Mapping, analysing and implementing foreign policy instruments

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Executive summary

This report provides a framework for mapping, analysing and implementing foreign policy instruments. It is the first Deliverable in Work Package 6 of the FRAME project. The FRAME is a research project funded under the EU's Seventh Framework Programme (FP7) focusing on EU internal and external human rights policies. Within FRAME, the focus of Work Package 6 is on Regional Partnerships and Bilateral Cooperation. Its main role is to support the regional case studies to be prepared as part of Work Package 6.

The objective of this report is to map and assess the human rights instruments the EU uses as part of its regional and bilateral relationships as well as the consistent and qualitative integration of human rights in the EU's external policy. It provides the theoretical and methodological basis to the case studies of Work Package 6, which will analyse to what extent human rights issues structure bilateral dialogue and whether the EU's rhetorical emphasis on human rights issues is backed by acts: other instruments (e.g. financial instruments and strategic partnerships) through which it can provide incentives to promote and protect human rights in its partner countries. Thus a general aim of Work Package 6 is to assess the consistency of the EU's discourse and policy of external human rights promotion, as it appears in bilateral relations. This report offers a discussion of the role of human rights tools and instruments in the EU's external action at a more general level, while the case studies will look into the operation of these tools in the context of particular bilateral partnerships and regional cooperation.

Part I surveys the literature produced by academic and think tank communities between 1998 and 2013 offering an overview of the narratives about the EU's external human rights activism and actorness on the international scene. Although the human rights component was present in certain EU policy fields prior to the 1990s the EU's human rights identity emerged in the 1990s connected to international political developments such as transition in Central Eastern Europe and the enfolding crisis in the Western Balkans, thus marking a beginning of a period of more intense discussions about the EU's external agenda and capabilities in the field of human rights. The goal of this part of the report is to inform the reader about the debates and issues raised by scholars and policy researchers regarding the role of human rights in the EU's external action. This comprehensive literature review reveals an apparent hiatus of targeted fieldwork which would be necessary for moving beyond institutional accounts and macro-summaries of developments. Such field research could also help to generate policy recommendations as to how the various inconsistencies of the EU's external human rights promotion could be tackled in practice that are pointed out by many authors studying EU foreign policy.

Part II scrutinises the various inconsistencies that characterise the EU's approach to human rights in its external relations. These deserve special attention as such inconsistencies undermine the credibility and efficiency of the EU's engagement in third countries and its promotion of human rights. Therefore these, often interrelated, inconsistencies are worthy of consideration by decision makers as these have consequences on policy outcomes and should thus be looked at in more detail. Part II also outlines the theoretical debates about the question whether and to what extent human rights are (and should be) part of European foreign policy, besides highlighting the main criticisms of the EU's external human rights engagement, which will be revisited by the case studies.

Part III looks more closely at foreign policy tools and instruments, their types, relations and general introduction, with special regard to their possible role in human rights promotion. A detailed description

of the various foreign policy tools based on EU documents was already provided by Deliverable 12.1, therefore this chapter instead investigates how these tools and instruments fit together in a unified fashion thus defining their role and place in the EU's wider human rights tool kit that require a combined approach to reach their full potential. This part seeks to map instruments by presenting them as a system and looks at various categorisations and classifications, assessing how various tools and instruments hang together, while also noting the existing inconsistencies in their application. Instruments are categorised based on various dichotomies such as hard power versus soft power tools; positive and negative instruments; secret and public instruments; human rights specific and general instruments; unilaterally and multilaterally applied instruments; tools along the diplomatic-economic-military axis; discretionary, mandatory and prohibited instruments. The chapter closes with recommendations concerning how some of the shortcomings could be tackled.

Part IV is devoted to presenting and mapping instruments of EU enlargement. Enlargement policy requires special attention not only because it is set at the boundary between EU external and internal policies, allowing for questions of coherence and consistency to be discussed from this particular angle, it is also central to human rights promotion by EU institutions. While human rights have acquired an increasing role in enlargement policy since the 1990s, enlargement policy discourse and practice in turn over the last two decades have played a significant part in shaping the EU's human rights policy. Thus enlargement greatly contributed to the development of the EU's external human rights policy, demonstrated also by the fact that a number of instruments developed in enlargement policy have been taken over to other EU policy fields or have potential to be so. The chapter outlines how enlargement policy has evolved over the last twenty years in terms of placing growing importance on human rights, with a focus on the period since 2007; while it also maps relevant instruments currently applied within the enlargement framework discussing these in more detail based on relevant EU documents and academic works.

List of abbreviations

CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSCE	Conference on Security and Co-operation in Europe
CSDP	Common Security and Defence Policy
CVM	Cooperation and Verification Mechanism
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EOM	Election Observation Mission
ESDP	European Security and Defence Policy
EU	European Union
EUROMED	Euro-Mediterranean Partnership
HLAD	High Level Accession Dialogue
HLD	High Level Dialogue
HR	Human Rights
HRD	Human Rights and Democratisation
IBM	Interim benchmarks
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Tribunal for the Former Yugoslavia
IPA	Instrument of Pre-Accession Assistance
MIPD	Multi-annual Indicative Planning Documents
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NPE	Normative Power Europe
OBM	Opening benchmarks
OSCE	Organization for Security and Cooperation in Europe
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHCR	United Nations High Commissioner for Refugees
WP	Work Package

List of abbreviations

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Tables and Figures

Introduction

The main goal of this report is to map the field of foreign policy tools and instruments at the disposal of the European Union in human rights promotion, with a special focus on bilateral relations. Part I draws up the context and provides a narrative overview of the development of human rights promotion in EU external relations. It surveys how the literature produced by academic and think tank communities conceptualised the EU external engagement in the field of human rights and the EU as a human rights actor on the international scene. The goal of this section is to situate our research in academic debates and mark out potential space for contribution. This chapter also offers a glimpse into the historical record of the EU's bilateral relations and regional partnerships from the point of view of human rights promotion – one of the main topics of the forthcoming case studies of this Work Package. It looks at how the literature assessed the role of human rights in some particular relations, however enlargement policy and European Neighbourhood Policy (ENP) are at the centre of this discussion since these policies have informed the most theorising about the EU's human rights identity. Although the established wisdom of this literature arrives at a pessimistic note by highlighting the mixed track record of the EU's achievements in the area of human rights promotion, more targeted fieldwork about agency, capabilities and scope conditions has been in short supply so far, which could move us beyond macro-level, general conclusions. By screening the literature the hiatus of studies focusing on micro level details of the EU's functioning as a human rights actor becomes apparent, which justifies the need for in depth case studies into the EU's bilateral relations and regional partnerships.

This first part of the study, which offers a bird's eye view on this topic is somewhat narrowed down in Part II to reviewing accounts of existing inconsistencies characterising the EU's human rights policy in external relations. Part II thus gives a more systematic overview of the main sources of criticism as well as the most important attempts, in the literature, to justify the role that human rights play in this area. The general question raised by this body of literature is whether and to what extent human rights are and should be part of EU foreign policy. After introducing how international relations theories view the role of human rights in the EU's foreign policy, the various inconsistencies that characterise the EU's approach to human rights in its external relations will be presented, as they are being discussed by different authors. These are: inconsistency between values and interests, which ties into the question of what is the place of human rights among the EU's external relations priorities; inconsistencies between the EU's rhetoric and action; in the treatment of third countries; between external and internal policies; inconsistency as fragmentation across levels and institutions, which boils down to the 'too many voices argument'; inconsistency in the content meaning what kind of rights the EU is promoting; and between the EU's reactive versus proactive behaviour. Lastly, critical explanations assessing the impact of EU foreign policy on the human rights situation in third countries are discussed. These criticisms will be revisited in the future case studies, by looking at the extent to which the EU managed to address these with its attempt to introduce a more coherent human rights policy under the pretext of the Strategic Framework and Action Plan on Human Rights and Democracy.

Part III addresses more directly the question of tools and instruments, and lists those that are at the EU's disposal, first, through the most common typologies and second, through a comprehensive list - that is, in this form, largely missing both from the available literature and from the desks of decision-makers - presenting briefly the various tools and instruments in the context of external human rights promotion. The main question of Part III of the report is what the typology of the instruments can tell about the normative, human rights aspect of these tools.

Part III concludes with preliminary suggestions (considering that it is only the first step in the project) on how the EU could address the criticisms it faces concerning its use of foreign policy tools and instruments. This part of the report seeks to support the development of the regional case studies of bilateral relations, the next phase of the project, and provide those studies with a theoretical and analytical framework that helps both orientation and consistency. Finally, a separate section (Part IV) deals with the tools and instruments the EU has used to promote human rights in the enlargement process, the area where the EU's impact has so far proved to be the most substantial.

The report was written with certain deliberate constraints to avoid overlap. Separate reports discussed EU external action and human rights promotion by offering a detailed description of available tools and instruments in light of the available EU documents (Deliverable 12.1), in development and trade policy (9.1), EU action at the multilateral level (5.1) and additional questions like the role of the various EU institutions in shaping foreign policy (Deliverable 5.1 Part III.B), among others. (The report will refer the reader to these reports at the relevant sections.) These areas are discussed only to the extent that it seemed unavoidable to address certain questions directly relevant for this report. However, as Deliverable 12.1 already provides a detailed presentation of external human rights tools and instruments based on EU documents with the exception of tools of enlargement, our mapping exercise is geared more towards interpretations and explanations outside of the EU thus those offered by academic and policy think tank accounts. Since in Deliverable 12.1 tools and instruments of enlargement were just briefly mentioned, a more thorough discussion of this topic was needed here, which explains a somewhat disproportionate weight and the amount of technical details from EU documents of this section in the overall report. Part IV also constitutes part of the mapping exercise as it provides a detailed and systematic description of human rights tools and instruments used in enlargement policy also diverting briefly to existing connections between them thus showing how they hang together. It is not a case study as it does not analyse how these instruments operate in practice and what human rights priorities they reveal, which will be done by Deliverable 6.2.

The analyses, classifications and insights from the report are all prepared with the case studies in mind, that will be written as the next phase of Work Package 6, by regions, as shown on the map below.
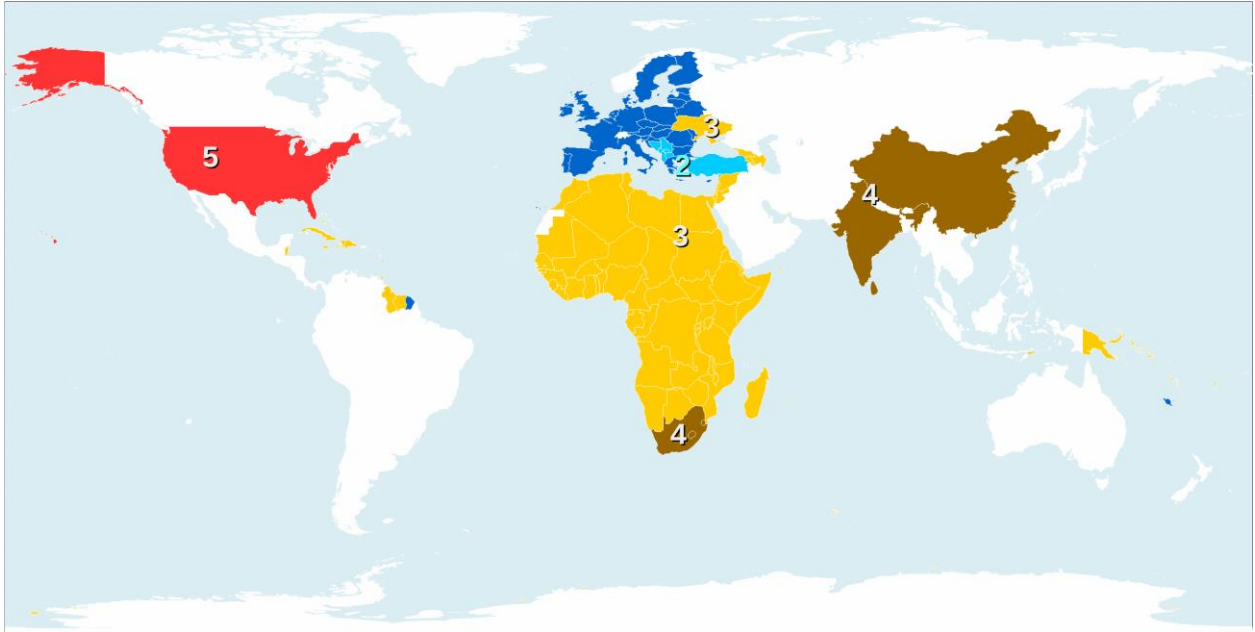
*Figure 1: WP6 Case Studies: 6.**2** European Enlargement Policy, with a focus on the Western Balkans and Turkey; 6.**3** Economic partnership with ACP Countries, Neighbourhood Policy, and Eastern Partnership; 6.**4** Bilateral relations with China, India and South Africa (BRICS); 6.**5** The role of human rights in the EU-US bilateral relationship.*

I.   Reviewing the literature on EU foreign policy instruments and human rights promotion

A.   Introduction and overview

1.   Chronologies of European Union human rights promotion and the approach of the report

The approach of the present section within the overall literature review is one of chronological sequencing modulated by major trends in the literature. This implies acknowledging the tight relationship between EU policy (mis)adaptation, events and processes in relevant action theatres on the one hand, and academic, as well as policy analysis commentary on the other. As a result, this section is roughly chronological: it traces the relationship, the 'dialogue' between the events/policies and the analysis. At the same time, the discussed themes and observations are not ordered strictly according to the time line. Rather, it is assumed that various discourses have evolved at various junctures about EU human rights actions, and these need to be presented as cohesive and complete dialogues with their respective foci, strategic metaphors and normalising or critical contributions to policy. As a result of this approach, the sections that follow survey larger bodies of texts, which are only loosely grouped according to a chronological order. There are some overlaps, since the focus was on discussing together the texts that are in a relationship of dialogue with each other. This method yields, at least in theory, an analytical narrative: the subsequent ways of writing about human rights in the context of EU external action are presented in some ways as a story, however, this story is not merely told as the reflection of political events. Instead, it is understood to have its own internal logic: the way the academic and think tank communities have worked at proposing conceptualisations and prescriptions to both describe and ameliorate human rights promotion by the EU.

The review is limited largely to the literature produced in the one and a half decades between 1998 and 2013, which marks out the period between the compilation of the bibliography in early 2014 and the beginning of a period of more intense discussion about the EU agenda and capabilities in the field of human rights. This latter followed the launch of the Euromed cooperation, the initiation of the 'hard' phase of the accession processes within Eastern Enlargement and an acceleration in the institutionalization of the security element in the Common Foreign and Security Policy – three areas that all required developing and scrutinizing ideas relating to human rights actorness. Less significantly at the time, but certainly not without historical significance and impact on the overarching question of what and how the EU should promote in the field of human rights have been the simultaneous and interrelated (with one or more of the above themes) engagements in the Western Balkans in the wake of the Dayton Agreements and the ensuing cessation of fighting in the post-Yugoslav wars, as well as the initial tentative programmes conducted in the vast post-Soviet space following the path opened up by NATO and its Partnership for Peace programme. As section I.B.2 will argue, a human rights component was present in certain EU policy fields prior to the 1990s, but it is overall justified to claim that a kind of incubation period in the mid-1990s was followed towards the end of the decade by the marked intensification of human rights promotion by the European Union in various contexts and its study.

2. A tentative structure for interpreting EU human rights promotion across two decades

To complement the general aims and structure of the review, following a short survey of general Human Rights literature about the EU (see section A.3), the subsequent section samples the accounts of an emergent EU human rights identity (understood as a component part of its foreign policy identity) in the decades preceding the centring of the issue area relating to aid, development, enlargement, milieu-shaping and security policy, which, it is argued, occurred in the mid-to-late 1990s (Section B). The aim of the review of general literature is to gauge the recognition the European Union has been receiving from non-EU experts as a human rights actor and to permit a tentative assessment of the extent to which the EU has left an impact on human rights thinking in the field. Accordingly, this focuses on syntheses and introductions to the discipline, seeking to provide a diachronic image of the past two decades. Section II then presents what one could call the canonical image of the roots of EU human rights activism as found in recent literature, noting the emergence of a consensual 'story of origins' that is challenged by a few contributions only, notably from critical International Relations and Political Science.

Following this double introduction, the review proceeds to investigate the 1990s as the period of the emergence of an initial, but explicit incarnation of the EU's human rights identity and its tool kit (Section C). The next section makes the argument that around the end of the decade, the first discourse which produced a general theory about the actorness of the EU in the fields of external governance, democratisation and human rights emerged in the twin contexts of norm transfer (theory) and enlargement (practice). It was complemented by the synchronous reflections on the Western Balkans engagement of the EU (Section D). It was Central Eastern European successes that caused both the academic and the think tank communities to produce a body of work that declared itself largely optimistic about the tool kit and the possibilities of human rights norm diffusion, while more cautious empirical inputs from the Mediterranean neighbourhood formed an under-theorised, second-order discourse that was not filtered up into more theoretical contributions and syntheses, discussed as a counterpoint in section D.3.

Section E argues that there is a definite linkage between the literature reflecting on these 'golden years' and the emergence of the Normative Power Europe discourse, which is presented as peculiar in its lack of focus on agency, representing a theoretical step back from earlier constructivist analysis. As the mixed track record of the European Neighbourhood Policy, global activism and ESDP actions make clear, Normative Power Europe has failed in its implicit or explicit predictions regarding the EU's ability to shape, inter alia, the human rights arena both in its broader surroundings and globally (Section F).

Subsequent failures have prompted think tanks, and later increasingly theorists as well, to launch discussions about agency, capabilities and scope conditions for EU human rights and democratisation promotion. The review concludes on the critical note that the changes in political environment, principal (i.e. Member State) priorities in the wake of the global economic crisis of the end of the past decade have gone on to shape the most recent policy discourse about EU arenas of action such as the neighbourhoods and the Western Balkans in ways that represent a partial, at the very least, abandonment of the earlier analytical and normative focus on human rights promotion (Section H). This overall sense of policy ineffectiveness cannot be offset with the significant theoretical contribution of the human security literature to discussions of EU norm promotion – if anything, the mismatch between this strand of theorising, presented in Section G, and the aforementioned 'facts on the ground' further

sharpen the disillusionment with EU capabilities and the transformative potential of its external action toolbox.

The conclusion offered in Section I, at the end of this more or less chronological review, is not a second recapitulation of the concise summary offered here. Instead, looking at the whole of the literature surveyed below, notable lacunae of levels of research and evidence are pointed out. These, it could be argued, have prevented the study of the EU and its human rights promotion to become a legitimate subfield of European Studies and Human Rights alike. Missing targeted fieldwork at the micro and meso-level (meaning both studies of ground operations and EU-partner interactions, as well as of national level processes with an eye specifically on human rights promotion rather than democratisation and governance at large) is desperately required if EU literature treating human rights is to be able to move beyond institutional accounts and macro-summaries of developments. This would also be a potential vista to escape the apparent reactive character of the field to developments and permit more substantial and visionary prescriptions about what options the EU has to regain and enhance its capabilities as a human rights norm entrepreneur.

3. Roles and functions of the European Union in standard human rights literature

a) Why human rights literature could ignore the European Union

Human Rights literature devotes substantial discussion to European developments by default. The continent has seen the evolution of a densely institutionalised HR regime well ahead of other geographical macro-regions, involving both supranational jurisdiction and organisations specialising in field operations, such as the European Court of Human Rights (ECHR) and the Organization for Security and Cooperation in Europe (OSCE). Combined with a vast network of transnational linkages, many of them established by non-governmental players, others mixed in character, the developments constitute important evidence for Human Rights as an academic discipline and naturally merit investigation.

At the same time, it is far less obvious that the EU, strictly understood, should be accorded special attention. Its Charter of Fundamental Rights applies to member states only when they are implementing EU law. The supranational human rights court which adjudicates cases with compulsory rulings for member states is the ECHR, and is located outside of EU institutions. Nor has the EU sought to supplant the Council of Europe and the OSCE with regard to their fields of deliberation and action. As a result, the human rights actorness of the EU is less apparent to non-EU specialists, although important changes in the past two decades have left a very clear mark on general Human Rights literature. It is less frequently pointed out that the European Court of Justice (ECJ) has contributed to the integration of fundamental rights into the legal order of the EU. This, in turn, has been part of a more general assimilation of the EU's system to that envisioned in ECHR rulings.[1]

Standard 1990s syntheses rarely devoted a sustained discussion to the role of the European Union in the field of human rights. Even publications that sought to move beyond the dualism of nation state/United Nations in their perspective often disregarded EU initiatives to infuse a human rights element into trade and development regimes.[2] David Forsythe, when analysing the human rights regime-building in post-

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[1] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Oxford: Hart 2010) 143.

[2] David P. Forsythe, *Human Rights and Peace: International and National Dimensions* (Lincoln, NE: University of Nebraska Press 1993).

Cold War Europe in a survey, dwelt at length only on nation state preferences, notably French and German and recognised EC/EU involvement as a conduit for the latter, not requiring any separate analytic treatment.[3] A standard contribution to the field noted the increase of activities by the EU, and while no longer analysis of the consequences was presented, Jack Donelly's synthesis noted the shift from 'weak human rights provisions included in the Lomé Conventions [the EC's trade and development agreements with African, Caribbean and Pacific countries]', as the initial coupling of a HR agenda and development policy in the European Community, to a principled condition to 'include human rights conditionality in all future aid allocations' as of 1991.[4]

b) *The emergence of the EU as a player in Human Rights literature*

While later syntheses and surveys have tended to treat the EU as a human rights actor meriting some degree of analysis, more recent and important contributions on occasion still forego discussing its role even when including case studies where the European Union has been active through diplomatic dialogue and/or its development and aid policies.[5] At the same time, the field has definitely noted the emergence of the new actor with specific regional and global capabilities deriving largely from its attractiveness as a model and a political convergence pole, as well as from its considerable economic leverage – the two most common dimensions listed in European Studies literature, as well. Donnelly's synthesis, quoted above, was expanded to include discussion of the EU as the most prominent regional HR regime in later editions.[6] According to Manfred Nowak, this shift has its empirical roots in the 1998 'Human Rights Year' in the EU , which produced a *comité des sages* report (*Human Rights Agenda for the European Union for the Year 2000*) and catalysed EU engagement in the field at large.[7] Nowak discusses the EU in a separate chapter, arguing that conditionality, political dialogue frameworks, but first and foremost development cooperation projects make the EU 'well established as a "global payer" as far as human rights are concerned', noting that the EU and its (then) 15 member states spent about twice as much on human rights promotion and protection projects as the United States.[8]

The mandatory inclusion (the so-called essential clause requirement) of conditionality into all bilateral trade agreement and other treaties with third countries and the EU, effective since 1995, is usually considered a unique achievement in Human Rights literature. At the same time, the rapid transformation, human rights reforms and eventual accession of CEE countries have also demonstrated the 'indispensable role' of the EU 'in some of the former communist countries of Eastern Europe by taking human rights off of the moral wish list and making it an institutional reality'.[9]

It has to be added that HR literature tends to engage in less sustained criticism. This may derive from having an empirical horizon rich in failures that makes a Human Rights scholar more permissive toward inefficiencies and double standards often challenged by EU think tankers. Jack Donnelly is regularly quoted in the European Studies literature with his argument relating to the impossibility of enforcing

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[3] David P. Forsythe (ed), *Human Rights in the New Europe: Problems and Progress* (Lincoln, NE: University of Nebraska Press 1994), cf. also Shale Horowitz and Albrecht Schnabel (eds), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (New York: United Nations University Press 2004).

[4] Jack Donnelly, *International Human Rights* (2nd edn, Boulder, CO: Westview Press 1998) 71.

[5] Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (New York: Oxford University Press 2009).

[6] Jack Donnelly, *International Human Rights* (4th edn, Boulder, CO: Westview Press 2013) 267.

[7] Manfred Nowak, *Introduction to the International Human Rights Regime* (Boston: Brill 2003) 248.

[8] ibid 244-247.

[9] Helen M. Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture* (Stanford University Press 2009) 118-119; also Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill 2003) 243.

human rights criteria equally at all times, and the undesirability of a rigid conditionality that would preclude engagement with non-democratic regimes in third countries. Also, at the same time, there is an empirical disconnect inasmuch as Human Rights literature has not made much use of broader European Studies fieldwork results that point to shortcomings in EU policies and actions. Partly as a result of this, EU experts tend to paint – with notable exceptions – a less flattering image of the emergence and consolidation of the European Union as a human rights norm promoter and agent of diffusion.

B. Accounts of the emergence of an EU human rights identity

1. Early theorising and the impact of history

The emergence of an EU human rights identity is usually tied to 20th century historical experiences, notably the Second World War and the Cold War, as well as the post-colonial condition of many Western member states. All of these, it can be argued, imply a sensitivity to human rights issues, especially when interacting with third parties. Ole Waever has famously argued that the primary other of Europe is its own past which it seeks to exorcise continually by articulating a security identity with a strong social component, including human rights.[10] These same threats of authoritarianism, racism, etc. can also be construed as threatening the project of integration, contributing to understanding the famous 'take it or leave it' approach of enlargement with regard to democratic principles, including, prominently, human rights. In this vein, Henrik Larsen has argued that 'the emphasis on the liberal values in the Union can be seen as a negation of Europe's dark past'.[11]

The Helsinki process imbued old member states with the consciousness of the necessity to incorporate human rights in European political processes, as well. This happened at the time when the Greek military dictatorship had served as a second reminder for European leaders of the dangers of any (not just Soviet) threat to human rights and societal security. Daniel Thomas makes the argument that these Cold War experiences have all left their mark on the EU, reinforcing the notion that human rights are constitutive of European identity.[12]

More integration-focussed accounts tend to highlight the fact that human rights concerns were identifiable at all stages of the multi-track process of unifying Europe, in fact, in the single most detailed human rights chapter to be found in any European foreign policy monograph Karen Smith makes the historicising argument that this presence can be documented from post-World War II designs of integration throughout the history of the EC to the post-Cold War consolidation, formalisation and expansion of the EU human rights regime. Notable stops on this 'road' would include, per Smith, the periodic investigation of human rights issues in the foreign policy cooperation mechanism (EPC) launched after the 1973 Copenhagen summit, and the emergence of a European trade and development policy embodied in the various regional and trans-regional treaties in the vein of Lomé.[13]

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[10] Ole Waever, 'European Security Identities' [1996] 34/1 Journal of Common Market Studies 122.

[11] Henrik Larsen, 'Discourse Analysis in the Study of European Foreign Policy' in Ben Tonra and Tomas Christiansen (eds), *Rethinking European Union Foreign Policy* (Manchester, England: Manchester University Press 2004) 74.

[12] Daniel C. Thomas, 'Human Rights in U.S. Foreign Policy' in Sanjeev Khagram, James V. Riker and Kathryn Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press 2002) 74.

[13] Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge-Boston: Polity 2003).

Indeed, after Francois Duchêne applied the term 'civilian power' in 1972, the EC did periodically engage in political dialogue through the EPC with various human rights violators, notably Turkey and South Africa. In placing human rights on the table, European demands were often propelled by the European Parliament, exploring its role as norm entrepreneur within the Community.[14] As Michael Smith observed, lax and informal criteria in the 1970s were reshaped in the 1980s, and in the 1990s human rights as a policy concern of the new European Union found, if minimal, reflection in the Maastricht Treaty and in the emergent CFSP structure.[15]

Steve Marsh and Wyn Reese more recently, and much earlier Paul Kubicek argued that the signing of the TEU launched a next phase of the institutionalisation of human rights priorities, providing a principled foundation for the emergent policy practice of coupling various sectoral external relations with human rights.[16] This phase, according to Kubicek, yielded

> an emphasis on democratization, human rights, genuine pluralism, and the rule of law. These concerns have been enshrined in European Council declarations dating from 1991, Association and Partnership and Cooperation Agreements with former Communist states, the Maastricht Treaty, the most recent Lomé Convention, and in the 1993 Copenhagen Criteria establishing democratic requirements for EU membership. Development aid has been made increasingly conditional on the recipients' respect for human rights.[17]

Kubicek's co-authors from the 2003 edited volume which explored systematically EU democratisation efforts and exchanges also noted the constitutive role of sustained interaction with problematic partners such as Turkey and the resulting identity-formation process of the EU. This, as Knud Erik Jørgensen presents, led to the civilian power identity becoming more pronounced in the European Union.[18] In sum, the TEU is widely accepted to have had a transformative, but also delayed effect, which made itself felt later than the actual coming into force of the treaty. Interpretations of this delayed effect make up, in a way, the next sections of this review.

2. Conditionality and human rights promotion

a) The post-colonial and the identity arguments

According to Siegmar Schmidt, not only its emergent civilian power identity, but also the post-colonial condition impacted on EU actors' preferences regarding the use of positive, rather than negative conditionality. Schmidt notes the important shifts in the international opportunity structure of the post-bipolar world, which, coupled with intra-EU preferences, produced a conditionality system that can punish, but is fundamentally geared towards carrots, rather than sticks. Carrots usually include economic

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[14] Michael Emerson, Senem Aydın, Gergana Noutcheva, Nathalie Tocci, Marius Vahl and Richard Youngs, **'**The Reluctant Debutante – The EU as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (Brussels: CEPS 2005) 173.

[15] Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge-New York 2004) 171-172; also Henrik Larsen, 'Discourse Analysis in the Study of European Foreign Policy' in Ben Tonra and Thomas Christiansen (eds), *Rethinking European Union Foreign Policy* (Manchester University Press 2004) 75

[16] Steve Marsh and Wyn Reese, *The European Union in the Security of Europe: From Cold War to Terror War* (London-New York: Routledge 2012) 37-40.

[17] Paul J. Kubicek, 'International Norms, the European Union, and Democratization' in Paul J. Kubicek (ed), *The European Union and Democratization* (New York: Routledge 2003) 1–3.

[18] Knud Erik Jørgensen, 'Theorising the European Union's Foreign Policy' in Tonra and Christiansen, *Rethinking European Union Foreign Policy* (Manchester University Press 2004) 23; also Thomas W. Smith, 'The Politics of Conditionality' in Paul J. Kubicek (ed),*The European Union and Democratization* (New York: Routledge 2003) 118.

incentives such as trade opportunities and development aid as the most frequently and broadly deployed instrument type, but can extend to political processes such as accession in specific cases. Sticks include sanctions as the hardest instrument, but the freezing of aid or even ongoing cooperation and negotiations can also be named as elements of the conditionality structures. Beyond conditionality, the post-Westphalian identity component of the EU has resulted in transnational activism and engagement with foreign NGOs from the 1990s on. According to Schmidt,

> [p]olitical conditionality became an important policy instrument in the 1990s when the end of the Cold War – the sea change in international politics – allowed western donors to refrain from supporting states only for strategic and ideological reasons. This new political leverage for donors was used by them to be more uncompromising in the case of serious human rights violations. From 1992 all relations between the EU and other states were subject to the principle of respect for human rights and democracy. Parallel to conditionality, the EU strengthened its efforts to promote human rights and democracy by 'positive measures', i.e. the support for democratic elections, civil society, and democratic institutions. The main instrument became the European Initiative for Democracy and Human Rights (EIDHR) through which the funds were channelled mainly to NGOs serving as implementing agencies.[19]

The practice of universal conditionality was the first truly distinguishing mark of a European human rights external relations policy. Its application, as Gordon Crawford observed at the time, meant a considerable step forward, just as the subsequent fusing of human rights and democratization (HRD), highlighted by Karen Smith, was a novelty in the post-Cold War setting.[20] Here too, the Parliament established itself as a watchdog early on, through the budgetary control of the dedicated instrument named European Initiative for Democracy and Human Rights (EIDHR).[21] Importantly, however, as Helene Sjursen and Karen Smith have pointed out, the EU sought to temper its stance by basing its human rights conditionality clauses on widely accepted international standards, enabling it to argue that 'these are not just EU-specific values but reflect widely accepted principles.'[22]

A further reflexive element in the application of the conditionality clauses has been, according to Karen Smith, the attention accorded to safeguarding societal interests in partner and aid recipient states. Beyond the already mentioned emphasis on positive instruments and the emphasis on using universally acknowledged norms, in more recent years, especially the new millennium, EU practice has placed relatively increased emphasis on economic, social and minority rights which are less codified, but are seen usually as both carrying immense societal relevance and according with the experiences of the European Union as a donor, notably in the Western Balkans.[23] While the primacy of political and civil rights remains, the survey presented in Section II.A.7 confirms the terminus of this process: a less than coherent, but certainly multi-dimensional approach to the meaning and content of human rights.

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[19] Siegmar Schmidt, 'Soft Power or Neo-Colonialist Power? - African Perceptions of the EU' [2012] 4/3 Review of European Studies 100–110.

[20] Gordon Crawford, 'European Union development co-operation and the promotion of democracy' in Peter Burnell (ed), *Democracy Assistance: International Co-operation for Democratization* (London: Frank Cass 2000).

[21] Michael Emerson, Senem Aydın, Gergana Noutcheva, Nathalie Tocci, Marius Vahl and Richard Youngs, 'The Reluctant Debutante – The EU as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (Brussels: CEPS 2005) 173.

[22] Helene Sjursen and Karen E. Smith, 'Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement' in Ben Tonra and Tomas Christiansen (eds), *Rethinking European Union Foreign Policy (*Manchester, England: Manchester University Press 2004) 133.

[23] Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge-Boston: Polity 2003) 107–109, 119.

b) *The influence of constructivist theorising*

The emergence of a toolbox with three major components – dialogue, conditionality and a HR-focussed foreign development policy – suggested in the 1990s the emergence of a distinct foreign policy identity of the European Union, building on, but going beyond the civilian power metaphor. This coincided with and found a basis for theorising in the influx of constructivist international relations into European Studies, which had by this time produced a remarkable corpus on the dynamics of norm transfer and social learning in the international sphere – goals that the EU had seemingly pursued with increasing motivation in the wake of the Cold War. The constructivist discourse on how norms spread became foundational to the theorising of an EU foreign policy identity, inasmuch as it presented concepts hitherto underused in EU studies such as communicative action, rhetorical entrapment, social learning and diffusion. These addressed norm transfer at various levels of international analysis, but they all supported the notion that formal and informal engagement of international actors can result in social learning and even emulation. As Thomas Risse, a key contributor to this stream of theorising observed in 1999, in the case of engagement, the more partners '"talk the talk" . . . the more they entangle themselves in a moral discourse which they cannot escape in the long run.'[24]

For many commentators around the turn of the millennium, including Pridham, Bretherton and Vogel, on the increasing HRD activism of the EU both in the East Central European neighbourhood and around the world, this theorising seemed to suggest the possibility of not just 'convergence' around EU norms, but also of the EU 'reproducing itself'.[25] Looking back, Daniele Piana summarised the period, in the context of early enlargement efforts, as providing evidence of the capacity of the EU to promote itself as a system of governance oriented towards enforcing human rights and fundamental freedoms. European constitutionalism is strongly entrenched in these two values: enforcement of human rights at the transnational level and an independent judiciary to act as a check on domestic legislatures within national systems and at the European level, and these principles reproduced themselves in European expectations vis-à-vis partners in the field of development and trade.[26]

At the time, Richard Youngs argued for a similar, although more nuanced logic of norm export on the part of the EU, while in 2002 Ian Manners published a piece where he first used the concept of Normative Power Europe.[27] It should be noted that around this time (1998-2002), neither of these contributors to the discussion had investigated the fault lines in the norm transfer discourse, the focus fell far more on interpreting the emergence of a new foreign policy actor and its human rights- and democracy-based identity. The experience of the new HRD toolbox of the 1990s meshed well with such an account and contributors like Ian Manners, Robert Whitman, Kalypso Nicolaidis and others engaged in the theorisation of the EU foreign policy identity with an emphasis on norm promotion and human rights

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[24] Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area' [1999] 27 Politics and Society 529–59; Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Steve C. Ropp ad Kathryn Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Political Change* (Cambridge University Press 1999) 1–38.

[25] Geoffrey Pridham, *The Dynamics of Democratization* (New York: Continuum 2000) 296; Charlotte Bretherton and John Vogler, *The European Union as a Global Actor* (London: Routledge 1999); Sandra Lavenex, 'EU external governance in "wider Europe"' [2004] 11⁄4 Journal of European Public Policy 680–700.

[26] Daniele Piana, 'Judicial policies and European enlargement: Building the image of a rule of law promoter' in Furio Cerutti and Sonia Lucarelli (eds), *The Search for a European Identity: Values, policies and Legitimacy of the European Union* (London-New York: Routledge 2008) 185.

[27] Richard Youngs, *The European Union and the Promotion of Democracy* (Oxford University Press 2001).

activism based on domestic norms which both prescribe (a necessarily value- and identity based) foreign policy for the EU and can promote convergence in third parties.[28]

C. Interpretations of the 1990s: Take-off and weakness

1. The security/human rights nexus

a) The influence of the concept of a broadened security agenda

The previous section surveyed how the 1980s and the early to mid-1990s figure in the literature produced after 1998 (the emergence a functional European external action framework). Also, it demonstrated how in the period between 1998-2002 both in academia and in policy-oriented texts one finds attempts at interpreting the recently emerged EU foreign policy identity and the role and function of human rights within it. Parallel to this discourse – built on the observation of the linear creation of ever more HRD instruments, institutional codification and consolidation and not least the theoretical input of social constructivism – a more diffuse body of literature treated the experiences of the mid-to-late 1990s. As will be shown below, these contributions tended to emphasise unevenness and problems more, but a sizable part, while agreeing with the tenet that the human rights component and the broader foreign policy identity of the EU is an unfinished project, remained fundamentally optimistic.

One of the distinguishing marks of the mid-1990s was the emphasis on the security-driven character of EU foreign policy actions – something that started to change as enlargement became the dominant issue area with a human rights bearing at the end of the decade. An early survey edited by John Peterson and Helene Sjursen, interesting since it pairs a quasi-realist scholar of EU politics with a future leading exponent of the Normative Power Europe concept, documented in some detail the emergence of the HR clauses and emphases of European foreign policy across sectors and regions, underlining how the emergence of the EU as a foreign policy actor is usually a response to various power and security voids, the products of the end of the Cold War.[29]

This logic featured prominently in empirical discussion around the turn of the millennium, serving as an explanatory variable for the observed activism without making recourse to the social constructivist argumentation of Normative Power Europe, and generating a middle ground where experts with realist/rationalist and constructivist leanings could discuss the experiences of EU activities outside its borders. As Marco Giorello observed, human rights conditionality clauses can have a security justification, the avoiding of crisis situations in the neighbourhood and in the world by strategic prevention. As EU practices consolidated, the early and weak human rights clauses in the security-deficient environment of the nineties took on better defined features, and standards such as the strict 'Baltic' and the more permissive, but refined 'Bulgarian' clauses, with their origins in European

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[28] Ian Manners and Richard G. Whitman, 'The 'difference engine': constructing and representing the international identity of the European Union' [2003] 10/3 Journal of European Public Policy 389. Similarly treating the importance of human rights are Kalypso Nicolaidis and Robert Howse, '"This is my EUtopia ...": Narrative as power' [2002] 40/4 Journal of Common Market Studies 767-792.

[29] John Peterson and Helene Sjursen (eds), *A Common Foreign Policy for Europe: Competing visions of the CFSP* (London-New York: Routledge 1998).

Agreements, were being replicated in EU-third party agreements in the 1990s, representing a new generation in the history of EU conditionality.[30]

The prominence of the human rights-security policy linkage is at least partially explained in this period by the so-called broadening of the security agenda that occurred and was also heavily theorized in the 1990s. This dual (political and academic) turn to a broad concept of security permitted the interpretation of EU external action in a new security framework. Human rights were nested in this broader agenda as a cross-sectoral factor, and commentators like Sjursen presented the human right-security continuum accordingly.[31]

This position could be replicated at least in parts by realists such as Adrian Hyde-Price, who was willing the acknowledge that the EU in the late nineties was

> seen as performing the roles of an anchor of stability in the new Europe; a magnet for the new democracies of Central and Eastern Europe; and a focus for European cooperation and integration. Above all, the EU was seen as a bastion of liberal democratic values and practices, involving a respect for human rights and the rule of law, and the peaceful resolution of disputes.[32]

The driving force behind this, according to Hyde-Price was the lesson of post-Cold War insecurity, an argument that appears in various forms in the 1990s. Nicholas Wheeler reasoned that the EU sought to use its own leverage to extend the CSCE/OSCE regime, while Fowler pointed out that the human rights agenda is deployed in tandem, and aligned with security interests.[33] The seamless juxtaposition of security and identity-driven foreign policy in these texts is striking in view of later contributions, discussed in the upcoming sections. Strategic action and value rationality are taken to coincide, and leave no room for 'the EU as a force for good'-type arguments.

b) The European Union's interactions with other organisations to promote human rights

As Frank Schimmelfennig and his co-authors defined it looking back on this period, NATO and the EU engaged in strategic incentivising and engagement, with the increasing number of diplomatic dialogues not dependent on third party performance in the field of human rights. As Schimmelfennig argued, 'NATO partnership was extended to the most autocratic regimes of the OSCE region: Belarus and many Central Asian countries. The same is true for the EU's PCAs with the successor states of the Soviet Union or the Euro-Mediterranean Partnership Agreements in the framework of the Barcelona Process.'[34]

At the same time, while security and diplomatic dialogues provided ample evidence of the soft deployment of human rights conditionality by the EU, human rights-focussed analyses noted the rigidity

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[30] Marco Giorello, 'The Clauses of Democratic Conditionality in the European Union's External Relations' in Carol Cosgrove-Sacks and Carla Santos (eds), *Europe, Diplomacy, and Development: New Issues in EU Relations with Developing Countries* (New York: Palgrave 2001) 80.

[31] Helene Sjursen, 'Missed opportunity or eternal fantasy? The idea of a European security and defence policy' in John Peterson and Helene Sjursen (eds), *A Common Foreign Policy for Europe: Competing visions of the CFSP* (London – New York: Routledge 1998) 97-113.

[32] Adrian Hyde-Price, 'Interests, Institutions and Identities in the Study of European Foreign Policy' in Ben Tonra and Thomas Christiansen (eds), *Rethinking European Union Foreign Policy* (Manchester University Press 2004) 110.

[33] Nicholas Wheeler, 'The Human Rights and Security Agenda' in G. Wyn Rees, *International Politics in Europe: The New Agenda* (New York: Routledge 1993) 145.

[34] Frank Schimmelfennig, Stefan Engert, and Heiko Knobel, *International Socialization in Europe: European Organizations, Political Conditionality and Democratic Change* (Houndmills: Palgrave 2006) 45.

and at best partial functionality of the cross-sectoral HR mechanisms. Optimistic commentators, such as Janne Haaland Matlary are in the minority making the claim that the nascent regime was powerful by virtue of delegating coercion and shaming to diplomacy, but also legalised, empowering transnational expert communities, and open enough to permit persuasion and argumentation to take place within its framework.[35]

2. Analyses of structural weaknesses in the promotion of human rights

a) Internal incoherence arguments

Witnessing the emergence of the regime, Alston and Weiler argued in a landmark essay that the HR regime that was seen as emerging was too legalistic and easy to circumvent if political expedience so demanded. Alston's seminal 1999 edited volume in general offered sharp criticism of the incomplete, or worse, malformed character of the EU human rights regime in external action.[36] As will be discussed in greater detail in Part II, around the turn of the millennium critical voices were noting the lack of coherence in several arenas, notably the impossibility of 'a comprehensive policy in relation to developing countries.'[37]

This period has, since, been characterised by the term coherence gap (the first of many gap metaphors in this field, as will be shown) between emergent or recent policies with human rights components. Gourlay argued in retrospect that while the EIDHR was meant as an instrument that would finally cut across pillars and policies, it did not mitigate the fractured character of human rights policies due to development and aid being a first pillar, while security and foreign policy a second pillar issue area, under the supervision of the Commission and the General Affairs Council, respectively.[38] While Hanggi and Tanner account for both the first and second pillar policy formation process, their summary confirms that 'across the board' promotion of HR was not possible at the time, even though various Commission and Council communications had called for this.[39]

b) Analyses of the early HRD toolkit available to the EU

Apart from the internal incoherence of EU policies in the field of human rights, the performance of the extant tripartite toolkit could be gauged in the Western Balkans during the 1990s. Both economic leverage and diplomatic dialogue, culminating in recognition of new states as the supreme reward for cooperation was expected, inter alia by Nicholas Wheeler, to raise the profile of the EC/EU

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[35] Janne Haaland Matlary, 'Human Rights' in Walter Carlsnaes, Helene Sjursen and Brian White (eds), *Contemporary European Foreign Policy* (Sage 2004) 141-154, esp. 152-153.

[36] Philip Alston and J. H. H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 3-66; also in retrospect: Thomas W. Smith, 'The Politics of Conditionality' in Paul J. Kubicek, *The European Union and Democratization* (Routledge 2003) 117.

[37] Irene Sacristan Sanchez, 'The European Union's Human Rights Policy towards Developing Countries: A Constitutional and Legal Analysis' in Carol Cosgrove-Sacks and Carla Santos (eds), *Europe, Diplomacy, and Development: New Issues in EU Relations with Developing Countries* (New York: Palgrave 2001) 67.

[38] Catriona Gourlay, 'Community Instruments for Civilian Crisis Management' in Agnieszka Nowak, *Civilian Crisis Management: The EU Way, Chaillot Paper no. 90* (Institute for Security Studies June 2006) 52-55.

[39] Heiner Hanggi and Fred Tanner, "Promoting security sector governance in the EU's neighbourhood," Chaillot Paper no 80. (Institute for Security Studies, July 2005), 28-32.

internationally and especially in the post-Yugoslav arena. EC engagement was taken by Wheeler to mean also more focus on human rights than old-fashioned diplomacy would have accorded it.[40]

Later commentators tend to agree, however, that EU conditionality was applied in an uneven, unprincipled manner in the 1990s in the Western Balkans, and also in North Africa – in both regions because of security concerns and the diplomatic preference for stability over human rights. As Fraser Cameron noted, Macedonia's recognition was delayed for such reason and at around the same time 'the EU turned a blind eye as the military intervened after the first round of voting in the Algerian election'. Cameron argues that Association Agreements, set up in this decade with Mediterranean partners, were stable only thanks to the laxness in EU practice of (not) invoking their human rights clauses.[41]

Finally, towards the end of the decade, as Agnieszka Nowak observes, a second gap was opened up: the capability gap referred to the lack of an EU crisis management task force that would have integrated civilian and military components also with the view to promote the 'human rights agenda since experts are linked and interact with all civil capabilities branches including police, judicial and penal expert and administrators.' While Nowak acknowledges that the EU was in a position to deploy 505 monitors and 391 advisors – altogether an exceptional number of experts – in the Western Balkans, institutional weaknesses and lack of integration hampered efficiency.[42] Other commentators, like Carlsnaes and co-authors, saw a different kind of gap – an inability to use military means to ensure the protection of human rights, if need be. But all acknowledged that policy- and capability-building had begun.[43]

3. The 1990s in retrospect

In retrospect most academics and also think tankers tend to agree that the 1990s saw the take-off, if only partial successful, of policies based on the emergent human rights identity of the EU, firmly nested in the external action 'universe', itself a supranational and intergovernmental centaur. The process of growth, as Rosa Balfour observes, led to the inclusion of 'human rights and democratisation objectives ... in the EU's conflict prevention strategy as a crucial building block of sustainable stability.'[44] Ulrich Sedelmeier pinpoints the strict conditionality of accession as a catalyst in embedding human rights in the emergent EU identity in general. The period in his description is characterised by storm and stress and uneven initial output, but with likely consolidation to follow.[45]

Sedelmeier's and Karen Smith's accounts rhyme inasmuch as the latter emphasises the instinctive character of the process, making the argument that the initial security-driven character of human rights promotion and HRD in general later ceded to a genuine normative expectation on the part of the EU. The path-dependency both of them identify as at work in the 1990s suggests the consolidation of a human

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[40] Nicholas Wheeler, 'The Human Rights and Security Agenda' in G. Wyn Rees (ed), *International Politics in Europe: The New Agenda* (Routledge 1993) 143.

[41] Fraser Cameron, *An Introduction to European Foreign Policy* (Routledge 2007) 184.

[42] Agnieszka Nowak, 'Civilian Crisis Management within ESDP' in Agnieszka Nowak (ed), *Civilian Crisis Management: The EU Way Chaillot Paper no. 90.* (Institute for Security Studies 2006) 15-38, esp. 27-28.

[43] Frederic Charillon, 'Sovereignty and Intervention: EU's Interventionism in its 'Near Abroad'' in Walter Carlsnaes, Helene Sjursen and Brian White (eds), *Contemporary European Foreign Policy* (Sage 2004) 252-264.

[44] Rosa Balfour, 'Principles of Democracy and Human Rights: A review of the European Union's Strategies towards its Neighbours' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy*(New York-London: Routledge 2006) 128.

[45] Ulrich Sedelmeier, 'Collective Identity' in Walter Carlsnaes, Helene Sjursen and Brian White, *Contemporary European Foreign Policy* (Sage 2004) 123-140.

rights identity which, it seemed, could soon become operational and help overcome the unevenness in the application of principles and the capabilities gap as well.[46] Similar claims with regard to the embedded human rights component of the enlargement process, path-dependency leading to more normative deployment of instruments and the prospective closing of the capability gap were also made by Helene Sjursen in looking back on the 1990s.[47] Altogether, commentators agree, the period was one of rapid, if uneven growth.

In view of the progression of human rights commitments, capacity building, policy and institutional reform towards the end of the 1990s, as Thomas Smith argued, one may have been tempted to say that the EU's post-Maastricht philosophy of international relations has coalesced around the broad idea of human rights, even if specific policies and practices have left much to be desired or, as in the case of the former Yugoslavia, have failed spectacularly. Civil rights are deeply seated in the European experience and the rhetoric of rights comes naturally to member states. Article 6(2) of the 1992 Treaty of Europe (TEU), or Maastricht Treaty, binds member states to take human rights into account in their external relations. The development of human rights and fundamental freedoms is one of the five objectives of the CSFP. More importantly, the CSFP fuses human rights and international security in the idea of 'soft security' related to political and economic chaos, ethnic strife, minority conflicts, border disputes, refugees, and the environment. The 'Petersberg Tasks' of rescue, peacekeeping, and crisis management, to be carried out by a EU rapid-reaction force, complete an ambitious human rights agenda. Speaking on behalf of the EU at the Fifty-fifth Session of the UN Commission of Human Rights, German Foreign Minister Joschka Fischer argued that human rights policy was not a 'soft topic,' but was 'tough Realpolitik.'[48]

D. The golden years: Enlargement and state-building in the Western Balkans

1. The Eastern Enlargement as the model of human rights promotion by the EU

a) Constructivist theorising and enlargement

The eastern enlargement of 2004 ended a process that saw not only the rapid adoption of the *acquis communautaire* in accession countries, but also several broad policy reforms not directly related to the *acquis*. These included human rights and in fact shaped the EU's self-image of a human rights norm entrepreneur by both refining and broadening the concept. While in the wake of under-performing on the part of new member states and more recent instances of democratic backsliding there is now considerable criticism, academic and public, of the way the enlargement conditionality failed to truly transform candidate countries into fully performing member states, a review of relevant literature makes it very clear that the accession process was hailed at the time and for some years after as the single most successful external relations venture of the European Union. It inspired various subsequent external

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[46] Karen E Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe,* 2nd edn (Basingstoke, NY: Palgrave-Macmillan 2004).

[47] Helene Sjursen, 'Security and Defense' in Walter Carlsnaes, Helene Sjursen and Brian White, *Contemporary European Foreign Policy* (Sage 2004) 59-74; Helene Sjursen, 'Enlargement and the Nature of the EU Polity' in Helene Sjursen, *Questioning EU Enlargement: Europe in Search of Identity* (London: Routledge 2006) 1-16.

[48] Thomas W. Smith, 'The Politics of Conditionality' in Paul J. Kubicek, *The European Union and Democratization* (Routledge 2003) 116.

relations frameworks, notably the European Neighbourhood Policy, and especially with regard to the broader HRD agenda it was considered to have achieved a transformation that made the EU appear as a very potent norm entrepreneur and agent of deep-reaching transformation. As Kubicek argued, the process seemed to suggest that the EU's liberal identity could be reproduced, at least close to home, with relative ease:

> One notion that is widespread in much of the literature on democratization is democratic contagion, sometimes called diffusion, a demonstration effect, or even the global zeitgeist. The notion here is that events or systems in one country or group of countries, to the extent that they are seen to be attractive or achievable, can spread across borders.[49]

Constructivist theorising, broadly speaking, supported the logic of democratic contagion. Classics of institutional sociology and novel theorising about norm transfer all suggested that in weakly institutionalized issue areas, with much uncertainty, interaction and normative pressures could foster norm adoption.[50] As Frank Schimmelfennig argued, strategic behaviour can be manipulated so that norms are adopted and eventually a 'stale domestic structure in which actors have no incentive to deviate from the rules' can emerge.[51]

b) Theorising mechanisms of norm adoption as a model for promoting human rights

In the above theoretical setting, it seemed that East Central European countries were 'good candidates' for norm adoption, having recently experienced the loss of credibility of domestic structures, represented a good 'cultural match' (Checkel)[52] and the EU's carrots or positive incentives were very strong, having been given a conditional promise of membership.[53] Human rights regime expansion could be interpreted under the aegis of accession as 'governance by conditionality', a term coined by Schimmelfennig and Sedelmeier. While these authors, much like Wade Jacoby, warned about scope conditions required for successful norm transfer, the accession process was in general interpreted as a success.[54] Schimmelfennig and co-authors noted that human rights touch on constitutive rules of a political community and thus represent hard cases, but also cases where a norm-based policy process is likelier to unfold. Since EU actors and stakeholders in accession considered that 'the promotion of

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[49] Paul J. Kubicek, 'International Norms, the European Union, and Democratization' in Paul J. Kubicek, *The European Union and Democratization*, (Routledge 2003) 5.

[50] Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' [1983] Vol. 48 American Sociological Review 147-160; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] 52/4 International Organization 896-904, Jeffery T. Checkel, 'Why Comply? Social Learning and European Identity Change' [2001] 55/3 International Organization; Daniel Drezner, 'Globalization and Policy Convergence' [2001] 3 Spring International Studies Review 53-78.

[51] Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union' [2001] 55/1 International Organization 47-80.

[52] Jeffrey T. Checkel, 'Norms, Institutions and National Identity in Contemporary Europe' [1999] 43/1 International Studies Quarterly 83–114.

[53] Barbara Lippert, Gaby Umbach and Wolfgang Wessels, 'Europeanization of CEE Executives: EU Membership Negotiations as a Shaping Power' [2001] 8/6 Journal of European Public Policy 980-1012; Jurgen Dieringer and Nicole Lindstrom, 'The Europeanization of Regions in EU-Applicant Countries: A Comparative Analysis of Hungary, Poland, Romania and Slovenia' CEU Working Papers IRES No. 2002/3 (Central European University 2002).

[54] 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 661–679; Wade Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (Cambridge University Press 2004).

democracy and human rights is an indispensable element', conditionality was accordingly strict and norm transfer relatively efficient.[55] As this train of thought went, over time, calculus-based behaviour of domestic elites and of EU stakeholders would converge around a normative core through mutual entrapment in an emerging discourse of accession and membership.[56]

Providing empirical support to the mechanism outlined above, Rosa Balfour, as well as Sjursen and Smith refer to the policy changes achieved by the EU in Slovakia and Romania with regard to minority policy and broader democratic rights, arguing that this was at the same time a learning process for the EU as well – an important lesson after the post-Yugoslav wars, and one that has continued to shape EU expectations vis-a-vis third countries.[57] At the same time, one has to note the relatively modest set of empirical references and the lack of detailed case studies that would have helped gauge the depth of the transformative effect of enlargement. In retrospect, it appears that optimism with regard to this transformative potential was founded more on short term outcomes than on a solid, field-work based understanding of how these mechanism would work.

2. The ambivalence of the Western Balkans experiences

a) *The test case of the deployment of the reinforced EU tool kit*

Simultaneously with Eastern Enlargement, the EU was also in a novel security policy situation, increasing its stake in the reorganization of the Western Balkans. As Eva Gross pointed out, the Stability Pact and the Stabilization and Association Process for Western Balkan countries both opened the way for the EU to shape its neighbourhood and entrenched human rights criteria in the prospective cooperation with Stability Pact signatories.[58] For the first time, the whole spectrum of EU human rights and democratization toolkit was deployed, including diplomatic dialogue, civil society programs, conditionality mechanisms and military-civilian missions on the ground. Sanctions were deployed against the Former Republic of Yugoslavia (FRY), empowering the opposition which could offer, thanks to support on the part of the EU, 'the promise of integration' and 'an alternative to the isolation of the previous decade'.[59] Beyond the FRY, reformists were boosted by normative EU support, according to John Peterson, in Croatia and Bosnia, as well, whose success was fed by awareness on the part of societies that 'that large aid infusions were conditional on human rights improvements'.[60]

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[55] Frank Schimmelfennig, Stefan Engert, and Heiko Knobel, *International Socialization in Europe: European Organizations, Political Conditionality and Democratic Change* (Palgrave 2006) 22-25.

[56] Frank Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric* (Cambridge University Press 2003).

[57] Rosa Balfour, 'Principles of Democracy and Human Rights: A review of the European Union's Strategies towards its Neighbours' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 118-121; Helene Sjursen and Karen E. Smith, 'Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement' in Ben Tonra and Thomas Christiansen (eds), *Rethinking European Union Foreign Policy* (Manchester University Press 2004) 136.

[58] Eva Gross, 'European Union Foreign Policy towards the Balkans' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence (*Palgrave MacMillan 2007) 97-111.

[59] Rosa Balfour, 'Principles of Democracy and Human Rights: A review of the European Union's Strategies Towards its Neighbours' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 121-124.

[60] John Peterson, 'The US and Europe in the Balkans' in John Peterson and Mark A. Pollack (eds), *Europe, America, Bush: Transatlantic Relations in the Twenty First Century* (New York: Routledge 2003) 93.

In this venture, the EU was, as Sedelmeier argued, in possession of a better defined sense of mission and identity as a result of the process of 'enlargement policy and the related discourse' which had 'contributed to the formation of this specific role of the EU'. Sedelmeier interprets 'role formation' as an 'unintended consequence' of experience, yet one that contributes to the normalising of previous innovations such as the formulation of a wide-ranging HRD agenda.[61]

As the EU, especially CFSP High Representative Javier Solana, assumed high-profile missions in the region, on occasion with NATO Secretary-General Lord Robertson, the normative pull seemed strong enough to prevent further conflicts from spiralling into war.[62] Apart from more traditional diplomatic engagement, as Isabelle Ioannides observed, the crisis missions also demonstrated how EU methods, tested in the accession process, could become operational in the context of the broader HRD agenda in non-legislative schemes (as opposed to the codification-centred process of *acquis* adoption). The police missions, judiciary training and other transnational engagements included such enlargement tools as twinning alongside other best practices, promoting human rights within various governance institutions.[63]

The optimistic scenario, expounded, inter alia, by Ettore Greco, saw the EU deploy similar mechanisms in the Western Balkans as it had in East Central Europe. Invoking ECE experience, it could be argued that:

> conditionality policy provides the most powerful stimulus for further development of the democratization process and for improvement of overall human rights conditions. Since the late 1990s the EU has closely watched key developments in the political life of the region's countries, contributing to various monitoring activities. The introduction of legislation implementing international standards for the respect of human rights, has also considerably benefited from the EU's advisory role. The EU's contribution to human rights promotion is likely to grow as a result not only of the deepening of integration and cooperative links with the individual countries, but also from the tendency of the OSCE to downsize its presence in the region, creating a void that is most likely to be filled by the Union.[64]

Such summaries attest to how rapidly the assumptions about the sufficiency of the EU HRD tool kit and the normative pull of the EU became basic tenets in relevant literature. The promotion of human rights, along with other aspects of democratic governance, were expected to make headway thanks to these two factors and based on the experiences of enlargement.

b) *Criticisms and the bilan of European HRD capabilities*

Critical voices from the first years of the decade were fewer. Turkey, while experiencing a rapid accession-perspective fuelled reform burst around 2002, failed to launch accession discussions with the EU. Michael Emerson and co-authors describe these reforms as 'the first crucial responses to EU conditionality' which led to 'significant reforms, particularly in the fields of human rights protection of

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[61] Ulrich Sedelmeier, 'The EU's Role as a Promoter of Human Rights and Democracy: Enlargement Policy Practice and Role Formation," in Ole Elgstroem and Michael Smith, *The European Union's Roles in International Politics: Concepts and Analysis* (London-New York: Routledge 2006) 118-135.

[62] John Peterson, 'The US and Europe in the Balkans' in John Peterson and Mark A. Pollack (eds), *Europe, America, Bush: Transatlantic Relations in the Twenty First Century* (New York: Routledge 2003) 90.

[63] Isabelle Ioannides, 'Police Mission in Macedonia' in Michael Emerson and Eva Gross (eds), *Evaluating the EU's Crisis Mission in the Balkans* (Brussels: CEPS 2007) 81-125.

[64] Ettore Greco, 'South-Eastern Europe'in Roland Dannreuther (ed), *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy* (New York: Routledge 2004) 69.

minorities, freedom of expression and freedom of association.'[65] In the Western Balkans, too, expectations and progress diverged, at times sharply. This led to what Martin Holland called a 'capacity-expectation gap', referring to the inability of the EU to fulfil the expectations of would-be accession countries. Overall, Martin argued, these unmet expectations damaged the EU's normative power and its ability to promote its HRD agenda.[66]

The most sustained line of criticism came from critical IR corners. Arguments made, inter alia, by David Chandler, John Laughland and Federica Bicchi, all directed attention to the fact that through rigid conditionality the EU was unreflectively exporting itself, while profiling the various accession and state-building processes as apolitical and derivative of universal norms. This is why its HRD policy had assumed an 'imperial' character, made all the more unsettling by the lack of checks and balances in the deployment of leverage – power, in the end. As Laughland and Chandler warned, the liberal principle would require control over the actions of EU agents in the neighbourhood just as it would necessitate an emancipatory dimension to the human rights and democratisation agenda, so that its programmes do not become 'ciphers for external power rather than linked to societies.'[67]

Despite such warnings, the overall balance of the accession years was felt to be positive with regard to embedding the broader HRD agenda in EU operations and policies. As Balfour recounts, the period saw the EU go from a commitment to 'mainstream' human rights in 'all EU external policies' to the filtering down of this commitment into the institutional structure, resulting in inter-pillar committees, working groups and also high profile posts such as the EU's Personal Representative for Human Rights. Beyond conditionality, all aid and development funding was to include a portion earmarked for human rights promotion, making the EU 'the most generous human rights and democracy donor.'[68] While this may not have resolved the coherence gap altogether, it did represent progress according to Balfour and others, and certainly represented a move towards becoming a more principled HR actor.[69]

The accession period led to a general broadening of the EU's human rights agenda and promoted the view that norm transfer could be efficiently achieved in the field of HRD through a combination of leading by example, engagement and conditionality. The success of enlargement meant, paradoxically, that for the first time, key players in the EU felt in possession of a recipe for success with regard to the broader human rights and democratization agenda. Tanja Boerzel and Thomas Risse argued conclusively that the assumption that was to impact both the theory and practice of norm promotion and norm entrepreneurship in the EU for some years had its roots in the success of the Eastern Enlargement. They

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[65] Michael Emerson, Senem Aydın, Gergana Noutcheva, Nathalie Tocci, Marius Vahl and Richard Youngs, 'The Reluctant Debutante – The EU as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (Brussels: CEPS 2005) 187.

[66] Martin Holland, *The European Union and the Third World* (Houndmills, Basingstoke: Palgrave 2003).

[67] David Chandler, 'The EU's Promotion of Democracy in the Balkans' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (London: Routledge 2008) 68-82; Federica Bicchi, '"Our size fits all": Normative Power Europe and the Mediterranean' [2006] 13/2 Journal of European Public Policy 286 - 303; John Laughland, 'Human Rights and the Rule of Law: Achieving Universal Justice' in David Chandler (ed), *Rethinking Human Rights: Critical Approaches to International Politics* (Basingstoke, NY: Palgrave MacMillan 2002) 50.

[68] Rosa Balfour, 'Human Rights Promotion," in Furio Cerutti and Sonia Lucarelli (eds), *The Search for a European Identity: Values, Policies and Legitimacy of the European Union* (Routledge 2008) 164.

[69] Rosa Balfour, 'Principles of Democracy and Human Rights: A review of the European Union's Strategies Towards its Neighbours' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 114-129.

termed the tacit assumption that seemed to transpire into novel norm promotion and HRD programmes the 'One size fits all' idea, which they argue, held sway over considerable parts of the EU governance and policy making community.[70]

3. The problematic Middle Eastern and North African experiences

a) Member state interests and human rights

During the years of the Eastern Enlargement, the area where the European Union had engaged in the most sustained effort of norm promotion previously, the Mediterranean or MENA (Middle East and North Africa) region received comparatively less attention. Reviewing the literature, it is evident that MENA experiences were not, or very fragmentarily, integrated into the broader theoretical discussion about norm promotion, including the promotion of the EU's broader HRD agenda. At the same time, experts of the region continued to produce a body of work that suggested problems with the ability of the EU to exert normative power and induce compliance under any scope conditions. This short section treats this literature separately, not the least because of the lack of impact it seems to have made on mainstream discussions of the EU's capabilities and policy options in the field of HRD at the time.

Summing up his evaluation of norm promotion in North Africa, Martinez argues that a general dynamic can be spotted across cases in the region. Since the EU, but certainly stakeholder member states, have specific security and economic interests in the region, human rights norms enforcement was uneven and HR considerations were often sidelined.[71]

Also, beyond the changing priority structures of member states, the cooperation format had faults to start with. As Lannon, Inglis and Haenelbacke observed, the coherence gap had detrimental results in the functioning of the EuroMediterranean Partnership (EUROMED). Since

> each basket is run in a more or less autonomous way. The Association Agreements include provisions on political dialogue, human rights, rule of law, and so on, but these have remained very general, and even then have never been invoked. The regulations on the MEDA Programme, the financial instrument of EU Mediterranean policy, link economic support to the promotion of human rights, fundamental freedoms and good-neighbourly relations, but in practice conditionality has been very limited if not non-existent.[72]

Such lack of cross-conditionality in the EUROMED was criticized numerous times, yet powerful member state interests, notably those of Spain, France and Italy, precluded a thorough revision of the items.[73] As Emerson and Noutcheva argue, this led to conditionality being insufficiently effective. Since HRD norms are not built into EUROMED financing schemes like MEDA, the running of such programs has had little effect on the promotion of human rights in the region. As they conclude, 'there has been no systematic

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[70] Tanja A. Börzel and Thomas Risse, 'One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law' Paper prepared for the International Conference "Thirty Years of the Third Wave of Democratization: Paradigms, Lessons, and Perspectives" (Social Science Research Centre Berlin 2004).

[71] Luis Martinez, 'European Union's Exportation of Democratic Norms: the Case of North Africa,' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences*, (London – New York: Routledge 2008) 118-133.

[72] Ervan Lannon, Kirstyn Inglis and Tom Haenebalcke, 'The many faces of EU conditionality in pan-Euro-Mediterranean Relations," in Marc Marescau and Ervan Lannon (eds), *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* (New York: Palgrave 2001) 97–138.

[73] Daniel Schmid, 'Interlinkages within the Euro-Mediterranean Partnership. Linking Economic, Institutional and Political Reform: Conditionality within the Euro- Mediterranean Partnership' EUROMESCO Paper No. 27 (Instituto de Estudos Estratégicos e Internacionais 2003).

procedure or attempt to include human rights concerns in the implementation of reform programmes. There are no coherent mechanisms or procedures to benchmark and monitor the human rights performance of the partner country.' Conditionality exists as per Art. 2 of the Association Agreements, 'which provides the legal base for appropriate measures in the event of serious breach of international human rights standards', yet these have not been invoked with any regularity.[74]

Commentators like Richard Youngs warned repeatedly that EU agents tended to work closely with authoritarian leaders in exchange for token gestures in the field of human rights. Overall, Youngs argued in 2005, this has suggested a preference on the part of the EU for stability – which is supported by the thesis about member state preferences dominating community policy in this case.[75] As Youngs put it elsewhere, 'European democracy policy resemble[d] a man trying to learn to swim without letting go of the riverbank: keen to reach the deep, rewarding waters of political transformation but reluctant to let go of the supportive engagement built up with Middle Eastern regimes.'[76]

b) *The weak incentives – slow progress relationship*

Sven Biscop noted that for many of these partners, the 'carrot' offered was also less than enticing. Since there was a strong push for economic and especially trade reform on the part of the EU, coupled with demands for human rights and other societal reforms, partners were expecting meaningful concessions such as the opening of 'the EU's agricultural policy, the protectionist character of which produces major negative effects for its Southern partners – not to mention for the EU budget'. Instead, trade concessions were made, according to Biscop, in areas relevant for EU member states (oil, gas, industrial products).[77]

A review of the field authored by Emerson et al. noted some convergence towards human rights norms in the Maghreb region. The same review also observed a strengthening of conditionality due to the influence of Northern member states representing a more principled stand vis-a-vis EUROMED partner states. As a positive outcome, the review noted the launching of the Democratic Facility on the bases of the 'epistemic community' built on the 'shared understanding around human rights and democratic reform concerns'. While this meant the expert and advisorial communities rather than decision makers, it certainly represented progress in building a transnational network that would act as a domestic catalyst for reform over the longer term.[78] Also, Emerson and Noutcheva hoped, in 2005, that the incoming system of Action Plans, with their goal-setting mechanism, would improve the ability of stakeholder to integrate HRD priorities into ongoing co-operations – but they too felt the present situation to be deeply dissatisfactory.[79]

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[74] Michael Emerson and Gergana Noutcheva, 'From Barcelona Process to Neighbourhood Policy: Assessments and Open Issues' (CEPS Working Document No 220, CEPS 2005), 6-8.

[75] Richard Youngs, 'Ten Years of the Barcelona Process: A Model for Supporting Arab Reform' (FRIDE Working Paper No. 2, 2005).

[76] Richard Youngs, 'Europe's Uncertain Pursuit of Middle East Reform' (Carnegie Paper No. 45, Carnegie Endowment for International Peace 2004).

[77] Sven Biscop, 'The EU and Euromediterranean Security: A New Departure?' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (Palgrave-MacMillan 2007) 199

[78] Michael Emerson, Senem Aydın, Gergana Noutcheva, Nathalie Tocci, Marius Vahl, and Richard Youngs, 'The Reluctant Debutante – The EU as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in European Neighbourhood* (CEPS 2005) 200-203.

[79] Michael Emerson and Gergana Noutcheva, 'From Barcelona Process to Neighbourhood Policy: Assessments and Open Issues' (CEPS Working Document No. 220, CEPS 2005) 8.

Seeking to explain the phenomenon of unevenly applied or even dormant conditionality despite the HR goals laid forth in the 2002 Valencia Action Plan Marsh and Reese have recently argued that after events like the 1995 Paris bombings and then 9/11, security concerns have forced a stability-oriented realpolitik onto the Commission and also on member states.[80] Such concerns, coupled with realpolitik traditions at home and the reticence of long-standing authoritarian regimes such as the one in Tunisia, or regimes hard pressed by extremist opposition (Algeria) have yielded, as Panebianco observes, a very different image of the EU as norm exporter in the Mediterranean than the one in East Central Europe. While enlargement was taking place, in the southern neighbourhood HRD 'seem[ed] more part of political discourse than a priority of international action'.[81]

E. Normative Power Europe

1. The roots of the concept

Discussions of the special character of the presence and actorness of the European Union go back to Francois Duchêne's characterisation of being a 'civilian power'.[82] The special character – the attachment to the promotion of universal norms through predominantly civilian means – has figured prominently in the discussions of both the emergence of a European foreign policy identity and the Eastern Enlargement in previous sections. It was this history that underlay the Normative Power Europe discourse that was launched by Ian Manners' 2002 article of the same name,[83] but which came to dominate normative theoretical discussions of EU external relations in about 2006. As Boerzel and Risse argued in 2009, this stream of discussion is linked by its emphasis on the broader HRD agenda being constitutive of this identity.[84] NPE promised to the broader human rights expert community a global lesson, according to which, as Goodhart put it, 'transnational human rights institutions can have a catalytic effect on domestic democracy, providing legitimacy and support for political agents struggling for reform'.[85]

Scheipers and Sicurelli note that underneath the NPE discourse lies the assumption that the EU's human rights identity can somehow become operational in international politics.[86] Indeed, this has been the key research puzzle for this stream of theorising, and the answers given to this puzzle have governed the arguments and predictions concerning the ability of the EU to exert a normative and normalising influence either globally or over its neighbourhoods.

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[80] Steve Marsh and Wyn Reese, *The European Union in the Security of Europe: From Cold War to Terror War* (London: Routledge 2012) 149-156.

[81] Stefania Panebianco, 'The constraints on EU action as a 'norm exporter' in the Mediterranean," in Ole Elgstroem and Michael Smith (eds), *The European Union's Roles in International Politics: Concepts and analysis* (London, New York: Routledge 2006) 136-154, esp. 151-152.

[82] Francois Duchêne, 'Europe's Role in World Peace' in Richard Mayne (ed), *Europe Tomorrow: Sixteen Europeans Look Ahead* (London: Fontana 1972) 32-47.

[83] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' [2002] 40/2 Journal of Common Market Studies 235-258.

[84] Thomas Risse and Tanja Börzel, 'Venus Approaching Mars? The European Union's Approaches to Democracy Promotion in Comparative Perspective' in Amichai Magen, Thomas Risse and Michael A. McFaul (eds), *Promoting Democracy and the Rule of Law. American and European Strategies* (Houndsmills: Palgrave Macmillan 2009) 34-60.

[85] Michael Goodhart, 'Human Rights and Global Democracy' [2008] 22/4 Ethics and International Affairs.

[86] Sybille Scheipers and Daniele Sicurelli, 'Normative power Europe: A credible utopia?' [2007] 45/2 Journal of Common Market Studies 435-457.

In 2002, Manners claimed that recent developments in EU external actions imply placing 'universal norms and principles at the centre of its relations with its Member States and the world', and that the European Union was progressing 'towards making its external relations informed by, and conditional on, a catalogue of norms which come closer to those of the European Convention on Human Rights and Fundamental Freedoms (ECtHR) and the Universal Declaration of Human Rights (UDHR) than most other actors in world politics.'[87]

2. Aspects of the concept of NPE

In Manners' argument, normative power derived from what the EU was, but also from how it operated – through 'ideas and opinions'. Identity and action were taken to be inseparable inasmuch as Manners argued that 'the central component of normative power Europe is that it exists as being different to pre-existing political forms, and that *this particular difference pre-disposes it to act in a normative way*'.

Manners and others joining him in the project of theorising Normative Power Europe, notably Helene Sjursen and Erik Oddvar Eriksen, as well as Lerch and Schwellnuss, broke new ground by offering a prescription for operating in the international system as a normative power. Previous iterations of EU external action theories observed perhaps the tendency to institutionalize and regulate relations – in contrast to traditional diplomacy, but it was in the discourse around the concept that it was argued that procedurally the EU needs to adopt a law-based and/or law-like operational code, as well.

Sjursen argued that the goal of EU foreign policy was a cosmopolitan international order based on a 'common judicial order' with a strong emphasis on human rights, in contrast to the current state of international affairs operating within the confines of traditional power politics, necessarily entailing a measure of 'arbitrariness'. In this case law is viewed as the opposite of and remedy to (excessive) political discretion: it appears as a 'system of action that makes it possible to implement moral duties and commitments'.[88] Her practical prescription was to institutionalize a 'thin' version of cosmopolitan justice, preserving the ability of partners to accept it, and making it less culturalist in character. The other prescription related to accountability – both on the part of the EU and partners.[89]

Eriksen argued that a law-based order reduced risk in international interactions and cosmopolitan law would compel compliance 'without unleashing the potential threat of force when it applies to all and when it is in compliance with moral principles.'[90] Lerch and Schwellnuss demonstrate the key differential: the EU is more successful promoting norms it complies with (abolition of death penalty) than norms it cannot properly institutionalize in its own territory (collective human rights, minority protection).[91]

In proposing not just human rights, but human rights law as the basis of EU foreign policy, NPE theorising provided a vista to conceptualise the novel foreign policy identity as a cosmopolitan achievement and explained its success by the growth of world society. The element lacking from this discourse was a

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[87] ibid 241.

[88] Helene Sjursen, 'The EU as a 'Normative Power': How Can This Be?'[2006] 13/2 Journal of European Public Policy 244.

[89] Helene Sjursen, 'Doing Good in the World? Reconsidering the Basis of the Research Agenda on the EU's Foreign and Security Policy' (RECON Online Working Paper, 2007/9, Center for European Studies University of Oslo 2007) <http://www.reconproject.eu/projectweb/portalproject/AbstractRECONwp0709.html>.

[90] Erik Oddvar Eriksen, 'The EU – a Cosmopolitan Polity?' [2006] 13/2 Journal of European Public Policy 265.

[91] Marika Lerch and Guido Schwellnuss, 'Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy' [2006] 13/2 Journal of European Public Policy 304-321.

theory of the agent, which subsequent contributions sought to correct, by proposing a theory of ethical action. According to Aggestam, successful international action depends on credibility which is assured through acting in 'defence of universal values, such as human right, physical security, economic prosperity and social well-being.'[92] This is what Manners termed 'procedural normative ethics' rooted in nine 'substantive normative principles', sustainable peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance.[93]

In all, NPE represents the most radical attempt to provide a grand normative theory of EU foreign policy identity and action. It reflects experience from the Eastern Enlargement and from state-building in the Western Balkans and sought to replace diplomacy with rule-bound behaviour altogether. Predictably, critics were numerous, including realists like Hyde-Price who argued that while NPE has merit in explaining EU foreign policy priorities, it overlooks the feature of the EU as a 'repository of second order normative concerns of EU member states.'[94] The EU will act roughly in accordance with NPE prescriptions, the argument goes, as long as the second order concern do not conflict with first order interests such as security and energy needs – which explains the uneven empirical record of the EU in negotiations with third parties. Similarly, Jan Zielonka employed the imperial analogy to highlight how HRD efforts may be interpreted in the context of power politics. In his contribution to the NPE debate, Zielonka maintained that normative agendas are dependent on influence and power to succeed and their deployment is an 'imperial' action inasmuch as it is rooted in a power asymmetry that enables the imperial party - the EU - to promote its agenda. Where this asymmetry is not present or the EU has to compete with other influential powers, its normative capabilities are reduced.[95]

F. The problematic human rights track record of the European Neighbourhood Policy and weakness beyond the EU's close abroad

1. The Neighbourhood Policy under scrutiny

a) ENP as the outcome of intra-EU institutional transfer

Normative Power Europe theorising holds out the promise of conceptually bounded (Kantian, thin cosmopolitan), but geographically boundless operations of the EU in promotion of human rights. In an interesting case of theory/politics mismatch, as the NPE discourse was gathering steam around 2006-2008, a new body of empirical literature was growing rapidly, reporting on the lack of progress made in milieu-shaping. After the mixed record of the EUROMED cooperation, its geographically expanded and conceptually redesigned follow-up, the European Neighbourhood Policy was coming under intense scrutiny from think tankers. Ideally, as Parmentier summarizes, it was expected that partner states

> in a relatively weak position in a situation of complex asymmetric interdependency [will be forced] to adopt at least the European discourse, and some internal changes leading to the implementation of European norms. By implementing procedures, the norm-takers are expected to slowly head toward substantive reforms and reincorporation of norms – a liberal teleology in an evolving neighbourhood.[96]

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[92] Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' [2008] 84/1 International Affairs 6.

[93] Ian Manners, 'The Normative Ethics of the European Union' [2008] 84/1 International Affairs 46

[94] Adrian Hyde-Price, 'A 'Tragic Actor'? A Realist Perspective on 'Ethical Power Europe'' [2008] 84/1 International Affairs 29–44, esp. 31-36.

[95] Jan Zielonka, 'Europe as a Global Actor: Empire by Example?' [2008] 84/3 International Affairs 471-484.

[96] Florent Parmentier, 'The Reception of EU Neighbourhood Policy' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (London – New York: Routledge 2008) 115.

Relaunches of the ENP failed to fundamentally alter the discourse about its shortcomings, and the broad evidence published in the past decade have become some of the most forceful arguments about the stronger than presumed limitations on the transformative potential of the EU and normative power in general.

As ENP was launched in 2003, the academic community reacted with keen interest. At a theoretical level the most important observation made by a number of contributions was the detection of an isomorphic transfer from enlargement to neighbourhood policy. ENP was meant as an upgrade of Association Agreements and Political and Cooperation Agreements, seeking to engage partners with the promise of functional integration into EU policy areas – envisaging a terminus described by President of the Commission Prodi as 'everything but the institutions'. This upgrade meant, at least in terms of procedure, recycling the successful toolkit of enlargement and applying it to the European neighbourhood. Accordingly, the ENP mechanism foresaw annual reports, goal-setting and benchmarking, as well as a number of lower order procedures familiar from accession countries (training, funding capability building programs on the ground, etc.). This 'procedural carbon copying' could be interpreted, alternatively, as the continuation of a tried and tested approach or as the unreflective transposition of a mechanism to an arena where it was not meant to function.[97] As Emerson et al. called it, a 'mission creep' had taken place, with not only the neighbourhood policy, but also the Stability and Action Plans of the Western Balkans being modelled after the accession policy blueprints.[98]

b) *Explaining causes of underperforming in the context of ENP*

Criticism of ENP has included claims of a lack of 'analytical depth as far as concepts and processes of democratization are concerned, along with an arbitrary and largely useless selection of pseudo-benchmarks', proposed by Del Sarto and Schumacher. Such shortcomings would by definition preclude significant progress in the field of human rights, as evidenced by their analysis of Action Plans for Jordan and Tunisia.[99] Sven Biscop observes that even the Commission cadre has reflected on the problems of human rights targeting and divergent stability-focussed preferences impacting the Action Plans, but he concludes that being aware of the problem has not, in this case, resulted in producing a synthesis of interests.[100]

Gisella Bosse argued that path dependency also impacted ENP: the human rights component in the South reflected earlier practices where Eastern European countries were pushed towards more substantial goals.[101] At the same time, allowing for the continued presence of references to non-EU-

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[97] Judith G. Kelley, *Ethnic Politics in Europe. The Power of Norms and Size* (Princeton University Press 2004); Judith G. Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighborhood Policy' [2006] 44/1 Journal of Common Market Studies 29–55; Geoffrey Pridham, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe* (Basingstoke: Palgrave Macmillan 2005).

[98] Michael Emerson, Senem Aydın, Gergana Noutcheva, Nathalie Tocci, Marius Vahl and Richard Youngs, 'The Reluctant Debutante – The EU as Promoter of Democracy in its Neighbourhood' in Michael Emerson (ed), *Democratisation in the European Neighbourhood* (Brussels: CEPS 2005) 176.

[99] Raffaella A. Del Sarto and Tobias Schumacher, 'From Brussels with love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratization Policy' [2011] 18/4 Democratization 932-955.

[100] Sven Biscop, 'The EU and Euromediterranean Security: A New Departure?' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (Houndmills, Basingstoke -New York: Palgrave MacMillan 2007) 205.

[101] Giselle Bosse, 'Values in the EU's Neighbourhood Policy: Political Rhetoric or Reflection of a Coherent Policy?' [2007] 7 European Political Economy Review 38-62.

specific norm sets in the fields of human rights (UN and OSCE, notably) closer inspection of eastern action plans are also presented as 'paternalist'. Bono argues that this paternalistic bent is derivative of the 'official framing of the situation' by elites in Brussels, and precludes meaningful dialogue that could have a real normative effect. To return to Manners procedural norms: the EU may be acting on the basis of a universal thin cosmopolitanism in promoting human rights in Action Plans, but the procedure, based on conditionality at least in form, is not conducive to arriving at shared understandings and engaging in real norm learning.[102] Bicchi adds the observation to this line of thought that lack of reflexivity, meaning the ability to scrutinize the correspondence between principles of equality among partners, etc. and the unintended outcomes of their practices, on the part of EU actors leads to lack of 'empowerment' and 'giving voice' to partner societies, as it is in fact the EU that attempts to 'speak for' them.[103]

The critical literature with regard to ENP has given rise to another gap metaphor. Observing the formal cooperation of elites, several commentators claim that norm-following is more mimetic in these cases than real, and while formal revisions for instance to laws are made, these often are not implemented – hence the term 'implementation gap'. Tom Casier, as Alexander Duleba and his co-authors use Ukraine as a test case to demonstrate the existence of such a disconnect, presenting evidence of the willingness of EU and Ukrainian elites to accept superficial changes as reform and proceed with Action Plans even in the absence of actual progress.[104]

Examining the case of Egypt, Pace, Laidi and Demmelhuber, in separate contributions, conclude that unlike in the Ukrainian case, Cairo officials succeeded in putting pressure on the EU, rather than the other way around. Capitalising on the success-dependency of EU elites, they pressured them to act in defiance of the EP's strong criticism, grant aid without meeting the attached conditions and revise the official Action Plan to tone down its human rights content.[105]

Richard Youngs argues that the Egyptian case is in fact part of a trend where democracy and human rights projects are merged with broader development projects and their transformative character is suppressed.[106] Youngs' conclusions are matched by Bicchi's criticism focussed on the phenomenon of 'decoupling', which here refers to the human rights and democracy component being eviscerated from ongoing projects, leading even to instances where funds are not used.[107] Freyburg et al. use the term as a sociological *terminus technicus*, their reasoning reproduces the implementation gap observation, but overall the evaluation is similar to Bicchi's, if less normative.[108]

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[102] Giovanna Bono, 'The Perils of Conceiving EU Foreign Policy as a "Civilizing" Force' [2006] 1 International Politics and Society 150-163.

[103] Federica Bicchi, '"Our Size Fits All": Normative Power Europe and the Mediterranean' [2006] 13/2 Journal of European Public Policy 286-303.

[104] Tom Casier, 'The EU's Two-track Approach to Democracy Promotion: The Case of Ukraine' [2011] 18/4 Democratization 956-977.

[105] Michelle Pace, 'Paradoxes and Contradictions in EU Democracy Promotion in the Mediterranean: The Limits of EU Normative Power' [2009] 16/1 Democratization 39-58, Thomas Demmelhuber, 'Egypt's Moment of Reform and Its Reform Actors: The Variety-Capability Gap' in Michelle Pace (ed), *The European Union's Democratization Agenda in the Mediterranean* (London - New York: Routledge 2010) 120.

[106] Richard Youngs, 'Trends in Democracy Assistance. What has Europe Been Doing?' [2008] 19/2 Journal of Democracy 162.

[107] Federica Bicchi, 'Dilemmas of Implementation: EU Democracy Assistance in the Mediterranean' [2010] 17/5 Democratization 976-996.

[108] Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripka, and Wetzel, Anne, 'EU Promotion of Democratic Governance in the Neighbourhood' [2009] 16/6 Journal of European Public Policy 916-934.

The apparent 'democratization fatigue' on the part of donors is exploited by various strategies on the part of domestic elites, including, as Pace, Cavatorta and Seeberg argue, encouragement from MENA elite to 'look at them as a "special case" or as an exception in terms of the EU's preferred practices built around the notions of democratic accountability and human rights'.[109] Elsewhere Pace also adds that these same elites have considerably more wiggle-room to choose from the menu, since it is clear to them that EU interests range from stability and security oriented cooperation to disinterested norm promotion, and they can satisfy some preferences while ignoring others without risking serious repercussions.[110]

c) Divergent explanations for ENP underperformance in the academic and policy literatures

Schimmelfennig proposes in various pieces and with various co-authors an overarching explanation derived from his earlier work focusing on enlargement. While in theory the governance model can be transposed from enlargement to neighbourhood policy, its efficiency is not guaranteed. Schimmelfennig and Lavenex explain that ENP represents a departure from two 'received' modes of promoting the HRD agenda – linkage (transnational networks, civil society building) and leverage (conditionality and other threats/incentives and bargains). Governance refers to the 'functional cooperation between administrations.'[111] It can ideally make up for lack of leverage (no accession perspective to motivate elites), but it also implies that only those issue areas will be impacted which are opened up in the first place. Human rights are likely to be backtracked as a result of other sectoral policies which imply fewer conflicts and differences of opinion.[112] Indeed, 'EU incentives such as partnership and cooperation do not reliably promote democratic change', since the costs of such change for the elite are not offset by the opportunity of accession.[113]

In several case studies, Schimmelfennig et al. also tested the theories' predictions, finding that in asylum policy, a HR-related field compliance was weakest (compared with other sectors tested), even in weak countries committed to accession such as Moldova. Larger partners (Ukraine) or less European in their identities (Morocco, Jordan) performed even worse.[114] These authors, however, do not claim that no progress is possible under ENP – several outcomes are considered possible, including hybrid regimes, enlightened authoritarian systems, and potentially even democratization if a domestic dynamic is set off through cooperation in HRD issue areas.

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[109] Michelle Pace, Francesco Cavatorta and Peter Seeberg, 'The European Union's Democratization Agenda in the Mediterranean: A Critical Inside-Out Approach' in Michelle Pace (ed), *The European Union's Democratization Agenda in the Mediterranean* (London - New York: Routledge 2010) 4.

[110] Michelle Pace, 'Paradoxes and Contradictions in EU Democracy Promotion in the Mediterranean: The Limits of EU Normative Power' [2009] 16/1 Democratization 39-58.

[111] Sandra Lavenex and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?' [2011] 18/4 Democratization 895.

[112] ibid 887.

[113] Frank Schimmelfennig and Hanno-Scholtz, 'EU Democracy Promotion in the European Neigbourhood' [2008] 9/2 European Union Politics 187-215.

[114] Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripka, and Wetzel, Anne, 'EU Promotion of Democratic Governance in the Neighbourhood' [2009] 16/6 Journal of European Public Policy 924-926. As well as Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripk, and Anne Wetzel, 'Democracy Promotion Through Functional Cooperation? The Case of the European Neighbourhood Policy' [2011] 18/4 Democratization 1045.

Unlike Schimmelfennig, the think tank community tends to be more concerned with normative evaluations of ENP. As Hinc, Sadowska and Swieboda observe, ENP did not achieve the consistency that was sought in enforcing human rights criteria.[115] This is shared and elaborated on by Schmid, who also adds that inconsistency coupled with the lack of an accession perspective as the ultimate incentive further decreases efficiency, while not instituting a dialogue of equals. In fact, Schmid argues that without an accession perspective, ENP constituted a step back from the dialogue-centric EUROMED method.[116]

Charles Grant, writing for the Centre for European Reform, observed the slow construction of ENP programs, but also welcomed the first HR capability building initiatives with Morocco, Jordan and Moldova. Observing the relative failure of HRD in the framework, Grant looked forward to the launching of the Euroepan Neighbourhood and Partnership Instrument (ENPI), a funding instrument where funds would be earmarked to also support technical capabilities for the adoption of human rights initiatives.[117]

Later commentators, however, saw the ENPI just as inefficient as previous incarnations of neighbourhood support. Youngs argues that while – thanks in part to the commitment of Parliament – a total decoupling of democracy conditionality and funding has not happened (as in the case of Turkmenistan), informal backtracking on human rights conditions is not punished if the partner has any strategic significance – the lack of which, according to Youngs, explains the pariah situation of Belarus.[118]

In sum, ENP is usually portrayed as a failure with respect to human rights promotion by the European Union. While more academic texts tend to emphasise the importance of domestic scope conditions for reform – this is for instance Browning's and Christou's position[119] - the think tank community has been more focussed on the re-emergence of security needs and the preference for stability in partner countries. Pace demonstrates in her explanation of what keeps the ENP alive in the Mediterranean after the obvious failure of nominally key components such as human rights promotion and democratisation. In her view, 'the ultimate objective of these initiatives is securing the EU's own concerns about (in)migration, security and stability, rather than 'transformation' in the MENA', which means that the southern dimension of ENP may actually not be as much of a failure as often assumed to have been. Rather, its underlying goals were served by the way it was run, and its ultimate success may have to be evaluated along terms different from the vocabulary of the HRD agenda.[120]

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[115] Agata Hinc, Maria Sadowska and Pawel Swieboda, *The European Union and its Neighbourhood in a Changing World: Defining a New Strategic Relationship with the Eastern and Southern Neighbours* (Warsaw: demosEUROPA Centre for European Strategy 2008).

[116] Dorothee Schmid, 'The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?' [2004] 9/3 Mediterranean Politics 396-421.

[117] Charles Grant, *Europe's Blurred Boundaries: Rethinking Enlargement and Neighbourhood Policy* (London: Centre for European Reform 2006) 51-55.

[118] Richard Youngs, 'Is European democracy promotion on the wane?' (CEPS Working Document No. 292, Centre for European Policy Studies 2008) 7-10, on Belarus cf. also G Dura, 'The EU's Limited Response to February 2008) 1-10.

[119] Christopher S Browning and George Christou, 'The Constitutive Power of Outsiders: The European Neighbourhood Policy and the Eastern Dimension' [2010] 29 Political Geography 109-118.

[120] Michelle Pace, 'Paradoxes and Contradictions in EU Democracy Promotion in the Mediterranean: The Limits of EU Normative Power' [2009] 16/1 Democratization 42-45.

2. Accounts of EU weakness beyond the neighbourhood

a) EU activism without the HRD tool kit: the case of BRIC states

This sub-section represents a partial break with the logic of the review so far. It treats, roughly speaking, those non-neighbourhood partner states where the EU acts as a norm entrepreneur, usually within the older format of a structured diplomatic dialogue. Since institutional innovation and learning has not impacted this arena (unlike enlargement and ENP), a far more static image, a summary of two decades of norm entrepreneurial diplomacy, can be given here, as a second observation about the mismatch between NPE theorising and much of the evidence produced by the expert community.

As Panebianco observes, the EU has had a strong preference to engage, rather than contain partners. This does not mean abandoning hard to achieve agendas such as HRD, but it does imply that stalling or even backtracking is not met with punishment. It is evident that the 'EU approach ... insists more on persuasion through political discourse than imposition through the threat of sanctions'.[121]

In discussions about the BRIC countries, Brazil and India are accorded comparatively less attention, and often it is made plain by authors that China and Russia are the two countries of the BRIC group, where EU human rights promotion represents an important dimension of an analysis of bilateral relations. In the case of Russia, the EU enjoyed substantial leverage at the time of the Russian Westernisation and transition shock. However, as Margot Light argues, even in the 1990s there was a discrepancy between EU and Russian discourse. The latter was more open to influencing but remained fundamentally rooted in a state-to-state imaginary. This meant even then very basic human rights concerns remained difficult to address, and EU officials had to choose between breaking off relations with Russia or appearing inconsistent in their treatment of human rights violations. Light comments that

> when Russian officials disregarded their concerns about Chechnya, it suggested to European electorates that the EU's policy on human rights was selective. Russian politicians and officials, on the other hand, were equally distressed that the EU did not accept Russia's great power status and treated Russia as if it were any small state. They were offended by EU demands that related, in their view, to 'domestic' matters: in particular, they perceived EU statements-and sanctions-relating to Chechnya as improper and intolerable.[122]

Because of massive human rights violations in Chechnya, James Hughes observes, only the PCA ratification suffered delay, and Russia eventually succeeded in decoupling the human rights dialogue from other baskets, likely in part because – as Emerson suggest – neither party's first order interest included human rights.[123]

Other BRIC states have acted not unlike Russia, according to Jonathan Holslag, safeguarding their freedom of action in sensitive issue areas like human rights. The EU was in a relatively weak position,

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[121] Stefania Panebianco, 'Promoting Human Rights and Democracy in European Union Relations with Russia and China' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Polic* (London - New York: Routledge 2006) 145.

[122] Margot Light, 'US and European Perspectives on Russia' in John Peterson and Mark A. Pollack (eds), *Europe, America, Bush: Transatlantic Relations in the Twenty First Century* (New York: Routledge 2003) 75.

[123] James Hughes, 'EU Relations with Russia: Partnership or Asymmetric Interdependency?' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (Houndmills, Basingstoke - New York: Palgrave MacMillan 2007) 77 and 90-91; also Michael Emerson, 'Russia and the West: From an Awkward Partnership to a Greater Europe: A European Perspective' in Dana H. Allin and Michael Emerson (eds), *Readings in European Security* (Brussels: CEPS 2005) 1-19.

lacking strong economic incentives, while institutionalization usually meant a structured dialogue, which 'was not a format that could push through socialization.'[124] Menotti and Vencato reach similar conclusions in their analysis that includes, but also goes beyond the BRIC states.[125]

In the case of China, Balme highlights how human rights has been 'compartmentalized' by the Commission, the opposite of the prescriptions found in communications and also the more recent founding documents of the EU. At the same time, Balme does suggest that human rights considerations are introduced, from time to time, into sectoral dialogues, once EU official feel that a sector is 'ripe for reform'.[126] This account contrasts strongly with standard accounts which tend to emphasise member state opportunism, Commission weakness and the low influence of the EP, which seeks to present itself as a principled actor (if one without leverage), or simply China's ability to resist normative pressure.[127] The issue here is whether the Commission can use diplomacy in the traditional sense to influence only some sectors and whether such strategic deployment of normative power to promote human rights will backfire or not. Depending how one interprets it, the Commission is realistically holding out until there is a chance to succeed with norm promotion, or, is opportunistic and thus saps its own ability to influence through its identity and norm-adherence.

b)   *EU global action beyond the BRIC*

Similarly to the above large international players, even smaller Asian states represent a hard test for EU capabilities. The ASEM dialogue between the EU and East Asian states has not yielded real progress rather it has revealed, according to Nicola Casarini, the lack of an ability to influence on the part of the EU and of a will to reform the human rights regimes on the part of partner states.[128] As Helen Stacy observes, however, these states do not formally and abstractly refuse EU attempts at norm promotion, but use a postcolonial discourse to argue for the legitimacy of region- and culture-specific human rights and concepts of democracy. The findings in the literature are inconclusive as to whether the EU would be once more trying to lock the reluctant ASEAN states into dialogue so as to entrap them in their discourse (which does, after all, acknowledge the existence of human rights, if permitting for variation across cultures and continents), or whether the resistance on the part of partners is proving to be an obstacle that the EU, lacking a strong incentive and thus leverage, has slim chances of overcoming.[129]

Overall, the literature on EU diplomatic dialogue with major players and geographically distant macro-regions is fairly pessimistic. Normative texts, such as Karen Smith's review of EU relations with Burma,

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[124] Jonathan Holslag: 'Europe's Normative Disconnect with Emerging Powers' (BICCS Asia Paper 5 no. 4, 2010) 1-21.

[125] Roberto Menotti and Maria Francesca Vencato, 'The European Security Strategy and the Partners' in Sven Biscop and Jan Joel Anderson (eds), *The EU and The European Security Strategy: Forging a Global Europe* (London - New York: Routledge, 2008) 103-121.

[126] Richards Balme, 'The European Union, China and Human Rights' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (London – New York: Routledge 2008) 143-172.

[127] May-Britt Stumbaum, 'Engaging China - Uniting Europe? EU Foreign Policy Towards China' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (Houndmills, Basingstoke – New York: Palgrave MacMillan 2007) 72; Bruno Tertrais, 'Europe and the Emergence of China: Consequences for the Transatlantic Relationship – A European Perspective' in Dana H. Allin and Michael Emerson (eds), *Readings in European Security* (Brussels: CEPS 2005) 99-103.

[128] Nicola Casarini, 'The Making of the EU's Strategy towards Asia' in Nicola Casarini and Costanza Musu (eds), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (Houndmills, Basingstoke -New York: Palgrave MacMillan 2007) 216.

[129] Helen M. Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture* (Stanford University Press 2009) 118-119; also Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill 2003) 162.

Cuba and Zimbabwe notes that even with minor powers, EU positions shift frequently and as a result of relatively minor interests or the desire to continue to engage elites. This of course damages credibility, and as a result if the EU does want to test its normative power and ability to promote human rights beyond its neighbourhood, a more principled stand is needed, since 'taking a principled stance and then backtracking on it fundamentally damages the credibility and legitimacy of its role'.[130] An alternative to testing the potential of normative power through strict adherence to the thin cosmopolitanism it represents is striking a balance between realpolitik and HRD promotion. Jan Joel Andersson and others have called for an examination of a middle road, whereby the EU would not sacrifice its interests for norms it seeks to project, but not abandon norms altogether, either. The question, left unanswered, here is whether this de facto means the primacy of realpolitik, and, if not, how is it to be decided when strategic interests and when normative concerns should determine the EU stance in a diplomatic dialogue. Calls for balance and coherence without an answer to this question are rather rhetorical.[131] On the other hand, NPE theorists have little in the way of showing why and how a purely normative actor would be efficient in international politics, unless of course it were to interact exclusively with like-minded actors. Calling for strict normativity in interactions is reckless without experience – and those, as this and the preceding sections suggest – do not bode well for a purely norm-driven policy, either to promote human rights or as a framework for foreign policy in general.

G. ESDP/CSDP: human security and human rights

1. Interpreting the place of human rights in the emerging security identity of the EU

a) *The path to the European Security Strategy*

The EU has not had an autonomous and separately institutionalized human rights policy. The EU Strategic Framework and Action Plan on Human Rights and Democracy itself draws on pre-existing policies, seeking to coherently organize their human rights components. The foundations of the human rights clauses are derivative of the iterations of the founding treaty and entrust the Commission with acting in the field of development and trade policy.[132] At the same time, as Thierry Tardy and others have argued repeatedly, the human rights toolbox of the EU experienced rapid growth throughout the first decade of the new millennium.[133] Much of this expansion had to do with security policy, which grew as the EU assumed ever increasing responsibilities in the Western Balkans and, starting with its Congo mission in 2003, over the world. Javier Solana was instrumental in lobbying for the acceptance of the need for a European Security Strategy (ESS), finally promulgated in 2003, which prominently featured human rights in the framework of its aims, linking them with international stability. In contrast with United States policy at the time, the ESS envisioned security promotion in the context of international

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[130] Karen E. Smith, 'The Limits of Proactive Cosmopolitanism: the EU and Burma, Cuba and Zimbabwe' in Ole Elgstroem and Michael Smith (eds), *European Union's Roles in International Politics: Concepts and Analysis* (London - New York: Routledge 2006) 168.

[131] Jan Joel Andersson, 'The European Security Strategy and the Continuing Search for Coherence' in Sven Biscop and Jan Joel Andersson (eds), *The EU and The European Security Strategy: Forging a Global Europe* (London - New York: Routledge 2008) 126.

[132] Irene Sacristan Sanchez, 'The European Union's Human Rights Policy towards Developing Countries: A Constitutional and Legal Analysis' in Carol Cosgrove-Sacks and Carla Santos (eds), *Europe, Diplomacy, and Development: New Issues in EU Relations with Developing Countries* (New York: Palgrave2001) 73.

[133] Thierry Tardy, 'The European Union From Conflict Prevention to Preventive Engagement: Still a Civilian Power Lacking a Strategic Culture' [2007] 62/3 International Journal 539-558.

terrorism by addressing the social causes of terrorist activity. This, incidentally, further reinforced the human rights component of security thinking, since the emergence of terrorism was linked explicitly to deficiencies in domestic fundamental rights regimes. Clearly, ESDP, soon to be renamed CSDP represented a break with the concept of a purely civilian power. As Per Norheim-Martinsen argued,

> If the 'postmodern' identity of Europe has to include a place and a role for the armed forces, then the areas of human rights, peacekeeping and state-building become the obvious arenas for their actions, however limited. The Barcelona Report commissioned by Javier Solana and presented at the end of 2004 was a clear attempt to reconcile armed forces and Europe's ethical or humanitarian beliefs and values. The report laid out seven principles of actions for the use of armed forces – the primacy of human rights, clear political authority, multilateralism, a bottom-up approach, regional focus, the use of legal instruments and the appropriate use of force.[134]

b) The emergence of the concept of human security in the context of the ESS

It was with the Barcelona report and subsequent theorising – a kind of *science engagée* on the part of experts – that the emergent human security discourse was adopted, seen as summing up the above priorities and also normatively marking out a zone of action for EU security and defence policy. The experts engaged to participate in this conceptualising work were led by Mary Kaldor, much of whose recent work has focussed on defining and refining the concept. This occurred in tandem, as Kaldor observes, with the increased canonisation of the term in EU documents, starting with the 2008 implementation report of the ESS.[135]

While many experts would agree with Kaldor regarding the thesis that human rights have always been a de facto, if under-theorised priority in ESDP/CSDP missions, Kaldor and other scholars who have taken up the task of hammering out an operationalized concept of human security add to this standard observation a number of important points.[136] There is agreement about the reactive character of the process: Kaldor is in some way engaging in post-facto theorising (while of course also seeking to provide policy guidance in proposing a well-defined, operational concept), since the mixed, civilian-military character of EU presence, and often of individual missions in the Western Balkans especially has prefigured some aspects of the concepts. As Kaldor and Selchow argue, member state identities impacted the way missions were conceptualised, which in turn helped shape the emergent security identity of CSDP.[137]

2. Conceptualising human rights as nested in human security

a) Canonical interpretations of the concept

Arloth and Seidensticker have provided the most in detail description of early operational practices of military and civilian missions, as well as of their international, community and domestic legal

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[134] Per M Norheim-Martinsen, 'EU Strategic Culture: When the Means Becomes the End European Security Policy: Strategic Culture in Operation?' [2011] 32/3 Contemporary Security Policy 524-541.

[135] Mary Martin and Mary Kaldor, 'Introduction: European Security and Human Security' in Mary Martin and Mary Kaldor (eds), *The European Union and Human Security: External Interventions and Missions* (London - New York: Routledge 2012) 1-11.

[136] Peter Schmidt and Benjamin Zyla, 'European Security Policy: Strategic Culture in Operation?' [2011] 32/3 Contemporary Security Policy 484-493.

[137] Mary Kaldor, Mary Martin and Sabine Selchow, 'Human Security: a New Strategic Narrative for Europe' [2007] 83/2 International Affairs 275-276.

foundations. The survey suggests that ESDP/CSDP missions are conceived to fit into the normative power framework, given the emphasis on behaviour standards, pre-deployment training, and also on the cooperation with host entities.[138] The early codification of such standards has permitted a discussion of an emergent strategic culture within the EU, as manifested by various civilian and mixed missions abroad, all constructed in observance of the same cosmopolitan norm set and having similar procedural features, as well. Authors like Koutrakos or Kammel have recently argued for the existence of such a defence identity/security culture based on the experience of the norm-governed toolbox of CSDP missions and their similarities despite very different locations and goals.[139] In most such cases however, as evidenced by the important 10-year review of ESDP published by the Institute for Security Studies (a semi-official think tank for CFSP), human rights remained under-conceptualised in the theorising of the emergent security culture, often relegated to merely being listed as constitutive elements of what CSDP is.[140]

While the human security discourse has its roots in the work done by the UNDP and notably by the Commission on Human Security in the UN, its transmission and inculcation into the 'fibre' of EU policy thinking occurred through the follow-up work to the ESS. In the context of this follow-up work, notably the Barcelona Report and the academic discourse that grew out of this policy-focussed research, Kaldor's approach and the concept of human security have gone beyond the standard discussions of security culture in the EU among other things by virtue of explicitly theorising the relationship between human rights and human security. The concept itself is founded on 'respect for human rights', and is operationalised through a sustained discussion of how this goal can be represented in crisis situations requiring CSDP assistance/intervention.[141]

The operationalization, as accomplished by Kaldor, Selchow, Martin and others is firmly rooted in the legacy of the broadened security agenda of the 1990s and Kaldor's earlier work on 'new wars'. Irregular conflicts that dominate crises situations in the post-bipolar world, as Haine argues, tend to produce mass human rights violations.[142] The new precariousness of human rights in crisis situations is what the concept of human security targets. It marks out such crises as zones of intervention not against an enemy but the conflict situation itself, which threatens human rights broadly understood. Hence, 'human security ... is not warfighting, it is about protection of individuals and communities, and it is about expanding the rule of law, while squeezing out the arena of war.' It refers to 'the crisis end' of human rights, and is justified by its goal to address 'human needs' – the ultimate justification for ethical cosmopolitan action.[143]

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[138] Jana Arloth and Frauke Seidensticker, *The ESDP Crisis Management Operations of the European Union and Human Rights* (Berlin: German Institute for Human Rights 2007).

[139] Pano Koutrakos, *The EU Common Security and Defence Policy* (London - New York: Oxford University Press 2013) 167; Arnold H Kammel, 'Putting Ideas into Action: EU Civilian Crisis Management in the Western Balkans' [2011] 32/3 Contemporary Security Policy 625-643.

[140] Giovanni Grevi, Damien Helly, and Daniel Keohane (eds)*, European Security and Defence Policy: The First 10 Years (1999-2009)* (Paris: EUISS 2009).

[141] Mary Kaldor, Mary Martin and Sabine Selchow, 'Human Security: A new Strategic Narrative for Europe' [2007] 83/2 International Affairs 273-288.

[142] Jean Yves Haine, 'The ESS Coping with Threats - Is Europe Secure?' in Sven Biscop and Jan Joel Andersson (eds), *The EU and The European Security Strategy: Forging a Global Europe* (London - New York: Routledge 2008) 24.

[143] Mary Kaldor, Mary Martin and Sabine Selchow, 'Human Security: A new Strategic Narrative for Europe' [2007] 83/2 International Affairs 273-288, also Jean Yves Haine, 'The Failure of a European Strategic Culture – EUFOR CHAD: The Last of its Kind' [2011] 32/2 Contemporary Security Policy 583-602.

Kaldor's main contribution lies in making a major contribution to providing a benchmark for measuring CSDP crisis management practices. These very practices, however, while the work of providing both a theoretical foundation and a set of operational prescription was going on, were met with criticism from several angles in EU Studies literature. Haine found the reason for failure of a specific mission, to Chad, in a case study in the lack of assets made available to the mission (a technical, rather than conceptual fault).[144] Richard Youngs argued, comprehensively, that while first pillar human rights policies, if limited, are coherent and operational, and CSDP has in fact been undergoing an institutional learning/transfer process, as prevention and post-conflict work become increasingly imbued by the tents of development policy. These, as Youngs puts it, seem to 'have filtered up into the EU's "security conscience".'[145]

b) *Criticisms of the human security concept*

While Youngs or Haine observe that work remains to be done to truly integrate the migrant elements of development discourse in the emergent security culture of the EU, other authors debate the fundamental direction of the shift. Realist-leaning authors have questioned the legitimacy of focussing on soft capabilities which they see preclude effective action in the gravest of crises. Anand Menon called CSDP nothing less than 'an alibi for a tendency to avoid broader international security responsibilities'.[146] The situation in Darfur and other major African human security crises did see the EU, as many experts have observed, enter the crisis zone only to remain passive until the worst part of the crisis was over, engaging in post-conflict reconstruction more than in crisis management.[147] Summed up by Michael Merlingen as characterised by lack of ambition and scale problems which render them political gestures rather than a human rights-based operation driven by normative concerns of a human security-centric security culture.[148]

CSDP at the beginning of the decade seemed to suffer more from lack of ambition and extreme risk-aversion than from a lack of theoretical underpinnings. The concept of human security has provided a crisis phenotype of EU human rights policies and priorities, complementing development and trade policy, as well as the socialising institutions (accession mechanism, SAP, ENP). It defines CSDP missions as the zone (of exception) where direct engagement to build security for humans and human rights must take the place of teaching partners to build such security from themselves. At the same time, as experts have been pointing out, for lack of resources, commitment and perhaps the same success-dependency that was pinpointed in the case of ENP with regard to moving forward with Action Plans in the absence of real compliance and change, CSDP missions have so far, according to most accounts, do not come to represent proper translations into practice of the concept of human security.

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[144] ibid.

[145] Richard Youngs, 'Fusing Security and Development: Just Another Euro-Platitude?' (2007) CEPS Working Document No. 277 (Centre for European Policy Studies) 20.

[146] Anand Menon, 'Empowering Paradise? The ESDP at Ten' [2009] 85/2 International Affairs 228.

[147] Asle Toje, 'The Consensus-Expectations Gap: Explaining Europe's Ineffective Foreign Policy' [2008] 39/1 Security Dialogue 128; Kori Schake, 'An American Eulogy for European Defence' in Anne Deighton and Victor Mauer (eds), *Securing Europe? Implementing the European Security Strategy* (Zürich: Center for Security Studies 2006) 101-108.

[148] Michael Merlingen, 'A Toolkit for Evaluating the Design and Implementation of European Union Security and Defence Policy Mandates' [2013] 5/3 Review of European Studies 41-56; Bastian Giegerich, 'European Military Crisis Management: Connecting Ambition and Reality' (2008) Adelphi Paper 397 (International Institute for Strategic Studies) 27.

H. The discourse of subsequent policy reforms and the impact of the economic crisis

1. Endogenous factors as explanations for failed policies

a) Theoretical challenges to Normative Power Europe theorising

Directing attention to a series of insufficiencies may be the best way to characterise the thrust of most observations concerning the human rights and democratisation agenda of the European Union published during the past five years. The second half of this section will treat a specific subset of these: texts that problematise HRD based on normative power with reference to the shifts in power and international political imaginaries that have been taking place since the global economic crisis had hit Europe and the world in 2008. What follows here, however, is a review of positions that do not reference this contemporary realignment of power structures in the world and point instead to a supposed 'endogenous institutional crisis'. This sense of crisis or at least structural weakness is usually the outcome of realisations that HRD instruments may be based on wrong assumptions due to overlooked regional scope conditions and conceptual and procedural flaws immanent to the EU tool kit.

The Normative Power Concept, as introduced in Section V, emerged in the previous decade as the dominant metaphor of European foreign policy identity, despite obvious difficulties in operationalising it (the serious lack of meso- and micro-level process theories and empirical studies proving how European normative power operates). As the experiences of the supposed operation of normative power tended to be negative, the concept itself came under sustained and more radical critique than earlier. In essence, mainstream EU Studies adopted the logics of earlier critical theory commentaries, which had touched on human rights as well. In this perspective, any regime, especially one that identifies itself as universal, appears potentially threatening to the political agency of societies and individuals, as its claim to universalism precludes the negotiability of the content of norms. It should be noted that many NPE proponents had argued for precisely the kind of thin cosmopolitanism that permits dialogue about contents of norms, including, to some extent even the concept of human rights. Critical theorists, however, viewed NPE literature as a discursive practice that sought to legitimise its referent object, identity-based European foreign policy actions. They therefore investigated the policies and challenged the theory not on the basis of what it had originally contained (as promulgated by Manners or Sjursen) but on the grounds of how it had become embedded in a political context as a legitimising discourse.

It was largely this logic that rose to eminence and became mainstream in around and after the end of the decade. Various contributions to the discussion treated the concepts and deployment of human rights promotion, especially in the asymmetric relationships characterising the EU neighbourhoods. While its cosmopolitanism was recognised (i.e. it is rarely accused of being culturalist in inception), commentators like De Zutter tended to conclude that cosmopolitan normative power, due to its claim to a post-political procedurality of norm adoption rather than norm generation, was soft imperialist in theoretical bent and despotic in deployment.[149]

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[149] Elisabeth De Zutter, 'Normative Power Spotting: An Ontological and Methodological Appraisal' [2010] 17/8 Journal of European Public Policy 1106-1127.

In response to such criticism, 'revisionist' NPE literature emerged, treating the concept as an ideal type, rather than an actual political discourse as in the case of Forsberg,[150] or by linking civilian, normative and ethical powers as constitutive of the foreign policy identity of the EU.[151] Manners himself, with co-authors, laid forth the argument that NPE may in fact be abused by deploying it asymmetrically and in a non-emancipatory way, yet this does not follow from the largely procedural concept the content of which is rooted in the EU's self-image as 'pacific democracy'.[152]

b) Attempts to revise the concept of Normative Power Europe

Beyond the reflexive criticism of the strategic metaphor governing much of European foreign policy and especially HRD promotion agendas in expert literature (less so in academic pieces), various other tenets relating the EU's ability to act as a human rights norm entrepreneur and socialise partners in various sustained interactions through conditionality and learning had become informed by recent data during the past half decade. The single most successful arena and as a result the model of norm diffusing and HRD promotion, the East Central European new member states, including both their governments and societies, were increasingly viewed as insufficiently Europeanised. The grand narrative of accession and transformative power was modified in several steps, touching on several policy and government sectors.[153]

Simultaneously to this process, the ENP was further distinguished from accession policy. Gawrich et al. summed up findings in proposing that full Europeanization, understood in this case as norm-adoption based on logics of appropriateness, occurs in fact only by performing these norms and in the norm-based setting of the EU itself, where practices are tied closely to the ideational underpinnings (membership Europeanisation). Compared to this, accession Europeanisation represents a weaker transfer mechanism, while neighbourhood Europeanisation is marked by 'an illusion of integration' and – confirming earlier observations – 'continuous, but always superficial political reforms, which are often not properly implemented'.[154]

This view also resonated with more theory-oriented contributors to the discourse looking for a Normative Power Europe – Reloaded formula. As Barbé and Johansson-Nogués argued, one of the lessons of ENP has been that politics cannot, after all, be removed from the equation. The legalistic framework that characterises ENP – also a synonym for conditionality – 'marks only the outer boundaries of politics and is too blunt an instrument for regulating political action satisfactorily'. Consequently, 'there is a need for the elaboration of *political* rules of action, or best practices', in which case international actors are assumed to have the capability of moral action and 'the political', seen as a 'less

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[150] Tuomas Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' [2011] 49Journal of Common Market Studies 1183–1204.

[151] Isabel Ferreira Nunes, 'Civilian, Normative, and Ethical Power Europe: Role Claims and EU Discourses' [2011] 16/1 European Foreign Affairs Review 16.

[152] Thomas Diez, Ian Manners, and Richard G. Whitman, 'The Changing Nature of International Institutions in Europe: the Challenge of the European Union' [2011] 33/2 Journal of European Integration 117-138.

[153] Heather Grabbe, *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe* (New York: Palgrave Macmillan 2006); Tanja A. Börzel, Yasemin Pamuk, and Andreas Stahn, 'Good Governance in the European Union' (Berliner Arbeitspapiere zur Europäischen Integration 7, Freie Universitaet Berlin 2008).

[154] Andrea Gawrich, Inna Melnykovska, and Rainer Schweickert, 'Neighborhood Europeanization through ENP: Case of Ukraine' [2010] 48/5 Journal of Common Market Studies 1209-1235.

clear-cut approach' as compared to law, 'still represents a more flexible format than the legal, given its ability to change and adapt to different situations over time without becoming meaningless.'[155]

The return of politics idea is complemented in the revisionist NPE literature with another important element – the development of hard military capacities. In view of the criticism summarized in the preceding section regarding the risk-aversion inherent in CSDP missions, Dunne's call for increased military capabilities 'to deepen its commitment to cosmopolitan values which have shaped its identity' restores another element of 'old fashioned' international politics that the EU and the NPE discourse sought to shed.[156] This shift in NPE theorising about a 'return to politics' signalled the coming into doubt of the two decade-old HRD promotion tool kit embedded in European foreign policy identity. Human rights promotion, for most commentators, remains of course a priority that cannot be removed from external action, at the same time, the tool kit, according to the prevailing mood in both the academic and the think tank communities, needed rethinking.

2. Neighbourhood Policy reform cycles under scrutiny

a) The second reform of the ENP mechanism

In 2011 the European Commission introduced the promotion of 'deep and sustainable democracy' as the main priority of its second ENP reboot. The memo *A new and ambitious European Neighbourhood Policy* as well as the joint communication *A new response to a changing Neighbourhood* pushed human rights as a universal norm more to the fore of ENP than had ever been the case before. The EU explicitly revised its position in introducing the term 'mutual accountability' with reference to its often criticised 'paternalism'[157] and inched closer to the ideal of 'thin cosmopolitanism' prevalent in earlier Normative Power Europe literature. The documents clearly reflected the influence of NPE theorising, but also of criticisms of ENP institutions, even if it could be argued that the Arab spring had had a catalytic effect on the renewed prominence, at least in writing, of the HRD agenda. At the same time, flagship projects mentioned in the documents were markedly practical, focusing on sectoral politics promoting security and societal welfare, while a promised switch to a 'pragmatic and project-based approach' also suggested the limits to the formally rejuvenated transformational agenda. [158]

With that said, the new ENP, supported by two regional fora, the Union for the Mediterranean and the Eastern Partnership, could be interpreted as a response to earlier criticism. As Richard Youngs observed, especially in the Mediterranean, human rights and democracy assistance had been reduced and human rights violations routinely overlooked as the outcome of institutional reform.[159] It also seemed to respond to observations in the research community about how the study of norm diffusion had to be realigned with experience in turning towards the study of domestic scope conditions in target countries

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[155] Esther Barbé and Elisabeth Johansson-Nogués, 'The EU as a Modest 'Force for Good': The European Neighbourhood Policy' [2008] 84/1 International Affairs 83-84.

[156] Tim Dunne, 'Good Citizen Europe' [2008] 84/1 International Affairs 13-16.

[157] Muennever Cebeci, 'European Foreign Policy Research Reconsidered: Constructing an "Ideal Power Europe" through Theory?' [2012] 40/3 Millennium - Journal of International Studies 563-583; Elena Lazarou, Maria Gianniou, and Gerasimos Tsourapas, 'The Limits of Norm Promotion: The EU in Egypt and Israel/Palestine' [2013] 15/2 Insight Turkey 171-193.

[158] European Commission, 'A new and ambitious European Neighbourhood Policy - MEMO/11/342 25/05/2011, European Commission, A new and ambitious European Neighbourhood Policy- IP/11/643 25/05/2011.

[159] Richard Youngs, 'Is European Democracy Promotion on the Wane?' (CEPS Working Document No. 292, Centre for European Policy Studies 2008) 1-2.

that permit or preclude diffusion.[160] More focus on 'on the ground' projects suggested a desire to establish a link between general goals and the practical work needed to create the appropriate conditions for constructive work towards them.

b) *Reactions of the research community: the prevalence of pessimism*

Other key points of previous criticism, however, were not answered by the relaunch. As Korosteleva argues, 'the notion of 'partnership', central to the new philosophy of cooperation with the outsiders, continues to be ill defined, causing a number of problems for the effective and legitimate realisation of the European Neighbourhood Policy/Eastern Partnership in the region'. Also, the EU will not regain legitimacy in the eyes of Eastern European citizens potentially seeking emancipation through membership by closing off the accession option, which has created an expectations gap between EU rhetoric and partner societies.[161] The institutional reconfiguration, in fact, could also be interpreted as an abandonment of pro-change groups, since the new fora 'regovernmentalize' some part of the relations with authoritarian regimes in the neighbourhood.[162] Dannreuther expands this argument to the ENP as a whole, noting a pro-government bent in most EU actions in the field of human rights and democracy. According to ENP practices, he adds, where the EU is not defined as the lone guardian of the sector, the governments co-create agendas, which makes them very efficient at resisting EU preferences which do not transpire into actual programmes – especially not in the field of human rights, deemed highly sensitive by authoritarian regimes.[163]

Current literature on the subject seems to suggest that despite rhetorical commitment to substantive human rights promotion and to relying on a nominally very well-developed tool kit that extends far beyond sanction and includes groundwork and its financing through various transnational funding schemes, the EU has in fact been backtracking on its commitment to promoting its HRD agenda. Boerzel et al. interpret the engagement in the Western Balkans as focussed, more than ever, on effective governance rather than promoting human rights and democracy in a region where such activism would mean a much-needed prop to crumbling societal commitments to EU norms.[164] The argument was treated at length in a collected volume by Sofia Sebastian, with similar conclusions, observing a normative turn from justice towards efficiency, mirrored in more attention to stability than democratisation.[165] Kotzian et al. note the plethora of external actions instruments yet point to a lack of

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[160] Tanja A. Boerzel and Thomas Risse, 'The Transormative Power of Europe: The European Union and the Diffusion of Ideas' (KFG Working Paper no. 1, Freie Universitaet Berlin 2009).

[161] Elena Korosteleva, 'Change or Continuity Is the Eastern Partnership an Adequate Tool for the European Neighbourhood?' [2011]25/2 International Relations 243-262.

[162] Oliver Schlumberger, 'The Ties that do not Bind: The Union for the Mediterranean and the Future of Euro-Arab Relations' [2011] 16/1 Mediterranean Politics 135-153.

[163] Roland Dannreuther, 'The European Security Strategy's Regional Objective: The Neighbourhood Policy' in Sven Biscop and Jan Joel Andersson (eds), *The EU and The European Security Strategy: Forging a Global Europe* (London - New York: Routledge 2008) 74-79.

[164] Tanja A. Börzel, Yasemin Pamuk, and Andreas Stahn, 'Good Governance in the European Union' (Berliner Arbeitspapiere zur Europäischen Integration 7, Freie Universitaet Berlin 2008) 26.

[165] Sofia Sebastian, 'The Balkans: European Inducements' in Richard Youngs (ed), *The European Union and Democracy Promotion*: *A Critical Global Assessment* (Baltimore: The Johns Hopkins University Press 2010) 38-59.

systematic deployment when it comes to promoting the HRD agenda – a certain sign of missing strategy, or commitment, or both according to the authors.[166]

Among the alternatives to the Commission's drift towards regovernmentalization, the most often encountered proposal from the expert community is the exploration of the so-called 'second track' of human rights and democracy promotion. This is based on transnational coalition-building and is frequently recommended in outlier cases like Russia, as in the Western Balkans (where it led to winning reform coalitions once before) and the partners in ENP.[167] The most thorough study of the uneven application of ENP mechanisms in the field of human rights, Rosa Balfour's dual case study monograph on Egypt and Ukraine, underlines this conclusion.[168] Her findings about the EU's decision to not pursue human rights violations with any force in dialogue with Ukraine, the sustained, but very low level engagement about torture in Egypt both attest to the EU's inability to try to pressure partner governments without strong incentives to offer, and the ability of non-democratic regimes to formally adopt the human rights discourse while continuing to disregard its basic norms.

The suggestion of the re-transnationalisation of HRD policies is frequently complemented with further reform proposals that permit gauging the growing dissent in the expert community with what Timo Behr described as a mere 'rebranding' of ENP in 2011. Real adaptation would imply preparing to keep the post-Arab spring status quo on track, if needs be, through a return to the idea of positive conditionality with regard to the human rights and democracy agenda, offering real incentives for progress.[169] The overhaul of the incentive structure has been a recurring prescription, proposed by Lehne, Youngs and other experts.[170] Any major turnaround, however, is currently not expected. Nick Witney, in a recent Notre Europe policy paper stated – 'it was not meant to be like this'.[171]

c) *Evaluations of the Arab Spring*

Both academics and analysts writing on the broader questions of HRD in the wake of the economic crisis necessarily reference the greatest 'external shock' received by the neighbourhood policy structure since its launch: the Arab Spring of 2011. The special place of this chain of events in the EU human rights discourse is underscored by at least two mutually reinforcing considerations. Firstly, most commentators agree that as ambivalent as the EU's southern HRD record had been, the Arab Spring suddenly held out the promise of creating an environment much more conducive to efficient norm transfer, potentially

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[166] Peter Kotzian, Michele Knodt, and Sigite Urdze, 'Instruments of the EU's External Democracy Promotion' [2011] 49/5 Journal of Common Market Studies 995-1018. For the case of sanctions cf. Konstant Gebert, 'Shooting in the Dark? EU Sanctions Policies' (ECFR Policy Brief 71, European Council on Foreign Relations 2013).

[167] Elena Klitsounova, 'Promoting Human Rights in Russia by Supporting NGOs: How to Improve Strategies' (CEPS Working Document No 287, Centre for European Policy Studies 2008); Jelena Subotic, 'Europe is a State of Mind: Identity and Europeanization in the Balkans' [2011] 55/2 International Studies Quarterly 309–330; Richard Youngs, 'The End of Democratic Conditionality: Good Riddance?' (Working Paper no. 102, FRIDE 2010); Richard Youngs, *Europe's Flawed Approach to Arab Democracy* (London: Centre for European Reform 2012).

[168] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The cases of Ukraine and Egypt* (London - New York: Routledge 2012).

[169] Timo Behr, 'Europe and the Arab World: Towards a Principled Partnership' (CA Perspectives No. 2, Center for Applied Politics 2011).

[170] Stephan Lehne, 'Time to Reset the European Neighbourhood Policy' (2014) Carnegie Europe Working Paper (Carnegie Europe); Richard Youngs, 'Introduction: Idealism at Bay' in Richard Youngs (ed), *The European Union and Democracy Promotion: A Critical Global Assessment* (Baltimore: Johns Hopkins University Press 2010) 12.

[171] Nick Witney, 'Where does CSDP fit in EU foreign policy?' (Notre Europe Policy Paper no. 64, Notre Europe Paris 2013).

reversing the trend in EU actions from ever more stability-oriented strategic action towards democratization and 'normative actorness'.[172] Secondly, the shock prompted the EU to engage in further dedicated institution-building, which signalled a break with the ongoing re-governmentalisation of EU-Southern Neighbourhood polices. The Civil Society Facility and the European Endowment for Democracy, created in 2011 and 2012 respectively, expressly served the purpose of empowering societal and domestic political actors to foster democracy and respect for basic rights.

Early commentators noted both the extent of the change in the southern neighbourhood and the quick reaction on the part of the EU, arriving at optimistic assessments with regard to the possible revitalisation of human rights promotion efforts, inter alia. Volker Perthes and many others argued for immediate and sizeable political investments into the region, with events seemingly confirming their hopes of a more determined EU stance.[173] Specifically, the principle of 'more for more', a clear promise of a return to enforcing positive conditionality was often greeted as one of the most needed breaks with former opportunistic engagements.[174]

At the same time, criticism of EU HRD promotion hardly abated with some observers steadily supplying arguments that real change had not taken place. Balfour argued in June 2012 that despite the new and focussed instruments, the EU had not overcome its tendency to apply different standards for different countries, nor its previous commitment to 'listening' - which of course conflicted with the idea of more pro-active norm promotion underlying the new instruments.[175] According to Schumacher the explanation for the uneven track record remained the same before and after the Arab Spring: the lack of a shared, EU-wide notion of the strategic interests and values to be pursued. Without such normative consensus, policy action remained vulnerable to influencing on the part of stakeholder member states representing opportunistic agendas.[176] As Martin Beck summarised 2013: 'Two years after the beginning of the Arab Spring, there are few indicators that the EU has used the transformation in the Arab world as an opportunity for a comeback as a civilian power in its relations with the countries south of the Mediterranean'.[177]

Two main types of arguments exist in the scholarly literature to account for the apparent failure of the EU to adopt a tougher and more ambitious HRD policy in the wake of the Arab Spring. One stream of research argues that the intra-EU institutional setting prevents a more defined stance vis-a-vis partner states. As Babayan and Viviani argue, that EU has a tendency to react to external shocks by creating new structures, but the hypertrophisation of mechanisms does not increase capabilities - the new structures

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[172] Jean-Pierre Cassarino, 'Reversing the Hierarchy of Priorities in EU-Mediterranean Relations' in Joel Peters (ed), *The European Union and the Arab Spring: Promoting Democracy and Human Rights in the Middle East* (Plymouth: Lexington Books 2012) 1-17.

[173] Volker Perthes, 'Europe and the Arab Spring' [2011] 53/6 Survival: Global Politics and Strategy 73-84.

[174] Solveig Richter and Julia Leininger, 'Flexible and Unbureaucratic Democracy Promotion by the EU?' (SWP Comments 2012/c26, Berlin: Stiftung fuer Wissenschaft und Politik 2012); Lorenzo Fioramonti, 'Promoting Human Rights and Democracy: A New Paradigm for the European Union' in Joel Peters (ed), *The European Union and the Arab Spring: Promoting Democracy and Human Rights in the Middle East* (Plymouth: Lexington Books 2012) 17-32

[175] Rosa Balfour, 'EU Conditionality after the Arab Spring' (PapersIEMed 16, Barcelona: European Institute of the Mediterranean 2012) 11-12 and 25-27 <http://www.epc.eu/documents/uploads/pub_2728_papersbalfour_for_euromesco16.pdf>.

[176] Tobias Schumacher, 'The EU and the Arab Spring: Between Spectatorship and Actorness' [2011] 13/3 Insight Turkey 107-120.

[177] Martin Beck, 'The Comeback of the EU as a "Civilian Power" through the Arab Spring?' (GIGA Focus 2013/2, Hamburg: German Institute of Global and Area Studies 2013).

are often 'redundant', while real political entrepreneurship remains scarce.[178] These institutional pseudo-innovations also tend to preferentialise long-term planning without direct action mechanisms being created, and institutional path-dependency tends to replicate the content of older institutions in 'new wineskins'.[179]

The other line of argumentation is arguably even plainer. Several observers such as Rosemary Hollis, Vera van Huellen and Daniela Huber have observed that the preference structure of EU members and actors has not shifted, and their preference for stability, security, the management of migration pressures and energy interests cause EU engagement and action to deviate from its normative track. While ever more programs and systems of conditionality are introduced to lend new vitality to HRD, each successive reform falls victim to the same strategic incentives to engage important partners. Weaker and more dependent states - such as Tunisia - face stronger pressure to engage in real reform, while strategic countries such as Egypt get a pass even without real progress.[180] In sum, while the Arab Spring did revitalize institutional activity with respect to the EU human rights promotion policies, the dominant view of the past few years has been that this spurt of activism has failed to translate evenly into practice, and that previous patterns of interest-driven engagement with Southern Mediterranean partners were quick to re-emerge.

3. After the economic crisis: The return of self-interest?

a) The resurgence of state-level interactions

The final sub-section of this chapter deals with the phenomena of the relative receding into the background of the human rights agenda in current EU external action policy literature and the emergence, as of now still tentative, of references to a realist shift in foreign policy. Panebianco notes that European foreign policy has been slowly shifting toward strategic interest promotion and away from its arguably constitutive HRD agenda, at least in the MENA countries.[181] Policies that remain strong and are promoted tend to be those that correspond to some security concern in member states. Marsh and Reese make the argument that anti-corruption measures, governance-related capability building, rule of law along with economic and societal welfare development projects first and foremost serve to 'lessen

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[178] Nelli Babayan and Alessandra Viviani: 'Shocking Adjustments? EU Human Rights and Democracy Promotion' (Transworld Working Paper 18, Rome: Institute of International Affairs 2013) <http://www.iai.it/pdf/Transworld/TW_WP_18.pdf>.

[179] Gergana Noutcheva, 'Institutional Governance of European Neighbourhood Policy in the Wake of the Arab Spring' [2015] 37/1 Journal of European Integration 19-36; Ingebor Toemmel, 'The New Neighbourhood Policy of the EU: An Appropriate Response to the Arab Spring?' [2013] 9/1-2 Democracy and Security 19-39.

[180] Rosemary Hollis, 'No Friend of Democratization: Europe's Role in the Genesis of the Arab Spring' [2012] 88/1 International Affairs 81-94; Vera van Huellen: 'Europeanisation Through Cooperation? EU Democracy Promotion in Morocco and Tunisia' [2012] 35/1 West European Politics 117-134; Daniela Huber, 'Mixed Signals Still? The EU's Democracy and Human Rights Policy Since the Outbreak of the Arab Spring' (IAI Working Papers 12/13, Rome: Institute of International Affairs 2012) <http://www.iai.it/pdf/dociai/iaiwp1213.pdf>.

[181] Stefania Panebianco, 'The EU and the Middle East' in Federiga Bindi (ed), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (Washington DC: Brookings Institution 2010) 150.

the push factors' of migration, which explains their staying power, whereas human rights, more narrowly understood, are accorded less importance in this perspective.[182]

An alternative conceptualization by Ben Rosamond, which situates the EU firmly within the liberal tradition interprets this same shift as movement from 'the ethic of cosmopolitan duty' with its principled and non-negotiable emphasis on human rights towards securing peace with liberal means and the primacy of self-interested 'market liberalism.'[183] This logic, using English School terminology, represents the (partial) abandonment of world society-oriented politics and a move back towards the international society tradition, since power aggregators (states, organisations, etc.) are re-centred in the process as those units which can procure important public groups from security to prosperity, while diffuse power operators such as transnational networks are 'downgraded' with regard their significance. In short, this reasoning maintains that if the EU prefers interactions with capable actors (as it seemingly does), it means limiting norm promotion ambitions as long as those capable actors – often illiberal states – do not consent the objective.

Either interpretation, however, suggests the short and medium term difficulties with keeping the HRD agenda in the foreground and making its tool kit operational. As partners are no longer routinely considered as susceptible to norm adoption under EU guidance, new discussions are required to replace or update the norm transfer theorising of the late 1990s and the previous decade. Ferreira-Pereira suggests nothing less than throwing this body of work out the window when she argues that the EU's success, its performance with regard to its own internal and external, formal and informal policy objectives, is the key independent variable in explaining how receptive to foreign norms local partners will reveal themselves to be.[184]

b) *The new discourse of EU interest promotion*

Given the economic and political difficulties in the EU, coupled with the realization that social learning and norm transfer can only be successful in the presence of favourable domestic scope conditions, a number of arguments are made relative to the potential benefits of re-conceptualising formerly HRD promotion-focussed policies. Cavatorta and Pace warn in their 2010 piece that the self-explanatory and static image of a norm-driven and norm-exporting EU entering into a one-way relationship with third countries, notably MENA states needs to be replaced with a complex and dynamic understanding of the multidimensional and -directional links that connect the EU and the Mediterranean.[185] Theirs is a value-neutral argument in favour of re-reading the few realist contributions to the field, such as Hyde-Pryce's critique of NPE in light of the changing distribution of power in the international system. The expert communities prescriptions, however, also suggest the need for a renewed engagement with the place and functions of human rights and democracy promotion in the world and the EU's neighbourhood, with some suggestions, as by Grevi et al. to abandon the twin projects of human rights promotion and

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[182] Steve Marsh and Wyn Reese, *The European Union in the Security of Europe: From Cold War to Terror War* (London - New York: Routledge 2012) 10 and 24.

[183] Ben Rosamond, 'Three Ways of Speaking Europe to the World: Markets, Peace, Cosmopolitan Duty and the EU's Normative Power' [2014] 16 The British Journal of Politics and International Relations 133–148.

[184] Laura Ferreira-Pereira, 'Human Rights, Peace, and Democracy: Is "Model Power Europe" a Contradiction in Terms?' in Federiga Bindi (ed), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (Washington DC: Brookings Institution 2010) 290-302.

[185] Francesco Cavatorta and Michelle Pace, 'The Post-normative Turn in European Union (EU)-Middle East and North Africa (MENA) Relations: An Introduction' [2010] 15/5 European Foreign Affairs Review 581–587.

transnational civil society building to focus on policy sectors with higher pay-offs and the promise of quicker progress, as well as deeper engagement.[186]

Marking the shift in focus, conditioned by the difficult phase of intra-EU institutional reform, the deepening of the integration being driven predominantly by fiscal and monetary exigencies, the discussion of human rights promotion instruments and their opportunity structure in the neighbourhood have featured less prominently in recent discussions of EU external action. Neither Grevi and Keohane, nor Tocci accorded any kind of sustained investigation to the issue area in recent edited volumes, a lack that would likely not have been the case in years prior to the economic crisis.[187]

At the same time, there is ample evidence that the discussion of norm-driven action and normative power will remain an important component, if not of publications by think tanks, at least in academic debates. While the academic human rights research agenda and its normative dimension is not being translated through the transmission belt of policy analysis to practitioners at the moment, it is a fairly conservative assessment, with view to the intense institutional development and the theorising of the past two decades, that considerations of human rights in EU external action and foreign policy identity will remain constitutive elements of thinking about the field. The present, as mirrored by contributions from the expert community, is one of retrenchment in both policy practice and prescription, yet retrenchment is not synonymous with elimination. Human rights promotion, as this review attests, has become institutionalised in policies and research to an extent that makes ignoring it as a strategic identity component impossible. The real research question of the moment has to do, instead, with the extent and duration, as well as the consequences of the present retrenchment.

I.   Conclusion

Human rights, lacking a separate policy niche, exist nested in several sectoral EU policies. This feature predetermines the way it is treated in European Studies literature, with HR-specific pieces few and far between, and discussion of human rights policies usually taking place in the context of the broader human rights and democratization (HRD) agenda.

One of the consequences of its irregular institutionalisation has been, however, that relatively few field research accounts focussing specifically on the human rights component of one or another policy have been published so far. Fieldwork, it seems, tends to focus on various sectoral bureaucracies and third state partners in the context of one or more specific sectors. This is on the one hand a natural outcome of the lack of an autonomous EU human rights policy, on the other it has the detrimental effect of often producing only token mentions of the human rights components of various actions and policies. As much as CSDP literature rightly tends to mention the special place of human rights on the EU's security agenda and its crisis management approach in particular, relatively little is known, for instance, about how human rights elements are integrated into missions at the level of practice. Case studies of the present research project seek to expand on the existing knowledge in this regard, by providing both micro- and meso-level analyses focussing specifically on the operationalisation of the EU human rights agenda.

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[186] Giovanni Grevi, Daniel Keohane, Bernice Lee and Patricia Lewis, *Empowering Europe's Future: Governance, Power and Options for the EU in a Changing World* (London - Madrid: Chatham House - FRIDE 2013) 101.
[187] Giovanni Grevi and Daniel Keohane (eds), *Challenges for European Foreign Policy in 2014: The EU's extended Neighbourhood* (Madrid: Fride 2014); Nathalie Tocci (ed), *Imagining Europe: Towards a More United and Effective EU* (Roma: Edizioni Nuova Cultura 2014).

Similarly, there is very limited material available about human rights working groups attached to EU-third country institutions and fora, or even about how the issue can manifest itself in standard interactions within the context of development aid agreements or, for that matter, ENP Action Plans. Surveys about elite and societal attitudes in aid recipient or partner countries are not referenced in the literature, suggesting their scarcity, apart from Eurobarometer data.

This missing micro- and meso-level evidence would constitute a link in being able to interpret human rights policies in the fashion of, say, agriculture or trade. Instead, HR exists first and foremost as the sum of plans, declarations/communications and clauses in much of the literature rather than as accounts of on the ground practices – which would constitute a deeper, sociological and dynamic understanding that academia should be aiming to achieve. Lacking such empirical foundations, the literature tends to focus on high-visibility arenas like that of diplomatic negotiations, multilateral fora, legislative change, democracy scores, etc., which are important but do not exhaust the perspectives available to European studies.

Second, the above survey attempted to make clear the surprisingly reactive character of much of the literature. To take Schimmelfennig's model of norm transfer through entrapment, it required ever newer iterations as experience from various regions necessitated reworking the model, which emerged at first as a rather one-way track concept and gradually morphed into a complex, multi-variable explanatory mechanism as much of the success as of the failures of norm transfer. Similarly, policy experts are often forced to rely on EU-internal information regarding human rights promotion in external action, and normative theorising has had also very limited empirical underpinning. Were more reports of fieldwork from third countries available, it is very likely that the mainstream literature's ability to predict and to prescribe would increase substantially.

The survey attempted to trace conceptualisations of HRD in their 'native' context of external action and present a dynamic account of the interplay of events and analysis, as they constitute each other. Accordingly, this review sought to properly represent the interpretative achievements that had the greatest impact on the possibility of thinking about an embedded European human rights policy in the context of external action. Norm transfer theories, the Normative Power Europe concept and human security have each profoundly shaped our perception of these 'meanings'. Their importance is beyond doubt, as such theorising has, at various points in the past 15 years, transformed what the academic and expert communities conceived of as the subject of inquiry. At the same time, empirical pieces, both case studies and policy analysis, were included into the survey to signal the sometimes overlooked presence of critical thinking within the broader EU external action literature. It is with these empirical contributions that one can start to gauge the complexity and multifaceted character of the subject matter, something that is not just confusing at first, but also hopefully productive and can help inspire further theorising to explain the ongoing development of the EU's human rights identity and policies.

II. Human rights and foreign policy: Mapping the debate

After a narrative overview of the literature and discussions about the role of human rights in EU foreign policy, this chapter presents a systematic introduction into the different approaches, as well as the central issues and concerns that frame the debates. This part, together with Chapter III, is written mainly to assist the case studies to be prepared in the next phase of Work Package 6.

The EU (EC) has come a long way from the limited economic cooperation, and by now has competences that reach out to foreign policy and human rights. This in itself requires explanation, and the way we explain this process will also inform our understanding of the relationship between human rights and EU foreign policy today. The unmatched developments of the European integration is usually linked to the power of spill-over and the refined focus of integration, following a step-by-step process. At the same time, the lack of a focus on foreign affairs as well as on human rights, at least in the first decades, is inherent to this approach.

On the other hand, we tend to forget that human rights concerns were on the table in the discussions between the founding states in the 1950s,[188] although they did not become part of the founding treaties, and such issues were usually seen as the unique concerns of the Council of Europe or, later, of the OSCE, instead of the EC/EU framework. The engagement in Kosovo shows that this distinction is still haunting. Katarina Månsson quotes an UNMIK official saying that when it comes to human rights, there is a general perception by the various actors that it is the OSCE – and not the UN or the EU – that is the only competent actor.[189]

Historically, the courts (above all the ECJ and high courts in some states) are usually seen to be the first, in applying European law, that directly confronted the question of human rights standards implied in an emerging, fully-fledged legal system. The European Court of Justice incorporated and started to apply basic human rights considerations without express treaty reference, most importantly in its decisions in the Stork (1959), Stauder (1969), Internationale Handelsgesellschaft (1970), Nold (1974), Hauer (1979) cases. There was pressure from the national level as well, most notably in the Solange I decision of the German Federal Constitutional Court (1974).

By now, both human rights and foreign policy have solid basis in the primary legal sources, most importantly with the Lisbon Treaty. In addition to the general human rights clauses (Articles 2, 3 and 6 of the TEU), the Treaties confirm specifically that human rights are part of the Common Foreign and Security Policy (CFSP) framework, indeed, they form the very basis of the same, as set out in Art. 21 of the TEU:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and

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[188] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' [2011] 105 American Journal of International Law 649.

[189] Katarina Månsson, 'Communicative Action on Human Rights: Lessons for the European Union from the Peace Operations in Kosovo and the Democratic Republic of Congo' in Julia Kozma, Manfred Nowak, Roland Schmidt (eds), in *Indicators and Monitoring Systems in External Policy-Making of the EU* (Neuer Wissenschaftlicher Verlag 2009) 127.

fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[190]

The TEU also stresses that human rights promotion should happen through a high level of international co-operation (TEU Art. 21(2)). This obligation applies to areas specifically mentioned in the Treaties on the Functioning of the European Union, like foreign commercial policy, development, financial and technical cooperation and humanitarian aid.[191]

The inclusion of human rights concerns has a double effect: all EU policies, including foreign policy, is subject to human rights standards; and human rights promotion, on the international level, is an important goal of foreign policy.[192]

It is now hard to deny that human rights have become part of foreign affairs, of states dealings with each other, and also the engagement of international organisations with states. It remains contested, however, to what extent this discourse reflects a genuine shift in how foreign policy is made. This is especially true for a foreign policy that is shaped by a larger number of states and other institutional actors, as is the case with EU foreign policy. The scholarship is divided on theoretical explanations of EU decision-making, that has an impact on how we conceive the emergence (or delusion) of human rights in EU foreign policy.

Some are reluctant to accept that institutions have an impact of their own, and instead focus primarily on nation states. Assessing the impact of human rights in EU foreign policy, on policy making itself and on the policies' impact in third countries, will require a judgement on all of these controversies.

In the following, we will first review arguments on why human rights should be part of EU foreign policy, and then move on to assess how they are part of decision-making in external relations.

A.   Why are human rights part of EU foreign policy?

Considering the issues of the gap between rhetoric and action, as well as coherence and enforcement (see in Chapter I and also following this section, in II.B), one could ask why human rights are part of EU foreign policy, whether it's worth the effort after all. There are various arguments and interests that can explain why human rights are (and should be) present on the highest level of decision-making in EU foreign policy.

With or without accepting the relativist argument, one can claim that it is the 'national interest of liberal democracies to export their norms and values, including human rights norms'.[193] Governments can use human rights arguments in their international dealings to legitimise their power, while furthering human rights goals can bring or maintain order and peace. Finally, human rights are now positive law: there are a growing number of international legal documents dealing with human rights, and this in itself explains

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[190] Treaty on European Union [2008] OJ C 115 Art. 21(1).
[191] Articles 205–221 of the Treaty on the Functioning of the European Union, see Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 8.
[192] Josiane Auvret-Finck, 'La projection des droits fondamentaux dans les relations extérieures' in Joël Rideau, *Les droits fondamentaux dans l'Union européenne. Dans le sillage de la Constitution européenne* (Brussels: Bruylant 2009) 407.
[193] Peter R. Baehr and Monique Castermans-Holleman, The Role of Human Rights in Foreign Policy (3rd Palgrave 2004) 2.

that it would be hard to ignore this topic entirely,[194] not to mention the constitutional traditions of the various Member States. The responsibility that the EU takes when assessing the human rights situation in third countries has a basis in international law, as human rights are not the sole responsibility of the concerned states, as the (still debated) concept of the Responsibility to Protect more recently underlined.

The idea of a 'just basis' for international relations for the Communities appeared already in 1973 when heads of member states agreed on a declaration on Europe's identity. The 1986 Single European Act mentioned democracy, rule of law and human rights as values that should guide European foreign policy.[195] The Lisbon Treaty marked an important step towards the inclusion of human rights considerations on various levels of policy making in the EU. Making human rights part of the European project has benefits both externally and internally. On the international level, this could serve the inspiration to become a global player in the area of human rights; internally, a bill of human rights might make the EU look more like a state[196] – this second issue can be seen as largely resolved by the Treaty of Lisbon, with its inclusion, by reference, of the Charter of Fundamental Rights.

After the more detailed overview of Chapter I, here we address briefly two main arguments for including human rights in EU foreign policy decisions. First, as seen in Chapter I.B, human rights form an important part of the very identity of the EU and its normative power. Second, on a more utilitarian note, Member States can get leverage through promoting human rights at the level of the EU rather than pursuing the same goals at the national level, in a more fragmented way (the argument for aggregation).

1.   The identity argument

Identity plays an important role in structuralist approaches. Human rights might then be seen as a constitutive element for European identity. When we consider these arguments we should keep in mind that identity itself is an ambiguous term[197] and in a sense the whole of EU foreign policy can be seen as constituting an 'international identity' of the EU.[198]

Considering human rights promotion in the context of the EU, we should first look at how human rights became part of the very identity of the European cooperation. Sonia Lucarelli discusses the role of identity, the relationship between cultural and political identity, and argues that existing literature either creates an inherent link between the two (neo-nationalist, European culturalist and civilizationalist arguments) or sees political identity as something that should be created, not evidently based on an existing cultural identity (communicative and functionalist arguments).[199] In general, a bi-directional formation is present: the identity of the EU is forming foreign policy, and the EU's international presence

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[194] See these four arguments in Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 2-3.

[195] Nathalie Tocci (ed), 'The European Union as a Normative Foreign Policy Actor' (CEPS Working Document No. 281, Centre for European Policy Studies 2008) <http://aei.pitt.edu/7582/1/Wd281.pdf> 1.

[196] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011).

[197] Rogers Brubaker and Frederick Cooper, 'Beyond 'Identity' [2000] 29 Theory and Society 1-47.

[198] See the works of Manners and Whitman, cited in Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006).

[199] Ian Manners, 'The constitutive nature of values, images and principles in the European Union' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 11–13.

is forging its identity.[200] (See the same argument in Chapter IV, Introduction and Conclusion.) Canada is often mentioned as an example where human rights promotion as a foreign policy goal is closely linked to collective identity, and where internally, too, the adoption of a human rights charter was linked to internal discussions on a Canadian identity.

While it is debated to what extent values make an impact on actual foreign policy decisions, it is uncontested that they are present, at least as a discourse. It is part of what is presented as 'Europeanness', or European 'values, images and principles'.[201] There are distinct but interrelated questions of who defines Europe along these values, what this entails, and whether and to what extent it corresponds to the social and political reality. It can also be problematised whether human rights, if universal, can have a European flavour at all, and if it's possible to discern a genuinely European approach, that is common for all EU countries, but distinct from, e.g. the Northern American one. The strong emphasis on the individual (as opposed to more collective values in Africa or Asia) as well as on solidarity (as opposed to the US; see the insistence of a 'social market economy') are often used to emphasise these differences.

As was already explained in Chapter I.E human rights constituting an inherent part of the EU's identity was central to the concept of Normative Power Europe introduced by Manners. He further argues that 'cosmopolitical supranationality' is central to the European self-image, the 'belief in multilayered politics shaped by a vibrant international civil society, more equal rights for women, the pooling of sovereignty, and supranational law.'[202] This explains how Europe can be presented as a role model for regional projects elsewhere.

Inherently linked to the identity argument, we find the criticism about a European exceptionalism regarding human rights protection. This has been widely discussed in the literature, especially after the Kadi judgement.[203] In this case, the ECJ invalidated the EU implementation of a UN Security Council resolution on freezing assets in the anti-terrorism context.[204] While the decision has been praised on human rights grounds, it can be argued that, at a more general level, such an approach can easily undermine efforts to solidify the international human rights regime.[205]

Finally, it can be argued that the identity based argument goes against the historical developments of human rights in the context of the EU, grounding the identity of the EU in human rights is simply

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[200] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 214.

[201] Ian Manners, 'The constitutive nature of values, images and principles in the European Union' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006).

[202] Ian Manners, 'The constitutive nature of values, images and principles in the European Union' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 28.

[203] Richard Burchill, 'Assessing the EU's Position on Human Rights. Is it a Desirable One?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011); Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' [2010] 51 Harvard International Law Journal 1.

[204] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML.>

[205] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' [2010] 51 Harvard International Law Journal 1.

historically inaccurate.[206] This should not in itself discredit attempts to include human rights, it simply points out that the development that led to the inclusion of human rights considerations had important external elements, and was not a strictly internally driven process. It was not until the events in Eastern Europe and the Western Balkan, in Europe's own 'backyard,' that serious human rights commitment appeared in the EU (EC), which marked a shift from the (lack of) responses to human rights violations in Uganda, South Africa and Chile, countries receiving development assistance from Europe.[207] In a sense, Eastern enlargement contributed to the solidification of the EU's identity as it forced the organisation to articulate its preconditions in a normative way, including values like human rights and democracy. (See also the discussion on the Copenhagen Criteria in Chapter IV.C.2.a.)

2. Aggregation

As human rights considerations are already present in Member States foreign policies, a possible argument could point out the advantages of harmonising such efforts at the European level. An advantage of elevating human rights promotion to the level of the EU stems from aggregation. Once national governments do pursue human rights goals in their foreign policies, achieving these goals might be more effective at a collective level. This 'burden-sharing' means that 'a lesser burden is placed on overall bilateral relations'.[208] Shifting foreign policy to the European level can lower the stakes also in the sense that retaliation by third states is less likely to happen.[209] An obvious drawback is that common action can fall back to the weakest common position,[210] although, usually, independent government action can still follow (one counter-example is economic sanctions by member states without EU approval).

We have seen that human rights and democracy are part of EU foreign policy, but there is a gap between the rhetoric and actual performance. Interest-based calculations, idealism and identity (or, more broadly, the specificity of the process of integration) can all play a role and explain the motivations behind human rights considerations. While in certain cases these can clash with other interests, e.g. strategic considerations, economic interests, securitisation (immigration, terrorism), they can destabilise or create backlash, discourage engagement and international cooperation, the overall gains include an increased 'political and moral weight', observance of long-term goals, and the role of a 'normative power'.[211]

The balance between the positive and negative aspects will largely depend on what specific instruments are applied in concrete cases, and how the various institutions are involved. In the following section, we will turn to these questions.

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[206] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 121.

[207] ibid 124–125.

[208] Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 66.

[209] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 140.

[210] Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 66–67.

[211] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 1–3.

B. How are human rights part of EU foreign policy? A systematic overview of common criticisms

To understand the role of human rights in the context of bilateral and regional cooperation we need to address the question *whether and to what extent human rights are (and should be) part of European foreign policy*. The descriptive question is, accordingly, whether human rights (values, principles, concepts etc.) play a substantial role in foreign policy decisions, and if they should play a role when we try to explain foreign policy.[212] A parallel question to ask is to what extent we should expect them to play a role.

The importance of such considerations cannot be underestimated. The size and weight of the EU warrants that the organization has an impact in the international realm, both in its dealing with international organizations – universal bodies as well as other regional institutions – and other states. Still, there seems to be a certain fear, in research on the role of values, images and principles, from 'touching normative issues'.[213] Knud Erik Jørgensen contrasts this to the continuing interest in issues of ethics and identity. Accordingly, there is a renewed opportunity for EU foreign policy research to integrate theoretical insights into the studies of European institutional conduct.[214]

1. International relations theories

The view on how human rights play a role in foreign policy is closely connected to one's views on international relations in general. The different traditions in international relations theory often provide contradictory answers; realists usually emphasise the role of interests, the liberals underline the importance of values, while the English School is usually seen as taking an intermediary approach.[215] An attempt to reconcile the contradicting approaches could apply all of them, to various stages of processes in international relations. The rationalist (instrumentalist) approach accounts for the reason why the different actors enter into long-lasting contacts, while the constructivist approach can help to explain how their motives (identities) are influenced by these relations.[216]

There are various arguments against taking human rights into considerations in foreign policy decisions. One can claim either that other policy goals are more important or that the criticized (human rights based) measures are unlikely to bring about change and improve the human rights situation.

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[212] Knud Erik Jørgensen, 'Theoretical Perspectives on the Role of Values, Images and Principles in Foreign Policy' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 43.
[213] ibid.
[214] ibid 57–58.
[215] Adrian Gallagher, 'An Overview of the English School's Engagement With Human Rights E-International Relations, System, Society and the World: Exploring the English School' (2013) <http://www.e-ir.info/2013/05/06/look-inside-ir-shes-alright-shes-alright-an-overview-of-the-english-schools-engagement-with-human-rights/>, arguing that English School is sensitive to human rights issues, mostly through maintaining that mass human rights violations are necessarily "a matter of international concern". On the liberal/realist dichotomy on the relevance of human rights, see, e.g. Jack Donnelly's balanced account, criticizing realism in this regard and, more specifically, arguing that human rights and democracy, while being "important concerns for liberal internationalism", "were excluded by neorealist structuralism". Jack Donnelly, *Realism and International Relations* (Cambridge University Press 2000) 31.
[216] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 123.

One such general opposition is based on the classical realist argument that states do, or should, not include human rights among the main policy goals, unless of course these coincide with their interests. This would mean that human rights promotion can never be a goal in itself, only as a means to further other state interests. The only way for human rights considerations to enter foreign policy in this view is to show that they serve important interests. This argument is not unrealistic considering the leverage gains and the EU's self-image as a model or standard-setter in human rights issues, see the identity argument above (II.B.1). An inherent connection is sometimes asserted between human rights promotion and states' interest to seek security. However, this might miss the point that long-term objectives of creating and maintaining responsive, democratic governments can go against short-term goals of international stability.

Janne Haaland Matláry,[217] while accepting the premise that the international system remains largely anarchic, argues that 'values and norms matter in world politics … to an increasing extent', 'human rights and democracy have become stronger as motives for foreign policy', which does not mean that 'national interests have disappeared'. She further claims that this change cannot be traced back to a change in human nature, but to its very elements: the 'inclination to seek power and wealth' but also to promote 'values that one internalises and thus really believes in'.[218] Furthermore, most states seek legitimacy, an 'intangible power resource', that can be undermined by non-compliance.[219] Urfan Khaliq refutes the realist vision precisely because human rights considerations became one objective, even if one among many.[220]

Institutionalism can explain how norms become entrenched, mitigating intergovernmentalism.[221] Constructivism can explain how 'policy entrepreneurs' can use rhetorical persuasion, especially as rotating presidents.[222] Matláry, on the other hand, sees the primary role of constructivist (IR) theory as providing useful insights into the shortcomings of other theories.[223]

The various approaches and the methodologies they use might be useful for different parts of the research. We will now address the dichotomy that seems to dominate theoretical discussions, and provide for a general framework for the debate.

2. Values and interests

Different policy goals can and do conflict with each other. The EU seeks to maximise 'economic and strategic welfare,' an aim that can easily trump the other goal of human rights promotion.[224] In external relations, raising domestic human rights issues can reinforce mutual mistrust, and destabilise countries, undermining the legitimacy of governments, and, as a result, compromise the general goals of peace and

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[217] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002).

[218] ibid 30.

[219] ibid 40.

[220] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 448.

[221] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 144.

[222] ibid 145.

[223] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 88.

[224] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 128.

security. Even more limited security considerations can be seen as antithetical to human rights. Max van der Stoel, former foreign minister of the Netherlands, argued that in certain situations, human rights 'should not be given absolute priority'. He refers to a hypothetical case where raising human rights concerns would risk 'an important breakthrough in arms control negotiations'.[225] However, it can be argued that this statement reflects a limited view of human rights. Arms control is also an important human rights concern, without which more lives (as well as other rights) would be threatened, and this balancing can easily be interpreted as a balancing between competing human rights.

Regardless of whether we see such concerns as internal or external to human rights, the lack of prioritisation between the elements that can contradict each other will lead to inconsistency and uncertainty. In the European Neighbourhood Policy and the European Security Strategy it has been defined as of equal importance 'to spread democracy, human rights and good governance outside the Union's borders as well as to create a 'ring of friends' for the pursuit of stability and security'.[226]

Raising human rights issues in foreign policy can be problematic for various reasons. First, it can peril prospering interstate relations; especially if concerns are expressed publicly, or if the state in question is a mass human rights violator. Second, such criticism is often seen (at least rejected) as a violation of state sovereignty over domestic matters.[227] While both of these arguments can easily be rebutted – the present state of international law recognises the protection of human rights as one of the basic principles of international law and various human rights as legitimate concern for outside actors – it remains true that raising such concerns in international relations will depend on a choice, and, as we have seen, other foreign policy goals can easily trump devotion to human rights. And this prioritisation will often result in an inconsistent application of human rights scrutiny.

Rosa Balfour has proposed that we should stop seeing principles and interests as a clear-cut dichotomy and rather place them along a continuum. Human rights and democracy play a role and drive action in foreign policy just like security and stability. She acknowledges, however, that the relationship – between human rights and democracy, on the one hand, and other goals on the other – is often dialectic.[228] After all, a continuum also implies that there is a pay-off inherent to a policy choice, i.e. in a simplified version, moving closer to security will take us away from human rights. While in the Central and Eastern as well as in the South-Eastern European context, the EU made democracy and human rights an integral part of foreign policy (or enlargement) strategy, this was not the case in the Mediterranean context where these values proved to be secondary to maintaining stability.[229] Also, somewhat paradoxically human rights issues can become important precisely because they touch upon sensitive issues, because action on these questions can put key interests at risk.[230]

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[225] Max van der Stoel, 'De Rechten van de Mens in de Oost-West betrekkingen,' in Ph.P. Everts and J.L. Heldring (eds), *Nederland en de Rechten van de Mens, Baarn* (Anthos 1981) 79, quoted by Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 48.

[226] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 145.

[227] Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 45–46.

[228] 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) 115.

[229] ibid 115.

[230] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 138.

The picture is a bit more complex if we consider that in the enlargement context, democracy and human rights seemed to be accepted as contributing to the overall goal of stabilising the region. Furthermore, stability and security are values that are inherent to democracy, human rights and the rule of law. In assessing the relationship between these two sets of goals that are often seen antithetical it is necessary to look into the substance, into what human rights the EU seeks to promote. (See subchapter 7 below.)

According to the present approach of EU foreign policy, based on Article 21 TEU and spelled out in the EU Strategic Framework on Human Rights and Democracy, EU policies shall be guided by the protection of human rights and democracy in all its external actions. The Strategic Framework underlines the importance of mainstreaming human rights in all EU external actions.

Sonia Lucarelli summarises the diverging approaches to what role human rights can play in foreign policy as follows:[231] (1) they can provide road maps helping choice among possible courses of actions; or (2) serve as final aims of foreign policy; (3) they might only inform the selection of the appropriate instruments; and finally (4) they can be used as basis for legitimizing discourse. This will also mean that arguments based on human rights will be more or less powerful as opposed to arguments based on direct gains. In certain cases, the link between rhetoric and action might not be as weak as commonly assumed. At the micro-level, a shared understanding of human rights might be crucial, or even a precursor, for actual implementation.[232]

Before reaching a conclusion, it seems practical to put the relationship between EU foreign policy and human rights into perspective. Rosa Balfour contrasts the process to entrench the goals of promoting human rights and democracy through EU foreign policy to the less formal approach of large states: 'No other large state has put on paper that its foreign policy objectives include international action in support of human rights and democratic principles and has created a legal basis to do so'.[233] She argues that this formalisation provides for an added protection against political change and manipulation – but this does not mean that it also guarantees that these goals are implemented. Elena Jurado talks about legitimate (as opposed to illegitimate) expectations towards the EU concerning human rights promotion, and that we should always keep in mind that the EU is not and should not primarily be a human rights organisation. Common criticisms often fail to consider the limits of the EU, although they can be read as pointing to the inadequate cooperation between the EU and other organisations like the Council of Europe and the UN.[234]

Urfan Khaliq,[235] after a review of EU responses to events in Myanmar, Nigeria and Pakistan, argues that '[e]thical considerations are now an established part of the equation in the Union's dealing with third

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[231] Sonia Lucarelli, 'Introduction' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 14–15.

[232] See, in the context of peace operations, Katarina Månsson, 'Communicative Action on Human Rights: Lessons for the European Union from the Peace Operations in Kosovo and the Democratic Republic of Congo' in Julia Kozma, Manfred Nowak and Roland Schmidt (eds), *Indicators and Monitoring Systems in External Policy-Making of the EU* (Neuer Wissenschaftlicher Verlag 2009).

[233] 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) 127.

[234] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006).

[235] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 272.

states.' Which is not to say that they will override basic state interests in security and 'relations with vital allies and trade links'.[236] Reactions to comparable events might fundamentally differ, and will be applied on an *ad hoc* basis.[237]

All approaches acknowledge that there are competing foreign policy goals that can (do) override human rights considerations. Among such goals, a country might want to maintain friendly relations, further security and peace, build up economic relations, and pursue development goals.[238] But these goals can be compatible with human rights considerations according to the EU's own commitments.

3. Inconsistency: rhetoric and action

While it is hard to deny that human rights are part of EU foreign policy, there is a virtual consensus among scholars that there is a gap, or at least some inconsistency, between rhetoric and principles and actual performance, the commitment to human rights values expressed in various policy documents and statements on the one hand, and the role human rights actually play in decision-making.[239] It applies as a general rule that the legitimacy of 'producing and disseminating human rights … depends on the system's ability to develop substantive and procedural rules which apply to all.'[240] The adoption of the EU Strategic Framework and Action Plan, together with the human rights country strategies and the thematic human rights guidelines (see later) mark an important development in this respect, seeking to address just these types of criticism. Addressing more specifically the EU's response to the Arab Spring, a 2011 joint communication of the European Union and the European Council cites criticism toward the EU's role.[241]

Deliverable 3.2 concludes that one of the causes of the inconsistency is that the concept of human rights, democracy and the rule of law appear in the EU treaties, without being deeply theorised ('incompletely theorized' concepts).[242] As Sunstein mentions, 'incompletely theorized agreements' are used because they allow for 'convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity.'[243] But the 'incompletely theorized' content of these concepts (human rights, democracy and the rule of law) can lead to problems when being applied, also when the European Union uses its foreign policy tools and instruments. As the report states: 'A keener understanding of both its own and

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[236] ibid 273.

[237] ibid 447–448.

[238] See: Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004).

[239] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 2.

[240] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 124.

[241] European Commission, 'Human Rights and Democracy at the Heart of EU External Action – Towards A More Effective Approach' COM (2011) 886 final, Joint Communication to the European Parliament and the Council <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF> 6.

[242] 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 Deliverable 3.2 (forthcoming). This standpoint based on Sunstein argument about incompletely theorized agreements. See for this Cass R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) Chicago Public Law and Theory Working Paper no. 147 <http://www.law.uchicago.edu/files/files/147.pdf>.

[243] Cass R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) Chicago Public Law and Theory Working Paper no. 147 < http://www.law.uchicago.edu/files/files/147.pdf> 2.

others' conceptualisations of human rights, democracy and rule of law, could help the EU to be more effective in its external action'.[244]

The institutions of the European Union have the obligation to follow the values enshrined in Article 2 TEU in all of their policies and to 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (Article 21 TEU) in foreign policy, too. This goal is served by human rights mainstreaming in the foreign policy framework of the European Union, which requires that human rights promotion be part of decisions concerning all tools and instruments of EU foreign policy.

An important development in this respect was the adoption of the Strategic Framework and Action Plan on Human Rights and Democracy in 2012. This underlines the EU's commitment to promoting human rights in all external actions from trade to environment protection, i.e. human rights mainstreaming. The Strategic Framework explicitly states that it will integrate the promotion of human rights 'into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy.'[245] Transforming the goals of the Strategic Framework into actions, the Action Plan lists ninety-seven fields of actions to be implemented by the end of 2014. This serves as an important guideline for the everyday work within the EEAS, as confirmed by the Deputy Head of Division on Human Rights Strategy and Policy Implementation at the European External Action Service.[246] An important actor is the EU Special Representative for Human Rights who has to contribute to the implementation of the Strategic Framework and the Action Plan. In compliance with this goal the Union adopted several documents on mainstreaming human rights among CFSP policies.[247] This is a targeted response to the inconsistency arguments raised in this section, and marks a conscious, structured, institutional effort from the part of the EU, with the results to be seen in the coming years.

Other goals, such as security and economic development, should be compatible with human rights considerations, in this regard the Strategic Framework states that achieving 'sustainable peace, development and prosperity [is] possible only when grounded upon respect for human rights, democracy and the rule of law.'[248] This creates a framework where any incompatibility with the promotion of human rights directly translates into a serious dysfunction. As the 'Report mapping legal

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[244] 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 Deliverable 3.2 (forthcoming).

[245] Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 (25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> 2.

[246] Interview with Riccardo Serri, Deputy Head of Division on Human Rights Strategy and Policy Implementation, European External Action Service (Brussels, 12 June 2014).

[247] See, e.g. General Secretariat of the Council, 'Mainstreaming human rights and gender into European Security and Defence Policy. Compilation of relevant documents' (2008) <http://eeas.europa.eu/csdp/documents/pdf/news144_en.pdf>; Council of the European Union, 'Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions' 17138/1/10, REV 1 (30 November 2010).

[248] Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 (25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> 1.

and policy instruments of the EU for human rights and democracy support'[249] underlines, there have been recently some deficiencies in the field of human rights promotion. The report highlights some problematic areas, e.g. it identifies a trend of marginalisation in the case of social, economic and cultural rights in EU policies, while the Union emphasises the indivisibility of human rights.[250] Or, as the report also notes, some deficiencies flow from the Action Plan itself, which does not establish actions 'regarding the protection of refugees and migrants; and does not identify actions for some priority themes of the *Strategic Framework* (promotion of ESC rights)'.[251] Such deficiencies, however, appear not only on the supranational level but constitutional democracies themselves grapple with similar problems in the field of e.g. ensuring economic, social and cultural rights or in the field of the protection of refugees. Note that the Action Plan could later address these issues through its review mechanism.

Policies developed in various areas like the European Enlargement Policy, the European Neighbourhood Policy, relations with ACP countries and bilateral cooperation with emerging economies, all contain, at least on paper, elements that could be identified as human rights considerations. However, these elements do not provide for a comprehensive framework, only 'bullet points' that can inform the process.[252] (Note that this does not apply to the enlargement context, see Chapter IV.) After the adoption of the Strategic Framework and Action Plan on Human Rights and Democracy, the question arises mostly on the level of application. On a more critical note, human rights considerations can be seen as mere 'window dressing' or 'luxury goods' that will be dropped as soon as they conflict with weighty (state or EU) interests.[253]

Human rights should be part of bilateral (and multilateral) dialogues at all levels, as stated in a non-binding document adopted by the Council, the EU Guidelines on human rights dialogues with third countries:

> European Union undertakes to intensify the process of integrating human rights and democratisation objectives ('mainstreaming') into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of mission or the Commission. It will further ensure that the issue of human rights, democracy and the rule of law is included in programming discussions and in country strategy papers.[254]

Even a strong emphasis on human rights will not necessarily mean that foreign policy will be able to be both effective and consistent.[255] There might be a pay-off, certain selectivity allowing the policy to be

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[249] Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014).

[250] ibid 3.

[251] ibid 19.

[252] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 137.

[253] Knud Erik Jørgensen, 'Theoretical Perspectives on the Role of Values, Images and Principles in Foreign Policy' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 42.

[254] Council, 'EU Guidelines on human rights dialogues with third countries – Update' (adopted in 2001 and reviewed in 2009) <http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf > 5.

[255] Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 64–66.

more targeted and more likely to achieve at least some of the desired results – provided the inconsistency does not threaten the overall framework. This could allow, in certain cases, that different instruments are applied to similar situations, while respecting the universality of international human rights standards.

Lucarelli and Manners point out that the requirement of consistency – that appears most often in assessing the promotion of human rights and democracy – unavoidably conflicts with the need for pragmatism. Double standards – clearly contradicting the application of principles – hurt the normative power that the EU claims in its international dealings.[256] What some call incoherence, 'mismatch,' or 'bifurcation',[257] others might call a 'flexible adherence to principles' required by a compromise between idealism and pragmatism.[258]

Selectivity and inconsistency can take various forms, with variations, e.g. among third countries; among types of rights; among different institutional actors; over time; and between internal and external (or across various) policies. The following sections will review these sources of criticism.

4.   Inconsistency among third countries

The consistency argument concerning different third states (see, in more details, Chapter I.F) can be seen as an extension of the non-discrimination principle (which means in this case the equality between states, one of the basic principles of international law): there should be genuinely universal rules in place that are, in turn, applied to third states equally, regardless of their power and importance for the EU. It has been argued that the normative power of the EU has the strongest leverage where there is a relative symmetry between the EU and the respective partner state.[259]

Rosa Balfour argues that, paradoxically, the importance of human rights and democracy can increase with the rise of importance of the country in question.[260] In the case of Ukraine and Egypt, CFSP was used most in the case of human rights and democracy related issues, at least after 2000.[261] In such cases, human rights and democracy that are in themselves not first priorities can nevertheless guide policy as third country governments see a danger in these issues interfering with EU foreign policy.[262] Urfan Khaliq sums up the primary concern with the lack of consistency as follows:

> Any policy aimed at promoting and protecting certain values and principles in all third countries, to be credible and principled, must be coherent and consistent, with little regard to the strategic

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[256] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 207–208.

[257] Andrew Williams, *EU Human Rights Policies. A Study In Irony* (Oxford University Press 2004).

[258] 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), 128, referring to Knud Erik Jørgensen; Jack Donnelly and Chris Brown, see Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 213.

[259] Nathalie Tocci (ed), 'The European Union as a Normative Foreign Policy Actor' (CEPS Working Document No. 281, Centre for European Policy Studies 2008) <http://aei.pitt.edu/7582/1/Wd281.pdf>.

[260] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 138.

[261] ibid 141.

[262] ibid 143.

or economic importance of a third state or the historical considerations that continue to exist in relations with some third states.[263]

The EU as an international actor can be seen as a 'multifaceted' actor, with different attitudes towards the Eastern European region (pursuing normative goals) as opposed to other regions, e.g. Russia and Syria where strategic interests played an important role ('Realpolitik'); in conflict zones like Kosovo and Israel-Palestine ('imperialism'); and also in Ukraine and North Africa where the EU is best described as a 'status quo player.'[264] Countries like Australia, China or the United States might seem less scrutinised than other countries.

A general concern towards human rights promotion in EU foreign policy is the patronising attitude that might remind certain third countries of colonialism.[265] This, in addition to the relativist argument, might suggest that human rights promotion in EU foreign policy is nothing more than a new form of imposing Western values and interests on third countries. The very term of 'cooperation' and 'dialogue' might not be more than a euphemism, if we consider the power balance between the EU and most third countries. As Khaliq notes: 'Inconsistency in application, in particular, between developed and developing states and the use of conditionality in relations with the latter, exposes the Union to the accusation of cultural imperialism.'[266]

The relativist argument says that even if states do consider human rights, it is not universal norms that they are furthering, but what is part of their identity, principles flowing from their culture. (See the arguments about identity above, under A.1.) This might easily slip into an argument underlining human rights promotion in third countries as cultural imperialism. The very fact that human rights promotion is linked to democratisation in EU foreign policy can be seen as a cultural bias.[267] If we contrast these objections to the state of international law today, their validity can only be limited: human rights are part of international law and international relations; they are, at least to what could be labelled as core obligations, to be applied universally. The extent of this will of course depend on a number of factors that require a targeted analysis of specific countries and specific rights.

5. Inconsistency: internal and external policies and instruments

The internal and external inconsistency that is pointed out by a wide array of authors (e.g. Jurado, Khaliq, Williams, Wetzel) stems partly from the fact that EU foreign policy itself cuts across various policy areas. Stefania Panebianco describes the comprehensive approach as involving three fundamental components: international trade, with strong economic and financial interests, other political and

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[263] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 452.

[264] Nathalie Tocci (ed), 'The European Union as a Normative Foreign Policy Actor' (CEPS Working Document No. 281, Centre for European Policy Studies 2008) <http://aei.pitt.edu/7582/1/Wd281.pdf>.

[265] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 12.

[266] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 452.

[267] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 129.

security considerations in external relations, as well as a social and human dimension.[268] Jan Erik Wetzel summarises the common criticism as inconsistent behaviour and 'double standards' in trade relations, sanctions, recognition, i.e. between external entities; and 'stricter, better sourced, and more effective' external monitoring compared to the internal one.[269] The common critique blames the EU as an organisation that fails to live up, internally, to the expectations it applies externally. The most notable example is probably the treatment of immigrants and asylum seekers. Because of this, it is hard for the EU to present itself as the promoter of – what Manners identifies as – 'the Kantian cosmopolitan rights of hospitality to strangers'.[270] The image of the EU as a human rights model is weakened considerably by the poor immigration record, criticised, e.g. by the UNHCR, on its foundational levels.[271] And this policy has not changed over the past years.

A 1998 report commissioned by the EU identified the internal versus external inconsistency as the single most serious challenge that is especially detrimental to credibility (with other problems like the marginal position of human rights, informational inadequacies and institutional fragmentation).[272] This criticism is very much valid today, although there has been progress with the latest waves of accessions.

Enlargement is itself at the boundary between external relations and internal policies.[273] It is most likely the area where – both EU conditionality in general and particularly human rights – conditionality has the strongest influence on third countries. (It might be more than a coincidence that the EU is losing influence at a time when there is a turn-away from membership aspirations in Turkey.) Yet, inconsistencies are present here as well, in comparison to other policy areas, to other candidate countries and to states that are already members of the EU, applying higher standards to applicants.[274] (Human rights conditionality as an instrument in enlargement policy will thus be depicted in more detail in Chapter IV.C.2 below.)

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[268] Stefania Panebianco, 'Promoting Human Rights and Democracy in European Union Relations with Russia and China' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 133.

[269] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 12-13.

[270] Ian Manners, 'The constitutive nature of values, images and principles in the European Union' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 39.

[271] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 127; claiming that EU policies violate the UN Refugee Convention.

[272] Antonio Cassese, *Leading by Example: A Human Rights Agenda for the Year 2000: Agenda of the Comité des Sages and Final Project Report* (European University Institute 1998), cited by Jurado ibid 119.

[273] 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) 119.

[274] See, e.g. in the field of minority rights James Hughes and Gwendolyn Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' [2003] 1 Journal on Ethnopolitics and Minority Issues in Europe 1-36; and Michael Johns, ''Does as I say, not as I do': The European Union, Eastern Europe, and Minority Rights' [2003] 17/4 Eastern European Politics and Societies 682-699, or Christophe Hillion, 'Enlargement of the European Union – The Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' [2003] 27 Fordham International Law Journal 715. Attempts to establish a certain Copenhagen mechanism, internally, or a Copenhagen committee, were meant to address the issue more generally. See in more details 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 Deliverable 3.2 (forthcoming).

In addition to inconsistency between internal and external policy, not detached from this problem, we can identify inconsistency across internal policies as well.[275] Lina Grip shows how inter-institutional fragmentation plays a role in inconsistency between policies as well as internal versus external policies.[276]

6. Inconsistency as fragmentation and 'too many voices': Levels and institutions

The picture gets complicated once we consider that what appears at the international level as EU foreign policy falls partly under national and partly under EU competence. As a consequence, different EU bodies might have a decisive role, also depending on whether the action in question is trade-related or more strictly a security consideration. Often, most common issues with human rights promotion as part of EU foreign policy are related to the lack of harmonisation between institutions, departments, and 'their ad hoc planning methods'.[277] It should be noted that the establishment of the EU External Action Service and its efforts towards better cooperation and more consistency (e.g. Council Working Party on Human Rights, COHOM; the Commission's Inter-Service Group on Human Rights; Contact Group on Human Rights[278]) seek to address this problem.

EU and national foreign policy instruments can support each other, in their dealings with third states – like bilateral and multilateral methods can be effectively used in combination[279] – but one can just as well weaken the others. The institutional fragmentation, also within one institution (e.g. the Commission) can also aggravate the inconsistency.[280] These problems exist in interplay with other issues. Urfan Khaliq identifies three problems with the EU's approach to the Israeli-Palestinian conflict: the lack of credibility in the use of the 'essential elements' clause (in this case Article 2 of the Euro-Mediterranean Agreement), the lack of confidence to implement what has been agreed upon, and the fact that the EU has too many voices. While collective action reached beyond what the individual member states could have achieved, the internal division hinders not only decision-making, but implementation as well, limiting the role the EU plays on the political level.[281]

Considering this heterogeneity, it is not surprising that the most common criticism is exactly the fact that the EU speaks with too many voices at the international level. Most would add that until it manages to overcome this diversity, it will never be effective in pursuing its foreign policy goals, and this situation has been aggravated by the consequent enlargements.[282] This might suggest that as the bigger waves of enlargement are over for the near future, a period of consolidation could follow. At the same time, ever

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[275] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 451.

[276] Lina Grip, 'Mapping the European Union's Institutional Actors Related to WMD Non-Proliferation' (2011) Non-Proliferation Papers No. 1 (EU Non-Proliferation Consortium)

[277] Ruby Gropas, *Human Rights & Foreign Policy. The Case of the European Union* (Ant. N. Sakkoulas – Bruylant 2006) 184.

[278] See Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World in 2012' 9431/13 (13 May 2013) 12.

[279] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 57.

[280] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 127.

[281] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 395–403.

[282] ibid 450–451.

since foreign policy was part of the *acquis*, it has been influenced mostly by the big actors that usually take the lead, and its future will depend to a great extent on the role Germany is willing to play (with France, Germany and the UK as 'the Big Three').[283]

Smith connects the 'too many voices' argument with the 'bifurcation'-type of criticism, and argues that it seems to be 'easier to reach agreement on issues surrounding rights in accession candidate countries and rights in third countries than to secure agreement on statements *intra* Member States'.[284] (See also in Chapter III.B.2.)

Peter R. Baehr and Monique Castermans-Holleman concluded in 2004 that the 'activities of the European Union in the field of human rights have led to what can at best be termed "a mixed result"'. They point out that despite the 'large number of handsome statements and declarations with regard to the importance of maintaining human rights in the world, it is usually left to the member-states to raw concrete policy conclusion'. They also underline, however, that Member States themselves are constrained by EU foreign policy decisions, especially in the area of international trade.[285]

While it is inconsistency that is most feared and criticised, reducing the EU to 'one voice' might not be an attractive option from a pluralist perspective. A lesson learned from the totalitarian past of Europe,[286] and a requirement of consistency on a different level, the approach valuing diversity is essential to maintain plurality. (With an obvious limitation that a member state invoking plurality against EU intrusion should observe plurality internally.[287]) Marton Varju argues that 'European human rights law as a product of Europe to export… is a legal compound characterised not only by its shared principles or concepts, but also by its internal diversity, which is its intrinsic and protected characteristic and value.'[288]

A series of questions arise as to what are the minimum standards (strictly part of human rights that should be enforced, and lack of which should be seen as clear violations) and what are 'only' good practices; what are legitimate variations, within a margin required to maintain plurality, and what are inadmissible deviations; what is adaptation to the local circumstances and what are distortions of genuine human rights standards. This is partly a reflection of an issue inherent to, and a legitimate concern for, human rights protection (see, e.g. the margin of appreciation doctrine of the European Court of Human Rights): what outcomes are excluded as political options and what remains as a legitimate field where democratic decision-making can play out? The EU is usually seen (or presents itself) as a champion of diversity. This comes from its internal structure, composed of Member States with varying constitutional traditions and approaches that nevertheless show common elements that

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[283] Stefan Lehne, 'The Big Three in EU Foreign Policy' (Carnegie Europe, 5 July 2012) <http://carnegieeurope.eu/2012/07/05/big-three-in-eu-foreign-policy/>.

[284] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 38.

[285] Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004)), 107–108.

[286] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (2006) 214.

[287] See Matej Avbelj, 'The Hungarian Dilemma from a Pluralist Perspective' (*Verfassungsblog,* 2013) <http://www.verfassungsblog.de/the-hungarian-dilemma-from-a-pluralist-perspective/>.

[288] Marton Varju, 'European Human Rights Law as a Multi-Layered Human Rights Regime. Preserving Diversity and Promoting Human Rights' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 65.

arguably amount to a common European constitutional tradition. The EU could, building on these experiences, show sensitivity to cultural differences in its external relations all the while maintaining strong and truly universal human rights standards.

Finally, there are areas of action on the international level, like in the UN Human Rights Council, where the lack of (internal) unity cannot be blamed for the waning influence; there it is due to growing opposition coming from various developing countries.[289] Seeking internal cohesion will not solve this problem, and we might need to look more into the content of foreign policy strategies.

7.   Inconsistency in content: What kind of rights?

Inconsistency can also appear at the level of the disparate promotion of certain types of human rights. Khaliq points out that there is a certain inconsistency as for the internal standards of human rights considerations, e.g. freedom of expression gaining more attention than cases of torture and slavery. With its responses to breaches of democratic principles, the EU is actually contributing to an emerging customary norm.[290] Khaliq also finds a mismatch between the international law framework and certain EU foreign policy decisions. While punitive actions based on gross and systematic violations of human rights have more foundation in international law, the European approach intermingles this standard with democracy.[291]

Burchill reckons that the main issue is not so much a 'double standard', but the dependence of human rights enforcement on the goals of economic integration that is present both internally and externally.[292] He draws a parallel between the Washington Consensus and the 'Brussels Consensus', both of which mark an approach that allows the free market to trump human rights.[293] A quote from a Commission document might exemplify this agenda:

> the Union works with other countries and international organisations to bring everyone the benefits of open markets, economic growth and stability in an increasingly interdependent world. At the same time, the EU defends its legitimate economic and commercial interests in the international arena.[294]

Seemingly remote areas also connect to human rights and foreign policy. In the area of civil rights, Wolfgang Weiß raises an important issue, the application of human rights (e.g. criminal law) standards in antitrust cases with an international impact (against companies like Intel or Microsoft). The

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[289] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 81.

[290] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008) 271.

[291] ibid 449.

[292] Richard Burchill, 'Assessing the EU's position on human rights. Is it a desirable one?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011).

[293] ibid 31.

[294] European Commission, A World Player: The European Union's External Relations, Luxembourg, EC Publications, 2004, 3, quoted in Richard Burchill, 'Assessing the EU's position on human rights. Is it a desirable one?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011)29–31.

developments internal to EU antitrust law, with its impact on international cooperation and transnational business, will affect the international credibility of the Union.[295]

It is hard to assess the role of human rights in foreign policy without specifying the content of human rights, often used in conjunction with democracy and the rule of law. As we have seen, the critique of inconsistency is very much present in this field, too. Williams argues that the term 'human rights' bears a different meaning in the external and the internal context: while it is understood broadly in the former, when applied to internal EU policies, they are often restricted to political and civil rights, sometimes including social, economic, and cultural rights.[296] This is happening despite the fact that the universality of human rights is emphasised in all relevant EU statements and documents.[297]

The difficulty arises partly from the fact that the content of rights, values and principles is contested. They do not necessarily have a shared meaning, and can themselves be heterogeneous or, as Knud Erik Jørgensen put it, not 'playing in the same league'. Some might have a heavy influence on policy decisions, while others might play a more marginal role; some might be seen as mere political and moral, while others as strictly legal principles. We can apply distinctions like systemic and foreign policy principles, or particularistic and universal values, etc. Such arguments might play out differently in a purely theoretical as opposed to the foreign policy context.[298]

Without such common understanding of the term 'human rights' (or democracy and the rule of law), it will be hard to achieve consistency across policies, and expect consequential implementation. Katarina Månsson, in the context of peace operations, applies the Habermasian concept of communicative action and argues that the success of these operations depends, among others, on whether there is a common understanding of human rights, shared by civilian and military actors.[299]

A point of departure to build a shared understanding is a comprehensive list of human rights areas, the substance and the scope of human rights promotion. The Action Plan implementing the EU Strategic Framework and the EU Annual Report on Human Rights and Democracy in the World in 2012 identify the following priorities:[300]

- fight against death penalty; torture, cruel, inhuman and degrading treatment

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[295] Wolfgang Weiß, 'The EU Competition Policy as an International Human Rights Issue' in Jan Erik Wetzel, *The EU as a "Global Player" in Human Rights?* (Routledge 2011).

[296] Andrew Williams, *EU Human Rights Policies. A Study In Irony* (Oxford University Press 2004).

[297] See, e.g. Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 (25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>.

[298] Knud Erik Jørgensen, 'Theoretical Perspectives on the Role of Values, Images and Principles in Foreign Policy' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 42–43.

[299] Katarina Månsson, 'Communicative Action on Human Rights: Lessons for the European Union from the Peace Operations in Kosovo and the Democratic Republic of Congo' in Julia Kozma, Manfred Nowak and Roland Schmidt (eds), *Indicators and Monitoring Systems in External Policy-Making of the EU* (Neuer Wissenschaftlicher Verlag 2009).

[300] Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 (25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> 14–21; Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World in 2012' 9431/13 (13 May 2013) 71–121.

- freedom of expression, religion and belief
- democracy, electoral process
- children's rights
- women's rights, gender-based violence, gender mainstreaming
- LGBT rights
- minority and indigenous rights
- disability rights
- economic, social and cultural rights, labour standards
- development cooperation
- trade policy, business and human rights
- accountability
- administration of justice
- support to human rights defenders
- terrorism and human trafficking
- international humanitarian law

The list shows the priorities of the EU, manifesting a strong emphasis on what is usually termed 'first generation rights', with the notable exception of 'economic, social and cultural rights, labour standards'. Yet, the Union seeks to promote all types of rights:

> The European Union promotes respect for human rights at home and abroad. It focuses on civil, political, economic, social and cultural rights. It also seeks to promote the rights of women and children as well as of minorities and displaced persons.[301]

We will now briefly look at the various types of rights and their status in EU human rights promotion.

a) *First generation rights*

The Council has adopted human rights guidelines in the following areas: death penalty, torture and other cruel, inhuman or degrading treatment or punishment, freedom of expression online and offline, freedom of religion or belief, children and armed conflict, violence against women and girls and combating all forms of discrimination against them, international humanitarian law, human rights defenders, and human rights dialogues with third countries.[302] The rights of LGBTI persons and the rights of the child can be seen as including second generational rights in addition to civil and political rights.

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[301] European Commission, 'A World Player: The European Union's External Relations' (Luxembourg, EC Publications 2004) 7, quoted in Richard Burchill, 'Assessing the EU's Position on Human Rights. Is it a Desirable One?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 29–31.

[302] For an updated list, see http://eeas.europa.eu/human_rights/guidelines/index_en.htm, also Josiane Auvret-Finck, 'La projection des droits fondamentaux dans les relations extérieures' in Joël Rideau, *Les droits fondamentaux dans l'Union européenne. Dans le sillage de la Constitution européenne* (Brussels: Bruylant 2009) 419–420; Ruby Gropas, *Human Rights & Foreign Policy. The Case of the European Union* (Ant. N. Sakkoulas – Bruylant 2006) 114 and Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 (25 June 2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>.

Smith names human trafficking, indigenous peoples' rights and the abolition of death penalty as areas where the Commission steps up at the international level.[303] Jan Erik Wetzel concludes that the death penalty, double jeopardy, freedom of the press, data protection, access to public documents, a more expansive interpretation of torture, the right to democracy and human dignity are areas where the EU can legitimately stand up and try to set standards, whereas the picture is more ambiguous when it comes to fair trial rights, certain aspects of non-discrimination and the treatment of asylum seekers.[304] The goal of supporting civil society in third countries links the goal of democracy and freedom of speech, seeking to create a critical, vibrant, but constructive dialogue.

Altogether, there seems to be a shared understanding that the promotion of civil and political rights is generally less problematic than is the case with other rights. This also means that equality claims are, where possible, framed as falling under this category. Ian Manners (2006) presents nine values that are constitutive to the EU, among them solidarity, sustainable development, and inclusive equality, with an emphasis on gender equality.[305] Some underline that the 'defence of LGBT rights has long been strongly associated with European diplomacy'.[306]

Solidarity (as equality) is a value that can be applied in the international context, too, thus being a value that could inform foreign policy goals directly (as opposed to indirect means of human rights promotion).

Considering its legislative process, the European Union is similar to representative democracies. Consequently, political participation rights protecting representative democracy, like the right to vote and to stand as a candidate, play a primary role in contrast to political participation rights protecting direct democracy, e.g. citizens' initiatives for the legislation.[307] This conceptualisation of civic and political rights also appears in the field of foreign policy tools and instruments. It is no wonder that this policy emerges in a wide range of political instruments to promote participatory and representative democracy: e.g. the European Union's Election Observer Missions (EOMs)[308] primarily focusing on rights supporting representative democracy, e.g. voting or being elected at genuine periodic elections.[309]

b) *Social and economic rights*

A common contradiction raised in the literature is that between the original and primary focus on the common market, on the one hand, and the appearance and overriding effect of the human rights approach, on the other hand. Burchill argues that despite recent developments, 'human rights within the

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[303] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37.

[304] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 14–15.

[305] Ian Manners, 'The constitutive nature of values, images and principles in the European Union' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 32–38.

[306] Franziska Brantner and Richard Gowan, 'A Global Force for Human Rights? An Audit of European Power at the UN' (Report of the European Council on Foreign Relations, 17 September 2008) <http://ecfr.eu/page/-/ECFR-08_A_GLOBAL_FORCE_FOR_HUMAN_RIGHTS-_AN_AUDIT_OF_EUROPEAN_POWER_AT_THE_UN.pdf> 4.

[307] 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 Deliverable 3.2 (forthcoming).

[308] See http://eeas.europa.eu/eueom/.

[309] See for this: Handbook for European Union Election Observation (2008) <http://eeas.europa.eu/eueom/pdf/handbook-eueom-en-2nd-edition_en.pdf> 5.

EU project remain secondary to the treaty obligations setting out the economic integration project', and even where human rights seem to prevail, we see an emphasis on 'the impact rights protection has upon the integration project' rather than on the importance of the human rights.[310] Burchill further points out that, due to the priority of the market mechanism, there seems to be less concern with the rights of the marginalised classes of society. This approach fails, among others, to give adequate weight to rights in collective bargaining.[311]

The social dimension that seeks to address this area reflects less of a deep commitment to the normative value of these rights than a means to gain more support for the integration.[312] Social rights play an important role in labour standards in trade relations, an area where the EU can have a large impact on the international level. The inclusion of (mostly not new, but already existing) labour conditions in trade agreements, e.g. as requirements for access to the preferential tariffs regime under the Generalized System of Preferences, can be seen as reinforcing legitimacy for the overall process. However, such measures can also be interpreted as protectionist instruments (or even as remnants of colonialism) as they create asymmetric disadvantages to the participating developing countries.[313] Human rights standards are then used to counter threats of cheap import products from countries with looser labour or environment standards.[314]

In the area of social and economic rights, cohesion means the need to reconcile human (social) rights considerations with direct commercial interests. Takács emphasises the problem that bilateral solutions create by adding to the fragmentation (going against universal enforcement of existing ILO standards) and the perception of favouritism, based on the relative negotiating power.[315]

At the UN level, in the Human Rights Council, issues on economic and social rights – including the right to development, the right to food, the right to water and the right to adequate housing – put the EU on the defensive side in most cases, despite the attempts of the EU to reposition itself in this area.[316] Where developing countries raised issues, often outside the social and economic rights context, like colonial legacy (e.g. as a source of racism, see the Durban Declaration and Programme of Action), slavery, or the concept of 'defamation of religion' (usually associated with the Mohamed cartoons), the EU quickly found itself isolated,[317] and this plays a crucial role in action on the multilateral level, concerning second

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[310] Richard Burchill, 'Assessing the EU's Position on Human Rights. Is it a Desirable One?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 21.

[311] ibid 22.

[312] ibid 23.

[313] Tamara Takács, 'Human rights in trade. The EU's experience with labour standards conditionality and its role in promoting labour standards in the WTO' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 100.

[314] Zaki Laïdi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008) 6–7.

[315] Tamara Takács, 'Human rights in trade. The EU's experience with labour standards conditionality and its role in promoting labour standards in the WTO' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 111.

[316] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 75–76.

[317] ibid 76–77.

generation rights. In general, while poverty reduction[318] remains a priority, the EU is considered to have a weak record in economic and social rights, as is the case with minority rights.[319]

The EU's weak record in the field of economic and social rights often manifests itself at the level of tools and instruments, too. See, e.g. the EU policy guidelines on human rights dialogues with third countries adopted by the Council.[320] When defining the content of these instruments, the policy guideline on human rights dialogues does not explicitly list economic, social and cultural rights among 'issues covered in human rights dialogues'.[321]

c) *The question of collective rights and rights of national minorities*

The EU, with the notable exception of the rights of indigenous peoples, also refuses to consider the issue of collective or group rights, promoted by many developing countries.[322] The European approach to these rights consistently refers to the rights of *persons* belonging to certain groups, as does, e.g. Article 27 of the International Covenant on Civil and Political Rights, the binding universal norm of the field. This falls short of various claims raised as 'minority rights', most importantly in the area of transforming constitutional structures to accommodate diversity.

An area where addressing the collective aspect cannot be avoided is claims to self-determination, also a right recognised by international human rights law (common Article 1, ICCPR and ICESCR). This is a question that plays an important role in conflicts of special interest for the EU, like the Western Balkans (most importantly Bosnia and Herzegovina, Kosovo and Serbia), in Ukraine (Crimea and certain Eastern regions), and in Georgia (South Ossetia and Abkhazia). As the debate on the recognition of Kosovo has shown, EU Member States are as deeply divided as the international community in general, on the application of self-determination, in the context of secession and outside the context of decolonisation. It seems impossible to carve out a common European position against this background, as a general matter, which might not prevent consensus in concrete conflicts, e.g. opposing Russian expansionist moves. This challenge can also be framed as less of a European problem than an issue inherent to the notion of self-determination in international law, failing to define clearly enforceable legal standards, and leaving key decisions to the political process. This could be an example where the failure of the human rights approach radiates into foreign policy, in an area where the rights discourse simply cannot provide predictable outcomes. Sometimes the international community (also the EU) deals with a particular minority when it is regarded dangerous to international security, whereas no attention is paid to other minorities in a similar situation.[323] The human rights approach would provide special protection not

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[318] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press 2008).

[319] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 13.

[320] *EU guidelines on human rights dialogues with third countries* (2001 (review adopted 19 January 2009), <http://eeas.europa.eu/human_rights/guidelines/dialogues/index_en.htm.>

[321] *EU guidelines on human rights dialogues with third countries* (2001 (review adopted 19 January 2009), 6.

[322] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 77.

[323] However, it has already been done in the framework of international minority protection when the institution of the OSCE High Commissioner on National Minorities was established. The office of the High Commissioner was established to identify and seek early resolution of ethnic tensions that might endanger peace, stability, or friendly relations between participating states. In connection to this, see: CSCE Helsinki Document 1992, 'The Challenges of

because of security risks, but in order to balance the disadvantages deriving from the minority situation and would claim the legal protection of minorities based on the concept of just equality.[324] The granting of minority rights should not be simply the utilitarian distributing of rights independently of the equality and moral nature of man. It serves to raise persons in a disadvantageous position to a higher level and thereby enabling them to enjoy human rights granted to all.[325]

By demanding the protection of minorities from candidate countries in the course of accession, the European Union has also adopted and represented a security based approach. The EU applied a relatively strict conditionality policy towards CEE states including 'respect for and protection of minorities'[326] in spite of the lack of internal EU standards on minority rights. (See, in more details, Chapter IV.C.2.) EU decision-makers could have been driven by the objective to minimise the possible sources of danger surrounding new Member States. The security based outlook is present in the way the EU treated the Roma issue. Examining the documents adopted in this field, it seems that the Union was mainly interested in the Roma in the framework of minority rights only up to the accession of the new countries.[327] Whereas in its regular monitoring reports drawn up under the accession process the European Commission elaborated on the situation of the Roma in detail, in its comprehensive reports made at the end of the accession process it cut the question very short.[328] We can also take the case of the Hungarian Status Law, dealing with ethnic Hungarians abroad, where the way international organisations treated the question largely followed the security based approach, e.g. the Commission in its regular country monitoring reports dealt with the issue in the chapter on common foreign and security policy and not under the protection of minorities within the human rights chapter.[329] Following security considerations, the EU tries to sustainably avoid new security issues within its boundaries.

8. Reactive and proactive approaches, synergies and vagueness

Even when human rights are driving foreign policy choices, the use of EU instruments remains reactionary, and on that level, too, they fail to follow the occasional improvements in the respective partner countries, as happened in the case of the Orange Revolution in Ukraine and that of the Arab Spring.[330] The Council of the European Union, in its report on the implementation of the European Security Strategy, acknowledges that there is a need to strengthen the proactive approach: the EU 'must be ready to shape events', the EU should become 'more strategic in [its] thinking, and more effective and

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Change II'. For more details, see: Walter A. Kemp, *Quiet Diplomacy in Action: the OSCE High Commissioner on National Minorities* (The Hague 2001).

[324] Balázs Majtényi, 'Utilitiarianism in Minority Protection? Status Laws and International Organisations'in Osamu Ieda, Balázs Majtényi, Zoltán Kántor, Balázs Vizi, Iván Halász, Stephan Deets (eds), *Beyond Sovereignty: From Status Law to Trans-national Citizenship?* (Sapporo, Slavic Research Center, Hokkaido University 2006) 3-16, 3.

[325] ibid.

[326] Presidency Conclusions, 21–22 June 1993, Copenhagen European Council, SN 180/93, 12.

[327] Balázs Majtényi and Balázs Vizi, 'The Roma Minority in International Documents' in Balázs Majtényi, Balázs Vizi (ed), *A Minority in Europe. (Selected International Documents Regarding the Roma)* (Gondolat 2006) 9-23.

[328] European Commission Regular Reports (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia), Comprehensive Monitoring Reports (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, Slovenia).

[329] Balázs Majtényi, 'Utilitiarianism in Minority Protection? Status Laws and International Organisations'in Osamu Ieda, Balázs Majtényi, Zoltán Kántor, Balázs Vizi, Iván Halász, Stephan Deets (eds), *Beyond Sovereignty: From Status Law to Trans-national Citizenship?* (Sapporo, Slavic Research Center, Hokkaido University 2006) 3-16.

[330] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 136.

visible around the world', as success can be best achieved if the EU 'operate[s] in a timely and coherent manner'.[331]

As the response of the EU to human rights developments in third countries remains largely reactionary, it fails to trigger change. Rosa Balfour argues that despite the diverse elements at the EU's disposal, from foreign aid to negative instruments, without capitalising on the synergies between these components, the EU will not have the impact it could and seeks to have.[332] Largely as a consequence of information scarcity, traditional diplomatic instruments can lack the specificity required for effective human rights promotion. If démarches and other statements remain too vague, this can raise 'doubts on the EU's commitments to the human rights principles it claims to stand for.'[333]

C. Conclusion

We have seen that promoting human rights raises issues both from the perspective of foreign policy and human rights. This part has provided an overview of the various sources of criticism of human rights promotion in EU foreign policy, with the assessment of the theoretical background. Earlier literature has identified a tension between rhetoric and action, between internal and external policies, inconsistency among third countries in human rights promotion and among the different (types of) rights, the 'too many voices' argument points out the internal fragmentation in the EU, and the concern that the EU takes, in most cases, a reactive approach rather than a proactive one, hindering effectiveness. Inconsistency in many cases leads to the incoherent application of the various tools and instruments of EU foreign policy, in practice.

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[331] Council of the European Union, 'Report of the Implementation of the European Security Strategy: Providing Security in a Changing World' S407/08 (11 December 2008) 2.

[332] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 136.

[333] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 126.

III. Mapping foreign policy instruments

In the following we look at foreign policy tools and instruments, their types, relations and general description, with special regard to their possible role in human rights promotion. The terminology that we adopt in this systematic overview does not differentiate between 'tools' and 'instruments', the two terms will be used interchangeably. Chapter IV will then take a closer look at EU enlargement policy and map the specific instruments developed and used in this policy field in terms of human rights promotion.

The aim of this chapter is not to reconstruct the various foreign policy tools and instruments per se, but based on how EU documents see their role, in the context of human rights promotion. This has been covered by an earlier report in Work Package 12 of the FRAME project without the enlargement instruments (Chapter IV maps these type of instruments).[334] Our goal here is to step back and take a wider look at the instruments as a system: their categorisations, the relations between them, with due regard to concerns of inconsistency, the main source of criticism identified in the previous chapter. Maximizing the potential of each and every instrument requires a combined approach that makes use of different types of instruments. The instruments that the EU does have at hand, to promote human rights in third countries, can be categorised in a number of ways. The following section provides an overview of such classifications. We turn, then, to suggestions on how to address some of the shortcomings and criticism (e.g. inconsistency, ineffectiveness) that is present with regard to using EU foreign policy instruments in human rights promotion.

The European Union can use most, if not all tools and instruments that are available to the actors of international relations (e.g. states, international organisations, non-state actors). This includes instruments that are available to individual states, even if the nature of the EU and its foreign policy might change how these tools are used (e.g. consular protection of European citizens). The EU can also use tools and instruments that are available for international organisations (e.g. invitation for membership). (See to this IV.C.2.d). Foreign policy instruments include those that work in the shade, more or less hidden from the eyes of the public, as well as public statements made in various contexts. Nevertheless, all instruments of the EU's foreign policy, even those that are secretive, should be compatible with the values of the European Union enshrined in Article 2, thus the application of non-public instruments should be kept to a minimum since the majority of the instruments of democratic institutions work in public.

Contexts often matter as much as the actions themselves, this is why it is important to consider, even when looking at bilateral relations, multilateral frameworks. In addition to statements and more symbolic action, the EU can use its economic leverage to influence behaviour in third states. The EU can play a role in harder forms of sanctions (restrictive measures) that can go as far as intervention by military, with the EU often present to provide civilian support.

Below we provide a list of the various tools and instruments that the EU can use. Similar lists often include institutions – like the EU Special Representative for Human Rights or the human rights and

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[334] Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014) <http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> (accessed 20 December 2014).

democracy focal points of EU delegations – that we did not include here, as institutions are best presented as actors that make use of the various instruments, and not as instruments themselves:

Tools of quiet diplomacy
- informal meeting as quiet diplomacy
- (formal) démarche as quiet diplomacy, general or concerning individual cases

Public criticism and praise: naming and shaming
- promoting human rights in public statement, position, declaration, action, country report (European Commission Regular Reports, Comprehensive Monitoring Reports on the accession countries etc.) and other monitoring, communications (in press conference, in international body etc.)
- public criticism (démarche made public, condemnation, expressing concern, welcoming)
- public hearings (on controversial human rights issues)

Formalised types of statements and dialogues
- adopting formal (internal) documents: Common Strategies, Common Positions, Joint Actions; legislation on human rights issues, CFSP decisions etc.
- human rights dialogues (China, African Union etc.), sub-committees, political dialogue,[335] consultation[336]
- invitation for a visit (as recognition)
- invitation to international conference
- establishing, maintaining, reinforcing bilateral connections

Action at the international level, multilateral instruments[337]
- monitoring through international (human rights) bodies
- action at the UN (e.g. resolution initiatives, sponsoring in the UN General Assembly and other institutions and organs, campaigning for human rights causes, participation using the EU's observer status in the various bodies,[338] following EU priorities: European Union medium-term priorities at the United Nations, EU priorities for the United Nations General Assembly, EU Priorities at the UN Human Rights Fora)
- legal and political means through multilateral fora: filing complaints, raising issues using human rights mechanisms under international treaties (interstate complaints, Vienna and Moscow mechanisms – OSCE: exchange of information and sending expert mission)
- international judicial involvement (e.g. before the ECtHR), amicus briefs (e.g. US Supreme Court on capital punishment)

Support
- association agreement
- invitation for membership
- common educational and training projects, campaigns for awareness, general education etc.
- financial instruments: (Instrument contributing to Stability and Peace, European Endowment for Democracy, Development Cooperation Instrument (DCI), Instrument for Pre-accession assistance (IPA II), European Neighbourhood Instrument (ENI), European Development Fund (EDF),

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[335] For detail about the bilateral political dialogue see ibid 48-49.

[336] For Human rights dialogues and consultations see ibid 38-40.

[337] For Action in multilateral fora (UN, OSCE, Council of Europe) see ibid 45-48 and Grażyna 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' Deliverable 5.1. (forthcoming).

[338] UN Doc A/RES/65/276 granting the EU enhanced observer rights in the UNGA and certain subsidiary bodies.

Development Cooperation Instrument (DCI), Geographic Programmes (Common Areas of Cooperation) and Pan-African programme) etc.[339]

- Humanitarian Aid Regulation
- loans, credits
- granting most-favoured nation status in trade relations
- trade and cooperation agreements

Sanctions (restrictive measures)
- suspension or delay of negotiations on agreements
- rejection of application, denial of candidate status, denial, delay, suspension of accession negotiations[340]
- restriction or breaking off of sport and cultural relations, reduction of cultural, scientific and technical cooperation, boycott of sport and cultural events
- suspension of other cooperation
- cancellation or postponement of official visits
- breaking off of diplomatic relations, bilateral contacts, expulsion of diplomats
- human rights clauses (inclusion and use or threat of use)[341]
- flight and visa bans (e.g. Serbia, South Africa, Haiti, Myanmar), no-fly lists, denial of admission
- international criminal prosecution
- freezing of financial assets, financial restrictions
- boycott actions (ban on import)
- trade embargo measures (ban on export)
- suspending development assistance, aid or cutting back funds (ENP, ACP, Instrument for Stability, pre-accession funds etc.)
- revocation of preferential trade conditions (e.g. Sri Lanka, 2010)
- arms embargoes
- military action under Security Council resolution allowing intervention (human rights violations threaten international peace and security)
- intervention to protect nationals
- other military intervention, crisis management

Targeted instruments (support to civil society with possible government criticism)
- pushing for ratification and implementation (by third countries) of international human rights law instruments
- promoting laws and practices that protect human rights
- conferences, support to human rights NGOs, pro-bono or public interest lawyers
- other support to civil society, to opposition forces (that may be seeking regime change)
- European Initiative for Democracy and Human Rights (approx. €150m/year) financing human rights activities, programs in third countries, support for NGOs
- Civil Protection Mechanism
- election observation and other missions
- targeted observation
- other support, e.g. organising elections[342]

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[339] Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014) <http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> (accessed 20 December 2014) 53-73.
[340] See chapter IV.C.2.d and IV.C.2.e.
[341] See in detail: ibid Human Rights Clauses in EU Agreements 35-36.
[342] ibid 40-44.

- consular protection (to EU citizens), recognising refugees (as a form of criticism)

We will now turn to how these instruments can be classified, and what types of criticism can be raised concerning the various classes.

1. Formal, competence-based classification and the institutional logic

Once we identify a necessity to act or, more specifically, a 'European responsibility', it remains to be seen how we assign this duty to a specific actor, be they EU institutions, states, other bodies or NGOs. The rights discourse has been increasingly apparent in the workings of all major EU bodies, the Commission, the Council, the Court and the Parliament.[343] However, the different instruments can be and are being used in different ways and different frequency by the different institutions. It is thus essential to map the institutional framework of the EU in order to understand how human rights are part of European foreign policy.

Considering the internal institutional side of the instruments, one can categorise them by their place in the institutional structure of the EU. Most importantly, foreign policy instruments can be applied by the various EU institutions as well as by Member States. Consistency, as we have seen, requires harmonisation across the board. A similarly formal categorisation is applied by the Council of the European Union, in its thematic reports, classifying instruments and initiatives of human rights promotion in foreign policy as follows: (a) EU guidelines on human rights and international humanitarian law; (b) human rights dialogues and consultations;[344] (c) joint actions, common positions and crisis management operations; (d) démarches and declarations;[345] (e) human rights clauses in cooperation agreements with non-EU countries; (f) Personal Representative of Javier Solana for human rights (Mr. Michael Matthiessen from 2005; post-Lisbon, High Representative Catherine Ashton appointed EU Special Representative for Human Rights Stavros Lambrinidis, 2012-2014); (g) European Neighbourhood Policy; (h) activities funded under the European Instrument for Democracy & Human Rights (EIDHR).

On a more theoretical note, the chosen approach can have a large impact on whether one acknowledges the two levels, Member States and EU institutions, as separate actors. Matláry identifies the main difference between neo-realism and neo-liberalism in whether one attributes autonomous impact to international institutions.[346] Does the impact of the EU through its foreign policy add up to something more than the sum of the Member States? Matláry emphasises that legal supranationality is not in a direct causal relationship with whether there is a 'regime impact'.[347] As CFSP is closer to the working of a traditional inter-governmental structure, explanations giving more weight to state actors are essential to unpack what is behind various foreign policy moves. However, the hybrid nature of policy-making is in

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[343] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure up against other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (Routledge 2011) 38-39.

[344] Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014) <http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> (accessed 20 December 2014) CFSP joint actions, common positions and strategies and CSDP missions 50-53.

[345] ibid 49-50, Démarches and declarations.

[346] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 88.

[347] ibid 90.

many cases apparent as well.[348] Accordingly, the various theoretical approaches might dictate different methodologies, one with a primary interest in the 'institutional machinery' of the CFSP, the other in the external relations of the EC (former pillar I), and a third in the Member States' foreign policy.[349] The emphasis and the conclusions might vary depending on what approach one takes. It is nevertheless clear that a deeper analysis will require us to 'look inside the box,' and take institutional variations into account.

The European Commission is usually seen as a policy shaper, having a pivotal role in institutionalising human rights, and as an institution that improved the assessment of human rights in third countries through country reports by the 2000s.[350] This role goes hand in hand with the trend of continuously widening competences,[351] that can be criticised, praised, or simply seen as essential for the goals the Commission is expected to pursue. In the field of external relations, it is the Commission that is responsible for third country assessment, and cooperation with the Council of Europe, concerning human rights.[352] The Commission can use a wide variety of instruments listed in the previous section, from more traditional diplomatic measures, public statements, to initiating EU decisions on financial and policy matters. The Commission has a general duty to pursue human rights goals, including its cooperation with the Council of Europe, and with human rights dialogues with third countries, like China, Uzbekistan and Sri Lanka.[353] The Commission has now become a major actor in the field of foreign policy and has 'established itself as a key participant' on the international level, including human rights issues, with increased independence from member states; and this is most apparent in the enlargement process.[354] While it was the European Council that adopted the Copenhagen criteria, the Commission started to monitor them as part of the pre-accession process, making conditionality work through implementation and evaluation.[355] (See IV.B.1 generally on role of EC and IV.C.2.h on monitoring.)

The Treaties assign important roles to the High Representative of the Union for Foreign Affairs and Security Policy who can raise public criticism concerning the human rights situation in third countries, or engage in dialogues. It is also the High Representative – formerly Catherine Ashton, and now Federica Mogherini – who plays an important role in the inter-institutional coordination in foreign policy questions, together with the Foreign Affairs Council, which she also chairs, and in representing some continuity. The High Representative, is assisted by the European External Action Service, the autonomous diplomatic body of the EU. This entity has the burdensome mission to coordinate the various policy areas, often spread across different institutions. However, many point out the inadequacy

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[348] Stefan Lehne, 'EU – Actor or Toolbox? How Member States Perceive the EU's Foreign Policy' (Carnegie Europe 14 February 2013) <http://carnegieeurope.eu/2013/02/14/undefined/fi7b> accessed 20 December 2014.

[349] Sonia Lucarelli, 'Introduction' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 9.

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

[351] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 171-172.

[352] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37.

[353] ibid 37.

[354] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 167-177.

[355] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37; Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 238.

of capacity and funding, that makes it impossible for the EU foreign policy to catch up with the EU's leverage on the international scene.[356]

The growing demand for consistency is being addressed by various platforms for inter-institutional cooperation.[357] The Council Working Party on Human Rights (COHOM) is a forum where member states, the Commission and the EEAS can discuss human rights issues.[358] The Inter-Service Group on Human Rights is a joint effort of the Commission and the EEAS to bring together their services in the human rights field. The Contact Group on Human Rights addresses human rights issues as part of the cooperation between the EEAS and the European Parliament.[359] In addition, the High Representative appointed the EU Special Representative for Human Rights in 2012, 'tasked with ensuring the coherence, effectiveness, and visibility of the EU's human rights policy.'[360]

It is the interaction between the national and the supranational level that makes European foreign policy so unique. With the complex decision-making involving actors from both levels, it is not always easy to discern the boundaries between the two, if at all. The European Council, the Council and the Member States are the key players for those who identify the main actors at the national level. As state policy preferences account for a large part of foreign policy decisions, intergovernmentalism, as well as realism, remains an important approach to explain the dynamics of human rights in EU external relations.[361]

With the decreasing influence of Europe,[362] including the shrinking share of Europe in the world economy and population,[363] Member States may feel pushed into a closer cooperation to maintain and strengthen their influence at the international level. German politicians across the political spectrum consider the 'single permanent EU seat at the UN Security Council' as a question of time.[364] Debates around the membership of the UK are, to a certain extent, about the pay-off between having a voice of one's own and having a stronger voice but being forced to compromise with other states and institutions. Intergovernmentalism can explain how Member States shape normative positions, as happened with the rotating presidencies initiating declaratory statements. Different states value the role of human rights in foreign policy (and can have an impact on decision-making) to varying degrees, and

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[356] Stefan Lehne, 'Promoting a Comprehensive Approach to EU Foreign Policy' *(*Carnegie Europe 21 February 2013) <http://carnegieeurope.eu/2013/02/21/promoting-comprehensive-approach-to-eu-foreign-policy/fiou> (accessed 20 December 2014).

[357] See to the institutional background Grażyna 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' Deliverable 5.1. (forthcoming).

[358] Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 51.

[359] ibid 12.

[360] ibid 11.

[361] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 144.

[362] For an evaluation of this phenomenon at the UN, see Franziska Brantner and Richard Gowan, 'A Global Force for Human Rights? An Audit of European Power at the UN' *(*Report of the European Council on Foreign Relations, 17 September 2008) <http://ecfr.eu/page/-/ECFR-08_A_GLOBAL_FORCE_FOR_HUMAN_RIGHTS-_AN_AUDIT_OF_EUROPEAN_POWER_AT_THE_UN.pdf>).

[363] Stefan Lehne, *Why Is It So Hard to Develop an Effective EU Foreign Policy?*(Carnegie Europe 29 May 2013) <http://carnegieeurope.eu/strategiceurope/?fa=51927> (accessed 20 December 2014).

[364] Reinhard Brandl, Agnieszka Brugger, Viola von Cramon, Bijan Djir-Sarai, Roderich Kiesewetter, Lars Klingbeil and Stefan Liebich, 'More European Foreign Policy' (Carnegie Europe 7 March 2013) <http://carnegieeurope.eu/2013/03/07/more-european-foreign-policy/g36u> (accessed 20 December 2014).

this 'logic of diversity' often leads to the adoption of the minimum common denominator. The diversity also explains why 'action' often remained on the level of declaratory statements, reflecting nothing more than a minimum common denominator.[365] (Note that this 'race to the bottom' is necessarily limited, as state actions are also subject to human rights scrutiny. National governments should always act under the European Convention on Human Rights and, when applying EU law, under the Charter of Fundamental Rights.[366])

A recent study underlines that the economic crises triggered an important and dangerous shift towards intergovernmental decision-making,[367] a change that can also imperil supranational inspirations in foreign policy. The risk of re-nationalisation[368] has been present since well before the crisis. However, such trends should not necessarily lead to a weakening role of human rights considerations. The Council is the institution that is most sensitive to initiatives from individual Member States, and where the logic of diversity applies to the greatest extent. This can take the form of vetoing an action that seeks to promote human rights, but also of individual states stepping up for stronger positions.[369] State interests can also hamper consistency goals, by hijacking EU decision-making for the sake of favouritism towards third countries with special connections to the member state in question.

The Parliament has had a growing role that translated into activism at the level of human rights. Regarding third countries, this largely means diplomatic and political actions, statements and discussions that often trigger responses from the scrutinised third country governments.[370] The Parliament is also important because of its network of delegations and joint committees that can be used as part of a milder policy involving quiet diplomacy and political dialogue.[371] The EP can and does engage in public criticism, assessing the human rights situation in countries all over the world.[372] The Sakharov prize is usually seen as part of this framework, with a similar impact to what we have seen with more focus on the human rights promotion activities of the EU with the discourse around the EU's 2012 Nobel Peace Prize.

Internally, the participation of the Parliament in foreign policy making is an important step towards the democratisation of the field.[373] It is generally critical to double standards and lack of transparency,

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[365] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 140-141.

[366] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 38.

[367] Piotr Buras, (2013) The EU's Silent Revolution , European Council on Foreign Relations, Policy Brief No. 87, September 2013, <http://ecfr.eu/page/-/ECFR87_EU_SILENT_REVOLUTION_AW.pdf>.

[368] Stefan Lehne, 'EU – Actor or Toolbox? How Member States Perceive the EU's Foreign Policy' (Carnegie Europe 14 February 2013) <http://carnegieeurope.eu/2013/02/14/undefined/fi7b> (accessed 20 December 2014)

[369] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 139.

[370] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 38.

[371] Ruby Gropas, *Human Rights & Foreign Policy. The Case of the European Union* (Ant. N. Sakkoulas – Bruylant 2006) 119.

[372] ibid 117; EP (2012).

[373] Josiane Auvret-Finck, 'La projection des droits fondamentaux dans les relations extérieures' in Joël Rideau, *Les droits fondamentaux dans l'Union européenne. Dans le sillage de la Constitution européenne* (Brussels: Bruylant 2009) 454-455.

although its impact can vary. The Parliament was in favour of intervening in Ukraine, but its insistence on particular issues worked against the human rights agenda of the Commission and the Council in Egypt, that favoured a political dialogue through the European Neighbourhood Policy.[374]

Finally, an oft-neglected aspect of policy decisions is the importance of personal motives and the role of personal trajectories. As the cooperation among European foreign policy actors has been getting closer, the elites who are directly involved in shaping policies have also been changing. While institutions can explain certain elements, and personal behaviours do change reflecting institutional interests, these might not account for personal motivations like inter-institutional cooperation based on personal connections (earlier colleagues, career goals etc.; on the need to expend career possibilities for the EEAS.[375] Just like institutional interests can go against wider policy goals, e.g. by seeking to maintain power through informational monopoly. Understanding the hidden mechanisms of complex institutions remains partial without looking into the people behind the drafting, the negotiation and implementation of policy decisions. An empirical assessment can explain internal and external cooperation and harmonization problems as well. Elena Jurado quotes from a Canadian foreign affairs report explaining personal tensions between the UN and the EU teams in a joint operation.[376] The personal element is the focus of human rights and democracy trainings, e.g. as part of a pre-deployment preparations, training the staff and creating sensitivity to various human rights issues.[377]

B. Classifying instruments

Treating tools and instruments as part of a common system requires a systemic overview. There is a wide range of dimensions along which different instruments and tools can be classified. This chapter will proceed by providing an overview of the different typologies of foreign policy instruments, based on the literature. (For a more detailed list of typologies, combined with the list of instruments, see Annex I.) The goal of this overview is not to argue for some and dismiss other classifications, but to map the field of foreign policy instruments using well established dichotomies, while also to present how various instruments hang together constituting parts of the same tool kit. This comprehensive and largely descriptive endeavour should help the preparation of the regional case studies that will follow the adoption of present deliverable, within the framework of the Work Package (Regional Partnerships and Bilateral Cooperation, WP6). Building on the classifications, we conclude by identifying comprehensive aspects that provide a basis of analysis, a theoretical and methodological framework for the case studies: European Enlargement Policy, with a focus on the Western Balkans and Turkey (D6.2), Economic partnership with ACP Countries, Neighbourhood Policy, and Eastern Partnership (D6.3-6.4), Bilateral relations with China, India and South Africa (BRICS) (D6.4), The role of human rights in the EU-US bilateral relationship (D6.5).

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[374] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 141.

[375]Catherine Ashton, (2013) 'European Union External Action Review', July 2013, <http://www.eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf> (accessed 20 December 2014).

[376] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 131.

[377] Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 40–42.

1. Hard power, soft power tools

Janne Haaland Matláry differentiates between hard and soft (power) tools.[378] Hard tools would include sanctions and military actions, while more cooperative-type of tools, most of more traditional diplomatic and legal instruments, would count as soft tools.[379]

In Matláry's interpretation soft power tools refer to 'non-coercive policy tools such as cooperation, persuasion and co-optation, but also to criticism and 'shaming' in public fora. Hard power tools are coercive, including sanctions and military intervention, while political and economic conditionality should be placed in the soft power category although they are 'tough' uses of power which often do not leave the state in question very much choice. Nonetheless these tools are not enforced; they are 'strong suggestions for compliance.'[380] It means that soft power tools contain not only weak political instruments (e.g. public statements and hearings), but also strong instruments such as the Copenhagen criteria or human rights clauses in agreements, e.g. the revised Lomé Convention. This categorisation precludes that a hard power tool should necessarily be coercive, having a punitive impact or military nature (e.g. force in the case of crisis management operations).

The history of integration has a long track record of hard power instruments with human rights relevance against third states, including, e.g. EC sanctions against the apartheid regime in South Africa in 1985 and 1986. While the EU has been seen as a soft power for long, the use of sanctions (hard power tools) has increased considerably in the recent years.[381] An example could be the sanctions against Serbia up to the regime change in 2000 or, at the end of 2011, restrictive measures against Syria, where the EU imposed 'ten rounds of sanctions on 86 individuals and 30 entities, including many military and security officials responsible for the violence and repression.'[382] Thus, similarly to soft power tools, hard power tools can address not only states or international organisations. Article 215 TFEU provides a legal basis for the Council to adopt restrictive measures if such restrictive measures are necessary to achieve the objectives of the Common Foreign and Security Policy.[383] The measures against Al Qaida and Taliban and those against individuals, groups, undertakings and entities associated with Al Qaida and Taliban are examples for restrictive measures against non-state actors and individuals respectively.[384] As these examples demonstrate, measures can be categorised based on what their targets are: states, natural or legal persons, groups or non-state entities.

It can also occur that in compliance with the principles of international law and due to insisting on the status quo, EU documents do not specify the real targets of sanctions with regard to one of the basic principles of international law: the sovereignty of states. For instance, Council Decision 2014/386/CFSP is a sanction targeted at Ukraine. This decision, among others, prohibits the import into the Union of goods

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[378] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 8.

[379] ibid 8, 196–197.

[380] ibid 28.

[381] Stefan Lehne, *The Role of Sanctions in EU Foreign Policy* (Carnegie Europe 14 December 2012) <http://carnegieeurope.eu/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etw1> accessed 20 December 2014

[382] European Union, 'Human Rights and Democracy in the World. Report on EU Action in 2011 (European External Action Service 2012) < http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf> 171.

[383] The list of restrictive measures in force: European Commission – Restrictive measures in force (Article 215 TFEU), *<http://ec.europa.eu/geninfo/legal_notices_en.htm>*

[384] Council of the European Union, 'Common Position' 2002/402/CFSP (OJ L 139, 29.5.2002, p. 4)<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:139:0004:0005:EN:PDF>

originating in Crimea or Sevastopol.[385] The sanction is a response to the illegal annexation of Crimea and Sevastopol, by Russia, calling on the respect of the sovereignty, political independence, unity and territorial integrity of Ukraine and is not a sanction against the Ukrainian state itself.[386] During the crisis in Ukraine sanctions against natural or legal persons, entities or bodies who are held responsible for actions against the territorial integrity of Ukraine have also been imposed.[387]

While the hard power vs. soft power tools division is often cited, e.g. in the argument that the EU prefers soft power tools in general, and it can be helpful in certain contexts, the dichotomy taken as a contradicting set of instruments can be challenged. Jonas Tallberg differentiates between enforcement and management, largely replicating the soft vs. hard power division, and argues that instead of being contradicting and mutually exclusive categories, these are both necessary for an effective system securing rule conformance.[388]

2. The diplomatic-economic-military axis

One can distinguish among different types of instruments along the diplomatic-economic-military axis.[389] A diplomatic or economic instrument can work through exerting negative or positive influence on the subject of the measure. With respect to economic instruments, to grant a country the 'most-favoured nation treatment' is an acknowledgement of positive relations, whereas a ban on export/import, or the suspension of development assistance is a clear sign of disapproval.[390] Negative diplomatic instruments include the breaking off of diplomatic relations, the expulsion of diplomats, the cutting of diplomatic ties, the cancellation of official visits, while an invitation for a visit as the recognition of the human rights situation, or an invitation to membership or to an international conference will be an expression of appreciation.

The military instruments of the European Union generally do not appear as classic military coercive instruments, rather take the form of humanitarian, peacekeeping missions. Crisis management missions are functioning within the framework of the Common Security and Defence Policy.[391] There are examples for classic military instruments such as the humanitarian intervention that is a classic application of military instruments in international relations. E.g. in the course of the military operation in the

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[385] Council Decision 2014/386/CFSP (OJ L 183, 24.6.2014, p. 70) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0386&from=EN >

[386] European Commission – Restrictive measures in force (Article 215 TFEU)

[387] Council Decision 2014/145/CFSP (OJ L 78, 17.3.2014, 16), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0145&from=EN> , Notice to listed persons, entities and bodies (OJ C 79, 18.3.2014, p. 3) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0318(01)&from=EN> Notice to listed persons, entities and bodies (OJ C 238, 23.7.2014, p. 6), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0723(05)&from=EN>

[388] Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union, International Organization* (2002) 609-643.

[389] This distinction is applied in Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) 69–86.

[390] Council Regulation (EEC) No 2616/85 of 16 September 1985 concerning the conclusion of a Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China.

[391] Cremona M, 'The EU and Global Emergencies: Competence and Instruments' in *Antoniadis A, Schütze R, Spaventa E, (eds), The European Union and Global Emergencies: A Law and Policy Analysis (Har*t Publishing Limited 2011) 16.

Democratic Republic of Congo (2003),[392] (under the code-name 'Artemis') the EU sent 2000 troops to Bunia (North Eastern part of Congo). The EU has been trying to keep international focus, with humanitarian concerns, on countries like Afghanistan, Burma, Burundi, North Korea, the Democratic Republic of Congo, Liberia, Sudan, Sri Lanka and Somalia.[393] Currently, military operations are carried out under the auspices of the EU in Bosnia and Herzegovina and in three African countries. The EUFOR ALTHEA operation in Bosnia and Herzegovina,[394] the EUFOR RCA in the Central African Republic,[395] the EU NAVFOR in Somalia,[396] the EUTM in Somalia,[397] and the EUTM in Mali.[398] These crisis management operations carry out various activities: one of the missions in Mali is to 'neutralise organised crime and terrorist threats', the EU NAVFOR's mandate is to combat piracy and armed robbery at sea (e.g., the protection of vulnerable shipping off the Somali coast).

Alongside military actions, the EU is often seen in the role of providing civilian support actions, to maintain or rebuild democracy and the rule of law.[399] Crisis mission objectives can include conflict prevention, humanitarian aid, protection of civilians, maintenance of public order, prevention of general or organised criminality, (re)building national security and democratic institutions, and economic and social development.[400]

3.   Positive and negative instruments

Some typologies differentiate between instruments based on whether their application is positive, negative, or maybe both.[401] In the literature discussing EU policies, especially in the context of enlargement,[402] these are often labelled as 'sticks and carrots', creating incentives through threats or benefits. Providing funds, financial assistance can accordingly be seen as positive measures, while the threat or refusal of the entry into force of a treaty (most importantly treaties leading to accession) and the suspension of bilateral contacts as negative.

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[392] On 12 June 2003, the Council adopted the Operation Plan and the Decision to launch a Military Operation in the Democratic Republic of Congo (DRC). See to this Catherine Gegout, 'Causes and Consequences of the EU's Military Intervention in the Democratic Republic of Congo: A Realist Explanation' [2005] 10 European Foreign Affairs Review 427.

[393] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 75.

[394] http://www.euforbih.org/index.php?option=com_content&view=category&id=185&Itemid=143

[395] http://eeas.europa.eu/csdp/missions-and-operations/eufor-rca/index_en.htm.

[396] http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-somalia/

[397] http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-somalia/

[398] http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-mali/mission-description/

[399] Drawing on the experiences in Kosovo and the Democratic Republic of Congo, Katarina Månsson provides a list of considerations for future civil and military deployments, for a better integration of human rights concerns. (Katarina Månsson, 'Communicative Action on Human Rights: Lessons for the European Union from the Peace Operations in Kosovo and the Democratic Republic of Congo in Indicators and Monitoring Systems' in Kozma J, Nowak M, Schmidt M, (eds), *External Policy-Making of the EU* (Neuer Wissenschaftlicher Verlag 2009) 142–145.

[400] Marise Cremona, 'The EU and Global Emergencies: Competence and Instruments' in *Antoniadis A, Schütze R, Spaventa E, (eds), The European Union and Global Emergencies: A Law and Policy Analysis (*Hart Publishing Limited 2011) 25.

[401] See, e.g. the categorization Peter R. Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn Palgrave 2004) Chapter 4; or in Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012).

[402] For a detailed assessment of tools and instruments used in the context of enlargement, see Part IV below.

The EU can make invitations as positive instruments; invitations for a visit (as recognition of human rights achievements in third countries, e.g.), invitation to an international conference, or even invitation for membership.

Human rights clauses used, e.g., in treaties concluded with South Mediterranean countries can be both negative and positive depending on their application.[403] The first appearance of the human rights clause was in Article 5 of the fourth Lomé Convention of 1989, later it appears regularly in cooperation agreements. A common 'human rights clause' reads as follows: 'Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Parties and shall constitute an essential element of this Agreement.'[404] A separate clause then allows the EU to suspend the Agreement if it sees these goals or values in danger – a clear negative element.

EU foreign policy is usually seen as tilting towards positive instruments. A common criticism against negative instruments, especially negative economic instruments, is that they are not targeted enough, afflicting the third country government/regime, and end up punishing the population of third countries that already suffer under a non-democratic regime and/or a regime that violates human rights on a large scale. While proper targeting is necessary for the effective use of instruments in all cases, this is especially important for negative instruments as they can become counter-productive without this. Also, the economic and political tools and measures taken by EU institutions in response to the violation of fundamental rights by a government are not necessarily followed by changes in the nature of the system. In many cases, instead of economic sanctions, the support of civil rights NGOs could be more useful and justifiable. (On this, see the list of targeted measures below.)

a) Support

Largely lacking the military leverage comparable to states that play an important role on the international level, the EU is widely seen as able to exert pressure through using its economic power, the 'carrot' of stronger economic cooperation and other support. Regardless of how we evaluate the success of the EU as a 'global player' in human rights promotion, it definitely is a major donor (humanitarian aid) and a potent actor when it comes to the threat or use of economic sanctions.[405] In this respect it is important that the 'EU remains the biggest donor to countries in need.'[406] The 10th European Development Fund, the last financial framework covering the period from 2008 to 2013, specifies approx. EUR 24 billion for the financial assistance of the African, Caribbean and Pacific Group of States (ACP States).[407]

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

[404] Richards Burchill, 'Assessing the EU's Position on Human Rights. Is it a Desirable One?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 28.

[405] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 46.

[406] Council of the European Union, Report of the Implementation of the European Security Strategy: Providing Security in a Changing World, S407/08, Brussels, 11 December 2008, 2. <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf>

[407] Decision of the ACP-EC Council of Ministers 1/2006 (2006/608/EC) specifying the multiannual financial framework for the period 2008 to 2013 and modifying the revised ACP-EC Partnership Agreement, Annex 1b).1 [2006].

With the economic crisis, financial limitations can play a role, internally, and budgetary restraints might account, in part, for the increased use of sanctions, that usually require—or seem to require, at the initial stage—less investment than many of the alternative instruments.[408]

Translating economic leverage into human rights promotion instruments, the EU can use financial and other support to further human rights goals in third countries. It can make the decision to grant most-favoured nation status in trade relations upon meeting certain human rights standards. It can and does introduce human rights clauses into agreements, make trade and cooperation agreements or association agreement conditional upon compliance etc. For instance in 1985 Article 3 of the Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China granted a most-favoured nation treatment in some areas. Today this type of economic instrument would be theoretically justifiable only if it served the aim of human rights mainstreaming.

Support can go directly to governments, but the EU can provide support to entities other than third country governments. This can sometimes, but not necessarily, be read as indirect criticism of governments, supporting national (or international) NGOs that scrutinise, criticise and challenge their respective governments ('targeted measures'). Support can also foster democratic change, giving support for organising elections, and can be part of EU criticism or assessment of the situation on the spot, through election observation missions or other targeted observations. The limited impact of foreign aid (despite the fact that it is a considerable fraction of the budget) is often due to the fact that there is 'a mismatch with the political situation in third countries as well as with the priorities of the EU itself', and the EU continues, in practice, to support regimes like Mubarak in 2011 and Kuchma in 2004.[409]

b) Sanctions (restrictive measures)[410]

The EU can use, or threaten the use of various tools in trying to persuade third countries to implement basic human rights standards and end violations. All tools listed under 'Support' above can be used as conditional instruments and as sanctions, by denying or ceasing to provide them to third countries as a response to human rights violations. The application of such measures by the EU has a long history, e.g. against the apartheid regime in 1985 and 1986; arms embargo and economic and diplomatic sanctions against China in 1989; diplomatic sanctions against Nigeria, later with the suspension of development cooperation in 1993 and 1995; against Myanmar; oil sanctions against Serbia up to the regime change in 2000. Or, more recently, against Sri Lanka in the recent past (2010), when the EU revoked preferential trade conditions or sanctions against Russia's economy in the financial, energy and defence industry sector in 2014.[411] The EU can suspend development assistance, aid or cut back funds (ENP, ACP, Instrument for Stability, pre-accession funds etc. using human rights clauses, e.g.). The European Investment Bank also applies human rights standards by way of exclusion, not financing projects below

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[408] Stefan Lehne, 'The Role of Sanctions in EU Foreign Policy' (Carnegie Europe 14 December 2012) <http://carnegieeurope.eu/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etw1> accessed 20 December 2014

[409] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 146.

[410] Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014) 51-53.

[411] Council of the European Union, 'Reinforced Restrictive Measures Against Russia' (Press Office General Secretariat of the Council) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/144868.pdf>

the threshold.[412] This means that the Bank 'restricts its financing to projects that respect human rights'.[413] Sanctions can also take the form of the (threat of) suspension, delay, or restriction of negotiations, agreements or other cooperation, in the economic field, sport and cultural relations (cultural, scientific and technical cooperation, boycott of sport and cultural events) or other areas. At a more general level, the EU can threaten to break off diplomatic relations and bilateral contacts with the expulsion of diplomats.

Sanctions can include military and other interventions (see above) and can be mandatory, based on international obligations that bind the EU and/or its Member States (see below). All these can serve human rights goals.

c) Targeted instruments (support to civil society with possible government criticism)

A common criticism against the application of sanctions is that there is a gap between what they seek to achieve (or what they are declared to be seeking to achieve) and what they actually do, between the intended goal and the actual outcome. Measures can have adverse effects on the ground, instead of punishing the government, they end up penalising the population, and maybe even inciting local support for those in power. This is why targeted actions that address this issue are of primary importance in human rights promotion. In most cases they are about empowering civil society, or more directly an opposition whose goal is to challenge and change the government. Most importantly, in the case of targeted measures, the sanctions (or benefits) can differentiate between the government and the population.

Support in this context may take the form of legal empowerment, pushing for international, constitutional and other legal (human rights) standards, their adoption and implementation. The EU can exercise pressure for the adoption of key human rights documents and of national laws guaranteeing human rights, the adoption and dissemination of best practices, training and supporting human rights lawyers and groups. In certain cases this can go as far as providing personal protection to the safety of individuals who are engaging in these activities and, depending on their nationality, recognizing them as refugees or providing consular protection to them.

Election and other observation missions, support for managing elections or other areas relevant for the exercise of human rights are all areas where the EU can also be present locally and achieve the goal of empowerment while maintaining criticism towards existing human rights practices.

The EU can launch common educational and training projects, and can rely on its European Initiative for Democracy and Human Rights to finance human rights activities, programs in third countries, support for NGOs (approx. €150m/year). It can finance conferences, support human rights NGOs, pro bono or public interest lawyers, and can give other support to civil society, opposition (that may be seeking regime change). Financial assistance can be provided through ENP, ACP, Instrument for Stability, pre-accession funds etc. or through the Humanitarian Aid Regulation. The Council, together with the Parliament, can act upon a variety of instruments like Common Implementing Rules, Instrument for Pre-Accession Assistance, European Neighbourhood Instrument, Partnership Instrument, Civil Society Facility,

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[412] Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 30–31.
[413] ibid 31.

Instrument for Stability and Peace (the former Instrument for Stability, European Instrument for Democracy and Human Rights). Targeted instruments can help third countries build capabilities or address imminent challenges, e.g. in the framework of the Humanitarian Aid Regulation, the Stability Instrument, the Civil Protection Mechanism (or the 'Community Mechanism for Civil Protection'). The European Endowment for Democracy is not strictly speaking an EU instrument, but can be seen as a private initiative that completes and supports EU efforts in promoting human rights and democracy.[414]

Balfour underlines the role of 'policy entrepreneurs' working, through naming and shaming reluctant national governments, against those who deny support to stronger positions. This can have an effect on domestic politics, creating a pressure on government officials, raising questions about their position before their electorate.[415]

4. Discretionary, mandatory and prohibited instruments

Most instruments applied as part of EU foreign policy are based on discretionary decisions of the EU. Foreign policy instruments work within an existing legal framework that puts limits on the use of the various tools. There is a difference between instruments that are available to the actors and those that they are required or prohibited to use. While most instruments are discretionary, the UN Security Council can order mandatory sanctions, the EU or the WTO can limit the ability of states to apply economic sanctions (where hard law applies to Member States' decisions on trade), and human rights considerations of the states in question can dictate breaking off connections, to prevent assistance to violations, that could otherwise be considered a human rights violation by that state.

Mandatory measures can include no-fly lists, flight and visa bans (applied in the case of Serbia, South Africa, Haiti and Myanmar in the past), denial of admission, freezing financial assets, other financial restrictions, bans on export / import (trade embargo measures, boycott actions). The latter actions can include more specific embargoes targeting, e.g. arms trade. Sanctions can be more directly military too, with or without a Security Council resolution, with or without human rights violations in the background (threatening international peace and security). Foreign policy instruments can include support to opposition forces (seeking regime change), intervention to protect nationals, other military intervention, and crisis management, prevention, peace-keeping, and peace-enforcement (see the military instruments above).

Sanctions can be mandatory based on human rights or other international obligations too. These can bind the EU, its Member States, and third countries. The EU provides consular protection (to EU citizens, a duty under TFEU Art. 20(2)(c)) and recognises refugees, an act that might be seen as a form of criticism against the country in question (like a reversal of earlier classification, granting a 'safe' status can be seen as a positive measure). The EU can work with the International Criminal Court or other international criminal tribunals for international prosecution (see the common position and the action plan adopted on the issue: Council Common Position on the International Criminal Court, 2003/444/CFSP, 16 June 2003[416]) as well as with national courts and prosecutors. An ICC clause has been inserted into

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[414] Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 14.

[415] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 141.

[416] Olympia Bekou and Mark Chadwick, 'The EU Commitment to International Criminal Justice. Achievements and Possibilities' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 88–90.

agreements with third states (even China and Russia), while a different approach has been applied in dealing with the US.[417]

It follows that most mandatory actions are necessarily multilateral instruments, but there are mandatory instruments also in transnational European law, e.g. consular protection to EU citizens under Article 23 TFEU and Article 46 of the EU Charter of Fundamental Rights. As providing consular or diplomatic protection usually entails a criticism of the situation in the respective third country, a mandatory exercise of the protection will necessarily enter the realm of foreign policy decisions. Granting refugee status might also work to this effect, e.g. accepting that certain discrimination (let's say, of LGBTI persons) is a widespread pattern and ground for recognition as a refugee.

At this institutional level, legal limits on the use of instruments can be both internal and external to the EU. External limits like the UN framework or the international legal framework that define how far international actors can go in pressuring other actors, the WTO framework or the ECtHR can all limit the discretion of EU institutions in making foreign policy decisions. Internally, the most important procedure that can apply legal constraints is the work of the Court of Justice of the European Union. The Court plays an important role because the EU is founded on law, and this aspect, with the doctrine of direct effect, makes the EU unique among international organisations.[418] On the other hand, the Court is generally seen as having little effect on EU foreign policy.

Jurisdictional limitations themselves include human rights standards. However, the role, in foreign policy, of what Matláry calls the 'juridification of human rights' is often overlooked.[419] The CJEU has gained growing importance in the human rights field.[420] In addition, the decisions of international human rights bodies like the ECtHR, the ICC, ICTY, ICTR can have a direct impact on how human rights shape foreign policy. Looking beyond the regional mechanisms, Tawhida Ahmed and Israel de Jesús Butler argue that EU obligations concerning human rights could be wider than generally assumed, if we consider obligations under international law.[421] This can go as far as mandating action or constraining the application of possible actions.

The CJEU, the 'arbiter of the Treaties', has a limited role when it comes to foreign policy, and is only allowed to rule on whether a decision is made in line with the *acquis*, respecting the separation of competences and institutions. Even here, however, litigable human rights cases pop up, as the judicial assessment of counter-terrorist fund-freezing measures show.[422] This shows that in applying sanctions, foreign policy decision-making should already incorporate human rights concerns. The ECJ, in the Al Barakaat and Kadi case,[423] held that community acts implementing a UN Security Council resolution can be reviewed and annulled if violating human rights standards, here basically the right to a fair hearing.

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[417] ibid 90–91.

[418] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 181–183 and 194–195.

[419] ibid 53–56.

[420] ibid 238.

[421] Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' [2006] 17/4 The European Journal of International Law

[422] Frederic van den Berghe F, 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?' (2010) 16 *European Law Journal* 112

[423] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML.>.

In addition, the European Court of Human Rights can also play a role, through assessing, indirectly – through the actions of Member States who are parties to the European Convention on Human Rights – the compatibility of EU measures with the ECHR.[424] The Strasbourg Court indicated that this indirect control is compatible with the legal framework, although, at the same time, restrained the possibility of review based on a general observance of human rights by the European institutions.[425]

In the area of foreign policy, the European Court of Human Rights established its jurisdiction over a state action that gave effect to UN sanctions against Yugoslavia, but applied, at the same time, a general presumption of compliance, considering the human rights guarantees provided for under EU law: 'the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, 'equivalent'… to that of the Convention system.'[426]

The primary responsibility of the Member States for actions carried out by them under EU law will most likely not be altered with the accession of the European Union to the European Convention on Human Rights (a proposal already made some 35 years ago, in 1978): 'Under EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law… are attributed to the member State or member States concerned', including 'matters relating to the EU common foreign and security policy.' (Para. 23 of the Appendix V: Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms in the *Final report to the CDDH.)*[427]

This step will potentially enhance the legitimacy of the EU, which is an important element of its international presence and impact. The Secretary General of the Council of Europe, Thorbjørn Jagland argued that the EU, through its accession to the ECHR, 'will gain in legitimacy and in its power of persuasion'.[428] (The role of the ECtHR, and the interplay between this court and the ECJ, is also important because the European Convention on Human Rights is applied to countries that are not EU Member States but parties to the Convention, thus fall under the scope of EU foreign policy. The relevant jurisprudence then becomes part of the cooperation between the EU and the Council of Europe.)

The role of courts can be seen as enforcing certain tenets of the European human rights systems, addressing some, but not all, concerns with consistency, dealing with issues in a piecemeal fashion. Their role is nevertheless important. As political actors tie their hands – that is often part of raising stakes in negotiations externally –, as the area shared by enforceable human rights standards and foreign policy

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[424] See e.g. *Etienne Tête v. France* (decision of the Commission)*,* no. 11123/84, 9 December 1987; *M. & Co. v. Germany* (admissibility decision of the Commission)*,* no. 13258/87, 9 February 1990; *Matthews v. UK* [GC]*,* no. 248333/94, 18 February 1999; *Guérin Automobiles v. 15 EU Member States* (admissibility decision)*,* no. 51717/99, 4 July 2000.

[425] van den Berghe (2010), at 152–154, for a detailed overview of the relevant cases, see European Court of Human Rights Press Unit, Factsheet – Case-law concerning the EU, October 2013, <http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf>.

[426] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 165, 30 June 2005.

[427] Council of Europe, Steering Committee for Human Rights(47+1 2013 008rev2 Strasbourg) <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf>.

[428] Thorbjørn Jagland, Council of Europe Secretary General, Strengthening human rights across Europe. European Policy Centre Policy Briefing, Brussels, 16 February 2010, quoted in Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 47–48*.*

expands, and as there is growing awareness of how courts can guarantee protection against arbitrary sanctions, be they part of foreign policy, more and more questions can be litigated.[429]

5. Human rights specific and non human rights specific instruments

Most foreign policy goals can be translated into the language of human rights. General goals like security, development and democratization are values shared by the two areas (human rights and foreign policy). This should not come as a surprise considering that important principles and aims are elevated to the international scene as well as integrated into the body of human rights law. What remains unclear is how the translation (reframing issues as human rights problems or restating the same goals as foreign policy objectives) impacts the content, and how remaining inconsistencies are, or ought to be, reconciled. Foreign policy goals tend to focus on the macro level, on broad and general trends. Human rights considerations on the international level share some of these biases, but are marked by a strong individualist, micro-level stance. This in turn has the potential to transform widely stated goals, e.g., by providing a clear roadmap for evaluation. Progress in democratization can be assessed in various ways, but focusing on access to concrete political rights will considerably narrow down the choices. One question is, accordingly, how well human rights can capture foreign policy goals. The connection between foreign policy goals and human rights does not mean, however, that there is complete overlap, even on the general level. Translation means that something is lost, and some goals can be better stated in one or the other language. Diverging approaches have only limited space, also in the understanding of EU foreign policy goals as defined on the highest level of decision-making.[430]

Different types of instruments have varying potentials in human rights promotion. While all instruments can serve this goal, there might be tools that are more closely connected to one value or another. The values that Ian Manners identifies as 'sustainable peace', 'supranational rule of law', or 'good governance' can shape international missions that focus on rule of law promotion, support to civil society and capacity building, 'consensual democracy' can be linked more directly to tools like election observation.[431] The instruments available in a specific case might be limited, but they usually appear and operate jointly. An idea foreign policy will make use of the instruments in combination with each other, making sure that the right incentives are in place. While this will not, by far, guarantee success, it can contribute to minimize the danger of distortion, pushing third states into the wrong direction.

Certain instruments are inherently related to the promotion of human rights (specific human rights instruments) while others are general in their goals (instruments influenced by human rights mainstreaming). [432] Some of them promote democratic rule of law with human rights, e.g., the EIDHR, the human rights clauses, the human rights focal points in EU Delegations, the EUSR for Human Rights, and the human rights dialogues and consultations.[433] Other instruments of CFSP, such as bilateral

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[429] For the role of courts, see, most prominently, the Kadi judgment of the Court of Justice of the European Union, above, where the Court subjected a Security Council decision, and a sanction adopted therein, to a human rights test.

[430] For a more detailed discussion on the arguments on the role of human rights in foreign policy, see Part II.A.

[431] Ian Manners, 'The Constitutive Nature of Values, Images and Principles in the European Union' in Sonia Lucarelli and Ian Manners (eds) *Values and Principles in European Union Foreign Policy* (Routledge 2006) 33–38.

[432] See the detailed description of this category. Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas, Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support' (2014) 29-44.

[433] ibid.

political dialogues, demarches, restrictive measures etc., are affected due to the EU's objective of mainstreaming human rights in its foreign policy goals.[434] According to a similar but earlier categorisation there are instruments that are specific to human rights promotion, while others can be applied to various purposes, including human rights.[435] The use of instruments can also be categorized based on whether they seek to achieve human rights goals directly, or such goals are only secondary, if at all. Sanctions, for example, can respond to specific rights violations, to democratic backsliding (isolating government and thus strengthening opposition); but can also be security sanctions, where human rights considerations play a role to a lesser degree.[436]

6.   Unilateral and multilateral application of the instruments

Instruments can be applied in a multilateral or in a unilateral (or, depending on the role of the target country, bilateral) way, some available both of these ways, some not. E.g., monitoring and other activity can be unilateral – or bilateral, considering the addressee – or multilateral, through an international body. It has been argued that the EU is losing its influence in human rights matters at the level of international, multilevel human rights bodies.[437] (Note that a separate report has been prepared, as part of the present research project, that deals with the question of EU presence in multilateral fora and human rights promotion.[438])

Sanctions or positive measures can target third countries with or without cooperation with other countries or other international (regional) organizations, e.g., the UN, the NATO, or the African Union. According to the Strategic Framework the EU works 'in partnership with regional and other organisations such as the African Union, ASEAN, SAARC, the Organisation of American States, the Arab League, the Organisation of Islamic Cooperation and the Pacific Islands Forum with a view to encouraging the consolidation of regional human rights mechanisms.'[439]

All these can have an impact on bilateral relations and on the influence that the EU can have on the human rights situation in third countries. EU actions never work in a vacuum, the changing behaviour of other actors should lead to the re-evaluation of the efficiency of the various instruments.[440]

The EU can try to engage with human rights violations on the level of international organizations, sponsoring motions or supporting action targeting third countries.[441] A wide set of instruments and

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[434] See to this mainstreaming for instance Council of the European Union, Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions, 17138/1/10, REV 1, 30 November 2010.

[435] See, e.g. Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 194.

[436] Konstanty Gebert, 'Shooting In The Dark? EU Sanctions Policies, European Council on Foreign Relations' (Policy Brief No. 71, January 2013) 2; citing a general overview: Clara Portela, *European Union Sanctions and Foreign Policy: When and Why do they Work?* (Routledge 2010).

[437] Franziska Brantner and Richard Gowan, 'A Global Force for Human Rights? An Audit of European Power at the UN' *(*Report of the European Council on Foreign Relations, 17 September 2008) <http://ecfr.eu/page/-/ECFR-08_A_GLOBAL_FORCE_FOR_HUMAN_RIGHTS-_AN_AUDIT_OF_EUROPEAN_POWER_AT_THE_UN.pdf>

[438] Grażyna 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' Deliverable 5.1. (forthcoming).

[439] Council of the European Union (2012) *EU Strategic Framework and Action Plan on Human Rights and Democracy* 11855/12 4.

[440] Hans Kundnani, Mark Leonard, Nick Witney, Richard Gowan and Susi Dennison, 'Why Europe Needs a New Global Strategy' (2013) European Council on Foreign Relations Policy Brief No. 90 <http://ecfr.eu/page/-/ECFR90_STRATEGY_BRIEF_AW.pdf> 6.

institutions is available, including entities like the UN General Assembly, specialized UN bodies, but also courts or court-like bodies on the international as well as on the national level. Legal and political means can include filing complaints, raising issues using human rights mechanisms under international treaties (interstate complaints, Vienna and Moscow mechanisms, exchange of information and sending expert missions in the OSCE), international judicial involvement, e.g., before the ECtHR, or filing amicus curiae briefs, e.g., before the US Supreme Court on capital punishment (explaining the European position on human rights issues, without the EU being a party to the court case).

Multilateral instruments can have a large impact on bilateral relations. Elena Jurado argues that 'once the EU has opened the door to policy reform in a country by applying positive and negative sanctions, it must recognise the limits of its influence and allow the other international institutions to take over,' the Council of Europe or the UN, depending on geographic criteria.[442] Considering that the EU has not been primarily a human rights body (and, as Jurado argues, it should not be, either), the cooperation with other organisations in this field, like the Council of Europe or the UN, is essential.[443] Smith asks the question whether, after all, it makes sense for the EU to engage more actively in the human rights realm as there is already a European body, the Council of Europe doing just that.[444] The EU can be more effective in pursuing specific interests, while traditional human rights bodies can act pursuing genuinely universal values, resulting in a shared responsibility for human rights promotion.[445] The same way as the risks of human rights criticism are decreased by aggregation, by a shift to the European level, from the level of member states, it might be easier for the EU to pursue non human rights goals by raising these concerns with reference to criticism from other international organisations.

The European Security Strategy, adopted in 2003, is based on a view of 'effective multilateralism', and on the premise that the ability to shape and promote human rights at the international level should happen through reinforced cooperation with other international organisations, most importantly, the UN.[446] In evaluating the implementation of the Strategy, the Council emphasises that 'Europe must lead a renewal of the multilateral order' at the global level. The report adds: 'Everything the EU has done in the field of

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[441] For a more detailed overview of the use of multilateral instruments in this context see Grażyna 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' Deliverable 5.1. (forthcoming), 45-47.

[442] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 132.

[443] See also Council of the European Union (2012) *EU Strategic Framework and Action Plan on Human Rights and Democracy* 11855/12 3–4.

[444] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 47.

[445] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 127–128 and 133.

[446] Council of the European Union, 'A Secure Europe in a Better World: European Security Strategy' (2003) 9–10; Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 67.

security has been linked to UN objectives. We have a unique moment to renew multilateralism, working with the United States and with our partners around the world.'[447]

The EU was active in pushing for country- and issue-specific scrutiny in the UN Human Rights Council, going against a large number of developing states.[448] These latter states argue, among others, that the UPR is exclusive and not complementary to country mandates; country-specific assessment should only happen with the consent of the respective government, doing otherwise would be counterproductive; and they are ready to point out the inconsistencies and human rights deficits in EU countries.[449] As a report on the distribution of votes in the United Nations has shown, promoting human rights through multilateralism is not an approach without difficulties.[450] The position of the EU has been described as of 'increasing isolation' in this respect.[451] The tension between the multilateral approach and the substantial goals of human rights promotion seems to be growing, and the establishment of the Human Rights Council only contributed to this. Many efforts at the international level are ineffective due to opposition from a group of developing countries, with the EU's fading legitimacy. This latter, also acknowledged by EU officials, is largely seen as a result of 'double standards' and lack of criticism in certain human rights violations; the most prominent examples of such criticism is the stance towards the US (in its war engagement) or the Israeli-Palestinian conflict.[452]

7. Secret and transparent instruments

a) Tools of quiet diplomacy and the issue of secrecy

It is possible to differentiate between secret and transparent instruments of EU foreign policy. One of the major concerns of modern international law has been to limit the tools of secret diplomacy and to ensure the publicity of treaties. Secrecy has nevertheless been an important element of diplomacy, usually seen as necessary for effectiveness in certain cases, a goal set against the interest in transparency, a principle recognised by EU policy-making too. This holds especially for human rights promotion: it is hard to maintain the appearance of furthering human rights goals when going against accountability and reinforcing the feeling of democratic deficit in practice. Secrecy might easily become a cover for double speak, maintaining a hard line in public, while quietly dumping human rights issues that might otherwise be important for the European public. Nevertheless, traditional, quiet diplomacy instruments, like statements made in private meetings and the exchange of confidential notes, still have their role, especially in sensitive areas as human rights criticism certainly is.

The legitimate area for secrecy and transparency can only be assessed at the level of individual cases, by decision-makers and in reports studying concrete EU foreign policy actions. The two sets of tools, ideally,

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[447] Council of the European Union, 'Report of the Implementation of the European Security Strategy: Providing Security in a Changing World' S407/08 (2008) 2 and 11.

[448] See in detail Grażyna 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' Deliverable 5.1. (forthcoming).III.A.9.

[449] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 78–79.

[450] Brantner & Gowan I2008).

[451] Gjovalin Macaj and Joachim A. Koops, 'Inconvenient multilateralism. The challenges of the EU as a player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 80.

[452] ibid 79.

do not conflict, but reinforce each other's effects. However, they can also easily undermine each other, therefore, secrecy shall be limited to the most necessary cases.

b) *Public criticism and praise (naming and shaming) and formalised types of statements and dialogues*

The Council emphasised that '[m]aintaining public support for our global engagement is fundamental.'[453] This, to a large degree, presupposes transparency, that might be seen as antithetical to certain foreign policy instruments. In public statements, the pressure from public opinion is tangible, but public pressure is not the only force behind human rights considerations in EU foreign policy. The Commission and the Council are more likely to use non-transparent methods, considering the sensitivity of human rights issues,[454] in spite of the fact that from the values of the EU transparency should follow. One of the examples could be the lack of transparency in enlargement policy, in this regard Part IV.D of this report mentions the following: there is a need for indicators to be identified in order to make the Commission's monitoring more transparent. In the case of Croatia certain documents are not publicly accessible, even though there have been considerable improvements since the accession of Croatia.

Matláry talks about the 'democratization' of foreign policy by both mass media coverage and the impact of the Internet, working against the traditional approach in foreign policy. Under the traditional logic, 'procedures, interests and consequences of actions… often override human rights concerns, but are not seen as legitimate in a situation of urgency where an issue is on the public agenda'.[455] This has a transformative potential for foreign policy decisions as well. Where foreign policy decisions become concerns for domestic politics, democratisation (or, in the EU context, the growing role of the EP) can change the way issues are framed and challenges are addressed. Thus internal democratisation, in foreign policy decision making can change the way democratisation and human rights are dealt with in external relations.

Ruby Gropas argues that one of the main functions of EU institutions in human rights promotion is their role as 'access points' for non-state actors. NGO lobbying can also change the dynamics between traditional, institutional actors.[456] Furthermore, human rights NGOs play an important role in the functioning of international monitoring mechanisms e.g. by writing shadow reports, or when cases are brought before the monitoring mechanisms of international conventions.

Public statements can appear in a variety of settings, addressed to the target country, or to the press (public) in general; they can be made in meetings of international bodies (e.g. as part of hearings on controversial human rights issues) or in internal decisions of the EU (or Member States) and made public. They can take more formal shape like an official position, declaration, action, country report or other monitoring document, but can also appear as a communication addressed to a party, an international body or the press. The EU's High Representative of the Union for Foreign Affairs and Security Policy issues public statements in reaction to violations of human rights and international humanitarian law e.g.

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[453] Council of the European Union, 'Report of the Implementation of the European Security Strategy: Providing Security in a Changing World' S407/08 (2008) 12.
[454] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 143.
[455] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 51.
[456] Ruby Gropas, *Human Rights & Foreign Policy. The Case of the European Union* (Ant. N. Sakkoulas – Bruylant 2006) 162 and 171–172.

in the cases of Syria,[457] or South Sudan.[458] Statements and démarches are also used to support human rights defenders in autocratic countries.[459] Statements can be positive (praise, acknowledgement) or negative (criticism, concern), or else can be stated in a conditional way.

In order to be efficient, traditional diplomatic instruments like démarches, joint declarations and public statements need to be specific, which presupposes that the necessary information is readily available for the Council and the Commission – that is often not the case.[460]

At an institutional level, statements can be made by different actors, like the Presidency, the CFSP High Representative, or the EP, e.g. through public hearings, public discussions on the human rights situation in third countries or human rights prizes, often to opposition leaders, like the Sakharov Prize for Freedom of Thought.[461] The formalisation can produce Common Strategies, Common Positions, and Joint Actions, and can result in legislation on human rights issues (Council and EP).The Parliament is probably best seen as a forum that can 'check' and 'indicate', and less as a player applying a robust and coherent policy. A common way of formalised exchanges on human rights issues are the human rights dialogues,[462] dealing with partners as diverse as the African Union, China, Uzbekistan or Sri Lanka.[463] The EU Guidelines on Human Rights Dialogues with Third Countries[464] define four types of dialogues. Dialogues in the context of special relations exist with countries that are the closest in human rights policies, like the US, Canada, New Zealand or Japan. There are also institutionalised dialogues or discussions dealing systematically with human rights issues as one topic among others: with candidate countries, ACP States (Cotonou Agreement), Latin America, Mediterranean countries (Barcelona process) and the Caucasus (European Neighbourhood Policy), Asian countries (ASEAN and ASEM), association and cooperation agreements (sub-committees or groups specifically devoted to discuss human rights issues). There are also institutionalised dialogues that focus exclusively on human rights, e.g. with China, Russia or the African Union. Finally, there are also ad hoc dialogues through heads of mission, e.g. in Sudan. Formalisation can also take place at a unilateral level, internally, through different EU bodies, e.g. by legislation on concrete human rights issues.

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[457] Statement by EU High Representative Catherine Ashton on the 3rd Anniversary of the Syrian uprising, 140315/01, 15 March 2014.

[458] Statement by EU High Representative Catherine Ashton on South Sudan, Brussels, 140102/01, 02 January 2014.

[459] Statement by the EU High Representative Catherine Ashton regarding the death of Chinese human rights defender, Ms Cao Shunli, Brussels, 140315/02, 21 March 2014; Declaration by High Representative Catherine Ashton on behalf of the European Union regarding the treatment of human rights defenders and their relatives in China, Brussels, 6025/1/14 REV 1, (OR. en), PRESSE 48, 1 February 2014.

[460] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 126.

[461] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 38.

[462] Council of the European Union, 'EU guidelines on human rights dialogues with third countries – Update' <http://www.eeas.europa.eu/human_rights/guidelines/index_en.htm>.

[463] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37.

[464] *EU Guidelines on Human Rights Dialogues with Third Countries* <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf>.

The enlargement procedure, that is itself formalised, since the European Commission developed its review mechanism in the 1990s, can serve as a model for formalising the use of foreign policy instruments in human rights promotion. The Commission is usually seen as a policy shaper, having a pivotal role in institutionalising human rights, and as an institution that improved the assessment of human rights in third countries through country reports by the 2000s.[465] (See in detail Chapter IV.) This role goes hand in hand with the trend of continuously widening competences,[466] which can be criticised, praised, or simply seen as essential for the goals the Commission is expected to pursue. In the field of external relations, it is the Commission that is responsible for third country assessment, and cooperation with the Council of Europe, concerning human rights.[467] The Commission can use a wide variety of instruments listed earlier, from more traditional diplomatic measures, public statements, to initiating EU decisions on financial and policy matters. The Commission has a general duty to pursue human rights goals, including its cooperation with the Council of Europe, and with human rights dialogues with third countries, like China, Uzbekistan and Sri Lanka.[468] The Commission has now become a major actor in the field of foreign policy and has 'established itself as a key participant' on the international level, including human rights issues, with increased independence from member states; and this is most apparent in the enlargement process.[469] While it was the European Council that adopted the Copenhagen criteria, the Commission started to monitor them as part of the pre-accession process, making conditionality work through implementation and evaluation.[470] (See IV.C.2.a Copenhagen criteria on conditionality).

8. Classifications as frameworks

Most categorisations of tools and instruments and their use in human rights promotion that are widely applied in the literature do not tell us much about the normative, human rights aspect of those tools. However, relating categorisations to instruments that are used in certain countries or groups of countries and applying categories in a country-specific manner might help evaluate the human rights policy of the European Union. E.g. the use of human rights specific and non human rights specific instruments (influenced by human rights mainstreaming), or the lack thereof, might reflect important differences, relevant for the case studies to be prepared as part of the present project. This might show to what extent human rights promotion appears as a goal in the relations with a certain country, and if human rights specific instruments are not present to a satisfactory degree.

Table 1 below summarises the various classifications applied in this chapter:

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

[466] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 171–172.

[467] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37.

[468] ibid 37.

[469] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 167–177.

[470] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 37; ibid 238.

Table 1: Classifications of EU foreign policy tools and instruments

Quiet / Secretive		Public / Transparent	

Diplomatic	Economic	Military

Human Rights Specific		Non Human Rights Specific	

Unilateral/Bilateral		Multilateral	

Mandatory	Discretionary	Prohibited

Hard Power Tools		Soft Power Tools	

Positive Tools		Negative Tools	

Non-Targeted Sanctions		Targeted Sanctions	

Institutional aspect (who acts) and formal place (legal basis)

(There will be another, more detailed table below which lists EU foreign policy tools and instruments and their possible classifications.)

When Work Package 6 case studies examine the tools and instruments used in relation to the different countries (e.g. Western Balkans, ACP countries, or China, India, South Africa and the US), an assessment of compliance with the values of the European Union together with consistency and efficiency will tell the most about the use of instruments. At the same time, when mapping and analysing instruments in the case studies, the fact that instruments from certain categories are or are not used in the countries in question will help answer theoretical questions. It will be important to look at the reason why certain instruments are not used, in comparison to others, and whether this deficiency results in dysfunctions of EU policy and normative regulation. E.g. instruments used in respect of certain countries might differ depending on the military and economic potential within the international community of the given country. Such a difference can reflect a genuine difference of treatment on behalf of the EU, which might lead to different standards applied, which, in turn, can threaten the coherence and efficiency of EU human rights promotion. (See in detail II.A.4.)

In the case studies to be prepared in the framework of Working Package 6, it will be worth examining which instruments or categories of instruments are not used in respect of the given state(s) and how the

lack thereof has an impact on consistency, values and efficiency. An analysis of these questions in the case studies will contribute to the discussion on values, consistency and different standards with new standpoints.

Here the chapter provides a more detailed list of the various tools and instruments, combined with the classifications, that could serve as an analytical tool, also supporting case studies to be prepared as part of Work Package 6.

Table 2: Mapping EU foreign policy tools and instruments in human rights promotion, applying classifications

	Tools and instruments	quiet / transparent	diplomatic (inc. legal) / economic / military	specific to HRs	uni-/multi-lateral	hard / soft power	non-/targeted
Quiet	informal meeting as quiet diplomacy	quiet	diplomatic	non-specific	unilateral	soft	targeted
	(formal) démarche as quiet diplomacy, general or concerning individual cases	quiet	diplomatic	non-specific	unilateral	soft	targeted
Public	public statement, position, declaration, action, country report (European Commission Regular Reports, Comprehensive Monitoring Reports on the accession countries etc.) and other monitoring, communications (in press conference, in international body etc.)	transparent	diplomatic	non-specific	can be either	soft	targeted
	public criticism (démarche in public, condemnation, expressing concern, welcoming)	transparent	diplomatic	non-specific	can be either	soft	targeted
	public hearings (on controversial human rights issues)	transparent	diplomatic	non-specific	unilateral	soft	targeted
Formal	adopting formal (internal) documents: Common Strategies, Common Positions, Joint Actions; legislation on human rights issues; CFSP decisions etc.	transparent	diplomatic	non-specific	unilateral	soft	can be either
	human rights dialogues (China, African Union etc.), sub-committees, political dialogue, consultation	quiet	diplomatic	HR-specific	unilateral	soft	targeted
	invitation for a visit (as recognition)	transparent	diplomatic	non-specific	unilateral	soft	can be either
	invitation to international conference	transparent	diplomatic	non-specific	can be either	soft	can be either
	establishing, maintaining, reinforcing bilateral connections	transparent	diplomatic / economic	non-specific	unilateral	soft	non-targeted
Multilateral	monitoring through international (human rights) bodies	(mostly) transparent	diplomatic	specific to HRs	multilateral	can be either	targeted
	action at the UN (e.g. resolution initiatives, sponsoring in the UN General Assembly, campaigning for human rights causes)	transparent	diplomatic	non-specific	multilateral	soft	can be either
	legal and political means through multilateral fora: filing complaints, raising issues using human rights mechanisms under international treaties (interstate complaints, Vienna and Moscow mechanisms – OSCE: exchange of information	(mostly) transparent	diplomatic	can be specific	multilateral	can be either	can be either

	Tools and instruments	quiet / transparent	diplomatic (inc. legal) / economic / military	specific to HRs	uni-/multi-lateral	hard / soft power	non-/targeted
	and sending expert mission)						
	international judicial involvement (e.g., before the ECtHR), amicus briefs (e.g. US Supreme Court on capital punishment)	transparent	diplomatic	can be specific	multilateral	hard	targeted
Support	association agreement	transparent	diplomatic / economic	non-specific	unilateral	hard	non-targeted
	invitation for membership	transparent	diplomatic	non-specific	unilateral	soft	non-targeted
	common educational and training projects, campaigns for awareness, general education etc.	transparent	diplomatic / economic	non-specific	unilateral	soft	targeted
	financial instruments: Instrument contributing to Stability and Peace, European Endowment for Democracy, Development Cooperation Instrument (DCI), Instrument for Pre-accession assistance (IPA II), European Neighbourhood Instrument (ENI), European Development Fund (EDF), Development Cooperation Instrument (DCI), Geographic Programmes (Common Areas of Cooperation) and Pan-African programme) etc.	transparent	economic	non-specific	unilateral	soft	can be either
	Humanitarian Aid Regulation	transparent	diplomatic / economic	specific to HRs	can be either	soft	targeted
	loans, credits	transparent	economic	non-specific	unilateral	soft	non-targeted
	granting most-favoured nation status in trade relations	transparent	economic	non-specific	unilateral	hard	non-targeted
	trade and cooperation agreements	transparent	economic	non-specific	unilateral	hard	non-targeted
Sanctions (restrictive measures)	suspension or delay of negotiations on agreements	transparent	diplomatic / economic	non-specific	can be either	hard	non-targeted
	rejection of application, denial of candidate status, denial, delay, suspension of accession negotiations	transparent	diplomatic / economic	non-specific	unilateral	can be either	non-targeted
	restriction or breaking off of sport and cultural relations, reduction of cultural, scientific and technical cooperation, boycott of sport and cultural events	transparent	diplomatic / economic	non-specific	can be either	hard	non-targeted
	suspension of other cooperation	transparent	diplomatic /	non-specific	can be either	can be	non-targeted

Tools and instruments	quiet / transparent	diplomatic (inc. legal) / economic / military	specific to HRs	uni-/multi-lateral	hard / soft power	non-/targeted
		economic			either	
cancellation or postponement of ministerial and other official visits	can be either	diplomatic	non-specific	can be either	hard	non-targeted
breaking off of diplomatic relations, bilateral contacts, expulsion of diplomats	transparent	diplomatic	non-specific	can be either	hard	non-targeted
human rights clauses (inclusion and use or threat of use)	transparent	diplomatic / economic	specific to HRs	unilateral	can be either	non-targeted
flight and visa bans (e.g., Serbia, South Africa, Haiti, Myanmar), no-fly lists, denial of admission	can be either	diplomatic	non-specific	can be either	hard	can be either
international criminal prosecution	transparent	diplomatic	specific to HRs	multilateral	hard	targeted
freezing of financial assets, financial restrictions	can be either	economic	non-specific	can be either	hard	can be either
boycott actions (ban on import)	transparent	economic	non-specific	can be either	hard	non-targeted
trade embargo measures (ban on export)	transparent	economic	non-specific	can be either	hard	non-targeted
suspending development assistance, aid or cutting back funds (ENP, ACP, Instrument for Stability, pre-accession funds etc.)	transparent	economic	non-specific	can be either	hard	non-targeted
revocation of preferential trade conditions (e.g., Sri Lanka, 2010)	transparent	economic	non-specific	can be either	hard	non-targeted
arms embargos	transparent	economic / military	non-specific	can be either	hard	non-targeted
military action under Security Council resolution allowing intervention (human rights violations threaten international peace and security)	transparent	military	non-specific	multilateral	hard	can be either
intervention to protect nationals	mostly transparent	diplomatic / military	non-specific	unilateral	hard	targeted
other military intervention, crisis management	transparent	military	non-specific	can be either	hard	targeted
pushing for ratification and implementation (by third countries) of international human rights law instruments	transparent	diplomatic	specific to HRs	can be either	soft	targeted

	Tools and instruments	quiet / transparent	diplomatic (inc. legal) / economic / military	specific to HRs	uni-/multi-lateral	hard / soft power	non-/targeted
Targeted instruments (support to civil society with possible government criticism)	promoting laws and practices that protect human rights	transparent	diplomatic	specific to HRs	can be either	soft	targeted
	conferences, support to human rights NGOs, pro-bono or public interest lawyers	transparent	diplomatic	specific to HRs	can be either	soft	targeted
	other support to civil society, to opposition forces (that may be seeking regime change)	can be either	diplomatic / economic / military	non-specific	can be either	soft	targeted
	European Initiative for Democracy and Human Rights (approx. €150m/year) financing human rights activities, programs in third countries, support for NGOs	transparent	diplomatic	specific to HRs	unilateral	soft	targeted
	Civil Protection Mechanism	transparent	diplomatic	specific to HRs	unilateral	soft	targeted
	election observation and other missions	transparent	diplomatic	specific to HRs	can be either	soft	targeted
	targeted observation	transparent	diplomatic	specific to HRs	can be either	soft	targeted
	other support, e.g., organizing elections	transparent	diplomatic	can be specific	can be either	soft	targeted
	consular protection (to EU citizens)	can be either	diplomatic	can be specific	mostly unilateral	hard	targeted
	recognizing refugees (as a form of criticism)	can be either	diplomatic	can be specific	mostly unilateral	soft	targeted

(Note that not all instruments or groups of instruments fit under the various categories, in such cases, the report tried to select the more typical category, or else indicate that the tools in question can fit several categories.)

C. Mapping the impact: Ways to improve

Understanding the impact of EU foreign policy instruments is not simply a guarantee of efficiency, but also a normative necessity.[471] The economic crisis might have easily augmented this pressure. The competition for resources and the incentives to show the importance and effectiveness of the policies increases, renewing or intensifying debates about priorities. Furthermore, as the crisis hit actors to a varying extent, this changed the power balance. Yet, the crisis did little other than reinforcing existing problems, e.g. deepen differing views across Member States.[472]

Rosa Balfour's conclusion, based on her case studies on Ukraine and Egypt, summarises the criticism of many: 'most EU action on human rights and democracy was limited to the development of declaratory positions, often cushioned in encouraging terms, stating EU preoccupation on the matter and without raising the possibility of any EU action condemning the occurrences. In neither of the two cases were negative measures used, the human rights clause was never invoked, and even positive tools were scarcely used.'[473] She adds that there is a general preference towards maintaining the status quo in the third countries as well as maintaining a partnership with them, two considerations that often worked against stronger positions on human rights and democracy.[474] Assessing the impact of EU policy decisions should focus on the country in question, but also look beyond an individual case. One might lose sight of how foreign policy instruments work at a global level, and forget the impact of instruments targeting one country can have on other countries in a similar situation, if the case is only looked at in isolation from the wider context. This makes it even harder to approximate the 'impact' of certain sanctions, types of sanctions, or other measures.

Matláry cites Chayes and Chayes to argue that 'if political power is increasingly intangible, then also regimes may wield it'.[475] On the other hand, while using external pressure in the international arena one should also be aware of the legal constraints most importantly flowing from the principle of sovereignty.[476] Especially in the case of instruments seeking regime change, special efforts should be devoted to communication and cooperation with opposition forces.[477]

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[471] For restrictive measures, see para. 8 of the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, cited in Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 28. The Action Plan sets out the details of regular assessment of how the various instruments are implemented. (Council 2012; Council 2013, 36–37).

[472] Ronja Kempin and Marco Overhaus, EU Foreign Policy in Times of the Financial and Debt Crisis, 19European Foreign Affairs Review 2 (2014), 192.

[473] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 141.

[474] ibid 143; on the role of the EU in maintaining the status quo, see also Tocci et al. (2011).

[475] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 91; from Chayes, A. and Chayes, A. (1995), The New Sovereignty: Compliance with International Regulatory Agreements, Harvard University Press.

[476] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appriasal* (Cambridge University Press 2008) 449.

[477] Konstanty Gebert, 'Shooting In The Dark? EU Sanctions Policies, European Council on Foreign Relations' (Policy Brief No. 71, January 2013) 8.

The Action Plan implementing the EU Strategic Framework identifies several areas where improvement could make the use of instruments more effective:[478]

- local human rights strategies: draw lessons, formulate best practices, regularise follow-up mechanisms, and implementing country-specific human rights strategies in policy decisions as well as mainstreaming
- dialogue: set priorities, objectives, indicators; review best practices; use recommendations from other treaty mechanisms (e.g. UPR)
- coherent application of instruments: dialogue, targeted support, incentives, restrictive measures, human rights clauses[479]

In general, it would be important to establish robust monitoring capabilities and, to make them work, set realistic and specific goals for, e.g. sanctions, and, finally, make increased efforts to communicate the goals and the perspectives.[480] One should make sure that human rights are 'the silver thread', as High Representative Catherine Ashton put it,[481] not in the sense of decoration, but as a defining element of EU external action.

Without proper assessment, the EU keeps 'shooting in the dark', engaging in a 'wilful blindness'.[482] The remaining part of this chapter addresses, first the 'more assessment' argument and then applies it to the most sensitive area of inconsistency arguments, the internal versus external cohesion that is itself partly a reflection of institutional fragmentation.

1. Assessment as a necessity

Assessing the impact of EU foreign policy with respect to the human rights situation in third countries is a very complicated task.[483] One possibility to assess the impact of EU foreign policies in the human rights realm is to compare and see how the EU is performing vis-à-vis the impact of other international players like the Council of Europe, the OSCE or the UN (e.g. through its Universal Periodic Review mechanism).[484] Janne Haaland Matláry argues – in the context of comparing the three regional actors, the EU, the OSCE and the CoE – that the great impact of the EU is most importantly present in the case of general, as opposed to human rights specific, tools, mostly due to the general weight of the EU.[485]

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[478] Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* 11855/12 (2012) 22–23.

[479] See also the Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 129–133.

[480] Konstanty Gebert, 'Shooting in the Dark? EU Sanctions Policies, European Council on Foreign Relations' (Policy Brief No. 71, January 2013) 7–8.

[481] Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* 9431/13 (2013) 5.

[482] Konstanty Gebert, 'Shooting in the Dark? EU Sanctions Policies, European Council on Foreign Relations' (Policy Brief No. 71, January 2013).

[483] See more generally K. E. Jørgensen (1998) 'The European Union's Performance in World Politics: How Should We Measure Success?', in J. Zielonka (ed.) *Paradoxes of European Foreign Policy,* The Hague: Kluwer Law International, cited in Lucarelli & Manners (2006), 208.

[484] Rhona K. M. Smith, 'Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 46.

[485] Janne Haaland Matláry, *Intervention for Human Rights in Europe* (Palgrave 2002) 238–239.

There seems to be a wide agreement that the EU is the right venue for soft actions, and these collective measures can then serve as referential points for internal policy-making rather than externally.[486] It is important to identify both the external and the internal components where change seems necessary. External factors should be distinguished if we try to assess the impact that can be attributed to EU policies, yet, these same factors can prove to be central in influencing the context where EU foreign policy instruments are effectuated, and it is hard to control for elements that cannot be attributed to the actions of the EU. Furthermore, the impact of EU foreign policy in the area of human rights promotion will not necessarily coincide with the intent or motivation behind these policies.

There seems to be a growing application of sanctions,[487] where monitoring is also extremely important, and additional resources might be required, devoted to monitoring. If information on the impact of sanctions is not available, it cannot inform the debate on suspending, extending, or expanding sanctions, leaving more room for particular, mostly economic, interests to influence decisions, and less room for specific concerns for domestic observance of human rights and democracy. E.g. if the normative power of the EU proves to be best developed in relatively symmetric power relations,[488] it is important to assess how this impact can be extended to areas where there is an imbalance between the EU and the third countries in question.

To increase consistency, it is inevitable to address the problem of the internal side of coherence in human rights policies. In certain areas, judicial oversight, to be reinforced by the accession to the ECHR, can have a beneficial effect. At the same time, the flexibility necessary to build up and apply effective foreign policy might be on the losing sight. Elena Jurado argues that the same arguments raised in connection to the EU's accession to the ECHR could be applied to core UN treaties as well. As a result, the EU officials could be involved in the monitoring procedures both in the Council of Europe and the UN.[489] The goal of consistency can be advanced through improving the internal capacities that, in turn, will have an impact on the field of external policy. Further contractualisation of rules that require the EU to act normatively might be a way forward.[490] Sonia Lucarelli and Ian Manners argue, based on a research on the role of values, images and principles in EU foreign policy that there is a complex learning process happening between the different policies.[491] This shows that foreign policy cannot be studied in

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[486] Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012) 144; but note the recent increase in sanctions decisions, StefanLehne, *The Role of Sanctions in EU Foreign Policy* (Carnegie Europe 14 December 2012) <http://carnegieeurope.eu/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etw1> (accessed 20 December 2014)

[487] StefanLehne, *The Role of Sanctions in EU Foreign Policy* (Carnegie Europe 14 December 2012) <http://carnegieeurope.eu/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etw1>

[488] Nathalie Tocci and (with case studies by) Hakim Darbouche, Michael Emerson, Sandra Fernandes, Ruth Hanau-Santini, Gergana Noutcheva and Clara Portela (2008) The European Union as a Normative Foreign Policy Actor, CEPS Working Document No. 281, January 2008, Centre for European Policy Studies <http://aei.pitt.edu/7582/1/Wd281.pdf> (accessed 21 December 2014)

[489] Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 132.

[490] Nathalie Tocci and (with case studies by) Hakim Darbouche, Michael Emerson, Sandra Fernandes, Ruth Hanau-Santini, Gergana Noutcheva and Clara Portela (2008) The European Union as a Normative Foreign Policy Actor, CEPS Working Document No. 281, January 2008, Centre for European Policy Studies, 31. <http://aei.pitt.edu/7582/1/Wd281.pdf> (accessed 21 December 2014).

[491] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006).

isolation from other EU (or national) policies, and that studying foreign policy will also help better understand policy choices in other areas.

First, they identify a pattern of 'externalizing', where principles developed in internal policies make their way into foreign policy, as it happened with environmental protection. Second, there is a wider process of 'transferring' principles that migrate from the policy area where it was developed, to other (internal as well as external) policy areas, e.g., the spread of gender mainstreaming and sustainable development. And finally, 'reconstituting' means that a principle developed in response to a specific concern, intended to apply in a limited sphere, becomes central to a wider array of issues and policies, as was the case with the Copenhagen criteria.[492] These criteria, that integrated, among other, concerns of human rights and democracy for the enlargement process, have now become relevant for 'internal use', and according to a widely discussed proposal, should have their own commission.[493] While conditionality can contribute to achieving certain goals, it might pose problems to the more direct goals of international aid, as it challenges long-term reliability – due to the very fact of conditionality – that is necessary for adequate implementation.[494]

Various principles and values can continue to coexist with a coherent and efficient common foreign policy, but the fact that there is no one vision can impede many efforts. This raises the question of need for a truly political leadership that many advocate, but takes us beyond the realm of foreign policy.[495] One should not forget that the various instruments should make up one whole, the foreign policy of the EU, creating a perspective and the right incentives for the targeted countries and their leadership. Actions (or lack thereof) that go against the stated values and principles of the EU damage its legitimacy, credibility and, as a consequence, its identity. This is how what is called (internal) 'democratic deficit' (see earlier) is linked to the challenges of the EU's international presence.[496]

Taking the inconsistency argument seriously, we can apply an approach originally carved out to address internal policies, and use it to present and categorise foreign policy instruments, also exemplifying how the spill-over effect works, using an element developed in one policy area and apply it somewhere else. The inconsistency argument as applied to the use of foreign policy tools and instruments implies that there should be some universality to how and when the EU makes use of the various devices. Action or non-action should, accordingly, be based on some consistent evaluation of the underlying reality, the events in the target countries.

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[492] ibid 209–210.

[493] Jan-Werner Müller, 'What, if Anything, is Wrong with a Copenhagen Commission? The Idea of Democracy Protection in the EU Revisited' Transatlantic Academy Analysis (2013) <http://www.transatlanticacademy.org/sites/default/files/publications/Mueller_CopenhagenCommission_Jul13.pdf> and see chapter IV.A.

[494] Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appriasal* (Cambridge University Press 2008) 450.

[495] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 212. For a proposal to politicise the Commission in this sense see e.g. Müller (2013).

[496] Sonia Lucarelli and Ian Manners, 'Conclusion' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 211.

2. Making the use of instruments consistent: External and internal policies

One of the main questions that arises is whether one can find any inconsistency between external and internal policy tools and whether double standards exist. The comparison of foreign policy instruments with EU internal tools regarding the Member States is particularly important in this regard, because all internal (i.e. tools regarding EU institutions and member states) and foreign policy tools and instruments should be compatible with the values of the European Union (Article 2 TEU) and with one another, as well as the human rights policy of the European Union should itself be consistent. The above mentioned Article 21-1 TEU states that 'the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms.'

An analysis of foreign policy instruments and tools regarding the member states based on the same categorisation helps the examination of the functioning of the concept of democratic rule of law with fundamental rights, the evaluation of the EU human rights policy, as well as the comparison of the various instruments and the understanding of their functions. In what follows this report will bring examples for the external policy instruments and Member State policy instruments based on the threefold methodology of monitoring, evaluation and benchmarking, supervision.[497] The fact that these instruments are targeted mainly at member states and third countries, and not at the institutions of a supranational organisation will facilitate the comparison.

Sometimes there is also some overlap between internal and external policy instruments in the European Union. E.g. external instruments supporting the social inclusion of Roma primarily focus on candidate countries. The report Deliverable 12.1 states in this regard that 'DG Enlargement is of the opinion that the Framework for National Roma Integration Strategies is also relevant for candidate countries, as many of the integration goals will also be applicable to them.'[498]

The external human rights policy of the European Union is stronger in fields where the level of the protection is high at the European regional (CoE), at the EU and at the national level. An example for this could be the abolition of the death penalty which is protected by European and Member States regulation. It is no wonder that the policy on the abolition of the death penalty emerges in a wide range of political instruments: in the fields of guidelines,[499] financial instruments,[500] and country reports. Another example for the higher level protection could be the protection of vulnerable groups. Promoting equality has a strong legal basis in Member States regulations and in the European primary and secondary law. Both in internal and external policy instruments the EU focuses on protecting persons who belong to vulnerable groups (e.g. children, women, LGBT persons). These types of policies can lead to a better level of coherence between external and internal policies.

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[497] Sergio Carrera, Nicholas Hernanz and Elspeth Guild, 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism, Study for the European Parliament PE 493.031' (2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf>.

[498] See Detlev Boeing, 'Roma Policy in the Enlargement Context'(European Commission Enlargement DG) Slide 17 <http://romadecade.org/cms/upload/file/9347_file13_roma-policy-in-the-enlargement-context.pdf>

[499] Council of the European Union, Guidelines on Death Penalty, Common Guidelines, Brussels, 12 April 2013, 8416/13EU, adopted in 1998, updated in 2001, 2008 and 2013.

[500] Regulation 235/2014 of the European Parliament and of the Council establishing a financing instrument for democracy and human rights worldwide, 11 March 2004, OJ L77/85, art 2.1.(b) (i).

a) *Supervision, monitoring, evaluation and benchmarking*

The promotion of human rights, democracy and the rule of law will then require, above all, the monitoring of these principles, their application in third countries, likening it in principle to an Article 7 TEU procedure. Carrera, Hernanz and Guild mapped the existing EU legal and policy instruments assessing or monitoring the rule of law, democracy and fundamental rights-related issues of Member States. [501] The authors group instruments into three main categories. These types are: 1) supervision, 2) monitoring, 3) evaluation and benchmarking.

Supervision implies constant monitoring of a system based on European law or international conventions. The supervising actor can induce changes in the supervised system if it has a strong legal basis.

It is not the goal of this study to deal with the supervision mechanisms of the Union institutions and with the issue whether a democratic deficit exists on the level of the Union. At the present level of institutionalisation judicial control could be enough for supervision (the Court of Justice can annul legal rules that are contrary to primary law). It is more useful to compare foreign policy supervision instruments with the only supervision instrument of systematic deficiencies of the Member States (Article 7 TEU), protecting the fundamental values of the EU and the Member States from systematic deficiencies in a Member State.[502] (The proceeding for failure to fulfil an obligation before the Court of Justice under Article 258 of the Treaty on the Functioning of the EU was not constructed for systematic deficiencies. This latter statement is also true for human rights conditionalities, the Union has recently had the possibility of applying ex ante equality conditionalities in ensuring access to European funds. Regulation No 1303/2013 mentions among general conditionalities (Part II of Annex XI) anti-discrimination, disability and gender.)[503] Article 7 TEU is very similar to Article 8 of the Statute of the Council of Europe, the sister organisation and because of this fact Article 7 TEU seems to have the peculiarities rather of an instrument of international law than those of an instrument of European law. The nuclear option (strongest sanction, i.e. suspension of membership rights) has never been used in practice. What is more, according to some scholars Article 7 was not constructed for use, it has more of a symbolic meaning.[504] This supervision instrument is not suitable to serve as an efficient institution of militant democracy and protect the supranational organisation from the democratic deficit of the Member States.

Article 7 TEU is a weak instrument of supervision of the 'democratic rule of law with fundamental rights' concept in relation to the Member States, but the EU has relatively strong and structured supervision instruments to step up in defence of the democratic rule of law with fundamental rights concept in its foreign policy, e.g. humanitarian intervention, pre-accession conditionality (ratification of human rights

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[501] Sergio Carrera, Nicholas Hernanz and Elspeth Guild, 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism, Study for the European Parliament PE 493.031' (2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf>.

[502] Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. COM (2014) 158 final

[503] See, e.g. 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 Deliverable 3.2 (forthcoming).

[504] See the summary of these opinions Bogdandy, Antpöhler, Carlino, Dickschen, Hentrei, Smrkolj, Kottmann (2012) 54.

treaties, compliance, e.g. cooperation with the ICTY), human rights clauses in international trade agreements. These instruments were constructed for usage and they are really instruments of foreign policy. This is a problem of consistency and implies a double standard at the level of the EU instruments. (See also the double standards identified in Chapter II.A, in the field of trade relations, sanctions, recognition and the protection of national minorities.)[505] This discrepancy clearly appears in the field of enlargement policy where the EU has really strong instruments to supervise the human rights conditionality in the candidate countries. (See IV.C.2.a - i)

Monitoring provides data and periodically reports on a situation, 'the state of a system' with weak legal foundations. After a systematic analysis the evaluation (entailing the collection of data and the analysis of information) can make non-binding recommendations. Benchmarking, on the other hand, is an evaluation technique, involving 'the continuous and systematic search for and implementation of best practices.'[506]

In relation to Member States the EU has also developed policy instruments for the protection of the rule of law, fundamental rights and democracy to gather information and establish a communication forum about the human rights issues of the Member States. Policy instruments help the European Union evaluate, benchmark and monitor the state of democratic rule of law with fundamental rights in Member States.[507]

Policy instruments comprise the following evaluation and benchmarking instruments regarding the Member States: the EU Anti-Corruption Report (which reports on the situation in each Member State),[508] the EU Justice Scoreboard,[509] the Cooperation and Verification Mechanism for Bulgaria and Romania.[510] The Union also has annual reporting processes for monitoring Member States' developments.[511.]Among the foreign policy instruments one can name the following human rights specific tools: Human Rights Dialogues and consultations with countries (e.g. with China) or international organisations (e.g. with the African Union), or reports, statements on human rights issues (European Parliament, Council), suspension clause for accession negotiations with candidate countries (see in detail IV.C.2.e), rule of

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[505] Jan Erik Wetzel Foreword, in *The EU as a "Global Player" in Human Rights?,* ed. by Jan Erik Wetzel, (Routledge 2011), 12-13.

[506] Jan Niessen and Thomas Huddleston, 'Setting Up a System of Benchmarking to Measure the Success of Integration Policies in Europe' (Policy Department C Citizens' Rights and Constitutional Affairs, European Parliament PE 378 2007) 288.

[507] See, e.g. Sergio Carrera, Nicholas Hernanz and Elspeth Guild, 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism, Study for the European Parliament PE 493.031' (2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf>.

[508] Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report Brussels, COM(2014) 38 final <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm>.

[509] The EU Justice Scoreboard is an information tool which providing data on the quality, independence and efficiency of justice systems in all Member States. <http://ec.europa.eu/justice/effectivejustice/scoreboard/index_en.htm>.

[510] 'The Commission reports under the Cooperation and Verification Mechanism every 6 months on progress with judicial reform, the fight against corruption and, concerning Bulgaria, the fight against organised crime' <http://ec.europa.eu/cvm/progress_reports_en.htm#thirteen>

[511] The European Commission's Annual Report on the Application of the Charter of Fundamental Rights of the EU, The European Parliament's Annual Report on the Situation of Fundamental Rights in the EU, EU Fundamental Rights Agency's Annual Report on the Situation of Fundamental Rights in Member States, European Ombudsman Annual Report, Annual Reports by the European Anti-Fraud Office.

law/human and minority rights enlargement instruments of benchmarking (see in detail IV.C.2.e and f). From among foreign policy monitoring instruments the EU's Annual Report on Human Rights and Democracy in the World could be an example for monitoring activities, or monitoring, e.g. the Copenhagen criteria for enlargement. (see in detail IV.C.2.h)[512]

Even justified criticism of third countries, on the part of the EU, can be undermined if a comparable or worse situation is present within the Union. This is a clear problem of consistency and implies a double standard at the level of the EU instruments. With respect to the participation of women in political life in Pakistan, for example, there are 66 female members of Parliament, amounting to 19.3% of the seats.[513] It is true that the number of women elected to the National Assembly is only 6 (2%),'[514] but there are also 60 reserved seats in Pakistan. The European Union Election Observation Mission thus included a series of recommendations to increase the number of women in political life, including parliamentary representation.[515] However, in certain Member States the number of female MPs is lower, e.g. in Hungary this ratio is only 10 percent, yet, EU critics fail to focus on this issue.

The EU institutions discuss important issues and make recommendations in policy instruments, which, however, are not binding and since they do not lead to sanctions these instruments can be effective only where states have the intention to communicate and change policy and legislation. But without the support of legal instruments these policy instruments are not enough in themselves in cases where on behalf of the member state there is no will for substantial dialogue with the European Institutions. Normative impact then is dependent on the will of the target countries to engage in substantial dialogue. It has been argued that 'the cases of Syria, Ukraine and Kosovo suggest that the EU can have a normative impact even when either its goals or policy means are not normative.'[516]

To sum up, the European Union pays attention to human rights in Member States and in the world, instruments inducing changes, however, exist in the field of foreign policy (because of the wider list of applicable supervision instruments) rather than in the policy regarding Member States.

D. Conclusion

This chapter has dealt with foreign policy tools and instruments with special regard to their possible role in human rights promotion. It was written mainly with the aim to find a link among the theoretical questions (analysed in detail in the earlier chapters) and typologies, relations and general description of foreign policy instruments.

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[512] European Union, 'Annual Report on Human Rights and Democracy in the World in 2013' <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011107%202014%20INIT> (accessed 21 December 2014).

[513] 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 Deliverable 3.2 (forthcoming).

[514] European Union Election Observation Mission, 'Pakistan 2013. Promote the Participation of Women. Recommendations' <http://www.eueom.eu/files/pressreleases/english/eu-eom-pakistan-2013-final-report_en.pdf> 6.

[515] ibid 37-43.

[516] Nathalie Tocci and (with case studies by:) Hakim Darbouche, Michael Emerson, Sandra Fernandes, Ruth Hanau-Santini, Gergana Noutcheva and Clara Portela (2008) The European Union as a Normative Foreign Policy Actor, CEPS Working Document No. 281, January 2008, Centre for European Policy Studies, 30 <http://aei.pitt.edu/7582/1/Wd281.pdf>(accessed 21 December 2014).

Consistency and efficiency can tell the most about the use of foreign policy instruments. Consistency deserves special attention as its lack undermines the credibility and efficiency of the EU's engagement in third countries and its promotion of human rights. Therefore the often interrelated inconsistencies are worth being considered by decision makers since they have consequences on policy outcomes, thus they should be looked at in more detail. The chapter concluded that only a better coherence - among foreign policy instruments and between internal and foreign policy instruments and their coherent use - could make the human rights goals of the EU foreign policy more effective. Although the EU has less influence in the world than China or the US, but its foreign policy in the field of human rights promotion could be more consistent due to the fact that its member states have accepted more universal human rights instruments than other powerful players.

The chapter has sought to support the regional case studies of bilateral relations, the next phase of Working Package 6, and provide those studies with a theoretical and analytical framework - through the typologies, mapping, analysis of foreign policy instruments. When case studies examine the tools and instruments used in relation to the various countries (e.g. Western Balkans, ACP countries, or China, India, South Africa and the US) the theoretical framework will contribute with new standpoints to the discussion on values, consistency and different standards (e.g. to examining the place of human rights among the EU's external relations priorities; inconsistencies between the EU's rhetoric and action; inconsistencies in the treatment of third countries; inconsistency as fragmentation across levels and institutions).

The following chapter focuses on enlargement policy and maps current enlargement instruments and their role in the promotion of human rights. The enlargement policy is set on the boundary between EU external and internal policies, allowing for questions of coherence, consistency and efficiency to be discussed from this viewpoint.

IV. Instruments for the promotion of human rights in EU enlargement policy

A. Introduction

> The best-known application of human rights in the external context concerns accession of new Member States.[517]

The following text will take a closer look at EU enlargement policy and give an account of how the instruments particular to this policy field are specifically used for the promotion of human rights. Enlargement policy is given special attention not only because it is set at the boundary between EU external and internal policies, allowing for questions of coherence and consistency to be discussed from this particular angle. What is more, enlargement policy discourse and practice over the last two decades have played a significant part in shaping the EU's human rights policy. As Sedelmeier points out with regard to the 5th enlargement round with 12 new Member States acceding in 2004 respectively 2007, the EU's so-called eastern enlargement served as a key source for the development of the EU's role as promoter of human rights and democracy, thus forming the EU's identity in this respect: 'EU policy-makers not only set compliance with the principles of human rights and democracy as membership conditions for candidate countries, but articulated and institutionalized them as characteristics of the EU's collective identity'.[518] While Sedelmeier argues that this identity formation process induced by enlargement practice had effects on the broader EU human rights policy both internally and in external relations,[519] the focus of the present text will remain on enlargement policy as such, in which the promotion of human rights, democracy and the rule of law have gained even more prominence in the accession processes since 2007. Whether this is the result of a strengthened EU identity as promoter of human rights or whether in turn this development is a specificity of enlargement policy which – maybe unintentionally – continues to shape the pertinent role of the Union, i.e. whether enlargement policy should be considered the dependent or the independent variable[520] will be left unaccounted for in this paper (even though it is assumed that it is most likely a two-way process[521]). The following sections will firstly sketch how enlargement policy has evolved over the last twenty years in terms of placing growing importance on human rights, with emphasis being put on the period since 2007; and secondly, as the result of a mapping exercise, relevant instruments currently applied within the enlargement framework will be discussed in more detail, also in view of the fact that a number of instruments developed in enlargement policy have been taken over to other EU policy fields or have potential to be so.[522]

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[517] Jan Erik Wetzel 'Foreword' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 10.

[518] Ulrich Sedelmeier 'The EU's Role as Promoter of Human Rights and Democracy: Enlargement Policy Practice and Role Formation', in Ole Elgström and Michael Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (Routledge 2006) 118.

[519] ibid 120.

[520] Ulrich Sedelmeier 'EU Enlargement, Identity and the Analysis of European Foreign Policy: Identity Formation through Policy Practice' (EUI Working Papers RSC No. 2003/13 European Forum Series) 2.

[521] Christophe Hillion 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (Swedish Institute for European Policy Studies *European Policy Analysis*, issue 2013) 13. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[522] Compare e.g. a number of instruments of the European Neighbourhood Policy having been modelled on enlargement tools on the one hand, and on the other hand the initiative taken by the European Commission in March 2014 for a new internal rule of law mechanism including certain elements of benchmarking and monitoring, which constitute key instruments in the pre-accession context (see Communication from the Commission to the

B.   Human rights developing into a key area in EU enlargement policy

As has been pointed out amply in both enlargement and human rights literature[523] , the last twenty years of EU enlargement policy have been characterised by human rights promotion becoming a more and more prominent topic in the association and accession processes of the enlargement countries. In comparison to previous enlargements of the Union, human and minority rights came to play an unprecedentedly important role in the 5th enlargement round with Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Malta, Hungary, Poland, Slovakia and Slovenia joining the EU in 2004 and Bulgaria and Romania acceding in 2007. Since then, regular reviews of the enlargement strategy and structural changes in the policy framework have made human rights into a central factor in accession negotiations, which is also reflected in a more pronounced EU enlargement discourse: 'Respect for the rule of law, democratic principles and human rights remain the focal point of the enlargement process'.[524] While this development towards an increasingly stricter scrutiny in terms of compliance with human rights and democratic standards could already be observed during the accession process of Croatia, becoming the 28th Member State in 2013, it holds all the more true for the present candidate and potential candidate states.[525] Before turning to their status quo and the currently applicable policy framework, however, it is worth going back in time and giving a short overview of the described evolution since the early 1990s.

1.   Enlargement policy 1993-2007 (5th EU enlargement)[526]

It was the European Council held in Copenhagen in June 1993 that constituted the crucial starting and reference point of the accession process of the Central and Eastern European Countries (CEEC). At this meeting the Council not only formally provided the CEEC with an accession perspective, but also formulated certain requirements to be fulfilled by a respective country prior to accession. These 'Copenhagen criteria' comprise (besides economic pre-conditions and the ability on the 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'.[527] These criteria became the reference framework for EU human rights policy in the enlargement context for all candidate countries since 1993.[528] Given the vagueness of these

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European Parliament and the Council – Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 158 final.

[523] See e.g. Ulrich Sedelmeier 'The EU's Role as Promoter of Human Rights and Democracy: Enlargement Policy Practice and Role Formation', in Ole Elgström and Michael Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (Routledge 2006) and Ulrich Sedelmeier 'EU Enlargement, Identity and the Analysis of European Foreign Policy: Identity Formation through Policy Practice' (EUI Working Papers RSC No. 2003/13 European Forum Series).

[524] Commission 'The European Union explained: Enlargement, Luxembourg: Publications Office of the European Union' 12. <http://europa.eu/pol/pdf/flipbook/en/enlargement_en.pdf> (accessed 20 December 2014).

[525] As of 1 October 2014, Albania, Iceland, Macedonia, Montenegro, Serbia and Turkey are candidate countries while Bosnia and Herzegovina and Kosovo are potential candidate countries.

[526] This section builds on Susanne Fraczek 'Human Rights and the EU Enlargement Policy', in Manfred Nowak, Karolina Miriam Januszewski and Tina Hofstätter, (eds), *All Human Rights for All. Vienna Manual on Human Rights* (NWV Verlag 2012) 204-209.

[527] European Council 'Copenhagen European Council, 21 and 22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1' 13. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72921.pdf> (accessed 20 December 2014).

[528] While the Copenhagen Criteria explicitly determined the respect for human rights as a pre-condition for membership for the first time (followed in 1997 by the Treaty of Amsterdam, see chapter III.B.1), certain human rights requirements have – at least indirectly- also been of relevance for previous enlargement waves, notably the

requirements, however, it rested with the European Commission as main EU actor in the accession process to specify them further over the following years, also through dialogue with the enlargement countries. EC enlargement practice and discourse hence significantly shaped the role of human rights in enlargement policy, in particular through the EC's task of assessing the human rights situation in a given country and recommending to the Council whether accession negotiations should or should not be opened as well as its later monitoring tasks throughout the accession process. It can be said that enlargement practice, while not always developing consistently, put human rights more and more on the agenda and has framed the applied principle of conditionality[529] in this sense. Enlargement-specific political conditionality, which links EU membership – or to be more precise, the start of accession negotiations[530] – to compliance with the Copenhagen criteria as outlined above, takes the form of positive conditionality, i.e. promoting the fulfilment of the conditions through providing incentives and rewards. Next to and in combination with political dialogue and aid programmes, the principle of conditionality has turned out as an effective tool for human rights promotion in the enlargement countries, as will be further elaborated on in section IV.C.2.a.

An important step in this development was the definition of a pre-accession strategy by the European Council in Essen in 1994 as a pro-active approach towards steering the accession process, notably the harmonisation of national legislations with the *acquis communautaire*, forming the core of conditionality. As a key element this strategy foresaw important financial aid through the PHARE programme, whose main focus lay on legal approximation as well as institution- and capacity-building within the public sector, but also comprised specific funds directly dedicated to the promotion of democracy. Moreover, functioning public institutions are of course in turn necessary for the protection and enforcement of human rights, meaning that the significance of PHARE assistance with regard to human rights promotion should not be underestimated.

Following the publication of the European Commission's Opinions on the membership applications of the ten CEEC in July 1997 (as part of its Agenda 2000), in which it had assessed their compliance with the Copenhagen criteria, the European Council of Luxembourg in December of the same year decided to open accession negotiations with the Czech Republic, Estonia, Hungary, Poland and Slovenia as well as Cyprus. The other five CEEC candidate countries (Bulgaria, Latvia, Lithuania, Romania, Slovakia) had to

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southern enlargement of the 1980s (Greece, Spain and Portugal). These requirements were set out in the conclusions of the 1978 European Council in Copenhagen, containing the 'Declaration of Democracy', which inter alia read: "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European communities" (European Council 'Copenhagen European Council, 7-8 April 1978, Conclusions of the Presidency' 13. <http://www.european-council.europa.eu/media/854616/copenhagen_april_1978__eng_.pdf> (accessed 20 December 2014). Directed primarily towards the Member States, it can be argued that this declaration also 'aimed at underlining the EEC's consistent attitude to potential Members' (Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 208). See also Ulrich Sedelmeier 'The EU's role as promoter of human rights and democracy: enlargement policy practice and role formation', in Ole Elgström and Michael Smith (eds), *The European Union's Roles in International Politics: Concepts and analysis* (Routledge 2006) 123.

[529] Generally, conditionality signifies a strategy to make cooperation or aid dependent on certain conditions, thus promoting fulfilment of these conditions.

[530] This was clarified by the European Council in Luxembourg in December 1997, agreeing that "[c]ompliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations", while the other criteria were to be assessed "in a forward-looking, dynamic way" (European Council '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 20 December 2014).

wait until 1999 when the opening of negotiations with them was agreed on by the European Council in Helsinki (as was the case for Malta after re-activating its application in 1998). The reasons why the latter countries had not been included among the 'Luxembourg Six' were to a large part non-compliance with the economic criteria and lack of administrative capacity, yet the political criteria and with them fundamental and minority rights also played a role. This was in particular the case for Slovakia under the Meciar regime which was criticised for instability of its state institutions, the problematic role of the police and secret service and its unsatisfactory minority policy.[531] Insufficient compliance with the political criteria also hampered Turkey's moving closer towards accession in 1997, after having submitted an application for EU membership already in 1987 and hoping for candidate status. In its Agenda 2000 the EC concluded that 'Turkey's record on upholding the rights of the individual and freedom of expression falls well short of standards in the EU'.[532] With the European Council following the EC's assessment (and despite last minute legislative action by the Turkish government in the field of policing), Turkey did not obtain candidate status at the 1997 summit, but had to wait for the Helsinki summit in 1999 to do so.[533]

The Luxembourg European Council 1997 furthermore agreed on an enhanced pre-accession strategy as suggested by the EC in the Agenda 2000, which brought a number of significant innovations. The core elements of this intensified strategy were the bilateral Accession Partnerships (APs) as new tools defining short- and medium-term priorities for reform as well as the corresponding assistance through significantly increased EU funds, above all PHARE. The APs, forming thus as EU instruments (Council decisions) the framework for a country's accession process, were to be complemented by National Programmes for the Adoption of the Acquis (NPAAs), further breaking down the priorities and obligations on part of the respective candidate country in terms of time and resources. Together these documents 'formed a legal matrix',[534] binding both the EU and the candidate country as well as building the basis for the yearly programming of EC assistance. The APs were to be reviewed and amended by the EC on a regular basis, taking into consideration progress made by the candidate country and changes in the priorities.

The enhanced pre-accession strategy of 1997 foresaw as another important novelty the EC's monitoring of each country's performance in light of both the Copenhagen criteria and the individual APs through publishing Regular Reports (after 2004 taking the name of Progress Reports respectively Monitoring Reports). The structure of these annual reports was adapted over the time to also take into account the list of the negotiation chapters the *acquis communautaire* was split into[535] and to assess the implementation of reforms along these lines. In drafting these reports the EC gave and gives

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[531] See European Commission 'Agenda 2000 – Commission Opinion on Slovakia's Application for Membership of the European Union, DOC/97/20' 126. <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/slovakia/sk-op_en.pdf> (accessed 20 December 2014).

[532] European Commission (1997a) 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 20 December 2014).

[533] See also Merzuka Selin Türkeş 'Human Rights in the European Union's Foreign Policy. Universal in Discourse, Flexible in Practice' (RECON Online Working Paper 2011/21) <http://www.reconproject.eu/main.php/RECON_wp_1121.pdf?fileitem=50512032> (accessed 17 October 2014); Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 92.

[534] Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 292.

[535] The list of negotiation chapters was also changed gradually, from originally 29 (see Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 248) to currently 35 chapters.

considerable room to the political criteria, drawing not only on its own observations (mainly through its Delegations on the ground), but also considering findings by other international organisations or NGOs. Turkey, even though until 1999 not formally participating in the enlargement process, was subject to EC monitoring already from 1998 on, especially regarding progress towards the Copenhagen political criteria. On the whole, the regular monitoring carried out by the EC since 1998 has been met with some criticism not only from within the candidate countries, but also academically. The strengths and weaknesses of EC monitoring as an enlargement-specific instrument will be looked at in more detail in section IV.C.2.h.

On the level of pre-accession assistance, another new instrument introduced by the enhanced pre-accession strategy and taken up into the annual aid programmes from 1998 on was Twinning. Twinning stands for bringing together institutions from a Member State and a candidate country in bilateral partnership projects in order to support the latter in transposing the *acquis* as well as in institution-building. Applied across the whole spectrum of the *acquis* and becoming a central instrument of enlargement policy, Twinning also took on an important role in promoting democratic standards, rule of law and human rights in a practical, tailored and result-oriented manner. Through an elaborated reporting mechanism the results of Twinning projects could and can be directly taken into consideration by the EC in elaborating its Regular Reports. Turning full circle, the findings and recommendations contained in the Reports could lead to amendments of the APs, as outlined earlier, which would then be reflected in the programming of EU aid again. Criticism has also been voiced on a lack of coherence in this context, which will be illustrated in section IV.C.2.i.

Following, yet in parts already parallel to the 5th enlargement round in 2004 and 2007, further reviews of enlargement policy have led to even more emphasis being put on compliance with the political criteria and notably human and minority rights standards. These changes affecting the accession processes of the Western Balkans' enlargement countries, Turkey (and Iceland) in various ways will be traced in the next section.

2. Enlargement policy since 2004/2007

After the accession of the ten New Member States Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia on 1 May 2004, the European Council in Brussels in December 2004 not only concluded the negotiations with Bulgaria and Romania, [536] which had not been possible two years earlier, not least due to outstanding judicial and administrative reforms.[537] The Council at that point also decided to start accession negotiations with Turkey and Croatia, the latter holding candidate status since June 2004,[538] yet it was not before 3 October 2005 that the negotiations

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[536] Bulgaria and Romania became Members of the Union three years later on 1 January 2007, after having been subject to close monitoring during this period, in particular in the area of Justice and Home Affaires (see European Council 'Brussels European Council, 16 and 17 December 2004, Presidency conclusions, 16238/1/04 REV' 2 and 3 and the safeguard clauses Art. 37 and 38 Act of Accession for Bulgaria and Romania <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf> (accessed 20 December 2014). Both countries are still subject to post-accession monitoring, see IV.C.2.f.

[537] See European Council 'Copenhagen European Council, 12 and 13 December 2002, Presidency conclusions, 15917/02' <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/73842.pdf> (accessed 20 December 2014).

[538] See European Council 'Brussels European Council, 16 and 17 December 2004, Presidency conclusions, 16238/1/04 REV 1' 4 and 6. <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf> (accessed 20 December 2014).

with both countries were officially launched. In the case of Croatia this was due to the Council not seeing sufficient cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), which it had set as a pre-condition for negotiations to be opened.[539] Drawing on experience gained through the 5th enlargement round, the policy framework has been further developed in a number of ways since 2004. As Hillion argues, '[t]he fundamental rights dimension of the pre-accession strategy has developed strikingly since the "big bang" enlargement of 2004' and '[t]he start of accession negotiations with Croatia and Turkey was a milestone in this respect'.[540]

From the human rights perspective, the crucial novelty in the accession processes of Croatia and Turkey (and ensuing, Macedonia, Montenegro, Iceland and Serbia[541]) was the creation of the specific negotiation chapter 23 'Judiciary and fundamental rights'[542] which as such had not existed in the previous negotiations. With Turkey having so far not come to the point of opening negotiations on chapter 23, Croatia was the first country to negotiate on it. Being given great attention not only by the EC, but also by the Member States, also with regard to Croatia's position on the prosecution of war crimes, chapter 23 became crucial for Croatia's entire accession process and was subject to particularly close monitoring by the EC.

Also, a new methodology for carrying out the negotiations was established in 2005 by following a two-stage approach and introducing benchmarking into the negotiation procedure.[543] Following the logic of the – since that year – 35 *acquis* chapters, the first step is the so-called 'screening' during which the Commission together with the candidate state examines each negotiation chapter on the degree of preparedness of the candidate for accession. This formal process closes with the elaboration and adoption of screening reports for the respective negotiation chapters. As the case may be, the EC recommends to the Council to determine opening benchmarks before a given chapter can be opened for negotiations. Similarly, closing benchmarks are defined which have to be achieved in order to finalise negotiations within the respective chapter. How this benchmarking mechanism is applied in the field of human rights will be looked into in section IV.C.2.e.

What was also very important from the human rights point of view was the introduction of specific suspension clauses in the Negotiating Frameworks with Croatia and Turkey in 2005. In line with the Conclusions of the Brussels European Council of December 2004, which '[took] account of the

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[539] See European Commission 'Croatia 2005 Progress Report' COM (2005) 561 final 3. <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1424_final_progress_report_hr_en.pdf> accessed 20 December 2014

[540] Christophe Hillion 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (Swedish Institute for European Policy Studies *European Policy Analysis*,issue 2013) 4. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[541] Albania, which was granted candidate status in June 2014, is still at a very early stage of the accession process, so that a Negotiating Framework has not been elaborated for it so far (see procedure under III.B.5). Yet, it is more than likely that the current layout of the negotiation chapters will be kept for Albania, too.

[542] The use of the terms 'fundamental rights' human vs. 'human rights' is, as underlined by Hillion 'somewhat patchy' (Christophe Hillion 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (Swedish Institute for European Policy Studies European Policy Analysis, issue 2013) 2. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014)), not only, but also in enlargement policy, which can be traced throughout policy documents. The Copenhagen Criteria speak of human rights as do the Accession Partnerships and Negotiating Frameworks, while the term fundamental rights is used when there is a direct reference to the *acquis*. The Screening Reports on chapter 23, on the other hand, use both terms simultaneously. This report will mostly stick to the term human rights as the broader notion.

[543] See Negotiating Frameworks for Croatia and Turkey.

experience of the fifth enlargement process',[544] these clauses provide the possibility of negotiations to be suspended '[i]n the case of a serious and persistent breach in [the respective candidate country] of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded'.[545]

In its meeting of December 2006 the European Council agreed on a renewed consensus on enlargement as outlined by the Commission in its Enlargement Strategy of the same year. This renewed consensus was based on three principles: consolidation of existing commitments towards candidate countries, strengthening of conditionality which is to be applied in a 'fair and rigorous' way, and intensified communication with the public, i.e. increasing transparency.[546] The strict application of conditionality agreed on at this point paved the way to further emphasis being put on rule of law issues, which could be observed in the Enlargement Strategy of 2009: 'In line with the renewed consensus on enlargement and taking into account experience from the fifth enlargement, the rule of law is a key priority which needs to be addressed at an early stage of the accession process'.[547]

Carrying this idea forward, the Commission in its Enlargement Strategy of 2011 suggested a new approach with regard to the negotiation chapters 23 and 24 ('Justice, Freedom & Security'): 'These should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records' (European Commission 2011, 5). Having been endorsed by the Council in December 2011, this new approach became manifest in the Negotiating Framework with Montenegro adopted in June 2012.[548] It laid out not only that chapters 23 and 24 shall be opened at the very beginning of negotiations and closed last, thus treating them with even more attention, also allowing for sufficient time for reforms to be carried out.

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[544] European Council 'Brussels European Council, 16 and 17 December 2004, Presidency conclusions, 16238/1/04 REV 14' 6. <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf> (accessed 20 December 2014).

[545] European Council 2004, 8; Negotiating Framework with Croatia, point 12; Negotiating Framework with Turkey, point 12. The Negotiating Frameworks with Iceland (2010), Montenegro (2012) and Serbia (2014) do contain an almost identical suspension clause, with the exception that instead of 'the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded' they speak of 'the values on which the Union is founded' (see Negotiating Framework with Iceland of 26 July 2010, 7; Accession Document 23/12, 9; Accession Document 1/14, 9). This can be explained by the fact that these later Frameworks have been elaborated after the Treaty of Lisbon came into force, through which the reference to the EU founding values suffices to arrive – via Article 49 TEU in combination with Article 2 TEU – at the even more refined meaning of 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. For the sake of clarity and explicitness, it could be recommended to include this wording directly into the suspension clause of a given Negotiating Framework.

[546] European Commission 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2006-2007' COM (2006) 649 final 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf> (accessed 20 December 2014).

[547] European Commission 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2009-2010' COM (2009) 533 5. <http://ec.europa.eu/enlargement/pdf/key_documents/2009/strategy_paper_2009_en.pdf> (accessed 20 December 2014).

[548] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union ' 23/12 (Brussels, 29 June 2012) <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 20 December 2014). Montenegro had been awarded candidate status in December 2010. See Conclusions of the European Council, 16-17 December 2010, 3. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf> (accessed 20 December 2014).

As an innovation, it furthermore stipulated interim benchmarks to be defined for these two most challenging chapters at the time of opening negotiations on the chapters respectively. These interim benchmarks have to be fulfilled before closing benchmarks can be set at a later stage of the negotiations, with the purpose of enhancing and tracing the actual implementation of reforms in a more systematic way. For chapters 23 and 24 the Framework also foresees the possibility that these benchmarks be amended during the negotiation process or other 'corrective measures, as appropriate'[549] be taken. Another novelty established in this Negotiating Framework and of relevance in the area of human rights is that – next to the safeguard clause allowing for suspension of negotiations in serious cases of non-compliance, as outlined above – a further provision has been added that aims at keeping a balance in the advancement of negotiations and avoiding that progress in the field of chapters 23 and 24 lags behind. For this purpose a special suspension clause has been introduced foreseeing that negotiations on other chapters can be slowed down or stopped, should there be problems in the rule of law area, including fundamental rights.[550] As Hillion has put it, '[p]rogress in the areas of judiciary and fundamental rights has thus become the keystone of the advancement of the entire accession process'.[551] This is supported by the fact that the new approach also entails an intensified monitoring by the Commission which is tasked with reporting to the Council on progress within chapters 23 and 24 twice a year.[552] Finally, greater transparency and inclusiveness of the accession process also form part of the principles governing this new approach.[553]

'[A]nchoring the rule of law at the centre of the accession process and laying the foundations also for future negotiations', as outlined by the Commission in 2012,[554] the new approach – applied for the first time on Montenegro – is now also reflected in the negotiations with Serbia taken up in January 2014.[555]

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[549] Accession Document 23/12, 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union ' 23/12 (Brussels, 29 June 2012) 17. <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 20 December 2014).

[550] See ibid 11.; Wolfgang Nozar *The 100% Union: The rise of Chapters 23 and 24* (Clingendael Netherlands Institute of International Relations August 2012) 4. <http://www.clingendael.nl/publication/100-union-rise-chapters-23-and-24> (accessed 09 October 2014).

[551] Christophe Hillion 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (Swedish Institute for European Policy Studies *European Policy Analysis*, issue 2013) 7. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[552] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union ' 23/12 (Brussels, 29 June 2012) 17. <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 20 December 2014).

[553] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' COM (2014) 700 final 13. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014). The new approach to negotiations and the different tools applied under it are discussed in more detail in section IV.C.2.e.

[554] European Commission 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2012-2013' COM(2012) 600 final 4. <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> (accessed 20 December 2014).

[555] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union' 1/14 (Brussels, 21 January 2014) <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT   > (accessed 20 December 2014). Serbia has been a candidate country since March 2012 (see Conclusions of the European Council, 1/2 March 2012, 14 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/128520.pdf (accessed 20 December

Based on the EC's screening report for chapter 23 published in May, the preparations towards opening the chapter are currently under way, with action plans having to be elaborated as a pre-condition. What is new in the case of Serbia is that the normalisation of relations with Kosovo forms a special item in Serbia's Negotiating Framework, being specifically dealt with under chapter 35 and following the same – stricter – new approach regime like the rule of law chapters.[556]

Talking of specificities in the accession processes of particular countries, it has to be mentioned, too, that Commission-led initiatives have been established for Turkey, Macedonia and Albania since 2012. These take the form of a Positive Agenda in the case of Turkey, a High-Level Accession Dialogue with Macedonia (candidate country since December 2005) and a High-Level Dialogue with Albania, being since June 2014 the most recent candidate state. These targeted instruments will be described with regard to their human rights content in more detail in section IV.C.2.g.

Finally, the period since 2004 also saw another important development in enlargement policy, namely significant changes in the financial assistance landscape. Had the enlargement countries during the financing period 1999-2006 been benefiting from different, geographically structured financing instruments, from 2007 on EU enlargement funds have been delivered through the newly created, unified Instrument for Pre-accession Assistance (IPA). IPA replaced the previous aid programmes and has been supporting the beneficiary countries in institution-building and approximation to the *acquis*, with special focus being placed on the political criteria. With the new financing period 2014-2020, IPA II has become the current pertinent instrument, which 'increases focus on priorities for EU accession in [inter alia] the areas of democracy and rule of law'.[557] Also, in 2008 the EC set up a special Civil Society Facility (CSF) for the promotion of civil society development in the enlargement countries, inter alia in the field of human rights. More on financial assistance through IPA and IPA II can be found in section IV.C.2.i.

C.   Mapping: Current enlargement instruments and their role in the promotion of human rights

This chapter presents the results of a mapping exercise on instruments and tools developed in the context of the EU's enlargement policy, analysed in terms of their contribution to the promotion of human rights in the enlargement countries. This mapping has been carried out on the basis of primary and secondary sources, following a two-fold approach: on the one hand, general instruments of EU external human rights policy (see also chapter III) have been looked into as to their enlargement-related content, if any; on the other hand, enlargement-specific instruments have been assessed from the perspective of human rights promotion. The instruments discussed will be <u>marked</u> in the text for reasons of clearness and easy reference.

2014)), with the granting of this status having to a large extent depended on the country's cooperation with the ICTY.

[556] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union' 1/14 (Brussels, 21 January 2014) <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT> (accessed 20 December 2014).

[557] European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' COM (2014) 700 final 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

1. Enlargement in general human rights instruments

Before turning to the results of the latter endeavour in detail in the following sub-chapters, the findings of the examination of general instruments of EU external human rights policy shall be summarised here. Following up on the overall analysis in chapter III, it can be stated that enlargement policy is not given too much particular attention in the general human rights instruments, despite the high degree of human rights conditionality applied in this specific policy field. While the latest EU Annual Report on Human Rights and Democracy in the World on the year 2012 does briefly cover the candidate and potential candidate countries in its country reports part, making reference to both human rights as key elements of the Copenhagen criteria as well as being assessed in detail in the EC's annual Enlargement Package,[558] the EU Strategic Framework and Action Plan on Human Rights and Democracy from 2012 remain rather silent on enlargement. Under the heading of bilateral cooperation the Strategic Framework states that '[h]uman rights will remain at the heart of the EU's enlargement policy',[559] but the ensuing Action Plan does not contain any specific reference to it, apart from a footnote seemingly acknowledging the existence and antecedence of special arrangements in enlargement.[560] Yet, since these general instruments apply to human rights in external relations on the whole, they are of course also relevant reference frameworks for enlargement policy. This also goes for the various EU Human Rights Guidelines (see II.A.7.a), which as practical tools mainly directed towards EU delegations in the field could and should direct EU human rights policy also in the enlargement context. It was only lately, however, that enlargement policy has been distinctly included under the tools section of the 2014 EU Human Rights Guidelines on Freedom of Expression Online and Offline, explicitly mentioning instruments like political dialogue, Progress Reports, accession talks under chapter 23 and assistance through IPA II as well as civil society support in particular.[561] As regards the EU Special Representative for Human Rights

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[558] See Council of the European Union 'EU Annual Report on Human Rights and Democracy in the World in 2012' *(Country Report)*, Brussels, 21 May 2013, 9431/13, 7. <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209431%202013%20ADD%201%20REV%201> (accessed 14 August 2014). Some short references to enlargement policy / candidate countries are also contained in the thematic report part, in the context of women's rights, the protection of minorities, as well as consultations on human rights having taken place (see Council of the European Union 'EU Annual Report on Human Rights and Democracy in the World in 2012' (Thematic Report), Brussels, 13 May 2013, 9431/13 87, 112, 132. <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209431%202013%20INIT> (accessed 20 December 2014). In Annex I, the thematic report refers to EU pledges made at the high-level meeting on the rule of law at national and international levels held at the UN General Assembly on 24 September 2012, among which the intensification of the rule of law dialogue with the Western Balkans countries in their association and accession processes is also cited (see ibid 184).

[559] Council of the European Union 'EU Strategic Framework and Action Plan on Human Rights and Democracy' Luxembourg, 25 June 2012, 11855/12, 3. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> (accessed 20 December 2014).

[560] This footnote refers to the introductory remark to the Action Plan that '[i]t builds upon the existing body of EU policy on human rights and democracy in external action' and reads: 'Without prejudice to arrangements concerning candidate countries and potential candidates under the EU's enlargement policy' (Council of the European Union 'EU Strategic Framework and Action Plan on Human Rights and Democracy' Luxembourg, 25 June 2012, 11855/12, 5. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> (accessed 20 December 2014).

[561] See Council of the European Union 'EU Human Rights Guidelines on Freedom of Expression Online and Offline', Foreign Affairs Council meeting Brussels, 12 May 2014, 14. <http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf> (accessed 21 October 2014). The EU Guidelines on Death Penalty of 2013 contain a short reference, underlining, with regard to Article 2 of the EU Charter of Fundamental Rights, that '[a]bolition [of the

installed in 2012 (even though rather an institution than an instrument, see introduction to chapter III), his mandate is very broad and shall contribute to 'deepening Union cooperation and political dialogue with third countries, relevant partners, business, civil society and international and regional organisations and through action in relevant international fora'.[562] The research carried out into EU documents and information provided by the EU External Action Service could not establish in how far the Special Representative has set specific activities within the enlargement context. The nexus between the European Instrument for Democracy and Human Rights (EIDHR) and enlargement will be sketched in section IV.C.2.i.

2. Human rights in enlargement instruments

This chapter subsequently attempts to give an overview of the instruments as they are currently and specifically applied in enlargement policy with regard to how they enhance the promotion and protection of human rights in the partner countries. EU instruments used generally in external (human rights) policy – and thus also in relations with the enlargement countries – will not be covered here but in a subsequent case study on the Western Balkans (D6.2); this also includes instruments under the Common Security and Defence Policy applied in enlargement countries, as they do not constitute tools specific to enlargement policy. Likewise, being mechanisms deployed towards various countries, association and visa liberalisation processes are neither recorded here, even though they regularly involve human rights requirements to be met by the respective countries, e.g. in the case of the Stabilisation and Association Process with the Western Balkans.[563] While inter-linkages of these processes with the accession process evidently do exist, they have been set up with different objectives (i.e. conclusion of Stabilisation and Association Agreements respectively visa liberalisation) and do not directly aim at EU membership.

In depicting the relevant enlargement instruments, a certain logical sequencing and grouping is applied, with different tools under the sub-headings being marked in the text, yet this does not entail a weighting of any kind. Also, no particular typology developed in literature has been chosen to categorise the instruments. Even though Balfour's classification into positive, negative and conditional tools[564] provides a useful grid of 'carrots and sticks' deployed in external human rights policy (see III.A.3), it did not seem

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death penalty] is also a precondition for candidate countries seeking accession to the EU' (Council of the European Union 'EU Guidelines on Death Penalty' Brussels, 12 April 2013, 8416/13 COHOM 64 PESC 403 OC 213 4. <http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/guidelines_death_penalty_st08416_en.pdf> (accessed 20 December 2014).

[562]   Council   Decision   2012/440/CFSP,   Art.   2   (a).   <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:200:0021:0023:EN:PDF> (accessed 20 December 2014).

[563] See e.g. the requirements Kosovo had/has to meet on its way to a Stabilisation and Association Agreement (see European Commission and High Representative of the European Union for Foreign Affairs and Security Policy 'Joint Report to the European Parliament and the Council on Kosovo's progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilisation and   Association   Agreement'   Brussels,   22.4.2013,   JOIN(2013)   8   final,   5. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/ks_spring_report_2013_en.pdf>   (accessed   02 November 2014) or in fulfilling the roadmap for visa liberalisation (see European Commission 'Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council Second report on progress by Kosovo in fulfilling the requirements of the visa liberalisation roadmap' Brussels, 24.7.2014,   SWD(2014)   251   final   <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/second_commission_assessment_en.pdf> (accessed 20 December 2014).

[564] See Rosa Balfour *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt,* (Routledge 2012) 39.

expedient to classify the enlargement instruments described below along these lines. Enlargement policy, as has been illustrated earlier, is primarily characterised by the principle of positive conditionality, working by incentives and rewards. Conversely, this means that rewards not being handed out (e.g. the denial of candidate status, of the opening of negotiations, of financial assistance etc.) could be portrayed as negative tools in most of the cases. Most of the instruments outlined below could accordingly be both positive and negative – or conditional in the sense of depending on their circumstances. Looking at further classifications discussed in chapter III.A, the instruments mapped below can be subsumed predominantly under the categories of soft power tools, diplomatic (partly quasi-legal) instruments, uni- or bi-lateral instruments as well as both quiet and transparent instruments (with a tendency to increased transparency, see e.g. on benchmarking IV.C.2.e). While the majority of them - as tools/mechanisms of enlargement policy as a whole – are not human rights specific, they do contain particular explicit human rights elements (from the Copenhagen criteria over the various tools of accession negotiations to the Instrument for Pre-Accession Assistance).

a) *Copenhagen criteria and conditionality*

As sketched in chapter IV.B.1, the Copenhagen political criteria 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'[565] constitute the basis of human rights conditionality in enlargement policy and the pertinent reference framework for all (pre-)accession processes. Both, the criteria and the resulting conditionality have been explored at length in academic literature, especially with regard to the fifth enlargement round and the period before the Treaty of Lisbon 2007. Matters of discussion were to a large part the content of the criteria as well as the (non-)coherence with EU internal human rights policy.[566] What gained particular attention in academic discourse was the criterion of minority protection, due to the lack of EU *acquis* in this area.[567] The Treaty of Amsterdam 1997 had brought some clarity and consolidation for human rights conditionality in EU primary law through the newly formulated Article 6 TEU (on founding values) and Article 49 TEU (on membership application), which in combination regulated that only countries respecting human rights and fundamental freedoms (next to the other principles named in Article 6 TEU) were eligible for EU membership.[568] Yet, minority rights had been omitted in Article 6 TEU at that time and it was only through the Treaty of Lisbon 2007 that they were integrated among the EU's founding values in – now – Article 2 TEU, with Article 49 still referring to these as eligibility conditions.[569] In filling both the Copenhagen criteria and the provision in Article 2 TEU with content in the field of minority protection, the EC's enlargement practice has resorted to the framework and mechanisms established by the Council of Europe (Framework Convention for the Protection of National Minorities with the Advisory Committee on the Framework Convention) and the OSCE (High Commissioner on National

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[565] European Council 'Copenhagen European Council, 21 and 22 June 1993, Conclusions of the Presidency', SN 180/1/93 REV 1, 13. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72921.pdf> (accessed 23 October 2014).

[566] See e.g. Manfred Nowak `Human Rights `Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Alston P, (ed), *The European Union and Human Rights* (Oxford University Press 1999) 692ff.

[567] See e.g. Kirsten Lampe *Human Rights in the Context of EU Foreign Policy and Enlargement (*Nomos Verlagsgesellschaft 2007) 126ff.

[568] See Manfred Nowak `Human Rights `Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Alston P, (ed), *The European Union and Human Rights* (Oxford University Press 1999) 689f.

[569] See Bruno de Witte 'The EU and the International Legal Order: The Case of Human Rights', in Malcolm Evans and Koutrakos Panos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011) 140.

Minorities).[570] Article 49 TEU, moreover, regulates that '[t]he conditions of eligibility agreed upon by the European Council shall be taken into account', thereby referring back in particular to the Copenhagen criteria.[571] Balfour and Stratulat argue that through this re-formulation of Article 49 by the Treaty of Lisbon 'additional conditions for accession can be set by the EU … [which] potentially makes it possible to raise standards further during the process'.[572]

The fact that the Treaty of Lisbon has incorporated the EU Charter of Fundamental Rights into primary law can be considered as giving some more grounding to the Copenhagen criteria, as pointed out by Tatham already with regard to its proclamation at the Nice European Council in 2000: 'It was strongly arguable that the CFR provides in clear terms those rights and freedoms that acceding countries are to protect and ensure domestically and provides a yardstick by which to measure their work in this field'.[573] However, policy discourse and practice shows that the human rights obligations the enlargement countries have to live up to are broader in substance than the Charter, e.g. regarding minority rights or media freedom. So the criticism voiced already in the context of the 5th enlargement – that, on the basis on the Copenhagen criteria, the candidate countries were confronted with an increase in human rights requirements, which in the case of minority rights go beyond EU law and hold the countries to OSCE and Council of Europe standards which not all Member States conform to[574] – still holds.[575]

The Copenhagen criteria have repeatedly been termed as quasi-legal means,[576] around which the EU institutions 'managed to build the whole enlargement regulation'[577] and on which all ensuing documents

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[570] For a detailed analysis on minority rights promotion in enlargement policy with the Western Balkans, see European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Benedek, W., et.al., Brussels 2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 20 December 2014).

[571] See Christophe Hillion 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (Swedish Institute for European Policy Studies European Policy Analysis, issue 2013) 3. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[572] Rosa Balfour and Corina Stratulat 'The Enlargement of the European Union' (European Policy Centre Discussion Paper 10 December 2012) 5. <http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> (accessed 17 December 2013). They also state that 'there have been discussions in Brussels on the opportunity of changing the Copenhagen criteria', yet do not give an account of these (ibid).

[573] Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 213.

[574] See e.g. Grainne de Búrca 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union' (2003) 27 (2) Fordham International Law Journal, 699ff; Kirsten Lampe *Human Rights in the Context of EU Foreign Policy and Enlargement (*Nomos Verlagsgesellschaft 2007) 126ff.

[575] Critical assessments have also been brought forward with regard to inconsistent application of the Copenhagen political criteria, in particular on part of the European Commission (see e.g. Dimitry Kochenov `Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers* 23. <http://eiop.or.at/eiop/texte/2004-010a.htm> (accessed 30 October 2014)). Kochenov saw the reasons in the criteria themselves: 'With a wording so broad and overinclusive, neither the candidate countries nor the Commission really knew how to apply them in practice. … The enlargement process suffered because of ambiguity of the meaning and vagueness of the Copenhagen criteria.' (ibid).

[576] See e.g. Christophe Hillion, 'Enlargement of the European Union: A Legal Analysis', in Anthony Arnull and Daniel Wincott, (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 402, as cited in Dimitry Kochenov `Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers*, 1. <http://eiop.or.at/eiop/texte/2004-010a.htm> (accessed 30 October 2014).

adopted by the Commission, the Council and the European Council with regard to enlargement have been based. Even though the criteria themselves, in the form of Council conclusions, can be regarded as merely politically binding and in this sense a political instrument, through the adoption of the – as Council decisions legally binding – Accession Partnerships from 1998 on, they were made 'a quasi-legal obligation by establishing a control procedure and system of sanction'.[578] With the European Commission being the primary interlocutor with the candidate states and the driving actor in enlargement policy,[579] it was mainly the EC's interpretation and application of the criteria which shaped political (and with it, human rights) conditionality over the years.

The criteria formulated in Copenhagen in 1993 have been complemented by the Madrid European Council of 1995 through naming 'the adjustment of [the enlargement countries'] administrative structures' as a prerequisite for their 'gradual, harmonious integration'[580], which 'effectively evolved over the pre-accession period into another precondition for joining the EU'.[581] However, while harmonisation of national legislations to the *acquis communautaire* – which as such is indispensable, with only the timing and conditions being subject to negotiations – forms 'the most prominent part of conditionality',[582] the convergence pressure with regard to the requirement of adequate administrative capacities is limited. This is due to the fact that there is no EU standard of good governance or of administrative structures and procedures, let alone pertinent *acquis*, so that there is room for national solutions and hence diversity.[583] Königová summarised the implication of the principle of conditionality correspondingly as follows: 'There is clear adaptational pressure for norm and, more generally, *acquis* adoption but no pressure for a specific procedural change. This leaves a leeway for national institution traditions and character to shape different and unique solutions to the same pressure, possibilities and challenges'.[584] This 'nature' of conditionality reverberates not only in the different instruments and how

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[577] Dimitry Kochenov `Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers*, 23. <http://eiop.or.at/eiop/texte/2004-010a.htm> (accessed 30 October 2014).

[578] Heather Grabbe 'Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants' (Robert Schuman Centre Working Paper *12/99*, San Domenico di Fiesole (FI) European University Institute 1999), 14. <http://www.esiweb.org/enlargement/wp-content/uploads/2010/01/grabbe_conditionality_99.pdf> (accessed 03 October 2014).

[579] See Article 49 TEU stipulating that the Council may act with unanimity only 'after consulting the Commission and after receiving the consent of the European Parliament'.

[580] European Council 'Madrid European Council 15 and 16 December 1995' Presidency Conclusions, 00400/95 part A.III.A. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00400-C.EN5.htm> (accessed 20 December 2014).

[581] Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 230.

[582] Elsa Tulmets, 'Introduction of OMC in EU's Enlargement Policy'(2005) 3 *European Political Economy Review* 55.

[583] See inter alia Heather Grabbe `How does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 *Journal of European Public Policy* 1024f; Lucie Königová, Elsa Tulmets, and Eliska Tomalová, *Twinning Projects: Analysing the Experience of „Old" EU Member States and Evaluating Benefits of Twinning Out for the Czech Republic* (Research project report for the Czech Ministry of Foreign Affairs, Prague November 2006) 10f.

[584] Lucie Königová, Genetically Modified Organisations? Twinning as a Case of Transnational Interaction (Paper for the CEEISA/ISA Convention in Budapest, CEU, 26 – 29 June 2003), 21 <http://kms2.isn.ethz.ch/serviceengine/Files/EINIRAS/31434/ipublicationdocument_singledocument/F7323EA4-E966-473B-81EE-ADF11F03951B/en/2003-06-Genetically+Modified+Organisatins.pdf> (accessed 30 October 2014). See also Heather Grabbe `How does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 *Journal of European Public Policy* 1025 with regard to the fifth enlargement: '… it is the continuing diversity of member states' governance patterns which inhibits the emergence of a detailed agenda for CEE.'

they generally work (e.g. benchmarking, monitoring or technical assistance),[585] but also has to be taken into consideration when looking at human rights governance within a given country and to which extent it can be shaped through enlargement policy.

With the clear focus on *acquis* adoption, pre-accession conditionality has been most effective in terms of rule transfer which, as Schimmelfennig and Sedelmeier put it, 'is best explained by an external incentives model of governance',[586] i.e. a system of positive conditionality. In such an incentive system reforms are rewarded with more cooperation, i.e. coming further steps in the accession process, but also through more financial assistance, with the ultimate incentive – or in other words, the 'carrot of carrots' – being EU membership. In getting there, the countries are in the position to set the pace by determining the reform process. As stated by Kochenov, '[b]ased on the political conditionality and on the Copenhagen criteria as its main tool, a concept of merit-based enlargement was introduced'.[587] Despite flaws and inconsistencies having been found in this merit-based process,[588] it was through positive conditionality that 'the EU has become capable of expanding its governance … beyond its boundaries …, impacting thus on applicant countries … even before they join in'.[589] Even though the EU could also have used negative conditionality by reducing or entirely cutting financial assistance or economic benefits, it was not inclined to do so and merely applied it 'in a rhetorical way'.[590] As will be illustrated later, certain tools, however, have been used in a negative fashion, meaning that measures were not taken on the part of the EU because of non-fulfilment of requirements on the part of the candidates (e.g. negotiations not having been taken up with Slovakia in 1997).

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[585] E.g. benchmarks and monitoring being directed at adoption or amendment of laws and their implementation as well as the strengthening of administrative capacities, but not at a specific institutional set-up. See also Königová on technical assistance/cooperation within Twinning as a 'voluntary selective domestication by accession administratives of experience, expertise, procedures, and structures of member states' (Lucie Königová, *Genetically Modified Organisations? Twinning as a Case of Transnational Interaction* (Paper for the CEEISA/ISA Convention in Budapest, CEU, 26 – 29 June 2003) 2 <http://kms2.isn.ethz.ch/serviceengine/Files/EINIRAS/31434/ipublicationdocument_singledocument/F7323EA4-E966-473B-81EE-ADF11F03951B/en/2003-06-Genetically+Modified+Organisatins.pdf>) (accessed 30 October 2014).

[586] Frank Schimmelfenning and Ulrich Sedelmeier, `Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11 *Journal of European Public Policy* 661.

[587] Dimitry Kochenov `Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers* 23. <http://eiop.or.at/eiop/texte/2004-010a.htm> (accessed 30 October 2014).

[588] Dimitry Kochenov `Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers* 23. <http://eiop.or.at/eiop/texte/2004-010a.htm> (accessed 30 October 2014).

[589] Lucie Königová, *Genetically Modified Organisations? Twinning as a Case of Transnational Interaction* (Paper for the CEEISA/ISA Convention in Budapest, CEU, 26 – 29 June 2003), 18. <http://kms2.isn.ethz.ch/serviceengine/Files/EINIRAS/31434/ipublicationdocument_singledocument/F7323EA4-E966-473B-81EE-ADF11F03951B/en/2003-06-Genetically+Modified+Organisatins.pdf> (accessed 30 October 2014). As for academic explanations for the success of the conditionality tool, reasons have been found either in a cost-benefit logic (bargain-based model) or in social learning processes (socialisation model), which work not so much by incentives but by rule internalisation. See Alan Tatham, *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009), 236f.

[590] Elsa Tulmets, 'Taking Stock After Enlargement: Social Learning, Norm Transfer and Promoting Good Governance. Contextualizing the State of the Art in European Studies' (*EU Frontiers policy paper*, CEU/ENS, 5 June 2011) 8f. <http://cens.ceu.hu/sites/default/files/publications/policypaperno5eufrontierstulmetswithchanges.pdf> (accessed 30 October 2014).

Turning to human rights conditionality more specifically, it has been acknowledged as a powerful tool to influence national policies and to enhance reforms in the field, in particular with regard to rights of persons belonging to minorities.[591] Respect for human rights, as a pre-condition for membership, means that they shall be recognised in domestic legislation and 'shall by and large be observed in practice'.[592] As outlined earlier, compliance with the Copenhagen political criteria is a prerequisite for opening accession negotiations. Tatham clarifies that they 'do not have to be completely fulfilled to commence negotiations … [but] need to be substantially or clearly on the way to being substantially fulfilled'.[593] The non-admission of Slovakia into negotiations in 1997, the long period in the case of Turkey between granting of candidacy in 1999 and opening of negotiation in 2005 as well as the postponement of the start of negotiations with Croatia for half a year in 2005 were all due to insufficient compliance with the political respectively human rights criteria.[594] (While the EU monitors a whole range of human rights issues during the accession process, it is telling what constitutes such serious breaches that lead to postponement or suspension of the process. Singling out these issues reveals a lot about the EU's human rights priorities, which will be discussed in the Deliverable 6.2 case study on the Western Balkans.) With an improvement of methodologies in terms especially of benchmarking (see also section IV.C.2.e) it has become somewhat clearer and more traceable how far 'on the way' a country is expected to proceed to meet the sufficiency-requirement. This will be further exemplified for the individual current candidate states in section IV.C.2.e.

As for the Western Balkan countries, 'the dynamics of the enlargement process with [them] is far more challenging from EU conditionality policy standpoint'.[595] They face not only stricter conditionality regarding rule of law issues, but also enhanced conditionality by region-specific content having been added. Termed by Balfour and Stratulat the 'Copenhagen Plus criteria',[596] the additional criteria can be comprehended mainly as the legacy of the conflict past. Next to cooperation with the ICTY, they relate to resolving disputes with neighbouring countries and regional cooperation as well as refugee return. Against this background, the issue of minority protection has of course also gained in importance in the current enlargement context. Yet, enhanced and stricter conditionality is coupled with a more complex political situation than in the previous enlargement countries. As outlined by Sedelmeier, the domestic conditions in the current candidate countries are not favourable for compliance, not only because their administrative capacities to implement the manifold and demanding reforms for EU approximation are low, but also because the (additional) political criteria demand high domestic costs of adjustment, which

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[591] See European Parliament 'The Observers in the European Parliament' 15. <http://www.europarl.europa.eu/ressources/observer/obs_en.pdf> (accessed 20 December 2014).

[592] Manfred Nowak `Human Rights `Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Alston P, (ed), *The European Union and Human Rights* (Oxford University Press 1999) 694.

[593] Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 202.

[594] The lack of full cooperation with the International Tribunal for the Former Yugoslavia (ICTY), which was the reason for negotiations with Croatia being postponed, can certainly be seen as a human rights issue, too, given the tribunal's task of prosecuting those who have committed war crimes or grave human rights abuses during the conflicts in the Balkans in the 1990s.

[595] Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al. (Association for Development Initiatives – Zenith 2013) 7.

[596] Rosa Balfour Corina and Stratulat 'Between Engagement and Cold Feet: Ten Years of the EU in the Western Balkans', in Prifti E, (ed), *The European future of the Western Balkans (Thessaloniki@10,* EU Institute for Security Studies *2003-2013*) 21.

can affect statehood and national identity and hence also threaten the power base of governments.[597] Also, in comparison with the CEEC, the current candidate countries' membership perspectives are more distant and less credible.[598] A credible membership perspective, however, is determined by Sedelmeier as a key factor of the power of conditionality.[599] It remains to be seen which effects the 'enlargement moratorium' decided for the next five years (signified also by renaming the Commissioner for Enlargement into 'Commissioner for Enlargement Negotiations') will have on the working of conditionality.

b) Pre-accession/enlargement strategies

Chapter IV.B has described the evolution of the EU's pre-accession/enlargement strategy from its first definition by the Essen European Council in 1994 over its enhancement in 1997 and various ensuing reviews to the present day strategy characterised by centrality of rule of law issues and a set of corresponding tools. While the term pre-accession or enlargement strategy in this sense stands for the EU's policy towards enlargement countries at large, the terms are used with different meanings both in policy documents and literature. Pre-accession strategy cannot only be understood as the general approach taken by the EU in shaping its relations towards the enlargement countries, which is primarily defined in Council conclusions (on the basis of EC proposals), and which comprises a certain sub-set of instruments applicable to all countries.[600] It can also signify the framework of the accession process of a given country, based on the set of standard instruments, but laid down individually for the country in

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[597] See 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) 7 and 9.

[598] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al. (Association for Development Initiatives – Zenith 2013) 7.

[599] 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) 9. Widened conditionality as applied on the Western Balkans has been looked at from a variety of angles: while some have criticised its inconsistent application, mitigating the EU's tranformative power and credibility (see e.g. Tanja Börzel, 'The Transformative Power of Europe Reloaded. The Limits of External Europeanization' (*KFG Working Paper Series – The Transformative Power of Europe*, Kolleg-Forschergruppe (KFG) Freie Universität Berlin, February 2010) 24. <http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_11.pdf> (accessed 25 September 2014)), others still see a consistent linkage to compliance with democratic norms (Frank Schimmelfennig, 'EU Political Accession Conditionality After the 2004 Enlargement: Consistency and Effectiveness' (2008) 15 *Journal of European Public Policy* 918-937 as cited by Tanja Börzel, 'The Transformative Power of Europe Reloaded. The Limits of External Europeanization' (*KFG Working Paper Series – The Transformative Power of Europe*, Kolleg-Forschergruppe (KFG) Freie Universität Berlin, February 2010) 24. <http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_11.pdf> (accessed 25 September 2014)) or argue that the evolution 'enabled the EU conditionality policy to be sufficiently tailor-made in order to address the multitude of challenges' (Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al. (Association for Development Initiatives – Zenith 2013) 39). Still others have written about the resulting 'conditionality dilemmas for the EU as a country's compliance pattern often differs according to the issue', so that rewards and sanctions would be required depending on the field in question (Stephan Keukeleire and Tom Delreux *The Foreign Policy of the European Union* (2nd edn, The European Union Series, Palgrave Macmillan 2014) 244). Exploring these assessments further would, however, go beyond the scope of this paper and will be addressed in D6.2.

[600] See e.g. European Parliament Briefing No 24 Pre-Accession Strategy for Enlargement of the European Union <http://www.europarl.europa.eu/enlargement/briefings/24a1_en.htm> (accessed 04 November 2014).

question and thus potentially complemented by specific instruments.[601] Similarly, the notion enlargement strategy is used in different ways: in a broad sense, it can mean (the evolving) enlargement policy and can in so far also be synonymous to pre-accession strategy.[602] Yet, in a narrow sense, the term often refers to the yearly Enlargement Strategy Papers, which since 2000 accompany the Progress Reports and together with these form the Enlargement Package of a given year, so that one can speak of, e.g. the current Enlargement Strategy 2014-2015.[603]

Regardless of how the different terms are used, the strategy documents are important sources of enlargement discourse and practice, be they Council conclusions or Commission communications, all the more if looked at from the human rights perspective. As Sedelmeier puts it generally, 'European Council declarations regularly asserted the promotion of democracy and human rights as a distinct goal to be served (indirectly) through enlargement'.[604]This also applies to the EC Enlargement Strategy Papers, in particular, as outlined earlier, since 2011 when the Commission proposed the new approach to negotiations on the rule of law chapters 23 and 24. After endorsement of the new approach through the Council, the Enlargement Strategy Paper 2012-2013 with its special focus on rule of law was a key document, naming human rights first under the main challenges[605] and reiterating later that '[c]ivil, political, social and economic rights, as well as the rights of persons belonging to minorities are key issues in most enlargement countries'.[606] The latest Enlargement Strategy Paper of October 2014 continues in the logic of the new approach and in its section 'Fundamentals first – consolidating reform and strengthening credibility' treats the sub-section 'The rule of law and fundamental rights' with

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[601]   See   e.g.   Pre-Accession   Strategy <http://europa.eu/legislation_summaries/glossary/preaccession_strategy_en.htm> (accessed 04 November 2014).
[602] See e.g. European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Benedek, W., et.al., Brussels 2012, 90.   <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 20 December 2014).
[603] See also this varying usage in European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Benedek,   W.,   et.al.,   Brussels   2012,   61. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 20 December 2014): 'In the most recent Enlargement Strategy…'. Furthermore, as regards terminology, the early Enlargement Strategy Papers have used both terms, arguably defining pre-accession strategy in the more technical sense of the set of created instruments and enlargement strategy   in   the   broader   sense   of   policy   (see   Enlargement   Strategy   Paper   2000 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/strat_en.pdf> (accessed 04 November 2014)). The latest Enlargement Strategy Paper of October 2014 does not contain the term pre-accession strategy anymore (see European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and   Main   Challenges   2014-2015',   Brussels,   08.10.2014,   COM(2014)   700   final. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf>   (accessed   15 October 2014)), so it seems to have been given up along the way, maybe exactly for the reasons of clarity in terminology.
[604] Ulrich Sedelmeier 'The EU's role as promoter of human rights and democracy: enlargement policy practice and role formation', in Ole Elgström, and Michael Smith, (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (Routledge 2006) 120.
[605] European Commission 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2012-2013'*,* Brussels, 10.10.2012, COM(2012) 600 final. 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> (accessed 20 December 2014).
[606] ibid 5.

particular emphasis.[607] After illustrating the key features of the new approach to chapters 23 and 24 as well as the different instruments used and stating that '[t]he Commission is carefully monitoring the situation as regards civil, political, social and economic rights, as well as the rights of persons belonging to minorities in the enlargement countries',[608] the Strategy Paper highlights specific human rights topics. These are: freedom of expression and media; protection of minorities, including Roma; sexual orientation and gender identity; women's rights; and rights of the child.[609] In elaborating on these areas in terms of summarising the situation in the enlargement countries as well as corresponding Commission activities, the authors have also inserted four small cases of reforms being initiated in Turkey, Serbia, Bosnia and Herzegovina and Montenegro.[610] In comparison to the previous Strategy Papers, this is an innovation in methodology following the 'naming'-logic, which is apt to throw more light on and perhaps enhance human rights promotion.

c) *Accession Partnerships / European Partnerships*

> The Accession Partnerships and European Partnerships are the central element of the pre-accession strategy. Based on the findings of the Commission's progress reports on each country, the Partnerships set out the priorities for these countries to make progress towards the objective of EU membership. They also provide a framework for EU assistance towards achieving this objective.[611]

In this way the European Commission highlighted the centrality of the bilateral Partnerships in its 2006 Enlargement Strategy, outlining the renewed consensus on enlargement. Having been introduced as core instruments for the 5th enlargement round, the <u>Accession Partnerships</u> continue to be the basic documents for a country's preparation for accession by defining short- and medium term priorities as well as laying the ground for financial assistance. Modelled on the Accession Partnerships, <u>the European Partnerships</u> were created in 2003 as an instrument in the frame of the Stabilisation and Association Process of the Western Balkan states.[612] The Partnerships can be subject to revisions, with priorities being adapted, and European Partnerships can be replaced by Accession Partnerships. The currently applicable Partnerships date from 2007 (European Partnership with Montenegro) and 2008 (European Partnerships with Albania, Bosnia and Herzegovina, Serbia including Kosovo respectively Accession Partnerships with Turkey and Macedonia).[613] The Partnerships as Council decisions continue to be

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[607] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 4ff. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[608] ibid 12f.

[609] ibid 14ff.

[610] These cases concern: guaranteeing fundamental rights by the Constitutional Court in Turkey; supporting early years education - Roma teaching assistants in Serbia; improving police response to violence against LGBTI persons in Bosnia and Herzegovina; comprehensive gender equality programme in Montenegro (ibid).

[611] European Commission 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2006-2007' Brussels, 08.11.2006, COM (2006) 649 final 7. <http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf> (accessed 31 October 2014).

[612] See Council of the European Union '*2518th Council meeting External Relations*' Luxembourg, 16 June 2003, Annex A. 14. <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/76201.pdf> (accessed 23 September 2014). They formed part of *The Thessaloniki Agenda for the Western Balkans – Moving towards European integration* adopted by the Council on 16 June 2003.

[613] Croatia's latest Accession Partnership was also adopted in 2008.

complemented by National Plans for the Adoption of the Acquis in the case of the candidate countries.[614] These documents together constitute the framework for the programming of the EU's financial assistance to the enlargement countries (see section IV.C.2.i). In setting short- and medium-term priorities, all Partnerships refer to human rights promotion, yet in most cases remain on a rather general level.[615] Still, these priorities serve as reference points for the monitoring by the EC through its Progress Reports and are broadly covered in there,[616] while it has been suggested that this interlinkage could be improved[617] (see also IV.C.2.h).

What is important is that the Council decisions on the Partnerships contain explicit conditionality provisions, primarily allowing the suspension of financial assistance, which can be considered a negative instrument. While these provisions have been formulated in slightly different ways, they always make assistance conditional on meeting the Copenhagen criteria as well as the defined priorities, i.e. this way also on human rights promotion. This is complemented by a corresponding suspension clause in the Regulation on the Instrument for Pre-Accession Assistance, as will be illustrated in IV.C.2.i.

d) EC Opinions on application and awarding candidate status

Once a country has submitted an application for EU membership to the Council, the Commission is tasked with elaborating an Opinion on this application, assessing in how far the country in question fulfills the conditions of membership eligibility as laid out by the European Council (in Copenhagen and Madrid, see chapter IV.C.2.a), plus in the case of the Western Balkans the conditionality of the Stabilisation and Association Process. In drafting the Opinion the EC concentrates on the political criteria and organises expert missions to the respective country.[618] With regard to human rights and the protection of minorities, the existence of the country's pertinent legal and policy framework is reviewed and its correspondence to European and international standards assessed. The Opinion is accompanied and substantiated by an Analytical Report, which not only analyses the fulfilment of the political criteria

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[614] The most recent example is the Serbian NPAA adopted in February 2013, see <http://www.seio.gov.rs/news.101.html?newsid=1422> (accessed 04 November 2014).

[615] See European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Benedek, W., et.al., Brussels 2012, 59f. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 20 December 2014). The European Parliament study analyses the European and Accession Partnerships also in terms of changes through revisions, with focus on minority rights. It draws conclusions on why priorities reappear in later Partnerships and sees explanations in priorities being either too ambitious or too broad or confronted with too strong national resistance.

[616] See ibid. 62.

[617] See ibid. 92.

[618] See e.g. European Commission '*Communication from the Commission to the European Parliament and the Council – Commission Opinion on Albania´s application for membership of the European Union*', Brussels, 09.11.2010, COM(2010) 680, 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/al_opinion_2010_en.pdf> (accessed 27 October 2014). The findings of these expert missions are, however, not the only source of information; the EC also draws on questionnaires filled in by national authorities, consultations with the EU Delegations, reporting by the Member States' Embassies, assessments by international organisations as well as local and international non-governmental organisations (see e.g. European Commission '*Commission Staff Working Document - Analytical report accompanying the Communication from the Commission to the European Parliament and the Council – Commission Opinion on Albania´s application for membership of the European Union*', Brussels, 09.11.2010, SEC(2010) 1335, 8. <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/al_rapport_2010_en.pdf> (accessed 27 October 2014).

in more detail, but also under the criterion 'Ability to assume the obligations of membership' (referring to the alignment with and implementation of the *acquis*) examines already along the individual *acquis* chapters the status quo in the country and the medium-term prospects. Starting out with a paragraph on the *acquis* respectively the aim of EU policies in the field, the chapter sections after the country assessment conclude with summarising which further action is needed on part of the applicant country. Not surprisingly, the section on chapter 23 contains a number of interlinkages with the section on the political criteria and vice versa, so that there are repeatedly cross-references (which is also generally the case in the EC's Progress Reports). Based on the content of the Analytical Report, the Commission will either recommend that candidate status be granted to the applicant country and formulate certain <u>key priorities</u> (predominately in the area of the political criteria) that have to be met before accession negotiations can start (this was the case for Montenegro and Serbia[619]) or it will only put forward key priorities, which are then the reference point for a later recommendation on candidacy (like has happened in the case of Albania). In either case, these key priorities can be regarded as 'precursors' to the benchmarks applied later in the negotiation procedure, following the same intrinsic logic.[620]

To take the example of Albania, the Commission in its Opinion of 9 November 2010 stated 12 key priorities along which the country's degree of compliance with the Copenhagen criteria would be measured. One of these priorities was to 'take concrete steps to reinforce the protection of human rights, notably for women, children and Roma, and to effectively implement anti-discrimination policies' while two others referred to improvements in the areas of property rights and treatment of detainees.[621] Based on progress achieved with regard to these key priorities since then,[622] the Commission in its Enlargement Strategy 2013-2014 recommended that Albania be granted candidate status,[623] while at the

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[619] See European Commission 'Communication from the Commission to the European Parliament and the Council – Commission Opinion on Montenegro´s application for membership of the European Union', Brussels, 09.11.2010, COM(2010) 670, 11f. <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf> (accessed 27 October 2014) and European Commission 'Communication from the Commission to the European Parliament and the Council – Commission Opinion on Serbia's application for membership of the European union', Brussels, 12.10.2011, COM(2011) 668 final, 12. <http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/sr_rapport_2011_en.pdf > (accessed 27 October 2014).

[620] This methodology using key priorities was introduced with the Opinions on Montenegro's and Albania's applications being published in November 2010. In the antecedent Opinion on Croatia the Commission had recommended the opening of negotiations right away (see Commission of the European Communities '*Communication from the Commission – Opinion on Croatia's Application for Membership of the European Union*', Brussels, 20.4.2004, COM(2004) 257 final, 121. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0257&from=EN> (accessed 20 October2014).

[621] European Commission 'Communication from the Commission to the European Parliament and the Council – Commission Opinion on Albania's application for membership of the European Union' Brussels, 09.11.2010, COM (2010) 680. 11. <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/al_opinion_2010_en.pdf> (accessed 27 October 2014).

[622] The 2013 Progress Report on Albania refers inter alia to legislation having been improved in the areas of freedom of expression, hate crimes, economic and social rights (see European Commission 'Commission Staff Working Document – Albania 2013 Progress Report' Brussels, 16.10.2013, SWD(2013) 414 final. 10. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/al_rapport_2013.pdf> (accessed 27 October 2014).

[623] It had already done so one year earlier in the Enlargement Strategy 2012-2013, yet had subjected this recommendation 'to completion of key measures in the areas of judicial and public administration reform and revision of the parliamentary rules of procedure' (European Commission 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2012-2013', Brussels,

same time specifying – in follow-up to its Opinion – five key priorities which still need to be met for accession negotiations to be opened.[624] Of these, the fifth key priority relates to reinforcing the protection of human rights, with the wording, in comparison to the priority as defined in the Opinion, going a bit further in terms of effectiveness: 'take effective measures to reinforce the protection of human rights, including of Roma, and anti-discrimination policies, as well as implement property rights'.[625] On 24 June 2014 (upon delivery of a special report by the Commission on progress in the fight against corruption and organised crime and in judicial reform), the Council granted candidate status to Albania,[626] with this decision being endorsed by the European Council on 26/27 June 2014. Reference was made in the Council conclusions to the key priorities and that Albania should 'intensify its efforts to ensure [their] sustained, comprehensive and inclusive implementation'.[627] The Council's positive decision on Albania's candidacy was also linked to the High Level Dialogue led with the Commission since November 2013 and the Roadmap on the five key priorities resulting from it. This Dialogue will be further treated under III.B.7.

Clearly, the Commission Opinions on a country's application as well as the <u>Council's decision to award candidate status</u> can be described as important instruments for shaping reforms in the field of human rights within the applicant country. Not only can the defined key priorities serve as 'guideposts' where action is expected by the EU for the applicant to move closer to the Union and thus trigger corresponding reforms, but also can a positive recommendation by the EC and all the more the granting of candidate status through the Council function as incentives and rewards respectively. Conversely, <u>denial of candidate status</u> works as a negative tool, which could in the past also be seen, as mentioned earlier, in the case of Turkey where human rights played the most significant role. In spite of the fact that the Turkish government in 1997 – in light of the Council's up-coming decision on candidacy – passed relevant legislation in the area of policing, the Council did not consider this convincing enough action against torture and decided negatively at that time.[628] Finally, the introduction of the current system of key priorities can be regarded as having increased transparency of the process towards opening of accession negotiations (whereas it can also be argued that they have simultaneously protracted it).

10.10.2012,   COM(2012)   600   final.   27. <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> (accessed 20 December 2014).

[624] European Commission 'Commission Staff Working Document – Albania 2013 Progress Report' Brussels, 16.10.2013,   SWD(2013)   414   final   19. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/al_rapport_2013.pdf> (accessed 27 October 2014).

[625] ibid.

[626] See Council of the European Union 'Council conclusions on Albania, General Affairs Council meeting' Luxembourg,   24   June   2014 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/143354.pdf> (accessed 24 October 2014).

[627] ibid 1.

[628] See Merzuka Selin Türkeş 'Human Rights in the European Union's Foreign Policy. Universal in Discourse, Flexible in   Practice'   (*RECON   Online   Working   Paper*   2011/21)   6. <http://www.reconproject.eu/main.php/RECON_wp_1121.pdf?fileitem=50512032> (accessed 17 October 2014). The implications of this negative decision in terms of promoting human rights reforms in the following years up to 1999 when Turkey achieved candidate status would have to be looked into in a separate analysis.

e) Accession negotiations

Starting and conducting accession negotiations can as such be understood as an instrument for the promotion of human rights in the enlargement countries, all the more in the way the negotiation process is now set up under the new approach.[629] At the same time, accession negotiations entail a number of specific tools, some of which are particularly dedicated to the promotion of rule of law and human rights, as will be illustrated in more detail in this chapter. Furthermore, a short overview will be given on the state of affairs in negotiations with Montenegro, Serbia and Turkey, with emphasis on human rights issues.[630]

Whether accession negotiations are opened is decided by the Council unanimously upon recommendation of the European Commission. There have repeatedly been instances where the Council did not follow the EC's positive recommendation and has blocked the start of negotiations (the most persistent example being Macedonia, for which the Commission has now handed out a recommendation to open negotiations for the sixth year in a row,[631] yet – primarily due to the unresolved name issue with Greece – the Council has not yet decided to do so).[632] When the Council decides to open negotiations with a country, it grants the Commission a negotiating mandate and tasks it to elaborate a General EU Position on the negotiations. This Position includes the Negotiating Framework containing the principles governing the negotiations.[633] After adoption by the Council, the General Position and with it the Negotiating Framework are formally presented to the candidate country at the first Intergovernmental Accession Conference, with which the negotiations are officially launched.

The main feature of negotiations as they are structured at the moment is the central position given to chapter 23 'Judiciary and fundamental rights' and chapter 24 'Justice, freedom and security', regularly referred to as the rule of law chapters. As has been mentioned before, chapter 23 was of crucial significance during the accession process of Croatia, which was the first country to negotiate on this

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[629] Balfour generally determines the suspension or delay of negotiations as negative tools for human rights promotion (Rosa Balfour *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt,* (Routledge 2012) 39.), which in the past could be observed also in the case of Slovakia not having been admitted into the Luxembourg group to start negotiations in 1997 due inter alia to human rights concerns (with regard to policing and minority rights). Conversely, taking up negotiations and staying committed to them can hence be captured as positive tools.

[630] Negotiations between the EU and Iceland were put on hold by the Icelandic government in May 2013 (see EU Enlargement – Iceland <http://ec.europa.eu/enlargement/countries/detailed-country-information/iceland/index_en.htm> (accessed 23 October 2014)).

[631] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 24. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[632] See Rosa Balfour and Corina Stratulat 'The Enlargement of the European Union', (*European Policy Centre Discussion Paper* 10 December 2012) 3. <http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> (accessed 17 December 2013), perceiving a strengthened role of the Council in determining the conditions for progress and a 'creeping nationalisation' of the pre-accession process (citing Hillion C, *The creeping nationalisation of the enlargement process* (SIEPS Paper, Stockholm, November 2010).

[633] See e.g. Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union' 1/14 (Brussels, 21 January 2014) <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT> (accessed 23 October 2014).

newly created chapter. However, it was opened rather later in the process, not least due to its 'tricky' nature.[634] The two rule of law chapters were opened one and a half years later than the official start of accession talks, and two other chapters were opened ahead of them.

The innovation brought about by the 2012 Negotiating Framework with Montenegro following the <u>new approach</u> of opening the two chapters at the beginning of the negotiations drew on experiences with Croatia and was connected to a change of concept. One could say that, instead of waiting for a country to do its homework first before sitting down to talk about the 'serious stuff', the method followed now is to start and keep talking all through the process and to exert influence continually in this way.[635] This modification of methodology can be regarded as widening the application of 'constructive engagement'[636] as a policy instrument. It is expected that by allowing maximum time for reforms to be initiated and implemented a country will be enabled to 'demonstrat[e] that such reforms are solidly embedded in its constitutional fabric, prior to admission'.[637]

In keeping with this new approach of tackling chapters 23 and 24 with primacy, the <u>screening</u> exercise as the first stage of the negotiation process can be started with regard to these chapters already before the official launch of negotiations at the first Accession Conference. This was a novelty in the negotiations with Montenegro and was also done so subsequently in the case of Serbia. Screening happens in <u>two formal meetings</u>, with the first being dedicated to the explanation of the pertinent *acquis* and EU policies, and the second one looking into the situation in the country. It should not go unmentioned at this point that representatives from Serbia and Macedonia also took part in the explanatory screening meeting for chapter 23 with Montenegro in 2012.[638] Inviting countries not yet negotiating to the process in countries which are more advanced in the accession procedure can surely serve as a useful tool not only for making them familiar with the process as such, but also with the pertinent substance of the *acquis*. Also, the socialisation effects of such a measure should not be underestimated.

As a result of the screening phase, the commission drafts a <u>Screening Report</u> on the given chapter, which needs to be approved by the Council before it can be officially transmitted to the candidate and published. With this report <u>opening benchmarks</u> (OBM) are defined that have to be met in order for negotiations on the chapter in question to be opened. This applies to the Screening Reports on chapter 23 for Montenegro and Serbia where the OBM can be concluded from the recommendations put

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[634] Even though the EC concluded in December 2008 that the chapter could be opened, it was blocked by the Member States until February 2010 due to insufficient cooperation by the Croatian authorities with the International Criminal Tribunal for the former Yugoslavia (ICTY).

[635] See also Wolfgang Nozar *The 100% Union: The rise of Chapters 23 and 24* (Clingendael Netherlands Institute of International Relations August 2012) 3. <http://www.clingendael.nl/publication/100-union-rise-chapters-23-and-24> (accessed 09 October 2014) with regard to Croatia: '… rule of law issues have so far only been addressed in a comprehensive way at a fairly late stage of the accession process. Reform efforts were slow in the period before opening the chapter … Only with the chapter 23 opening benchmarks, was there a strong and effective target for Croatia to prioritise these key issues. … Given the challenges faced in chapters 23 and 24, and the long term nature of the reforms, there are strong arguments in favour of opening these chapters earlier in the negotiations process'.

[636] Ole Elgström and Michael Smith (eds), *European Union's Roles in International Politics: Concepts and analysis* (Routledge 2006) 3.

[637] Christophe Hillion 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 6. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[638] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 27.

forward under each subsection (i.e. judiciary, anti-corruption and fundamental rights). The published report for Croatia, by contrast, did not contain the OBM; these were adopted by the Council only at a later stage and presented to the Croatian government in side letters to the report.[639] This lack of transparency and public accessibility was repeatedly criticised,[640] which may have led to the described improvement. The OBM for chapter 23 regularly consist of Action Plans having to be elaborated, e.g. in the case of Croatia for the implementation of the Constitutional Law on the Rights of National Minorities.[641] The path chosen by Montenegro was to elaborate a comprehensive Action Plan for all areas addressed in the Screening Report on chapter 23.[642] Serbia is currently taking the same route of preparing one all-encompassing Action Plan for chapter 23. For the preparation of the Action Plans, which should comprise timetables and needed resources as well as indicators,[643] the EC is to provide substantial guidance.[644]

Once the fulfilment of the OBM is confirmed by the Commission and the Council, the candidate country is invited to present its Negotiating Position on the chapter. Likewise, the Commission prepares and the Council adopts an EU Common Position, after which negotiations on the specific chapter can be opened in another Accession Conference. The new approach since 2012 foresees that in the EU Common Positions on chapters 23 and 24 interim benchmarks (IBM) will be determined (and not right away closing benchmarks, as was the case with Croatia and still is with regard to other negotiation chapters). 'These interim benchmarks will specifically target, as appropriate, the adoption of legislation and the establishment and strengthening of administrative structures and of an intermediate track record and will be closely linked to actions and milestones in the implementation of the action plans'.[645]

When the IBM have been met, the Council decides on an Interim Position, in which closing benchmarks (CBM) for the chapter are laid down, 'requiring solid track records of reform implementation'.[646] One chapter 23 CBM for Croatia was e.g. – in follow-up to the mentioned Action Plan for the implementation

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[639] See ibid. 9f; The Greens / European Free Alliance in the European Parliament *Transparency in retrospect: preliminary lessons from Croatia´s EU accession process*, paper author Škrabalo, M., 8 November 2012, 2. <http://www.franziska-brantner.eu/wp-content/uploads/2012/11/Transparency-in-retrospect.pdf> (accessed 27 August 2014).

[640] See ibid 7; European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 68. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf. > (accessed 28 August 2014).

[641] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 10.

[642] See Government of Montenegro 'Action Plan for Chapter 23 Judiciary and Fundamental Rights´ June 27, 2013 <http://www.gov.me/ResourceManager/FileDownload.aspx?rId=138837&rType=2> (accessed 28 August 2014).

[643] See Christophe Hillion 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 6. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[644] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 12. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[645] Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union' 23/12*(Brussels, 29 June 2012)* 16. <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 23 October 2014).

[646] ibid.

of the Constitutional Law on the Rights of National Minorities as OMB – to strengthen the protection of minorities through effective implementation of the law.[647] What 'effective implementation' meant remained rather unclear, though, so that 'it was very difficult to define satisfactory implementation results'.[648] It is exactly the process of implementation of reforms that the introduction of IBM is supposed to further systematise by 'identifying additional milestones in the candidate's absorption of the EU *acquis* in the area concerned'.[649]

The Negotiating Frameworks also foresee the possibility of <u>corrective measures</u> to be taken in the negotiations on chapters 23 and 24, which may assume different forms: 'Where problems arise in the course of negotiations under these chapters, the Commission may propose updated benchmarks throughout the process, including new and amended action plans, or other corrective measures, as appropriate'.[650] Such measures could also include the adjustment of pre-accession assistance 'in accordance with applicable rules and procedures'.[651] It has to be noted that this provision, which has introduced to the negotiation process a new form of possible sanctions, is rather open both in terms of 'problems' as well as 'other measures' and it remains to be seen if and in which way it will be invoked in practice.

As outlined earlier, the system of sanctions currently available in accession negotiations also includes the possibility of over-all negotiations to be slowed down or suspended, if negotiations on the rule of law chapters lag behind significantly. Pointing to the linkage of these chapters to the Union's founding values, the Negotiating Frameworks regulate that in such event 'the Commission will … propose to withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work, as appropriate, until this imbalance is addressed'.[652] This <u>specific suspension clause</u>, accentuating the contents of chapters 23 and 24 even further, has been added to the <u>basic suspension clause</u> allowing for the negotiations to be halted '[i]n case of a serious and persistent breach by [the

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[647] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 20.

[648] ibid 10. See correspondingly Wolfgang Nozar, *The 100% Union: The rise of Chapters 23 and 24* (Clingendael Netherlands Institute of International Relations August 2012) 2.<http://www.clingendael.nl/publication/100-union-rise-chapters-23-and-24> (accessed 09 October 2014): 'Due to the limited amount of 'hard *acquis*' in many of these areas [of chapter 23], the requirements to be met are mainly to be found in general principles and European standards. This sometimes makes it difficult to determine exactly what the target to be reached is and how to measure progress.'

[649] Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 7. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014); see also the recommendation that 'the Commission should focus on the implementation of legislation on the protection of persons belonging to national minorities by the identification and promotion of best practices' in European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Benedek, W., et.al., Brussels 2012, 91. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 20 December 2014) .

[650] Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union' 23/12*(Brussels, 29 June 2012)* 17. <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 23 October 2014).

[651] ibid. See also IV.C.2.i) Financial and technical assistance.

[652] ibid 11.

candidate] of the values on which the Union is founded'.[653] In both cases the Council – upon a pertinent recommendation by the Commission – can decide on the suspension and the conditions for negotiations to be resumed by qualified majority.[654] This stands not only in contrast to the general principle of unanimity of Council decisions in enlargement matters (see Article 49 TEU); it also differentiates the suspension procedure from the comparable case of sanctions being taken against a Member State which violates the founding values in accordance with Article 7 TEU, demanding unanimity. Suspension of accession negotiations is hence a potentially swifter mechanism of reacting to a country's non-compliance with the values enshrined in Article 2 TEU, i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[655] (See also III.B.2.a on this inconsistency in supervision instruments)

When the closing benchmarks for a given chapter have been reached, this chapter is – again upon consent of all Member States – provisionally closed. This means that, up to conclusion of the Treaty of Accession, the chapter can be reopened again, should it be necessary due to either new *acquis* being created or the country not meeting the benchmarks any longer.[656] The principle 'nothing is agreed until everything is agreed'[657] applies, so that it is only at the end of the negotiations as a whole that the individual chapters are definitely closed. Again with regard to chapter 23 and chapter 24, they are considered to be among the last to be closed,[658] making maximum use of time.

With regard to rule of law / human and minority rights, the instrument of <u>benchmarking</u>, introduced in 2005 and since then having been refined and turned into an essential element of accession negotiations, has been assessed rather differently in literature. On the one hand, it has been portrayed as an effective tool that 'gave the Commission the opportunity to develop tailor-made, country specific targets which will provide sufficient guidance to the accession country concerning the challenges which have to be addressed'.[659] On the other hand, benchmarks have been criticised as too vague, non-transparent and having been developed without 'having clear concepts, measurement methods, indicators, collection methods or time frames in mind'.[660] The diverging resumes might predominantly be explained by the fact that the authors of the European Parliament study only analysed experiences from the negotiations with Croatia whereas the more recent study by the Association Zenith follows a comparative case study approach, looking into Croatia and Montenegro (as well as drawing analogies to Macedonia). At any rate,

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[653] ibid 9; see also IV.B.2 for a comparison of this clause to its predecessor laid out in the Negotiating Frameworks with Croatia and Turkey.

[654] See ibid 9 and 11.

[655] See also Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 9. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[656] See also Alan Tatham, *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 258.

[657] European Commission 'The European Union explained: Enlargement' Luxembourg: Publications Office of the European Union. 8. < http://europa.eu/pol/pdf/flipbook/en/enlargement_en.pdf > (accessed 25 September 2014).

[658] See Wolfgang Nozar, *The 100% Union: The rise of Chapters 23 and 24* (Clingendael Netherlands Institute of International Relations August 2012) 3. <http://www.clingendael.nl/publication/100-union-rise-chapters-23-and-24> (accessed 09 October 2014).

[659] Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 8.

[660] European Parliament, Directorate-General for External Policies of the Union (2012) *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 68. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf. > (accessed 28 August 2014).

when comparing their negotiation processes, there have been improvements both in terms of more transparency, as mentioned above, and methodology, which will be further exemplified in the following paragraphs on the different status of the countries negotiating as of 1 October 2014, focusing on chapter 23.

Montenegro

On the basis of the European Council conclusions of December 2011 and subsequent to a specific Commission report of May 2012 particularly focusing on progress in the areas of rule of law and fundamental rights, accession negotiations with Montenegro were formally opened on 29 June 2012. With the screening procedure on chapters 23 and 24 having begun even before,[661] the corresponding Screening Reports could be presented already in November 2012. The Montenegrin government fulfilled the defined chapter 23 OBM by adopting the comprehensive Action Plan for Chapter 23 in June 2013.[662] Having been drafted by a specially installed Montenegrin Working Group for Chapter 23,[663] this Action Plan defines concrete measures with short-, medium- and long-term deadlines, determining also result and impact indicators for monitoring its implementation. The European Commission was not only involved in the preparation of the Plan, primarily through providing guidelines,[664] but is also given a role in the monitoring mechanism on implementation of the Plan, entailing three- as well as six-monthly reports.[665] Continuing the structure of the Screening Report, the Action Plan has incorporated the Report's recommendations in detail, resulting in the field of fundamental rights in 47 measures/activities, most of them due by mid-2014 and to be funded by different sources, like the Montenegrin government budget, the OSCE, the IPA Gender Programme 2010, UNDP, IRZ Foundation and others.[666]

On 12 December 2013 the EU Common Position on chapter 23 was adopted.[667] The human rights related interim benchmarks defined in it comprise – next to a general one on ensuring monitoring of the

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[661] See Government of Montenegro 'Action Plan for Chapter 23 Judiciary and Fundamental Rights' June 27, 2013. 4. <http://www.gov.me/ResourceManager/FileDownload.aspx?rId=138837&rType=2> (accessed 28 August 2014).

[662] See Government adopts action plans on negotiation chapters 23 and 24 <http://www.gov.me/en/news/129083/Government-adopts-action-plans-on-chapters-23-and-24.html> (accessed 28 September 2014).

[663] This Working Group was broadly composed and comprised also civil society representatives, so that '[i]n line with the negotiating framework, [it] was developed through a process of consultation with key stakeholders …, in order to provide maximum support for implementation' (Government of Montenegro 'Action Plan for Chapter 23 Judiciary and Fundamental Rights' June 27, 2013. 10. <http://www.gov.me/ResourceManager/FileDownload.aspx?rId=138837&rType=2> (accessed 28 August 2014)).

[664] See ibid 5. Moreover, the June Action Plan was submitted to the Commission 'for further consideration' (Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 31) and then finally adopted by the government on 10 October 2013 (ibid.). Whether any changes have been introduced on the basis of the EC's consideration or whether final adoption just happened after 'clearance' by the Commission could not be found out by desk research.

[665] See Government of Montenegro 'Action Plan for Chapter 23 Judiciary and Fundamental Rights' June 27, 2013. 11f. <http://www.gov.me/ResourceManager/FileDownload.aspx?rId=138837&rType=2> (accessed 28 August 2014). This monitoring mechanism also consists of the participation of civil society representatives 'who will significantly … contribute …also to maintenance of the necessary level of transparency' (ibid 11).

[666] See ibid 148ff.

[667] See Accession Document 'European Union Common Position Chapter 23: Judiciary and fundamental rights, Montenegro' 17/13 (Brussels, 12 December 2013) <http://register.consilium.europa.eu/doc/srv?l=EN&f=AD%2017%202013%20INIT > (accessed 23 October 2014).

implementation of the Action Plan[668] – 5 IBM on fundamental rights,[669] with 11 sub-IBM concretising the former.[670] In the Position itself no timeframes are given for the IBM, but since it repeatedly refers to the Action Plan and both documents are interlinked, these can be deducted from the Action Plan. In line with the Negotiating Framework, the EU Common Position reiterates that 'the EU indicates its intention to propose updated interim benchmarks, whenever it is duly justified'.[671] The negotiations on chapter 23 (as well as chapter 24) were formally opened in the <u>third Accession Conference</u> on 18 December 2013.[672]

The Coalition of NGOs for Monitoring the Accession Negotiations with European Union – Chapter 23, comprised of 16 Montenegrin NGOs,[673] delivered a situation report on the progress of the implementation of Chapter 23, covering the period up to April 2014. In the area of human rights protection, the Coalition states that the formal commitments were mostly met, but that there were no significant positive changes in practice.[674] In the area of non-discrimination e.g. the remaining key obstacles are seen in the lack of full harmonisation of domestic regulations with international guarantees of human rights protection,[675] as well as the practice of non-discriminatory legacies. Also, the transparency and inclusiveness in carrying out the Action Plan's activities is perceived as unsatisfying in many areas: although NGO representatives are included in the Working Group, 'the Rules of Procedure … restrict NGOs to inform the public about the work of the working group. … In this way, the transparency of the process reduces and limits the work of NGOs'.[676]

Serbia

The historic 'First agreement of principles governing the normalisation of relations' concluded between Serbia and Kosovo in April 2013 paved the way for the Council's decision in June 2013 to open accession negotiations, which officially happened with the <u>first Accession Conference</u> being held on 21 January 2014. There the EU presented its <u>General Position</u> and the <u>Negotiating Framework</u>, which are modelled on the documents elaborated for Montenegro.[677] A specificity in the case of Serbia is chapter 35 which

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[668] ibid 19.

[669] These require Montenegro to: strengthen the effective application of human rights; improve alignment with the EU *acquis* and international standards regarding procedural safeguards; step up the protection of minorities and cultural rights; take steps to align its domestic legal framework with the *acquis* and international standards against racism and xenophobia; and ensure for the above policy areas an adequate involvement of civil society in policy development, implementation and monitoring (see ibid 25ff).

[670] See ibid 25ff.

[671] ibid 28.

[672] See Council of the European Union 'Third meeting of the Accession Conference with Montenegro at Ministerial level - key rule of law chapters opened among others' 17964/13, 18 Dec 2013, <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/140154.pdf> (accessed 23 October 2014).

[673] See Report on the implementation of the Action Plan for Chapter 23 <http://umhcg.com/en/press-release-report-on-the-implementation-of-the-action-plan-for-chapter-23/> (accessed 03 September 2014).

[674] Coalition for Monitoring the Accession Negotiations with the European Union – Chapter 23 *Situation Report in the area of Judicial Reform and Human Rights (Chapter 23) in Montenegro in the period from 10 October 2013 to 10 April 2014* (Centre for Development of NGOs (CRNVO) April 2014) 34. <http://umhcg.com/wp-content/uploads/2014/07/Situation-Report-in-the-area-of-Judicial-Reform-and-Human-Rights-_Chapter-23_-in-Montenegro-in-period-from-10-October-to-10-April-2014.pdf> (accessed 03 September 2014).

[675] ibid 41.

[676] ibid 59.

[677] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union' 1/14 (Brussels, 21 January 2014)

comprises the normalisation of relations with Kosovo as a special item in the negotiations. The Negotiating Framework determines that the particular rules devised for chapters 23 and 24 will also be applicable to chapter 35.[678]

Like was the case with Montenegro, screening on chapters 23 and 24 had already started before the official launch of negotiations, so that the Screening Reports on both chapters were published on 15 May 2014 already. Again, the opening benchmarks set in the field of fundamental rights are directed towards the elaboration of one or more pertinent action plan(s).[679] Similar to Montenegro, particular attention shall in these be given to the areas of torture prevention and prison conditions, anti-discrimination as well as minority rights and media freedom.[680] Serbia has installed a National Convent on the EU bringing together more than 200 NGOs in order to provide expertise for the negotiations as well as monitoring these.[681] The Convent's Working Group for chapter 23 had its constitutive session still in May[682] and the first draft of the Action Plan was sent to the EC for comments in September 2014.[683] According to the Head of the EU Delegation to Serbia Michael Davenport, '[o]pening of Chapters 23 and 24 …could happen in spring 2015 in the best case scenario'.[684]

Turkey

The development of accession negotiations between the EU and Turkey can be considered a special case. While they have formally been taken up on 3 October 2005, together with Croatia, and the screening meetings on chapter 23 were carried out in 2006, the pertinent Screening Report has not yet been approved by the Council and thus opening benchmarks have up to now not been set.[685] As highlighted by the Commission in its 2014 Progress Report, '[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

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<http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT> (accessed 23 October 2014).

[678] This means that chapter 35 will be opened at the beginning and closed at the end of negotiations (see ibid 11), will be subject to interim benchmarking (see ibid 19) and will be distinguished by the specific suspension clause for the case of negotiations on it lagging behind (see ibid 12). Also, it will be connected to the same close monitoring procedure of semi-annual reports (see ibid 19), which will be the task of the European External Action Service (Ministry of Foreign Affairs of the Republic of Serbia (2013) *Information concerning the EU accession negotiating process*, 4. <http://www.mfa.gov.rs/en/images/stories/pdf/Information-concerning-the-process-of-negotiations-process.doc> (accessed 30 October 2014).

[679] see European Commission 'Screening Report Serbia Chapter 23 – Judiciary and fundamental rights', 15.05.14, MD 45/14. 38f. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf> (accessed 09 November 2014).

[680] See ibid.

[681] See Role of the civil sector in EU membership negotiations <http://www.europa.rs/en/mediji/najnovije-vesti/4281/Role+of+the+civil+sector+in+EU+membership+negotiations.html> (accessed 23 October 2014).

[682] See Miscevic: objective screening report of chapter 23 <http://voiceofserbia.org/content/miscevic-objective-screening-report-chapter-23 > (accessed 23 October 2014).

[683] See Draft Action Plan for Chapter 23 <http://www.tanjug.rs/news/144506/draft-action-plan-for-chapter-23-sent-to-ec.htm> (accessed 23 October 2014).

[684] See Opening of Chapters 23 and 24 in spring 2015 in best case scenario: Davenport <http://www.europa.rs/en/mediji/najnovije-vesti/4688/Opening+of+Chapters+23+and+24+in+spring+2015+in+best+case+scenario%3A+Davenport.html> (accessed 24 October 2014).

[685] See Republic of Turkey, Ministry of EU Affairs *2013 Progress Report prepared by Turkey*, December 2013, 143. <http://www.abgs.gov.tr/files/AB_Iliskileri/AdaylikSureci/IlerlemeRaporlari/2013_tr_progress_report.pdf> (accessed 23 October 2014).

States'.[686] In 2013 the relationship between Turkey and the EU has been particularly strained by the events surrounding Gezi Park, the ensuing wave of protest across the country and the reaction by the police and the Turkish government. Despite the new Positive Agenda launched by Turkey and the EC in 2012 in order to revive the stagnating accession process and despite reforms being carried out in 2013 (in particular through the 4th Judicial Reform Package addressing also a number of human rights issues), serious concerns persist and hamper Turkey's accession process. These relate in particular to excessive use of force by the police, restrictions to freedom of expression and of the media, infringement of freedom of assembly.[687] EU reactions to the violent events taking place in May and June 2013 were mixed, from cancelling meetings and thus intermitting communication to advocating an even closer dialogue with Turkey on human rights. The EC in its 2013 Enlargement Strategy also underlined the importance of an enhanced engagement on fundamental rights and of setting the route for opening negotiations on Chapter 23,[688] which it re-iterated in the 2014 Strategy:

> Accession negotiations need to regain momentum … The EU should remain an important anchor for Turkey's economic and political reforms. In this regard, it is in the interest of both Turkey and the EU that the opening benchmarks for chapter 23: Judiciary and Fundamental rights and 24: Justice, Freedom and security are defined as soon as possible, leading to opening of negotiations under these two chapters.[689]

Under the Positive Agenda an EU-Turkey working group on chapter 23 has been established, allowing the Commission to engage with Turkey in the area despite the fact that the negotiation process on the chapter is on hold. At the third meeting of this working group on 17 June 2014, European Commissioner for Enlargement and European Neighbourhood Policy Štefan Füle also pointed to recent peer review missions on specific topics under chapter 23.[690] '[A]iming at renewed cooperation',[691] these peer assessments commissioned by the EC and conducted by EU experts were carried out from November

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[686] European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 4. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf > (accessed 20 December 2014).

[687] See European Commission 'Commission Staff Working Document Turkey 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 307 final. 15. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf> (accessed 27 October 2014)

[688] See 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) 700 final. 22. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> (accessed 01 September 2014).

[689] European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015', Brussels, 08.10.2014, COM(2014) 700 final. 26f. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 15 October 2014).

[690] See European Commission Štefan Füle European Commissioner for Enlargement and European Neighbourhood Policy SPEECH/14/473, Opening remarks of Commissioner Füle at the EU-Turkey working group on Chapter 23, Ankara, 17 June 2014. 1. <http://europa.eu/rapid/press-release_SPEECH-14-473_en.htm > (accessed 09 November 2014).

[691] European Commission 'Commission Staff Working Document Turkey 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 307 final. 3 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf> (accessed 27 October 2014).

2013 to May 2014 and concerned – next to different topics regarding the judiciary – also freedom of expression.[692] It is likely that this instrument will continue to be applied by the Commission.[693]

With regard to all accessions negotiations (as well as other forms of engagement), the socialisation effects should not be underestimated. As Elgström and Smith underline when discussing EU external policy instruments, 'social influence is intimately linked to negotiation processes'.[694] They also refer to social influence being exerted through 'naming and opprobrium',[695] which of course is closely linked to monitoring through the Commission's reporting mechanism. Given the high significance of monitoring as a tool, it will be treated separately in chapter IV.C.h, even though it is of great relevance to and intertwined with the negotiation process, too.

f) *Accession instruments*

After the accession negotiations have been formally concluded, the following accession instruments are elaborated: the Treaty of Accession (in the narrow sense), signed by the enlargement country and all EU Member States; the Act Concerning the Conditions of Accession which contains the institutional and substantive terms; and the Final Act, supplementing the other documents and acknowledging their adoption.[696] The Treaty 'proper' and the Act of Accession (which is annexed to the former) can be referred to as 'the Accession Treaty sensu largo'.[697]

From the perspective of specific human rights relevance, it is worth discussing some provisions in the Act of Accession (AA) for Croatia of 2012 in terms of safeguard clauses as well as monitoring and also, in comparison, to take a look back on the Act of Accession for Bulgaria and Romania of 2005. What the two Acts have in common is that they contain certain safeguard clauses in the area of economy, internal market and justice and home affairs which allow for measures to be taken in case of serious problems during the three years following accession.[698] The JHA safeguard clause does, however, in both cases not have any special human rights content. In its Article 39, the Act for Bulgaria and Romania moreover foresees that membership could be postponed for one year in case of 'clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership'. While this provision could thus also have covered human rights relevant *acquis*, it, in practice, was not applied and the accession of the two countries took place as planned on 1 January 2007. The AA for Croatia does not contain such a membership safeguard clause, but it is characterised by another novelty. In Article 36 the continuing monitoring tasks of the European Commission after

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[692] See Peer Review Reports under <http://www.avrupa.info.tr/en/eu-and-turkey/accession-negotiations/peer-review-reports.html> (accessed 24 October 2014).

[693] See also European Commission Štefan Füle European Commissioner for Enlargement and European Neighbourhood Policy SPEECH/14/473, Opening remarks of Commissioner Füle at the EU-Turkey working group on Chapter 23, Ankara, 17 June 2014. 2. <http://europa.eu/rapid/press-release_SPEECH-14-473_en.htm > (accessed 09 November 2014).

[694] Ole Elgström and Michael Smith (eds), *European Union's Roles in International Politics: Concepts and Analysis* (Routledge 2006) 3.

[695] ibid.

[696] See Alan Tatham *Enlargement of the European Union* (Wolters Kluwer Law & Business 2009) 260.; Adam Łazowski 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy*, 4.

[697] Adam Łazowski 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy*, 4

[698] See Articles 37-38 Act of Accession Croatia and Articles 36-38 Act of Accession Bulgaria and Romania.

conclusion of negotiations are specifically and concretely regulated and hence incorporated into primary law. Close monitoring by the Commission in the period between signature of the Accession Treaty and actual accession had also existed in the case of the previous enlargement, yet it had not been explicitly foreseen in the Act.[699] In the case of Croatia, Article 36 (1) AA stipulates: 'The Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved before or by the date of accession.' This last specification – together with the fact that Article 36 does not set any formal time frame – has caused deliberations in academic literature on whether this opened up the path also for post-accession monitoring.[700] The formulation ('including') indeed can be read as expanding the possibility for Commission monitoring also to commitments beyond the date of accession.

Article 36 (1) goes on with not only detailing the different tools the Commission should use for fulfilling its task, but also laying a specific focus on the area of the judiciary and fundamental rights, i.e. on chapter 23, referring to Annex VII attached to the Act. This Annex defines 10 priority actions, three of which directly concern human rights issues.[701] The monitoring carried out on a six-monthly basis between April 2012 and Croatia's accession on 1 July 2013 was done on the basis of these priority actions, so that one could argue that they were the logical continuation of the benchmarking methodology during negotiations.

In fact, the EC monitoring on the implementation of the priority actions during this period was very important for the ratification process of the Accession Treaty. As pointed out by Łazowski, 'several Member States questioned Croatia's compliance with the entry conditions and decided to wait with ratification'.[702] Eight Member States (among them 'the big three' France, Germany and United Kingdom) ratified the Treaty only after the last EC Monitoring Report in March 2013 was published and gave a positive assessment.[703]

Next to this specific monitoring provision, another novelty in the Act of Accession for Croatia was Article 36 (2) which established the possibility for the Council to 'take all appropriate measures if issues of concern are identified during the monitoring process'. Enabling the Council to decide by qualified majority (and thereby carrying forth the logic of the suspension clauses in the Negotiating Framework), this provision did not only remain rather vague and open (with regard to both, the issues of concern and the measures), but also did, again, not contain any time frame. In connection with and depending on the reading of Article 36 (1), however, one could argue that it provided – in case of post-accession

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[699] Still, it can be argued that it had been established implicitly through references to it in the safeguard clauses of Articles 37-39.

[700] See e.g. Adam Łazowski 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 Croatian Yearbook of European Law & Policy, 34.; Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 5. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[701] These are: 7. To continue to strengthen the protection of minorities, including through effective implementation of the Constitutional Act on the Rights of National Minorities (CARNM); 8. To continue to address outstanding refugee return issues; 9. To continue to improve the protection of human rights. The tenth priority action regarded continued full cooperation with the ICTY.

[702] Adam Łazowski 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy*, 5.

[703] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 9.

monitoring being applied – the possibility for such measures to be taken also after accession.[704] In practice, neither was Article 36 (2) invoked for Croatia during its acceding phase, nor was post-accession monitoring carried out,[705] but, as Łazowski has put it: 'This mechanism allow[ed] the European Commission to keep its finger on the political trigger and the Council of the European Union on a 'gun' during the remainder of the pre-accession phase'.[706]

Yet, it remains to be seen whether future Acts of Accession will contain similar clauses – with a comparable focus on chapter 23 and under it human rights issues – and, if so, whether they maybe will be invoked for <u>post-accession monitoring</u> and Council measures at some point.[707]

g) Country-specific EC initiatives outside of negotiations

This section will highlight initiatives taken by the European Commission for those candidate states with which accession negotiations have not yet been opened and will look into them in terms of being instruments for human rights promotion.[708] Balfour and Stratulat state with regard to these newly created instruments:

> … the EU has expanded its toolkit to include more ingenious tactics aimed at helping with internal/bilateral impasses in the region. The logic was to circumvent the big political elephants obstructing countries on their EU track by focusing short-term attention on technicalities that can instead move forward the reform agendas of such aspirants.[709]

Macedonia

Since 2009 the European Commission keeps recommending in its Progress Reports that accession negotiations be started, yet the Council has so far not taken this decision. This is mainly due to the

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[704] However, this would then also have had to be set into context with the enforcement measures available towards Member States.

[705] See also *Our next goal: to join the Schengen area: Croatia's ambassador to Belgium* <http://www.euronews.com/2013/04/10/our-next-goal-to-join-the-schengen-area-croatia-s-ambassador-to-belgium/> (accessed 29 October 2014).

[706] Adam Łazowski 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy* , 34.

[707] In terms of post-accession monitoring it should not be left unmentioned that both Bulgaria and Romania continue to be exposed to such a monitoring through the Cooperation and Verification Mechanism (CVM), established by the Commission in 2006 on the basis of the safeguard clauses in Articles 37 and 38 of the Act of Accession (see Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C (2006) 6570 final and Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C (2006) 6569 final). Under this mechanism progress in the areas of judicial reform, the fight against corruption and, concerning Bulgaria, the fight against organised crime is being monitored on a six-monthly basis. The mechanism follows a benchmarking logic and will continue until all the benchmarks have been met by the countries. While there is no direct reference to human or fundamental rights in the CVM for Bulgaria and Romania (leaving apart that human rights implications could be seen in terms of access to justice and procedural rights), the mechanism constitutes a precedent for post-accession monitoring in general and could figure as a reference instrument for the invocation of future human rights safeguard clauses in particular.

[708] While the Positive Agenda set up with Turkey in 2012 technically also constitutes such an initiative outside of accession negotiations, it is covered under chapter IV.C.2.e (Accession negotiations) because it has been devised to revive the accession process of Turkey with whom negotiations have already been launched in 2005.

[709] Rosa Balfour and Corina Stratulat 'The Enlargement of the European Union', in *European Policy Centre Discussion Paper* (10 December 2012) 3f. <http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> (accessed 17 December 2013).

unresolved name issue with Greece which has resulted in 'bilateral conditionality … undermining the whole concept of merit based accession within the framework of strict but fair conditionality'.[710] In the past, the Commission has repeatedly expressed its preparedness 'to present without delay a proposal for a negotiating framework, which also takes into account the need to solve the name issue at an early stage of accession negotiations'.[711] In its Enlargement Strategy 2014-2015 the European Commission reiterated its positive assessment of sufficient fulfilment of the political criteria and its recommendation to launch negotiations with Macedonia for the sixth time.[712] It has also chosen somewhat clearer words in attesting the continuing stalemate: 'The EU accession process for the former Yugoslav Republic of Macedonia is at an impasse. Failure to act on the Commission's recommendation to the Council means that accession negotiations have still not been opened'.[713] On the other hand, the Commission also noted back-sliding in some areas, primarily as regards freedom of expression/media and the independence of the judiciary,[714] which occurred against the background of the political crisis arising at the end of 2012 and still leaving the Parliament malfunctioning.

In order to invigorate the accession process despite the fact that negotiations would not be opened, in March 2012 the Commission and the Macedonian government entered into a <u>High Level Accession Dialogue (HLAD)</u> which focuses mainly on rule of law issues. Led by the Macedonian Prime Minister and the EU Commissioner for Enlargement, this Dialogue is structured along <u>five priority areas</u> (with area I pertaining to media and including freedom of expression as well as area II covering rule of law and fundamental rights)[715] and specific <u>targets</u> within these areas 'which Macedonia has to meet in order to sustain the positive recommendation for opening accession negotiations'.[716] Leaving apart the fact that progress in reaching the targets is necessary for Macedonia not to lose the EC's positive assessment (without fulfilment of targets being directly linked to further steps in the accession process), the HLAD's methodology is modelled on the new approach applied in negotiations. This way 'the Commission firmly anchored the rule of law related policy reforms in Macedonia's accession process'.[717] Parallel to the

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[710] Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 40.

[711] European Commission 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2012-2013', Brussels, 10.10.2012, COM(2012) 600 final. 25 <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf> (accessed 01 September 2014); 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) 700 final. 18. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> (accessed 01 September 2014).

[712] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 23. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[713] ibid 22f.

[714] ibid 2.

[715] See Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 34.

[716] ibid 35.

[717] ibid 35.

HLAD, a <u>Technical Dialogue on chapters 23 and 24</u> was started in the same month,[718] signifying the particular attention given to rule of law issues.

Soon after the launch of the HLAD the Macedonian government adopted an <u>Operative Roadmap</u> for reforms in the defined five priority areas, the implementation of which has been continually monitored by the EC – not only in its Progress Reports, but also in a specific report in spring 2013 as requested by the Council in its meeting in December 2012.[719] While the 2012 and 2013 Progress Reports underlined the impetus provided by the HLAD for reforms to be brought on,[720] the momentum initially generated by it seems to have ebbed away not only due to the difficult political situation in Macedonia, but also because of the prolonged non-decision on accession negotiations. The Commission stated in its Enlargement Strategy 2013: 'The High Level Accession Dialogue is a useful tool which will continue to focus on key issues, including good neighbourly relations, but it cannot replace the accession negotiations'.[721] Similarly, the Macedonian Association Zenith concluded in 2013 with regard to the contents of chapter 23: 'Obviously, this short-term incentive mechanism is the current reform catalyst in Macedonia ... This innovation can only be effective in the short-term, until the bilateral conditionality is removed from the accession process, and by any means cannot be a substitute for a long-term strategy'.[722]

It can be argued that one year later – during which on the one hand still no date for opening accession negotiations has been set and on the other hand signs of backsliding have been observed – this appraisal of the merely short-term effectiveness of this instrument comes to prove true. According to the EC's 2014 Progress Report for Macedonia, no HLAD-meetings took place between October 2013 and September 2014.[723] This fact – even though the Commission still declares itself committed to the HLAD process[724] – adds to the generally found impasse.

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[718] See Technical talks on chapters 23 and 24 under way in Brussels <http://vlada.mk/node/2540?language=en-gb> (accessed 27 October 2014).

[719] While this report does elaborate on the issue of freedom of expression and the media as well as inter-ethnic relations and minority issues (under the heading 'Inter-community dialogue'), the section 'Rule of law and fundamental rights' only looks at measures undertaken in the field of the justice system and of prevention of corruption, thus – if applying analogy – only attaining to two of the three sub-chapters of chapter 23 (see European Commission 'Report from the Commission to the European Parliament and the Council – The Former Yugoslav Republic of Macedonia: Implementation of reforms with the framework of the High Level Accession Dialogue and promotion of good neighbourly relations', Strasbourg, 16.4.2013, COM(2013) 205 final <http://ec.europa.eu/enlargement/pdf/key_documents/2013/mk_spring_report_2013_en.pdf> (accessed 27 October 2014).

[720] E.g. legislation being passed in the area of freedom of expression (European Commission 'Commission Staff Working Document The former Yugoslav Republic of Macedonia Progress Report', Brussels, 16.10.2013, SWD(2013) 413 final, 12. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/mk_rapport_2013.pdf> (accessed 27 October 2014).

[721] 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) 700 final. 17. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> (accessed 01 September 2014).

[722] Association Zenith *Embedding rule of law in the enlargement process: A case for the EU political conditionality in the accession of the Western Balkan countries*, study authors Nechev, Z. et. al., (Association for Development Initiatives – Zenith 2013) 41.

[723] See European Commission 'Commission Staff Working Document the former Yugoslav Republic of Macedonia 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 303 final, 4.

Albania

In its June 2014 decision to grant Albania candidate status, the Council had also made reference to the High Level Dialogue (HLD) which had been established between Albania and the EC in November 2013.[725] This Dialogue centres on the five key priorities determined in the Commission's Opinion (see chapter IV.C.2.d). Following the model of the HLAD applied in Macedonia, the HLD in Albania is equally chaired by the Prime Minister and the EU Commissioner for Enlargement and 'serves as a tool to structure EU-Albania co-operation and to help Albania maintain focus and consensus on EU integration'.[726] This initiative has led not only to the adoption of the Roadmap on the five key priorities in May 2014,[727] which was arguably a factor for candidate status, but also of a comprehensive 2014-20 National Plan for European Integration in July.[728]

Up to the time of writing (October 2014), there have been four rounds of the High Level Dialogue. During the last one so far on 29 September 2014, the establishment of 5 EU-Albania Joint Working Groups (JWG) in the 5 key priorities was underlined.[729] In the operational conclusions from the JWG's constituent meeting on 18 September 2014 (annexed to the HLD conclusions) it can be traced which actions have been identified by the new Working Group Key priority 5: Human rights.[730] In brief, these relate to relevant institutional issues, legislation on persons with disabilities, property rights and minorities. It is foreseen that the results of future JWG meetings 'will feed into the High-Level Dialogue meetings and forthcoming reports by the European Commission on progress made by Albania on the implementation of the five Key Priorities'.[731]

<http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf> (accessed 27 October 2014).

[724] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 23. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[725] See Council of the European Union 'Council conclusions on Albania, General Affairs Council meetin' Luxembourg, 24 June 2014. 2. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/143354.pdf> (accessed 24 October 2014).

[726] See Albania - EU Relations < http://www.punetejashtme.gov.al/en/mission/eu-integration/albania-eu-relations> (accessed 27 October 2014).

[727] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 23. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf > (accessed 20 December 2014)

[728] See European Commission 'Commission Staff Working Document Albania 2014 Progress Report' Brussels, 08.10.2014, SWD (2014) 304 final. 7. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf> (accessed 27 October 2014). This Plan is structured in a similar way as the Progress Reports, in that the Copenhagen criteria are dealt with first and then the chapters of the *acquis* are presented and the plan of approximation 2014-16 (see <shtetiweb.org/wp-content/uploads/2014/06/L2-National-Plan-for-European-Integration-2014-2020.doc> (accessed 27 October 2014)).

[729] See Joint Conclusions of the fourth High Level Dialogue on the Key Priorities [between the EU and Albania], 29 September 2014. 1. <http://eudelegationalbania.wordpress.com/2014/09/29/eu-albania-eu-integration-must-be-inclusive-responsibility-on-government-and-opposition-2/> (accessed 27 October 2014).

[730] See ibid 8f.

[731] ibid 4.

h) Monitoring

Systematic EC monitoring as introduced into enlargement policy through the enhanced pre-accession strategy in 1997 and since then further developed in a number of ways has become a powerful tool to – through a 'naming and shaming' logic – exert influence (see also chapter IV.C.2.e) on the enlargement countries and trigger reforms, not least in the human rights field. At the same time, monitoring by the Commission has repeatedly been subject to criticism.

The monitoring mechanism applied in the enlargement context at the moment revolves primarily around the annual Progress Reports published in autumn of every year for each candidate and potential candidate country. Together with the Enlargement Strategy Paper the Progress Reports form the annual Enlargement Package.[732] In addition, the Commission from time to time elaborates specific separate reports, if tasked by the Council to do so (e.g. the 2013 Spring Report on Macedonia's progress in implementing reforms within the HLAD, see IV.C.2.g). Once a country has concluded accession negotiations and signed the Treaty of Accession, the Commission continues to draft six-monthly Monitoring Reports up to the time of accession (see the explicit provision in Article 36 Act of Accession for Croatia as discussed in chapter IV.C.2.f). Post-accession monitoring is still applied on Bulgaria and Romania in the context of the Cooperation and Verification Mechanism (in the areas of judicial reform and fight against corruption), whereas Croatia could avoid becoming subject to a similar procedure – even though Article 36 Act of Accession would arguably have allowed for such a mechanism to be installed (see chapter IV.C.2.f).

Looking at chapter 23 specifically, Croatia experienced particularly close monitoring by the EC on this chapter, with a specific interim report in 2011 assessing the progress and open issues in respect to all 10 closing benchmarks in detail.[733] This focus in monitoring did not cease with the conclusion of negotiations, but could also be observed in the bi-annual Monitoring Reports published thereafter concentrating on the 10 priority actions defined for chapter 23 in the Act of Accession (see chapter IV.C.2.f). Established by the Negotiating Frameworks with Montenegro and Serbia, particular monitoring requirements now exist with regard to chapters 23 and 24, in that the Commission has to report to the Council on 'the state of advancement of negotiations' on these chapters twice a year.[734]

In terms of methodology, the Progress Reports as main instruments are structured along firstly the Copenhagen criteria, assessing compliance with these, and secondly the *acquis* chapters, giving an account of either progress or remaining issues in relation to these. The sections on the Copenhagen

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[732] See Strategy and Progress Report <http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm> (accessed 07 November 2014).

[733] See European Commission 'Interim report from the Commission to the Council and the European Parliament on reforms in Croatia in the field of judiciary and fundamental rights (negotiation chapter 23)' Brussels, 2 March 2011, COM (2011) 110, <http://ec.europa.eu/enlargement/pdf/hp/interim_report_hr_ch23_en.pdf> (accessed 09 November 2014).

[734] See Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union' 23/12 (Brussels, 29 June 2012) 17. <http://ec.europa.eu/enlargement/pdf/st20002_05_mn_framedoc_en.pdf> (accessed 23 October 2014);. Accession Document 'General EU Position – Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union' 1/14 (Brussels, 21 January 2014) 18. <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT> (accessed 23 October 2014). In the case of Serbia, this frequency also applies on the reports to be drafted by the EEAS on the normalisation of relations with Kosovo under chapter 35 (see ibid 19).

political criteria, where human rights and the protection of minorities form a sub-section, and on chapter 23 regularly contain cross-references. The latter is sub-divided into judiciary, anti-corruption and fundamental rights, thus following the structure of the chapter 23 Screening Reports. Under fundamental rights the Commission regularly records civil and political rights (prevention of torture and ill-treatment, prison conditions, access to justice, freedom of expression and media, freedom of association and assembly as well as freedom of thought, conscience and religion), economic and social rights (women's rights and gender equality, children's rights and the rights of socially vulnerable and persons with disabilities, non-discrimination (with increasing attention to LGBTI issues), property rights and labour rights), protection of minorities and cultural rights, and protection of personal data.[735] As pointed out by Benedek et al. in their study for the European Parliament, these topics are consistently covered in all Progress Reports every year, yet it is not always clear how the Commission comes to its assessment of improvement or deterioration in a certain field.[736] This is why they strongly recommend to create a set of indicators (which in cooperation with local stakeholders, also from civil society, could be adapted to county-specific needs) to be used by the Commission in its monitoring exercise.[737] As argued by Nowak, 'in the assessment of the human rights situation, certain priority needs to be accorded to compliance with the ECHR'.[738] Yet, de Witte states that 'the European Commission … did not use [it] as the primary indicator of the applicant State's human rights performance, and still does not do so with the current candidate countries', despite them being parties to the Convention.[739] Similar to the EU Charter of Fundamental Rights, however, the ECHR is narrower in substantive scope in terms of economic, social and cultural rights as well as not including minority rights, while these rights do form part of human rights conditionality in enlargement and thus pre-accession monitoring as illustrated above.[740] As for indicators, it has also been recommended to use those developed by the EU Fundamental Rights Agency: 'The fact that its mandate is, for the time being, limited to EU member states and Croatia [comment: as observer at that time] does not prevent the Commission from making use of these indicators in its evaluation of states' progress in realizing these human rights'.[741]

What has also been a point of criticism regarding the EC's monitoring is the fact of insufficient or lacking reference to priorities defined in the Accession Partnerships / European Partnerships as well as to the

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[735] See Progress Reports 2014.

[736] See European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 61f. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[737] See ibid 62.

[738] Manfred Nowak, `Human Rights `Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Alston P, (ed), *The European Union and Human Rights* (Oxford University Press 1999) 694.

[739] Bruno de Witte, 'The EU and the International Legal Order: The Case of Human Rights', in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011) 139.

[740] See also Manfred Nowak, `Human Rights `Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Alston P, (ed), *The European Union and Human Rights* (Oxford University Press 1999) 693; Bruno de Witte 'The EU and the International Legal Order: The Case of Human Rights', in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011) 139.

[741] European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 66. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

benchmarks set at different stages in the negotiation process.[742] Correspondingly, possibilities to link the various instruments and to thereby increase both coherence and transparency were identified in 'dedicating a separate chapter in Progress Reports to the assessment of Partnership priorities … and benchmarks or [in] explicitly mentioning priorities and benchmarks in the individual chapters'.[743]

Finally, the fact that systematic monitoring is only applied until accession and not on Member States has given rise to further critical comments on double standards being applied.[744] Hillion speaks of incongruity and assumes that it will persist because of the lack of internal monitoring mechanisms: 'Paradoxically, this might prolong the discrepancy ..: as the internal EU fundamental rights system still lacks teeth, the leverage derived from the pre-accession conditionality is used to push for ambitious adaptations essential to the proper functioning of the EU legal order, because such adaptations are difficult to enforce in a post-accession context'.[745]

i) *Financial and technical assistance*

Financial assistance

The Instrument of Pre-Accession Assistance (IPA), replacing in 2007 previous aid programmes like inter alia PHARE and CARDS (which had also financed human rights related activities), has become the main EU financial instrument for supporting the enlargement countries on their way to membership. The new financing period 2014-2020 brought the creation of IPA II, with some novelties in methodology. IPA was divided in five components, with strong focus on the first component I) Transition Assistance and Institution Building, which was also most relevant in terms of human rights promotion.[746] Programming of funds entailed a running three-year Multi-annual Indicative Financing Framework (MIFF) for the allocation of funds, on the basis of which (and of the priorities determined in the Accession and European Partnerships) the Commission elaborated – again three-year – Multi-annual Indicative Planning Documents (MIPD) for each country. These formed in turn the basis for the annual national IPA programmes. As outlined earlier, thinking in the policy cycle, the content of the EC's Progress Reports should ideally be reflected in the planning documents and the programming of EU assistance. However, Benedek et.al. in their study for the European Parliament found that '[m]ostly, the programming of the IPA does not take on or respond to the new information on developments provided by the annual reports'.[747] Similarly, Berenschot and Imagos, evaluating IPA programming in inter alia the rule of law in the Western Balkans, concluded that the Progress Reports 'would typically raise concerns within the field of Rule of Law, but these were not followed up by specific financial allocations or suggestions for

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[742] ibid 63 and 68.

[743] ibid 92.

[744] See e.g. Grainne de Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union' (2003) 27 (2) Fordham International Law Journal 699ff.

[745] Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 9. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[746] In this component the protection of human rights was subsumed under the areas political requirements, socio-economic requirements and alignment to European standards (see European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 71. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[747] ibid.

restructuring or re-orienting ongoing activities'.[748] Also, for projects dealing with institution-building they considered the limited support (in terms of time and funding) as problematic: 'Building or restructuring a court system, modifying a law tradition, changing the principles of policing or how to deal with sophisticated criminality requires long-term support and guidance'.[749] Addressing this issue might have been one reason for the shift to a sector approach being introduced for the MIPDs 2011-2013, in order to arrive at a more integrated planning.[750]

Implementation of IPA is still ongoing, but at the same time programming for IPA II has started which will continue to follow the sector approach for more structural reforms: 'IPA II targets reforms within the framework of pre-defined sectors. These sectors cover areas closely linked to the enlargement strategy, such as democracy and governance, rule of law or growth and competitiveness'.[751] In addition, IPA II brings as new tools 'incentives for delivery on results',[752] i.e. the possibility for a country to obtain additional funds if it demonstrates special progress in fulfilling set targets.[753] A further novelty are the Country Strategy Papers introduced as planning documents elaborated for each county for the whole financing period.[754] These Country Strategy Papers have been adopted in August 2014 and are complemented by the June 2014 Multi-country Indicative Strategy Paper for EU horizontal and regional financial assistance. As pointed out by the Commission in its 2014 Enlargement Strategy, under IPA II the focus on the areas of democracy and rule of law will be increased[755] – which is also re-confirmed in the Country Strategy Paper for Montenegro, to take one example, naming a 'renewed focus on democracy and governance, the rule of law and fundamental rights'[756] as one of two pillars of IPA programming.

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[748] Berenschot and Imagos 'Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organised Crime in the Western Balkans – Lot 3' (Service Contract Ref. No 2010/ 256 638, Final Main Report 2012) 13. <http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2013_final_main_report_lot_3.pdf> (accessed 09 November 2014).

[749] ibid 15.

[750] See European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 70. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[751] See Overview - Instrument for Pre-accession Assistance http://ec.europa.eu/enlargement/instruments/overview/index_en.htm#ipa2 (accessed 28 August 2014).

[752] European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015', Brussels, 08.10.2014, COM(2014) 700 final. 3. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 15 October 2014).

[753] See also Helping Countries Prepare for Accession <http://www.auswaertiges-amt.de/sid_A14500FB29AF5B155521B58C6EEB6396/EN/Europa/Erweiterung/UnterstuetzungsProgramme_node.html> (accessed 09 November 2014).

[754] See Overview - Instrument for Pre-accession Assistance http://ec.europa.eu/enlargement/instruments/overview/index_en.htm#ipa2 (accessed 28 August 2014).

[755] See European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 4. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf > (accessed 20 December 2014).

[756] European Commission 'Instrument for Pre-Accession Instrument (IPA II) Indicative Strategy Paper for Montenegro (2014-2020)' 18/08/2014. 9. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140919-csp-montenegro.pdf > (accessed 09 November 2014).

What is important to note is that there has also been a change regarding the possibility of suspending assistance. While IPA was subject to a suspension clause in case a country fails to respect 'the principles of democracy, the rule of law and for human rights and minority rights and fundamental freedoms',[757] no such provision has been taken up into the IPA II Regulation. In this context, only the following statement by the European Parliament is attached to the Regulation:

> The European Parliament notes that ... 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) do[es] not contain any explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably the principles of democracy, rule of law and the respect for human rights.[758]

The reason for and implications of the omission of such a suspension clause would need to be further explored, which, however, would go beyond the scope of this mapping exercise.

The European Instrument for Democracy and Human Rights (EIDHR) is another relevant source of funding in the enlargement context, in particular as it can reinforce activities implemented through IPA.[759] Also, while IPA funds are directed at state bodies mainly, EIDHR enables to circumvent these and to support civil society with a bottom-up approach.[760] Therefore complementarity between the two instruments in the promotion of human rights should be enhanced in order 'to benefit from parallel actions'[761] – something which is also touched upon in e.g. the Montenegro IPA Country Strategy Paper.[762]

Technical assistance

The central instrument devised for technical assistance in enlargement is Twinning, applied for supporting *acquis* adoption and institution-building since 1998 (and in the meantime also extended to the context of the European Neighbourhood Policy). Twinning consists in bilateral partnership projects between administrative bodies of EU Member States and of beneficiary countries. Developed for all areas of the *acquis*, Twinning has gained considerable significance also in promoting rule of law and human rights, e.g. in the fields of anti-discrimination policies, justice reform, data protection, and the prevention of trafficking in human beings, to name just a few examples of past Twinning projects with human rights content.[763]

An essential feature of Twinning projects is the delivery of specific, guaranteed results through joint efforts. Based on this, the project partners jointly create a detailed work plan with milestones to meet an

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[757] Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), Article 21. <http://eacea.ec.europa.eu/tempus/documents/tempus_ipa.pdf > (accessed 21 October 2014).

[758] 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 09 November 2014).

[759] See European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 72. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[760] See ibid.

[761] ibid 93.

[762] See European Commission 'Instrument for Pre-Accession Instrument (IPA II) Indicative Strategy Paper for Montenegro (2014-2020)' 18/08/2014. 9. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140919-csp-montenegro.pdf> (accessed 09 November 2014).

[763] See e.g. Twinning <http://bim.lbg.ac.at/en/twinning-0> (accessed 09 November 2014).

objective concerning priority areas of the *acquis* as defined in the Accession Partnerships. Twinning aims to share good practices developed within Member States (MS) with Beneficiary Country (BC) administrations and to create sustainable relationships between the partners. For this purpose a bilateral project team is set up, with a MS Resident Twinning Adviser (RTA), seconded to the BC administration for a minimum of 12 months, and a BC RTA Counterpart as backbones of the project. The project activities (analyses and reports on the status quo in the BC, comparisons of European good practice models, development of standards, legislative proposals and recommendations, joint workshops, consultations, seminars and training, evaluations, etc.) are implemented by a pool of experts during their country missions of short or medium duration.[764] Study visits or secondments of the BC administration staff in the partner countries often form another important part of the project activities. This gives the chance to gain an inside view on MS partner institutions and different MS administrative systems, but also facilitates establishing important contacts and networks as well as exchange of experiences. Twinning projects are moreover characterised by detailed reporting requirements to ensure the achievement of the set milestones and the agreed project outcome and to inform the EU Delegations in the BC countries for the elaboration of EU Progress Reports.

With these features Twinning not only is in keeping with the benchmarking and monitoring logic applied throughout enlargement policy, but also is a key instrument for achieving socialisation effects and exerting social influence (see chapter IV.C.2.e). Also, from a human rights perspective, the partnership principle and the dialogic approach inherent to the concept of the instrument should be underlined as important features.

Finally, it should not go unmentioned here that technical assistance is also provided on a more short-term and smaller scale basis through the TAIEX instrument. Under this instrument managed by the Directorate-General Enlargement technical assistance and advice is implemented primarily through workshops, study visits and expert missions.[765] Especially in form of the later, peer assessments are increasingly used by the Commission as a tool in the pre-accession process, notably in the preparation of negotiations (see chapter IV.C.2.e regarding screening as well as the recent assessment missions on chapter 23 in Turkey). Yet, the TAIEX instrument and its tools can also be applied in complementarity to Twinning, e.g. for carrying out follow-up activities and hence strengthening the achieved effects of a Twinning project, both in terms of reforms being implemented and social ties being enforced.

j) Observer status and participation in EU programmes

The involvement of (potential) candidate countries in different EU bodies and programmes is a strong tool and incentive to enhance exchange and cooperation on a personal level as well as to support alignment in inter alia human rights related policy fields. A thorough understanding of the highly complex structures, modes of cooperation, negotiation and communication as well as opinion-forming and decision-making processes and the power centres of the European Union's institutions is essential for the candidate countries to become capable of playing an active role within the EU. The candidate countries' involvement in EU institutions, through obtaining observer status, and their participation in EU programmes strengthens cooperation between the candidate state and the EU and provides candidates

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[764] See European Commission 'Institution Building in the Framework of European Union Policies. Common Twinning Manual' Update 2013-2014. <http://ec.europa.eu/europeaid/sites/devco/files/twinning-manual-2012-update-2013-2014-final-_20140910_en_0.pdf> (accessed 09 November 2014).

[765] See What is TAIEX? <http://ec.europa.eu/enlargement/taiex/what-is-taiex/index_en.htm> (accessed 09 November 2014).

with a practical insight into the Union's instruments and policies in order to familiarise them with various policy areas.[766] These tools are also of considerable relevance in terms of human rights promotion, which be outlined in the following sections.

Observer status in EU bodies

Through being granted observer status for several EU institutions, a candidate country is phased in into the EU decision-making machinery after completion of negotiations and signature of the Treaty of Accession until the date of accession. This applies to the European Council and the Council of the European Union as well as the European Parliament,[767] with full membership rights obviously unfolding only after the entry into force of the Treaty of Accession.

In the case of the <u>Council</u>, observer status for an acceding country – next to participation in meetings – entails also that it takes part in the Information and Consultation Procedure, which 'allows [it], at least in theory, … to shape pending proposals of EU legislation, which are adopted after the cut-off date of the accession negotiations but before accession to the European Union'.[768] Candidate countries value the observer status as essential for increased transparency of EU procedures and for addressing issues of special importance. So, while certain Council meetings are open to countries once they have obtained candidate status,[769] Turkey started an informal initiative aiming to obtain observer status generally at European Council summits and EU Council meetings already during the accession negotiations and not only in the phasing-in period after conclusion of negotiations.[770] The success of this initiative, which is also seen as 'a serious step in the convergence of all these countries to the EU' might depend on the political will for support and the assessment of accordance with the EU legal framework.[771]

As for the <u>European Parliament</u>, acceding countries are traditionally invited to nominate observers.[772] In the most recent case of Croatia, 12 members of the Croatian parliament were sent as observers to the European Parliament, corresponding to the seats allocated to the country when becoming a fully-fledged member.[773] The Parliament's Rules of Procedure describe the rights of the observers as follows: '[They] shall take part in the proceedings of Parliament and shall have a right to speak in committees and political groups. They shall not have the right to vote or to stand for election to positions within Parliament. Their participation shall not have any legal effect on Parliament's proceedings'.[774]

Looking furthermore at EU agencies, the level of involvement of enlargement countries with them varies and will be exemplified by the cases of the European Union Agency for Fundamental Rights (FRA) and the

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[766]   See   Helping   Countries   Prepare   for   Accession.   <http://www.auswaertiges-amt.de/EN/Europa/Erweiterung/UnterstuetzungsProgramme_node.html> (accessed 22 September 2014).

[767] See Adam Łazowski, 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy*, 11.

[768] ibid 11f.

[769] See EU Delegation to Albania <http://eudelegationalbania.wordpress.com/2014/06/24/eu-candidate-status-for-albania/ > (accessed 26 October 2014).

[770]   Supported   by   Serbia,   Macedonia   and   Montenegro,   see <http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/03/31/feature-03> (accessed 24 October 2014).

[771] See ibid.

[772] See Adam Łazowski, 'European Union do not Worry, Croatia is behind you: a Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy*, 12.

[773] See ibid 14.

[774]   See   The   Observers   in   the   European   Parliament <http://www.europarl.europa.eu/ressources/observer/obs_en.pdf> (accessed 24 October 2014).

European Institute for Gender Equality (EIGE), being the two most relevant agencies in the area of human rights.

Having been established in 2007 based on Council Regulation No.168/2007, the <u>European Union Agency for Fundamental Rights (FRA)</u> has the task to provide assistance and fundamental rights expertise to the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law.[775] The founding regulation refers to the possibility of participation for candidate countries as well as countries with a Stabilisation and Association Agreement (SAA) as observers 'since this will enable the Union to support their efforts towards European integration by facilitating a gradual alignment of their legislation with Community law as well as the transfer of know-how and good practice, particularly in those areas of the *acquis* that will serve as a central reference point for the reform process in the Western Balkans'.[776] In Article 28 the participation and scope is laid down with a differentiated approach for each candidate country by basing their participation and the respective modalities on a decision of the relevant Association Council. On this legal ground the EC supports the involvement of candidate countries: 'In order to better integrate the enlargement countries into EU frameworks and support the spread of best practice, the Commission strongly encourages the candidate countries to continue their preparations aimed at participation as observers in the work of the EU's Fundamental Rights Agency'.[777] Furthermore, Article 28 para. 3 foresees that the Commission could propose to the Council to invite all countries with which an SAA has been concluded (i.e. irrespective of candidate status) to participate in the Agency as observers.

Before joining the EU, Croatia as first country had held observer status within the FRA from May 2010 on, with representatives on the FRA's management board and Croatian civil society organisations already active in its Fundamental Rights Platform. In line with its statutory mandate (see Council Regulation (EC) No. 168/2007 Article 28: '…the Agency may deal with fundamental rights issues within the scope of Article 3(1) in the respective country…'), this status gave the FRA the possibility to include Croatia e.g. in its annual reports, in its data collecting activities and workshops,[778] in meetings with the National Liaison Officers,[779] and in surveys being carried out, most notably its large 2010 LGBT survey,[780] the very relevant results of which were published in May 2013 still before Croatia's accession.[781] Among the current

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[775] See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights <http://fra.europa.eu/sites/default/files/fra_uploads/351-reg_168-2007_en.pdf> (accessed 25 September 2014).

[776] ibid preamble point 28.

[777] See 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) 700 final. 13. <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf> (accessed 01 September 2014).

[778] See e.g. European Union Agency for Fundamental Rights 'Annual Activity Report 2011', Luxembourg: Publications Office of the European Union (2012). 7 and 46.

[779] ibid 56.

[780] See FRA welcomes Croatia to the EU <http://fra.europa.eu/en/news/2013/fra-welcomes-croatia-eu> (accessed 15 October 2014).

[781] See LGBT Persons' Experiences of Discrimination and Hate Crime in the EU and Croatia <http://fra.europa.eu/en/publication/2013/lgbt-persons-experiences-discrimination-and-hate-crime-eu-and-croatia> (accessed 17 October 2014).

candidate states, Serbia and Albania have applied for observer status, yet the decisions are still pending.[782]

In their study for the European Parliament, Benedek et al. see rightly more potential for the FRA in the enlargement context and on the one hand advocate the extension of a FRA observer status to all countries with which an SAA has been concluded and recommend the Commission to invoke the pertinent clause in the FRA Regulation. This way 'the Commission could benefit in its monitoring activities from country or thematic studies to be produced by the Agency as well as from its elaborate methodology in collecting and analysing data'.[783] Irrespective of observer status, the study authors identify a potential indirect way for spreading FRA's expertise into the enlargement context: the EC could make use of best practices identified by FRA in its annual reports as well as the indicators developed by it for its monitoring and reporting activities.[784] In addition, the FRA's work can also bring benefits to the accession process through its publications being used more systematically. A case in point is the FRA's toolkit *Joining up fundamental rights* targeting governments and giving 'advice to help integrate fundamental rights into policy making, service delivery, and administrative practices'.[785] This toolkit could be of great use when it comes to institution- and capacity-building activities in enlargement countries.

The European Institute for Gender Equality (EIGE), having become operational with its first work programme in 2010 on the basis of Regulation (EC) No 1922/2006, aims at 'contribut[ing] to and strengthen[ing] the promotion of gender equality, including gender mainstreaming in all EU policies and the resulting national policies, and the fight against discrimination based on sex […] by providing technical assistance to the Community institutions'.[786] One of its tasks is to 'provide information to the Community Institutions on gender equality and gender mainstreaming in the accession and candidate countries'.[787]

Other than the FRA, EIGE's founding regulation does not refer to a potential observer status within the agency for candidate countries. Still, EIGE stresses the importance of the involvement of (potential) candidate countries for a successful accession process:

> The main criteria for EU membership are aligning national legislation with EU "*acquis*" and ensuring effective administrative structures to implement EU rules. It is therefore in the EU's interest to involve

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[782] See European Commission 'Commission Staff Working Document Serbia 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 302 final. 5. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf> (accessed 27 October 2014); European Commission 'Commission Staff Working Document Albania 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 304 final. 5. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf> (accessed 27 October 2014).

[783] European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 92. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[784] See ibid 66.

[785] See Joining up fundamental rights <http://fra.europa.eu/en/joinedup/home> (accessed 17 October 2014).

[786] European Union *The EU justice and home affairs agencies*, Luxembourg: Publications Office of the European Union. 13. <http://eige.europa.eu/sites/default/files/BZ0414283ENC_web.pdf> (accessed 10 October 2014).

[787] Regulation (EC) No 1922/2006, Article 3 paragraph 1 lit. l.

candidate countries and potential candidates in the work of EU agencies such as EIGE and to provide them with technical assistance.[788]

In 2013 EIGE consequently started an IPA project on 'Preparatory Measures for the participation of candidate countries and potential candidates in EIGE's work' with the main objective to strengthen the capacity of candidate countries and potential candidates to comply with the EU policies in the field of gender equality as well as enhancing communication and information sharing between (potential) candidate countries, EIGE and the EU Members States. A number of activities have so far been implemented, like technical meetings with the beneficiary countries, in-country events on specific subjects and the participation of national experts from candidate countries and potential candidates in specific meetings, conferences and study visits organised by EIGE.[789] Furthermore, EIGE participates in the informal network of EU Agencies working with the Instrument of Pre-accession Assistance (IPA) and the European Neighbourhood Policy (ENP) countries with the main objective to share experiences, lessons learned and good practices between EU agencies' IPA and ENP project officers and coordinators.[790]

Participation in human rights relevant EU programmes

Leaving aside the EU programmes dedicated specifically to pre-accession (IPA and IPA II) and to the promotion of human rights in external relations (EIDHR), which have been depicted in chapter IV.C.2.i, this section will take a look at relevant programmes designed for Member States, but (at least theoretically) giving also enlargement countries possibilities to participate.

Firstly, the 2007-2013 Community Programme for Employment and Social Solidarity PROGRESS, supporting the development and coordination of EU policy in the areas of employment, social inclusion and social protection, working conditions, anti-discrimination and gender equality, was also open to candidate countries and potential candidate countries.[791] In terms of human rights promotion, participation in PROGRESS, i.e. the possibility to receive funding under this financial instrument, proved particularly relevant in the areas of non-discrimination and gender equality. Taking the year 2013 as an example, the EC's list of activities for that year foresaw the participation of candidate countries and pre-candidate countries in 13 activities in the non-discrimination sector[792] and in 10 activities in the gender equality sector.[793]

With the new financial period 2014-2020, PROGRESS has been integrated and become an axis of the newly created EU Programme for Employment and Social Innovation (EaSI).[794] The PROGRESS axis is now

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[788] See EIGE's Cooperation with Candidate Countries and Potential Candidates <http://eige.europa.eu/content/eiges-cooperation-with-candidate-countries-and-potential-candidates> (accessed 25 September 2014).

[789] See IPA Project <http://eige.europa.eu/content/ipa-project> (accessed 25 September 2014).

[790] See EIGE's Cooperation with Candidate Countries and Potential Candidates <http://eige.europa.eu/content/eiges-cooperation-with-candidate-countries-and-potential-candidates> (accessed 25 September 2014).

[791] See Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress. Article 16. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D1672&from=EN > (accessed 29 October 2014).

[792] European Commission 'List of activities for 2013 European Union Programme for Employment and Social Solidarity – PROGRESS' 22ff. < http://ec.europa.eu/social/BlobServlet?docId=9999&langId=en> (accessed 30 October 2014).

[793] ibid 26f.

[794] See EU Programme for Employment and Social Innovation (EaSI) <http://ec.europa.eu/social/main.jsp?langId=en&catId=1081> (accessed 30 October 2014).

dedicated to three thematic sections: employment, in particular to fight youth unemployment; social protection, social inclusion and the reduction and prevention of poverty; and working conditions – thus not comprising the former explicit focus on anti-discrimination and gender equality anymore.[795] The regulation establishing EaSI continues to determine that candidate and potential candidate countries can take part in the PROGRESS axis, yet makes their participation dependent on 'accordance with the general principles and the general terms and conditions laid down in the framework agreements concluded with them on their participation in Union programmes'.[796]

The same applies to the relevant 2014-2020 programmes set up by the Directorate-General Justice, which are 1) the Rights, Equality and Citizenship Programme and 2) the Justice Programme. The regulations for both programmes foresee the possible participation of candidate, potential candidate and acceding countries subject to bilateral 'Framework Agreements and Association Council decisions, or similar agreements'.[797] This follows in line to the preceding Fundamental Rights and Justice Programme (2007-2013) whose specific programmes Civil Justice, Daphne III and Fundamental Rights and Citizenship all contained an analogue provision.[798] Concluding, however, from information by the Directorate-General Justice[799] as well as the Progress Reports 2014, none of the enlargement countries actually participates in any of these human rights relevant DG Justice programmes.

k) *Cooperation with other international institutions*

For the sake of efficient use of limited financial means and to ensure maximum impact and sustainability of EU interventions sustained cooperation with other international institutions covering relevant issues is crucial. Yet, different institutional histories, cultures, set-ups and political strategies – next to the mere practical problems in coordinating huge organisations – might impede an ideal cooperation structure to a certain limit. In its Enlargement Strategy 2014 the Commission stated its intention – with regard to the protection of minorities – to 'enhance strategic cooperation with international organisations and other

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[795] See Progress axis of EaSI <http://ec.europa.eu/social/main.jsp?catId=1082&langId=en> (accessed 30 October 2014).

[796] Regulation (EU) No 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation ("EaSI") and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion, Article 18 para 1 lit. c. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0238:0252:EN:PDF> (accessed 30 October 2014). Supposedly, those countries that have actually participated in PROGRESS, like Serbia (see European Commission 'Commission Staff Working Document Serbia 2014 Progress Report' Brussels, 08.10.2014, SWD(2014) 302 final. 5. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf> (accessed 27 October 2014)), will in an analogous manner have access to the PROGRESS axis under EaSI.

[797] Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 Article 7 para 1. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1382&from=EN> (accessed 26 September 2014); Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020, Article 6 para 1 lit. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1381&from=EN> (accessed 26 September 2014).

[798] See Decision No 1149/2007/EC Article 4; Decision No 779/2007/EC Article 5; Council Decision 2007/252/EC Article 4. The specific programme Criminal Justice, by contrast, did not foresee such a clause for participation of enlargement countries (see Council Decision 2007/126/JHA).

[799] See Justice Programme <http://ec.europa.eu/justice/grants1/programmes-2014-2020/justice/index_en.htm> (accessed 29 October 2014) and Rights, Equality and Citizenship Programme 2014 -2020 <http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm> (accessed 29 October 2014).

donors'.[800] The following paragraphs shall exemplify in which ways such a cooperation is or can be an instrument of human rights policy generally in enlargement.

The Council of Europe (CoE), as one of the most important stakeholders in the field of human rights specifically in the enlargement countries, is considered a key partner in the enlargement process by the EC. Cooperation happens in the form of annual consultations on the enlargement package as well as joint programming exercises.[801] In 2013, the then European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle gave a strong statement on the importance of the cooperation EU-CoE in the enlargement context and indicated room for improvement as well:

> The Council of Europe is a key partner in various aspects of the enlargement process. … Coordination between the European Union and the Council of Europe is crucial for coherent and effective action. We rely on each other's efforts to advance our common objectives and support our shared values. I am absolutely clear that the key is to work hand in hand to provide the best support possible for the democratic process in the partner countries. I hope that in the future we will have the opportunity to expand our collaboration to make it even more stable and strategic.[802]

Cooperation between the EU and the CoE is based on a Memorandum of Understanding concluded in 2007, which lays out: 'Bearing in mind the common aim of promoting and strengthening democratic stability in Europe, the Council of Europe and the European Union will increase their common efforts towards enhanced pan-European relations, including further co-operation in the countries participating in the European Union's Neighbourhood Policy or the Enlargement process…'.[803] As concretised by the EEAS in terms of priorities for cooperation, the Western Balkans will be a focus area, and enlargement countries for which cooperation with the CoE is envisaged in 2014-2015 are Turkey, Bosnia and Herzegovina, Kosovo.[804] Human rights figure prominently under the areas named for thematic cooperation in this period.[805] The ways in which this cooperation shall materialise is stated by the EEAS as follows: '1) political cooperation: regular and frequent high level and working level dialogues: 2) legal cooperation: strengthening coherence between EU law and CoE legal standards, 3) assistance cooperation: through joint programmes in EU partner countries.'[806]

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[800] European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enlargement Strategy and Main Challenges 2014-2015' Brussels, 08.10.2014, COM (2014) 700 final. 15. <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf> (accessed 20 December 2014).

[801] See Council of the European Union 'EU Annual Report on Human Rights and Democracy in the World in 2012' (Thematic Report), Brussels, 13 May 2013, 9431/13, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209431%202013%20INIT > (accessed 14 August 2014); Council of the European Union 'EU Annual Report on Human Rights and Democracy in the World in 2012' (Country Report), Brussels, 21 May 2013, 9431/13 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209431%202013%20ADD%201%20REV%201> (accessed 14 August 2014).

[802] European Commission Štefan Füle, European Commissioner for Enlargement and Neighbourhood Policy SPEECH/13/50, *Address to the Parliamentary Assembly of the Council of Europe*, Strasbourg, 24 January 2013. 2 and 6. <http://europa.eu/rapid/press-release_SPEECH-13-50_en.htm> (accessed 09 November 2014).

[803] Memorandum of Understanding between the Council of Europe and the European Union, May 2007, 5. <http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf> (accessed 09 November 2014).

[804] See The European Union's Relations with the Council of Europe <http://eeas.europa.eu/delegations/council_europe/eu_council_europe/index_en.htm> (accessed 09 November 2014).

[805] See ibid.

[806] ibid.

Another form of cooperation relates to the CoE's European Commission for Democracy through Law (Venice Commission) which as an independent consultative body works in the field of constitutional, legislative and administrative principles and techniques for the efficiency of democratic institutions, fundamental rights and freedoms.[807] The EU can request an opinion from the Commission,[808] which e.g has been done by the EU Special Representative in Kosovo in 2013 with regard to the Kosovar draft law on freedom of religion.[809]

Examples of relevant practical cooperation in enlargement policy between the EU and the CoE (and the OSCE as another relevant actor) can be found primarily in the field of minority protection, but also of data protection. With regard to the former, Benedek et al. in their study for the European Parliament point to three joint regional projects promoting minority protection and inclusion in the Western Balkans, which have partly been co-funded by the institutions.[810] As for data protection, an example of practical ad-hoc cooperation could be observed in a Twinning project in Montenegro implemented from 2010 to 2012. The background to this project had not only been alignment to the EU *acquis*, but also 'to ensure conditions for realization of obligations resulting from the membership in the Council of Europe' as one of 'the most important reasons for adopting and implementing regulations regarding data protection activities'.[811] Thus a CoE expert drafted an analysis of the amendment to the Montenegrin Data Protection Act, which had been jointly elaborated in the course of the Twinning project by Montenegrin and Member State experts. The involved Twinning expert gave feedback on the CoE comments and both reports were taken into account by the relevant stakeholders. Furthermore, synergies could be used and exchange supported through cooperation in an OSCE round-table on the topic of free access to information. What these very concrete examples showed, however, is that successful cooperation with other institutions occasionally remains an issue of individual commitment and sustained channels of communication with local project partners.

This leads to the recommendation brought forward by Hillion that the cooperation with the CoE and other organisations ought to be further institutionalised, also in enlargement.[812] Similarly, Benedek et al. recommended to enhance cooperation between EU, CoE and OSCE in the field of minority protection 'through the institutionalisation of joint meetings',[813] but also through applying more systematic cross-

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[807] See Revised Statute of the European Commission for Democracy through Law, Art. 1 <http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute> (accessed 27 October 2014).

[808] See The Commission's activities <http://www.venice.coe.int/WebForms/pages/?p=01_activities> (accessed 27 October 2014).

[809] See CDL-AD(2014)012-e Opinion on the Draft Law on Amendment and Supplementation of Law No. 02/L-31 on Freedom of Religion in Kosovo*, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)012-e > (accessed 27 October 2014).

[810] See European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels 2012, 83. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[811] Project Fiche *IPA 2009 Montenegro "Implementation of Personal Data Protection Strategy".* 4. <http://ec.europa.eu/enlargement/pdf/montenegro/ipa/2009/pf_04_ipa_2009_data_protection_clean.pdf> (accessed 20 October 2014).

[812] See Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 12. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

[813] European Parliament, Directorate-General for External Policies of the Union *Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans*, study authors Wolfgang Benedek, et.al., Brussels

referencing, by especially incorporating findings of the CoE's Advisory Committee for the Framework Convention for the Protection of National Minorities (ACFC) in the EC Progress Reports.[814] As regards cooperation with the OSCE, this study also refers to formal exchange between the EC and the OSCE secretariat as well as to the High Commissioner on National Minorities (HCNM) collaborating with DG Enlargement in funding of projects and joint missions.[815] Despite these different forms of cooperation and largely common objectives, there is some immanent potential for tensions and contradictions due to different mandates and diverging approaches, which – in using this policy instrument – should be taken into account.[816]

Finally, another form of cooperation with other international organisations occurs in the shape of <u>indirect centralised management</u>,[817] through which the EC delegates budget implementation tasks to them. This way IPA funds are often programmed to be executed through <u>UN bodies</u>, one significant example being the IPA 2010 Gender Programme in Montenegro which is implemented by UNDP in partnership with the EU Delegation and the Ministry of Human and Minority Rights.[818]

D. Conclusion

It has been shown in the preceding chapters that the EU – and in particular the European Commission as a driving force – have been very inventive over the last decades in terms of devising instruments for fostering reforms in the enlargement countries. Increased efforts have been put in, on the one hand, the promotion of rule of law, democracy and human rights and, on the other hand, the implementation of legislation, once it has been harmonised. The various instruments which have been established and which this paper has given an account of do have their strengths and weaknesses and, despite recent reviews and new approaches taken, there is surely more room for improvement. This pertains firstly to the tool of benchmarking in all the different forms it is used which still suffers from vagueness in formulation and often a lack of measurability. If 'effective implementation' is set as a benchmark, it needs to be made clear what this refers to and how effectiveness can be assessed. This leads to the need for indicators to be identified in order to make the Commission's monitoring more transparent. Speaking of transparency, this, thirdly, should be enhanced for the whole accession process. Still certain documents are not publicly accessible, even though there have been considerable improvements since the accession of Croatia.

While the evolution of enlargement policy and its pre-accession conditionality can be viewed as a positive development from the perspective of human rights gaining more and more significance, it needs to be taken into account that a key factor to its success is credibility. As pointed out by the Balkans in Europe Policy Advisory Group, changing conditions might make EU membership 'a moving and elusive target' for accession countries and might 'hinder the commitment of Balkan political leaders to Brussels-demanded reforms, as well as the support of the Balkan people for European integration'.[819] Enhanced

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2012,   94.   <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457114/EXPO-DROI_ET%282012%29457114_EN.pdf> (accessed 28 August 2014).

[814] ibid.

[815] See ibid 83.

[816] See ibid 81f.

[817] See <http://ec.europa.eu/europeaid/prag/document.do?chapterId=2.2.&MENU_OPTION=PRAG_DOCUMENT > (accessed 09 November 2014).

[818] See <http://www.gendermontenegro.me/program-document/<u>></u> (accessed 25 October 2014).

[819] Balkans in Europe Policy Advisory Group 'Unfulfilled Promise: Completing the EU Enlargement to the Balkans', Centre for Southeast European Studies for European Fund for the Balkans' (2013) 17. <http://balkanfund.org/wp-

conditionality and stricter procedures are also to be seen against the background of EU internal human rights policy: discrepancies between the external and internal dimension damage credibility and thus decrease the Union's transformative leverage. After all, the connection between the EU's enlargement policy and its human rights policy can indeed be perceived as a two-way road:

> Enlargement and fundamental rights protection are thus significantly influencing one another: while the former contributes to enhancing the latter both externally and – by necessity – internally, enhanced domestic fundamental rights protection might in turn benefit enlargement and the Union's legitimacy more generally.[820]

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content/uploads/2014/11/Unfulfilled-Promise-Completing-the-EU-Enlargement-to-the-Balkans.pdf> (accessed 26 October 2014).

[820] See Christophe Hillion, 'Enlarging the European Union and deepening its fundamental rights protection' (Swedish Institute for European Policy Studies European Policy Analysis, Issue 2013) 13. <http://www.sieps.se/sites/default/files/2013_11epa.pdf> (accessed 20 December 2014).

Conclusions

The report assessed the role of human rights in the EU's regional and bilateral relationships and the use of the various foreign policy tools and instruments in promoting human rights, in a way to support the regional case studies that will be prepared as the next phase of Work Package 6, and provide those studies with a theoretical and analytical framework.

Part I traced conceptualizations of human rights and democratization in the context of EU external action and presented a dynamic account of the interplay of events and analysis, as they constitute each other. The first discourses theorising the actorness of the EU in the fields of external governance, democratization and human rights emerged around the end of the 1990s, in the twin contexts of norm transfer theory and enlargement practice also complemented by the synchronous reflections on the Western Balkans engagement of the EU. These accounts were infused with optimism concerning the toolkit and the possibilities of human rights norm diffusion especially in the enlargement context. A review of relevant literature makes it very clear that despite the recent disappointments with the long term effects of the accession process, enlargement to Central Eastern Europe was hailed at the time as a clear success having inspired especially the European Neighbourhood Policy. It was considered to have achieved a transformation that made the EU appear as a very potent norm entrepreneur and agent of deep-reaching transformation. In retrospect, it appears that optimism with regard to this transformative potential was founded more on short term outcomes than on a solid, field-work based understanding of how these mechanism would work.

The theory of Normative Power Europe in the 2000s represents the most radical attempt to provide a grand normative theory of EU foreign policy identity and action. According to NPE, the EU promotes human rights and democracy because such values are constitutive of its own identity. A major research question of NPE theorizing has been how can this human rights identity become somehow operational in international politics. Many critics pointed out that the EU will act roughly in accordance with NPE prescriptions, as long as human rights goals do not conflict with economic or security interests this way explaining the uneven empirical record by pointing to the inconsistency between values and interests discussed more in Part II. What was really missing from NPE discourse was a theory of the agent, which subsequent contributions sought to correct, by proposing a theory of ethical action. NPE research ties into the larger question of why are and/or should human rights be part of EU foreign policy where the identity argument is one possible answer. This theme was further explored in Part II of this report where international relations theories were revisited. According to the rationalist reasoning presented by liberal theories an instrumentalist logic underlies the EU's human rights promotion serving the purpose of security or legitimacy.

With the emergence of the EU's military identity represented by the launching of ESDP/CSDP scholars normatively marked out a zone for EU security and defence policy by applying the notion of human security. In this context human security aimed at theorizing the relationship between human rights and human security, and was operationalised by addressing the question of how this goal can be represented in crisis situations requiring CSDP assistance/intervention. So far, empirical record of CSDP missions was however characterized by lack of ambition and scale problems which render them political gestures rather than a human rights-based operation driven by normative concerns.

These theoretical currents in the past 15 years, transformed what the academic and expert communities conceived of as the subject of inquiry. At the same time, empirical pieces, both case studies and policy analysis, were included into our survey to signal the sometimes overlooked presence of critical thinking within the broader EU external action literature. Although inconsistencies are discussed in Part II, these empirical studies included in Part I also pointed out the lack of coherence in several arenas. Analyst evaluating the 1990s characterized that period by the term coherence gap between emergent or recent policies with human rights components. This boils down to the inconsistency across levels and institutions discussed more thoroughly in Part II. A different kind of gap often highlighted was that of capabilities which concerns the inability to use military means to ensure the protection of human rights, if need be.

While enlargement features prominently in theorizing about the EU's external human rights promotion, accounts about the EU's engagement in the southern and eastern neighbourhoods were fragmentarily integrated into the broader theoretical discussion about norm promotion. Authors addressing this subject were also much more sceptical regarding the EU's normative power. Many pointed out how the member states' security and economic interests often trump human rights consideration resulting in uneven norm enforcement and the side-lining of human rights considerations. The general criticisms discussed in Part II about inconsistency between rhetoric and action and between values and interests capture some of these issues. The launching of the ENP and ENPI did not change this bleak picture either, on the contrary, subsequent empirical studies reinforced arguments about the stronger than presumed limitations on the transformative potential of the EU and normative power in general. ENP rebooted in 2011, supported by two regional fora, the Union for the Mediterranean and the Eastern Partnership, could be interpreted as a response to such earlier criticism. D6.3 discussing the EU's neighbourhood policy will look more into how successful this endeavour has been so far.

The record outside of Europe looks even less appealing. Because the EU tends to have a strong preference to engage, rather than contain partners backtracking is often not met with punishment. Such dynamics are a combined effect of the EU's inability to influence and a lack of will to reform their human rights regimes on the part of partner states. EU positions shift frequently as a result of relatively minor interests or the desire to continue to engage elites, which damages credibility, and eventually the potential of effective EU action. Many came to the conclusion that the EU has to balance between interests and norms which are easier said than done. The question, left unanswered, is how it to be decided when strategic interests and when normative concerns should determine the EU stance in a diplomatic dialogue.

This literature review arrived at a pessimistic note that as a result of the changing political environment marked by the global economic crisis recent policy discourses about EU arenas of action such as the neighbourhoods and the Western Balkans represent a partial, at the very least, abandonment of the earlier analytical and normative focus on human rights promotion. There is an overall sense of policy ineffectiveness that further sharpen the disillusionment with EU capabilities and the transformative potential of its external action toolbox. However, one of the most important conclusions of this review is that fieldworks tracing at the empirical level how the EU's external human rights policy operates in practice have been in short supply. More field research focused on ground operations could enhance our understanding in a way which could help the academic and policy communities to move beyond their enduring pessimism and find ways to address gaps and inconsistencies in a constructive way.

Part II of the report presented a systematic overview of the various criticisms identified in the literature concerning the use of foreign policy tools and instruments in human rights promotion. Several of them were touched upon in Part I but deserve a more systematic exploration since these inconsistencies undermine the credibility and efficiency of the EU's engagement in third countries and its promotion of human rights.

1.   **Inconsistency between values vs. interests**, which also concerns the place of human rights among external relations priorities. The traditional presentation of human rights considerations in the context of foreign policy would see a struggle between 'values and interests,' with human rights usually being on the losing side of prioritization. Most approaches acknowledge that there are competing foreign policy goals that can (do) override human rights considerations such as maintaining friendly relations, furthering security and peace, building up economic relations, and pursuing development goals.

2.   **The lack of prioritization** between the elements that can contradict each other may also lead to inconsistency and uncertainty. In the European Neighbourhood Policy and the European Security Strategy it has been defined as of equal importance 'to spread democracy, human rights and good governance outside the Union's borders as well as to create a 'ring of friends' for the pursuit of stability and security'.

3.   **Inconsistency between rhetoric and actual performance** is about the tension between the commitment to human rights values expressed in various policy documents and statements on the one hand, and the role human rights actually play in decision-making. Policies developed in various areas like the European Enlargement Policy, the European Neighbourhood Policy, relations with ACP countries and bilateral cooperation with emerging economies, all contain, at least on paper, elements that could be identified as human rights considerations. However, these are often just mere 'bullet points' that can inform the process, or worse, mere 'window dressing' or 'luxury goods' that will be dropped as soon as they conflict with weighty (state or EU) interests.

4.   **Inconsistency among third countries**: in the human rights field there should be genuinely universal rules in place that are, in turn, applied to third states equally, regardless of their power and importance for the EU. However, the EU displays different attitudes towards different regions. In the Eastern European region it pursues normative goals, in Russia and Syria strategic interests play an important role, while in Ukraine and North Africa the EU is best described as a 'status quo player.'

5.   **Inconsistency between internal vs. external policies**: The common critique blames the EU as an organization that fails to live up, internally, to the expectations it applies externally. I was being argued that the term 'human rights' bears a different meaning in the external and the internal context: while it is understood broadly in the former, when applied to internal EU policies, they are often restricted to political and civil rights, sometimes including social, economic, and cultural rights. This theme was further explored in Part III where the EU's impact was problematized and in Part IV in the context of enlargement policy.

6. **Inconsistency as fragmentation**, across levels and institutions is one of the most often heard criticisms. This kind of fragmentation also results in the EU speaking with 'too many voices' on the international level. The problem stems from the lack of harmonization between institutions, departments, and 'their ad hoc planning methods'. According to this critique, without overcoming this

diversity, the EU will never be effective in pursuing its foreign policy goals, while this situation has been aggravated by the consequent enlargements. The establishment of the EU External Action Service and its efforts towards better cooperation and more consistency (e.g., Council Working Party on Human Rights, COHOM; the Commission's Inter-Service Group on Human Rights; Contact Group on Human Rights) seek to address this problem.

7. **Inconsistency in content:** The inconsistency can also appear at the level of the disparate promotion of certain types of human rights, e.g., freedom of expression gaining more attention than other types of right violations, such as cases of torture and slavery. Due to the priority of the market mechanism, there seems to be less concern with the rights of the marginalized classes of society. Social rights play an important role in labor standards in trade relations, an area where the EU can have a large impact on the international level. The inclusion of (mostly not new, but already existing) labor conditions in trade agreements, can be seen as reinforcing legitimacy for the overall process. However, such measures can also be interpreted as protectionist instruments (or even as remnants of colonialism) as they create asymmetric disadvantages to the participating developing countries. In general, while poverty reduction remains a priority, the EU is considered to have a weak record in economic and social rights, as is the case with minority rights.

8. **Reactive vs. proactive; synergies and vagueness**: According to this criticism, as the response of the EU to human rights developments in third countries remains largely reactionary, they fail to trigger change. Despite the diverse elements at the EU's disposal, from foreign aid to negative instruments, without capitalizing on the synergies between these components, the EU will not have the impact it could and seeks to have.

Such potential for synergies was explored in Part III, which mapped instruments by presenting them as a system and looked at various classifications, assessing how different tools and instruments link together, while also listing the existing inconsistencies in their application referring back to Part II. Mapping the field of foreign policy instruments relied on well-established dichotomies:

1. **Hard power versus soft power tools**: The EU has been mostly associated with using primarily non-coercive soft power tools, unlike hard power tools which rely on coercion and have a punitive impact or military nature. However, the history of integration has a long track record of hard power instruments with human rights relevance against third states, especially applying sanctions.

2. **The diplomatic-economic-military axis**: One can distinguish among different types of instruments along the diplomatic-economic-military axis. A diplomatic or economic instrument can work through exerting negative or positive influence on the subject of the measure. The military instruments of the European Union generally do not appear as classic military coercive instruments, rather take the form of humanitarian, peacekeeping missions.

3. **Positive and negative instruments**: Some typologies differentiate between instruments based on whether their application is positive, negative, or maybe both often labelled as 'sticks and carrots' especially in the enlargement context by creating incentives through threats or benefits. EU foreign policy is usually seen as tilting towards positive instruments. A common criticism against negative instruments, especially negative economic instruments, is that they are not targeted enough in afflicting the third country government/regime, and end up punishing the population of third countries.

4. **Discretionary, mandatory and prohibited instruments**: There is a difference between instruments that are available to the actors and those that they are required or prohibited to use. On this institutional level, legal limits on the use of instruments can be both internal and external to the EU. External limits like the UN framework or the international legal framework that define how far international actors can go in pressuring other actors, the WTO framework or the ECtHR can all limit the discretion of EU institutions in making foreign policy decisions. Internally, the most important procedure that can apply legal constraints is the work of the Court of Justice of the European Union. The CJEU has a limited role when it comes to foreign policy, and is only allowed to rule on whether a decision is made in line with the acquis. However, here have been quite a few litigable human rights cases, as the judicial assessment of counter-terrorist fund-freezing measures show. This indicates that while applying sanctions, foreign policy decision-making should already incorporate human rights concerns. The European Court of Human Rights represents a further constraint on EU foreign policy exercised on human rights grounds indirectly—through the actions of Member States who are parties to the European Convention on Human Rights. With the accession of the European Union to the European Convention on Human Rights the primary responsibility of the Member States for actions carried out by them under EU law will most likely not be changed, yet this step will potentially enhance the legitimacy of the EU, which is an important element of its international presence and impact especially concerning human rights.

5. **Human rights specific and non human rights specific instruments**: Some instruments of the EU have the primary purpose of promoting human rights while others are general in their goals thus are instruments influenced by human rights mainstreaming. The use of instruments can also be categorized based on whether they seek to achieve human rights goals directly, or such goals are only secondary. One question is, accordingly, how well human rights can capture foreign policy goals, especially since foreign policy can have objectives that are competing or conflicting with that of human rights. Moreover, foreign policy goals tend to focus on the macro level, on broad and general trends, while human rights considerations on the international level are marked by a strong individualist, micro-level stance. Therefore, adopting human rights goals into foreign policy has the potential to transform widely stated goals, e.g., by providing a clear roadmap for evaluation.

6. **Unilateral and multilateral application of instruments**: Multilateral instruments can have a larger impact on the promotion of human rights than unilateral ones. Considering that the EU has not been primarily a human rights body, the cooperation with other organizations in this field, like the Council of Europe or the UN, is essential. According to the European Security Strategy, the EU should promote human rights on the international level through reinforced cooperation with other international organizations, most importantly, the UN. However, there seems to be a growing tension between the multilateral approach and the substantial goals of human rights promotion in the UN as many efforts of the EU on the international level are ineffective due to opposition from a group of developing countries, and also because of the EU's fading legitimacy.

7. **Formal, competence-based classification and the institutional logic**: Instruments can also be categorized by their place in the institutional structure of the EU. Most importantly, foreign policy instruments can be applied by the various EU institutions as well as by member states. Ever since the EU launched its foreign policy, consistency has been a challenge, requiring harmonization across the board. How we evaluate the EU's performance in the international human rights arena depends also on whether one acknowledges the two levels, member states and EU institutions, as separate actors. Accordingly, the various theoretical approaches might dictate different methodologies, one with a

primary interest in the 'institutional machinery' of the CFSP, the other in the external relations of the EC (former pillar I), and a third in the Member States' foreign policy. The new foreign policy architecture created by the Lisbon Treaty sought to address these fragmentations especially between CFSP and EC policies, yet essential divisions remained. However, it is the interaction between the national and the supranational level that makes European foreign policy so unique. With the complex decision-making involving actors from both levels, it is not always easy to discern the boundaries between the two, if at all.

8. **Secret and transparent Instruments**: One of the major concerns of modern international law has been to limit the tools of secret diplomacy and to ensure the publicity of the treaties. Secrecy has nevertheless been an important element of EU diplomacy as well, usually seen as necessary for effectiveness in certain cases, which is in conflict with the interest in transparency, a key principle from the aspect of maintaining credibility especially regarding human rights promotion. Public statements and formalized types of statements and dialogues owing to their public nature are under the scrutiny of democratic publics presupposing transparency thus representing tools of democratisation of foreign policy.

The case studies of WP6 will specifically examine which instruments from certain categories are or are not used in the countries or regions in question, which will help answer theoretical questions. It will be worth to look at the reasons why certain instruments are not used, in comparison to others in particular relations, and whether this shows dysfunctions of EU policy and normative regulation. A different application of tools and instruments vis-à-vis different countries might reflect a genuine difference of treatment on behalf of the EU, which might lead to different standards applied, which, in turn, can threaten the coherence and efficiency of EU human rights promotion.

As the final point, Part III provided some clues as to **how the EU's impact can be mapped** with regards to human rights promotion which is not only a question of efficiency but also a normative necessity. Measuring impact in general would require establishing robust monitoring capabilities and, to make them work, set realistic and specific goals for individual instruments, and, finally, make increased efforts to communicate the goals and the perspectives. Impact is closely related to consistency which has been a major theme of the entire report. For increasing consistency and in turn impact, it is inevitable to address the problem of the internal side of coherence in human rights policies in the EU. In certain areas, judicial oversight, to be reinforced by the accession to the ECHR, can have a beneficial effect. One of the major issues to be addressed is the inconsistency between external and internal policy tools and double standards. All internal (i.e. tools regarding EU institutions and member states) and foreign policy tools and instruments should be compatible with the values of the European Union (Article 2 TEU) and with one another. Not surprisingly, the external human rights policy of the European Union is stronger in fields where the level of the protection is high on the European regional (CoE), on the EU and on the national level. Even justified criticism of third countries, on the part of the EU, can be undermined if comparable or worse situation is present within the Union.

Part IV continued the mapping exercise by applying it to enlargement policy. It surveyed human rights instruments of enlargement by presenting their evolution over the last two decades and offering a brief description of individual instruments. How these instruments have operated in practice over the last decade and what kind of human rights priorities they reveal will be the subject of Deliverable 6.2 discussing the EU's relations with the Western Balkans and Turkey. Enlargement represents a very important policy area from the perspective of external human rights promotion as it has greatly

contributed to the evolution of the EU's human rights identity and its external tool kit of promoting human rights as was explained in Part I. In addition, the EU's transformative effect and norm promotion despite all the criticisms has been evaluated as the most successful in the enlargement context. The principle of conditionality coupled with aid programmes and political dialogues proved to be an effective tool of human rights promotion in the enlargement countries. Following up on the dichotomies introduced in Part III, enlargement policy primarily operates by positive conditionality working by incentives and rewards rather than by using negative instruments. Negative conditionality when it happens usually takes the form of postponing or denying the upgrade of the respective country's relationship with the EU. Especially since 2005 human rights have acquired a central role in accession negotiations by subsequent methodological innovations of the enlargement framework, such as the creation of a specific chapter dedicated to human rights, the introduction of benchmarking, the suspension clause and the 'new approach' according to which chapters 23 and 24 have to be opened early in the negotiation process. Thus the EU has been very innovative in terms of devising instruments for fostering human rights reforms in the enlargement countries. At the same time enlargement policy has not been spared from criticism either about inconsistencies across policies and instruments. Human rights obligations of enlargement countries are broader in substance than the Charter of Fundamental Rights compelling member states, and concerning minority rights go beyond EU law, while stricter procedures apply to enlargement countries than to member states. This problem of inconsistency between external and internal policy tools and double standards was discussed also in Part III, as a factor that weakens the impact of EU policies. Although the consistency of the EU's human rights priorities across time, countries and instruments in the context of enlargement will be examined more closely by Deliverable 6.2, Part IV of the present report makes some preliminary conclusions concerning these issues mostly by summarizing existing criticisms of the process. While the European Commission systematically monitors accession candidates' human rights performance, it is not clear how the Commission comes to its assessment of improvement or deterioration in a certain field in the absence of clear indicators. In addition, monitoring reports often lack sufficient reference to priorities and benchmarks set at previous stages of the accession process. Financial assistance provided by the IPA program does not follow up on the information about developments provided in the progress reports. These issues will be revisited by Deliverable 6.2 in more detail and in a systematic way.

Overall, the report supports the forthcoming regional case studies of bilateral relations, the next phase of Working Package 6, and provides those studies with a theoretical and analytical framework – through the typologies, mapping, and analysis of foreign policy instruments. When case studies examine the tools and instruments used in relation to the various regions and countries, the Western Balkans, ENP and ACP countries, or China, India, South Africa and the US, the theoretical framework will contribute with new standpoints to the discussion on values, consistency and different standards.

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Annexes

Annex 1: Typologies in the Literature

1) Baehr & Castermans-Holleman 2004, 69–86.
- diplomatic means
    - negative instruments
        - quiet (confidential) diplomacy (traditional form), in private meetings, formal démarche
        - public statements, can also happen in public meetings of international bodies
        - cancellation or postponement of ministerial visits
        - legal and political means: international human rights treaties (interstate complaints), raising human rights issues under mechanisms provided by other international treaties (Vienna and Moscow mechanisms etc.), leading to adoption of resolutions
        - restriction or breaking off of sports and cultural contacts
        - breaking off diplomatic relations
    - positive instruments
        - invitation for a visit as recognition of the human rights situation
        - invitation to membership, to international conference
        - common educational and training projects (e.g. judges, lawyers, officials, students)
        - financial or practical support, e.g. in organizing elections
- economic means
    - negative instruments
        - boycott actions (ban on import)
        - embargo measures (ban on export)
        - suspending development assistance
    - positive instruments
        - granting most-favored nation status in trade relations
        - loans, credits
- military means: intervention for humanitarian purposes
    - military action under Security Council resolution allowing intervention (human rights violations threaten international peace and security)
    - intervention to protect nationals
    - other military intervention (e.g. NATO air strikes against Serbia; 2003 intervention in Iraq)

2) European Commission, 2010, 19-23.
- EU guidelines on human rights and international humanitarian law
- Human rights dialogues and consultations
- Joint actions, common positions and crisis management operations
- Démarches and declarations
- Human Rights clauses in cooperation agreements with non-EU countries
- Personal Representative of Javier Solana for human rights
- The European Neighbourhood Policy
- Activities funded under the European Instrument for Democracy & Human Rights (EIDHR)

3) Auvret-Finck 2009, 421–432.
- Institutional capacities: Council, Commission, Parliament, Court, Fundamental Rights Agency (FRA), Human Rights Working Group (COHOM), personal representative for human rights, special representatives, Europe Aid etc.
- Diplomatic instruments: (public and confidential) démarches and political dialogues

- Legal instruments: hard law and soft law instruments
- Restrictive measures: diplomatic sanctions, suspending cooperation, boycott (of cultural and sports events), commercial and financial sanctions, no-fly lists, denial of admission etc.
- Operational dimension: elections, rule of law missions, civil and military missions
- Financial instruments: funds available in the context of ENP, ACP, Instrument for Stability, pre-accession funds etc.
- Cooperation with third parties: engagement with the civil society

4) Balfour 2012, 39.
- Positive tools
  - European Initiative for Democracy and Human Rights – around €150m per year
  - Financial assistance
  - Election observation missions
  - Agreements with 'human rights clause'
- Conditional tools
  - Economic tools
    - Trade and cooperation agreements
    - Association Agreements
  - Diplomatic tools
    - démarches, positions, actions, statements and declarations
    - human rights dialogues, sub-committees
    - expulsion of diplomats, cutting of diplomatic ties, cancellation of official visits
- Negative tools
  - Suspension or delay of negotiations on agreements
  - Reduction of cultural scientific and technical cooperation programs
  - Postponement of meetings or official visits
  - Suspension or delay of aid or financial assistance
  - Suspension of bilateral contacts
  - Targeted sanctions
  - Suspension of cooperation
  - Flight and visa bans
  - Freezing of financial assets, financial restrictions
  - Arms embargoes
  - Trade embargoes

5) Wetzel 2011, 10–12.
- pre-accession conditionality (ratification of human rights treaties, compliance, e.g. cooperation with ICTY)
- conditionality in external trade: human rights clauses in international trade agreements
- application of not human rights specific tools: revocation of preferential trade conditions (e.g. Sri Lanka in 2010), trade sanctions (e.g. arm embargoes, visa bans, Serbia, South Africa, Haiti, Myanmar)
- Human Rights Dialogues and consultations with countries (e.g. with China) or international organizations (e.g. with the African Union)
- Human Rights Guidelines
- European Instrument for Democracy and Human Rights (EIDHR) financing human rights activities, programs in third countries, support for NGOs
- reports, statements and legislation on human rights issues (European Parliament, Council)
- strategies for promoting human rights in communications (European Commission), appearing on the international fora, e.g. before the ECtHR
- Common Strategies, Common Positions, Joint Actions
- action on the international level (e.g. sponsoring in the UN General Assembly)

- conferences, support to human rights NGOs, pro-bono or public interest lawyers
- diplomatic communications, general démarches, démarches in individual cases
- consular assistance, statements in individual cases
- amicus curiae (death penalty before the United States Supreme Court)

6) Gropas 2006, 114–133 and 137–179.
- strategies of human rights diplomacy
  - standard-setting and monitoring within international and regional forums (UN, CoE, OSCE)
  - shaming and public criticism (condemnation, expressing concern, welcoming; statements also by the Presidency, the CFSP High Representative, or the EP, Sakharov price)
  - quiet diplomacy and political dialogue (informal and formal dialogues, pressure to free political prisoners, confidential démarches)
  - conditionality and sanctions:
  - development cooperation, technical and financial assistance (strengthening democracy, civil society, human rights)
  - human rights clause
  - economic sanctions
- key instruments
  - common strategies
  - common positions
  - joint actions
  - démarches and declarations
  - conflict prevention and crisis management operations (ESDP)
  - dialogue and consultation
  - human rights clause
  - guidelines on EU policy towards third countries on specific human right themes
  - EU actions in international or regional human rights organizations
  - EU election observation missions
  - project funding (EIDHR)
- both
  - positive approach to foster a democratic peace
  - punitive approach applying sanctions
- functions of EU institutions (Gropas 2006, 137–179)
  - enabling common positions
  - initiating human rights policy outputs
  - partnership with non-state actors
  - receptive to external expertise

7)
Matláry 2002, 8, 56, 187–188 and 194–197.
- general tools – European Parliament
  - hearings (on controversial human rights issues) – public diplomacy
  - silent diplomacy (e.g. seeking release of political prisoners), often combined with public diplomacy (releasing information afterward)
  - rejecting agreements with third countries
  - supporting democratization projects, monitoring elections
  - initiating EU (hard) sanctions
- 'regime tools' – Commission and European Council
  - (suspension clause: for member states)
  - monitoring, e.g. Copenhagen criteria for enlargement
- tools specific to human rights goals

- o persuasion, learning tools: through the presence of experts or observers, programmes and funds, training programmes
- o monitoring tools: traditional diplomatic offices and missions, local observers (e.g. Western Balkan)
- o legal tools: especially in the case of enlargement, with candidates obliged to adopt the acquis
- o conditionality in aid programmes and trade agreements: conditionality clause in all aid (except for emergency aid), since the late 1980 (before that it was seen as irreconcilable with the apolitical self-image)
- o suspension of membership and partnerships: Copenhagen criteria and human rights clauses in agreements (e.g. revised Lomé convention), suspending cooperation and aid
- o shaming in public diplomacy: actor at the UN, démarches, public statements, developing human rights norms
- o hard power tools
    - ▪ sanctions (e.g. against the apartheid regime in 1985 and 1986; arms embargo and economic and diplomatic sanctions against China in 1989; diplomatic sanctions against Nigeria, later with suspension of development cooperation in 1993 and 1995; against Myanmar; oil sanctions against Serbia up to the regime change in 2000)
    - ▪ military power (force for crisis management operations)
- o soft power measures in bilateral relations (Matláry 2002, 56):
    - ▪ development cooperation (combined with human rights, democracy and rule of law support)
    - ▪ cooperation with NGOs (to support human rights improvements in third countries; e.g. with Amnesty International, Helsinki Committee)
    - ▪ human rights dialogue
    - ▪ developing specific human rights soft and hard law
    - ▪ shaming and praising (e.g. through UN human rights bodies), or shunning, with or without aid conditionality

Annex 2: Guiding research questions for the case studies

- *What role did the different EU bodies play in human rights promotion through public or secret statements?*

- *What was the relationship between the public and secret statements (if known), did they reinforce each other, or on the contrary did they not?*

- *To what extent was conditionality applied, and how consistent was it through time?*

- *How effective was public and secret criticism or encouragement by the EU?*

- *Were trade relations and foreign aid policies in line with human rights objectives?*

- *Was the target and means of support carefully selected, considering the pros and cons of supporting governments or directly supporting non-state actors, in line with human rights goals?*

- *Is there a civil society or opposition that measures can target? What did and can the EU do in this regard?*

- *To what extent did targeted measures, if any, manage to avoid the adverse effects of traditional sanctions?*

- *To what extent did problems of inconsistency (understood on different levels: internal and external; between policies, e.g., trade and human rights; between third countries etc.) set back human rights objectives?*

- *Is there a tangible and clear understanding of human rights goals for EU foreign policy in the target countries?*