports which have been raised in the past,¹¹⁸³ we can say that criticism on the EC for not using compliance with the ECHR (and ECtHR rulings) as indicator for human rights performance¹¹⁸⁴ does not really hold for Turkey, at least not since 2004. ECHR-compliance has been consistently addressed in the accession process and also incorporated into the visa liberalization dialogue. Most recently, lack of compliance with the Convention and problems in the execution of ECtHR judgements have been mentioned in the EU Enlargement Strategy, too (arguably in reflection to the wanting implementation of the 2014 Action Plan on Prevention of ECHR Violations). What has to be confirmed in the case of Turkey, too, is that neither the Progress Reports nor the pertinent sections of the Enlargement Strategies have so far made clear references to priorities defined in Accession Partnerships or to Screening Reports and opening benchmarks. While obviously the latter could not be the case for chapter 23, since these have not been adopted, it also applies to chapter 19, in case of which the two opening benchmarks from 2006 (see section 2 on negotiations) were not used as reference points in the Progress Report. This proves detrimental not only to transparency, but also to coherence, so that the criticism of insufficient interlinkages of the instruments voiced by Benedek et al. with regard to the Western Balkans can be upheld for the Turkish case as well. Consequently, ‘dedicating a separate chapter in Progress Reports to the assessment of Partnership priorities ... and benchmarks or explicitly mentioning priorities and benchmarks in the individual chapters’,¹¹⁸⁵ as they suggest, continues to be a very valid recommendation. The same applies to their encouraging the EC to use the indicators developed by the EU Fundamental Rights Agency for evaluating the enlargement countries’ human rights performance and progress.¹¹⁸⁶

2015 has seen not only an altered approach to the Enlargement Strategy, but also modifications in the methodology of the Progress Reports, as has been mentioned earlier. The above mentioned suggestions appear to not have been taken into consideration, yet the changes introduced clearly add more structuredness and traceability. The EC from now on differentiates between state of play as regards alignment with the membership criteria and progress achieved over the past 12 months. Under both aspects a five-tier scale of assessment has been introduced as follows:¹¹⁸⁷

- *For state of play:*
Early stage – Some level of preparation – Moderately prepared – Good level of preparation – Well advanced
- *For progress in the past year:*
Backsliding – No progress – Some progress – Good progress – Very good progress

¹¹⁸² *ibid* 28f.

¹¹⁸³ See Deliverable 6.1 (n 712) 148f.

¹¹⁸⁴ See *ibid* 148.

¹¹⁸⁵ Benedek, W., et al., *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans* (European Parliament, Directorate-General for External Policies of the Union, 2012) 92, http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf accessed 27 February 2016.

¹¹⁸⁶ See *ibid* 66.

¹¹⁸⁷ See EC, ‘Communication, EU Enlargement Strategy 2015’ (n 285) 32.

The Commission further elaborates:

*Particular emphasis is given to the importance of implementation and track records of concrete results in each area. Accordingly, these areas are given more weight than legal alignment and institutional framework in the overall assessment.*¹¹⁸⁸

This new methodology has been applied in 2015 on the ‘current political priorities and weaknesses in the enlargement countries’,¹¹⁸⁹ among them the following chapter 23 issues: judiciary, corruption, organised crime, freedom of expression. A uniform application across all countries is supposed to increase transparency for all stakeholders and to allow for more comparability amongst the countries.¹¹⁹⁰ Also, in the pilot areas as well as under the single acquis chapters more guidance is given to the countries with regard to what they should do in the year to come. To illustrate, in Turkey’s case this ‘homework list’ on freedom of expression reads:

→ *act against intimidation of journalists in all its forms: notably investigate all physical attacks and threats against journalists and actively prevent attacks on media outlets but also defuse the tense political climate which creates an environment curtailing freedom of speech in the media and on the internet;*

→ *ensure that defamation law and other similar offenses are not used as a means of putting pressure on critics by ensuring courts are fully aware of and apply the case law of the ECtHR;*

→ *ensure that existing legislation notably the internet law complies with European standards and is implemented in a manner which ensures proportionality and equality before the law.*¹¹⁹¹

The Commission will follow-up on these ‘assignments’ in the next Progress Report and also envisages to perhaps apply the new methodology of standardized assessment to further areas. Looking at Turkey, this would of course be highly recommendable for other ‘burning’ human rights issues where backsliding trends could be observed, notably women’s rights for which a strong focus on implementation of existing legislation would be paramount (see section D.1).

So far reactions to the new format appear to have been largely positive, also from stakeholders within Turkey. To name two examples from academia and think tanks, Dimitrova voiced her impression ‘that the reports, one of the key monitoring and reform tools of enlargement policy, are indeed changed and much improved’;¹¹⁹² others have found them to be written ‘in a much more intelligent and

¹¹⁸⁸ *ibid.*

¹¹⁸⁹ *ibid* 31.

¹¹⁹⁰ See *ibid.* See also on this effect of ‘friendly competition and mutual learning from best practice’ European Stability Initiative (n 1119). In fact, the main traits of the new methodology seem go back to the propositions by the European Stability Initiative.

¹¹⁹¹ EC Progress Report 2015 (n 797) 22. The human rights related ‘to do’s’ under chapters 19 and 23 read rather broadly: ‘step up social protection, social inclusion and anti-discrimination policies, with the aim of ensuring equal treatment for all’ and ‘ensure full respect for fundamental rights and freedoms, in particular freedom of expression, the fight against impunity, freedom of assembly and protection of personal data and of persons belonging to minorities’ (*ibid* 51 and 56) and appear less tangible and clear than the ones on freedom of expression as a pilot area.

¹¹⁹² Antoaneta Dimitrova ‘The ‘reporting revolution’ in enlargement reports: will it help overcome ‘enlargement fatigue’?’ *eurosearch*, 18 November 2015 <https://eurosearch.wordpress.com/2015/11/18/the-reporting-revolution-in-enlargement-reports-will-it-help-overcome-enlargement-fatigue/> accessed 25 February 2016.

strategic fashion'.¹¹⁹³ Yet, there are still critical voices accusing the EC to be biased in their selection of sources for their monitoring and to not involve a balanced variety of interlocutors. Hence, statements received during the interviews conducted for this study ranged from calling the 2015 Progress Report the best ever to perceiving a constant decrease in quality. Some observers have criticized it for not being explicit enough on restrictions of fundamental freedoms,¹¹⁹⁴ whereas most of the interviewees found that in fact it turned out quite critical, which some expressed relief about. In light of the delay in publication of the whole enlargement package 2015, which only happened after the Turkish general election on 1 November, it had been feared that the EU would shun away from being too vocal about human rights violations in Turkey because of realpolitik necessities in the refugee policy crisis.¹¹⁹⁵ Others were of the opinion that, while containing important assessments on issues like freedom of expression and the Kurdish question, some issues continue to be underrepresented, i.e. children's and women's rights.¹¹⁹⁶ On the whole, interviewees pointed to the relevance of the Progress Reports in terms of sparking debate, which was also indirectly confirmed by those mentioning criticism on the recent Reports on part of the society and/or government. This fits in with the Turkish Ministry of EU Affairs issuing quite a long press statement on the 2015 Report, in which it emphasizes that 'objective and reasonable criticisms will be noted carefully. ... However, those criticisms which we do not agree and found to be unfair will be brought to the attention of the Commission.'¹¹⁹⁷

Finally, it shall be noted that the Commission in the EU Enlargement Strategy of 2015 (valid until 2019) commits itself to

*focus its efforts on ensuring that countries prioritise reforms in the fields of rule of law, including judicial reforms and tackling organised crime and corruption, fundamental rights, including freedom of expression and fighting discrimination, notably against the LGBTI community and Roma, and the functioning of democratic institutions, including public administration reform.*¹¹⁹⁸

This outlook on future priorities for all enlargement countries alike gives an indication as to which areas will probably receive particular coverage in the Progress Reports to come. If the strengthened focus on consistency and traceability is upheld, the 19th Progress Report on Turkey of 2016 shall also display these priorities.

¹¹⁹³ Melih Özsoz and İlke Toygür, Hürriyet Daily News 'How to read the next generation progress reports', 1 December 2015, <http://www.hurriyetdailynews.com/Default.aspx?pageID=238&nID=91902&NewsCatID=396> accessed 25 February 2016.

¹¹⁹⁴ See Today's Zaman 'EU progress report criticized for not pressuring Turkish gov't enough on freedoms', 11 November 2015, http://www.todayszaman.com/anasayfa_eu-progress-report-criticized-for-not-pressuring-turkish-govt-enough-on-freedoms_404021.html accessed 25 February 2016.

¹¹⁹⁵ See e.g. Arisan Eralp October 2015 (n 883) 7, confirmed in interviews.

¹¹⁹⁶ The statement brought forward in this context that women's rights were outweighed by LGBT rights in terms of priority given could not be confirmed by the present research, as demonstrated above.

¹¹⁹⁷ Republic of Turkey, Ministry for EU Affairs 'Press Statement on the 2015 Report on Turkey' <http://www.ab.gov.tr/index.php?p=50080&l=2> accessed 25 February 2016. Adding that 'Turkey will make use of the report as a constructive element in making progress in Turkey's EU accession and reform processes', the Ministry seems to have reacted somewhat more matter-of-factly than in previous years.

¹¹⁹⁸ EC, 'Communication, EU Enlargement Strategy 2015' (n 285) 13.

The monitoring and reporting tasks the Commission has under the visa liberalisation process should not go unmentioned here, all the more since they are very likely to interlink with the EC's regular reporting. While there are some differences with regard to, of course, objectives and focus areas, some of the priorities spelled out above also figure in the visa liberalisation dialogue (notably freedom of expression, Roma discrimination), as will be illustrated in detail in section 6. Also, we will argue there that some more streamlining between the different kinds of reports in terms of methodology would be as recommendable as consistency would be essential. Yet, before we shall turn to the instrument of visa liberalisation in detail and leave the enlargement 'realm' *sensu stricto*, the following chapter shall examine another important enlargement tool: pre-accession assistance.

5. Financial and technical assistance

After Turkey had obtained candidate status in 1999, it was in December 2001 that the Council adopted the first pre-accession funding instrument for the country, as has been outlined in section B.2.¹¹⁹⁹ It has been mentioned earlier that the interplay of candidate status, the 2001 Accession Partnership complemented by the National Programme for the Adoption of the Acquis and the specific Regulation on pre-accession financial assistance (all the more as increased at the Copenhagen Council meeting in 2002) was very important for human rights conditionality to unfold its effect in the years to follow (see section 1.a). We will not look into this earlier financing instrument in detail, but turn to the more recent years instead.

The specific funding instrument for Turkey was replaced in 2007 by the Instrument for Pre-Accession Assistance (IPA) as a uniform funding tool for all enlargement countries.¹²⁰⁰ Currently, the programming of pre-accession financial assistance for Turkey is based on the IPA II Regulation¹²⁰¹ covering the financing period 2014-2020, while implementation of IPA funds from the previous years is still on-going. General background information on how IPA and IPA II are structured and work can be found in Deliverable 6.1.¹²⁰² Here we shall depict which human rights priorities were set in the last IPA three-year Multi-annual Indicative Planning Document (MIPD) for Turkey and in the current IPA II Indicative Strategy Paper for Turkey 2014-2020 as well as the annual programmes under these planning documents.

The MIPD 2011-2013 gives an overview of the financial allocations per sector for both periods of 2007-2010 and 2011-2013. It shows in total an allocation of € 813 million for the sector justice, home affairs and fundamental rights, with € 439.77 million for 2001-2013 (which amounts to 17% of the whole IPA

¹¹⁹⁹ Council Regulation (EC) No 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey (n 760). As mentioned in section IV.B.1, one year before a Special Action for Turkey under its European strategy had been created, yet with the pre-accession regime the yearly financial aid to Turkey doubled (see European Commission Progress Report 2000 (n 1167) 8).

¹²⁰⁰ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), <http://eacea.ec.europa.eu/tempus/documents/tempus_ipa.pdf> accessed 18 December 2015.

¹²⁰¹ Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II) <http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2014/231-2014_ipa-2-reg.pdf> accessed 18 December 2015.

¹²⁰² See Deliverable 6.1 (n 712) 149f.

funding for Turkey in that period).¹²⁰³ Among the five objectives indicated for the sector one reads: 'to achieve measurable progress towards the full enjoyment of all fundamental rights and freedoms by all individuals without discrimination'.¹²⁰⁴ The following, wide-ranging indicators have been put forward with regard to assess progress towards this objective:

- *Freedom of expression, including freedom of the press, freedom of assembly and demonstration, freedom of religion and cultural rights protected and strengthened through targeted training completed on human rights and investigation techniques for judges, public prosecutors, law enforcement officers and civil administrators, including effective investigation of allegations of torture in line with the framework of the Istanbul Protocol. Upgraded detention centres in conformity with international standards, effective follow up mechanism for European Convention for Human Rights (ECHR) preventing repeated violations of the Convention and for the European Court of Human Rights (ECtHR), definition and implementation of ethic principles for law enforcement officers and effective reporting, registration and follow up of human rights violations.*
- *Improved integration, respect for and protection of minorities and disadvantaged groups, including internally displaced persons, Roma; children's rights and women's rights are protected and promoted effectively, reduction of violence against women and children; gender equality and anti-discrimination policies are implemented and promoted; support mechanisms in place for persons with disabilities, mental illnesses and elderly persons and enjoyment of full trade union rights by workers and public servants.*¹²⁰⁵

Looking into the annual IPA programmes for IPA component I (Transition Assistance and Institution Building (TAIB) as the most relevant one for human rights promotion) renders more information on sector funds being used for fundamental rights actions specifically, in terms of both amounts allocated and priorities broken down more concretely. When we examine the three annual programmes under the MIPD 2011-2013, the IPA-TAIB national programme 2011 (part I and II), to start with, foresees under the above mentioned sector objective on fundamental rights one project on economic and social integration of Internally Displaced Persons (€ 3.4 million).¹²⁰⁶ Other projects deal with the protection of victims of trafficking in human beings (€ 1.7 million)¹²⁰⁷ and the establishment of the Ombudsman Institution (€ 2 million),¹²⁰⁸ but are not categorized under the fundamental rights

¹²⁰³ European Commission (2011) *Commission Implementing Decision of 28.6.2011 adopting a Multi-annual Indicative Planning Document (MIPD) 2011-2013 for Turkey*, Brussels, 28.6.2011, C(2011) 4490 final, 14, <http://ec.europa.eu/enlargement/pdf/mipd_turkey_2011_2013_en.pdf> accessed 26 February 2015. The largest share (23%) is dedicated to agriculture and rural development (ibid.).

¹²⁰⁴ ibid 16f.

¹²⁰⁵ ibid 18.

¹²⁰⁶ European Commission (2011) *Commission Implementing Decision of 25.7.2011 adopting a national programme part 1 for Turkey under the IPA-Transition Assistance and Institution Building component for the year 2011*, Brussels, 25.7.2011, C(2011) 5404 final, Annex, 5, <http://ec.europa.eu/enlargement/pdf/turkey/ipa/2011/national_programme_turkey2011_en.pdf> accessed 26 February 2016.

¹²⁰⁷ ibid.

¹²⁰⁸ European Commission (2011) *Commission Implementing Decision of 11.11.2011 on adopting a national programme part 2 for Turkey under the IPA-Transition Assistance and Institution Building component for the year 2011*, Brussels, 11.11.2011, C(2011) 8130 final, Annex, 8, <http://ec.europa.eu/enlargement/pdf/turkey/ipa/2011/part2/financial_proposal_turkey_2011_part2_en.pdf> accessed 26 February 2016.

objective. The national programme 2012 does not contain any action falling under the fundamental rights objective or being otherwise directly human rights related.¹²⁰⁹ In programming the 2013 IPA-TAIB funds, the EC changed the format and logic to some extent, introducing a sub-sector ‘Judiciary and Fundamental Rights (incl. reform of law enforcement institutions)’ and under fundamental rights foreseeing two measures: ‘Supporting the Individual Application to the Constitutional Court in Turkey’ (€ 4 million) and ‘Enhancement of Participatory Democracy in Turkey: Monitoring Gender Equality’ (€1.628 million).¹²¹⁰ These projects programmed between 2011 and 2013 are envisaged by the EC to be carried out through different implementation tools: service contract (1), grant scheme (1), Twinning grant contract (1), direct grant contracts (3), with clear preference for the latter.

The thematic evaluation of IPA projects in Turkey in the field of judiciary and fundamental rights commissioned by the EC in 2011 suggests a higher number of relevant projects being programmed in the earlier years: relating the EU project portfolio in the period 2004-2011 to Accession Partnerships’ priorities, the authors find over 111 projects linked to these, with 70 projects directly addressing human rights issues.¹²¹¹ Another evaluation published in 2011 looks into the assistance provided to Turkey through the Twinning instrument¹²¹² alone between 2002 (when the instrument was first applied in Turkey) and 2009. It presents an overview of 91 initiated projects, of which 30 fall into the justice and home affairs sector (including fundamental rights).¹²¹³ Yet, this evaluation does not show how many of these were actually human rights related. The authors, however, conclude at some other point that the utilisation of the Twinning instrument significantly depends on political will and that in some areas, including human rights, there is lesser political will to undertake Twinning projects.¹²¹⁴ Limited political will to make use of EU funds / technical assistance may also indeed be the reason why there appear to be fewer human rights relevant projects programmed or launched targeting the Turkish public sector over the last years. This impression has been confirmed in the interviews conducted for this research.

The IPA II Indicative Strategy Paper for Turkey 2014-2020 points to a total of € 191 million in IPA 2007-2013 assistance for judiciary and fundamental rights, stating however that ‘despite Turkey’s efforts and support from the international community, the objectives and activities relating to judiciary and

¹²⁰⁹ See European Commission (2012) *Commission Implementing Decision of 21.6.2012 on adopting a national programme for Turkey under the IPA-Transition Assistance and Institution Building component for the year 2012*, Brussels, 21.6.2012, C(2012) 4279 final, Annex, <http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2012/turkey/20140303-annex-financing-proposals-turkey-2012.pdf> accessed 26 February 2016.

¹²¹⁰ European Commission (2013) *Commission Implementing Decision of 13.11.2013 adopting a National programme for Turkey under the IPA -Transition Assistance and Institution Building Component for the year 2013*, Brussels, 13.11.2013, C(2013) 7710 final, Annex, 7f, <http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2014/20141201-annex-for-the-commission-implementing-decision-turkey.pdf> accessed 26 February 2016.

¹²¹¹ See Robert P, Hansen A, et al. 2011 (n 927) 29.

¹²¹² For more general information on Twinning as the key instrument for acquis adoption and institution-building see Deliverable 6.1 (n 712) 151f.

¹²¹³ See Ecorys, *Review of Twinning in Turkey - Annexes to the final report*, 23 May 2011, 10, <http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2013/annexes_to_final_report_review_of_twinning_turkey.pdf> accessed 21 December 2015.

¹²¹⁴ See Ecorys, *Review of Twinning in Turkey - Final Report*, 23 May 2011, 21, <http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2013/final_report_review_of_twinning_turkey_23_05_2011.pdf> accessed 21 December 2015.

fundamental rights have not yet been sufficiently translated into improvements in practice.¹²¹⁵ For the current financing period, funds for the sector,¹²¹⁶ as ‘key strategic priorities for pre-accession assistance to Turkey’¹²¹⁷ will be substantially increased, with the indicative allocation foreseen for the whole period amounting to € 624.9 million.¹²¹⁸ Assessing risks, the Strategy Paper continues: ‘The rule of law, protection of human rights and good governance must remain high on the political agenda. Effective capacity to undertake reforms and make use of financial assistance will have to be confirmed.’¹²¹⁹ While IPA support for the judiciary will also aim at raising awareness on human rights among the judiciary,¹²²⁰ the actions foreseen under fundamental rights are quite comprehensive:

- *Strengthening the institutional capacity on fundamental rights in the Ombudsman institution, the National Human Rights institution and the Ministry of Justice; helping to set up an equality and anti-discrimination body and ensuring civil society involvement and consultation in that process*
- *Bringing the Turkish legal framework into line with European standards in all areas, notably freedom of expression and freedom of assembly; ensuring that courts and authorities fully implement legislation and rules so that rights are respected in full and in practice, with proper accountability and verification systems*
- *Developing the capacity to conduct independent, impartial and effective investigations into allegations of misconduct by security forces*
- *In the area of women's rights and gender equality, focusing on political representation and combatting violence against women in practice, including early and forced marriages; upgrading the legal framework in order to address violence and discrimination based on sexual orientation and gender identity*
- *Strengthening the cooperation between institutions and stakeholders engaged in the area of human rights*¹²²¹

The Strategy Paper also makes reference to the Turkish Action Plan on the Prevention of ECHR violations and the Action Plans on Gender Equality and on Combating Domestic Violence against Women in that the priorities set out in these plans will be taken into account in the programming of IPA II assistance.¹²²²

¹²¹⁵ European Commission (2014) *Instrument for Pre-accession Assistance (IPA II) Indicative Strategy Paper for Turkey (2014-2020)*, adopted 26/08/2014, 20, <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140919-csp-turkey.pdf> accessed 27 February 2016.

¹²¹⁶ In fact, it is now a sub-sector of the sector ‘Rule of Law and Fundamental Rights’, which also comprises the sub-sector ‘Home Affairs’ (see also European Commission, European Neighbourhood Policy and Enlargement Negotiations ‘Turkey - financial assistance under IPA II’ <http://ec.europa.eu/enlargement/instruments/funding-by-country/turkey/index_en.htm> accessed 27 February 2016).

¹²¹⁷ European Commission IPA II Indicative Strategy Paper for Turkey (n 1215) 23.

¹²¹⁸ *ibid* 46.

¹²¹⁹ *ibid* 23.

¹²²⁰ *ibid* 21. The Strategy Paper states in this context: ‘As the judiciary and fundamental rights are complementary areas, IPA II assistance will be programmed in a holistic and strategic way’ (*ibid.*).

¹²²¹ *ibid* 22. Overall, these are the expected results: ‘fundamental rights and freedoms guaranteed, with relevant institutions functioning properly; protection of rights of persons belonging to minorities improved, and anti-discrimination policies and measures effectively implemented.’ (*ibid.*).

¹²²² See *ibid*.

The concrete programming under IPA II happens through Annual Action Programmes, in which certain Actions under the different sectors are foreseen. These Actions in turn comprise Sub-Actions and under these a number of Measures (which often correspond to one or more projects then). We shall look into the Country Action Programmes 2014 and 2015 to illustrate this programming structure and to give examples of envisaged human rights activities.

Under the 2014 Turkey Action Programme, Action 7 'Fundamental Rights' is funded with € 13.625 million.¹²²³ This Action is further elaborated in a specific action document, which foresees 2014 funding for Sub-Action 1 'Strengthening the Institutional Capacity in the Field of Fundamental Rights'.¹²²⁴ This again splits up into the following five measures:

- *Measure 1-Empowerment of the Role of Parliament in the Protection and Promotion of Human Rights by Strengthening the Administrative Capacity of Parliament*
- *Measure 2-Enhancing the Capacities of both Chief Civil Administrators about Crowd Control and the Civil Inspectors about Effective Investigation*
- *Measure 3- Strengthening the Capacity of Bar Associations and Lawyers on European Human Rights Standards*
- *Measure 4-Strengthening the Civilian Oversight of Internal Security Forces in Coordination with the Ministry of Interior General Directorate of Provincial Administration*
- *Measure 5-Strengthening the Institutional Capacity of National Human Rights Institution of Turkey on the results stipulated in the Indicative Strategy Paper*¹²²⁵

These measures will be implemented through two Twinning projects (1, 2), two direct grants to the Council of Europe respectively UNDP (3, 4) and a technical assistance service contract (5).¹²²⁶

The other two Sub-Actions, for which no measures have been programmed in 2014, are: Sub-Action 2-Strengthening the Cooperation between Institutions and Stakeholders in the Field of Fundamental Rights and Sub-Action 3-Protection of Socially Vulnerable Persons.¹²²⁷

The 2015 Annual Action Programme allocates almost € 19 million to (in this case) Action 4 'Fundamental Rights'.¹²²⁸ The corresponding specific action document foresees these funds to be used for Sub-Actions 1 and 3 with the following Activities:

¹²²³ See European Commission (2014) *Commission Implementing Decision of 17.12.2014 adopting a Country Action Programme for Turkey for the year 2014*, Brussels, 17.12.2014, C(2014) 9849 final, Annex, 14, <<http://ec.europa.eu/enlargement/pdf/turkey/ipa2014-031-874-turkey-action-programme.pdf>> accessed 27 February 2016.

¹²²⁴ See European Commission (2014) *Instrument for Pre-accession Assistance (IPA II) 2014-2020 Turkey Support to Fundamental Rights*, 6, <<http://ec.europa.eu/enlargement/pdf/turkey/ipa/2014/ipa2014-031-874.7-tr-fundamental-rights.pdf>> accessed 27 February 2016.

¹²²⁵ *ibid.* Note that these measures are directly based on expected results formulated in the 2014 Action Programme.

¹²²⁶ See *ibid.*, 17ff.

¹²²⁷ *ibid.* 4.

¹²²⁸ European Commission (2015) *Commission Implementing Decision of 7.12.2015 adopting an Annual Action Programme for Turkey for the year 2015*, Brussels, 7.12.2015, C(2015) 8773 final Annex, 11, <<http://ec.europa.eu/enlargement/pdf/turkey/ipa/2015/ipa2015-038-404-turkey-action-programme.pdf>> accessed 27 February 2016.

SUB ACTION 1 (Strengthening the Institutional Capacity in the Sector of Fundamental Rights)

- *Activity 1.6 Empowerment of the Role of Ombudsman in Protection and Promotion of Human Rights (Technical Assistance and Twinning Light)*
- *Activity 1.8 Strengthening the institutional capacity of Turkish National Police regarding Public Order Management, Crowd Control (Twinning and Supply)*
- *Activity 1.9 Independent Police Complaints Commission & Complaints System for the Turkish National Police, Gendarmerie and Coast Guard (Twinning)*

SUB-ACTION 3 (Protection of Socially Vulnerable Persons)

- *Activity 3.2 Increasing the Organizational Capacity of the Women and Children Sections (WCS) of the Gendarmerie General Command (Supply and Twinning)*
- *Activity 3.3 'Generation Democracy' Strengthening A Culture of Democracy in Basic Education Institutions (Direct Grant to Council of Europe)¹²²⁹*

The Action Documents on fundamental rights under both Annual Programmes make references to the Accession Partnership 2008, National Programme for the Adoption of the Acquis 2008, the Enlargement Strategies (2013 respectively 2014) and the Progress Reports (again 2013 respectively 2014).¹²³⁰ They also contain links to the relevant Turkish national strategies, with in particular the 2015 Action Document elaborating on how the planned Activities meet with objectives of the Action Plan on the Prevention of ECHR violations, the Action Plans on Gender Equality (2008-2013) and on Combating Domestic Violence against Women (2012-2015), the Action Plan on the Rights of the Child (2013-2017) as well as the National Action Plan for EU Accession Phase II.¹²³¹

It can be concluded that programming of pre-accession assistance for Turkey under IPA II appears to follow a more integrated and consistent approach, in that the content of previous Progress Reports is reflected in the annual programming. Looking at the latest Annual Action Programme 2015 as an example, the Activities which are to receive EU funding indeed correspond to the previous Progress Report by tackling the matter of wanting implementation of existing legislation through state institutions, the prevention of use of force as well as the issue of domestic violence (against women and children). At the same time, the concerns on freedom of expression and the need to increase human rights awareness within the judiciary (expressed in both the Indicative Strategy Paper and the ensuing Progress Reports) have so far not been directly addressed through IPA II financial assistance instruments. It remains to be seen whether next year's programming may react to the 2015 Progress Report in that it e.g. in some way takes up the further backsliding occurring in the context of the internal security package in the past year.

Some concrete examples of technical assistance provided through IPA funds in form of the Twinning instrument as well as TAIEX will be highlighted in the mini case study on gender equality in section

¹²²⁹ See European Commission (2015) *Instrument for Pre-accession Assistance (IPA II) 2014-2020 Turkey Fundamental Rights Action Document 2015*, 11ff, <http://ec.europa.eu/enlargement/pdf/turkey/ipa/2015/ipa2015-038-404.4-fundamental_rights.pdf> accessed 27 February 2016. The terminology has been streamlined with programming under the European Neighbourhood Instrument, so that the term Measure has been replaced by Activity in 2015.

¹²³⁰ It shall be noted that, due to the programming cycle work flow, the annual programming documents – even though regularly adopted at the end of the calendar year after publication of the enlargement package in autumn – can be based only on the package of the year before. This means that e.g. the 2015 Annual Action Programme can be regarded as operationalising the 2014 Enlargement Strategy, based on the findings in the Progress Report 2014.

¹²³¹ See European Commission *IPA II Turkey Fundamental Rights Action Document 2015 (n 1229) 6*.

D.1. TAIEX funds have in the past years also been deployed to a significant extent for peer assessment missions in the fields of human rights, be it in the context of the Positive Agenda (see section 3) or the visa liberalisation dialogue (see section 6). This might be regarded as going hand in hand with the perceived decrease in other forms of pertinent EC financed technical assistance.

What shall still be added at this point is that IPA has throughout the years also entailed substantial funding for civil society promotion, which, in combination with the European Instrument for Democracy and Human Rights (EIDHR), has been of considerable significance for the EU's human rights impact in Turkey, too. Through promoting both civil society dialogue and civil society development the EU was able to establish partnerships with civil society actors in Turkey and thereby exert influence – a strategy identified as linkage¹²³² or targeted measures¹²³³ in academia. The factors for success or failure of such a strategy have been discussed at some length in enlargement literature. Kubicek¹²³⁴ traces the EU's linkage approach in Turkey through the periods since 2000, setting it into parallel to the application of political conditionality. He concludes that linkage has followed the same course of being successful until 2005, yet losing in effectiveness as an instrument for human rights promotion after that. He elaborates that, while since 2005 the EU has in fact increased its efforts in terms of human rights promotion through different programmes and funding schemes (which seems logical in times when EU-Turkey relations at the political level became more difficult), 'the impact of these activities is hard to discern'.¹²³⁵ In view of the growing polarisation in the country and the fact that many of the groups the EU has been supporting (in the area of women's and minority rights notably) are not in dialogue with the government, civil society appears rather fragmented and not very influential on government policies. In addition, the loss of credibility on part of the EU has also affected civil society, resulting in disappointment and the former 'alliance' for political change being weakened.¹²³⁶ Having said this, it shall be underlined that the EU continues to apply a wide range of tools for civil society promotion in Turkey, with clear references also to fundamental rights promotion. The IPA II Indicative Strategy Paper dedicates a sub-sector in the sector on democracy and governance to civil society in order to 'promote a culture of fundamental rights and dialogue'¹²³⁷ and both the 2014 and 2015 Annual Action Programmes contain specific Actions on civil society.¹²³⁸ Another instrument worth noting in this respect is the EU Local Strategy to Support and Defend Human Rights Defenders in Turkey elaborated by the EU Delegation in Ankara in 2010 and updated again in 2015. It aims at enabling exchange with Turkish Human Rights Defenders and NGOs and providing support to them, and as such links with both pre-accession assistance as well as EIDHR.¹²³⁹

¹²³² See Kubicek 2011 (n 932) 913.

¹²³³ See Deliverable 6.1 (n 712) 84-85.

¹²³⁴ See Kubicek 2011 (n 932) 910ff.

¹²³⁵ Kubicek 2011 (n 932) 921.

¹²³⁶ See also Börzel and Soyaltin 2012 (n 909) 15.

¹²³⁷ See European Commission IPA II Indicative Strategy Paper for Turkey (n 1215) 18.

¹²³⁸ See European Commission Country Action Programme for Turkey 2014 (n 1223) Annex, 10f, and European Commission Annual Action Programme for Turkey 2015 (n 1228) Annex, 5f.

¹²³⁹ See Delegation of the European Union to Turkey, *European Union Local Strategy to Support and Defend Human Rights Defenders in Turkey*, 4 http://avrupa.info.tr/fileadmin/Content/EU/160128_Final_EU_local_strategy_on_HRD-EN.pdf accessed 27 February 2016. For more information see also Delegation of the European Union to Turkey, 'EU and Human Rights', <http://avrupa.info.tr/eu-and-human-rights.html> accessed 27 February 2016.

Finally, it shall be highlighted that there is also a linkage between IPA funds and the visa liberalisation dialogue (VLD). The Commission in its first VLD report in October 2014 committed itself ‘to making use of all available EU financial and technical resources, notably inter alia those available under the Instrument for Pre-accession Assistance, to support Turkey on this endeavour’ (i.e. carrying out reforms to meet the VLD benchmarks).¹²⁴⁰ In the EU-Turkey Joint Action Plan 2015 an increase of funds for this purpose is pledged.¹²⁴¹ It could not be established in the frame of this study how IPA funds have been or will be allocated along the different VLD thematic blocks and benchmarks. Yet, it remains doubtful at least whether additional funds would be invested into the fundamental rights block, as the Joint Action Plan in this context states that financial assistance shall be increased ‘notably by enhancing the capacities and developing a well-functioning asylum, migration, visa and integrated border management system’.¹²⁴² With these areas obviously being very high on the EU’s agenda in its current relations with Turkey, this leads us to examining the workings of the visa liberalisation dialogue in the following section.

6. Visa liberalisation process

The process of visa liberalisation as a tool to induce reforms in a partner country constitutes a general EU external policy instrument. Since it is not exclusively applied to enlargement countries and, in its application in the enlargement context, is not directed to the objective of EU membership, but establishing a visa-free regime between the EU and the country in question, it cannot be counted among the specific instruments of enlargement policy.¹²⁴³ However, visa liberalisation dialogues with enlargement countries regularly contain human rights components and do interlink at certain points with their accession processes, as has been illustrated in the case studies on Bosnia and Herzegovina and Serbia earlier and shall be examined for Turkey here. Visa liberalisation constitutes a major issue in EU-Turkey relations at the present moment and, as long as negotiations on the rule of law chapters are not opened, may be regarded as the main route for the EU to induce political reforms in the country. Therefore, it will be examined here in some detail as to its human rights components – all the more as it has become increasingly entangled with the current refugee situation, which poses crucial human rights questions to both Turkey and the EU.

As outlined above in section B.3, the visa liberalisation dialogue (VLD) between Turkey and the EU started on 16 December 2013 when the visa liberalisation roadmap prepared by the European Commission was formally handed over to the Turkish government (with Turkey in parallel signing the readmission agreement with the Union in the same ceremony).¹²⁴⁴ It has to be emphasized, however, that at this first session of the dialogue the Turkish representatives brought forth comments and presented an annotated roadmap, upon which, as the minutes read, ‘the two sides agreed that the

¹²⁴⁰ European Commission (2014) *Report from the Commission to the European Parliament and the Council on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap*, Brussels, 20 October 2014, COM(2014) 646 final, 40, <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/turkey_first_progress_report_en.pdf> accessed 19 February 2016.

¹²⁴¹ See EU-Turkey Joint Action Plan 2015 (n 864) 2.

¹²⁴² *ibid.*

¹²⁴³ See also Deliverable 6.1 (n 712) 120.

¹²⁴⁴ See European Commission (2013), *Press Release - Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey*, Brussels, 16 December 2013, Press Release IP/13/1259, <http://europa.eu/rapid/press-release_IP-13-1259_en.htm> accessed 21 December 2015.

Visa Liberalization Dialogue would be conducted on the basis of the annotated Roadmap¹²⁴⁵ which was annexed to the minutes. We shall refer to these comments in the annotated roadmap on a case-by-case basis, if relevant for the present analysis. The roadmap as such consists of – next to specific requirements regarding the readmission of illegal migrants – four blocks of requirements Turkey has to fulfil in order to obtain visa-free travel of its citizens to the EU: 1) documents security; 2) migration and border management; 3) public order and security; 4) fundamental rights.¹²⁴⁶ While obviously the fourth block is of particular significance, there are also human rights relevant requirements in blocks 2 and 3.

Before looking into all of these requirements in more detail, it is worth noting that the roadmap foresees that the Commission shall provide status reports to the Council and the European Parliament on a bi-annual basis, drawing on a wide range of information sources including Member State expert missions.¹²⁴⁷ The first report on Turkey's progress in fulfilling the roadmap's requirements was presented in October 2014. As announced at the Turkey-EU summit on 29 November 2015,¹²⁴⁸ the second report was published by the Commission at the beginning of March 2016. The reasons why the 6-month reporting interval has previously not been kept (and not even the timeline of one year for the second report envisaged in the first one)¹²⁴⁹ could not be established in the frame of this research.¹²⁵⁰ At the EU-Turkey summit of 29 November 2015 the following further process was set out:

Both sides agree that the EU-Turkey readmission agreement will become fully applicable from June 2016 in order for the Commission to be able to present its third progress report in autumn 2016 with a view to completing the visa liberalisation process i.e. the lifting of visa requirements for Turkish citizens in the Schengen zone by October 2016 once the requirements of the Roadmap are met.¹²⁵¹

The new agreement on migration management reached between the EU and Turkey at the summit on 18 March 2016 (see section B.4) foresees a further acceleration of the process, 'with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all

¹²⁴⁵ First meeting of the EU-Turkey visa liberalization dialogue – agreed minutes and annotated roadmap, 1, <<http://www.mfa.gov.tr/data/agreed%20minutes%20ve%20annotated%20roadmap.pdf>> accessed 22 February 2016.

¹²⁴⁶ See Roadmap toward a visa-free regime with Turkey (n 825).

¹²⁴⁷ *ibid* 3.

¹²⁴⁸ EU-Turkey statement 29/11/2015 (n 865) point 4.

¹²⁴⁹ It could be speculated that, supposing the report would be likely to give a mediocre assessment again, there have been political motives for delaying its publication in order not to jeopardize the crisis talks and agreements with Turkey and to give Turkey more time to take measures in line with the VLD roadmap. The Progress Report 2015 (of October) also already speaks of the VLD report being published in the first quarter 2016.

¹²⁵⁰ What has been found is that, similar to the preceding year, TAIEX expert missions to assess implementation of the roadmap requirements in the field of border management, international protection and fundamental freedoms have been carried out in spring 2015, with the latter focusing on anti-terror legislation and jurisprudence (see European Commission, TAIEX Events, http://ec.europa.eu/enlargement/taieux/dyn/taieux-events/library/detail_en.jsp?EventID=59161, http://ec.europa.eu/enlargement/taieux/dyn/taieux-events/library/detail_en.jsp?EventID=59595, http://ec.europa.eu/enlargement/taieux/dyn/taieux-events/library/detail_en.jsp?EventID=59613 all accessed 22 February 2016). The reports of these missions are not publicly available.

¹²⁵¹ EU-Turkey statement 29/11/2015 (n 865) point 4.

benchmarks have been met'.¹²⁵² Ahead of the summit, the EC underlined that this new target 'will require even further efforts from Turkish authorities in adoption and implementation of the legal and administrative measures needed to fulfil all the requirements' and that '[t]he applicable benchmarks will not be amended'.¹²⁵³

With visa liberalisation rated very highly by Turkey, the dialogue process has clearly become a major factor in EU-Turkey talks and rapprochement over the last months. The Turkish government committed itself to accelerating its efforts to comply with the roadmap requirements and to fully apply the readmission agreement by mid-2016; conversely, the EU came up with a conditional date for completion of the process, being first October 2016 and now already June 2016. As has been seen in Turkey's enlargement process (and that of other countries), date-setting can be an important tool in making incentives more powerful. While Turkey's performance in fulfilling the conditions of the roadmap previously received a rather mediocre assessment,¹²⁵⁴ the EC in its March 2016 report finds intensified efforts since the November 2015 summit.¹²⁵⁵ Of the 72 requirements, the EC considers 35 to be fulfilled.¹²⁵⁶ Whether it will be possible for Turkey to fulfill the remaining requirements within the newly envisaged, shorter timespan remains somewhat questionable – in its second VLD report, the EC even refers to (then still valid) October 2016 as 'ambitious'.¹²⁵⁷

As for the roadmap's human rights requirements, the following pages present an overview on their content versus their status of implementation as assessed by the Commission, complemented by information from NGO sources.

1. In block 2 – Migration management the first section on border management foresees that Turkey should '[e]nsure that border management is carried out in accordance with the international

¹²⁵² EU-Turkey statement 18/03/2016 (n 868) point 5. The statement announces that, if the EC assesses Turkey's compliance with the benchmarks by the end of April, it will make a proposal to lift the visa regime to the Council and EP (ibid.)

¹²⁵³ European Commission (2016) *Communication from the Commission to the European Parliament, the European Council and the Council – Next operational steps in EU-Turkey cooperation in the field of migration*, Brussels, 16.3.2016, COM(2016) 166 final, 6f, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/next_operational_steps_in_eu-turkey_cooperation_in_the_field_of_migration_en.pdf> accessed 14 April 2016.

¹²⁵⁴ See European Commission VLD report 2014 (n 1240).

¹²⁵⁵ See European Commission (2016) *Report from the Commission to the European Parliament and the Council - Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap*, Brussels, 4.3.2016, COM(2016) 140 final, 10, <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/turkey_second_progress_report_en.pdf> accessed 14 April 2016.

¹²⁵⁶ See European Commission 2016 (n 1253) 6. The European Stability Initiative translated the Commission's findings in 2014 and 2016 into a scorecard which highlights progress: while only a limited number of benchmarks had been considered as 'fulfilled' or 'almost fulfilled' in autumn 2014, more than half of the benchmarks are rated this way in March 2016 (see European Stability Initiative 'Visa Lib Scorecard - Turkey's progress on the visa liberalisation roadmap', October 2014, <http://www.esiweb.org/pdf/ESI%20-%20Turkey%20Visa%20Liberalisation%20Scorecard%20-%20Dec%202014.pdf> accessed 20 February 2016 and European Stability Initiative 'Turkey's Visa Liberalisation Scorecard', 18 March 2016, <<http://www.esiweb.org/pdf/ESI%20-%20Turkey%20Visa%20Liberalisation%20Scorecard%20-%20March%202016.pdf>> accessed 14 April 2016).

¹²⁵⁷ European Commission 2016 (n 1255) 10.

refugee law, in full respect of the principle of non-refoulement and effectively allowing the persons in need of international protection to have access to asylum procedures'.¹²⁵⁸

In the annotated roadmap the following comment has been added to this requirement by the Turkish side:

*The International Refugee Law is irrelevant in this context. Turkey already respects and ensures with its new Law on Foreigners and International Protection, compliance with the non-refoulement principle as well as access to asylum procedures for the persons in need of international protection.*¹²⁵⁹

The EC in its specific visa liberalisation report 2014 considers this benchmark to be fulfilled in that Turkey 'granted international protection to more than one million asylum seekers from Syria and many other countries' and '[n]o push-back cases were reported'.¹²⁶⁰ One year later, it states in its Progress Report 2015: 'Incidents where Turkey did not respect the principle of 'non-refoulement' were reported and criticised by civil society.'¹²⁶¹ There have since been further highly critical accounts on refugees being pushed back or unlawfully returned by Human Rights Watch¹²⁶² and Amnesty International.¹²⁶³ The latest Asylum Information Database Country Report Turkey also refers to these reported incidents and the lacking capacities of UNHCR and NGOs to carry out monitoring activities along the borders, so that in the present context 'it is difficult to analyse the current state of practices by Turkish border authorities'.¹²⁶⁴ The already complex situation is very likely to worsen with increasing refugee movements from the war-zone in the Middle-East on the one hand and EU pressure on Turkey to take measures along the EU-Turkey Joint Action Plan agreed in November 2015 (see section B.3 and below) to prevent refugees from moving further towards Greece on the other hand. The EC's second VLD report of March 2016 neither addresses the mentioned incidents, nor does it contain any reference to international refugee law or the principle of non-refoulement in assessing the block 2 requirements.¹²⁶⁵

Under this block the visa liberalisation roadmap contains a section on visa policy, stipulating i.a. that Turkish visa policy be aligned with the EU acquis, 'notably vis-à-vis the main countries representing important sources of illegal migration for the EU'.¹²⁶⁶ On the basis of this requirement (which Turkey

¹²⁵⁸ Roadmap toward a visa-free regime with Turkey (n 825) 8.

¹²⁵⁹ Annotated roadmap visa liberalization dialogue (n 1245) 8.

¹²⁶⁰ European Commission VLD report 2014 (n 1240) 11.

¹²⁶¹ EC Progress Report 2015 (n 797) 71.

¹²⁶² See Human Rights Watch 'Turkey: Syrians Pushed Back at the Border', 23 November 2015, <https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border> accessed 21 February 2016.

¹²⁶³ See Amnesty International *Europe's Gatekeeper – Unlawful detention and deportation of refugees from Turkey*, December 2015, 12 f, <https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf> accessed 21 February 2016.

¹²⁶⁴ Asylum Information Database (AIDA), *Country Report Turkey*, December 2015, http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf accessed 20 February 2016.

¹²⁶⁵ On the whole, the report presents the EC's findings in a very condensed form, without including detailed comments on the single benchmarks (unlike in the first VLD report, the benchmarks are not stated again). Under block 2, more focus is placed on border management and visa policy than on international protection (see European Commission VLD report 2016 (n 1255) 3ff.)

¹²⁶⁶ Roadmap toward a visa-free regime with Turkey (n 825) 9.

again committed itself to in the Joint Action Plan¹²⁶⁷), Turkey has partly abolished visa-free entry for Syrians at the beginning of 2016.¹²⁶⁸ Alignment of visa policy may have human rights relevant implications, in that it might exacerbate the situation of people in need of protection, especially in the current crisis situation. EU policy in this regard shall therefore be set into context and looked upon with an attentive eye.

2. The same block under the section on international protection contains a number of requirements in the field of asylum law, which can be summarized as follows: '[a]dopt and effectively implement legislation and implementing provisions, in compliance with the EU acquis and with the standards set by the Geneva Convention of 1951 on refugees and its 1967 Protocol, thus excluding any geographical limitation'; '[e]stablish a specialised body responsible for the refugee status determination procedures'; ensure 'a decent reception and protection of the rights and dignity of asylum seekers and refugees'; give refugees 'the possibility to self-sustain, to access to public services, enjoy social rights'.¹²⁶⁹

These requirements are highly important, all the more with the EU presently aiming at joint action with Turkey in trying to solve the Syrian refugee situation, and shall therefore be treated here with particular attention.

What is crucial is that Turkey has so far not applied the 1967 Protocol to the Geneva Convention (which widened the geographical scope of the Convention originally limited to European countries) and thus still only grants refugee status (in the sense of the Convention) to those fleeing from Europe. In the annotated roadmap one can find the following comment: 'Turkey will consider to lift geographical limitation to the Geneva Convention upon her accession to the EU.'¹²⁷⁰ We have seen in section 4, that the Commission has in its Progress Reports consistently been pointing to this reservation, the lifting of which is also foreseen in the Accession Partnership 2008 as a medium-term priority.¹²⁷¹ The first VLD report of 2014 also referred to this geographical limitation 'which the Turkish authorities have decided, for the time being, to keep applying',¹²⁷² whereas the second VLD report does not touch upon it anymore.

The Turkish 2013 Law on Foreigners and International Protection (LFIP)¹²⁷³ introduced the possibility for protection also for people falling outside the geographical limitation by awarding the status of

¹²⁶⁷ See EU-Turkey Joint Action Plan 2015 (n 864). Yet, it has to be pointed out that the annotated roadmap contains this interpretative comment: 'The alignment of the Turkish Visa regime to that of the EU will be possible only upon Turkey's accession to the EU.' (Annotated roadmap visa liberalization dialogue (n 1245) 9).

¹²⁶⁸ See Hürriyet Daily News 'Turkey's new visa law for Syrians enters into force', 10 January 2016, <http://www.hurriyetdailynews.com/turkeys-new-visa-law-for-syrians-enters-into-force.aspx?pageID=238&nID=93642&NewsCatID=352> accessed 21 February 2016.

¹²⁶⁹ Roadmap toward a visa-free regime with Turkey (n 825) 10.

¹²⁷⁰ Annotated roadmap visa liberalization dialogue (n 1245) 10.

¹²⁷¹ Accession Partnership 2008 (n 1005) 17.

¹²⁷² European Commission VLD report 2014 (n 1240) 16.

¹²⁷³ The LFIP had been adopted before the visa liberalisation roadmap was handed over to Turkey, but it can nevertheless be considered a result of the process, given that technical talks about it had started before (see also chapter IV.C.3 on the Positive Agenda). Turkey also explicitly referred to the LFIP in the annotated roadmap, stating: 'The Law on Foreigners and International Protection ensures access to rights and cohesion/harmonization activities for applicants and beneficiaries of international protection.' (Annotated roadmap visa liberalization dialogue (n 1245) 10).

‘conditional refugee’, which the EC in its specific 2014 report finds to be ‘somewhat less beneficial ... but the differences are not huge.’¹²⁷⁴ It calls on the Turkish authorities to make sure that there should be no differences in practice with regard to ‘work permits, social assistance and opportunities to integrate’.¹²⁷⁵ The EC Progress Report of November 2015 does not give any indication of this new status having been applied. With regard to Syrian refugees it refers to a specific regulation on temporary protection of October 2014 (the concept as such was also introduced by the LFIP), which it describes, however, as precluding access to individual asylum procedures as well as not giving access to employment.¹²⁷⁶ While legislation on the latter was pending at the time of the Progress Report,¹²⁷⁷ January 2016 saw the adoption of a pertinent regulation, on the basis of which registered Syrian refugees who have been in Turkey for more than six months can apply for work permits.¹²⁷⁸ It has to be mentioned that such legislation was not only recommended in the EC 2014 visa liberalisation report (which subsumed under the above outlined benchmarks that all beneficiaries of international protection, including the beneficiaries of temporary protection and ‘conditional refugees’ can effectively and systematically exercise their rights relating to identity cards and access to the labour market),¹²⁷⁹ but was also related to the EU-Turkey Joint Action Plan agreed upon on 29 November 2015. While the Plan only speaks of ‘participation in economy’¹²⁸⁰ for Syrians under temporary protection, the issue of opening up the possibility for employment (and schooling) has become essential in ensuing EU-Turkey talks (especially between Germany and Turkey).¹²⁸¹ So, clearly in this regard the visa liberalisation conditions as well as the interaction with Turkey around the 2015 Joint Action Plan have jointly brought about this legislative improvement. If the former would have had the same effect without the latter cannot be judged, but, looking also at the persistence with which this issue was pursued primarily by the German Chancellor Merkel, it seems safe to say that the crisis has at least accelerated this measure.¹²⁸² The regulation’s practical implementation remains yet to be seen (the second VLD report does not explicitly refer to it) and should be reflected upon in the EC’s further assessments under the VLD.

¹²⁷⁴ European Commission VLD report 2014 (n 1240) 16. It continues: ‘Where the law leaves a margin of discretion as to its implementation, these differences have the potential to become almost symbolic.’ (ibid.) The regular EC Progress Report 2014 (n 823) had merely stated: ‘This gives a high level of protection to such refugees, though lower than for refugees originating in Europe.’ (64).

¹²⁷⁵ ibid 17.

¹²⁷⁶ See EC Progress Report 2015 (n 797) 71.

¹²⁷⁷ See ibid.

¹²⁷⁸ See UNHCR ‘High Commissioner welcomes Turkish work permits for Syrian refugees’, 18 January 2016, <http://www.unhcr.org/569ca19c6.html> accessed 20 February 2016.

¹²⁷⁹ European Commission VLD report 2014 (n 1240) 18.

¹²⁸⁰ EU-Turkey Joint Action Plan 2015 (n 864).

¹²⁸¹ See e.g. Süddeutsche Zeitung, ‘Merkel in der Türkei - Nato soll Schlepper bekämpfen’, 8 February 2016, <<http://www.sueddeutsche.de/politik/merkel-in-der-tuerkei-nato-soll-schlepper-bekaempfen-1.2853998>> accessed 20 February 2016.

¹²⁸² Also again, to be accurate, the benchmark itself did not pertain to Syrians in the first place (as it only referred to refugees which they were and still are not under Turkish laws), it was only the 2014 EC report recommendation that captured them (and all other beneficiaries of international protection). So, strictly speaking, there was no outright conditionality in this question, but only a recommendation, which gained in political significance. The Progress Report 2015 already uses a somewhat stricter tone, as it speaks of ‘legislative loopholes’ and states that ‘Turkey should still adopt legislation...’ (25).

Implementation of existing legislation is also still an issue as regards access to health insurance and education, as the Commission found in its 2015 Progress Report: ‘Despite commendable efforts by the authorities, around 500 000 refugee children have no access to education. Refugees living outside the camps still face difficult living conditions and considerable challenges in accessing essential services.’¹²⁸³ The demand for access to public services in the visa liberalisation roadmap has also been taken up again in the Joint Action Plan, explicitly naming school education and health services.¹²⁸⁴ The second VLD report calls in a general manner for ‘the effective access of beneficiaries of international protection to social services (notably schooling for their children), to legal employment opportunities, decent housing, vocational and linguistic training’.¹²⁸⁵ It is to be hoped that the ‘spirit of burden sharing’ alluded to in the Joint Action Plan¹²⁸⁶ will soon bring some improvements in these fields, too – which of course to a large extent also depends on the EU’s pledge to provide financial support under the Refugee Facility for Turkey being concretely followed up.

The interrelation of measures according to the Joint Action Plan with the visa liberalisation dialogue was explicitly established in the former: ‘The Plan builds on and is consistent with commitments taken by Turkey and the EU in other contexts notably the Visa Liberalisation Dialogue.’¹²⁸⁷ While this primarily concerns part II of the Joint Action Plan (Strengthening cooperation to prevent irregular migration), being measures to reduce the number of refugees coming to the Union (or to readmit them to Turkey), the measures under part I (Supporting the Syrians under temporary protection and their Turkish hosting communities) have, as outlined above, supported / concretized some of the visa liberalisation conditions in the area of the Turkish asylum system. Also, one could say, by Turkey subscribing to ‘enhance the effective implementation’¹²⁸⁸ of the LFIP, there is a general reference to meet all EU demands in this regard, notably ensuring the functioning of the General Directorate for Migration Management (GDMM), created by the LFIP as the required special body.¹²⁸⁹ Yet, of course this is rather generic and thus vague and also does not relate to any changes in terms of the codified geographical limitation.¹²⁹⁰

What is more, the roadmap requirement of ‘ensuring a decent reception and protection of the rights and dignity of asylum seekers and refugees’ has not been reiterated in the Joint Action Plan. As for reception facilities, both the first VLD report as well as the 2015 Progress Report, while acknowledging Turkey’s tremendous efforts in hosting around 2 million Syrian refugees, point to the fact that only around 10% of these live in refugee camps. The remainder ‘face difficult living conditions’, with ‘local capacity and resources under significant strain in many places’,¹²⁹¹ especially in the conflict-torn and

¹²⁸³ See EC Progress Report 2015 (n 797) 71.

¹²⁸⁴ EU-Turkey Joint Action Plan 2015 (n 864).

¹²⁸⁵ European Commission VLD report 2016 (n 1255) 7.

¹²⁸⁶ EU-Turkey Joint Action Plan 2015 (n 864).

¹²⁸⁷ *ibid.*. While ‘other context’ may also include commitments within the accession process, there is no explicit reference to it in the Plan.

¹²⁸⁸ EU-Turkey Joint Action Plan 2015 (n 864).

¹²⁸⁹ Currently, the GDMM is still in the process of becoming fully operational and establishing the new asylum system under the LFIP, hence UNHCR, previously carrying out refugee status determination procedures in Turkey and ensuing resettlements, continues to be a complementary protection actor in the country (see AIDA Country Report Turkey 2015 (n 1264)).

¹²⁹⁰ Quite to the opposite, there is a footnote in the Joint Action Plan to the point of Turkey ensuring completion of initiated asylum procedures that clarifies the maintenance of the geographical limitation.

¹²⁹¹ EC Progress Report 2015 (n 797) 71.

socio-economically weak south-east.¹²⁹² At the present moment it is difficult to see how Turkey could fulfil the roadmap requirement by providing accommodation for all beneficiaries of international protection and temporary protection,¹²⁹³ even though, again, the EU's Refugee Facility could crucially contribute to improvements. Looking at the roadmap requirement to protect the rights and dignity of asylum seekers and refugees, it has neither been given explicit mention in the Joint Action Plan, nor been referenced in ensuing pertinent EU statements.¹²⁹⁴ The second VLD report does not touch upon this benchmark, either, but only contains the summary recommendation cited above.

Aydın-Düzgüt (and other observers) have criticized the agreement on the Joint Action Plan as 'ethically problematic because it refers to the 'containment' of immigrants, treating them as if they are objects'.¹²⁹⁵ Absence of reference to human rights and the rights of refugees has been particularly criticised in light of measures being taken against refugees immediately after the EU-Turkey summit on 29 November.¹²⁹⁶ In December 2015, Amnesty International reported on cases of unlawful detention and deportation of refugees and asylum-seekers, which it observed since the negotiations on the Joint Action Plan started and saw in 'contrast with the generally favourable, humanitarian approach of the Turkish authorities'.¹²⁹⁷ Warning the EU about the 'danger of being complicit in serious human rights violations',¹²⁹⁸ it recommended i.a. that '[t]he EU and Turkey should establish effective independent monitoring mechanisms to review human rights compliance of the EU-Turkey Joint Action Plan and the use of EU funds for migration-related detention purposes'.¹²⁹⁹ Ensuring that human rights of asylum seekers in the present situation are respected appears key for the EU to

¹²⁹² *ibid* 25. According to the AIDA Country Report Turkey 2015 (n 1264), there is – next to the camps set up by the Turkish Government's Disaster and Relief Agency for the Syrian refugees in Southern Turkey – currently only one reception centre and the vast majority of all refugees lives outside of state shelters (75).

¹²⁹³ This was also recognized by the 2014 VLD report, which still recommended to 'set up an adequate number of reception centres ... providing accommodation at least for those in the most vulnerable groups' and to 'write policies and put in place institutional tools to prevent discrimination against those who receive international protection' (18).

¹²⁹⁴ In general, human rights as such did not figure in this recent EU documents: EU-Turkey Joint Action Plan 2015 (n 864); the EU-Turkey statement of 29 November 2015 (n 865); European Commission (2015) *Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey*, Strasbourg, 15.12.2015, C(2015) 9490, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf)

[documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf) accessed 21 February 2016; European Council (2015) *European Council meeting (17 and 18 December 2015) – Conclusions*, Brussels, 18 December 2015, EUCO 28/15, <http://www.consilium.europa.eu/en/press/press-releases/2015/12/18-euco-conclusions/> accessed 29 February 2016).

¹²⁹⁵ Today's Zaman 'Academic Aydın-Düzgüt: Turkey-EU agreement not ethical, a step backward in relations' (n 887).

¹²⁹⁶ See Aydıntaşbas 2015 (n 891); The Guardian 'Turkey arrests 1,300 asylum seekers after £2bn EU border control deal', 30 November 2015, <http://www.theguardian.com/world/2015/nov/30/turkey-arrests-1300-asylum-seekers-after-2bn-eu-border-control-deal> accessed 21 February 2016.

¹²⁹⁷ See Amnesty International (n 1263) 12 f.

¹²⁹⁸ Amnesty International 'Turkey: EU risks complicity in violations as refugees and asylum-seekers locked up and deported', 16 December 2015, <https://www.amnesty.org/en/latest/news/2015/12/turkey-eu-refugees-detention-deportation/> accessed 21 February 2016.

¹²⁹⁹ *ibid*.

maintain credibility as promoter of the fundamental values it keeps referring to – yet not only in Turkey, but of course also at and within Union borders.

3. The visa liberalisation roadmap's block on migration management comprises also a section on illegal migration which contains some human rights (relevant) requirements regarding illegal migrants: 'legislation ... aligned with the EU and the Council of Europe standards ... on the reception, return and rights'¹³⁰⁰ of illegal migrants; and with regard to their expulsion from Turkey, 'offering all the needed legal aid, as well as social and psychological assistance, and decent and fair detention conditions and removal procedures, to the returnees'.¹³⁰¹

Without entering into a discussion of the concept of 'fortress Europe' here, it shall be underlined that illegal migrants form a particularly vulnerable group everywhere, also within the EU.¹³⁰² Many of the points raised above hold for the benchmarks under this section, too: the LFIP is the new relevant legislative basis, the DGMM the new responsible authority, implementation of the law and administrative practice need to be further evaluated.¹³⁰³ The first EC VLD report from 2014 considered both requirements as partially fulfilled 'with good prospects for further progress',¹³⁰⁴ without, however, substantiating this much further. The 2015 Progress Report contains a section on legal and irregular migration under *acquis* chapter 24 (Justice, freedom and security), yet does not address rights of illegal migrants there. Nor does the second VLD report, despite containing a longer passage on irregular border migration and a number of recommendation how it should be reduced.¹³⁰⁵

As the 2015 AIDA (Asylum Information Database) Country Report Turkey emphasizes, in the current complex crisis situation and with Turkey building up its asylum system from scratch, it is not very clear where to draw the exact line between asylum-seekers, Syrians entitled to temporary protection and irregular migrants. Not only are there 'mixed flows' of people on the move to, within and through Turkey,¹³⁰⁶ but also can temporary protection beneficiaries fall under the notion of irregular migrants by trying to cross over to Greece on the one hand¹³⁰⁷ and have there been cases of asylum applications from people under deportation procedure for 'irregular presence or attempted irregular entry or exit' in so-called removal centres on the other hand.¹³⁰⁸ So, the boundaries are blurred and it is hence paramount to make sure that the right to asylum / protection is guaranteed. In any case, the situation in the removal centres needs to be given particular attention, too. Next to the Turkish National Human Rights Institution reporting human rights violations in the Istanbul Deportation Centre in 2014,¹³⁰⁹ the Amnesty International report from December 2015 gives an alarming account of conditions and

¹³⁰⁰ Roadmap toward a visa-free regime with Turkey (n 825) 11.

¹³⁰¹ *ibid* 12.

¹³⁰² See e.g. European Union Agency for Fundamental Rights (2011) *Fundamental rights of migrants in an irregular situation in the European Union*, http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf accessed 21 February 2016.

¹³⁰³ See European Commission VLD report 2014 (n 1240) 19 and 21, as well as EC Progress Report 2015 (n 797) 70.

¹³⁰⁴ *ibid*.

¹³⁰⁵ See European Commission VLD report 2016 (n 1255) 4ff. It in fact defines the requirement of reducing irregular border crossings (into or out of Turkey) as the most important one (see *ibid* 4).

¹³⁰⁶ AIDA Country Report Turkey 2015 (n 1264) 32.

¹³⁰⁷ *ibid* 10.

¹³⁰⁸ *ibid* 32.

¹³⁰⁹ See Human Rights Foundation of Turkey 2015 (n 1017) 8.

treatment in removal centres.¹³¹⁰ Expectations that the EC in the second VLD report would look into this benchmark more closely and provide substantial evidence for its assessment were not met. Consequently, it did also not address the information contained in the latest AIDA Country Report that five out of six new reception centres for asylum-seekers and refugees erected with EU funds in the framework of an EU project are to be converted into removal centres.¹³¹¹

4. Under block 3 on public order and security (section on preventing and fighting organised crime, terrorism and corruption) the visa liberalisation roadmap requires Turkey to '[s]ign and ratify the Council of Europe's Convention on Action against Human Trafficking as well as adopt and effectively implement legislation ... related to the prevention of the trafficking in human beings, the prosecution of traffickers, and the protection and assistance of their victims' and to ensure the 'decent reception and protection of the rights and dignity of victims of trafficking, and supporting their social and professional reintegration'.¹³¹²

According to the second VLD report, Turkey has ratified the CoE Convention on Action against Human Trafficking on 19 February 2016.¹³¹³ Yet, the EC's earlier criticism of an incomplete legislative framework (despite provisions in the LFIP as well as the Penal Code)¹³¹⁴ still holds and is reiterated.¹³¹⁵ Also with regard to trafficking in human beings the DGMM has been made the responsible authority and has set up a special department.¹³¹⁶ With regard to victims' protection and assistance, shelters are so far exclusively run by NGOs and the EC recommends that the Turkish authorities should open additional ones.¹³¹⁷ The Progress Report 2015 states that the detection rate of victims remains low and that 'the situation has seriously worsened as regards trafficking of women, forced prostitution and sexual exploitation, especially among refugees from Syria.'¹³¹⁸ The impact of visa liberalisation conditionality with regard to this benchmark has so far remained limited to the establishment of the new DGMM department and the ratification of the CoE Convention, with the latter clearly linked to the acceleration efforts since November 2015. In its 2015 Progress Report the EC finds that a 'comprehensive multi-disciplinary and victim-oriented approach to human trafficking remains to be developed'.¹³¹⁹

5. The same block 3 furthermore contains requirements on data protection: to '[s]ign, ratify and implement relevant international conventions, in particular the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 and its Additional Protocol n.181' and to '[a]dopt and implement legislation on the protection of personal data in line with the EU standards'.¹³²⁰

¹³¹⁰ See Amnesty International December 2015 (n 1263).

¹³¹¹ See AIDA Country Report Turkey 2015 (n 1264) 76.

¹³¹² Roadmap toward a visa-free regime with Turkey (n 825) 12.

¹³¹³ See European Commission VLD report 2016 (n 1255) 7.

¹³¹⁴ See European Commission VLD report 2014 (n 1240) 23 and EC Progress Report 2015 (n 797) 73.

¹³¹⁵ See European Commission VLD report 2016 (n 1255) 7.

¹³¹⁶ See European Commission VLD report 2014 (n 1240) 23 and EC Progress Report 2015 (n 797) 73.

¹³¹⁷ See European Commission VLD report 2014 (n 1240) 23.

¹³¹⁸ EC Progress Report 2015 (n 797) 66.

¹³¹⁹ *ibid* 21.

¹³²⁰ Roadmap toward a visa-free regime with Turkey (n 825) 15.

Recent progress induced by the intensified efforts in the wake of the EU-Turkey agreement also showed in Turkey ratifying the mentioned CoE Convention on 19 February 2016,¹³²¹ which it had signed already at the time of its adoption in 1981. With its Additional Protocol not yet ratified, however, and a law on personal data protection also still lacking, as stated in the second VLD report,¹³²² the two benchmarks remain only partly fulfilled. What is more, the EC found in November 2015: ‘In the absence of progress in this field, the existing legislation on the National Intelligence Service and the amended internet law, which grant wide powers to the National Intelligence Service and the Telecommunications Communication Presidency, continue to raise concerns.’¹³²³ Thus, in the area of data protection, the visa liberalisation dialogue’s human rights conditionality has so far not worked particularly well.

Turning now to the roadmap’s specific block 4 – fundamental rights,¹³²⁴ the first two sections concern the freedom of movement of Turkish citizens and the issuing of identity documents:

6. ‘Ensure that freedom of movement of citizens of Turkey is not subject to unjustified restrictions, including measures of a discriminatory nature, based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.’¹³²⁵ It shall be added that the annotated roadmap contains the following comment from the Turkish side: ‘The right of free movement of the Turkish citizens within their country is a constitutionally guaranteed right and is applied without any discrimination.’¹³²⁶
7. ‘Ensure full and effective access to travel and identity documents for all citizens’ and ‘to identity documents for the refugees and stateless persons residing in Turkey’ as well as ‘[p]rovide information about the conditions and circumstances for the acquisition of Turkish citizenship’, ‘for changing personal data’ and ‘on registration requirements to foreigners wishing to reside in Turkey’.¹³²⁷

The EC’s 2014 report on progress in the visa liberalisation process saw all of these requirements fulfilled (stating in the case of 6. that ‘there appear to be no major obstacles to this freedom in practice’¹³²⁸), with the exception of the issuance of identity documents for refugees, which it rated as ‘almost fulfilled’,¹³²⁹ meaning that ‘only some limited work needs to be done to entirely fulfil the requirement’.¹³³⁰ The second VLD report, on the whole, refers back to the 2014 report with regard to the fundamental rights block, stating that ‘[s]ince then, little has happened in these areas [identified

¹³²¹ See European Commission VLD report 2016 (n 1255) 7.

¹³²² See European Commission VLD report 2016 (n 1255) 8.

¹³²³ EC Progress Report 2015 (n 797) 63.

¹³²⁴ In the annotated roadmap Turkey has added this comment on block 4 as a whole: ‘Turkey has sufficiently fulfilled the political criteria and started the accession negotiations with the EU. Turkey considers therefore that this title is not directly related with the visa dialogue.’ (Annotated roadmap visa liberalization dialogue (n 1245) 15). Neither the reasoning, nor the effect of this comment could be further investigated in the frame of this study and hence remain unclear for now.

¹³²⁵ Roadmap toward a visa-free regime with Turkey (n 825) 16.

¹³²⁶ Annotated roadmap visa liberalization dialogue (n 1245) 15.

¹³²⁷ Roadmap toward a visa-free regime with Turkey (n 825) 16.

¹³²⁸ European Commission VLD report 2014 (n 1240) 31.

¹³²⁹ *ibid* 32.

¹³³⁰ *ibid* 2.

as the ones where further progress was needed]¹³³¹ and reiterates the recommendations formulated in the first report.

The regular 2015 Progress Report does not directly address the content of these benchmarks, yet, in the context of the breakdown of the peace-process with the PKK and the re-escalating violence in the east and southeast, mentions the 9-day curfew imposed on Cizre, a town north of the Syrian border, last September and the alleged severe human rights violations there, notably the reported killing of civilians.¹³³² Amnesty International has repeatedly called on the Turkish government to apply the principles of necessity and proportionality in its military and security measures to restore order in the southeast and to uphold freedom of movement under these aspects. In a statement on the Cizre September curfew the NGO found that ‘an indefinite, round-the-clock curfew is a disproportionate restriction’, as is ‘cutting electricity, water and communications to the entire population’.¹³³³ On 11 January 2016, it launched an urgent action with regard to an indefinite 24-hour curfew declared over Cizre, Silopi and parts of Diyarbakır in December, calling on the Turkish authorities

*to refrain from imposing arbitrary restrictions on freedom of movement and to ensure residents ... have sufficient time each day to leave their homes or are provided with other safe means to access to all necessary supplies, medical care, water and electricity, and are able to leave affected areas if they so wish.*¹³³⁴

The escalating situation in the southeast was also addressed by Commissioner Hahn in a speech he held at the European Parliament on 20 January 2016, in which he i.a. refers to the curfews and the need to ensure human rights compliance:

*The measures currently being taken by security services in the south-east, which includes the use of long-lasting curfews, have resulted in extreme disruptions to essential services such as healthcare, and means of communication. The proportionality and legality of such operations must be ensured and should comply with international human rights standards.*¹³³⁵

Clearly, major attention should be paid to these issues in assessing the freedom of movement benchmark in the ongoing EC VLD monitoring. It is not tackled in the second VLD report of March 2016, evidently because it has already been considered fulfilled in the earlier report, so that there is no earlier recommendation to be followed up on.

¹³³¹ European Commission VLD report 2016 (n 1255) 9.

¹³³² EC Progress Report 2015 (n 797) 25.

¹³³³ Amnesty International Public Statement ‘Turkey: Authorities must allow residents of Cizre access to basic needs during prolonged curfew’, 11 September 2015, <https://www.amnesty.ch/de/laender/europa-zentralasien/tuerkei/dok/2015/amnesty-besorgt-ueber-die-folgen-der-abriegelung-von-cizre/amnesty-briefing-turkey-cizre.pdf> accessed 22 February 2016.

¹³³⁴ Amnesty International ‘Urgent Action – Indefinite 24-hour curfew, over 200,000 in danger’, 11 January 2016, <https://www.amnesty.org/en/documents/EUR44/3178/2016/en/> accessed 22 February 2016. It also called for the restrictive use of firearms, ‘prompt, independent and impartial investigations into deaths and injuries that have occurred in curfew areas’ as well as ‘the right to freedom of peaceful assembly ... for citizens wishing to show their solidarity with those living under curfew’.

¹³³⁵ European Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn (2016) *Situation in the South East of Turkey – Remarks by Johannes Hahn on behalf of the HR/VP at the EP Plenary*, Strasbourg, 20 January 2016, SPEECH/16/120, <http://europa.eu/rapid/press-release_SPEECH-16-120_en.htm> accessed 22 February 2016.

As for the benchmark on issuance of documents to refugees and asylum-seekers, the AIDA Country Report Turkey of December 2015 finds a number of problems in actual implementation of the LFIP in this regard, especially as concerns asylum-seekers in detention.¹³³⁶ Again, it seems crucial that the EC will look into this requirement thoroughly in its monitoring, given that identity documents form the basis for access to rights and services,¹³³⁷ which – in the case of Syrian temporary protection beneficiaries – ties in again with the agreements in the EU-Turkey Joint Action Plan. The second VLD report does not mention this benchmark, either.

Finally, the third section of block 4, entitled ‘Citizens’ rights and respect for and protection of minorities’, is comprised of the following three requirements:

8. ‘Develop and implement policies addressing effectively the condition of the Roma social exclusion, marginalisation and discrimination in access to education and health services, as well as its difficulty to access to identity cards, housing, employment and participation in public life;’¹³³⁸
9. ‘Ratify the additional Protocols n.4 and 7 to the European Convention on Human Rights (ECHR);’
10. ‘Revise – in line with the ECHR and with the European Court of Human Rights (ECtHR) case law, the EU *acquis* and EU Member States practices – the legal framework as regards organised crime and terrorism, as well as its interpretation by the courts and by the security forces and the law enforcement agencies, so as to ensure the right to liberty and security, the right to a fair trial and freedom of expression, of assembly and association in practice.’¹³³⁹

The EC’s 2014 VLD report rendered an ‘only partially fulfilled’¹³⁴⁰ assessment for all of these benchmarks, meaning ‘much work still needs to be done to fulfil the requirements of the benchmark, no particular positive developments to address them were observed’.¹³⁴¹ In order to see if there has been any progress since, also with regard to the recommendations given to the Turkish government in the 2014 report, we will look at the requirements separately in the following paragraphs. As mentioned above, the second VLD report of March 2016 does not present concrete progress, but picks up most of the recommendations of the earlier report as ‘largely valid’.¹³⁴²

Ad 8.: A specific strategy and action plan, as recommended by the EC, have yet to be adopted. The 2015 Progress Report mentions ‘new attempts to lynch Roma’ and that ‘Roma groups continued to face discrimination in social and economic life and in accessing employment and quality education.’¹³⁴³ It finds improvements in access to health services, but sees Roma further on disadvantaged by urban

¹³³⁶ See AIDA Country Report Turkey 2015 (n 1264) 30f, 71 and 102 on the ‘International Protection Applicant Registration Document’, assigning a ‘Foreigners ID Number’ to the applicant.

¹³³⁷ See *ibid* 71.

¹³³⁸ Turkey commented on this requirement as follows: ‘Reference to Roma under the section ‘respect for and protection of minorities’ contradicts with the concept of ‘minorities’ in Turkey, which finds its definition in the Lausanne Peace Treaty.’ (Annotated roadmap visa liberalization dialogue (n 1245) 15). While Roma are not legally recognized as a minority in Turkey, it could be argued that this specific benchmark could also be subsumed under ‘citizen’s rights’ as the first part of the section’s title.

¹³³⁹ Roadmap toward a visa-free regime with Turkey (n 825) 17.

¹³⁴⁰ European Commission VLD report 2014 (n 1240) 32f.

¹³⁴¹ *ibid* 2.

¹³⁴² European Commission VLD report 2016 (n 1255) 9.

¹³⁴³ EC Progress Report 2015 (n 797) 69.

development projects, which links in with its earlier recommendation that housing measures should entail social inclusion programmes. Also, the EC repeated its recommendation to increase collection of data on Roma. With regard to the adoption of an anti-discrimination law, as also recommended in the 2014 VLD report,¹³⁴⁴ the EC recently again underlined the ‘urgent need to adopt a comprehensive framework law on combating discrimination in line with European standards’.¹³⁴⁵

Ad 9.: Protocol No. 4 (prohibiting civil imprisonment and expulsion of nationals as well as collective expulsion of foreigners and providing freedom of movement) and Protocol No. 7 (with procedural rights provisions as well as providing equality between spouses),¹³⁴⁶ which Turkey has signed in 1992 respectively 1985,¹³⁴⁷ have so far not been ratified. The annotated roadmap contains this comment:

*Turkey will consider ratifying Protocol n.4 upon accession to the EU. The procedure regarding the ratification of the Additional Protocol n.7 is under consideration. The recently adopted ‘Law on Foreigners and International protection’ addresses already the issues relevant for the visa dialogue contained in the two protocols.*¹³⁴⁸

The Progress Report 2015 again calls on Turkey to ratify the two Protocols (as well as Protocols 12 and 16)¹³⁴⁹ as does the second VLD report.¹³⁵⁰ It shall be noted in this context that the latest Accession Partnership of 2008 does not contain any explicit reference to these ECHR Protocols, only to compliance with the ECHR as such.

Ad 10.: This last requirement is obviously a crucial one, given its broad scope, the current human rights as well as security situation in Turkey and the potential for friction over compliance assessment. Interestingly, there is no specific comment on this requirement in the annotated roadmap. As elaborated under section 1.c), this benchmark appears to considerably have triggered the elaboration of the Action Plan on Prevention of Violations of the European Convention on Human Rights, adopted by the government in March 2014 (even though the Action Plan itself does not refer to the visa liberalisation process or EU relations).¹³⁵¹ Since implementation remains an issue, the EC raises this point both in the 2014 visa liberalisation report as well as the 2015 Progress Report, recommending improved monitoring.¹³⁵² The need for extending the scope of the Action Plan in terms of provisions

¹³⁴⁴ See European Commission VLD report 2014 (n 1240) 32. This goes in line with such legislation having repeatedly been called for by the EC in its Progress Reports and thus seems highly consistent.

¹³⁴⁵ EC Progress Report 2015 (n 797) 66.

¹³⁴⁶ See Council of Europe ‘Details of Treaty No.046 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’, <<http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/046>> and Council of Europe ‘Details of Treaty No.117 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms’, <<http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/117>> both accessed 22 February 2016.

¹³⁴⁷ See Council of Europe ‘Treaty list for a specific State – Turkey’, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR?p_auth=3JO8pIFR> accessed 11 February 2016.

¹³⁴⁸ Annotated roadmap visa liberalization dialogue (n 1245) 15.

¹³⁴⁹ EC Progress Report 2015 (n 797) 61.

¹³⁵⁰ See European Commission VLD report 2016 (n 1255) 9.

¹³⁵¹ See Action Plan on Prevention of ECHR Violations (n 1023).

¹³⁵² See European Commission VLD report 2014 (n 1240) 33, and EC Progress Report 2015 (n 797) 22. The lack of transparent monitoring was also confirmed in the interviews at the EU Delegation in Ankara, which keeps up its

in the anti-terror legislation and the Penal Code curbing freedom of expression (see section 1.c) is not explicitly mentioned in the 2014 VLD report (while it does recommend amending the former, yet does not link this to the Action Plan), but underlined in the latest Progress Report. The internal security package of March 2015 (see section 1.c), which the EC considers ‘at odds’¹³⁵³ with the Action Plan, will have to be considered under this benchmark in the EC’s future assessment, too. The same applies to the functioning of the Ombudsman and the National Human Rights Institution, the strengthening of which has been recommended by the EC in October 2014 and needs to be followed up, given also further criticism and calls for legal amendments regarding the NHRI from Turkish civil society.¹³⁵⁴ Finally, the EC will have to look closely into the status quo of its final recommendation on this benchmark, namely measures to ensure the consistent interpretation of existing legislation in line with the ECHR and ECtHR case-law – which appears to remain a challenge. Thus, the EC in its first report recommended not only training measures, but also the creation of ‘an independent and impartial body to investigate police offences’.¹³⁵⁵ Welcomed by Turkish civil society and seen as ‘of critical importance’,¹³⁵⁶ such a body has not been established yet. The European Stability Initiative counts this roadmap requirement (10.) among the ‘red alert issues’¹³⁵⁷ which it advises Turkey to tackle as a priority. Also with regard to this benchmark, the EC in its second VLD report essentially repeats its earlier recommendations,¹³⁵⁸ but does not elaborate any further on the related critical points mentioned above.

To sum up, there are considerable human rights requirements linked to the visa liberalisation dialogue, which can figure as a successful EU tool for the promotion of human rights. One can view the non-inclusion of certain topics into the roadmap with a critical eye, e.g. the fact that non-discrimination in the broad sense has not been taken up as a benchmark (only with regard to Roma) and also that there is no explicit reference to necessary legislation, which only came in through the EC recommending the adoption of an anti-discrimination in its first VLD report. Discrimination on other grounds is only invoked with regard to restrictions of freedom of movement (see point 6.). This narrow approach has been criticized primarily with regard to discrimination on the basis of sexual orientation and identity, with the rights of LGBTI persons being again counted among the areas of major concern by the Progress Report 2015 (as are gender-based violence and discrimination against minorities at large, which the roadmap equally does not directly address).¹³⁵⁹ Comparing the VLD roadmap for Turkey with the visa liberalisation action plan for Ukraine, which does include an explicit benchmark for a comprehensive anti-discrimination law to be adopted,¹³⁶⁰ commentators and NGOs have seen inconsistencies and

efforts to be informed about the reporting process from the Ministry of Justice to the Prime Ministry (foreseen on an annual basis, see Action Plan on Prevention of ECHR Violations (n 1023) 2).

¹³⁵³ EC Progress Report 2015 (n 797) 56.

¹³⁵⁴ See e.g. Arisan Eralp April 2015 (n 1016) 4 and Human Rights Foundation of Turkey 2015 (n 1017) 4 and 18.

¹³⁵⁵ European Commission VLD report 2014 (n 1240) 33.

¹³⁵⁶ Arisan Eralp April 2015 (n 1016) 4.

¹³⁵⁷ European Stability Initiative ‘Red Alert in Turkey’, ESI newsletter 2/2015, 10 March 2015, 6, <http://www.esiweb.org/index.php?lang=de&id=67&newsletter_ID=89> accessed 22 February 2016.

¹³⁵⁸ See European Commission VLD report 2016 (n 1255) 9.

¹³⁵⁹ EC Progress Report 2015 (n 797) 22.

¹³⁶⁰ See International Organization for Migration, Mission in Ukraine ‘EU-Ukraine Visa Dialogue – Action Plan on Visa Liberalisation’ <<http://www.iom.org.ua/en/legislation/migration-related-legislation/action-plan-on-visa-liberalisation.html>> accessed 22 February 2016.

discrepancies in the EU's approach.¹³⁶¹ Not only is there differential treatment of the two countries, but also is the EC perceived to apply double standards with regard to human rights of LGBTI persons in Turkey, in that this topic is excluded from the VLD whereas highly problematized in the last Progress Report. Explanations by the EC that anti-discrimination is treated in the frame of the accession process (while towards Ukraine the EU has to resort to visa liberalisation as a tool to push for reforms) are met with scepticism in view of the blocked chapter 23 negotiations: '...for Ilga-Europe, locking gay rights in Turkey's accession box amounts to relegating the issue to an uncertain future.'¹³⁶²

What is generally acknowledged is the importance of visa liberalisation as an incentive that the EU offers for carrying out reforms. Also in the case of Turkey, it entails considerable human rights conditionality, as has been outlined in this chapter. It remains to be seen to which extent it will be invoked, i.e. how strictly it will be applied by the EU, with the requirements after all leaving some room for interpretation by both sides. Date-setting and invigorating the – as it seems somewhat protracted – process may also speed up reforms by making the incentive more tangible and credible. However, exactly for the sake of the latter – credibility – fulfilment of all the requirements needs to be closely monitored in a transparent manner, and has to remain the yardstick for eventually lifting the visa regime. This means that, on the one hand, the EU should not compromise on the benchmarks for the sake of potential political expediency around the EU-Turkey Joint Action Plan or further similar cooperation initiatives around the present refugee situation. Talking of transparent monitoring, the reporting methodology could be improved, in that the progress assessment on the individual benchmarks is (more) substantiated, indicating where and why the EC sees e.g. partial fulfilment. This would not only make the assessment more traceable, but would also acknowledge fields of compliance by Turkey, which could encourage intensified efforts or further measures. Also, the definitions of progress assessment could be checked for their consonance with the new standard assessment scales of the 2015 Progress Report (see section 4). Differentiating between state of play and progress may be beneficial for VLD reporting, too, and allow for more consistency between the reports. Including concrete recommendations with each benchmark that is not considered entirely fulfilled, like has been done in the first VLD report, is certainly an important methodological feature in terms of providing guidance as well as a reference frame for monitoring. It could be further developed by making the recommendations even more concrete and congruent with the findings of the Progress Report. The omission of the benchmarks and the summary way of presenting the assessment in the second VLD report should be repealed, as this appears detrimental to the report's quality in terms of transparency, explicitness and substantiation. Finally, it is of utmost importance that fulfilment of a requirement shall not take this benchmark off the EC's 'radar', but rather should it be continuously monitored as new developments may call it in question again. The second VLD report seems not go back to requirements already 'ticked' as fulfilled in the previous report, which deserve to be re-examined (see e.g. point 6. above).

If the EC in the future concludes that Turkey has met all the requirements, on the other hand, the EU should avoid letting political deliberations – new or old – obstruct the decision by the Council and the

¹³⁶¹ See Andrew Rettman 'No place for human rights in EU-Turkey visa talks', *euobserver* 16 December 2015, <<https://euobserver.com/lgbti/131544>> accessed 23 February 2016, citing both an EC spokesperson and a representative from ILGA-Europe.

¹³⁶² *ibid.*

European Parliament on abolishing the visa obligation. Aydın-Düzgit sees both technical and political problems, linking the latter to the situation in the EU after the Paris attacks and thus arrives at a rather sceptical conclusion: 'At the end, we might face a more difficult period for Turkey-EU relations because the lack of trust between the two sides is likely to increase if the deal falls through, threatening cooperation in different areas, as well as Turkey's ultimate EU membership perspective.'¹³⁶³ It remains to be seen how the two processes – visa liberalisation and accession negotiations – will over the next months (and beyond) influence each other. Given that steps taken towards meeting the VLD benchmarks will have to imply harmonising Turkish legislation and administrative practice with the EU *acquis* and standards, this may figure positively in Turkey's accession process.¹³⁶⁴ Whether, in the human rights field, progress in the VLD would in itself also enhance the opening of negotiations on chapter 23 seems questionable, as this appears to depend less on Turkey taking measures of a technical kind, but mostly on Cyprus giving up its political veto on the adoption of the Screening Report (see section 2 Accession negotiations). While this veto is not officially linked to Turkey's human rights track record, improvements in this field may still make it more difficult for Cyprus to keep up its blockage - all the more at a time when the other Member States, first and foremost Germany, want to strengthen their partnership with Turkey and may increase pressure on Cyprus. How likely such improvements are against the background of serious backsliding over the last years is hard to tell and will depend once more on the preferences of the AKP government. But again, here visa liberalisation, which the Turkish government sets great store by and aims to achieve as soon as possible,¹³⁶⁵ offers the EU an important – and presently probably most effective – tool to gain leverage. Yet, the extent of possible impact will clearly depend on the quality of the EC's monitoring and thorough scrutiny being continually applied.

D. Looking closer: the promotion of gender equality and minority rights in Turkey through EU enlargement policy

'Gender inequality and low respect for minority rights, particularly of the Kurdish population, are among the key structural factors underlying Turkey's underdeveloped democracy.'¹³⁶⁶ This section does not set out to prove or disprove this statement by Firat Cengiz, but will follow her in analysing the workings of EU enlargement policy on the two issue areas in Turkey. Apart from Cengiz's assessment, these two areas have been chosen as mini case studies for the present research in Turkey for the reason that they 1) constitute areas in which significant reforms have been carried out in the context of Turkey's accession process, 2) both essentially revolve around the notion of equality which has become a central concept in EU human rights policy at large, but specifically with regard to the

¹³⁶³ Today's Zaman, 'Academic Aydın-Düzgit: Turkey-EU agreement not ethical, a step backward in relations' (n 887).

¹³⁶⁴ See also Delegation of the European Union to Turkey 'Questions and Answers on the EU-Turkey Readmission Agreement and Visa liberalisation dialogue', <<http://avrupa.info.tr/en/visas-mobility-migration/eu-turkey-dialogue-on-visas-mobility-migration.html>> accessed 22 February 2016.

¹³⁶⁵ See Hürriyet Daily News 'Turkey to overhaul its visa policy to align with EU *acquis*', 4 December 2015 <<http://www.hurriyetdailynews.com/turkey-to-overhaul-its-visa-policy-to-align-with-eu-acquis.aspx?pageID=238&nID=92042&NewsCatID=510>> accessed 22 February 2016, illustrating the government's commitment completing the process within 2016 by citing EU Minister Bozkır: 'We'll accomplish all of the necessary commitments on time for visa-free [travel to] Europe.'

¹³⁶⁶ Cengiz F, 'Rethinking conditionality: gender equality and the Kurdish issue in Turkey's EU accession framework' in Cengiz F, and Hoffmann L, (eds.), *Turkey and the European Union: Facing new challenges and opportunities*, (Routledge 2014) 156.

enlargement countries and 3) allow for interesting insights into EU human rights leverage by drawing some comparisons between them. These will demonstrate that – despite the common denominator of equality policy – the two areas have been treated somewhat differently in the EU’s enlargement instruments vis-à-vis Turkey and conditionality has displayed different effects over time. Also, by analysing and comparing these two areas we will show that the (non-)existence of EU legislation does not preclude the extent of the EU’s impact.

1. Gender equality

Before starting out to portray the impact EU accession conditionality has had in the area of gender equality in Turkey, it shall be emphasized that the EU in this policy field has developed a robust legal framework. In fact, gender equality formed the starting point of the EU’s equality policy and internal equal treatment / anti-discrimination legislation, with multiple provisions in the treaties and six pertinent directives having been adopted since 1978.¹³⁶⁷ Complemented by further EU soft law measures in areas where the EU does not have the necessary competences, like in the field of violence against women, the gender equality *acquis* constitutes a clear and strong reference frame for candidate countries in harmonising their national legislation.

Nevertheless, EU conditionality towards Turkey in the area of gender equality only evolved over time, as the issue did not figure as an EU priority in the beginning. The Accession Partnership 2001 called on Turkey to ‘[r]emove remaining forms of discrimination against women’ and to ‘[t]ranspose EU legislation in the field of ... equality of treatment between women and men’ as medium-term priorities.¹³⁶⁸ In the Accession Partnership 2003 one finds the latter provision still under the medium-term priorities, yet in the short-term Turkey was supposed to ‘[a]dopt a transposition programme’ regarding the pertinent *acquis*.¹³⁶⁹

As we have seen in section C.4, the early Progress Reports (1998 and 1999) did not mention the concept of gender equality or equal treatment at all. They did include, however, a short passage on the status of women. While the terminology changed later on, the attention paid to the issue of women’s rights / gender equality remained rather limited, even though violence against women started to appear on the EC’s agenda, too (yet again being paid minor attention first). EU emphasis on gender equality and related issues increased during the ‘golden years’ period, with the Progress Report 2004 marking a distinct difference in the EC’s treatment of the issue area. Violence against women (including domestic violence and ‘honour killings’) was also explicitly treated by the 2004 Report (and before already in the one from 2003, yet to a lesser extent).

The period 1999-2005 brought significant improvements in the field of gender equality and women’s rights, primarily on the legal level, as pointed out by Müftüler-Baç: ‘The Turkish adoption of the EU *acquis* and norms enabled significant progress on policies on gender equality.’¹³⁷⁰ It is acknowledged

¹³⁶⁷ See European Commission, Justice ‘Gender Equality Legislation’ <http://ec.europa.eu/justice/gender-equality/law/index_en.htm> accessed 27 February 2016. The EU directives pertain to equal treatment in working life as well as access to goods and services.

¹³⁶⁸ Accession Partnership 2001 (n 757) 20.

¹³⁶⁹ Accession Partnership 2003 (n 775) 47 and 52. This transposition programme as a short-term priority also pertained to ‘the fight against discrimination’ in general (ibid 47).

¹³⁷⁰ Müftüler-Baç M, *Gender Equality in Turkey* (European Parliament, Directorate-General for Internal Policies of the Union, Policy Department C - Citizens’ Rights and Constitutional Affairs, 2012) 5,

that the EU accession perspective and the working of human rights conditionality were certainly a driver of reforms in this regard.¹³⁷¹ Yet, it has also been pointed out that at the time when Turkey received candidate status in 1999 Turkey had embarked on ‘a process whereby women’s rights and gender equality were taken more seriously’.¹³⁷² This can be traced back to firstly gender equality policy within the UN system having effects on Turkey and secondly the emergence of a women’s rights movement within Turkey.¹³⁷³ The EU accession process and the demands towards more gender equality and the protection of women’s rights can be said to have fitted into this already existing trend by in particular ‘joining forces’ with the Turkish women’s rights movement in calling for reforms.

Reforms revolved around changes to the Constitution, the Civil Code and the Criminal Code. While the Turkish Constitution had already enshrined equality between men and women before law (Art. 10), the 2001 constitutional amendments included provisions on gender equality within the family – where until then, on the basis of the Civil Code, male authority had been the rule.¹³⁷⁴ The new Civil Code drafted in the same year and coming into force in the beginning of 2002 did away with the former subordination of women to their husbands and ‘strengthened women’s place in the family and social order’.¹³⁷⁵ This also entailed equalizing the minimum age for men and women to get married at 18 years, providing for more equality in decision-making on family matters and foreseeing marital assets to be shared in the case of divorce.¹³⁷⁶ 2003 and 2004 saw some improvements in labour legislation, e.g. prohibiting gender-based discrimination in employment.¹³⁷⁷ The constitutional amendments of 2004 broadened the scope of gender equality in Art. 10 by stipulating: ‘Men and women have equal rights and the State is responsible for the measures to implement those rights’.¹³⁷⁸

Very importantly, the new Penal Code adopted in the same year significantly improved protection for the bodily integrity of women. Müftüler-Baç underlines that ‘for the first time, crimes committed against women were classified as ‘crimes against individual’, rather than crimes against family or social order’ and thus speaks of a ‘paradigmatic shift in Turkish legislation in terms of gender policy’.¹³⁷⁹ The new Penal Code also brought a breakthrough in sanctioning marital rape and addressing the issue of ‘honour killings’.¹³⁸⁰ All in all, it contained over 30 articles promoting gender equality and has hence been hailed for taking a strong stance against gender-based violence not only by the women’s rights movement perceiving a ‘revolutionary change of the underlying philosophy ... towards the recognition

<http://www.europarl.europa.eu/document/activities/cont/201202/20120207ATT37506/20120207ATT37506_EN.pdf> accessed 27 February 2016.

¹³⁷¹ See *ibid* 4 and 6.

¹³⁷² Fougner T, Kurtoğlu A ‘Gender policy: a case of instrumental Europeanization?’ in Güney A, Tekin A (eds), *The Europeanization of Turkish Public Policies: A Scorecard* (Routledge Studies in Middle Eastern Politics, Routledge 2016) 146.

¹³⁷³ See *ibid*.

¹³⁷⁴ See Müftüler-Baç 2012 (n 1370) 5 and 8.

¹³⁷⁵ Müftüler-Baç 2012 (n 1370) 8.

¹³⁷⁶ See *ibid*. and Fougner and Kurtoğlu 2016 (n 1372) 149.

¹³⁷⁷ See Fougner and Kurtoğlu 2016 (n 1372) 149.

¹³⁷⁸ Müftüler-Baç 2012 (n 1370) 5.

¹³⁷⁹ Müftüler-Baç 2012 (n 1370) 9.

¹³⁸⁰ See *ibid*.

of women's autonomy over their sexuality and bodies',¹³⁸¹ but also termed by the European Commission as 'generally progressive in terms of women's rights'.¹³⁸² At the same time, the EC saw that '[d]espite legal and practical initiatives to tackle the problem of discrimination and domestic violence this remains a major problem' and, as elaborated in section C.4 on Progress Reports, has since then put considerable attention to these issues in its monitoring of Turkey's progress. It shall be added at this point that the 2004 Penal Code can be seen as the result of parts of Turkish civil society lobbying for it for three years, with the accession process and its instruments offering an entry point. In light of the EU demanding the Turkish Penal Code to be modified and the NPAA 2001 including its revision, Ilkkaran reports: 'Perceiving this as a window of opportunity for gender equality in the penal code, WWHR [Women for Women's Human Rights] initiated a working group aiming at a holistic reform of the Turkish penal code from a gender perspective in early 2002'.¹³⁸³ She argues that the EC, however, was not very much concerned with gender equality in this regard, apart from the issue of 'honour killings'.¹³⁸⁴ This can be confirmed by the analysis of the APs 2001 and 2003 and the early Progress Reports (see section C.4).

So, at first it seems the EC did not prove too much of an ally for the civil society working group, which continued its campaign and expanded into a national Women's Platform on the Turkish Penal Code in 2003, winning increasing public support.¹³⁸⁵ With the EU becoming more attentive, it was obviously identified as a strategic partner, which showed particularly in the debate around a last-minute initiative by the AKP government to include the re-criminalization of adultery into the new Penal Code.¹³⁸⁶ The uproar from the women's rights movement also led to reactions by the EU (and the Council of Europe), which became even more explicit after the government withdrew the whole draft law in mid-September 2004, not too long before the envisaged decision on the start of accession negotiations. The controversy over the adultery clause and the delay in passing the Penal Code caused a serious crisis between Brussels and Ankara, in which the EU threatened not to launch the negotiations.¹³⁸⁷ Ilkkaran reports about a meeting between Commissioner for Enlargement Verheugen and Prime Minister Erdoğan after which the proposal to criminalize adultery was dropped,¹³⁸⁸ so that the new Penal Code was eventually passed at the end of September, just shortly before the EC publishing its Progress Report and Recommendation on Turkey's progress towards accession. As outlined in section C.1.a) in this Recommendation the setting into force of the Penal Code was made a condition for the actual opening of negotiations one year later. Clearly, it can be concluded that the EU, while not being in the driving seat for gender equality in the Penal Code at the beginning, has later on provided decisive backing to the reforms demanded by civil society groups and has in 2004 applied

¹³⁸¹ Ilkkaracan P, *Reforming the Penal Code in Turkey: The Campaign for the Reform of the Turkish Penal Code from a Gender Perspective* (Institute of Development Studies September 2007) 3, <<http://www.ids.ac.uk/ids/Part/proj/pnp.html>>accessed 15 December 2015.

¹³⁸² Progress Report 2004, 45.

¹³⁸³ Ilkkaracan 2007 (n 1381) 10.

¹³⁸⁴ See *ibid* 10f.

¹³⁸⁵ See *ibid* 14.

¹³⁸⁶ See *ibid* 22ff.

¹³⁸⁷ See BBC News 'EU demands new Turkish penal code', 20 September 2004, <<http://news.bbc.co.uk/2/hi/europe/3672834.stm>>accessed 28 February 2016.

¹³⁸⁸ See Ilkkaracan 2007 (n 1381) 26.

strict conditionality in this case by even threatening sanctions in form of delaying the accession process.¹³⁸⁹

What shall not go unmentioned is that it was also in 2004 that, on the institutional level, the KSSGM (Kadının Statüsü ve Sorunları Genel Müdürlüğü – General Directorate for the Status and Problems of Women), which had been established already in 1990, was not only renamed into KSGM (Kadının Statüsü Genel Müdürlüğü – General Directorate on the Status of Women), but also moved to the Prime Ministry and strengthened in terms of duties, staff and budget.¹³⁹⁰ The 2004 constitutional amendments also gave the KSGM the mandate to set up a Committee for the Prevention of Violence Against Women, which was established in 2007 including civil society representatives.¹³⁹¹

From 2005 onwards, measures against domestic violence and gender-based violence formed the focal point of gender equality policies in Turkey as well as pertinent EU policy vis-à-vis Turkey. Exhibiting the increased EU attention, the Accession Partnership 2006 contained a separate section on women's rights under short-term priorities, stipulating the following actions:

— *Implement legislation relating to women's rights, particularly the civil code, the new penal code and the law on the protection of the family.*

— *Pursue measures against all forms of violence against women, including crimes committed in the name of honour. Ensure specialised training for judges and prosecutors, law enforcement agencies, municipalities and other responsible institutions and establish shelters for women at risk of violence in all larger municipalities, in line with current legislation.*

— *Further promote the role of women in society, including their education and participation in the labour market and in political and social life, and support the development of women's organisations to fulfil these goals.*¹³⁹²

To support the achievement of these priorities, the EC i.a. financed the 2006-2008 project 'Promoting Gender Equality', part of which dealt with violence against women. In this context a nationwide research on domestic violence against women was conducted¹³⁹³ and a comprehensive National Action Plan for Combatting Domestic 2007-2010 formulated. The wider project also comprised a Twinning component, teaming up the KSGM and the Dutch Ministry of Social Affairs and Employment, in order to strengthen the institutional capacity of the former. The main output of this Twinning was the elaboration of a comprehensive National Action Plan Gender Equality 2008–2013.¹³⁹⁴ This Action Plan, complementing the one on domestic violence and addressing the fields education, economy, poverty, power and decision-making, health, media, and environment, has been assessed as being in line with the accession criteria and priorities.¹³⁹⁵ However, the EC kept referring to the lack of

¹³⁸⁹ It can be argued that the condition of setting the Code into force was taken up as a means to prevent the adopted law from being repealed before the opening of negotiations.

¹³⁹⁰ See Fougner and Kurtoğlu 2016 (n 1372) 150.

¹³⁹¹ See Müftüler-Baç 2012 (n 1370) 9 and Fougner and Kurtoğlu 2016 (n 1372) 150.

¹³⁹² Accession Partnership 2006 (n 793) 38.

¹³⁹³ This rendered figures of between a quarter and half of all married women having experienced domestic violence at least once (see Müftüler-Baç 2012 (n 1370) 10).

¹³⁹⁴ See Republic of Turkey, Prime Ministry, General Directorate on the Status of Women (2008) *National Action Plan Gender Equality 2008-2013*, <http://www.huksam.hacettepe.edu.tr/English/Files/NAP_GE.pdf> accessed 27 February 2016.

¹³⁹⁵ See Müftüler-Baç 2012 (n 1370) 7.

measurable targets and sufficient resources for implementing the Action Plans,¹³⁹⁶ adding also that ‘Action plans and circulars are not binding and are not applied evenly throughout the country.’¹³⁹⁷

Looking at the still valid Accession Partnership 2008, we find the following short-term priorities under the heading of women’s rights, similar to the ones from 2006:

— *Pursue measures to implement current legislation relating to women’s rights and against all forms of violence against women, including crimes committed in the name of honour. Ensure specialised training for judges and prosecutors, law enforcement agencies, municipalities and other responsible institutions and strengthen efforts to establish shelters for women at risk of violence in all larger municipalities, in line with current legislation,*

— *further increase the awareness of the general public, and of men in particular, concerning gender issues, and promote the role of women in society, including through ensuring equal access to education and participation in the labour market and in political and social life; support the development of women’s organisations to fulfil these goals.*¹³⁹⁸

Placing an emphasis on preventing violence against women and changing gender role perceptions in society, the EC continued to apply financial and technical assistance for meeting these aims. To name some examples, a range of workshops were organized under the TAIEX-instrument in different Turkish cities between 2008 and 2013, tackling especially violence against women.¹³⁹⁹ Another Twinning project ‘Promoting Gender Equality in Working Life’ was launched with the Ministry of Labour and Social Security as beneficiary.¹⁴⁰⁰ Bringing together Turkish officials with their counterparts from the German Ministry of Labour and Social Affairs as well as experts from the Austrian Ludwig Boltzmann Institute of Human Rights, this 2010-2012 project produced a review of Turkish labour and social security legislation in terms of its compliance with the EU gender equality acquis, finding need for further harmonisation in a number of fields.¹⁴⁰¹ It also included a broad range of training and awareness-raising activities, targeting both public officials as well as the broader public.

As for legal reform, 2009 saw the establishment of the Parliamentary Equal Opportunities Commission for Women and Men, which was tasked with analysing legal proposals and amendments from a gender equality perspective.¹⁴⁰² As highlighted by Müftüler-Baç, the Commission ‘also accepts individual

¹³⁹⁶ See European Commission Progress Report 2010 (n 966) 26; European Commission Progress Report 2011 (n 817) 32.

¹³⁹⁷ European Commission Progress Report 2011 (n 817) 32.

¹³⁹⁸ Accession Partnership 2008 (n 1005) 8f. As a medium-term priority it includes (interestingly under economic criteria): ‘continue to improve the general level of education and health, paying particular attention to the younger generation and women’ (ibid 15).

¹³⁹⁹ See European Commission ‘TAIEX Events’, <http://ec.europa.eu/enlargement/taieux/dyn/taieux-events/index_en.jsp> accessed 22 February 2016.

¹⁴⁰⁰ See Ludwig Boltzmann Institute of Human Rights ‘TURKEY: Promoting Gender Equality in Working Life (Twinning)’ <<http://bim.lbg.ac.at/en/turkey-promoting-gender-equality-working-life-twinning>> accessed 27 February 2016.

¹⁴⁰¹ For more detailed information see the expert reports on the different fields of legislation under <http://bim.lbg.ac.at/en/turkey-promoting-gender-equality-working-life-twinning>. A review mission carried out in 2013 found that most of the experts’ recommendations on acquis harmonization have yet to be followed up on, with the 10th National Development Plan 2014-2023, however, defining gender equality as a horizontal objective again.

¹⁴⁰² See Müftüler-Baç 2012 (n 1370) 6.

applications and complaints on gender based discrimination from all segments of the Turkish society',¹⁴⁰³ which appears noteworthy against the background of a still lacking gender equality body. While there have been news at the end of 2013 about government plans to dissolve the Parliamentary Equal Opportunities Commission,¹⁴⁰⁴ such a measure has apparently not been taken.

The 2010 democratisation package included a further amendment of the Constitution's Article 10, which since then allows positive action in favour of women.¹⁴⁰⁵ Another important improvement on the legislative level was the 2012 Law on the Protection of Family and Prevention of Violence against Women (replacing the 1998 Law on the Protection of Family), which followed the 2011 signature and 2012 ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence. Drawn up in Istanbul (and thereby taking the name 'Istanbul Convention'), its elaboration had been strongly supported by the Turkish government, which had been seen as 'thereby signalling its resolve to end all gender based violence'.¹⁴⁰⁶ The new domestic violence legislation law extended the definition of violence, foresaw new protective measures and for the first time gave protection also for non-married women.¹⁴⁰⁷ Again, the EC, while commending the new piece of legislation and the 'inclusive consultation exercise undertaken by the authorities with civil society', pointed to the need for it being properly implemented: 'substantial efforts are needed to turn this new law, and earlier legislation, into political, social and economic reality.'¹⁴⁰⁸ Also it stressed last-minute changes having raised concern, which refers to the Prime Minister's Office's attempt to push through a different version of the law – without any references to gender equality and putting the emphasis on protection of the family.¹⁴⁰⁹ After women's rights groups protested, a compromise law was eventually adopted. Despite valuing the law as a historic step, women's rights activists voiced criticism about women still being perceived as family members instead of individuals.¹⁴¹⁰

This, it can be argued, also showed on the institutional level when the Ministry for Women and Family Affairs was replaced in 2011 by the Ministry for Family and Social Policies and the KSGM made into a

¹⁴⁰³ *ibid.* The recommendations on legal harmonisation elaborated in the above mentioned Twinning project were also presented to the Parliamentary Commission and met with great interest there.

¹⁴⁰⁴ See Women Against Violence Europe 'In Turkey, the word 'woman' is being erased from state mechanisms, and the Women-Men Equal Opportunities Commission is to be closed' <http://www.wave-network.org/content/turkey-word-woman-being-erased-state-mechanisms-and-women-men-equal-opportunities-commission> and European Women's Lobby 'Turkey - Discussions on Closing Parliamentary Women-Men Equal Opportunities Commission in Turkey', 5 December 2013, <http://www.womenlobby.org/Turkey-Discussions-on-Closing-Parliamentary-Women-Men-Equal-Opportunities?lang=en> both accessed 27 February 2016.

¹⁴⁰⁵ See Fougner and Kurtoğlu 2016 (n 1372) 151.

¹⁴⁰⁶ Müftüler-Baç 2012 (n 1370) 11.

¹⁴⁰⁷ See Fougner and Kurtoğlu 2016 (n 1372) 150 and European Commission (2012) *Commission Staff Working Document Turkey 2012 Progress Report*, Brussels, 10 October 2012, COM(2012) 600, 26, <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf> accessed 18 December 2015.

¹⁴⁰⁸ European Commission Progress Report 2012 (n 1407) 26.

¹⁴⁰⁹ See Human Rights Watch 'Turkey: Adopt Strong Domestic Violence Law', 7 March 2012, <<https://www.hrw.org/news/2012/03/07/turkey-adopt-strong-domestic-violence-law>> accessed 27 February 2016.

¹⁴¹⁰ See e.g. Hürriyet Daily News 'Female activists make history with new law to protect women', 10 March 2012, <<http://www.hurriyetaidailynews.com/female-activists-make-history-with-new-law-to-protect-women.aspx?pageID=238&nID=15649&NewsCatID=339>> accessed 27 February 2016.

unit under it. This measure was perceived as a down-grading of gender issues in public policy.¹⁴¹¹ Even though the new Ministry in 2012 adopted a new National Action Plan to Combat Violence against Women 2012-2015, it was criticised by civil society organisations and the EC for not including ‘indicators, objectives, a monitoring system or funds allocated for activities’.¹⁴¹² At the same time, there have been reports of a significant rise in violence against women with alarming figures of women and girls being murdered between 2011 and 2015.¹⁴¹³ Journalists have reacted with the creation of an online ‘femicide map’¹⁴¹⁴ in order to raise awareness and provide data. EUD representatives interviewed for this study also reflected on the worrying increase in violence against women, which arguably has linkages to degrading statements about women in political and social discourse. Interviewed civil society representatives also pointed to changes in discourse and climate, induced by political conservatism.

Another case of backlash could be observed in 2012 in the government’s discourse on gender equality and women’s right becoming increasingly restrictive.¹⁴¹⁵ This showed most clearly in respect to women’s reproductive and sexual rights in the preparation of a law which aimed to prohibit respectively restrict women’s access to abortion and Caesarean section.¹⁴¹⁶ Depicting this law as a case of de-Europeanization, Yilmaz illustrates that it was in line with the Prime Minister’s aim to increase Turkey’s population growth and his propagating that every women should at least have three children.¹⁴¹⁷ The EC found that ‘[i]n the debate that preceded this law and a similar debate on abortion, government statements neglected the overall need for increased respect for women’s rights in practical terms’.¹⁴¹⁸ Again, after wide civil society protest against the violation of fundamental rights, the prohibition of abortion was given up whereas caesarean operations were made conditional on medical necessity.¹⁴¹⁹ The EC reported that the law ‘was adopted with insufficient preparation and consultation with civil society, and in particular without hearing the views of women’s organisations’.¹⁴²⁰ Also, there have been allegations of administrative practice interfering with women’s reproductive and sexual rights in that the Ministry of Health is accused of monitoring pregnant women¹⁴²¹ or that hospitals are said to pass on examination data of female patients to their

¹⁴¹¹ See Cengiz in Cengiz and Hoffmann 2014 (n 1366) 171 and Müftüler-Baç 2012 (n 1370) 6.

¹⁴¹² EC Progress Report 2014 (n 823) 56.

¹⁴¹³ See Daily Sabah ‘Website maps murders, violence against women in Turkey’, 25 November 2015, <<http://www.dailysabah.com/nation/2015/11/25/website-maps-murders-violence-against-women-in-turkey>> and Hürriyet Daily News ‘Violence against women in Turkey increases both in number and brutality’, 30 November 2015 < <http://www.hurriyetdailynews.com/violence-against-women-in-turkey-increases-both-in-number-and-brutality.aspx?pageID=238&nid=91880>> both accessed 27 February 2016.

¹⁴¹⁴ See Kadın Cinayetleri <<http://kadincinayetleri.org/>> accessed 27 February 2016 (in Turkish).

¹⁴¹⁵ See Cengiz in Cengiz and Hoffmann 2014 (n 1366) 171.

¹⁴¹⁶ See *ibid.*

¹⁴¹⁷ See Yilmaz 2015 (n 806) 9.

¹⁴¹⁸ European Commission Progress Report 2012(n 1407) 26.

¹⁴¹⁹ See Yilmaz 2015 (n 806) 10. Note that, two years later, in December 2014 the Turkish Health Minister Müezzinoğlu was reported to have stated: ‘Demanding a natural birth is a natural right of the patient ... The patients cannot say ‘I want a C-section,’ they do not have such a right.’ (Hürriyet Daily News ‘Patients have no right to demand C-sections, says Turkish Health Minister’, 20 December 2014, <<http://www.hurriyetdailynews.com/patients-have-no-right-to-demand-c-sections-says-turkish-health-minister-.aspx?pageID=238&nID=75861&NewsCatID=341>> accessed 19 February 2016).

¹⁴²⁰ European Commission Progress Report 2012 (n 1407) 26.

¹⁴²¹ See Cengiz in Cengiz and Hoffmann 2014 (n 1366) 172.

family.¹⁴²² It has been commented that the EU is hesitant to take a clear position with regard to women's reproductive and sexual rights¹⁴²³ and that, due to absence of strong conditionality in this respect, it rests with Turkish civil society to oppose the 'intrusive ... government's approach to intimate citizenship issues'.¹⁴²⁴

So, while the government did on the one hand adopt policies and measures to increase women's employment¹⁴²⁵ as well as gender equality in education by promoting school enrolment for girls¹⁴²⁶ over the last years, there have been backsliding phenomena in terms of political and societal discourse, which some have termed misogynist.¹⁴²⁷ This couples with and intensifies persistent problems in the implementation of existing laws, especially by the judiciary. In spite of the legal basis being perceived as broadly satisfactory, it is its implementation that remains, as put by Müftüler-Baç, 'limited by the prevalent social norms and practices', so that 'social transformation is needed'.¹⁴²⁸ This is also echoed in the EC's latest Progress Report, stating:

*The legislative and institutional framework on equality between women and men is in place. ... However, promotion of the traditional role of women, ineffective implementation of the legislation and the low quality of services make discrimination against women and gender-based violence major areas of concern.*¹⁴²⁹

The government's gender equality policy seems to stall to some extent. After 2013, there has not been a follow-up Action Plan on gender equality and the latest Action Plan to Combat Violence against Women has now also 'expired'. The elaboration of new Action Plans was interestingly not called for by the EC in its Progress Reports, which may hint at some scepticism about the effectiveness of these plans in really bringing about needed change. Dedeoğlu writes: 'Inconsistent policies on gender equality and a weak commitment to implement recent changes are traceable in every policy document as well as observable in the actions of social partners engaged in policy making.'¹⁴³⁰ She sees the reforms which have been introduced as 'only one more tick on the to-do-list of the government's EU accession agenda'.¹⁴³¹ Fougner and Kurtoğlu close with a similar conclusion in that they emphasize that 'post-1999 gender policy changes have not reflected a broad normative commitment to gender equality in Turkey'¹⁴³² (never an EU condition, though), so that they speak of 'instrumental Europeanization'.¹⁴³³

To sum up, it can be said that the EU has certainly had some impact on the gender policy changes that happened in Turkey after 1999. While however, in line with the general working of human rights

¹⁴²² This allegation was voiced during interviews carried out with Turkish civil society representatives.

¹⁴²³ See Fougner and Kurtoğlu 2016 (n 1372) 160, confirmed during the interviews.

¹⁴²⁴ Cengiz in Cengiz and Hoffmann 2014 (n 1366) 172.

¹⁴²⁵ See Müftüler-Baç 2012 (n 1370) 12ff and Fougner and Kurtoğlu 2016 (n 1372) 151ff.

¹⁴²⁶ See Fougner and Kurtoğlu 2016 (n 1372) 152.

¹⁴²⁷ See e.g. Kalaycıoğlu in Avci and Çarkoğlu 2013 (n 978) 65. Some interviewees confirmed this view.

¹⁴²⁸ Müftüler-Baç 2012 (n 1370) 14.

¹⁴²⁹ European Commission Progress Report 2015 (n 797) 66.

¹⁴³⁰ Dedeoğlu S, 'Gender equality policies and female employment: The reforms in the EU accession process' in Dedeoğlu S, and Elveren Y, A, (eds.), *Gender and society in Turkey: the impact of neoliberal policies, political Islam and EU accession* (I.B. Tauris 2012) 139.

¹⁴³¹ *ibid* 125.

¹⁴³² Fougner and Kurtoğlu 2016 (n 1372) 160.

¹⁴³³ *ibid*.

conditionality, the major changes happened in the period until 2005 and may be regarded as a result of both leverage through conditionality and linkage with Turkish civil society (which was a crucial driving force),¹⁴³⁴ the EU's influence thereafter diminished. Nevertheless, some additional reforms were introduced after 2006, both on the legal and institutional level. These reforms, placing in particular a focus on domestic violence, were probably induced by a combination of EU influence and domestic factors (with the government taking up civil society demands); the causality cannot be reliably established. However, with backlash phenomena occurring since 2011, with the still incomplete harmonisation of Turkish legislation with the EU gender equality directives, with the fact that the gender equality body prescribed by the *acquis* is still missing and with the EC in November 2015 once more repeating its criticism of ineffective implementation, the recent impact seems limited – and largely dependent on domestic preferences of the AKP government and how much it is inclined to change gender roles and relations.

2. Minority rights

In contrast to the area of gender equality the EU's legal framework regarding minority rights is rather weak. While the 1993 Copenhagen criteria oblige candidate countries to respect and protect minorities, it was only through the Treaty of Lisbon 2007 that minority rights were explicitly taken up among the EU's founding values in Article 2 of the TEU. It has been argued widely in literature that the issue of minority rights was given primary attention in the EU's external policy, especially toward the enlargement countries, due to security and stability interests in order to not 'import' any potential ethnic conflicts into an enlarged Union.¹⁴³⁵ Indeed, minority rights as well as equality policies and anti-discrimination in a broader sense, which have been of relevance already in the context of the 5th enlargement round of 2004/2007, have gained considerably in prominence in the EU's policy vis-à-vis the Western Balkan countries and Turkey. While this in fact may indeed be related to security interest to a large extent, the EU's internal equality policy, reflected in its anti-discrimination *acquis*¹⁴³⁶ which the candidate countries have to comply with, certainly also shaped EU human rights conditionality in this regard. Of course, the lens of anti-discrimination, as important as it is, entails primarily a preventive approach and does not oblige the countries to actively promote minority and cultural rights. In view of lacking clear EU norms on minority protection the EC in its enlargement practice and discourse has turned to standards and mechanisms set up by the Council of Europe (Framework Convention for the Protection of National Minorities – FCNM) and the OSCE (High Commissioner on National Minorities) in order to fill the Copenhagen criteria and Treaty provisions with content.

Looking at Turkey, it has to be said that these international instruments cannot be invoked by the EC as Turkey continues to apply a restrictive minorities policy.¹⁴³⁷ On the basis of the 1923 Treaty of Lausanne minority status is defined on the basis of religion, i.e. minorities are equated with non-

¹⁴³⁴ The impact of EU civil society support - of significance in the case of Turkey both with regard to gender equality and minority rights - on civil society itself has been examined in literature to some extent (see e.g. Cengiz in Cengiz and Hoffmann 2014 (n 1366) 162f), but for reasons of scope cannot be elaborated in the context of this case study.

¹⁴³⁵ See e.g. Cengiz in Cengiz and Hoffmann 2014 (n 1366) 160.

¹⁴³⁶ Next to anti-discrimination provisions in the EU Charter of Fundamental Rights, this entails in particular Directives 2000/43/EC and 2000/78/EC.

¹⁴³⁷ Turkey has signed neither the 1995 Council of Europe Framework Convention for the Protection of National Minorities nor its 1992 European Charter for Regional or Minority Languages.

Muslim groups.¹⁴³⁸ This provision in state practice and legislation has been applied only to Jews, Armenians and Greek Orthodox, excluding all other non-Muslim groups (who thereby 'have been unlawfully denied their rights arising from this treaty',¹⁴³⁹ as stressed by Kurban). As for the three recognized minorities, their rights were still subject to restrictions, which have been slowly removed in the course of the EU accession process, yet they continue to face discrimination, as found by Kurban as well as the latest EC Progress Report.¹⁴⁴⁰ Furthermore, there is no room for minority status amongst Muslims, all of whom after the Treaty of Lausanne have been perceived as Turks, irrespective of their ethnicity or religious orientation within Islam. As put by Grigoriadis, 'anti-minority policies were one of the key features of republican Turkish politics. Achieving the maximum degree of homogeneity was perceived as imperative for the success of Turkish state-building.'¹⁴⁴¹ The focus on ensuring indivisibility and unity of the state is also reflected in the 1982 Constitution, which for long entailed also the exclusive use of the Turkish language. This was to change in the wake of the EU accession process, which brought about some significant transformations.

Unlike gender equality issues, minority rights in Turkey have ranged high on the EU's agenda ever since the publication of the first EC Progress Report in 1998 – and have continually stayed a high priority issue, as has been seen in the analysis of the EC's monitoring in section C.4. Concentrating on the Kurdish population group, the Commission in the 1998 Report voiced not only criticism with regard to their legal and factual situation, but also noted that 'Turkey will have to find a political and non-military solution to the problem of the south-east'.¹⁴⁴² The Report was not very welcome by the Turkish government, not least because of these passages and, as pointed out by Kirisci, 'even led to accusations of European aspirations to undermine Turkey's territorial integrity'.¹⁴⁴³ President Demirel was reported to have 'expressed his discomfort over the need to meet the Copenhagen criteria on minority rights because of Turkey's genuine fear of separatism'.¹⁴⁴⁴ Of course the Kurdish question has always been connected to the government's military conflict with the PKK and thus a highly complicated issue with terrorism and counter-terrorist measures leading to far-reaching human rights violations, not least because of the state of emergency in force over (parts of) south-eastern Turkey until 2002 as well as considerable internal displacement.¹⁴⁴⁵ This chapter will not be able to consider this conflict or the attempts of settling it as such, but will look at the promotion of minority rights,

¹⁴³⁸ This paragraph draws on Kurban D, *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – Turkey* (European Network of Legal Experts in the Non-discrimination Field 2013) 37ff.

¹⁴³⁹ *ibid* 38.

¹⁴⁴⁰ See EC Progress Report 2015 (n 797) 68.

¹⁴⁴¹ Grigoriadis I N, 'On the Europeanization of minority rights protection' in Güney A, Tekin A (eds), *The Europeanization of Turkish Public Policies: A Scorecard* (Routledge Studies in Middle Eastern Politics, Routledge 2016) 133. Such a logic and policy has of course also not been unfamiliar to some EU Member States, like e.g. France.

¹⁴⁴² European Commission Regular Report 1998 (n 742) 20.

¹⁴⁴³ Kirisci 2005 (n 750) 66.

¹⁴⁴⁴ *ibid*.

¹⁴⁴⁵ Since the conflict re-escalated in summer 2015, there have been a number of allegations of severe human rights violations again (see chapter IV.C.6 as regards restrictions on freedom of movement and potential contradiction to visa liberalization benchmarks).

including of the Kurdish population, on a more general level. Having said this, the focus that both the EU and the government have laid on the Kurds can of course not be overlooked.¹⁴⁴⁶

In the Progress Report 1999 the EC did not attest any progress on the Kurdish question and repeated its recommendation of the previous year on ‘recognition of certain forms of Kurdish cultural identity and greater tolerance of the ways of expressing that identity, provided it does not advocate separatism or terrorism.’¹⁴⁴⁷ While clearly candidate status had thus not been linked to improvements in minority rights (it being largely a political decision, see section B.1), the Accession Partnership 2001 contained a number of provisions, strengthening and concretizing the minority rights conditionality of the Copenhagen criteria. Under short-term priorities it called on Turkey to ‘[d]evelop a comprehensive approach to reduce regional disparities, and in particular to improve the situation in the south-east, with a view to enhancing economic, social and cultural opportunities for all citizens’¹⁴⁴⁸ while including under the medium-term priorities the following clause:

— Ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin. Any legal provisions preventing the enjoyment of these rights should be abolished, including in the field of education.¹⁴⁴⁹

The shift towards concentrating on cultural rights for all Turkish citizens could be observed in the Progress Report 2000 already,¹⁴⁵⁰ but the AP 2001 constituted, as stressed by Kirisci, a ‘marked departure’¹⁴⁵¹ from the minority rights discourse: avoiding the notion and deploying ‘much more subtle, politically inoffensive and nuanced language ... helped moderates disarm the arguments of hard-liners in Turkey’¹⁴⁵² – which can be seen as decisive for the viability of ensuing reforms. Before moving on to these, it shall be mentioned here that the Progress Report 2001 for the first time also addressed the Roma minority (even though very briefly; this was to increase later on).

The ‘golden years’ between 2001 and 2005 saw a range of reforms promoting minority rights.¹⁴⁵³ The constitutional amendments of 2001 abolished the restriction on language use and thus paved the way for more freedom of expression and broadcasting in languages other than Turkish. Legislation was brought in line with these constitutional changes through the 3rd, 6th and 7th harmonisation packages of 2002 and 2003, which permitted broadcasting in Kurdish as well as teaching of Kurdish in private courses. An amendment to the Civil Registry Law in July 2003 allowed the naming of children in Kurdish. It needs to be noted, though, that these reforms did not explicitly mention Kurdish or the Kurds, thus did not bring legal recognition of Kurdish identity. However, they had considerable effects on the Kurdish minority and brought about a change in discourse, doing away with a taboo subject,

¹⁴⁴⁶ The Kurds can be described as the largest minority in Turkey (see European Commission Regular Report 1998 (n 742) 19). It should be noted, however, that, due to the conceptualization of Turkish nationhood up to today and the restrictive approach to minorities, the term itself is often connoted negatively and thus rejected (see Grigoriadis 2016 (n 1441) 133, also confirmed by interviews). For the purpose of this study we will use the terminology in line with EU concepts.

¹⁴⁴⁷ European Commission Regular Report 1999 (n 746) 14.

¹⁴⁴⁸ Accession Partnership 2001 (n 757) 17.

¹⁴⁴⁹ *ibid.* 19.

¹⁴⁵⁰ See European Commission Progress Report 2000 (n 1167) 19.

¹⁴⁵¹ Kirisci 2005 (n 750) 67.

¹⁴⁵² *ibid.*

¹⁴⁵³ This paragraph draws on Aydın and Keyman 2004 (n 771) 31ff.

and signifying political recognition ‘after many decades of suppression’.¹⁴⁵⁴ Obviously the lifting of the state of emergency on the Diyarbakir and Sirnak provinces also had important effects on the human rights situation of the Kurdish population as had general improvements in the field of freedom of expression. Some reforms were also carried out during this period with regard to the rights of non-Muslim minorities, yet they were not as transformative, apart maybe from a constitutional amendment in 2004 giving international treaties on human rights (and thus also the Treaty of Lausanne) precedence over domestic legislation.¹⁴⁵⁵ The 2004 Progress Report elaborated quite extensively on minority and cultural rights (which from that year on have been grouped together) and it has been argued that the actual start of both broadcasting and teaching in that year has been crucial for the EC recommending that accession negotiations be commenced and the Council deciding so in December 2004.¹⁴⁵⁶ So, while still limited in their number and scope, the reforms introduced meant remarkable progress, which was induced and thereafter rewarded by the EU – the impact of conditionality in this period being thus rather clear.¹⁴⁵⁷ This can be substantiated also by the fact that the Accession Partnership 2003 had foreseen priorities for the years 2003/2004, which, standing next to defined short-term priorities, can be considered as intermediate or urgent assignments, putting particular pressure for these on Turkey. With regard to cultural rights (again the term minority rights was not used), they comprised the following specification:

*Ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin. Ensure effective access to radio/TV broadcasting and education in languages other than Turkish through implementation of existing measures and the removal of remaining restrictions that impede this access*¹⁴⁵⁸

Discussing the combination of credible EU conditionality policy and Turkish reforms efforts towards the Copenhagen criteria in the previous years, Aydın and Keyman wrote in 2004:

*The protection of minorities is no longer a taboo subject in Turkish political life. There are serious efforts to improve the lives of minorities in Turkey. ... In order to ensure effective implementation of such measures for all minorities, it is also necessary to undertake a gradual shift from the traditional interpretation of the monolithic Turkish nation to a redefined notion of political community that requires a more inclusive and truly civic concept of citizenship.*¹⁴⁵⁹

Seeing the chance for legal and institutional to-do’s on the way to accession to be completed rather soon, they perceived the challenge to lie in changing mindsets in society, including public officials – nevertheless, they remained confident at that point.¹⁴⁶⁰

Repeating their exercise of giving an account of the status of Turkish democracy in light of EU-Turkey relations eight years later in 2012, they not only confirm the impasse in the EU accession process, but also the slowing down of the reform process after 2005, ‘with acute problem remaining in various

¹⁴⁵⁴ Cengiz in Cengiz and Hoffmann 2014 (n 1366) 166. See also Kurban November 2013 (n 1084) 3.

¹⁴⁵⁵ See Grigoriadis 2016 (n 1441) 136.

¹⁴⁵⁶ See e.g. Kirisci 2005 (n 750) 53.

¹⁴⁵⁷ See also Grigoriadis 2016 (n 1441) 136ff on the evident leverage of the EU on the legislative framework on minority rights in this period.

¹⁴⁵⁸ Accession Partnership 2003 (n 775) 44.

¹⁴⁵⁹ Aydın and Keyman 2004 (n 771) 46.

¹⁴⁶⁰ See Aydın and Keyman 2004 (n 771) 46.

areas such as minority rights, fundamental freedoms ... and the judiciary'.¹⁴⁶¹ Despite the fact that reforms in the area of minority rights did not stop completely, they remained rather piecemeal and the shift in concept envisaged by Aydın and Keyman in 2004 did not occur. Before looking into these reforms, we shall examine the Accession Partnerships 2006 and 2008 in terms of the priorities defined with regard to minority rights.

It can be observed that the AP 2006 introduced the heading 'Minority rights, cultural rights and the protection of minorities',¹⁴⁶² under which it foresaw the following short-term priorities:

- *Ensure cultural diversity and promote respect for and protection of minorities in accordance with the European Convention on Human Rights and the principles laid down in the Council of Europe's Framework Convention for the Protection of National Minorities and in line with best practice in Member States.*
- *Guarantee legal protection of minorities, in particular as regards the enjoyment of property rights in line with Protocol No 1 to the European Convention on Human Rights.*
- *Ensure effective access to radio/TV broadcasting in languages other than Turkish. Remove outstanding obstacles, particularly with regard to local and regional private broadcasters.*
- *Adopt appropriate measures to support the teaching of languages other than Turkish.*¹⁴⁶³

So, it can be seen that the EU intensified its attention to the issue area of minority rights and formulated conditions further concretizing the Copenhagen criteria. It seems noteworthy that at this point the Council of Europe regime explicitly became the reference framework vis-à-vis Turkey, too.¹⁴⁶⁴ Even though Turkey was not required to sign the FCNM, compliance with its principles was nevertheless made a condition. Also, the explicit reference to property rights was newly added in the AP 2006.

In the still applicable Accession Partnership 2008 the relevant provisions named under short-term priorities have been further elaborated under three sub-headings, singling out cultural rights and introducing anti-discrimination policies in a broader sense:

Anti-discrimination policies

- *Guarantee in law and in practice the full enjoyment of human rights and fundamental freedoms by all individuals, without discrimination and irrespective of language, political opinion, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation,*
- *strengthen efforts to revise curricula and textbooks so that discriminatory language is eliminated.*

¹⁴⁶¹ Aydın-Düzgüt and Keyman 2012 (n 809) 2.

¹⁴⁶² Accession Partnership 2006 (n 793) 38. Whether the shift in terminology can be traced back to Turkey having entered a new stage in the accession process after the opening of negotiations and thus a stricter and more explicit conditionality being applied could not be confirmed in the frame of this research, but it seems plausible. Similarly the question if, in turn, the formulation of this explicit and rather long list of tasks has contributed to the deterioration in EU-Turkey relations occurring in 2006 has to remain open at this point.

¹⁴⁶³ *ibid.*

¹⁴⁶⁴ The EC Progress Reports had been stating the fact that Turkey had not signed the FCNM since 2000, but without implying a requirement to sign the Convention or to comply with its principles until 2008.

Minority rights, cultural rights and protection of minorities

- *Ensure cultural diversity and promote respect for and protection of minorities in accordance with the ECHR and the principles laid down in the Framework Convention for the Protection of National Minorities and in line with best practice in Member States,*
- *guarantee legal protection of minorities, in particular as regards the peaceful enjoyment of possessions, in line with Protocol No 1 to the ECHR.*

Cultural rights

- *Improve effective access to radio and TV broadcasting in languages other than Turkish, in particular by removing remaining legal restrictions,*
- *adopt appropriate measures to support the teaching of languages other than Turkish.*¹⁴⁶⁵

While the minority and cultural rights clauses thereby remained very similar to the ones in the preceding Accession Partnership, the inclusion of anti-discrimination portrays a shift towards the broader concept of equality, which, as illustrated in section C.4 on progress reports, goes hand in hand with its treatment in a separate section in the Progress Reports since 2006.

The reforms introduced from 2006 onwards¹⁴⁶⁶ addressed primarily non-Muslim communities, with the most important one being the 2008 Law on Foundations. It improved property rights of non-Muslim community foundations – an issue which had been significantly restricted before and thus repeatedly raised as a matter of concern by the EC in its Reports. Also, the explicit provision in the Accession Partnership 2006 (see above) speaks indeed for the success of EU conditionality. The Progress Report 2008 therefore called the new law ‘a welcome step forward’,¹⁴⁶⁷ while pointing to implementation and the dialogue between the authorities and the communities being crucial. This also appears to be reflected in the pertinent wording of the Accession Partnership 2008 (with rights that have previously been called for having been granted by the new law). Apart from some other improvements for the three non-Muslim minorities in the field of education and media, progress with regard to other minorities remained limited. One such instance of progress was the establishment of a Kurdish-speaking channel of the state-owned TRT (Turkish Radio and Television) at the beginning of 2009. As mentioned in section C.1.b), neither the ‘Alevi Opening’ nor the ‘Kurdish Opening’ launched by the government in 2009 had much of an effect and both initiatives were soon abandoned again.¹⁴⁶⁸ The democratisation package, which the government embarked upon instead in 2010, did not entail any specific minority rights or anti-discrimination provisions. Some minor reforms were carried out in the field of broadcasting in 2010 and 2011, by first removing restrictions on broadcasting in other languages than Turkish at the local level and then also nationwide. 2011 also saw the Law on Foundations being amended, thereby extending property rights of non-Muslim communities, yet the critical Progress Report of the same year still perceived problems.¹⁴⁶⁹ This Report contained the following out-spoken conclusion on minority rights / anti-discrimination in general:

Overall, Turkey's approach to minorities remained restrictive. Full respect for and protection of language, culture and fundamental rights, in accordance with European standards, has yet

¹⁴⁶⁵ Accession Partnership 2008 (n 1005) 9.

¹⁴⁶⁶ This paragraph draws on Aydın-Düzgüt and Keyman 2012 (n 809) 11ff.

¹⁴⁶⁷ European Commission Progress Report 2008 (n 980) 24.

¹⁴⁶⁸ Aydın-Düzgüt and Keyman 2012 (n 809) 13, and Cengiz and Hoffmann 2013 (n 924) 424, link the initiation of the ‘Kurdish Opening’ to the AKP’s loss in local elections in 2009 and the abandonment of the initiative to public and opposition pressure in light of PKK members returning to Turkey being celebrated.

¹⁴⁶⁹ See Progress Report 2011, 29.

*to be achieved. Turkey needs to make further efforts to enhance tolerance and promote inclusiveness vis-à-vis minorities. There is a need for comprehensive revision of the existing legislation, the introduction of comprehensive legislation to combat discrimination and to establish protection mechanisms or specific bodies to combat racism, xenophobia, anti-Semitism and intolerance.*¹⁴⁷⁰

This assessment reflects the fact that the government's approach and rhetoric towards the Kurdish, but also other minorities became more nationalistic and hostile, especially in the run-up to the 2011 general elections. This has to be seen also against the background of waning EU conditionality, due mostly to decreasing credibility of the process and deteriorating EU-Turkey relations, which also showed in the EU not playing any role in the elections.¹⁴⁷¹ It has been argued that the AKP's anti-minority approach before the elections was a tactic to win nationalist votes.¹⁴⁷²

Gaining its third election victory, yet not the two-thirds majority it had strived for, the AKP's attitude towards the Kurdish question became more lenient again in the following years. In 2013 the government embarked on a peace process with the PKK leader Öcalan and in September announced another democratisation package. This package, adopted by the parliament in March 2014, had been expected to bring about far-reaching changes,¹⁴⁷³ yet turned out as continuing 'the state tradition [of] piecemeal and implicit reformism'.¹⁴⁷⁴ Nevertheless, it comprised some important improvement with regard to language rights: the use of the letters q, x and w, which are not used in Turkish, but in Kurdish, was permitted for official documents – which also bears a lot of symbolic character of recognition of the Kurdish identity (even though, again, not legally as the laws stay neutral). Furthermore, the package allowed for old, non-Turkish place names to be re-adopted (but with some limitations), constituting a 'gradual abandonment of ... assimilationist policy',¹⁴⁷⁵ with implications both for Kurds and Armenians. Also, the possibility for private schools to teach in languages other than Turkish was instituted. The fact that mother-tongue education was not also foreseen for public schools met a lot of criticism because of the socio-economic situation of Kurds in the south-east restricting their access to private schooling. Reforms in this field would however need a constitutional amendment and hence a qualified majority in parliament.¹⁴⁷⁶ As for minorities' political activities, the package introduced the right of political parties to campaign in other languages than Turkish.¹⁴⁷⁷ Finally, the package brought about provisions to the Penal Code sanctioning hate crime for the first time, but without including ethnicity as well as sexual orientation and identity among the protected grounds.¹⁴⁷⁸

It shall be mentioned at this point that 2013 also saw the adoption of the Law on Foreigners and International Protection, bringing some improvements for the status of asylum-seekers and

¹⁴⁷⁰ *ibid* 38.

¹⁴⁷¹ See Kubicek in Cengiz and Hoffmann 2014 (n 812) 204.

¹⁴⁷² See Aydın-Düzgit and Keyman 2012 (n 809) 13, and Cengiz in Cengiz and Hoffmann 2014 (n 1366) 170.

¹⁴⁷³ See Kurban November 2013 (n 1084) 2.

¹⁴⁷⁴ *ibid*.

¹⁴⁷⁵ Kurban November 2013 (n 1084) 5.

¹⁴⁷⁶ See *ibid* 6.

¹⁴⁷⁷ See *ibid* 3.

¹⁴⁷⁸ See Minority Rights Group *International State of the World's Minorities and Indigenous Peoples 2014* (July 2014) 182, <http://minorityrights.org/wp-content/uploads/old-site-downloads/mrg-state-of-the-worlds-minorities-2014.pdf> accessed 29 February 2016.

beneficiaries of international protection, who can be considered as new minorities. The EC has particularly addressed the situation of Syrian refugees in the country in its Progress Reports since 2012, commending Turkey for its humanitarian assistance and the good conditions in the refugee camps while also raising some issues of concern, especially for refugees living outside of these.¹⁴⁷⁹ The situation of refugees is treated in some more detail in section C.6 due its strong links to the visa liberalisation dialogue and the requirements under it (as well as the EU-Turkey Joint Action Plan of 2015).

With regard to the anti-discrimination policies called for in the Accession Partnership 2008 and consistently addressed in the EC Progress Reports of the last ten years, as of end of 2015, Turkey still lacks the needed comprehensive legislation as well as a specialised equality body. Neither the Ombudsman Institution nor the National Human Rights Institution established in 2012 have a specific anti-discrimination mandate. As elaborated in section C.6, again there is a linkage here to the visa liberalisation dialogue, with the visa roadmap containing a specific requirement on anti-discrimination and social inclusion as regards Roma and the EC's first VLD report also recommending the adoption of general anti-discrimination legislation (as has consistently and with growing urgency been done in the Progress Reports over the last years). What shall be underlined once more is that, while neither the government's Action Plan on Prevention of ECHR Violations 2014 nor the two National Action Plans for EU Accession of the same year speak of minority or cultural rights, National Action Plan for EU Accession 2014-2015 foresees the adoption of the Law on Anti-Discrimination and Equality. Yet, as pointed out before, the implementation of the Action Plan is delayed (the Law, as a case in point, should have been passed by mid-2015.) Again, it remains to be seen whether the now envisaged schedule within the visa liberalisation process can bring about action in this regard (see also the outlook in section E).

Also, the opening of negotiations on chapter 19 (see C.2), once possible, would be hoped to also have positive effects in the field of anti-discrimination as well as gender equality. As for the pending chapter 23 opening benchmarks, there is a chance that the EC in reviewing the ones envisaged in 2007 (which did not explicitly refer to minority rights or anti-discrimination) may adapt them in a way that reflects the priority and growing urgency it has given to these issues elsewhere since then.

To conclude, minority rights have right from the beginning of Turkey's accession process been subject to strong EU conditionality. In the period between 1999 and 2005 this has led to substantial reforms which can – not because of their quantity, but because of their significance - be perceived as transformation and which can be attributed to EU influence.¹⁴⁸⁰ Despite the slow-down in the accession process after 2006 and a stalemate in reforms in other human rights areas gradual reforms continued. This even holds for the period since 2011, which is marked by backsliding with regards to other human rights issues. However, the reforms affected mostly the three recognized non-Muslim minorities as well as the Kurdish population group. The situation of other minorities, among these Alevi and Roma, remains an issue of concern, with the EC continuing to report discrimination.¹⁴⁸¹ The slow and incomplete, yet unabated progress in minority rights protection (without many reforms in

¹⁴⁷⁹ See European Commission Progress Report 2012 (n 1407) 35; European Commission Progress Report 2013 (n 823) 16; EC Progress Report 2014 (n 823) 18; EC Progress Report 2015 (n 797) 25.

¹⁴⁸⁰ See also Grigoriadis 2016 (n 1441) 140.

¹⁴⁸¹ See EC Progress Report 2015 (n 797) 68f.

fact being tagged that way, given the still restrictive definition of minorities in Turkish legislation) can again be seen as a result of both resilient EU impact and domestic factors. Especially with regards to the Kurdish question, the AKP government has been perceived as acting upon incentives of power gains which a resolution of the issue would bring.¹⁴⁸²

Still, minority rights as such remain a sensitive issue, touching national identity and statehood, involving high domestic adaptation costs, which may explain the piecemeal approach taken by the Turkish government. In view of the breakdown of the peace process with the PKK last summer and the current situation in the south-east, the odds for minority rights, notably Kurdish rights to be strengthened in the near future are not too good. It shall be emphasized here again that the situation in the south-east of Turkey with escalating violence and alleged major human rights violations¹⁴⁸³ poses a particularly serious issue from the perspective of human rights. As we have outlined in section C.6 when looking at the visa liberalisation requirement of freedom of movement, the 2015 Progress Report has taken up the problematic curfews imposed as well as the killing of civilians, notably in Cizre. It, furthermore, criticised the curtailing of media freedom, restrictions to freedom of assembly, law enforcement authorities applying their new powers granted by the 2014 internal security package.¹⁴⁸⁴ The Report's call for proportionality of anti-terror measures¹⁴⁸⁵ was, as we have pointed out earlier, reiterated and somewhat sharpened by Commissioner Hahn's speech of 20 January 2016: 'The proportionality and legality of such operations must be ensured and should comply with international human rights standards'.¹⁴⁸⁶ Holding this speech at the European Parliament five days before the High-Level Political Dialogue meeting in Ankara on 25 January 2016, he ended with the pledge that '[t]he Commission will work with the new government on all reforms in the areas of rule of law and fundamental rights, freedom of religion and expression'.¹⁴⁸⁷ While he did not mention minority rights explicitly there, he called for 'an urgent return to the Kurdish Peace process' and also pointed to the High-Level Political Dialogue as 'another opportunity to raise these issues'.¹⁴⁸⁸ The situation in the south-east was raised there, judging from the statement by High Representative Mogherini after the meeting, announcing more discussions.¹⁴⁸⁹ Whether the EU could take an active role in a peaceful settlement, as called for by Dilek Kurban already in 2013,¹⁴⁹⁰ and how would need to be made the topic of further research.

¹⁴⁸² See e.g. Cengiz in Cengiz and Hoffmann 2014 (n 1366) 168.

¹⁴⁸³ See Today's Zaman 'Rights activist Kaya: Gross human rights violations committed in Cizre', 13 September 2015, http://www.todayszaman.com/monday-talk_rights-activist-kaya-gross-human-rights-violations-committed-in-cizre_399006.html accessed 21 December 2015; Amnesty International Public Statement 11 September 2015 (n 1333).

¹⁴⁸⁴ See European Commission Progress Report 2015 (n 797) 25 and 65.

¹⁴⁸⁵ *ibid.* 22.

¹⁴⁸⁶ European Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn *Situation in the South East of Turkey* (n 1335).

¹⁴⁸⁷ *ibid.*

¹⁴⁸⁸ *ibid.*

¹⁴⁸⁹ See European External Action Service 'Remarks by High Representative/Vice-President Federica Mogherini at the press conference following the EU-Turkey High Level Political Dialogue Meeting', Ankara, 25/01/2016, <http://eeas.europa.eu/statements-eeas/2016/160125_02_en.htm> accessed 29 February 2016.

¹⁴⁹⁰ See Kurban November 2013 (n 1084) 8.

E. Conclusions

By ‘zooming’ in on the two issue areas of gender equality and minority rights in the preceding section, we could observe that the EU’s leverage on human rights in Turkey has unfolded rather differently, despite the, as one could argue, same underlying concept of equality and inclusion. It could be seen that the robustness of EU acquis or lack thereof do not prejudge how strongly conditionality can be applied and how much impact EU policy can have. While in the case of gender equality the EU’s legal framework is rather elaborate, minority rights were only taken up into EU primary law with the Treaty of Lisbon of 2007 (with their treatment on legislative basis being largely limited to the anti-discrimination directives). Still, and in contrast to what one may expect, EU conditionality towards Turkey was, by comparison, stronger with regard to minority rights, having been a priority throughout the accession process, than gender equality, in the case of which the conditionality relationship only evolved. The fact that the EU gave more attention to minority rights (with a clear focus on Kurdish rights in the early years) may be linked to security deliberations (see also section B.1 on securitisation). Whatever the reasons, treating the two issues asymmetrically can be regarded as a case of internal-external inconsistency in view of their different status within the EU’s legal framework.¹⁴⁹¹

What both issue areas have in common is that significant reforms happened in the ‘golden years’ period until 2005 and selective, piecemeal reforms continued to be launched by the Turkish government thereafter. However, backsliding phenomena have occurred in the field of gender equality / women’s rights over the last years, reflected on both political and societal levels, coupled with persistent problems of law implementation. The constitutional amendments of 2014, on the other hand, brought further improvements for minorities (though again in a selective way). While we can observe EU conditionality to be at play to some extent there (thus a case of its resilience, following Sedelmeier¹⁴⁹²), domestic factors seem decisive - also considering that EU demands on gender equality at the same time appear to be less influential. The AKP government arguably has found higher incentives (related to power gains) in giving some more rights to minorities, notably the Kurds, than in effectively promoting gender equality.

The detailed analysis of these two issue areas links in with the following general conclusions on the EU’s impact on human rights in the Turkish case (keeping in mind that it is evidently not possible to exactly trace causalities). After EU enlargement policy, with human rights conditionality as a central tool, and the domestic reform process had interlocked in a virtuous cycle fashion from 1999 until 2005, the stalemate of the accession process from 2006 onwards has been accompanied by a slow-down in human rights reforms. These – like the accession process - did not come to a complete standstill, but they became more selective and dependent on domestic factors, i.e. the AKP government’s policy choices becoming more determined by domestic deliberations. In a setting where the EU membership perspective turned increasingly intangible and the accession process considerably lost in credibility through being politicised for EU internal or bilateral reasons, EU conditions and criticism - both of which in fact have been heightened, if one looks at the Accession Partnerships and the Progress Reports since 2006 – have taken more of a back seat in terms of influencing domestic human rights policies. While this is not to say that the EU has completely lost its function as external anchor for human rights reforms in Turkey, the way how reforms have been approached over the last years and

¹⁴⁹¹ See Cengiz in Cengiz and Hoffmann 2014 (n 1366) 174.

¹⁴⁹² See Sedelmeier 2014 (n 910) 1.

especially the concurrence with serious backsliding in a number of areas give an indication that the influence of EU policy has been rather limited, at least since 2011. As has been outlined, this has gone hand in hand with growing general estrangement between the EU and Turkey as well as increased power of the AKP government, now in its fourth term in office since November 2015. The government's policy preferences have been and will continue to be the determining factor for domestic change processes, be they in line or at odds with EU requirements.

From an EU perspective, the question remains if and how the trend of past years can be reversed and how the EU can assume a more prominent role as human rights promoter in Turkey again. This question revolves around the main issue of credibility, which we can capture in two dimensions: firstly, credibility of Turkey's accession process and the EU's role in it; and secondly, credibility of the EU as human rights actor in general, inseparably linked of course to its capacity as norm exporter. Both dimensions hinge on existent or future inconsistencies.

Turkey would first of all need to be consistently perceived as a candidate country rather than a strategic partner in order to aim for convergence of norms/values and not only of interests.¹⁴⁹³ It is in the enlargement frame that human rights issues are given close attention and scrutiny whereas their importance is likely to decrease in the context of a strategic partnership without any membership implications.¹⁴⁹⁴ We have outlined earlier (see section B.4) that there are indications that currently Turkey is seen more as a strategic partner with whom the EU negotiates joint action in order to solve its asylum policy crisis. However, since the agreement comprises also the reviving of accession negotiations, the enlargement lens is likely to gain in significance again.

Looking at Turkey's accession process then, the most crucial inconsistencies can be found in unilateral blockages of negotiation chapters without formal grounding. While the 2006 suspension of the six chapters entangled with Turkey's not acknowledging Cyprus has a legal basis in the corresponding Council decisions as well as the Additional Protocol to the Association Agreement, ensuing vetoes by Member States with regard to certain other chapters, thus preventing progress of the technical process of negotiations on these, can be regarded as undue politicisation and nationalisation, inconsistent with the merit-based concept of negotiations. As for chapter 23 'Judiciary and fundamental rights', the halt on the adoption of the Screening Report and the opening benchmarks for about nine years has to be considered particularly inconsistent, not only because Turkey ought to be given official information on what the EU's conditions are for opening this chapter, so that conditionality becomes transparent and traceable in this regard and that Turkey can proceed towards opening this chapter by fulfilling the requirements; but also because the EU not treating this chapter (together with chapter 24 'Justice, Freedom and Security') as a priority over other chapters is in clear contradiction to its new approach to negotiations applied since 2012, giving precedence to these chapters. So, on the basis of our previous categorisation (see Table 2 as well as the introductory remarks in section C.1) we can find two types of inconsistency here: inconsistency between enlargement countries (enlargement policy/tools not being applied objectively and transparently) on the one hand and inconsistency between rhetoric and action on the other hand.

¹⁴⁹³ See Dimitar Bechev and Natalie Tocci 2015 (n 886) 2.

¹⁴⁹⁴ See Aydın-Düzgit and Tocci 2015 (n 713) 172f.

What is more, the EU's inability to come to a constructive and engaging approach towards Turkey on human rights issues by moving ahead on chapter 23 during and after the Gezi Park protests in 2013 can be seen as another form of inconsistency, in that it did not use its arguably most effective tools vis-à-vis candidate countries, i.e. negotiations and benchmarking.¹⁴⁹⁵ Also, as outlined in section C.1.c), this missed opportunity of exerting influence by getting down to 'talk serious business' (which the EC could only very limitedly compensate via the Positive Agenda) may have contributed to further backsliding since then, while it in any case has had detrimental effects on the EU's position as external agent of human rights promotion. The criticism it has continuously been voicing on Turkey's human rights situation was in this sense not followed by action through unfreezing chapter 23 (while other forms of engagement were sought by the Commission).

The rapprochement between Turkey and the EU over the refugee situation since autumn 2015 has instilled new momentum into the accession process. The decision on opening chapter 17 'Economic and monetary policy' (arguably interrelated with the EU-Turkey Joint Action Plan on refugees and migration, see section B.4) can be seen as a further instance of other issues inconsistently being given priority over human rights; the same holds for the decision to next open chapter 33 'Financial and budgetary provisions' before end of June 2016, as agreed at the last summit on 18 March 2016.¹⁴⁹⁶ Yet at the same time, the Commission started a review process of the Screening Report on chapter 23 in autumn 2015. While eventual progress will depend on political dynamics (as regards the Cyprus issue, but also further joint action in the asylum policy crisis and potential influence by Germany on the unblocking of chapter 23), the Commission, from a technical point of view, would have the opportunity to come up in its review with a list of opening benchmarks that take into consideration both the reforms carried out by Turkey since 2006 and persistent human rights areas of concern. This means that the unofficial benchmarks of 2007 could be fine-tuned and updated, which technically speaking would be feasible and logical given the developments since then and the fact that the 'old' benchmarks have never been adopted. Such a revision would give the EU the possibility to tackle backsliding of the last years and thereby gain some leverage in these areas – if the Council arrives at adopting the revised documents. Moving ahead on chapter 23 by holding Turkey responsible for its deteriorating human rights record through the adoption of revised opening benchmarks would not only do away with the 'old' inconsistency around the chapter,¹⁴⁹⁷ but would also avoid new inconsistencies and discrepancies (which would occur if the benchmarks drafted nine years ago would be handed out unchanged to Turkey). By addressing the problematic human rights situation through the tool of benchmarking on chapter 23 may give the EU a new possibility for leverage in the field as well as strengthening the credibility and consistency of its enlargement policy towards Turkey – all the more at a time when it is suspected of trading human rights against Turkish support in solving its asylum policy crisis.

¹⁴⁹⁵ See Arisan Eralp April 2015 (n 1016) 5.

¹⁴⁹⁶ See EU-Turkey statement 18/03/2016 (n 868) point 8.

¹⁴⁹⁷ Approval of the Screening Report and the opening benchmarks can hence not be considered a reward, but a technical step or means of determining conditions and thereby triggering reforms (see section IV.C.2 for a more detailed reasoning).

The current situation, in which the EU seeks cooperation with Turkey in dealing with the high number of refugees crossing the Union's borders,¹⁴⁹⁸ can be characterised as one where the enlargement-inherent power asymmetry between the EU and Turkey is further and considerably changing to the benefit of Turkey. Such a shift in power relations, following Börzel and Soyaltin (see section C.1.b),¹⁴⁹⁹ makes it more difficult for EU conditionality to succeed, yet exactly in this setting it is essential for the EU to apply credible and consistent human rights conditionality towards Turkey and to not 'sell out' its values. This is also of utmost importance for the visa liberalisation dialogue (VLD), presently constituting – with the future of chapter 23 accession negotiations continuing to remain unclear at the time of writing – the key instrument of inducing human rights (relevant) reforms in the country. Yet, at the same time the VLD has become a central 'bargaining chip' between the EU and Turkey in coming to terms on joint action regarding refugees and migrants - which poses a serious risk to the entailed human rights conditionality. As we have elaborated in detail in section C.6, the visa liberalisation roadmap contains not only a specific block with fundamental rights requirements, but also a number of further benchmarks which have human rights implications, all the more in the current refugee situation within Turkey and at its borders. On the basis of the Commission's monitoring and selected NGO reports, we have traced progress as well as considerable open issues with regard to the VLD requirements. While the dialogue process has been protracted before (the reasons for which could not be established in this study, still one could perceive inconsistency here, too), the EU-Turkey summits on 29 November 2015 and 18 March 2016 brought agreement on accelerating the process. June 2016 as the now envisaged date for lifting the visa regime for Turkish citizens is conditional on the fulfilment of all 72 requirements. Since November, the Turkish government appears to have intensified its efforts to meet the VLD benchmarks by working on a number of bills, including protection of personal data and anti-discrimination.¹⁵⁰⁰ It was reported to have submitted the anti-discrimination draft law to parliament at the end of January,¹⁵⁰¹ but the law has apparently not been adopted yet (as of end of March 2016). However, the government's proposal has received massive criticism from Turkish human rights NGOs for a number of reasons, concluding that 'that there is no agenda supporting the protection of human rights and equality principles' and that the law is just 'a step taken for the sake of securing the negotiation for lifting the visa requirements'.¹⁵⁰² This case points towards the risk that in an accelerated dialogue process the reforms carried out by the Turkish government follow an instrumental logic, remain incomplete and/or continue to exhibit lacking consultation with stakeholders. In terms of EU policy, there is the additional risk that, in the current political situation of perceived dependency on Turkey, either the EC's monitoring may be downsized in terms of strictness of scrutiny (which is reinforced by the fact that the VLD requirements leave some

¹⁴⁹⁸ This can be most clearly seen in the rapprochement between Germany and Turkey, with the German Chancellor Merkel meeting Prime Minister Davutoglu at regular intervals (see e.g. *Süddeutsche Zeitung*, 'Merkel in der Türkei - Nato soll Schlepper bekämpfen', 8 February 2016, <<http://www.sueddeutsche.de/politik/merkel-in-der-tuerkei-nato-soll-schlepper-bekaempfen-1.2853998>> accessed 20 February 2016).

¹⁴⁹⁹ See Börzel and Soyaltin 2012 (n 909) 11.

¹⁵⁰⁰ See Daily Sabah 'Turkish parliament to draft critical bills for EU visa liberalization', 29 December 2015, <<http://www.dailysabah.com/eu-affairs/2015/12/30/turkish-parliament-to-draft-critical-bills-for-eu-visa-liberalization>> accessed 20 February 2016.

¹⁵⁰¹ *ibid.*

¹⁵⁰² Human Rights Foundation of Turkey 'Government Statement Regarding the Establishment of the Human Rights and Equality Institution of Turkey: the Issue of the Institutionalization of Human Rights is Perceived Fully from an Instrumental Perspective!', 18 January 2016, <<http://en.tihv.org.tr/government-statement-regarding-the-establishment-of-the-human-rights-and-equality-institution-of-turkey-the-issue-of-the-institutionalization-of-human-rights-is-perceived-fully-from-an-instrumental-p/>> accessed 20 February 2016.

room for interpretation as to measuring their degree of fulfilment); the summary assessment provided in the second VLD report of March 2016 (see section C.6) points towards this risk. Another one is that the Member States come to the decision of prioritizing certain requirements over others or lifting the visa regime without all requirements being (completely) fulfilled for reasons of political expediency. Such moves would undermine the concrete human rights impact the EU could have through the VLD instrument, would damage its credibility vis-à-vis Turkey even further and would signify another step away from the Union re-gaining the role as driver for political reforms in the country.

Waiving human rights requirements – either within the VLD or the accession process – would in the present moment not only be to the detriment of relations with Turkey as an enlargement country, but would have negative effects on enlargement policy at large by applying double standards and thus decreasing the EU's credibility also vis-à-vis the other enlargement countries. What is more, renouncing strict and consistent human rights conditionality towards Turkey now and trading it off for Turkey's support in reducing the number of refugees coming to the Union would seriously harm the already shaky identity of the EU as human rights actor and would exacerbate the current internal value and identity crisis.

Applying a credible and consistent human rights policy towards Turkey thus appears as a litmus test for the EU surviving the present crisis as a value-based community. Equally essential are of course the policies it and its Member States chose to embark on internally as well as vis-à-vis the Western Balkan countries. If human rights considerations are not sufficiently taken into account in asylum and migration policies by the EU or its Member States, this constitutes a shattering blow to the EU's identity as human rights promoter. If there is no political will to address human rights of refugees and migrants internally, they will not be raised in relations with Turkey, as we have illustrated. The present EU crisis, which has become so closely entangled with the Union's already complex relationship with Turkey, thus makes the two-way influence at work between enlargement policy and general human rights policy even more obvious and reveals very clearly the focal point: the EU's consistency and credibility throughout, which these days appear not only significant, but indispensable for the EU to maintain its identity as human rights promoter and normative power.

V. Conclusions: assessing consistency and coherence across the cases

The report analysed the application of EU human rights conditionality both on the level of commitments and in their implementation. The former consisted in comparing the EU's stated goals with the adopted actions, while the latter meant contrasting the EU's overall activity with the changes on the ground. Here we will revisit the conceptual framework from the introduction by building on the conclusions from the country case studies. The main source of criticism concerning EU action, or lack thereof, relates to the consistency and coherence of conditionality. To be able to assess how these can have a disparate impact on the effectiveness of conditionality, we have to look first at what types of inconsistencies we find. In what follows, we will look at six areas: inconsistencies on the level of stated goals and actions; on the level of the various instruments applied in the enlargement context; on the level of the various types of human rights; on the level of the standards applied; on the level of how standards are operationalised at the various stages of the pre-accession process; and on the level of internal and external policies.

A. Inconsistencies: values vs. interests, rhetoric vs actual performance

The review of the EU's engagement in Bosnia and Herzegovina from 2000 to 2015 and in Serbia from 2009 to 2015 shows that human rights have played an important role, but this was true more on the level of rhetoric than regarding EU action. In the case of Turkey, we witnessed a tension between the political decision to upgrade the country's status on the enlargement roadmap and the more consistent assessment, by the Commission, of the country's actual progress.

In the case of Bosnia, contrasting progress reports with European Partnership documents from the first half of the examined period (2000-2008) reveals this discrepancy. Progress reports include a detailed assessment of a wide range of human rights issues, already in the mid-2000s. European Partnership documents that set short and middle term objectives for Bosnia included only a few of the human rights issues identified in the progress reports. For instance, concerning media freedom, partnership documents mostly discussed the broadcasting reform and left out pressing problems like intimidation of, and political pressure on, journalists. In the case of minority rights, they appeared in partnership documents as a challenge for electoral rights. Other aspects of discrimination against minorities, such as in the field of education and employment, or the phenomenon of ethnically motivated incidents – problems discussed extensively in the progress reports – remained largely unaddressed in the partnerships. Prison conditions, the right to legal aid, religious intolerance, discrimination on other basis than ethnicity such as sexual orientation, women's rights, children's rights, the situation of civil society and access to social protection are further problems that were raised in the progress reports but were not included in the partnership priorities. The human rights conditionality leading up to the signing of the SAA was even narrower. In 2005 the Commission, in its communication, recommended opening SAA negotiations with Bosnia, and only set ICTY cooperation and the broadcasting reform as strict conditions. The Commission also mentioned, though not as essential conditions, the need to bring the electoral system in line with the ECHR, make progress on the creation of the single ombudsman office and data protection. To sum up, the EU focused on a few specific topics only during this initial period: the development of human rights institutions, broadcasting reform, refugee return and ICTY cooperation, while the European partnership

documents and progress reports contained a much wider range of human rights requirements. The success cases of EU conditionality are largely limited to these few priority areas. The more striking aspect of conditionality is that while progress reports and partnership documents monitored a wider range of human rights issues, the lack of progress in these areas did not seem to matter when the EU decided to sign the SAA.

After concluding the SAA in 2008, the EU's human rights agenda for Bosnia continued to centre on a few strategically important human rights subjects, most of which had important security implications. These include minority rights, especially the rights of the Roma, war crimes prosecution, refugees and IDPs, media freedom and antidiscrimination. In the case of Roma rights, the phenomenon of Roma migration from Southeast Europe in the EU played a role in devising the EU framework on Roma inclusion in the enlargement context. Refugee return and war crimes prosecution were promoted as important tools to foster reconciliation and regional stability, while refugee return became a high priority also because many refugees found a place in Western Europe whose return was desirable. The protection of minorities and anti-discrimination are instrumental in overcoming ethnic tensions. Conditionality concerning media freedom, especially its institution building aspect (broadcasting services and the Communication Regulatory Agency) served the de-ethnicization of the media sector in order to reduce ethnic divisions and tensions. Thus the EU's human rights agenda was shaped by the goals of security and stability, which is not that surprising in a post conflict environment. Yet, this also meant that while the EU heavily invested in the promotion of a few human rights issues, the assessment of other human rights areas remained mostly a façade, a legitimizing device of the general policy framework. The overwhelming emphasis on the Sejdić-Finci case marginalised other important aspects of minority protection, and of human rights in general up until 2015. The EU did not push for the option to declare oneself of ethnicity other than Serb, Croat or Bosniak in the 2013 census, despite request from domestic NGOs. The statement that it will not recognise the election results if elections were carried out in violation of the ECHR was also not more than an empty threat. These examples show the shallowness of human rights engagement with Bosnia.

It was the 2015 enlargement report that brought a change in tone, a shift that suggests that before 2015 human rights conditionality was motivated more by security concerns than by normative considerations. The 2011 and 2012 Progress Reports found that both civil-political and socio-economic rights were broadly respected, while in 2013 the Report noted that 'overall, the legal and institutional framework for the observance of human rights is in place' and only implementation had to be 'improved'.¹⁵⁰³ In 2014 the EU also presented an overall positive assessment by stating that 'the legal and institutional framework for the observance of human rights is in place and the main elements of international human rights laws have been incorporated into the legal system.'¹⁵⁰⁴ The question arises why Bosnia received such a harsh criticism in 2015 once the EU was more or less satisfied with Bosnia's human rights record in 2011, 2012, 2013 and 2014. It is improbable that the conditions worsened significantly from 2014 to 2015. Previously the EU's critical remarks concerning Bosnia's human rights performance were mostly about 'uneven' implementation. By contrast, in 2015 the EU also saw the need for substantial improvement in the legal and institutional framework. The EU's approach has

¹⁵⁰³ EU Progress Report Bosnia 2013, 19. http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf.

¹⁵⁰⁴ EU Progress Report Bosnia 2014, 20. http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf.

clearly changed, finally expressing criticism and raising demands that should have been voiced earlier, considering Bosnia's record. There is a perception in the EU that there is stronger leverage on the EU's side to raise issues on human rights now that the SAA entered into force, the new reforms initiated by the Compact for Growth agenda were launched and Bosnia applied for membership. The European Commission's more serious attitude towards the human rights performance of Bosnia also stems from the fact that the Commission began to assess human rights in the context of the Opinion it has to prepare now that Bosnia submitted its membership application.

In Serbia's case there has been a similar gap between the rhetoric on human rights and the EU's real treatment of this candidate state. Serbia was awarded candidate status in 2012 and opened accession negotiations in 2014, and as a result human rights got a stronger emphasis from the EU's side and became part of the 'essential conditions' of accession. At the same time, human rights have constituted just one of the different objectives of the EU for Serbia. Besides the normalisation of relations with Kosovo, judicial reform, fight against corruption and organised crime, and economic reforms were also important goals. As a result of the EU balancing between these various objectives, Serbia could move forward on the EU integration path, owing to its efforts to improve relations with Kosovo, despite serious relapses in the rule of law area. The conditions of free expression have deteriorated in the recent years despite Serbia's formal compliance with the EU's requirements, and despite the EU's ever stronger criticism of the Serbian government for its crackdown on media freedom. This was accompanied by growing attempts on behalf of the authorities to undermine independent institutions, most importantly the Ombudsman who criticized the government for the worsening human rights situation not only concerning freedom of expression but also with regards to socio-economic rights. Despite the EU's criticisms, Serbia's integration process was not halted, and in December 2015 the first chapters were opened for membership negotiations. Just like in Bosnia with the Sejdić-Finci issue, in the case of Serbia the Kosovo question seems to have trumped a more robust, complete and comprehensive human rights conditionality.

Both cases confirm the EU's reluctance to use negative conditionality. The EU has generally refrained, in the case of both countries, from applying sanctions for the inadequate fulfilment of human rights criteria except for the issue of ICTY cooperation and compliance on the Sejdić-Finci case. Concerning Bosnia, the failure to meet even essential conditions (broadcasting reform and the Sejdić-Finci case) did not constitute an obstacle to signing and ratifying the SAA. Although the Sejdić-Finci case put Bosnia's integration process on hold from 2009 to 2014, at the end, the EU eased this condition in the face of clear non-compliance. The EU was keen on sustaining its engagement with Bosnia and struggled to exercise its influence on the country especially after 2008 when Bosnian political leaders showed reluctance to give heed to the EU's demands. Prior to the Compact for Growth agenda, announced by the end of 2014, the EU lacked a strategy as to how to tackle Bosnia's deadlock which, if unaddressed, threatened with the renewal of instability in the country as well as in the wider region. In Serbia's case, since 2011 when Serbia extradited the last high profile war criminals to The Hague, the normalisation process with Kosovo determined key EU decisions concerning Serbia's accession, such as receiving candidate status in March 2012 and opening accession negotiations in January 2014. Relapses in the human rights field, especially in the area of freedom of expression and media freedom, met with harsh criticism from the EU, yet no consequences followed.

Both Serbia and Bosnia and Herzegovina could progress further on their track of EU integration without fulfilling basic human rights criteria. Altogether the integration process was never halted or

delayed because of inappropriate progress in the area of antidiscrimination, Roma rights, media freedom or the right for asylum, but also other human rights issues monitored in the progress reports could be mentioned. This suggests that the EU integration process appears to depend either on the country's commitment to a pro-EU course, such as in Serbia's case, or the EU's motivation to stay engaged regardless of the country's performance as happened in Bosnia.

The accession process of Turkey presents a somewhat different picture. We have demonstrated that the status of human and minority rights in the country have played an important role in both the EC's negative 1989 opinion on Turkey's application for EU membership and the EC Agenda 2000 of 1997 as well as the European Council's decision in Luxembourg that year not to grant Turkey candidate status. The decision on refusal could be regarded as the EU handing out a (legitimate) sanction. The report has shown that two years later, in 1999, the situation had improved only to a limited extent and yet, there were some signals towards political reform. This happened in parallel with a changed political setting within the EU, notably in the positions of Greece and Germany. At the 1999 Helsinki European Council meeting, Turkey was granted candidate status. It can be concluded that the political shifts within the Union played a larger role for this step than the modest improvements and the prospect of political reforms. The awarding of candidate status, however, appears always as a political decision given that the EU systemically lacks (even vague) indicators for when to take this decision. It can resort to the EC's monitoring and recommendations, but not to a roadmap, benchmarks or the like at this stage.

The Council's decision on the opening of negotiations, which one could see as the next step of upgrade in the process, on the other hand, is bound to the assessment of the candidate country sufficiently fulfilling the Copenhagen criteria. The term 'sufficiently' is obviously rather vague, but can be interpreted in the concrete case by referring – next to the EC's Progress Reports – to the Accession Partnership documents and National Action Plans for the Adoption of the Acquis providing roadmaps for reform and obliging as a 'legal matrix'¹⁵⁰⁵ both the EU and the candidate country. As for Turkey, we have seen that the incentive of starting accession negotiations triggered considerable human rights reforms in the years 1999-2005. We have examined this in more detail, including the interlinkages with the Accession Partnerships of 2001 and 2003, in the mini case studies on gender equality and minority rights. While we have argued that the EU's continuous attention to the Kurdish minority can be linked to security considerations, too, we have not traced the same degree of securitisation of human rights like in the cases of BiH and Serbia. All in all, we can conclude the decision to formally open accession negotiations with Turkey was consistent and substantiated from the human rights perspective. This could also be seen in the EU threatening to postpone this decision in case if the new Penal Code would not be passed in line with EU standards beforehand, which can be defined as another instance of negative conditionality.

What happened gradually after the launch of negotiations, however, i.e. the unilateral blockage of chapters due of bilateral reasons, notably Chapter 23, can be depicted as the most crucial inconsistency in the case of Turkey. The accompanying loss of credibility of the membership perspective was also fuelled by the discourse within the Union with some Member States bringing up culturalist, identity-based arguments against Turkey's future accession. This was coupled with a slow-down of reforms domestically and yet, the denial of progress on Chapter 23 was not linked to the

¹⁵⁰⁵ Tatham 2009 (n 714) 292.

protracted human rights reform process, but merely to political deliberations. Especially from 2011 onwards, EU criticism on the human rights situation in Turkey grew, yet engagement on Chapter 23 remained blocked. The EC devised the Positive Agenda as a new tool in 2012 to enable EU-Turkey dialogue on issues otherwise inaccessible for talks, with the Chapter 23 working group being given particular significance. As was highlighted in our analysis, its success in terms of concrete leverage is difficult to assess, all the more in light of the deteriorating situation with the Gezi Park protests in 2013. The fact that the Member States did not follow the Commission's call to proceed on Chapter 23 by handing out opening benchmarks to Turkey, thus enabling more engagement on human rights issue and setting clear conditions at a time when it seemed most needed has to be reiterated as a major inconsistency - not only with the new approach and its priority treatment of Chapter 23 (and 24), but also the clear human rights concerns voiced by the EU and its members. With this situation of politicisation of the accession process not having changed since and Chapter 23 still 'frozen', we can therefore reiterate this as a rhetoric vs. action or values vs. interest type of inconsistency.

While we have found some signs for a potential 'unfreezing' of Chapter 23 in the near future, at least preparatory activities on part of the Commission, it remains uncertain which political dynamics we are to observe in 2016. With the EU's current asylum policy crisis and its attempts to solve it through intensified cooperation with Turkey, there comes up the risk of new inconsistencies between values and interests. As emphasized explicitly and in more detail in the concluding chapter in the Turkey case study (section IV.E), it seems of paramount importance that the crisis and the perceived shift in power relations to the benefit of Turkey (which may not even be that clear) does not result in the EU becoming more reluctant to raise human rights issues vis-à-vis Turkey (be it publicly or behind closed doors), lowering human rights conditionality standards (in the accession process or the visa liberalisation dialogue) or turning a blind eye to its own or Turkey's treatment of refugees and migrants.

B. Internal coherence: instruments, institutions and prioritization

The overview revealed clear human rights priorities for the EU both in Serbia and Bosnia. The EU relied on a whole arsenal of instruments vis-à-vis Bosnia, not only conventional tools that are part of enlargement policy but also special instruments designed to keep the country engaged, such as the Structured Dialogue on Justice, the High Level Dialogue on the Accession Process and the Compact for Growth. With the exception of the EIDHR, none of the applied instruments was human rights specific. On the other hand, human rights were not lumped together with other political conditions and have been targeted specifically, by different issue areas. The instruments focused on particular human rights among which high priority was given to a number of topics that included, before 2008, the development of human rights institutions, broadcasting reform, refugee return and ICTY cooperation. After 2008 the priorities incorporated minority rights, Roma rights, war crimes prosecution, refugees and IDPs, media freedom and antidiscrimination. Moreover, two of the so-called special instruments promoted two selected human rights topics: anti-discrimination in the case of the Structured Dialogue on Justice and the Sejdić-Finci issue (the electoral rights of minorities by advocating harmonisation of the constitution with the ruling of the ECtHR) in the case of the High Level Dialogue.

The most potent tool of human rights conditionality in both Balkan states proved to be a non human rights specific instrument: visa liberalisation, which could play a potentially key role also in Turkey. This lies outside the enlargement framework and is primarily designed to assist justice and home

affairs reforms. As Bosnian politicians were keen to get rid of the visa obligation the visa liberalisation process provided the EU with leverage to push forward its agenda and gave an impetus to a number of legislative reforms. After 2009 most progress recorded in the area of human rights has been the result of visa liberalisation conditionality in both countries. Besides the visa liberalisation process, only IPA had some tangible results such as the construction of homes for the Roma and IDPs or the registration of people without documents.

The EU has mostly insisted on formal measures such as the adoption of laws and the creation of institutions while paid less attention to implementation. This has been characteristic throughout the entire examined time period in both countries. Bosnia could get away with partial measures concerning the broadcasting reform before 2008 because it did adopt a number of laws that the EU had been demanding. These were, however, just not enough for the creation of a financially and editorially independent state-wide public broadcasting system, with broadcasters that share a common infrastructure. The progress reports up to 2014 presented an overly positive picture of the state of human rights in Bosnia maintaining that civil and political rights, social and economic rights and minority and cultural rights were broadly respected. This gives the impression that implementation was secondary at the time. The same progress reports, in their more detailed assessment, revealed huge discrepancies between existing laws and practice. The 2015 Progress Report was much more consequential in this regard and gave a negative general evaluation of the state of human rights in Bosnia. Similarly, Serbia took most of the required legislative steps in order to strengthen media freedom, but did not implement these measures. The EU did criticise Serbia for many shortcomings in the area of freedom of expression and the media, yet Serbia could progress with its enlargement process.

Our analysis of the visa liberalisation as the most efficient version of conditionality policy in action also revealed that not enough attention has been paid to implementation. As part of the visa liberalisation process the EU carried out partial monitoring and generally accepted partial compliance, primarily focusing on formal measures such as adopting legislation and setting up institutions. Considerably less attention was paid to issues of implementation, as illustrated by the cases of asylum policy or data protection in Serbia, and anti-discrimination in Bosnia. Outside the context of the visa liberalisation process, the EU did follow up on these problems of enforcement, yet, these were not linked back to visa conditionality and remained without consequences. This shows that, although human rights were part of the visa liberalisation conditionality, they were not applied as an overriding priority because of the domination of security related goals. This can in part explain the lack of genuine commitment to thoroughly monitor of human rights conditions.

Overall, real progress in terms of implementation happened where the EU was willing to use negative conditionality such as regarding ICTY cooperation or invested financially into a policy field, such as IDPs, refugees and the Roma.

When we look at Turkey again, it can be added that, apart from the enlargement instruments applied also for human rights promotion in other countries, the Commission created the Positive Agenda as a dialogue tool in 2012 and under it a special Chapter 23 working group (see above). Again, it shall be reiterated that so far the instrument of negotiations including benchmarking (as a tool which significantly supports human rights conditionality), could not be applied to Turkey. Another human rights specific instrument that should be named is the EU Local Strategy to Support and Defend Human

Rights Defenders in Turkey, elaborated by the EU Delegation to Turkey. Aiming at exchange with Turkish Human Rights Defenders and NGOs, it appears as a non-negligible communication tool on that level, yet as such its concrete impact remains limited.

As for priorities, it can be summarized that there has been some development over the years: the strong earlier focus on death penalty, torture, disappearances and extra-judicial killings have prominently diminished around the start of negotiations and economic and social rights gained in prominence, notably gender equality issues (including violence against women). This turned into a broader equality-based approach with regard to anti-discrimination matters over the last years, which also goes hand in hand with minority rights becoming wider in scope, even though they have consistently been set as a priority (mostly with regard to property as well as cultural rights). Freedom of expression and freedom of media have been given continuing attention by the EU, which has increased recently, in concordance not only with the overall focus on that area in enlargement policy, but obviously also particular backsliding in Turkey. Also, we have seen in the case study that – given the persistent concerns about implementation of previously adopted legislation – more and more focus has been directed towards Turkey’s implementation track record over the past years. We have illustrated this problem in particular for the issue area of gender equality, where political and societal norms and discourse couple with wanting implementation especially by the judiciary, which results in a lack of respect of women’s rights.

Lastly, it can be added here that sometimes variation in priorities appears on the level of the various institutions involved. The pressure from Member States and the decisions of the Council can politicise the process, sometimes frustrating the consistency of the Commission’s more systematic assessment, as it happened in Turkey’s case. (See the politicisation of the negotiations and the blocking of some chapters, as explained in section IV.B.3.) This is, however, a difficulty necessarily flowing from the fact that the EU is a political body that should be ultimately responsive to the European constituency. In addition, the institutional fragmentation has its strength. The EP is well placed to play the role of agenda-setting. It can raise awareness concerning key issues like gender equality or LGBTI rights that might otherwise feature lower on the list of priorities.

C. Inconsistency in content: civil-political vs. socio-economic rights

The EU followed a balanced approach in the promotion of different types of rights in the case of all three countries examined in the present report.

In the two Balkan countries, social, economic and minority rights subjects, mostly related to Roma rights, minority rights, refugees and IDPs, featured high among the EU’s priorities, in addition to the more common focus on political freedoms like freedom of expression and the media or electoral rights. These areas were targeted by most instruments. In the case of the Roma and IDPs the focus on social and economic rights is also reflected by the allocation of a significant share of IPA funding to these areas. The largest share of IPA financing in Serbia was dedicated to Roma programs. Social inclusion and social development of Roma and other vulnerable groups such as IDPs, children and disabled persons has been a recurring priority from the beginning of the IPA programs. These included anti-poverty measures, increasing employment, strengthening social protection system for vulnerable groups. IPA II for Bosnia put a strong emphasis on women’s rights and gender equality including issues such as women trafficking, women’s participation in the labour market and family violence. Similarly, in Serbia social inclusion measures for vulnerable groups such as Roma, minorities, women, children,

people with disabilities, IDPs, the elderly, improving conditions of migrants and refugees, education and employment policy, social welfare system were among the most frequent objectives of IPA programs.

Thus, the EU's financial instruments in both countries targeted social and economic rights (some of which can be costly) more than other types of human rights. In addition, economic and social rights were a higher priority in IPA programs than for the other instruments. At the same time, instruments other than IPA such as Council conclusions, EP resolutions, enlargement strategies etc. also targeted a number of social and economic rights related issues among them children's rights, women's rights and other vulnerable groups. Social and economic rights were usually stressed concerning specific vulnerable groups rather than in more general terms (e.g. related to workers' rights).

In Serbia's case what the EU and local human rights NGOs regarded as the most important human rights challenges were generally overlapping, with the single exception of the social and economic rights of workers. For the years of 2013 and 2014 the Belgrade Centre for Human Rights and the Ombudsman highlighted social and economic rights of workers among the most pressing issues in the country and reported about deteriorating conditions. Many employers failed to pay the contributions to health and pension insurance funds provided for under the law, which violated workers' rights; workers were not receiving their salaries for months; and unions' rights were also violated. These were especially concerning trends in light of the exceptionally high unemployment rate and the aggravated economic situation of the country while the level of social security has been further weakened following recent legislative amendments. Some of these problems were addressed in the EU's yearly progress reports but not in the context of social and economic rights of workers but more as issues of the informal economy representing major obstacles to fair competition and business development. Although it was mentioned in the 2015 Progress Report that the provision of social services was uneven and compromised by the inadequate implementations of the regulatory framework,¹⁵⁰⁶ the EU reports did not seem to treat this problem with the same weight and detail as the ombudsman or local human rights watchdogs.

For Turkey it can be summed up (see also priorities above) that there has been a shift from a focus on civil and political rights in the early years to a more balanced approach between these and economic and social rights. This development happened roughly speaking between 2004 and 2006, with the differentiation between the two categories of rights being given up in the EC's monitoring altogether in recent years.

It should be stressed that not all variation results in inconsistency. Well-selected priorities reflect at least two aspects: the specificities of the target country, but also the state of affairs in the EU. Where consensus exists on a human rights topic across institutions and Member States, the EU might be best placed to act on the basis of human rights conditionality.

D. Issues of internal coherence: vague priorities and standards

A general issue of incoherence has been connected to the fact that priorities are vague and blurred, and they keep it unclear how progress in their implementation could be measured. For instance, it is hard to assess impact, to get a sense of the magnitude of the problems and to identify trends in the

¹⁵⁰⁶ Serbia Report 2015, 46.

absence of references to statistical or numerical indicators. In the case of Roma rights, the EU definitely contributed to progress in some areas that included the Roma's increased access to identity documents and social housing in Serbia and Bosnia, and the employment of education staff and health mediators in Serbia. However, despite the adoption of the Roma strategy and the subsequent action plans, and also considering that the largest share of IPA funding was spent on Roma support, it is difficult to tell whether the Roma fare any better as a result of these measures introduced under EU pressure (with the possible exception of the registration of people).

Concerning the Roma in Serbia, while the 2011 Opinion of the Commission on Serbia's application optimistically reported about positive developments in areas like health care, education and housing, the 2015 progress report noted that 'Roma continue to face difficult living conditions and discrimination in access to social protection, health, employment and adequate housing. Compliance with international standards on forced eviction and relocation still needs to be ensured.'¹⁵⁰⁷ The same problems are identified every year, making it clear what the challenges are, but leaving it unclear what the exact effect of the introduced measures has been and to what extent they manage to improve the situation on the ground. It would be imperative to evaluate existing trends in order to see what difference the adopted strategies, action plans and IPA money are making, ideally building on evidence from social sciences.

The lack of provision of statistics is a problem not confined to Roma rights. While presenting hard facts might not show the whole picture, they could be helpful in establishing trends for instance in human trafficking that are in turn indispensable to see whether reforms launched in the context of the visa liberalisation had any effect. While registration of stateless people has been progressing as a result of the visa liberalization, the post-visa liberalization monitoring reports of Serbia do not provide numbers as to how many people were still in need of documents in 2008 when the process was initiated and how many received documents in subsequent years. (In Bosnia's case the 2015 progress report cites figures showing that by September 2015 only 77 people at risk of statelessness remained to be registered.) Monitoring ethnically motivated incidents is also a case in point. EU progress reports present no numbers, making it difficult to assess the scale of the problem and establish trends.

E. Issues of internal coherence: operationalisation and stages of EU integration

Human rights conditions are usually not linked to the different stages of EU integration and are presented as general requirements formulated in rather broad terms. They lack regard to operationalisation and deadlines, simply stating that general improvement is expected without specifying the exact timing and nature of the change required. For instance, the effective system of free legal aid has been missing until today in both countries, even though free legal aid is part of the condition of access to justice. The EU progress reports since 2007 have been pointing out this shortcoming to Serbia, but the consecutive governments have not addressed it so far and the EU never tied it to a concrete stage in the accession process, e.g. the implementation of the SAA, granting candidacy or the opening of membership negotiations. The condition is mentioned in the Screening Report of Chapter 23 and it can be assumed that it will be a condition of accession. Concerning Bosnia, the lack of this type of gradualism – linking human rights conditions to specific stages of the integration

¹⁵⁰⁷ EU Progress Report 2015, 58.

process – is even more apparent. In some cases, the EU does specify what sort of measures it requires in terms of implementation, such as what Bosnia should do in order to enforce the law on anti-discrimination, yet, there is neither a deadline of implementation nor a threat of reprisal in case of non-fulfilment. For credible conditionality, requirements should be consistently linked to rewards. This also means that conditions should not only be credible but also small scale; the EU should provide feedback in the form of sanctions or rewards on incremental changes along the EU integration path.

F. Inconsistency between internal vs. external policies

Inconsistencies in the performance of EU Member States also weaken the power of conditionality. In the case of the right for asylum, Roma rights and media freedom Member States often do not fare much better than their Western Balkan counterparts. Asylum and immigration policy of quite a few Member States has been mostly driven by the aspiration to keep immigrants away from their borders ‘with little concern for human rights and international standards of refugee protection’.¹⁵⁰⁸ Concerning Roma rights it is hard to link the condition of ending forced evictions with membership for Serbia and BiH while many Member States continue this practice. The situation of media freedom is similar or worse in quite a few EU Member States than in the Balkans, according to IREX or Reporters Without Borders rankings.

The current EU asylum policy crisis, which the Member States intend to solve through intensified cooperation with Turkey, follows exactly the underlying logic of keeping as many refugees and migrants as possible out of the Union. Against this background – spelled out in the EU-Turkey Joint Action Plan 2015, but all the more in the new agreement of 18 March 2016 on ending irregular migration (see section IV.B.4) – the policies applied by the EU both internally as well as vis-à-vis Turkey (and the Western Balkan countries) have to be viewed with a very critical eye. If human rights of refugees and migrants are not given high significance internally, they will not be addressed in relations with Turkey, as we have demonstrated (see section IV.C.6). While this – tragically – per se could in fact be considered as a consistent approach, it is in stark contradiction to the EU’s proclaimed role as human rights promoter in external relations and notably in the enlargement context. A Union that does not sufficiently take into account human rights in its own asylum and migration policies and is not in the position to ‘bring its house in order’ loses its general credibility and legitimacy to act as normative power abroad. This internal-external inconsistency is prone to further damaging the EU’s leverage on human rights in Turkey and beyond.

G. Some common problems of human rights conditionality

The country studies revealed strong commonalities in the two Western Balkan states while parallels with Turkey remain considerably weaker. This supports the view that Turkey is an exceptional enlargement case in many respects. There are, however, some specific challenges and lessons that emerge with striking similarity in all case studies. In this section, we are offering some insight into these.

Human rights conditionality seems to allow for less-than-honest domestic compliance where the EU’s requests are (mis)used to boost the power of the national leadership. In the case of the Western

¹⁵⁰⁸ Ridvan Peshkopia, ‘Asylum in the Balkans: European Union and United Nations High Commissioner for Refugees Assistance to Balkan Countries for Establishing Asylum Systems,’ *Southeast European and Black Sea Studies* 5(2):213–241, May 2005.

Balkans, the report found that the enlargement process can result in favouring strong leaders who can deliver, even if the same 'strength' puts human rights compliance at risk. Both in Turkey and Serbia national leaders cherry-picked from the EU's conditions according to their own preferences. In the Turkish case, strategic compliance might mean that the desired effects of democratisation do not materialize.

A common thread of the three case studies is the confirmation that human rights conditionality that touches upon issues of identity constructions faces an uphill struggle. In the case of the Western Balkans, this mostly relates to the question of war crimes, while in Turkey, it includes issues of minority rights and freedom of religion. This finding does not mean, however, that the EU should shy away from these challenges. A move toward an approach that pays due regard to the depth of reforms would confirm the focus on the ultimate goal of human rights conditionality and genuine political and social changes that secure the results of conditionality firm ground.

Finally, lack of a coherent and consistent approach by the EU can create the most frustration among pro-EU forces that end up disappointed and even alienated rather than reinforced in their struggles as the most important domestic allies of the EU. This raises the stakes considering that the EU is risking to lose the firmest domestic support base, key partners in making harmonisation a durable transformation.

H. EU policy recommendations

1. Concerning Bosnia and Herzegovina

- More attention should be devoted to the situation of constituent people in minority position while assessing the situation of minorities and vulnerable groups in Bosnia.
- The Sejdić-Finci issue should not marginalise other important aspects of minority rights. The practice of ethnic discrimination in employment should be treated with due weight which affects not only the Roma, but also returnees and constituent people in minority position.
- The EU should include Bosnian civil society more in consultations and cooperation while advocating human rights in BiH.

2. Concerning Serbia

- The normalisation process with Kosovo should not side-line human rights reforms. In several respects, the general human rights performance of Serbia has deteriorated for the last few years, i.e. since Serbia became a candidate. If sufficiently meeting the Copenhagen political criteria is really a condition of conducting accession negotiations, human rights conditions should be given a higher place in the whole enlargement agenda for Serbia. In light of Serbia's dedication to the integration process the EU could afford to follow up more consistently on its human rights criteria.

3. Concerning Turkey

- Turkey should be treated consistently as a membership candidate country rather than a neighbour and strategic partner.
- Utmost attention should be paid to the EU's credibility as human rights actor by both maintaining strict human rights conditionality vis-à-vis Turkey and adopting a human rights compliant asylum and migration policy in general.

- The EU should stay committed to the condition-based nature of both the accession process and the visa liberalisation dialogue and consistently and coherently use all available tools for the promotion of human rights.
- Expanding the participation of candidate countries in existing EU programmes and institutions should be considered, e.g., possibilities for Turkey to obtain observer status in the EU Fundamental Rights Agency and to become more integrated in the work of the European Institute for Gender Equality. Possibilities should be considered for Turkey to participate in human rights relevant 2014-2020 EU programmes (Rights, Equality and Citizenship Programme and Justice Programme by the Directorate General Justice as well as the Progress axis of the EU Programme for Employment and Social Innovation – EaSI).
- Programming of human rights relevant projects under IPA should be stepped up and synergies with EIDHR should be further explored, especially in the fields of recent backsliding in Turkey.

4. Concerning the visa liberalisation dialogue (VLD) with Turkey

- The close monitoring of fulfilment of all human rights relevant requirements should be continued and intensified including with regard to the rights of refugees, asylum seekers and migrants and apply strict scrutiny to the quality of reforms implemented towards meeting the requirements. Learning from the experience of visa liberalisation in the Western Balkans, do not accept partial reforms and monitor all issues also in the post-visa liberalisation phase.
- A more substantiated progress assessment on the individual VLD requirements should be applied, definitions of progress assessment should be checked for their consonance with the new standard assessment scales of the 2015 Progress Report and recommendations should be made even more concrete and congruent with the findings of the Progress Report.
- Downsizing of any of the VLD requirements by reducing scrutiny, prioritizing certain requirements over others or lifting the visa regime before requirements have been fulfilled should be avoided.
- In case of satisfactory fulfilment of the VLD requirements inconsistent decisions on the lifting of the visa regime for Turkish citizens should be avoided.
- (Additional) IPA funds should be deployed to support Turkey in carrying out reforms to meet the human rights relevant VLD benchmarks.

5. Concerning the accession process

- Leverage should be maximized in the current stage of accession for all countries. For BiH, the opportunity of the recent membership application should be used to provide BiH a serious and credible examination of the human rights situation in the Opinion to be drafted by the European Commission. In the case of Turkey, the accession talks should be carried forth by treating the rule of law Chapters 23 and 24 with priority in line with the new approach on negotiations. A thorough review of the Screening Report on Chapter 23 for Turkey should be completed as soon as possible.
- The strength and consistency of human rights conditionality should be increased in the assessment of the progress in the countries concerned. Now that BiH has submitted its membership application, the weight and place of human rights should be strengthened in the overall conditionality policy. More attention should be paid to individual human rights and follow a more consistent human rights conditionality than before 2015, continuing with the

approach to human rights conditionality adopted in the 2015 Commission's Report on BiH. In both BiH and Serbia, a strong emphasis should be placed on the examination of implementation and actual impact while monitoring human rights. For Turkey, the Chapter 23 opening benchmarks should be updated by taking into consideration both the reforms carried out since 2006 as well as persistent human rights areas of concern and these opening benchmarks should be incorporated into the Screening Report.

- The Chapter 23 Screening Report for Turkey with the opening benchmarks should be adopted in the Council, i.e. discontinuing the blockage of the progress on negotiations on fundamental rights. In parallel to 'unfreezing' the process on Chapter 23 work should continue towards the application of the new approach methodology to EU-Turkey negotiations, too.
- Strategic considerations should not blur the standards of human rights conditionality, even in cases where there is a partial overlap with the human rights situation, like in the case of normalization for Serbia and Kosovo as well as for Turkey and Cyprus.
- Once negotiations on Chapter 23 will open with Serbia, a consistent follow up should ensue on each human rights issue. There should be no compromise on human rights conditions due to progress in other issue areas, see again the normalisation process with Kosovo. Given Serbia's commitment to the accession process, following up on specific human rights conditions more resolutely might lead to better compliance on the Serbian side.
- The EU has pledged to respect and enforce the universality and indivisibility of human rights in its foreign policy.¹⁵⁰⁹ The operationalisation of this principle should consider the extent to which various human rights areas are interlinked. The research on Serbia shows how this might be insufficient in the present form of enlargement conditionality. In the case of media freedom, the area relevant for achieving the goal of meaningful media pluralism includes, among others, electoral law, the structure of party funding, and other elements that might increase or decrease the likelihood of overconcentration of power.¹⁵¹⁰ Another example is the independence of the judiciary, which is an overarching issue: problems in this area extend to the entire human rights scene, undermining all human rights guarantees. Operationalising universality should mean that none of the interlinked conditions are seen as met when one element is not fulfilled.
- Human rights conditions should be linked to certain stages of the accession process and potential sanctions in the case of non-compliance. Provide feedback in the form of sanctions or rewards on incremental changes along the EU integration path.
- Whenever it is possible, priorities should be supported with numerical indicators. It should be clarified how progress in implementation could be measured. Concerning measuring the impact of EU – including IPA – programmes, more information should be provided on how the situation of target groups changed as a result, instead of reporting mostly about adopted action plans or other government measures. For instance, how many health mediators were employed in Serbia for helping the Roma is a useful information, yet it would be more important to see how the health situation of the Roma has changed as a result. Operationalizing conditionality in this way has the potential to create a virtuous circle of

¹⁵⁰⁹ See the Action Plan, the Strategic Framework or, from the primary law, TEU Art. 21-1: "The Union's action on the international scene shall be guided by the principles [...of] the universality and indivisibility of human rights and fundamental freedoms".

¹⁵¹⁰ Bajomi-Lázár (n 696) 236.

human rights conditionality, with more transparent benchmarks pressing actors on both sides to stick to general standards instead of individual deals.

- The elaboration and adoption of a new Accession Partnership for Turkey should be considered bringing the process in line, i.a., with the updated Screening Report and list of opening benchmarks for Chapter 23 and taking into consideration Turkey's National Action Plans for EU Accession from 2014.
- Conditionality should create and strengthen a sustainable framework that guarantees that progress can be measured on the ground. A case in point is media freedom in the Western Balkan states, where relevant structural factors like the electoral system, structural party influence etc. should also be taken into consideration. This approach requires sensitivity to the political, economic and social context that has an influence on the quality and stability of the required reform goals. In other words, attention should be paid to the 'depth' of compliance. This should counterbalance the apparent interest, by both sides, in more formal measures that remain shallow in terms of achieving sustainable changes that advance the genuine integration of the country. (In the case of media freedom, see section III.C.3 for more details.)

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Annexes

Table 1: Human rights related priorities in the 2005 Progress Report and the 2006 European Partnership, Bosnia and Herzegovina

Shortcomings identified in the 2005 Progress Report	2006 European Partnership priorities ¹⁵¹¹	
	Key priorities	
Further efforts are need to bring all indicted war criminals still at large to justice. ¹⁵¹²		1. 'Fully cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) in apprehending all ICTY indictees at large.'
'Considerable progress has also been made towards the adoption of the State law on the public broadcasting service. Once all State level legislation will be formally adopted, Bosnia and Herzegovina will need to pass the relevant legislation at Entity level. The main objective of all this legislation is to bring together the three present public broadcasters (the two Entity broadcasters and the nation-wide one) into a single legal entity managed through a single steering board, to prevent mono-lingual channels. This should contribute to reducing ethnic divisions and to preventing the undue political use of public TV services.' ¹⁵¹³		2. 'Adopt all the necessary public broadcasting legislation at State and entity level and start its implementation.'
	Short term requirements	
Rules of elections 'to both the Presidency and the House of Peoples are incompatible with Article 14 of the European Convention on Human Rights'. ¹⁵¹⁴	Elections	3. 'Amend electoral legislation regarding the Bosnia and Herzegovina Presidency members and the House of Peoples delegates, to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments.'

¹⁵¹¹ 2006/55/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0055&from=EN>.

¹⁵¹² Bosnia Progress Report 2005, 27.

¹⁵¹³ Bosnia Progress Report 2005, 21.

¹⁵¹⁴ Bosnia Progress Report 2005, 20.

Shortcomings identified in the 2005 Progress Report		2006 European Partnership priorities ¹⁵¹¹
Republika Srpska still allowed death penalty which was against European standards. ¹⁵¹⁵	Human rights	4. 'Abolish references to the death penalty in the Republika Srpska Constitution.'
Although Bosnia ratified most major human rights conventions, it had serious delays in reporting obligations. ¹⁵¹⁶		5. 'Implement the international conventions ratified by Bosnia and Herzegovina, including reporting requirements.'
'As the successor of the Human Rights Chamber, the Human Rights Commission was established in the Bosnia and Herzegovina Constitutional Court in early 2004. The Commission has substantially reduced the backlog of human rights cases.' ¹⁵¹⁷		6. 'Ensure that the Human Rights Commission within the Constitutional Court addresses all unresolved human rights cases.'
The implementation of international and domestic minority rights instruments was not adequate. Already this report addressed at length the problem of non-constituent people lacking access to the highest posts of the State and the entities, which was a violation of their individual political rights. ¹⁵¹⁸		7. 'Further improve the legal framework on minorities so that it fully meets the requirements of the Council of Europe Framework Convention on National Minorities, and ensure its implementation throughout Bosnia and Herzegovina.'
'New consultation structures for national minorities, such as the proposed Council of National Minorities and corresponding bodies at Entity level, have not been set up, despite legal obligations.' ¹⁵¹⁹		8. 'Establish the Council of National Minorities and the corresponding bodies at entity level.'
'Full and effective equality has not been secured for Roma, who continue to be exposed to discrimination and face particular difficulties in		9. 'Develop and start implementing the sectoral Action Plans of the national strategy for Roma as part of comprehensive strategy of poverty alleviation.'

¹⁵¹⁵ *ibid*, 16.

¹⁵¹⁶ *ibid*, 19.

¹⁵¹⁷ Bosnia Progress Report 2005, 19.

¹⁵¹⁸ *ibid*, 10.

¹⁵¹⁹ Bosnia Progress Report 2005, 24.

Shortcomings identified in the 2005 Progress Report	2006 European Partnership priorities ¹⁵¹¹	
fields such as housing, health care, employment and education. ¹⁵²⁰		
<ul style="list-style-type: none"> -prison conditions remained generally poor -the right to legal aid is not granted to everyone on a consistent basis -religious intolerance is still present -physical attacks and political pressure on the media -ethnically motivated incidents continued and were poorly investigated -discrimination in education and employment against minorities was widespread -discrimination posed a serious obstacle to sustainable return of refugees -discrimination based on sexual orientation -the legal environment of NGOs held back the development of the civil sector -'the participation of women in public life remained limited' -the separation of children according to ethnicity was a growing problem -'domestic violence, which is seldom reported to the authorities, remains a problem' -'access to social protection continues to be a major concern. The practical organization of the social security system often deviates from enacted legislation.'¹⁵²¹ 		Issues not addressed by the European Partnership
'The process of return has not yet been completed.	Regional issues and international obligations	10. 'Ensure that the Refugee Return fund is properly funded and fully operational. Contribute to ensuring the implementation of the Sarajevo Declaration. Complete the process of returnee/refugee return and achieve

¹⁵²⁰ *ibid.*

¹⁵²¹ Bosnia Progress Report 2005, 22-23.

Shortcomings identified in the 2005 Progress Report		2006 European Partnership priorities ¹⁵¹¹
<p>Appr. half a million people still wish to return. In addition to the wide range of conditions required to make return sustainable, including access to reconstruction assistance, employment, health care, pensions, utilities and an unbiased education system, continuing concerns for the safety of individual returnees remain.¹⁵²²</p>		<p>significant progress towards their economic and social integration.'</p>
<p>Under the subheading political criteria it was pointed out that election rules failed to comply fully with the requirements of the European Convention for Human Rights (ECHR).¹⁵²³</p>		<p>11. 'Address all outstanding Council of Europe post-accession requirements, in particular in the areas of education and elections.'</p>
<p>The report concludes that 'only a small number of trafficking cases have been tried successfully and that sentences are usually light. [...] The authorities' measures for protecting trafficking victims are still inadequate.¹⁵²⁴</p>	<p>Justice, freedom and security: Fighting organised crime and terrorism</p>	<p>12. 'Ensure the proper implementation of the national action plan for combating trafficking of human beings.' 13. 'Take additional measures for the protection of victims of trafficking and for the adequate implementation of the witness protection legislation.' 14. 'Enhance the State Investigation and Protection Agency capacity in the area of fight against terrorism; reinforce international cooperation in this area, including by the proper implementation of international conventions.'</p>
<p>Personal data protection was unsatisfactory.¹⁵²⁵</p>		<p>15. 'Adopt the law on the personal data protection and establish the Data Protection Agency.'</p>
Medium term priorities		
<p>'Implement the outstanding Council of Europe post-accession obligations notably regarding elections and education.'¹⁵²⁶</p>	<p>Human rights and the protection of minorities</p>	<p>16. 'Ensure full compatibility of national legislation with the European Convention on Human Rights.'</p>
<p>'Further efforts are required to complete the legal and administrative framework for the protection of</p>		<p>17. 'Ensure the protection of minorities in accordance with EU and international standard'</p>

¹⁵²² Bosnia Progress Report 2005, 26.

¹⁵²³ Bosnia Progress Report 2005, 10.

¹⁵²⁴ Bosnia Progress Report 2005, 65.

¹⁵²⁵ Bosnia Progress Report 2005, 19.

¹⁵²⁶ Bosnia Progress Report 2005, 28.

Shortcomings identified in the 2005 Progress Report	2006 European Partnership priorities ¹⁵¹¹	
minorities, and to ensure its implementation. ¹⁵²⁷		
'Efforts should also be devoted to improve the integration of the Roma minority.' ¹⁵²⁸		18. 'Implement the national strategy for Roma and its sectoral action plans.'
'Bosnia and Herzegovina remains a country of both origin and transit when it comes to trafficking in human beings.' ¹⁵²⁹	Justice, freedom and security	19. 'Ensure full implementation of all measures included in the action plan against organised crime.'

¹⁵²⁷ Bosnia Progress Report 2005, 69.

¹⁵²⁸ Bosnia Progress Report 2005, 69.

¹⁵²⁹ Bosnia Progress Report 2005, 64.

Table 2: Comparing human rights priorities of the 2005 and 2007 Progress Reports, Bosnia and Herzegovina

Human rights category	2005 Progress Report	2007 Progress Report ¹⁵³⁰
Observance of international human rights law	<p>Rules of elections ‘to both the Presidency and the House of Peoples are incompatible with Article 14 of the European Convention on Human Rights’.</p> <p>Although Bosnia ratified most major human rights conventions, it had serious delays in reporting obligations.¹⁵³¹</p> <p>‘As the successor of the Human Rights Chamber, the Human Rights Commission was established in the Bosnia and Herzegovina Constitutional Court in early 2004. The Commission has substantially reduced the backlog of human rights cases.’¹⁵³²</p>	<p>Bosnia has achieved results in addressing the backlog of human rights-related cases, but there is room for improvement as regards the implementation of rulings.</p> <p>Implementation of international human rights conventions also needs to improve. Implementation of the decisions of the Human Rights Commission remains insufficient due, in particular, to the reluctance of the Entity governments to compensate victims.</p>
Personal data protection	Personal data protection was unsatisfactory. ¹⁵³³	No progress has been made in this area.
Electoral rights	Rules of elections ‘to both the Presidency and the House of Peoples are incompatible with Article 14 of the European Convention on Human Rights’. ¹⁵³⁴	No progress has been made in reforming the Bosnia and Herzegovina Constitution, and minorities therefore continue to be excluded from the House of Peoples and the tripartite Presidency.
torture and ill treatment	‘Occasional physical mistreatment of prisoners has been reported, but investigations of police misconduct and police accountability have improved. Professional Standards Units have been established as internal affairs investigative units.’ ¹⁵³⁵	Cases of abuse of prisoners and detainees by the police or prison guards have occurred.
pre-trial detention and prison conditions	Prison condition remained generally poor. ¹⁵³⁶	Prison facilities and supervision need to improve to address the problems of overcrowding, poor living conditions, inadequate medical treatment and physical abuse by prison guards.

¹⁵³⁰ These texts are direct citations from the Bosnia Progress Report 2007, 15-20., unless stated otherwise.

¹⁵³¹ *ibid*, 19.

¹⁵³² Bosnia Progress Report 2005, 10.

¹⁵³³ Bosnia Progress Report 2005, 19.

¹⁵³⁴ Bosnia Progress Report 2005, 20.

¹⁵³⁵ Bosnia EU Progress Report 2005, 20.

¹⁵³⁶ Bosnia Progress Report 2005, 22-23.

Human rights category	2005 Progress Report	2007 Progress Report ¹⁵³⁰
Death penalty	Republika Srpska still allowed death penalty which was against European standards. ¹⁵³⁷	Article 11 of the Republika Srpska Constitution still allows the death penalty for capital crimes.
Access to justice	The right to legal aid is not granted to everyone on a consistent basis. ¹⁵³⁸	Access to justice in civil and criminal trials remains a matter of concern and equality before the law is not always guaranteed. In criminal trials, judges often do not fully inform defendants of their right to counsel at public expense. As a result, defendants do not request legal aid. Legal aid in civil cases is primarily provided on an ad hoc basis by privately funded NGOs. The right to a fair trial is formally incorporated into the four criminal procedure codes of Bosnia and Herzegovina. However, in lower level courts judges have tended to neglect the presumption of innocence.
Freedom of expression, media	The broadcasting reform needs to be completed. Physical attacks and political pressure on the media are prevalent. ¹⁵³⁹	The media remain ethnically divided. The public broadcasting law in the Federation has not been formally adopted. The adoption of this legislation is necessary to complete the legal framework for public broadcasting reform, which is a key priority of the European Partnership and one of the conditions for the signature of the Stabilisation and Association Agreement.
Civil society	The legal environment of NGOs held back the development of the civil sector. ¹⁵⁴⁰	Some progress has been made as regards civil society organisations. The Council of Ministers signed an agreement on cooperation with the non-government sector and appointed a senior programming officer. Civil society organisations continue to register mainly at Entity level, because the registration process at State level is perceived as more bureaucratic. Few NGOs are therefore active country-wide.
Freedom of religion	Religious intolerance is still present. ¹⁵⁴¹	Religious intolerance is still present in the country. Leaders of the religious communities have continued to intervene in political issues.

¹⁵³⁷ *ibid*, 16.

¹⁵³⁸ Bosnia Progress Report 2005, 22-23.

¹⁵³⁹ Bosnia Progress Report 2005, 21.

¹⁵⁴⁰ Bosnia Progress Report 2005, 22.

¹⁵⁴¹ Bosnia Progress Report 2005, 22-23.

Human rights category	2005 Progress Report	2007 Progress Report ¹⁵³⁰
Rights of women	The participation of women in public life remained limited. Domestic violence, which is seldom reported to the authorities, remains a problem. ¹⁵⁴²	Situation of women in Bosnia and Herzegovina has not improved. Trafficking in women and domestic violence remain issues of concern. Access to employment remains difficult and women's participation in the labour market continues to be low compared with men. Many women are not covered by health insurance. Provisions to guarantee women equal pay are in place but they are not applied. There have been no specific measures to address this situation and to facilitate women's employment. Women continue to be under-represented in politics and official authorities.
Children's rights	The separation of children according to ethnicity was a growing problem. ¹⁵⁴³	Although the legal framework is in place, children's rights are not fully secured. Problems remain in the field of health, social protection, education and domestic violence against children. Children's attendance of early childhood education programmes is low. Children with disabilities and Roma children continue to lack sufficient medical care and adequate educational opportunities.
Rights of the socially vulnerable and/or persons with disabilities	Discrimination based on sexual orientation is widespread despite the fact that Bosnia and Herzegovina's Constitutions prohibits such discrimination. ¹⁵⁴⁴	Discrimination against people with disabilities is prohibited by the legislation of both Entities. However, the fragmented legal and financial framework does not provide for the same social protection for all citizens throughout the country. Numerous groups of the population are excluded from social protection and assistance benefits. The privileged treatment of war veterans continued to have negative effects on other socially vulnerable people and people with disabilities. Discrimination on the basis of sexual orientation is common.
Labour rights and trade unions	Discrimination in education and employment against minorities was widespread.	No changes occurred over the reporting period. Ethnic discrimination in employment is widespread. In the area of anti-

¹⁵⁴² Bosnia Progress Report 2005, 22-23.

¹⁵⁴³ Bosnia Progress Report 2005, 22-23.

¹⁵⁴⁴ Bosnia Progress Report 2005, 22-23.

Human rights category	2005 Progress Report	2007 Progress Report ¹⁵³⁰
	‘Access to social protection continues to be a major concern. The practical organization of the social security system often deviates from enacted legislation.’ ¹⁵⁴⁵	discrimination policies, the State and Entity Constitutions guarantee equal treatment of all people. Bosnia and Herzegovina has not adopted a comprehensive antidiscrimination law, even though anti-discrimination legislation exists in several areas. Implementation is however deficient.
property rights	‘The enforcement of property rights is weak’ [...]. ¹⁵⁴⁶	Progress has continued on securing property rights. The mandate of the Commission for Property Claims of Displaced Persons and Refugees has been extended until the end of 2007 to address residual property repossession cases. Land administration reform continued, leading to improved legal security of land property rights and a stronger real estate market.
Minorities, Roma	The implementation of international and domestic minority rights instruments was not adequate. ‘New consultation structures for national minorities, such as the proposed Council of National Minorities and corresponding bodies at Entity level, have not been set up, despite legal obligations.’ ‘Full and effective equality has not been secured for Roma, who continue to be exposed to discrimination and face particular difficulties in fields such as housing, health care, employment and education.’ Ethnically motivated incidents continued and were poorly investigated. Discrimination in education and employment against minorities was widespread. ¹⁵⁴⁷	The Law on the Protection of Ethnic Minorities continues to be poorly applied, in particular as regards the Roma population. Discrimination against this community persists, with problems in access to housing, social services (health), education and employment. Some action has nonetheless been taken regarding the implementation of the 2005 ‘Strategy for Addressing Roma Problems’. Some efforts have been made to improve the education of Roma in schools and universities. However, only around 30% of the Roma children complete primary education. Overall, Bosnia and Herzegovina's progress in the area of minority rights, cultural rights and protection of minorities has been limited.
Refugees, returnees, IDPs	‘The process of return has not yet been completed. Appr. half a million people still wish to return. In addition to the wide range of conditions required to make return sustainable, including access to	Many refugees and internally displaced persons (IDPs) do still not benefit from basic pension and health provisions. The security situation for returnees has generally improved, although isolated incidents of violence have occurred.

¹⁵⁴⁵ Bosnia Progress Report 2005, 22-23.

¹⁵⁴⁶ Bosnia Progress Report 2005, 35.

¹⁵⁴⁷ Bosnia Progress Report 2005, 24.

Human rights category	2005 Progress Report	2007 Progress Report ¹⁵³⁰
	<p>reconstruction assistance, employment, health care, pensions, utilities and an unbiased education system, continuing concerns for the safety of individual returnees remain.’</p> <p>Discrimination posed a serious obstacle to sustainable return of refugees.¹⁵⁴⁸</p>	
ICTY cooperation	<p>‘Further efforts are need to bring all indicted war criminals still at large to justice.’¹⁵⁴⁹</p>	<p>Bosnia and Herzegovina's cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) has progressed and is now at a generally satisfactory level. The signature of the Stabilisation and Association Agreement (SAA) will require full cooperation with ICTY. The State Court of Bosnia and Herzegovina has performed well as regards the indictees transferred from the ICTY to be judged locally.</p>
Human trafficking	<p>‘only a small number of trafficking cases have been tried successfully and that sentences are usually light. [...] The authorities’ measures for protecting trafficking victims are still inadequate.’¹⁵⁵⁰</p>	<p>‘As for protection of victims and victim-witnesses of trafficking in human beings, the total number of victims identified, including victims with citizenship of Bosnia and Herzegovina, increased.’¹⁵⁵¹</p>

¹⁵⁴⁸ Bosnia Progress Report 2005, 26.

¹⁵⁴⁹ Bosnia Progress Report 2005, 27.

¹⁵⁵⁰ Bosnia Progress Report 2005, 65.

¹⁵⁵¹ Bosnia Progress Report 2007, 53.

Table 3: Comparing human rights priorities in the 2007 Progress Report and the 2008 European Partnership, Bosnia and Herzegovina

Human rights category	2007 Progress Report evaluation ¹⁵⁵²	European Partnership 2008 ¹⁵⁵³
Observance of international human rights law	Bosnia has achieved results in addressing the backlog of human rights-related cases, but there is room for improvement as regards the implementation of rulings. Implementation of international human rights conventions also needs to improve. Implementation of the decisions of the Human Rights Commission remains insufficient due, in particular, to the reluctance of the Entity governments to compensate victims.	Short term: Improve implementation of the international conventions ratified by Bosnia and Herzegovina, including reporting requirements. Medium term: Ensure that the national legislation is fully compatible with the European Convention for Human Rights.
torture and ill treatment	Cases of abuse of prisoners and detainees by the police or prison guards have occurred.	
pre-trial detention and prison conditions	Prison facilities and supervision need to improve to address the problems of overcrowding, poor living conditions, inadequate medical treatment and physical abuse by prison guards.	Short term: Agree on a comprehensive penitentiary reform and ensure construction of a State level prison.
Death penalty	Article 11 of the Republika Srpska Constitution still allows the death penalty for capital crimes.	Short term: Remove provisions on the death penalty from the Republika Srpska constitution.
Access to justice	Access to justice in civil and criminal trials remains a matter of concern and equality before the law is not always guaranteed. In criminal trials, judges often do not fully inform defendants of their right to counsel at public expense. As a result, defendants do not request legal aid. Legal aid in civil cases is primarily provided on an ad hoc basis by privately funded NGOs. The right to a fair trial is formally incorporated into the four criminal procedure codes of Bosnia and Herzegovina. However, in lower level courts judges have tended to neglect the presumption of innocence.	Short term: Enhance access to justice.
Freedom of expression, media	The media remain ethnically divided. The public broadcasting law in the Federation has not been formally adopted. The adoption of this legislation is necessary to complete the legal framework for public broadcasting reform, which is a key	

¹⁵⁵² These texts are direct citations from the Bosnia Progress Report 2007, 15-20.

¹⁵⁵³ Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, 3. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0211&from=EN>.

Human rights category	2007 Progress Report evaluation ¹⁵⁵²	European Partnership 2008 ¹⁵⁵³
	priority of the European Partnership and one of the conditions for the signature of the Stabilisation and Association Agreement.	
Civil society	Some progress has been made as regards civil society organisations. The Council of Ministers signed an agreement on cooperation with the non-government sector and appointed a senior programming officer. Civil society organisations continue to register mainly at Entity level, because the registration process at State level is perceived as more bureaucratic. Few NGOs are therefore active country-wide.	
Freedom of religion	Religious intolerance is still present in the country. Leaders of the religious communities have continued to intervene in political issues.	
Rights of women	Situation of women in Bosnia and Herzegovina has not improved. Trafficking in women and domestic violence remain issues of concern. Access to employment remains difficult and women's participation in the labour market continues to be low compared with men. Many women are not covered by health insurance. Provisions to guarantee women equal pay are in place but they are not applied. There have been no specific measures to address this situation and to facilitate women's employment. Women continue to be under-represented in politics and official authorities.	Short term: Strengthen the protection of the rights of women.
Children's rights	Although the legal framework is in place, children's rights are not fully secured. Problems remain in the field of health, social protection, education and domestic violence against children. Children's attendance of early childhood education programmes is low. Children with disabilities and Roma children continue to lack sufficient medical care and adequate educational opportunities.	Short term: Strengthen the protection of the rights of children.
Rights of the socially vulnerable and/or persons with disabilities	Discrimination against people with disabilities is prohibited by the legislation of both Entities. However, the fragmented legal and financial framework does not provide for the same social protection for all citizens	Short term: Continue de-institutionalisation, community-based services and aid to dependent persons, including in the field of mental health.

Human rights category	2007 Progress Report evaluation ¹⁵⁵²	European Partnership 2008 ¹⁵⁵³
	throughout the country. Numerous groups of the population are excluded from social protection and assistance benefits. The privileged treatment of war veterans continued to have negative effects on other socially vulnerable people and people with disabilities.	
Labour rights and trade unions	No changes occurred over the reporting period. Ethnic discrimination in employment is widespread. In the area of anti-discrimination policies, the State and Entity Constitutions guarantee equal treatment of all people. Bosnia and Herzegovina has not adopted a comprehensive antidiscrimination law, even though anti-discrimination legislation exists in several areas. Implementation is however deficient. Discrimination on the basis of sexual orientation is common.	Short term: Develop and implement all the sectoral action plans under the national strategy for Roma as part of a comprehensive strategy on poverty alleviation and social inclusion. Medium term: fully implement the national strategy for Roma and its sectoral action plans; develop data that can serve as sound basis to foster further developments of social inclusion strategies, action plans and their evaluation.
property rights	Progress has continued on securing property rights. The mandate of the Commission for Property Claims of Displaced Persons and Refugees has been extended until the end of 2007 to address residual property repossession cases. Land administration reform continued, leading to improved legal security of land property rights and a stronger real estate market.	
Minorities, Roma	No progress has been made in reforming the Bosnia and Herzegovina Constitution, and minorities therefore continue to be excluded from the House of Peoples and the tripartite Presidency. The Law on the Protection of Ethnic Minorities continues to be poorly applied, in particular as regards the Roma population. Discrimination against this community persists, with problems in access to housing, social services (health), education and employment. Some action has nonetheless been taken regarding the implementation of the 2005 'Strategy for Addressing Roma Problems'. Some efforts have been made to improve the education of Roma in schools and universities. However, only around 30 % of the Roma children complete primary education. Overall, Bosnia and Herzegovina's progress in the area	Short term: Further improve the legal framework on minorities so that it fully meets the requirements of the Council of Europe Framework Convention on National Minorities and ensure implementation throughout Bosnia and Herzegovina.(Short and medium term) Short term: Ensure proper operation of the Council of National Minorities of Bosnia and Herzegovina and the corresponding bodies at Entity level.

Human rights category	2007 Progress Report evaluation ¹⁵⁵²	European Partnership 2008 ¹⁵⁵³
	of minority rights, cultural rights and protection of minorities has been limited.	
Refugees, returnees, IDPs	Many refugees and internally displaced persons (IDPs) do still not benefit from basic pension and health provisions. The security situation for returnees has generally improved, although isolated incidents of violence have occurred.	Short term: Ensure that the refugee return fund is properly funded and fully operational; contribute to full implementation of the Sarajevo Declaration; complete the process of refugee return and achieve significant progress towards their economic and social integration.
ICTY cooperation	Bosnia and Herzegovina's cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) has progressed and is now at a generally satisfactory level. The signature of the Stabilisation and Association Agreement (SAA) will require full cooperation with ICTY. The State Court of Bosnia and Herzegovina has performed well as regards the indictees transferred from the ICTY to be judged locally.	

Table 4: Human rights priorities in European Parliament resolutions (2002-2009), South East Europe

	Individual resolutions	Make or break issues	Other selected issues
2002		South East Europe: cooperation with the ICTY, bilateral agreements with the USA on the ICC, refugee return, property restitution for returnees, protection of minorities, human trafficking ¹⁵⁵⁴	South East Europe: media freedom, gender equality and women's rights, refugee return, minority rights, Roma, civil society BiH: massacre in Srebrenica Croatia: protection of minorities, refugee return Macedonia: media freedom, democratic electoral principles ¹⁵⁵⁵
2003		South East Europe: cooperation with the ICTY, refugee return, human trafficking, ethnic discrimination ('states in which, in practice, the rights of citizens depend on their ethnicity do not have a perspective towards EU accession') ¹⁵⁵⁶	South East Europe: media freedom, civil society Albania: human trafficking, media freedom, minority protection BiH: refugee return, ICTY cooperation Croatia: protection of national minorities, refugee return, cooperation with the ICTY, freedom of the media FRY: media freedom, human trafficking, ICTY cooperation Kosovo: refugee return, minority protection ¹⁵⁵⁷
2004	1.South-East Europe: on women's rights ¹⁵⁵⁸ 2.Kosovo: minority rights (ethnically motivated violence) ¹⁵⁵⁹ 3.Serbia: minority rights (harassment of		Croatia: ICTY cooperation, refugee return, media freedom, rights of ethnic minorities and the Roma ¹⁵⁶¹

¹⁵⁵⁴ European Parliament resolution on the report from the Commission: The Stabilisation and Association Process for South East Europe - First Annual Report (COM(2002) 163 – C5-0256/2002 – 2002/2121(COS)).

¹⁵⁵⁵ European Parliament resolution on the report from the Commission: The Stabilisation and Association Process for South East Europe - First Annual Report (COM(2002) 163 – C5-0256/2002 – 2002/2121(COS)).

¹⁵⁵⁶ P5_TA(2003)0523 Stabilisation and association process for South-East Europe European Parliament resolution on the Stabilisation and Association Process for South East Europe: Second Annual Report (COM(2003) 139 - 2003/2094(INI)) 3.

¹⁵⁵⁷ 1. P5_TA(2003)0523 Stabilisation and association process for South-East Europe European Parliament resolution on the Stabilisation and Association Process for SouthEast Europe: Second Annual Report (COM(2003) 139 - 2003/2094(INI)).

¹⁵⁵⁸ P5_TA(2004)0382 Women in South-East Europe European Parliament resolution on women in South-East Europe (2003/2128(INI)).

¹⁵⁵⁹ P5_TA(2004)0271 Situation in Kosovo European Parliament resolution on the situation in Kosovo.

¹⁵⁶¹ P5_TA(2004)0273 Application by Croatia for accession to the EU European Parliament recommendation to the Council on the application by Croatia for accession to the European Union (2003/2254(INI)).

	Individual resolutions	Make or break issues	Other selected issues
	minorities in Voivodina) ¹⁵⁶⁰		
2005	<p>1.South-East Europe(Srebrenica): cooperation with the ICTY, refugee return¹⁵⁶²</p> <p>2.Serbia: Minority protection, anti-discrimination, media freedom^{1563 1564}</p>		<p>South-East Europe: Cooperation with the ICTY, refugee return, respect for minority rights, ethnic violence, human trafficking¹⁵⁶⁵</p> <p>BiH: immunity for US citizens from prosecution by the ICC, ICTY cooperation</p> <p>Serbia and Montenegro: ICTY cooperation, protection of ethnic and national minorities</p> <p>Kosovo: missing persons, protection of minorities, refugee return</p> <p>Albania: trafficking in human beings, protection of minorities</p> <p>Macedonia: electoral standards</p> <p>Croatia: ICTY cooperation, refugee return¹⁵⁶⁶</p>
2006		<p>BiH: ICTY cooperation, media reform (public broadcasting)</p> <p>Serbia: ICTY cooperation¹⁵⁶⁷</p>	<p>South-East Europe: refugee return, ethnic and religious reconciliation, minority rights,¹⁵⁶⁸ religious freedom, freedom of expression, people with mental health problems and/or intellectual disabilities, ICTY cooperation, compliance with UN conventions¹⁵⁶⁹</p> <p>BiH: refugee return¹⁵⁷⁰</p>

¹⁵⁶⁰ P6_TA(2004)0016 Voivodina: harassment of minorities. European Parliament resolution on harassment of minorities in Voivodina.

¹⁵⁶² P6_TA(2005)0296 The Balkans: 10 years after Srebrenica European Parliament resolution on Srebrenica.

¹⁵⁶³ Report of the FACT-FINDING MISSION BY THE EUROPEAN PARLIAMENT AD HOC DELEGATION TO VOÏVODINA AND BELGRADE (28 - 31 JANUARY 2005). March 2005.

¹⁵⁶⁴ P6_TA-PROV(2005)0369 Voivodina. European Parliament resolution on the defence of multi-ethnicity in Voivodina.

¹⁵⁶⁵ P6_TA(2005)0150 Human rights in the world (2004) and the EU's policy European Parliament resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter (2004/2151(INI)).

¹⁵⁶⁶ P6_TA(2005)0131 Regional integration in the western Balkans European Parliament resolution on the state of regional integration in the western Balkans.

¹⁵⁶⁷ P6_TA(2006)0096 European Parliament resolution on the Commission's 2005 enlargement strategy paper (2005/2206(INI)).

¹⁵⁶⁸ P6_TA(2006)0096 European Parliament resolution on the Commission's 2005 enlargement strategy paper (2005/2206(INI)).

¹⁵⁶⁹ P6_TA(2006)0220 Annual Report on Human Rights in the World 2005 and the EU's policy on the matter. European Parliament resolution on the Annual Report on Human Rights in the World 2005 and the EU's policy on the matter (2005/2203(INI)).

¹⁵⁷⁰ P6_TA(2006)0065 Outlook for Bosnia and Herzegovina European Parliament resolution on the outlook for Bosnia and Herzegovina.

Individual resolutions	Make or break issues	Other selected issues
		<p>Croatia: war crimes prosecution, Roma, refugee return</p> <p>Albania: blood feud</p> <p>Serbia: minority protection</p> <p>Kosovo: minority rights of Serbs and Roma¹⁵⁷¹</p>
2007		<p>BiH: ICTY cooperation, prosecution of war crimes, missing persons, non-discriminatory education, return and integration of refugees, women's rights¹⁵⁷²</p> <p>Serbia: ICTY cooperation, war crimes, denouncing the genocide in Srebrenica, protection of minorities, refugee return, ethnic intolerance, racism, missing persons, Roma inclusions, anti-discrimination, human trafficking, media freedom (murders of journalists), civil society¹⁵⁷³</p>
2008		<p>BiH: non-discriminatory access to education irrespective of gender, ethnic origin or religion, return of refugees, IDPs, discrimination against minorities in the electoral law, intolerance against LGBT, missing persons, war crimes prosecution, media freedom, civil society, human trafficking¹⁵⁷⁴</p> <p>Macedonia: minority rights (cultural rights, education, use of symbols, electoral rights); discrimination against the Roma in education, social protection, housing and employment and health care; religious freedom; women's rights; media freedom; Bilateral Immunity Agreement</p>

¹⁵⁷¹ P6_TA(2006)0096 European Parliament resolution on the Commission's 2005 enlargement strategy paper (2005/2206(INI)).

¹⁵⁷² P6_TA(2007)0077 Bosnia-Herzegovina European Parliament recommendation to the Council of 15 March 2007 on Bosnia Herzegovina (2006/2290(INI)).

¹⁵⁷³ P6_TA(2007)0482 EU-Serbia relations. European Parliament recommendation to the Council of 25 October 2007 on relations between the European Union and Serbia (2007/2126(INI)).

¹⁵⁷⁴ P6_TA(2008)0522 EC-Bosnia and Herzegovina Stabilisation and Association Agreement European Parliament resolution of 23 October 2008 on the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part.

	Individual resolutions	Make or break issues	Other selected issues
			with the US granting exemption from the jurisdiction of the ICC ¹⁵⁷⁵ Croatia: war crimes prosecution, ICTY cooperation, national minority rights, refugee return, Roma, anti-discrimination, implementation of the CLNM ¹⁵⁷⁶
2009	BiH: (on Srebrenica) ICTY cooperation, prosecution of war crimes ¹⁵⁷⁷	BiH: all minorities should enjoy the same rights as constituent peoples, abolishing ethnic discrimination in electoral rights ¹⁵⁷⁸	South-East Europe: civil society, war crimes prosecution, cooperation with ICTY, ethnic segregation of schools, protection of the rights of ethnic and national minorities, Roma, gender equality, refugee return, anti-discrimination, media freedom ¹⁵⁷⁹

¹⁵⁷⁵ P6_TA(2008)0172 2007 progress report on the former Yugoslav Republic of Macedonia European Parliament resolution of 23 April 2008 on the 2007 Progress Report on the former Yugoslav Republic of Macedonia (2007/2268(INI)).

¹⁵⁷⁶ P6_TA(2008)0120 Croatia: 2007 progress report, European Parliament resolution of 10 April 2008 on Croatia's 2007 progress report (2007/2267(INI)).

¹⁵⁷⁷ P6_TA(2009)0028 Srebrenica European Parliament resolution of 15 January 2009 on Srebrenica.

¹⁵⁷⁸ P6_TA(2009)0332 Situation in Bosnia and Herzegovina. European Parliament resolution of 24 April 2009 on the situation in Bosnia and Herzegovina.

¹⁵⁷⁹ P6_TA(2009)0331 Consolidating stability and prosperity in the Western Balkans. European Parliament resolution of 24 April 2009 on consolidating stability and prosperity in the Western Balkans (2008/2200(INI)).

The additional fifteen international human rights agreements that the constitution orders to apply in Bosnia and Herzegovina¹⁵⁸⁰

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide
2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto
3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol there to
4. 1957 Convention on the Nationality of Married Women
5. 1961 Convention on the Reduction of Statelessness
6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination
7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto
8. 1966 Covenant on Economic, Social and Cultural Rights
9. 1979 Convention on the Elimination of All Forms of Discrimination against Women
10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
12. 1989 Convention on the Rights of the Child
13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
14. 1992 European Charter for Regional or Minority Languages
15. 1994 Framework Convention for the Protection of National Minorities

¹⁵⁸⁰ Annex 4: Constitution of Bosnia and Herzegovina, Annex 1: Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina.