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Executive Summary

The aim of this report is to draw integrated conclusions from the research conducted by the FRAME project from its launch on 1 May 2013 to this day. This report, rather than focusing on the countless individual findings of the more than 20 substantial reports produced during that period, has opted to focus on the cross-cutting issues which these reports have helped to identify in relation to the EU's commitment to human rights, enshrined in the Treaty on European Union, the Charter of Fundamental Rights and many other policy pronouncements. These challenges are: implementation, coherence and effectiveness. Discussion of the three cross-cutting challenges is illustrated by examples taken from the entire spectrum of the FRAME research to date.

The challenge of implementation refers to the difficulties which the EU has in turning its commitment into practice. The report argues that this challenge is caused by hesitations in the conceptualization of such commitment. Second, implementation at home would be stymied by resistance from EU Member States. Finally, implementation abroad would be rendered difficult by the EU's position and leverage in international relations.

The challenge of coherence refers to the degree to which the EU's actions can generally be considered to be in keeping with its values-based commitment to human rights, and whether or not all actors and policies converge so as to reach that goal. The report evidences two dimensions of coherence: vertical, between the EU and its Member States; and horizontal, among EU institutions and bodies themselves. The report then identifies three types of consequences to incoherence: internal-internal, when one EU policy contradicts another one; internal-external, when the EU's human rights record does not match the demands it places on third countries; and external-external, when the EU's treatment of third countries is unequal. Finally, the report identifies several potential causes to incoherence: poorly aligned institutional structures; policy regimes which function under different logics; or competing interests.

The challenge of effectiveness relates to the question whether the EU is delivering on its commitment, that is, whether it can be considered successful in the protection and promotion of human rights at home and abroad. The report first discusses the difficulties in ascertaining any conclusion in this regard, due to methodological issues associated to the measurement of human rights. The report then insists that the extent to which the EU will generate success will depend on its ability to preserve its credibility. Finally, the report argues that the EU should rely on non-state actors to increase its chances to effectively deliver on its commitment.

The report finally concludes with an analysis of the interrelation of these three challenges, and finds that implementation and coherence share an intimate connection, and that progress regarding one of these challenges will also help overcoming the other. The report then finds that a healthy implementation-coherence relationship is a crucial factor for the effectiveness of the EU's human rights commitment.

List of abbreviations

ACP	African, Caribbean and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign Security Policy
CJEU	Court of Justice of the European Union
COHOM	Council Working Group on Human Rights
CoE	Council of Europe
CoR	Committee of the Regions
CRPD	Convention on the Rights of Persons with Disabilities
CSDP	Common Security and Defense Policy
CSR	Corporate Social Responsibility
CSO	Civil Society Organisation
DG	Directorate-General
DPRK	Democratic People's Republic of Korea
DROI	Subcommittee on Human Rights
EC	European Communities
ECHR	European Convention on Human Rights
EEAS	European External Action Service
EIB	European Investment Bank
ENP	European Neighbourhood Policy
ESCR	Economic, Social and Cultural Rights
EU	European Union
EU-MIDIS	European Union Minorities and Discrimination Survey
FRA	European Union Agency for Fundamental Rights
FRAME	Fostering Human Rights among European Policies

FREMP	Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons
FTA	Free Trade Agreement
GSP	General System of Preferences
HRD	Human Rights Defender
IFI	International Financial Institution
IHL	International Humanitarian Law
ILO	International Labour Organization
IPC	Inter-Parliamentary Cooperation
LGBT	Lesbian, Gay, Bisexual and Transgender
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PCD	Policy Coherence for Development
TEU	Treaty on European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States
WP	Work Package
WTO	World Trade Organization

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I. Introduction

This report intends to draw integrated conclusions from the research conducted by the FRAME project since May 2013. In terms of outputs, this represents so far notably 20 deliverables, navigating through virtually all the substantive fields of the European Union's (EU) action. In addition to this, more than a hundred FRAME-related publications have seen the light of day, more than 50 academic events have been organised, and three policy-briefs have been issued.

FRAME has therefore, over the last two and a half years, been a formidable provider of knowledge on the question of the EU's impacts on human rights. FRAME has also been working normatively to provide its readers with pointed recommendations on how to practically foster human rights among EU policies.

Needless to say, the amount of material and results which is available in these documents is too important to do justice to every single issue they address, every single conclusion they reach, every single recommendation they put forward, and this is not the purpose of this report, which aims at singling out the broader themes which permeate FRAME research, and which can be considered to form 'overall conclusions' of the whole project.

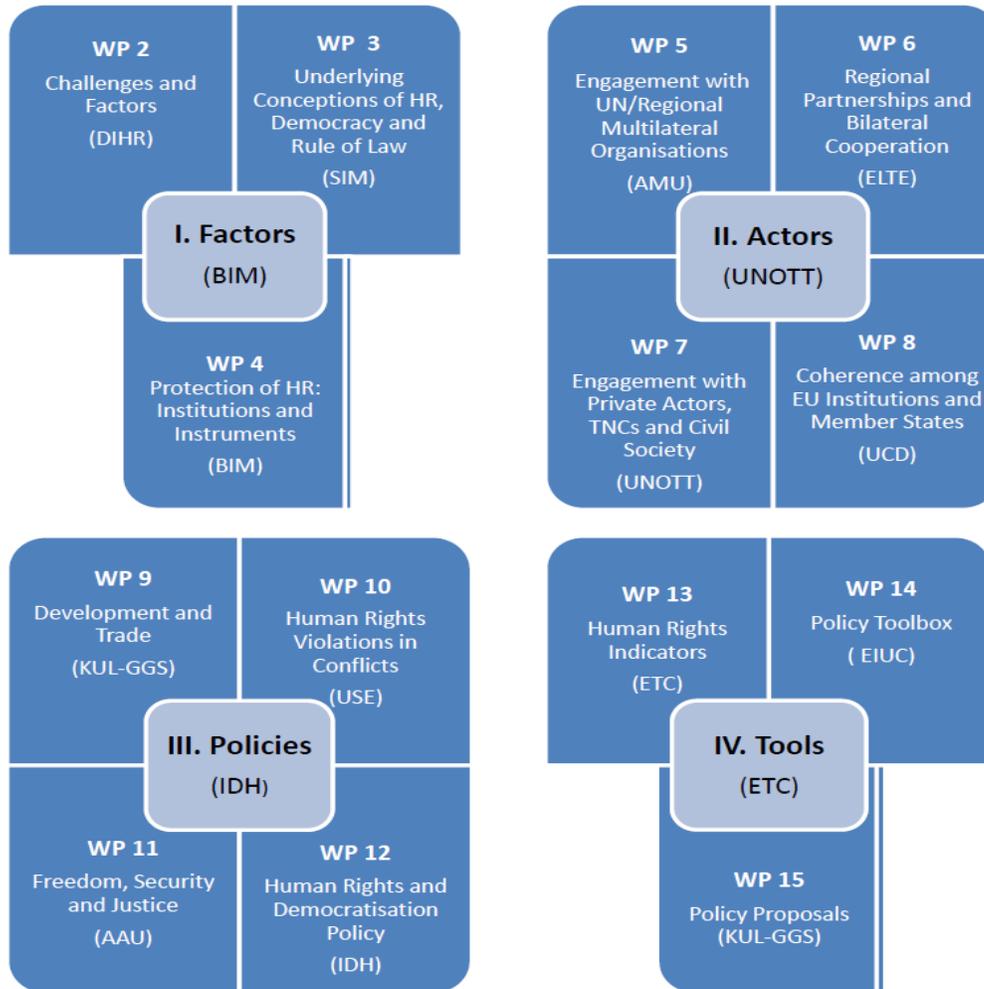
In this report, we will focus on three challenges which are cross-cutting in FRAME research, and which can form the basis of a future agenda on how to improve the EU's impact on human rights, namely:

- The challenge of implementation;
- The challenge of coherence;
- The challenge of effectiveness;

These three challenges will be illustrated by numerous examples drawn from FRAME research, and recommendations will be outlined for some of their aspects. However, the specific purpose of this report is not yet to make recommendations, as these will emerge in the last phase of the project, ending in 2017. Therefore this report will focus on identifying the particular concrete issues associated with these challenges, so as to pinpoint where remedy is due.

The focus on challenges should not make the reader assume that the conclusions to be drawn by the FRAME project will state that the EU has failed in its commitment to human rights. The EU has come a very long way since its inception, moving from a purely economic organisation to a values-based European political Union. Ever since the Treaty of Lisbon when the commitment to human rights was taken to another level, the EU has also made noticeable progress. This will be demonstrated through the description of numerous best practices which the EU is putting into place as a response to the challenges identified.

By way of introduction, let us first briefly recount the research that has been conducted throughout the reports which have been delivered, and how such research is structured. FRAME research is divided into four clusters of issues, and fourteen work packages, as shown on Figure 1 below.

Figure 1: Structure of FRAME research (exclusive of management and dissemination work packages)¹

Cluster 1 studies the factors which enable or hinder the promotion and protection of human rights by the EU. These factors are of a contextual nature (WP2), of a conceptual nature (WP3), and of an institutional nature (WP4). It further looks at how current human rights protection systems (WP4) are evolving as a response to the factors analysed in WP 2, particularly in the face of rapid technological changes, and in interaction with the attitudes, conceptions and values analysed in WP 3.

Cluster 2 addresses the actors which the EU must engage with in order to maximise the positive impact of its policies on human rights. The actors identified are other international organisations, global or regional (WP5); third countries with which the EU is trying to create more or less established 'partnerships' (WP6); non-state actors, notably civil society organisations (CSOs), business, human rights defenders

¹ WP1 is dedicated to the management of the FRAME Consortium, and WP16 is dedicated to the dissemination of the research results.

(HRDs) and international financial institutions (IFIs) (WP7); the EU's own constituencies, i.e. its institutions and bodies, as well as its Member States (WP8).

Cluster 3 looks at selected policies to assess the extent and nature of their impact – positive or negative, intended or incidental – on human rights. These policies are trade and development (WP9); the EU's interventions in conflict situations (WP10); the area of freedom, security and justice (AFSJ) (WP11); and the human rights and democratisation policies (WP12).

Cluster 4 examines the tools and instruments which the EU has at its disposal, is developing, or should develop, to implement its commitment to human rights. WP13 looks at human rights indicators as one of the most important tools for information-based policy-making; WP14 surveys policy instruments in order to devise an innovative 'policy toolbox' for human rights promotion by the EU; WP15 provides general recommendations on how to adapt current policies to human rights challenges.

Each of these clusters and work packages therefore provide different kinds of answers on the reasons, strengths and weaknesses of the current EU human rights performance, and all of them inform the challenges outlined above in their own particular way, as will become clear from the numerous examples illustrating the discussion of the challenges below.

II. Three challenges to the EU's human rights commitment

A. Implementation

As is well known, the EU has enshrined human rights in its system of values, and has pledged to function and be governed by those values. This is stated clearly in Article 2 of the Treaty on European Union, which states:

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

Article 3 (1) TEU then adds: '[t]he Union's aim is to promote peace, its values and the well-being of its peoples.'

This is valid not only for what concerns the EU's internal context, which supposedly is already infused by these values, but also for the EU's external relations. Article 21 in this regard reads:

(1) The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

[...]

(2) The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law

[...]

In light of the above provisions, the EU clearly positions itself as a 'normative' actor in (global) governance² which seeks to both advance certain values, and to be guided and limited by them.

The list is as long as the values are broad. To take only 'human rights' these represent an impressive catalogue of norms which is in constant expansion. The EU is also adding to its commitment to protect

² See Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *JCMS: Journal of Common Market Studies* 235. See also Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion', *FRAME Deliverable 6.1*, January 2015, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>, pp. 23-25.

and promote human rights in two ways. First of all, nothing in Art. 2, 3 or 21 TEU restricts the EU's human rights agenda only to the standards by which it is bound, be it through its own internal law (like the Charter of Fundamental Rights), through international treaties that it is a party to (like the Convention on the Rights of Persons with Disabilities (CRPD)), or through international custom. Arguably, the EU's commitment covers the entire field of human rights, and all recognised standards.

Moreover, as mentioned in Art. 21 TEU, the EU commits to *universal and indivisible* human rights. Arguably, this language should not be controversial, as principles of universality and indivisibility are part of the international law on human rights, as was made clear by the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights.³ However, when these principles have to be applied in practice, a host of issues emerge. Universality has been challenged for a long time by cultural relativist discourses, which urge to take into account the 'context' in which human rights standards have to be applied, the next step being that a variable content for human rights is warranted by circumstances.⁴ For others, the universal character of human rights, though not contestable as such, must not be confiscated by Western interpretations and manipulated to further Western interests and deny any diversity of situations.⁵ The idea of indivisibility, meaning that human rights are all of the same normative value, and that none should be promoted at the expense of another, is challenged by the unequal treatment of different human rights categories (civil and political rights v. economic, social and cultural rights; individual v. collective rights) and the necessity to establish policy priorities.

In light of the immensity of the EU's commitment to human rights, FRAME research has evidenced numerous instances in which the EU was struggling to implement its ambitious human rights agenda, and which we further discuss in this chapter. The implementation issue is made more visible by the fact that such bold commitments have raised expectations that the EU would be a kind of game changer. As Rosa Balfour notes, in the context of foreign policy:

The ways in which the EU has committed itself to human rights and democracy have raised expectations that it might display a 'different' kind of behaviour as an international actor, conceptualized in 'civilian' or 'normative' power models, or as an actor committed to an 'ethical foreign policy'. The EU itself considers that such commitment defines it as a 'unique' actor, thus making a claim for exceptionalism that is not dissimilar to that of the US.⁶

The different ways in which the challenge of implementation plays out in practice are the following:

- Implementation is made difficult in general because the transition from theory to practice is still in progress (Section 1);

³ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>, section I (5).

⁴ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400, 401.

⁵ Eva Brems, *Human Rights: Universality and Diversity* (Brill 2001); Ajneesh Prasad, 'Cultural Relativism in Human Rights Discourse' (2007) 19 Peace Review 589.

⁶ Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2013), p. 1.

- Implementation is made difficult internally because the EU's human rights agenda is resisted by certain Member States (Section 2);
- Implementation is made difficult externally because the EU's foreign policy tools are deficient on some counts (Section 3).

1. Conceptualisation

When reading Article 2 TEU, one could be led to think that human rights, as well as the other values it lists, such as the rule of law or democracy, are *given* and simply accepted, embraced and implemented by all. However, human rights, as is all law, are open-textured,⁷ meaning that they are broad concepts which require further definition, interpretation and operationalisation, lest they become indeterminate and easily manipulated.⁸

Therefore, when human rights have to serve as a 'guide' for policies, provide a foundation, or act as a 'silver thread',⁹ one needs firm benchmarks for the definition and evaluation of policy. In implementing the EU's human rights commitment, EU officials therefore need conceptual and operational guidance to turn the theory into policies.

The EU has taken an important step in conceptualising its references to human rights by adopting the European Union Charter of Fundamental Rights¹⁰ and by recognising the standards of the European Convention of Human Rights and the case-law of the Strasbourg Court as general principles of law (Art. 6 (3) TEU). The EU notion of human rights is therefore informed by quite a few layers of substance, and indeed, when EU policies refer to human rights in general, the Charter of Fundamental Rights is often used as a benchmark. An example is in the field of human rights impact assessments: all Commission legislative proposals, but also all 'acts and initiatives' now have to be assessed for impacts against the Charter of Fundamental Rights.¹¹

The Charter, however, does not fill all voids. First of all, the scope of the Charter extends by virtue of its Art. 51 'to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity.'¹² It was made clear on many occasions that the Charter applies to the EU institutions, bodies,

⁷ Erik Claes and Bert Keirsbilck, 'Facing the Limits of the Law (Conclusion)' in Erik Claes, Wouter Devroe and Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer Berlin Heidelberg 2009) 505.

⁸ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press, USA 2008) 497–498.

⁹ European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 'Human Rights and Democracy at the heart of EU External Action – Towards a more effective approach', Joint Communication to the European Parliament and the Council, 12 December 2011, COM (2011) 886 final, p. 7.

¹⁰ Along with the 'Explanations relating to the Charter of Fundamental Rights', *OJ C* 303/17, 14 December 2007.

¹¹ Nicolás Brando, Nicolas Hachez, Brecht Lein and Axel Marx, 'Assessing the impact of EU trade and development policies on human rights', *FRAME Deliverable 9.2*, June 2015, available at <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-9.2-Submitted-30-June-2015.pdf>, p. 70. See also European Commission, 'Better Regulation Toolbox', 2015, available at http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf, Tool #24, p. 176.

¹² Adding 'and to the Member States only when they are implementing Union law', which does not simplify the elucidation of the Charter's scope as far as its application to Member States' acts is concerned.

offices and agencies acting both in the internal and external policy realms.¹³ However, the question of the extraterritorial application of the Charter is not yet settled. It has been argued that applicability follows EU competences, whether internal or external, and that '[t]he precise duties will depend on the particulars of the case.'¹⁴ Nevertheless, speculation continues to exist in the absence of clear CJEU case-law, on how such 'extraterritorial application' concretely plays out, and what the precise limits are to the actual acts of the EU institutions to which the Charter supposedly applies. Notably, are abstentions and failures to act covered? These uncertainties lead to the result that, so far, statements as to the supposed extraterritorial application of the Charter 'are of political rather than legal value.'¹⁵ As a result, the Charter runs the risk of being disregarded in relation to the EU's external relations for reasons of political expediency.

Additionally, the Charter itself contains one major 'innovation' which contributes to blurring its interpretation, and to weakening some of the standards it contains, namely the separation between 'rights' which must be 'respected', and 'principles', which must be 'observed' and realised through legislation (Art. 52 (5) Charter). This distinction, which does not directly indicate which articles of the Charter fall under which category, creates much confusion as to the substance and applicability of the standards, leaving it to the CJEU to make determinations in this regard, which so far it has not done.¹⁶ Therefore, some have argued – misguidedly – that social rights had been relegated to the rank of principles, supposedly of a lesser legal value because not directly actionable.¹⁷

Therefore, when having to define or assess policies in relation to 'human rights' or 'fundamental rights' (the reason for the distinction is also not clear, see below), officials face a number of uncertainties and dilemmas as to the exact identity, scope and applicability of standards. This occurs in relation to different kinds of situations, and is more severe in external relations policy.

For example, there is considerable uncertainty regarding which bodies of law are actually applicable to EU actions alongside the Charter. The body of international human rights law which directly applies to EU actions is not well defined, beyond customary international human rights law (itself a moving target) and

¹³ See for example CFIEU, 4 Feb. 2014, *Syrian Lebanese Commercial Bank SAL*, joined cases T-174/12 and T-80/13, ECLI:EU:T:2014:52, confirming the applicability of the Charter to restrictive measures against Syria in the framework of the CFSP.

¹⁴ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1682.

¹⁵ Lorand Bartels, 'The EU 'S Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071, p. 1077.

¹⁶ Monika Mayrhofer (editor), Katharina Häusler, Renata Bregaglio, Carmela Chavez, Tingting Dai, Felipe Gómez Isa, Venkatachala Hegde, Jakub Jaraczewski, Magnus Killander, Karin Lukas, María Nagore, Bright Nkrumah and Lingying Yin, 'Report on the global human rights protection governance system', *FRAME Deliverable 4.2*, July 2015, available at <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-4.2-Submitted-28-July-2015.pdf>, p. 29.

¹⁷ 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', *FRAME Deliverable 3.2*, December 2015, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>, p. 24.

the only international human rights treaty that the EU is – so far – a party to (the Convention on the Rights of Persons with Disabilities). In this regard, the 11 ‘Human Rights Guidelines’ published by the Council provide useful information.¹⁸ However, such guidelines cover only a limited number of rights and situations, and might also be too general in certain respects. In relation to the Common Security and Defence Policy (CSDP), for instance, FRAME research has evidenced that the standards of international human rights and humanitarian law as they applied to EU CSDP operations lacked clarity and transparency,¹⁹ and notably did not reference particularly relevant rights in times of conflict such as the right to freedom of movement, the right to property and the right to privacy and family life. Despite the publication of a number of additional and more CSDP-specific guidance documents,²⁰ interviewed EU officials have shared with FRAME researchers that they were often still at a loss when having to apply human rights to particular crisis situations. An example which was given by an interviewee in this regard was the lack of clear criteria to decide which rights should supersede others when all human rights cannot be protected at the same time during a CSDP mission involving critical conditions. In this regard, the lack of jurisdiction of the CJEU in CSDP matters does not allow for settling these hesitations authoritatively.²¹ The new Action Plan on Human Rights and Democracy (2015-2019) however foresees two actions which should bring more certainty as to applicable standards in CSDP missions.²²

Another issue rendering implementation of the EU’s commitment to human rights difficult is the fact that the EU often refers to human rights standards which are boldly formulated. FRAME research shows that the EU human rights commitment was conceptualised in the thickest of terms, thereby making its full implementation almost impossible, and as a result standing fair chance of defeating expectations at the end of the day. This holds particularly true in external relations, in respect of the principles of universality

¹⁸ See http://eeas.europa.eu/human_rights/guidelines/index_en.htm.

¹⁹ Carmen Márquez Carrasco, Joana Abrisketa, Elizabeth Salmón, Laura Íñigo Álvarez, María Nagore, Chiara Marinelli, Rita Zafra, Rocío Alamillos Sánchez, Laura García Martín, ‘Report on applicable regulatory frameworks regarding human rights violations in conflicts’, *FRAME Deliverable 10.2*, forthcoming September 2015, p. 16 [to be updated].

²⁰ Eva Maria Lassen (editor), Monika Mayrhofer, Mandana Zarrehparvar, Hans-Otto Sano, Kristoffer Marslev, Anja Møller Pedersen, and Peter Vedel Kessing, ‘Report on in-depth studies of selected factors which enable or hinder the protection of human rights in the context of globalisation’, *FRAME Deliverable 2.2*, June 2015, available at <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-2.2-Submitted-30-June-2015.pdf>, pp. 127 ff.

²¹ *Id.*, p. 141.

²² Council of the European Union, ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, 20 July 2015, 10897/15, Action 21 (c): ‘Develop and implement a due diligence policy to ensure that EU support to security forces, in particular in the context of CSDP missions and operations, is in compliance with and contributes to the implementation of the EU human rights policy and is consistent with the promotion, protection and enforcement of international human rights law and international humanitarian law, as may be applicable.’; and 21 (d): ‘Whenever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed; where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU’.

and indivisibility.²³ As noted, the EU is vocal in its affirmation that it stands for universal and indivisible human rights.

However, in terms of universality, the EU has had to resort to a discourse which rather relates to ‘universally applicable legal norms,’²⁴ as enshrined in the body of international human rights standards, rather than to the actual rights which every human being should universally enjoy. The EU ‘therefore tends to emphasise universality more on the side of the duty-bearers (the States) than on the side of the rights-holders.’²⁵ Likewise, regarding indivisibility, the EU’s statement to the effect of recognising the equal value of civil and political rights on the one hand, and economic, social and cultural rights on the other, has not been verified in the facts. FRAME research has for example evidenced that policy documents such as the Strategic Framework and Action Plan on Human Rights and Democracy (2012), or political declarations like European Parliament resolutions placed much less emphasis on Economic, Social and Cultural Rights than on Civil and Political Rights, a situation which is well known to officials themselves.²⁶

Such boldness in formulation therefore fades in practice, to the effect that certain agenda items which feature high on the EU’s list at some point end up disappearing for lack of implementation. Such was the fate, for example, of the ‘deep democracy’ concept, which emerged in the wake of the Arab Spring and promised a complete institutional overhaul, including in human rights terms, in the region.²⁷ This is part of a more general challenge which is that of establishing and achieving ambitious priorities while respecting the principle of universality and indivisibility, and reckoning with the political developments. Prioritisation has been noted by FRAME research to lack direction and consistency. FRAME has particularly looked at the priority of protecting vulnerable groups, and ensuring their access to basic services, which is listed as a priority in the Strategic Framework on Human Rights and Democracy.²⁸ FRAME has shown, first of all, that the subject matter, vulnerable groups, had moving contours, as competing conceptions of vulnerability existed among EU internal and external policies.²⁹ These conceptual ailments often lead to the stigmatisation of the concerned persons, and do not allow for a consistent approach to vulnerability as a priority. As a result, vulnerability as a priority is unevenly mainstreamed in different EU policies.

²³ Katharina Häusler and Alexandra Timmer, ‘Human Rights, Democracy and Rule of Law in EU External Action: Conceptualization and Practice’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights* (NWV and Intersentia 2015).

²⁴ Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, 25 June 2012, 11855/12, p. 1.

²⁵ Timmer et al., above n. 17, p. 25. This is the debate between ‘legal universalism’ and formal legalism.

²⁶ *Id.*, p. 27.

²⁷ *Id.*, p. 46.

²⁸ Council of the European Union, above n 24, p. 3. The Action Plan has since then expired and been replaced, but the Strategic Framework remains valid.

²⁹ Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, ‘Report on the assessment of consistency in the prioritisation of human rights throughout EU policies’, *FRAME Deliverable 12.2*, July 2015, available at <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>, pp. 16 ff. The report identifies notably a ‘group approach’, according to which certain social groups are listed as vulnerable, and a ‘factors approach’, according to which any person subject to a vulnerability factor such as poverty, is part of the corresponding vulnerable group.

Whereas the CSDP, development and AFSJ policies clearly integrate special measures for groups such as women or children, other policies, such as trade or the European Neighbourhood Policy (ENP) largely disregard this aspect of the EU's commitment to human rights.³⁰

2. Values common to the Member States?

Article 2 TEU cited above clearly mentions that human rights are at the 'foundation of the Union' and are 'common to the Member States'. Yet, reality shows a different picture, and in the last few years, a number of Member States have been accused of violating human rights in a manner which was not accidental, but rather displayed serious differences with the human rights project.

France, for example, had in the summer of 2010 a long argument with then Justice Commissioner Viviane Reding about discrimination patterns against the Roma. Commissioner Reding had at the time had these very strong words on the situation:

Let me be very clear: Discrimination on the basis of ethnic origin or race has no place in Europe. It is incompatible with the values on which the European Union is founded. National authorities who discriminate ethnic groups in the application of EU law are also violating the EU Charter of Fundamental Rights, which all Member States, including France, have signed up to.

I therefore find it deeply disturbing that a Member State calls so gravely into question, by the actions of its administration, the common values and the law of our European Union.³¹

Although this particular instance of disagreement did not result in legal action being taken in the EU,³² what it shows is that discrimination is still very much a reality in a number of Member States despite a strong commitment from the EU against it. This is corroborated by FRAME research, despite the fact that non-discrimination is explicitly mentioned in the TEU, and that the EU has put in place some of the most progressive legislations in this respect.³³ Ethnicity and religion seem to be the main drivers of discrimination in the EU, so that migrant groups are among the most affected victims. This phenomenon

³⁰ *Id.*, p. 150.

³¹ Viviane Reding, 'Statement on the Latest Developments on the Roma Situation', 14 September 2010, SPEECH/10/428, available at http://europa.eu/rapid/press-release_SPEECH-10-428_en.htm.

³² France was however condemned in Strasbourg in 2013 for its policy of eviction of Roma families from their dwellings (the application was however filed in 2007 and the case only found a violation of Art. 8 ECHR, relative to the right to private and family life). See European Court of Human Rights, *Winterstein and others v. France*, Case no. 27013/07, 17 October 2013, available at <http://hudoc.echr.coe.int/eng?i=001-127539>. Specifically related to the facts of the summer 2010, a Collective Complaint under the European Social Charter was filed against France, and the Committee on Social Rights stated that '[i]t ha[d] been demonstrated that returning Roma of Romanian and Bulgarian origin to their countries of origin was based on discriminatory provisions that directly targeted Roma individuals and families.' See European Committee on Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. France*, Complaint No. 63/2010, 28 June 2011, para 66.

³³ See e.g. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, 2 December 2000, pp. 16-22; and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180, 19 July 2000, pp. 22-26. The long-standing Commission Proposal of 2 July 2008 for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final, is however still blocked in the Council.

certainly spills over into the field of migration and asylum, and can be counted amongst the root causes of the current European migration crisis, and of the reluctance which some EU Member States are showing in hosting their fair share of refugees.³⁴

As to the causes of such situation, FRAME research has identified a mix of interrelated factors belonging to the legal, political, social, economic and cultural spheres.

Legal factors include various defects in the non-discrimination directives, and notably a lack of uniformity in the design of national equality bodies, preventing them to discharge their functions effectively, namely educate the population, engage the political class, and investigate violations which are generally under-reported.³⁵

Economic and political factors also play a part in the lingering discrimination within EU Member States. The economic crisis has constrained the job market, and job discrimination against migrants has surged. Moreover, the resource-intensive realisation of economic and social rights for the most vulnerable in society, including migrants, has been rendered more difficult by the unfavorable economic situation. The political response to these challenges has also not been to the migrants' advantage, with a clear proliferation of populist discourses, and a rise of far-right and nationalists platforms, which do not seek to advance anti-discrimination policies, and even sometimes explicitly propose to annihilate them.³⁶

The Roma, as explained in the beginning of this section, have historically been a prime target for discrimination. As revealed by FRAME research, '[s]weeping historical prejudices and stereotyping of the Roma people as culturally homogeneous with common attributes of idleness, criminal habit and non-conformity persists to this day and obstructs efforts to protect and promote the human rights of the Roma people in the EU.'³⁷ As a result, '[t]he Roma and their inclusion is a litmus test of the EU's and its Member States' commitment and adherence to promoting and protecting human rights without discrimination.'³⁸

When the treatment of certain groups in a Member State amounts to a clear violation of human rights provisions which can be precisely identified, as Commissioner Reding claimed was the case in France in 2010, the Commission may start infringement proceedings to bring the Member State at fault back into line.³⁹ However, when the situation qualifies less as clear-cut violations, and more as a pattern of

³⁴ For example, on 22 September 2015, as the JHA Council was to vote on a Commission proposal to allocate quotas for the hosting of 120,000 candidate refugees EU-wide, the Czech Republic, Hungary, Romania, and Slovakia voted against, and Finland abstained. See Nikolaj Nielsen and Eszter Zalan, 'EU forces "voluntary" migrant relocation on eastern states', 22 September 2015, available at <https://euobserver.com/migration/130374>.

³⁵ 'FRA's EU-MIDIS Survey from 2009, an average of 82 per cent of the respondents (ethnic minorities) who had experienced discrimination in the prior 12 months had not reported the incident'. See Lassen *et al.*, above n. 20, p. 43.

³⁶ *Id.*, p. 44.

³⁷ *Ibid.*, p. 45.

³⁸ *Ibid.*

³⁹ See European Commission, '2014 Report on the Application of the EU Charter of Fundamental Rights', 2015, available at http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf, p. 11, which states: 'Whereas the Charter was mentioned in five infringement proceedings in 2013, in 2014 the Commission has

backsliding into human rights regression, the Commission's options are less evident,⁴⁰ and eyes often turn towards Article 7 TEU, which allows the Council to sanction a Member States in case it determines that 'there is a clear risk of a serious breach by [that] Member State of the values referred to in Article 2' TEU. However, the use of this procedure is often described as the 'nuclear option',⁴¹ given the antagonism it would create between the accused Member State and its counterparts, and the severity of the sanctions, ranging from suspension of voting rights to pure and simple exclusion. This option has to date never been pursued, even though worrying trends are taking place in certain Member States, which have been partly documented by FRAME.

In Hungary, to take the most discussed example, the newly adopted (2013) 'Fundamental Law defines the ethnic/cultural concept of the nation as a Christian community and institutionalises an outmoded national-historical approach with religious, devotional overtones. This concept of the nation cannot be reconciled with the moral equality of citizens which requires states not to favour or disfavour anyone on the ground of their conception of the good life. The Fundamental Law follows the interests of the government rather than moral values, and it in itself threatens constitutional democracy and leads to a constitutional tragedy.'⁴² As indicated, beyond the unlikely triggering of Art. 7 TEU and sporadic actions for infringements, the EU is short of legal means to discipline such conduct. So far, political calls from the Commission have remained without response, and the latter has also not activated its 2014 'New EU Framework to Strengthen the Rule of Law' (see below). Additionally, the Commission also failed to trigger conditionality linked to access to European Cohesion Funds when it had a chance to do it in 2014.⁴³

As a conclusion, a mix of historical, political, social, economic, and cultural/religious factors are causing increasingly significant shares of the population and the political leaders in some Member States to question the values of the EU, particularly when those concern 'the rights of persons belonging to minorities', 'pluralism, non-discrimination' and 'tolerance'.⁴⁴

Even if the dominant political discourse is still largely geared towards those ideals, it needs to become much more powerful, notably in changing citizen (and government) behaviour, and in providing appropriate legal tools to ensure both a strong non-discrimination framework, and an affirmative plan to

referred to the Charter in 11 cases of [infringement] proceedings [...]. *Five of the 11 cases relate to asylum and migration.*' (emphasis added)

⁴⁰ For example, infringement procedures are possible when measures threatening the rule of law or human rights also coincide with violations of standards of EU law, although this is not always the case. For examples, measures threatening the independence of the judiciary in Hungary were struck down by the CJEU as violating EU rules on equal treatment in employment (Directive 2000/78/EC, see above n. 33): CJEU, 6 November 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687.

⁴¹ José Manuel Durão Barroso, President of the European Commission, 'State of the Union 2012 Address', Strasbourg, 12 September 2012, SPEECH/12/596.

⁴² Timmer *et al.*, above n. 17, p. 73.

⁴³ *Id.*, p. 74: 'Regulation No 1303/2013 mentions among general conditionalities (Part II of Annex XI) anti-discrimination, disability and gender. In spite of the existing equality conditionalities in August 2014 the European Union and Hungary adopted the Partnership Agreement. The document 'paves the way for investing €21.9 billion in total Cohesion Policy funding over 2014-2020 (current prices, including European Territorial Cooperation funding and the allocation for the Youth Employment Initiative).'

⁴⁴ Lassen *et al.*, above n. 20.

realise the economic, social and cultural rights of significant parts of the migrant or vulnerable populations.

3. The challenge of implementation in foreign policy

Often talked about is a rise in cultural relativism worldwide, justifying discourses as to differentiated applications or interpretations of human rights according to the local context. This, arguably, is making the implementation of ambitious and ‘universal’ human rights agendas more difficult, but the EU seeks to stand firm and defend the powerless who have everything to gain from universal human rights.⁴⁵

Although cultural relativism has been branded one of the most pressing issues facing the implementation of the EU’s human rights agenda, other challenges are also holding back the implementation of the EU’s human rights agenda. These challenges play out at two levels: multilateral and bilateral. At each of these levels, the implementation of the EU’s human rights commitment implies to work with others in particular contexts. FRAME research has evidenced that the EU’s tools to that effect were defective to some extent.

a) Multilateral engagement

First, as proclaimed by Art. 21 (1) TEU, the EU seeks to ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’ as part of a broader commitment to ‘effective multilateralism’.⁴⁶ This commitment extends to human rights,⁴⁷ and therefore FRAME research has taken an extensive look at the EU’s engagement in UN human rights fora. Whereas in the past, intra-EU coordination efforts to ‘speak with one voice’ were overwhelming, this burden has now been assuaged following the Lisbon reforms, which allows the EU to present a clearer and more unified policy at the UN.⁴⁸ Also, the EU (along with its Member States) has been found to be one of the more active actors at UN human rights fora, participating in many negotiations and providing a position on virtually every issue, so that it is often considered a point of reference by other actors, and is providing leadership on many issues.⁴⁹

However, this is hardly sufficient to ensure a full or even satisfactory implementation of the EU’s commitment to universal and indivisible human rights. First of all, the EU’s legal status in the UN galaxy is very diverse and complex, making the achievement of policy objectives also dependent on the participation rights in the different UN bodies. Moreover, while the EU has established a very long list of

⁴⁵ Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’, 13 May 2013, 9431/13, p. 7.

⁴⁶ J Wouters, S de Jong and P De Man, ‘The EU’s Commitment to Effective Multilateralism in the Field of Security: Theory and Practice’ (2010) 29 Yearbook of European Law 164.

⁴⁷ See Council of the European Union, above n 22, Action 6: ‘Strengthening cooperation with the UN and regional Human Rights and Democracy mechanisms.’

⁴⁸ Grażyna Baranowska, Anna-Luise Chané, David D’Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki, Anna Połczyńska, ‘Report on the analysis and critical assessment of EU engagement in UN bodies’, *FRAME Deliverable 5.1*, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf>, p. 221. On many issues, common positions are however still difficult to reach, and Member States fail to support the EU’s agenda to follow their own course instead. See Theodor Rathgeber, ‘Human Rights à La Carte: The EU at the UN Human Rights Council in 2014’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights* (NWV and Intersentia 2015).

⁴⁹ *Id.*, p. 220.

thematic priorities, it has struggled to achieve them due to internal resistance on certain politically sensitive issues,⁵⁰ and lack of support from other UN members, who notably castigate the EU's priorities as selective, as they notably largely disregard ESCR.⁵¹ Geographic priorities are also accused of the same ills, as the EU's targets for criticism (e.g. DPRK, Burma/Myanmar, Iran and Belarus) are weak and isolated countries and rarely include and most often fail to include countries in which the EU has strategic interests. These various issues cause the EU to suffer from a deficit of goodwill on the part of other regional blocs or countries, which might at times oppose the EU as a matter of principle (see below, Section II.C.2). This of course stands in the way of the implementation of the EU's commitment to human rights. Therefore, FRAME research recommends '[a] stronger prioritization, paired with a more balanced approach'.⁵²

b) Bilateral level

The EU has also put in place a vast network of relations with bilateral partners, through which it intends to advance its human rights agenda. Bilateral engagement is done with individual countries, but also with other regional organisations such as the African Union or the Organization of American States.

The EU's engagement at the bilateral level on human rights takes various forms and is exercised through a large number of instruments, including:

- Statements;
- Diplomatic démarches;
- Political and human rights dialogues;
- Financing and other aid;
- Trade;
- 'Association' and other wide-ranging partnerships;
- Restrictive measures and other CFSP tools;
- CSDP missions.⁵³

FRAME research examined these instruments in depth, and found that a number of them, notably human rights dialogues and conditionality, to some extent failed to properly implement the EU's commitment to human rights.

(1) Human rights dialogues

Human rights dialogues are a 'soft' though formalised instrument of human rights promotion, which aims to discuss human rights in general, or in relation with particular issues, bilaterally with a partner country (or partner International Organisation). Dialogues are meant to be a two-way street, so that the partner

⁵⁰ Research identified the following issues as too 'politically sensitive': 'the EU's approach to counterterrorism and renditions in the context of the Iraq war, protective attitude to the human rights record of powerful or friendly countries, EU refugee and migration policy or the attitude to international cooperation on development and human rights'. *Ibid.*, p. 227.

⁵¹ *Ibid.*, p. 223-224: 'There is neither at the Human Rights Council nor at the UN General Assembly a single EU led initiative solely devoted to ESCR and it is not featured in the EU statements delivered at the UN.' Likewise, at the UPR, 'there is a sharp difference between attention paid to recommendations concerning civil and political rights and those related to economic, social and cultural rights, to the detriment of the latter.' *Ibid.* p. 226.

⁵² *Ibid.*, p. 223.

⁵³ For an exhaustive list, sorted by categories see Fraczek *et al.*, above n. 2, pp. 72-74.

country may also table items for discussion which concern the EU. Specific human rights dialogues are complemented by regular political dialogues held with third countries on other occasions or in the framework of other policies (such as Association Agreements).⁵⁴

The objectives of the dialogues are:

- a) Discussing questions of mutual interest and enhancing cooperation on human rights inter alia, in multinational fora such as the United Nations;
- b) Registering the concern felt by the EU at the human rights situation in the country concerned, information gathering and endeavouring to improve the human rights situation in that country.⁵⁵

The particular issues to be discussed in dialogues are determined on a case-by-case basis, but should reflect EU human rights priorities.⁵⁶

In light of the fact that states are primarily responsible for respecting, protecting and fulfilling human rights, dialogues are one of the most direct and most important instruments in this regard. Due to their softness, questions were however raised as to whether or not they were actually instrumental in implementing the EU's human rights commitment.⁵⁷ In this regard, the Strategic Framework on Human Rights and Democracy insists that '[t]he EU will raise human rights issues vigorously in all appropriate forms of bilateral political dialogue, including at the highest level.'⁵⁸ Actions to make dialogues more targeted were taken in the framework of the 2012 Action Plan,⁵⁹ and the 2015-2019 Action Plan now strengthens the focus on dialogues, notably by mentioning more explicitly which thematic priorities have to be the object of dialogue, and by restating the need to enhance possibilities for their evaluation⁶⁰ underlining the pivotal character of dialogues in the overall EU external policy on human rights.

In practice, 40+ dialogues are far from being a silver bullet for the implementation of the EU's human rights commitment. While generally considered as useful avenues for honest discussion and incremental progress on human rights, some dialogues remain underwhelming and unproductive.⁶¹ FRAME has notably studied the structured human rights dialogue conducted with the African Union and has noted the following issues:

⁵⁴ See EU Guidelines on human rights dialogues with third countries, 2008, available at http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf, pp. 2-3.

⁵⁵ *Id.*, pp 5-6.

⁵⁶ *Id.*, p. 6.

⁵⁷ D12.1, p. 40.

⁵⁸ Council of the European Union, above n. 28, p. 7.

⁵⁹ *Id.*, Action 32.

⁶⁰ Council of the European Union, above n. 22, Action 10 (c) on Human Rights Defenders; 18 (a) on Business and Human Rights; or 24 (b) on human trafficking.

⁶¹ See generally, about the EU-China dialogue, Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (Routledge 2015).

- Inclusiveness, and notably engagement with civil society is ‘peripheral and not embedded in all the stages of the process’, which is problematic in the light of the 2015 Action Plan’s objective to ‘invigorate civil society’;⁶²
- The traction of the dialogue is weak, as the EU and the AU have not been able to reconcile or even approximate views on crucial topics such as the indictment of heads of state before the International Criminal Court (ICC), LGBT rights, or the protection of migrants’ life on their way to the EU;⁶³
- Synergies with other human rights bodies such as regional treaty bodies and human rights courts are absent.⁶⁴

The three issues of inclusiveness, impact and synergies should act as benchmarks for an ambitious implementation of the EU’s human rights commitment through human rights dialogues.

(2) Conditionality

One of the ways the EU implements its commitment to human rights is through ‘conditionality’, namely by granting benefits or imposing sanctions based on conditions of respect for human rights. Conditionality is present in various internal and external policies: regional and cohesion policy, trade, development, neighbourhood, and enlargement. Conditionality can be ‘negative’, meaning that sanctions are imposed in case of human rights violations by the beneficiary, and ‘positive’ meaning that benefits are acquired in exchange for human rights commitments or progress. Conditionality is very widespread, but doubts have been expressed as to whether or not the way the EU applies it characterises as a proper implementation of its human rights commitment.⁶⁵

FRAME research generally concurs with this assessment, and has illustrated it particularly through studies of conditionality in the fields of trade and neighbourhood policy.

In trade, bilateral conditionality takes the form of ‘human rights clauses’ which define human rights (and most often other values such as the rule of law) as essential elements of a trade agreement.⁶⁶ As a consequence, when human rights are breached by one of the parties, an essential element of the relationship is missing, allowing the other to take ‘appropriate measures’.⁶⁷ So far, such essential elements clauses have only been activated a limited number of times, always by the EU against ACP countries, and

⁶² Council of the European Union, above n. 22, Objective I. b).

⁶³ Anna-Luise Chané, Nora HoTu Nam, Magnus Killander, Tomasz Lewandowski, Remember Miamingi and Bright Nkrumah, ‘Report on the EU’s engagement with regional multilateral organisations -- Case study: African perspective’, *FRAME Deliverable 5.4*, available at <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-5.4-Submitted-30-June-2015.pdf>, p. 31.

⁶⁴ *Id.*, p. 36.

⁶⁵ Elena Fierro, *European Union’s Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003).

⁶⁶ The agreement most often covers other fields as well, such as development and cooperation on a number of issues.

⁶⁷ Some agreements however provide for consultation processes by the parties in such cases, to avoid as much as possible that unilateral measures, such as, most famously, Art. 96 of the so-called ‘Cotonou Agreement’, See Partnership Agreement between the Members of the African, Caribbean and Pacific Group Of States of the one part, and the European Community and its Member States of the other part, signed in Cotonou, 22 June 2000.

not necessarily as a reaction to human rights violations, but rather following coups or flawed elections. Moreover, the actual measures taken have never amounted to actual trade sanctions.⁶⁸ This in turn triggers the credible critique that EU trade conditionality is a bland and selective tool, generating double standards. This critique is also valid in relation to the unilateral conditionality which can be found in the 'Generalised System of Preferences' (GSP), by which beneficiary countries receive increased market access on condition of respect for human rights. In the so-called GSP+ scheme, a number of eligible countries may receive additional benefits if they ratify and effectively implement 27 international conventions, 15 of which concern human rights.⁶⁹ So far, the EU has only lifted GSP benefits in the case of three countries, Myanmar, Sri Lanka and Belarus, and has left many other questionable situations go unpunished.⁷⁰

The reason for such a weak implementation of conditionality in the field of trade is perhaps to be found in the fact that an 'automatic' mechanism for sanctioning trade partners is rather inconvenient in light of the wider relations which the EU and the said country have sometimes developed. This is understandable as international relations require flexibility and pragmatism, but none the less, the general impression of arbitrariness surrounding trade conditionality is detrimental to the EU's human rights agenda. The 2012 Action Plan on Human Rights and Democracy had in this regard foreseen to 'develop criteria for application of the human rights clause',⁷¹ but this measure was not implemented. It was also not included again in the follow up Action Plan (2015-2019), but was replaced by a vaguer commitment to '[i]mprove coherence in the application of human rights clauses which are systematically included in all new EU international agreements.'⁷²

In new generation agreements (with South-Korea, Cariforum, or Colombia-Peru), human rights clauses have been supplemented with 'sustainable development chapters' which establish a process for dialogue and incremental progress on sustainability-related issues, including labour rights. Sustainable development chapters do not foresee sanctions, but rather set up committees and consultation procedures in case certain standards are not implemented. This much quieter mechanism, which moves away from pure conditionality, now appears to be the preferred avenue of the Commission for linking trade and human rights (though it will not replace human rights clauses). Some scholars, while not questioning the approach based on a self-paced but genuine implementation of labour rights in the partner country, have however warned against a generalised shift away from sanctions-based conditionality, and made proposals for sustainability chapters which would properly implement the EU's

⁶⁸ Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, 'Report on the integration of human rights in EU development and trade policies', *FRAME Deliverable 9.1*, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>, p. 69.

⁶⁹ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, *OJ L* 303, 31 October 2012, pp. 1-82, Annex VIII.

⁷⁰ Laura Beke and Nicolas Hachez, 'The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar' in Jan Wouters and others (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar 2015) 194.

⁷¹ Council of the European Union, above n. 28, Action 33 (b).

⁷² Council of the European Union, above n. 22, Action 33 (e).

labour rights agenda in a trade context.⁷³ All in all, this move away from hard conditionality is not unpromising, as research in the field of labour rights has shown that a dialogue-based approach to compliance is not necessarily correlated to results lower than those achieved by a harder approach.⁷⁴

The weakness of conditionality was found by FRAME research to be even more problematic in relation to the European Neighbourhood Policy, whereby third countries in the EU's direct vicinity (to the East and the South) were engaging in a deep integrative process ('everything but the institutions'⁷⁵) formalised by conditional Association Agreements and Action Plans. The Arab Spring events however clearly exposed that the EU had favored stability over human rights by never triggering conditionality against regimes such as that of Ben Ali in Tunisia.⁷⁶ In that sense, it can be said that the EU's commitment to human rights, at least as far as conditionality is concerned, was not properly implemented in the EU's Southern Neighbourhood.⁷⁷

4. Conclusion on the implementation challenge

In conclusion, one can summarise the challenges to the implementation of the EU's commitment to human rights as playing out along several axes.

First of all, the EU's commitment suffers from insufficient conceptualisation, leaving officials in charge of implementing this commitment somewhat helpless when they have to design concrete human rights-related policies. The EU Charter for Fundamental Rights is a useful compass, but uncertainties regarding its content and scope still leave many questions unanswered. This lack of conceptualisation is particularly severe as it concerns the EU's commitment to 'universal' and 'indivisible' human rights, as it is unclear how these principles can be fulfilled while at the same time leaving room for necessary prioritisation. Specific guidance should be developed in this regard to the attention of EU officials. FRAME hopes to contribute to this objective.

Second, the EU's all-encompassing commitment to human rights, aiming to establish it as a 'normative power', is incredibly daunting. As such, the principle and level of this commitment must not be questioned, but expectations raised by it should be managed by a clear, transparent and realistic implementation roadmap, so that any and each remaining human rights issue would not be identified as a failure by the EU to deliver on its commitment. In this sense, the Strategic Framework and Action Plan on Human Rights and Democracy was a necessary step forward as it identified clear objectives, deadlines and responsible entities. Yet, the 2012 version contained 97 'actions' to be taken in the space of just two

⁷³ Karin Lukas and Astrid Steinkellner, 'Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements', Ludwig Boltzmann Institute of Human Rights, June 2010, available at <http://bim.lbg.ac.at/sites/files/bim/Sample%20Texts%20Social%20Standards%20in%20FTAs.pdf>, pp. 9 ff.

⁷⁴ Beke *et al.*, above n. 68, p. 77.

⁷⁵ Romano Prodi, 'A Wider Europe - A Proximity Policy as the key to stability', Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

⁷⁶ Rosa Balfour, 'EU Conditionality after the Arab Spring', *IEMed./EuroMeSCO Joint Series Paper No. 16* (2012), available at <http://www.iemed.org/publicacions-en/historic-de-publicacions/papersiemed-euromesco/16.-eu-conditionality-after-the-arab-spring>, 16 17.

⁷⁷ Although issues are arguably much wider than the lack of implementation of conditionality. FRAME research also evidences a poor design of targets, benchmarks and objectives. See Fraczek *et al.*, above n. 2, p. 26.

and a half years. Although it is claimed that a large majority of the planned actions were achieved or about to be achieved by end 2014, the plan was still widely regarded as too ambitious. However, despite early plans to downsize it, the successor Action Plan (2015-2019) now contains 113 actions (admittedly to be achieved over four years). Additionally, we note a sharp decrease in the precision of the actions, many of which are now worded in very general terms.⁷⁸ In this respect, FRAME is conducting thorough research on human rights indicators as a way to benchmark actions and make progress verifiable.⁷⁹

Additionally, the EU's human rights commitment does not seem to be shared fully by all Member States, and therefore an effort should also be made internally to mobilise all Member States behind such commitment, to resist human rights-adverse political agendas which currently prosper in some Member States, and to step up political discourse to educate and convince citizens.

Finally, FRAME research has identified cases in which the EU's commitment to human rights was only very weakly upheld in external relations. For example, the imbalance in the EU's human rights priorities between civil and political rights and economic, social and cultural rights shows that the indivisibility of human right revered by the EU is easily put aside. Additionally, the EU's instruments are too seldom activated when the EU is facing the possibility of having to enforce the human rights obligations of third countries, notably in the field of trade or neighbourhood policy.

Another example of reticence by the EU to take an affirmative stance towards human rights is the field of business and human rights. The EU has since 2001 had an official CSR policy, supported the work of the UN Special Representative on Business and Human Rights, and firmly committed to implement the resulting UN Guiding Principles on Business and Human Rights, which it has notably done through pioneering regulatory initiatives in the fields of non-financial disclosure⁸⁰ or public procurement.⁸¹ However, the EU was never a leader in this field,⁸² and has often declined to stand at the forefront of efforts to ensure effective accountability of enterprises for human rights violations. An example is the 10+

⁷⁸ Abrisketa *et al.*, above n. 29, p. 27.

⁷⁹ Klaus Starl, Veronika Apostolovski, Isabella Meier, Markus Möstl, Maddalena Vivona and Alexandra Kulmer, in collaboration with Hans-Otto Sano and Erik André Andersen, 'Baseline Study on Human Rights Indicators in the Context of the European Union', *FRAME Deliverable 13.1*, December 2014, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf>. See also FRAME, 'The Post-2014 EU Action Plan on Human Rights and Democracy – A Policy Brief', January 2015, available at <http://www.fp7-frame.eu/policy-briefs/>, p. 8.

⁸⁰ See European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] *OJ L 330/1*.

⁸¹ See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ L 94*, 28 March 2014, pp. 65-242; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ L 94*, 28 March 2014, pp. 65-242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *OJ L 94*, 28 March 2014, p. 243-374

⁸² Stephanie Bijlmakers, Mary Footer and Nicolas Hachez, 'Report on tracking CSR responses', *FRAME Deliverable 7.4*, October 2015, forthcoming.

years it took the EU to drop the word ‘voluntary’ from its definition of CSR.⁸³ Another example is the little enthusiasm which the EU and its Member States show in issuing National Action Plans on CSR and/or business and human rights. A third example are the pre-conditions which the EU put to its participation in the July 2015 Meeting of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which could have been interpreted as ‘manoeuvres to derail the process’ of moving towards a binding instrument on business and human rights.⁸⁴

B. Coherence

The principle of coherence, often associated with consistency, has for a long time been identified as one of the most important public governance principles,⁸⁵ but also one of the main challenges for EU policy-making⁸⁶ which derives from the difficulty of producing a unified whole from a disparate set of competences. In lay terms, policy coherence can be described as designing and implementing policies which are geared towards a well-defined goal, and are faithful to the normative principles applicable to such policies. In respect of human rights, this means that, since the EU has placed human rights among its guiding values, all its policies must align so as to contribute to – or at least not undermine – human rights broadly defined. A number of studies regarding policy coherence in the EU have been conducted already, particularly in the field of foreign policy.⁸⁷ Coherence is often associated with ‘mainstreaming’, meaning that certain objectives or concerns are included in all policies. Mainstreaming is therefore one way to ensure coherence, and is being applied to human rights in the EU.⁸⁸ Institutions like the European Parliament have also referred to a ‘comprehensive approach’ to policy-making, one that takes into account all facets and impacts of policies.⁸⁹

Obviously, coherence is necessary in governance: it guarantees the credibility of a policy-maker, and makes its action more effective by directing all forces to the same goal. There have however been debates as to what it actually entails, and how far it should be pushed. For example, authors have asked whether

⁸³ Jan Wouters and Nicolas Hachez, ‘Business and Human Rights in EU External Relations – Making the EU a Leader at Home and Internationally’, Study for the European Parliament, EXPO/B/DROI/2009/2, April 2009, p. 27.

⁸⁴ Jérôme Chaplier (International Coalition for Corporate Justice), ‘Towards a legally binding instrument on Business and Human Rights’, European Parliament, 2 September 2015, available at <http://business-humanrights.org/sites/default/files/documents/ECCJ%20at%20SD%20Event%20Towards%20a%20Legally%20Binding%20Instrument.pdf>

⁸⁵ P.J. May, J. Sapotichne and S. Workman, ‘Policy Coherence and Policy Domains’ 34 *The Policy Studies Journal* 381.

⁸⁶ L. den Hertog and S. StroB, ‘Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term’ 18 *European Foreign Affairs Review* 373.

⁸⁷ C. Portela and K. Raube, ‘The EU Polity and Foreign Policy Coherence’ 8 *Journal of Contemporary European Research* 3

⁸⁸ Florence Benoît-Rohmer *et al.*, ‘Human Rights Mainstreaming in EU’s External Relations’, Study for the European Parliament, EXPO/B/DROI/2008/66, September 2009, p. 15: ‘Mainstreaming human rights may be defined as a strategic process of deliberately incorporating human rights considerations into processes or organisations which are not explicitly mandated to deal with human rights. More specifically, mainstreaming is a process of integrating human rights within policies and managerial structures, methodologically supported by a human rights-based approach in programming and operational activities.’

⁸⁹ European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)).

coherence was a virtue or a vice, given that an excess of coherence might lead to immobility, lack of flexibility or lack of debate.⁹⁰

FRAME has conducted in-depth research on the different facets of coherence, and has come up with the following definition, which we will try to unpack in the following sections, and illustrate with examples:

Coherence is policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of human rights policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States). Additionally, human rights policymaking ensures the respect for the universality and indivisibility of human rights in each policy dimension.⁹¹

1. The different dimensions of coherence

In FRAME research, questions of coherence have been raised along different dimensions which concern the delicate articulation of actors, competences, mandates and responsibilities in the EU. Many actors indeed share policy- and law-making prerogatives in the EU, according to a complex division and conferral of competences (including so-called ‘implied’ powers) and more or less well defined mandates. All this has the potential to create gaps and overlaps in law and policy, and thereby result in incoherence.

In the field of human rights, this is made even more complicated by the fact that the EU has no direct competence to positively act in the field of human rights (except in limited areas such as non-discrimination),⁹² but must rather use human rights as a framework of reference placing legal limits or providing overarching objectives in the exercise of its conferred competences. Therefore, (in)coherence with human rights is expressed in terms of legal violations or positive/negative impacts caused by the exercise of its regular competences in substantive fields. In this last instance, any conclusion as to the coherence or incoherence of a piece of law or policy with human rights must therefore be the result of a subjective values- and outcome-based analysis and is therefore made this much more difficult to spot and measure.⁹³

⁹⁰ Anne-Claire Marangoni and Kolja Raube, ‘Virtue or Vice? The Coherence of the EU’s External Policies’ (2014) 36 *Journal of European Integration* 473.

⁹¹ Tamara Lewis, Wolfgang Benedek and Anna Müller-Funk, ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’, *FRAME Deliverable 8.1*, September 2014, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>, p. 20.

⁹² *Id.*, p. 32 and CJEU, Opinion of the Court of 28 March 1996 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECLI:EU:C:1996:140, para. 6.

⁹³ See Lewis *et al.*, above n. 91, p. 48, for examples of Commission competences which can impact human rights more or less directly.

a) *Single-actor incoherence*

(In)coherence can, as it is clear from the above, take place at the level of one actor only, a Member State or an EU institution, agency or body, which would adopt policies that violate the EU Charter of Fundamental Rights, or more generally work at cross purposes with the EU's human rights agenda. One can think for example of the difficulties the Commission is having in properly assessing the human rights impacts of its legislative proposals, or of trade agreements it negotiates.⁹⁴ In the same field, the EU Agency Frontex has been under criticism for carrying out its functions in disregard of a number of established human rights standards, such as *non-refoulement*.⁹⁵

The cause of this kind of situation is often the lack of awareness, knowledge and training of the concerned officials regarding international human rights standards or EU human rights objectives.⁹⁶ At operational level, Frontex officials are now following mandatory human rights training provided by Member States as a result of these criticisms.⁹⁷ Likewise, calls have been made to work on a proper methodology for human rights impact assessments in the field of trade.⁹⁸

However, incoherence issues tend to gain in sophistication when they take place at the nexus between the actions, competences and mandates of several actors. Coherence would command that such actions, competences and mandates would align towards a well-defined goal, but this is not always the case.

b) *Vertical incoherence*

First of all, coherence issues can take place *vertically*, meaning between the different floors of the multilevel EU architecture.

Vertical incoherence typically takes place when Member States take policy directions which openly contradict EU values, like in the case of Hungary discussed above. In a number of instances, EU institutions have spoken up to encourage EU Member States to eliminate any legislation or policy which would run foul of the EU's human rights commitment. The European Parliament has recently 'call[ed] on all Member States to repeal any existing laws which contradict the fundamental freedom of religion and conscience and freedom of expression,' notably those legislations which can lead to discrimination against ethnic and religious minorities in acceding to the job market or to education.⁹⁹ Vertical incoherence however remains

⁹⁴ See generally Brando *et al.*, above n. 11 and Lewis *et al.*, 91, p. 78.

⁹⁵ Parliamentary Assembly of the Council of Europe, 'The interception and rescue at sea of asylum seekers, refugees and irregular migrants', Resolution 1821, 21 June 2011, para. 5.4.

⁹⁶ Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Lisa Maria Heschl, Stefan Salomon, Julia Planitzer and Helmut Sax 'Report critically assessing human rights integration in AFSJ policies', *FRAME Deliverable 11.2*, forthcoming, Section III. B. 3. (1).

⁹⁷ Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L* 105, 13 April 2006, pp. 1-32, Art. 16.

⁹⁸ Brando *et al.*, above n. 11, pp. 92-92.

⁹⁹ European Parliament, resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious difference, (2014/2690(RSP)). See also Eva Maria Lassen (editor), Monika Mayrhofer, Peter Vedel Kessing, Hans-Otto Sano, Daniel García San José and Rikke Frank Jørgensen, 'Report on factors which enable or hinder the protection of human rights', *FRAME Deliverable 2.1*, August 2014, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/03-Deliverable-2.1.pdf>, p. 13.

and is reinforced in the many cases when EU institutions fail to take appropriate action to discipline the said Member State, or are unable to make it mend its ways.

Beyond the question of divergence on values, incoherence can also arise when the EU and Member States share competences in a particular field and fail to align their policies, notably so as to ensure positive synergies for human rights. A specific example is in the field of development, which is characterised by a very complex articulation of funding and programmatic instruments both in the EU and the Member States. The Treaty on the Functioning of the European Union states (Art. 208 (1)) that '[t]he Union's development cooperation policy and that of the Member States complement and reinforce each other.' To that effect, the EU is notably committed to following the principles of 'Policy Coherence for Development' (PCD), that is, an approach aimed at 'minimising contradictions and building synergies between different EU policies to benefit developing countries and increase the effectiveness of development cooperation.'¹⁰⁰ For example, all development cooperation instruments, such as the European Endowment for Democracy (EED), the European Instrument for Democracy and Human Rights, the Instrument contributing to Stability and Peace, the European Neighbourhood Instrument (ENI), the Development Cooperation Instrument (DCI), and the Member States' bilateral instruments, are of course all supposed to collaborate, seek synergies and contribute to policy coherence.¹⁰¹ Specifically at the juncture of EU and Member States' policies, some best practices of vertical coordination have been observed in respect of human rights,¹⁰² notably as the EU has for some time been trying to implement a human rights-based approach (RBA) to development, thereby channelling the practice of some Member States.¹⁰³ The Commission, the EEAS and Member States therefore exchanged views and experiences along with civil society¹⁰⁴ and a Toolbox on the EU's human rights based approach to development was adopted on 30 April 2014.¹⁰⁵ As a result, two thirds of the EU's (EU + Member States) development policy is now 'RBA-oriented' and supposedly more coherent and mutually reinforcing.¹⁰⁶

Another example of successful coordination is between EU and Member States' human rights dialogues. FRAME research has evidenced that the Council Working Group on Human Rights (COHOM) supports the

¹⁰⁰ https://ec.europa.eu/europeaid/policies/policy-coherence-development_en

¹⁰¹ Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, 'Report mapping legal and policy instruments of the EU for human rights and democracy support', *FRAME Deliverable 12.1*, July 2014, available at www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf, pp. 45, 48, 54, 60, 63.

¹⁰² Even though for long programmatic documents on PCD did not reference human rights. See for example the Policy Coherence for Development Work Programme 2010-2013 (D5.1, p. 207). The European Commission's 2015 EU Report on Policy Coherence for Development (3 August 2015, SWD(2015) 159 final) however references a number of ways in which different policies together contribute to human rights as a development objective.

¹⁰³ Austria, Denmark, Finland Germany, Spain and Sweden.

¹⁰⁴ See in this respect the brainstorming seminar organised on 7 December 2013 by DG DEVCO: <http://www.eidhr.eu/events/brainstorming-seminar>

¹⁰⁵ European Commission, 'Tool-box -- A rights-based approach, encompassing all human rights for EU development cooperation', 30 April 2014, SWD(2014) 152 final.

¹⁰⁶ This is even though formally, only 6 Member States are implementing a comprehensive RBA (i.e. Austria, Denmark, Finland Germany, Spain and Sweden). *Id.*, p. 12.

coherence between bilateral human rights dialogues held by some Member States with third countries and EU HRDs held with the same countries, by coordinating topics and exchanging information.¹⁰⁷

Instances of vertical incoherence however remain numerous, and are all the more unfortunate that FRAME research has shown that much could be gained from a joint effort to stimulate vertical coherence, through what is called ‘localizing human rights.’ Such an approach to vertical alignment of policies translates in practice into the implementation of the EU’s human rights commitment by mobilising local and regional authorities along with Member States around a coordinated set of actions, allowing for long-term human rights gains, such as integration of migrant citizens in society, moralising political campaigns, fighting child abuse, or improving public health.¹⁰⁸ The EU Agency for Fundamental Rights (FRA) and the Committee of the Regions (CoR) have made concrete proposals in this regard.¹⁰⁹ The 2012 Commission report on the application of the Charter of Fundamental Rights notes an increase in the taking up of the Charter by national courts, which ‘gives a first indication of an effective, decentralised application of the Charter within the national constitutional orders. This is an important step on the road to a more coherent system for the protection of fundamental rights [...]’¹¹⁰

From the EU up, establishing vertical coherence between the EU and a supervisory body could also lead to better protected human rights. The EU is legally bound to accede to the European Convention on Human Rights (Art. 6 (2) TEU), and doing so might enhance the EU’s own respect for human rights, thereby helping it deliver on its commitment, notably vis-à-vis its own citizens which would have the same recourse against it as against Member States.¹¹¹ This objective has however taken a severe blow following the refusal of the CJEU to accept the ultimate jurisdiction of the ECtHR, considering that this would run counter to the principle of the autonomy of the EU legal order (see below, next section).¹¹²

Also on the topic of the relations between the EU and the Council of Europe (CoE), though from a non-hierarchical perspective, FRAME research has warned against the risk of discrepancies between AFSJ legislations which regulate matters falling into the scope of CoE conventions, notably in the area of judicial cooperation in criminal matters.¹¹³ And indeed, EU-CoE cooperation is happening, notably as the CoE is a major stakeholder in human rights promotion in EU enlargement policies. Cooperation between the two

¹⁰⁷ Timmer *et al.*, above n. 17, p. 80.

¹⁰⁸ See A Marx and others, ‘Localizing Fundamental Rights in the European Union: What Is the Role of Local and Regional Authorities, and How to Strengthen It?’ (2015) 7 *Journal of Human Rights Practice* 246.

¹⁰⁹ EU Agency for Fundamental Rights and Committee of the Regions, ‘Making rights real - A guide for local and regional authorities’, December 2014, available at <http://fra.europa.eu/en/publication/2014/making-rights-real-guide-local-and-regional-authorities>.

¹¹⁰ European Commission, ‘2012 Report on the Application of the EU Charter of Fundamental Rights’, 8 May 2013 COM(2013) 271 final, p. 10, and Lewis *et al.*, above n. 91, p. 12.

¹¹¹ Lassen *et al.*, above n. 99, p. 47; and Churruza Muguruza *et al.*, above n. 101, p. 47.

¹¹² See Court of Justice of the European Union, Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties (2014), Opinion 2/13 [2014] ECLI:EU:C:2014:2454.

¹¹³ Viljam Engström and Mikaela Heikkilä, ‘Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice’, *FRAME Deliverable 11.1*, September 2014, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>, p. 128.

entities occurs in the form of annual consultations on the enlargement package as well as joint programming exercises. The EEAS has stated that the cooperation between the EU and CoE must involve legal cooperation: strengthening coherence between EU law and CoE legal standards.¹¹⁴ This cooperation, however, has been characterised by a latent ‘turf battle’ between the CoE and the EU as the latter was adding to its human rights apparatus – the setting up of the EU Fundamental Rights Agency, for instance – and supposedly encroaching on CoE territory.¹¹⁵

However, sometimes vertical coherence between the EU and another international organisation to which it is subject is proving difficult. The WTO has for example taken issue in the past with the EU’s linkage of development and trade benefits in the GSP¹¹⁶ and in the Cotonou agreement.¹¹⁷ Likewise, in energy policy, the EU adopted the Renewable Energy Directive (RED),¹¹⁸ in which it integrates ‘sustainability criteria’ to the procurement of biofuels, including the ratification of the International Labour Organization’s (ILO) eight core conventions. Challenges arise as these criteria are not ‘easily accommodated’ within the WTO legal framework.¹¹⁹

c) *Horizontal incoherence*

A second dimension of coherence is located on a *horizontal* plane, that is, among the various ramifications of a particular level of governance. It is no secret that the EU is an extremely complex machinery, with its 7 institutions, 40 agencies, and numerous very important bodies like the European External Action Service (EEAS) or the European Investment Bank (EIB). All these actors have to find a way to coordinate their agendas and activities so that they do not work at cross purposes and defeat the EU’s human rights pledge.

Incoherence can take place among different institutions or bodies which all have a mandate to act in a certain domain yet do not exercise it in a mutually reinforcing manner. FRAME has in this regard conducted ample research on the way the so-called ‘Area of Freedom, Security and Justice’ (AFSJ) was run, and found that the accumulation of mandates was creating serious risks of horizontal incoherence. The multiplication of institutions, agencies and bodies entrusted with a mandate in this area is a source of gaps and overlaps, and the fact that many tasks are externalised or outsourced offers poor guarantees

¹¹⁴ Fraczek *et al.*, above n. 2, p. 158.

¹¹⁵ See Mayrhofer *et al.*, above n. 16, p. 31; Armin von Bogdandy and Jochen von Bernstorff, ‘The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law’ (2009) 46 *Common Market Law Review* 1035, 1049; Olivier De Schutter, ‘The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe’ (2008) 14 *Columbia Journal of European Law* 509, 517–522.

¹¹⁶ See World Trade Organization, Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925

¹¹⁷ See World Trade Organization, Ministerial Conference, *European Communities – the ACP-EC Partnership Agreement Decision of 14 November 2001*, WT/MIN(01)/15.

¹¹⁸ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ L* 140, 5 June 2009, pp. 16-62, Art. 17.

¹¹⁹ Carsten Daugbjerg and Alan Swinbank, ‘Globalization and New Policy Concerns: The WTO and the EU’s Sustainability Criteria for Biofuels’ (2015) 22 *Journal of European Public Policy* 429, 1; Beke *et al.*, above n. 68, p. 43.

with regard to the safeguard of EU values. For example, tasks in migration management are often entrusted to third states or private companies.¹²⁰ Another example is the disagreement which has unfolded at the end of last year between the Commission and the CJEU about the accession of the EU to the ECHR. Although in this case the ‘incoherence’ arose from a legal disagreement between two institutions, many have considered that the Court in this instance aimed at preserving its prerogatives as much as the integrity of the EU legal order.¹²¹ Another example of cross-institutional incoherence at the policy-making level has to do with the practice of impact assessments. While the Commission carries out impact assessments for all its major legislative and policy initiatives against human rights impacts, the Council never conducts such assessments regarding the amendments it introduces in the Commission’s proposals, and the Parliament only rarely does so, so that most pieces of legislation are only partially assessed against human rights impacts.¹²²

However, horizontal incoherence can also take place among the different services of the same institution. In the field of Corporate Social Responsibility and business and human rights, the different Commission Directorates General in charge of policy-making in this field (Growth, Environment, Employment) have notoriously had trouble coordinating¹²³ so as to come up with ambitious CSR policies fully engaging their different portfolios, perhaps reflecting the different views and cultures which are present within the Commission itself. Engagement with non-state actors such as businesses and civil society in this highly polarised field has so far also not helped forging a coherent CSR policy.¹²⁴ Another example can be found among the different Council Working Groups. For quite some time, the Council Working Party on Human Rights (COHOM), responsible for external promotion of human rights, and the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), responsible for aspects of the internal protection of fundamental rights, have felt the need to hold joint meetings, in order to make each other aware of their initiatives and the issues they were faced with, and act in due consideration. These joint meetings have so far been largely exploratory and have not led to any major alignment of EU internal and external human rights policies.¹²⁵

2. The different consequences of incoherence

Vertical and horizontal misalignments between EU policy actors results in policy making which is self-defeating in one way or another, since one strand of policy undermines the other. The consequences of incoherence, depending on whether the policies affected belong to the internal or the external realm,

¹²⁰ Engström and Heikkilä, above n. 113, p. 105 for concrete examples.

¹²¹ Paul Gragl, ‘The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights* (Intersentia and NWV 2015).

¹²² Brando *et al.*, above n. 11, p. 71.

¹²³ Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’, *FRAME Deliverable 7.2*, March 2015, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>, p. 164.

¹²⁴ *Id.*, p. 168.

¹²⁵ See e.g. Council of the European Union, ‘Consistency between internal and external aspects of human rights protection and promotion in the EU’, 31 March 2014, 8318/14.

materialise in different ways which we outline below. Incoherence, as is well known, can result in internal-internal, internal-external, and external-external hiatuses.

a) Internal-internal incoherence

Incoherence can take place between two lines of policy adopted by the EU exercising its competences. 'Internal-internal' here therefore does not relate to internal policies as opposed to external relations, but rather to the fact that the EU is the sole actor involved in the definition of these policies, and therefore coherence or incoherence are the result of internal alignment of policies to avoid that they would contradict each other.

Typically for our purposes between human rights and another substantive field. Frequently evoked in this regard are the discrepancies that exist between the protection of fundamental rights and the fight against terrorism, which seem to cause certain human rights standards to be sacrificed. Privacy would therefore have to yield to surveillance programmes¹²⁶ and due process would have to yield to restrictive measures.¹²⁷ Likewise, to take a recent example, the protection of the human rights of migrants (particularly asylum seekers) loses precedence to the integrity of the EU's territory and 'quota-based' and 'security-oriented' approaches to migration management.¹²⁸

Normally, as indicated above, major policy and legislative initiatives belonging to any substantive field, should be submitted by the Commission to an impact assessment, notably for what concerns impacts on fundamental rights, based on the Charter, which should ensure better coherence between human rights and other substantive policy fields.¹²⁹ The 2011 Operational Guidance on taking account of fundamental rights in Commission impact assessments¹³⁰ attempts to reconcile Commission proposals with fundamental rights through the following checklist:

¹²⁶ See CJEU, 8 April 2014, *Digital Rights Ireland et al.*, joined cases C-293/12 and C-594/12, *OJ C* 175, 10 June 2014, pp. 6-7, ECLI:EU:C:2014:238.

¹²⁷ See e.g. CJEU, 18 July 2013, *European Commission and Others v Yassin Abdullah Kadi*, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518.

¹²⁸ Engström and Heikkilä, above n. 113, pp. 95-96; Heikkilä, above n. 96, particularly section II. E.

¹²⁹ Starl *et al.*, above n. 79, p. 40.

¹³⁰ European Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments', 6 May 2011, SEC(2011) 567 final.

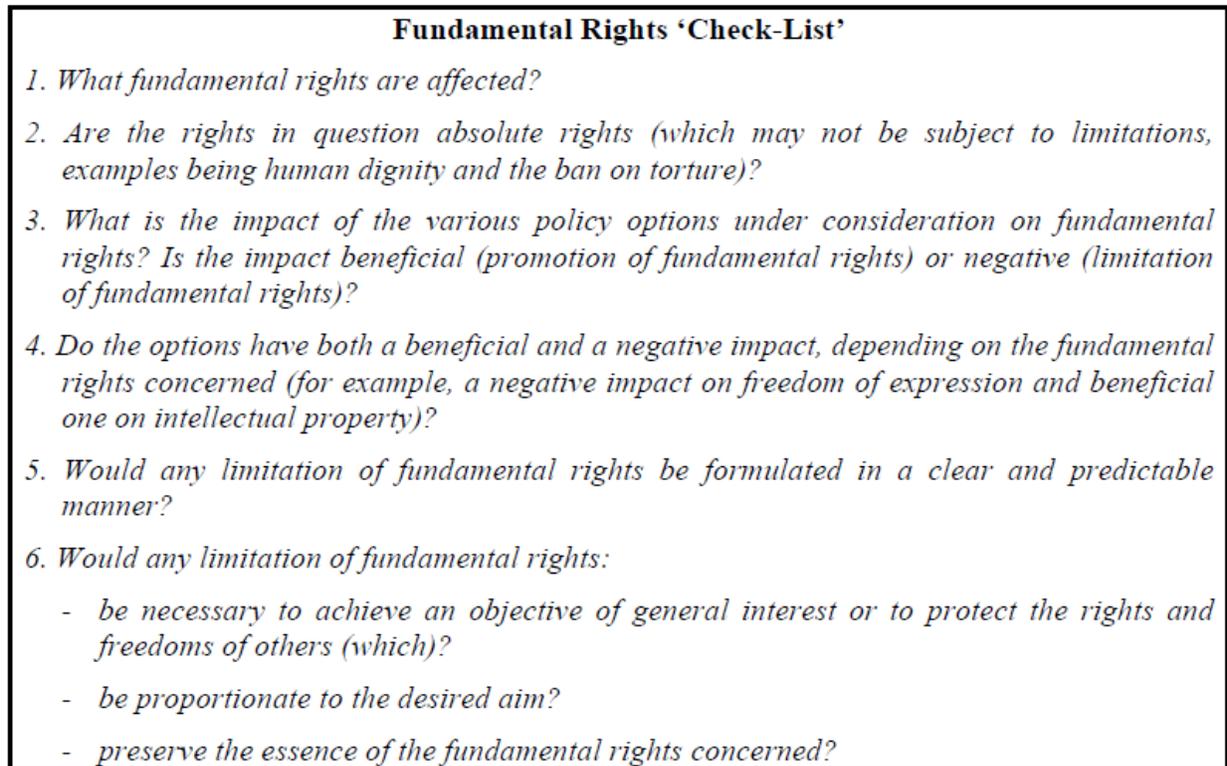


Figure 2: Fundamental rights checklist¹³¹

Internal-internal coherence can also be found missing in discourse as much as in actual policy, and in this regard the EU is deploying considerable efforts so that all its actors would ‘speak with one voice’ or ‘sing to the same songsheet’.¹³² This is particularly necessary in external relations, where the EU and Member States diplomacies often have tendencies not to react in the same way to particular situations. The very creation of the office of High Representative for Foreign Affairs and Security Policy as well as of the EEAS was designed partly as a remedy to this issue.¹³³ The appointment of the EUSR is also meant as a way to increase the coherence and consistency of EU human rights policies, as this objective explicitly features in his mandate.¹³⁴

¹³¹ *Id.*, p. 7. A very similar though slightly more detailed checklist is also available in European Commission, above n. 11, pp. 178-179. This expanded version notably includes – in bold and underlined – the following mention after point 2: ‘If it is concluded that the examined policy option limits an absolute right – it should be discarded already at this stage and a further analysis under points 3-6 is not needed.’

¹³² Council of the European Union, ‘Summary of the meeting of the European Parliament Subcommittee on Human Rights (DROI), held in Brussels on 11 April 2013’, 16 April 2013, 8523/13, p. 2.

¹³³ Clara Portela and Kolja Raube, ‘The EU Polity and Foreign Policy Coherence’ (2012) 8 *Journal of Contemporary European Research* 3, 9.

¹³⁴ Council Decision 2012/440/CFSP, of 25 July 2012 appointing the European Union Special Representative for Human Rights, Art. 3 (d), Council Decision 2014/385/CFSP of 23 June 2014 extending the mandate of the European Union Special Representative for Human Rights, art. 2 (c) and Council Decision (CFSP) 2015/260 of 17 February 2015 extending the mandate of the European Union Special Representative for Human Rights, art. 2 (c), and Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón and Kristine Yigen, ‘Report on the mapping study on relevant actors in human rights protection’, *FRAME Deliverable*

Internal-internal incoherence impacts the credibility of the EU's human rights pledge as a whole, as it leads stakeholders to believe that, far from 'guiding' EU policies in every respect, human rights are only being applied when nothing prevents it. In that sense, the EU should be more explicit about the ways it performs balancing acts between different internal policies and therefore clearly explain how it ensures maximal positive impact and minimal negative impacts on human rights in every case. Unfortunately, as indicated above, the practice of *ex ante* impact assessment is defective in several respects, and the practice of *ex post* assessments almost absent from EU policy.

b) Internal-external incoherence

Incoherence can also arise between the internal and external poles of EU policy, and typically when the EU itself, or EU Member States, are not applying, or are not held to, the same standards as the EU's external partners. The EU is known for placing strong requirements on its external partners when it comes to human rights. The fact that most of its trade and development policies are subject to human rights conditionality is a token of the EU's demanding stance, which in some cases may even backfire on the EU as some countries may decline to conclude the agreement or stall negotiations for this reason.¹³⁵ However, the EU is not keen on having the same treatment applied to itself, as can be seen from the dynamics of human rights dialogues, in which the EU frequently finds itself in the position of the best practice player 'lecturing' its interlocutor.¹³⁶

Likewise, when human rights violations occur in third countries, the EU is often quick – as it should – to speak up, shame and sanction, using the full range of diplomatic and other foreign policy instruments. Declarations, statements, restrictive measures, UN resolutions, trade sanctions and even military missions are deployed in such cases.¹³⁷ Yet when some of its Member States wilfully violate fundamental rights, the EU suddenly finds itself almost speechless and toothless, as is demonstrated by the bland responses to the situation of the Roma in some Member States, discussed above.

Another example lies in the so-called mainstreaming of human rights in conflict situations. FRAME research has evidenced that in most publicly available operational and policy documents relating to CSDP missions, calls to respect for human rights and international humanitarian law applied to the conduct of third states, not EU troops, such as the 2005 Guidelines on International Humanitarian Law.¹³⁸

A final example which spurs if not constitutes internal-external incoherence would be the fact that EU Annual Reports on Human Rights no longer have content addressing human rights issues within the EU

4.1, January 2014, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/02-Deliverable-4.1.pdf>, p. 57.

¹³⁵ Beke *et al.*, above n. 68, p. 66, citing the cases of Australia and India.

¹³⁶ Karen Smith, 'The EU as a Diplomatic Actor in the Field of Human Rights' in Joachim Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave MacMillan 2015) 163.

¹³⁷ Fraczek *et al.*, above n. 2.

¹³⁸ Lassen *et al.*, above n. 20, p. 129; and Council of the European Union, 'EU Guidelines on promoting compliance with International Humanitarian Law (IHL)', 1 December 2009, 16841/09, p. 2. The guidelines however reiterate that 'the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces', though that commitment is not covered by the Guidelines. See also the new actions in this regard foreseen by the new Action Plan (2015-2019), above n. 22.

since 2008. In this regard, the 2007 issue, the last one to contain information on the EU was still mentioning: '[t]he report also continues, as in previous years, to address human rights developments within the EU, although the focus is on external relations. This is not only a question of coherence, but also of credibility.'¹³⁹ A departure from this practice as of 2008 might indicate a diminishing concern for internal-external coherence in the EU. Likewise, whereas the Annual Reports reviews one by one (though briefly) the human rights situation for every third country, the same exercise can no longer be said to be performed in the EU since the EU Network of Independent Experts on Fundamental Rights, which had a mandate 'to monitor [...] the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights of the European Union'¹⁴⁰ was discontinued in 2006. Arguably, the network was replaced by the FRA, but the latter's mandate is narrower and does not allow for active 'monitoring' per se, nor to 'to "single out" states or conclude that a certain fundamental rights violation has occurred.'¹⁴¹ Likewise, the Commission's Annual Reports on the Application of the Charter of Fundamental Rights, established in 2010, are also of a more limited coverage due to the limitations in the applicability of the Charter to Member States' actions (Art. 51).¹⁴²

Internal-external incoherence as the EU not practicing what it preaches is as damaging to the EU as the internal-internal kind. Internal-external incoherence portrays the EU again as disingenuous in its engagement towards human rights,¹⁴³ but also as an arrogant lesson-giver which does not need to take lessons itself.¹⁴⁴ This perception undermines the EU's soft power and its capacity to generate goodwill in others for its demands and its agenda (see below, section II.C.2). A result might be the EU's notorious difficulties in building cross-regional coalitions at the UN EU-UN, as other groups have resented the EU's attempts to secure harsh and non-consensual condemnations of countries outside of its region.¹⁴⁵

To remedy this credibility deficit, FRAME research has recommended putting in place objective, comparative and regularly applied human rights measurements that assess the compliance with fundamental rights by every Member State in an effective and binding manner.¹⁴⁶ This would allow the EU to ensure that its fundamental rights priorities at home resonate with its human rights agenda abroad.¹⁴⁷ Such proposal echoes, for instance, the European Parliament's call for a new 'Copenhagen mechanism', i.e. a mechanism that monitors compliance with the Copenhagen criteria in Member States

¹³⁹ Council of the European Union and European Commission, 'EU Annual Report on Human Rights 2007', 2017, available at https://www.consilium.europa.eu/uedocs/cmsUpload/2007.5997-EN-EU_annual_report_on_human_rights_2007.pdf, p. 7.

¹⁴⁰ See 'EU Network of Independent Experts on Fundamental Rights', 12 January 2006, available at <http://cridho.uclouvain.be/documents/Documentos.Institucionales/CFR-CDFpresentationEN.pdf>.

¹⁴¹ Mayrhofer *et al.*, above n. 16, pp. 30-32. See also below n. 156.

¹⁴² See European Commission, above n. 39, p. 11.

¹⁴³ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45, 56.

¹⁴⁴ George Ulrich, 'Framework for the Analysis of Human Rights Diplomacy' in Michael O'Flaherty and others (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers 2011) 30.

¹⁴⁵ Karen Smith, 'European Union and the Politics of Legitimization at the United Nations' (2013) 18 *European Foreign Affairs Review* 63, 77.

¹⁴⁶ FRAME, above n. 79, p. 10.

¹⁴⁷ Starl *et al.*, above n. 79, p. 41.

and so as to avoid discrepancies between demands placed on Member States and on candidate countries.¹⁴⁸

c) External-external incoherence

External-external incoherence, finally, designates the oft-cited issue of ‘double standards’, namely the fact that the EU would not be applying equal treatment to all third countries, it being understood that powerful countries, or countries in which the EU has vested interests, get away easily with human rights violations, whereas the others receive harsher treatment. A good example of suspected double standards can be found in the activation of human rights clauses in EU international agreements, which to date have only been triggered against ACP countries, and not against more powerful trade partners which might have deserved a similar treatment.¹⁴⁹

This of course aggravates those countries which are applied the harsher standard, and disappoints those who advocate tougher reactions to some powerful countries’ bad deeds. All in all, this reduces the clout of the EU’s words and actions, including sanctions, as their perceived unfairness rallies observers against the EU. Marangoni and Raube for example cite the example of the first activation of Article 96 of the Cotonou agreement against Zimbabwe, which ended up weakening the EU’s position against the Mugabe regime.¹⁵⁰

While double standards are also damaging to the EU’s credibility and while this critique is certainly warranted in a number of cases, EU officials have stressed that it might sometimes be counterproductive to name and shame and frontally attack powerful or otherwise well-connected countries. In such cases, it may be wiser to engage more quietly with the said country, so as not to compromise any chance of convincing them to improve their human rights practice.¹⁵¹ Such an approach has for long been applied to China, for example.¹⁵²

To sum up, whenever the EU is seeking differentiated treatment, it must be certain that at least, its actions are coherent with its ultimate goal, which should be to promote human rights. External-external incoherence can in no circumstances acceptably stem from reasons of (geo)political expediency. Since 2012, EU human rights foreign policy is informed and guided by ‘country strategies’ which define the objectives of the EU in respect of the particular challenges of each country. The coverage of instruments is impressive, since 132 Strategies had been endorsed by the Council’s Political and Security Committee (PSC) as at the end of 2014.¹⁵³ Country Strategies arguably have the potential to make EU policies more

¹⁴⁸ European Parliament Resolution of 27 February 2014 on the situation of fundamental rights in the European Union, 2013/2078(INI), item 8 (o).

¹⁴⁹ Fierro, above n. 66, 309; Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (2nd ed., Palgrave Macmillan 2014), 207; Johanne Dohlie Saltnes, ‘The EU’s Human Rights Policy – Unpacking the literature on the EU’s implementation of aid conditionality’ (2013) Arena Working Paper 2/2013, available online <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2013/wp2-13.pdf>>.

¹⁵⁰ Marangoni and Raube, above n. 80, p. 480.

¹⁵¹ Fraczek *et al.*, above n. 2, p. 91.

¹⁵² Kinzelbach, above n. 55.

¹⁵³ Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2014’, 22 June 2015, 10152/15, p. 13.

objective and seem less arbitrary, but unfortunately country strategies are not publicly available,¹⁵⁴ thereby depriving the European public of a chance to hold the EU accountable for instances of external-external incoherence.

3. The different causes of incoherence

After having described in the above section the various dimensions of policy incoherence as clashes of actors, and clashes of policies, let us now turn to what causes incoherence along these different dimensions. By identifying the causes of incoherence, it will perhaps be possible to suggest appropriate remedies to this complex challenge.

FRAME research has concluded in this regard that incoherence can arise in three contexts which all provide an occasion for incoherence: structures, policy regimes and interests:

Structural incoherence refers to the way in which policy institutions are structured, how they interact and the coordination among the institutions. Incoherence in policy regimes relate to the substance of the human rights policies themselves and whether they are compatible with the objectives of the institution and the interests of protection and promotion of human rights. In addition, where several policies exist, incoherence can also arise when those policy regimes compete or conflict. Finally, the incoherence related to interests has to do with the influential players and how they approach human rights policy-making, their priorities and their philosophy and mind set regarding human rights.¹⁵⁵

In the next paragraphs, we briefly examine how such these different contexts in turn.

a) Structures

The European Union as a political entity can be analysed in structural terms as an addition of more or less connected and/or independent institutions and Member States which, through the exercise of their prerogatives, can pull the EU's actions in one direction or another. Naturally, the articulation of the different nodes in the structure may create gaps or overlaps in the coverage of certain issues. Likewise, institutional cultures, notably in terms of whether or not institutions and Member States are likely to collaborate, may either lead to convergent policies leading to success, or to contradictory policies leading to paralysis or even perverse effects.

An example which was highlighted by FRAME research as to structural incoherence is the gap that exists within the EU to monitor Member States' compliance with human rights. Arguably, all EU Member States are also members of the Council of Europe and subject to the jurisdiction of its Court, as well as they are legally required to comply with the EU Charter 'when implementing EU law' (Art. 51 Charter), and can face actions for infringement before the CJEU in case of breach. However, many negative effects on human rights caused by Member States are the result of incremental and insidious evolutions which cannot always and immediately be built into a legal case before one of these two courts, as the recent constitutional developments in Hungary demonstrate (see above, section II.A.2).

¹⁵⁴ Lassen *et al.*, above n. 99, p. 73.

¹⁵⁵ Lewis *et al.*, above n. 91, p. 72.

The FRA would in this regard be a good fit to independently ensure regular oversight of EU Member States and Institutions human rights records, as a National Human Rights Institution would. However, this is expressly excluded from the FRA's mandate,¹⁵⁶ which is limited to providing information and advice on fundamental rights to the EU institutions and Member States as they design or implement Union law or policy.¹⁵⁷ This therefore arguably leaves the EU with no safeguards against EU Member States which intend to design 'illiberal' policies. The Commission has recently tried to occupy this role by releasing a 2014 Communication on 'A New EU Framework to Strengthen the Rule of Law', which provides for a three step approach against 'situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.'¹⁵⁸ Commentators have criticised the softness of such an instrument,¹⁵⁹ and indeed to this day it has remained a dead letter.

Best practices none the less exist to ensure coherence despite these structural gaps and overlaps. FRAME research has found the FRA to have developed best practices in terms of reaching out, engaging and collaborating with other institutions and agencies to mainstream fundamental rights and tackle difficult issues such as hate crime and discrimination against LGBT people.¹⁶⁰ Inter-parliamentary cooperation (IPC) is also a good way for exchanging information and aligning priorities between Member States' and the European Parliament. Unfortunately, established practices in IPC have shown a number of weaknesses, so that relative participation in human rights-related IPC events has decreased recently.¹⁶¹ In the field of the AFSJ, FRAME research has also shown that national parliaments, despite the widespread

¹⁵⁶ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, *OJ L* 53 22 February 2007, pp. 1-14, Art 4, para 2: '[conclusions, opinions and reports] shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.'

¹⁵⁷ *Ibid.*, Art. 2.

¹⁵⁸ European Commission, 'A new EU framework to strengthen the rule of law', 19 March 2014, COM(2014) 158 final/2, p. 6.

¹⁵⁹ Axel Marx, Nicolas Hachez, Katrien Meuwissen, Pierre Schmitt, Kolja Raube, Jakub Jaraczewski, Joanna Roszak, Tamara Lewis, Klaus Starl, Maria Dolores Morondo Taramundi, Anna-Kaisa Tuovinen and Amy Weatherburn, 'Multilevel Protection of the rule of law and fundamental rights – the role of local and regional authorities and of the Committee of the Regions', Report for the Committee of the Regions, June 2014, available at <http://cor.europa.eu/en/documentation/studies/Documents/Multilevel-Protection-Rule-of-Law-Fundamental-Rights.pdf>, p. 7.

¹⁶⁰ The FRA has notably entered into a number of collaboration agreements and other formalised forms of cooperation with the European Institute for Gender Equality (EIGE), the European Foundation for the Improvement of Living and Working Conditions, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), the European Asylum Support Office (EASO), the Committee of Regions, the European Economic and Social Committee, the European Ombudsman, the European Police Office (EUROPOL), the European Union's Judicial Cooperation Unit (EUROJUST), the European Centre for Disease Prevention and Control (ECDC) and the European Police College (CEPOL). This collaboration provides for joint meetings, exchanges of information and data, and generally ensuring coherence in the work. See D8.1, Annex I.

¹⁶¹ Jan Wouters, Laura Beke, Anna-Luise Chané, Nicolas Hachez and Kolja Raube, 'Enhancing Cooperation between the European Parliament and EU National Parliaments on EU Human Rights Policy', Study for the European Parliament, March 2014, EXPO/B/DROI/2013/20, pp. 45-46.

consequences for Member States, are not involved enough in the definition and scrutiny of AFSJ policies.¹⁶²

FRAME is therefore recommending in this regard that, if gaps and overlaps cannot be remedied as a matter of law, EU institutions, bodies and agencies should engage in more structural collaboration and dialogue to ensure structural coherence of their action for fundamental rights.

b) Policy regimes

Incoherence can also be caused by sharp separations between policy regimes which are germane to each other and should rather be developed with deep mutual understanding and with close cooperation of the services involved.

The fragmentation of competences between Member States and the EU, and among the different services within institutions, does not help create links between policy regimes, but rather leads to policy development in silos. The Commission, for example, counts 33 Directorates-General and is run by 28 Commissioners. The Council's work is prepared by over 150 working groups.¹⁶³ Despite regular inter-service consultations and meetings in the Commission, for example, cross-fertilisation and mutual alignment of policies proves a daily challenge.

Perhaps the most visible policy schism is that which exists between internal and external policies, and results into two fundamentally different regimes: fundamental rights in internal policies, and human rights in external policies. The meeting points between these two poles are not many. The standards of reference are different: the Charter and the ECHR guide internal policies, the body of international human rights law guides external policies.¹⁶⁴ Different sets of institutions and services are in charge of these two policy bodies, even more so since the creation of the EEAS. All this creates a 'false dichotomy'¹⁶⁵ between fundamental rights on the one hand, and human rights on the other. Such false dichotomy materialises in different ways. First of all, there is little cross-fertilisation between the two policy and legal bodies. For example, the Strategic Framework and Action Plan for Human Rights and Democracy do not cross-reference internal fundamental rights policies such as the Stockholm Programme for the first Action Plan, or for the second, the relevant passages of the 2014 'Strategic Guidelines' on legislative and operational planning of the AFSJ until 2020.¹⁶⁶ The Charter is only mentioned in passing in the Strategic Framework and the first Action Plan (2012-2014), and is completely absent from the second Action Plan (2015-2019). And indeed, EEAS officials interviewed in 2014 have admitted complete ignorance of the Stockholm

¹⁶² Engström and Heikkilä, above n. 113, pp. 139-140.

¹⁶³ Council of the European Union, 'List of Council preparatory bodies', 28 July 2015, 10356/15.

¹⁶⁴ Though arguably the charter 'applies' to external policies, but it is sometimes difficult to see how this would work in practice. The CJEU is for example not competent for the CFSP, and it is difficult to imagine, for example, how the Court would for example review the legality of a free trade agreement because it is 'likely' to violate human rights, be they recognised in the Charter.

¹⁶⁵ Lewis *et al.*, above n. 91, p. 80.

¹⁶⁶ European Council, 'Conclusions', 27 June 2014, EUCO 79/14. See notably Annex I: 'Strategic Agenda for the Union in times of change (2015-2020)'.

Programme.¹⁶⁷ Such isolation of internal and external policies can only lead to incoherence at various junctures: internal-internal, or internal-external.

The EU is trying to encourage its Member States, institutions and policies to better connect and interact. We have already cited above the example of the joint COHOM-FREMP meetings, which are doubled up by joint LIBE-DROI meetings at the European Parliament, such as recently on Migration.¹⁶⁸ The EU Special Representative on Human Rights, M. Stavros Lambrinidis, is also a frequent guest of the Parliament. The Coordination mechanism amongst Member States and the EEAS for participation in UN Human Rights fora, is a good example of how enhanced coordination and collaboration can lead to increased coherence ('speaking with one voice' in this regard) and better results.¹⁶⁹ The EEAS, in general, seeks to engage with Member States on a regular basis, for example by organising exchanges of views on best practices in the implementation of human rights treaties.¹⁷⁰

In some policy fields, such as trade and development, a 'nexus' is progressively being achieved with human rights, so that mutually reinforcing trade and development policies, such as the GSP(+), can lead to positive human rights results.¹⁷¹ Yet a lot of effort remains to be done to increase the culture of cooperation between the EU institutions, bodies and agencies and foster links between different policy regimes so that they together can achieve better human rights protection.

c) *Interests*

Finally, and this relates to both the above causes, incoherence can arise when different interests conflict and one trumps the other in a way which is detrimental to the achievement of overarching policy objectives. In FRAME, several case-studies have been conducted which evidence these conflicts of interests. For example, as was already mentioned above, the human rights clauses in free trade agreements will only be activated if no other interest is hurt in the process. Likewise, GSP sanctions have only been applied a meagre three times since 1991 when human rights conditionality was inceptioned. This empty record leads to the accusation of double standards and the legitimate interrogation as to whether there exists a 'dichotomy between norms and interests' in EU trade policy.¹⁷² Similarly, FRAME has conducted a case study which tends to demonstrate that the interest of the EU's energy supply will supersede in all cases human rights promotion in supplier countries such as Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.¹⁷³ Finally, security has trumped human rights in discussions on migration between the Commission and the European Parliament.¹⁷⁴ As a result, among the many different interests associated to the many different competences of the EU, the functioning of the internal

¹⁶⁷ Lewis *et al.*, above n. 91, p. 71.

¹⁶⁸ 'Migration and refugee crisis: MEPs' debate with UNHCR Guterres and EU Commission', 15 September 2015, agenda and other documents available at [:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20150915IPR93231%2b0%2bDOC%2bXML%2bV0%2f%2fFR&language=FR](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20150915IPR93231%2b0%2bDOC%2bXML%2bV0%2f%2fFR&language=FR)

¹⁶⁹ Baranowska *et al.*, above n. 48, p. 76.

¹⁷⁰ Mayrhofer *et al.*, above, n. 134, p. 59.

¹⁷¹ Beke *et al.*, above n. 68.

¹⁷² Maurizio Carbone and Jan Orbie, 'Beyond Economic Partnership Agreements: The European Union and the Trade–development Nexus' (2014) 20 Contemporary Politics 1, 5.

¹⁷³ Lewis *et al.*, above n. 91, p. 83 and Annex II.

¹⁷⁴ *Id.*

market, as well as economic objectives¹⁷⁵ have a tendency to take precedence over other policies, sometimes in violation of human rights obligations, or at least at the price of a severely watered down implementation of the EU's human rights commitment.

However, incoherence linked to diverging interests does not only emerge within the institutions themselves, but also between the Union and its Member States. The current discussions on how to solve the Mediterranean refugee crisis is an appalling example of (some) Member States' interests (of fears) defeating any EU attempt to deal with this tragedy in a humane and, at any rate, in a human rights-compliant manner.¹⁷⁶ Another example can be found in the ENP, where EU conditionality is defeated by powerful Member State interests, notably those of Spain, France and Italy.¹⁷⁷

One would of course be naïve to hope that the definition of EU policies could dispense with battles of interests, or that all other interests would yield to human rights in every situation. Yet, the feeling is widespread that the opposite is happening: human rights are all too often superseded by contrary interests, causing their character as a 'guiding principle' as envisioned by Art. 2 TEU to wither slowly, along with the EU's normative power.

4. Conclusions on the coherence challenge

As a conclusion, attention needs to be placed on realigning several axes which are likely to diverge. At the actors' level, policies need to align vertically among actors at different levels in the chain of governance, and horizontally among actors in the same governance levels. One should note that the relations between the different actors are crucial in the alignment dynamics. A hierarchical relationship will provide more opportunities for authoritative alignment. The CJEU, for example, is in principle well-placed to ensure that EU institutions as well as Member States, when implementing EU law, abide by human rights. Similarly, EU institutions such as the Commission have the authority, through annual work programming, for example, to ensure that Agencies pay proper attention to human rights issues.

In the absence of hierarchical relationship, coordination and collaboration is paramount. This report has given multiple examples of successful collaboration practices between virtually all actors involved. However, such practices do not follow any grand plan, or any particular template. They are mostly *ad hoc* and informal.¹⁷⁸ FRAME has therefore recommended that collaboration, at least for ensuring coherence

¹⁷⁵ The question of Roma integration, for example is viewed from the economic angle rather than from the human rights point of view. Policy documents on Roma integration emphasise both the protection and the participation of Roma. However, the EU's primary focus – as defined in the EU Framework for National Roma Integration Strategies – is on the socio-economic integration of Roma. The 2013 Council Recommendation 'on effective Roma integration measures in the member states' is in this regard considered as progressive, because it requires Member States to combat anti-Gypsyism and also to facilitate the cultural participation of Roma. Churruca Muguruza *et al.*, above n. 101, p. 149.

¹⁷⁶ Jean-Claude Juncker, 'A call for Collective Courage', Statement, 28 August 2015, available at https://ec.europa.eu/commission/2014-2019/president/announcements/call-collective-courage_en, and above, n. 34.

¹⁷⁷ Fraczek *et al.*, above n. 2, p. 21.

¹⁷⁸ An example is the cooperation that is being put in place between the European Commission, in charge of negotiating EU trade agreements, and the European Parliament, in charge of assenting to them (Art. 218 TFEU). Beke *et al.*, above n. 68, p. 28.

in terms of the EU's commitment to human rights, be streamlined and supervised by a clearly identifiable body.¹⁷⁹

At the policy level, alignment is necessary between 'internal' and 'external' policies, which are now trapped in a false dichotomy. Migration is but one example of policy which calls on both domestic and international policy making. Many discrepancies have been noted between objectives and practices in internal and external fields, which need to be addressed so that all EU policies can be firmly geared towards delivering on the EU's commitment to human rights, and avoid defeating one another like it is now sometimes the case.

Below is a summary of the different dimensions along which coherence needs to be ensured.

EU Human Rights Policy Dimensions

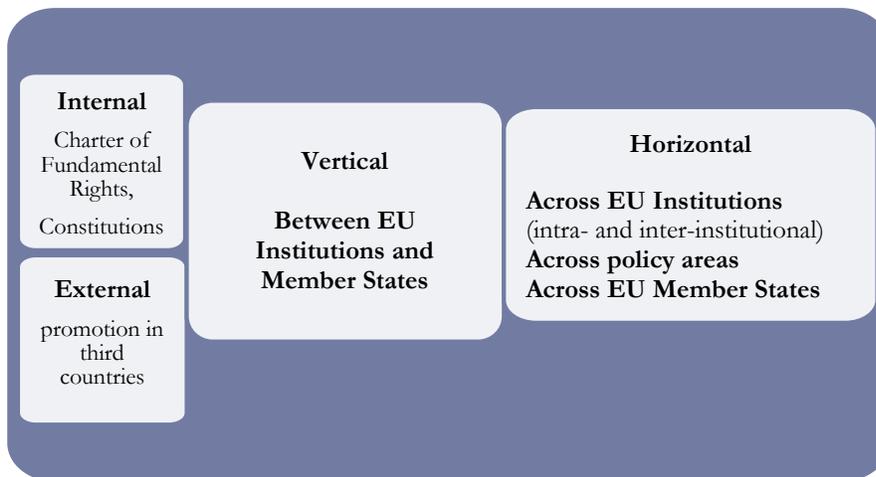


Figure 3: Dimensions of coherence¹⁸⁰

In order to ensure that alignment of policies is possible, of course points of views, objectives and practices need to be reconciled. FRAME research has shown that these diverged as a result of three causes (see Figure 4 below):

- Gaps and overlaps in the institutional structure of the EU;
- Lack of a global approach between policy regimes;
- A balance of interests geared towards economic concerns.

¹⁷⁹ Lewis *et al.*, above n. 91, p. 87.

¹⁸⁰ Source: *Id.*, p. 18.

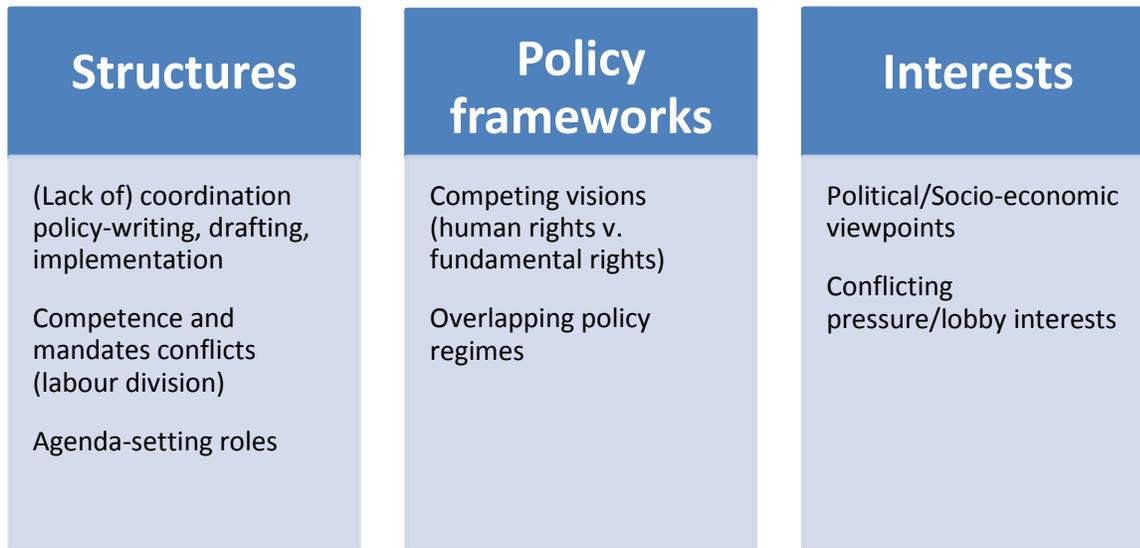


Figure 4: Causes of incoherence¹⁸¹

Consequently, practical action needs to be taken at these critical junctures. Competences and mandates must be streamlined and clearly oriented towards human rights. Policy regimes must avoid development in silos. Interests need to be clearly exposed and decisions democratically justified on how balance is made notably between economic and human rights interests.

As a conclusion, what is needed is a ‘comprehensive approach’ similar to that which the Council proposed in relation to conflicts and crises, which is

both a general working method and a set of concrete measures and processes to improve how the EU, based on a common strategic vision and drawing on its wide array of existing tools and instruments, collectively can develop, embed and deliver more coherent and more effective policies, working practices, actions and results. Its fundamental principles are relevant for the broad spectrum of EU external action.¹⁸²

We would argue that such comprehensive approach is not only relevant for external action, but for all of the EU’s policies, especially as they are developed by multiple actors across the internal-external divide.

¹⁸¹ Source: *Id.*, p. 20.

¹⁸² Council of the European Union, ‘Council conclusions on the EU’s comprehensive approach’, 12 May 2014. See also European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action, above n. 89.

C. Effectiveness

Effectiveness can mean a lot of things and is close to becoming a catchword. The study of effectiveness relates to the identification of the effects of a designated phenomenon, in our case EU policies. However, many types of effects can be the result of EU policies.¹⁸³ Non-exhaustively, scholars have identified problem-solving effectiveness, which designates the extent to which a policy solves the problem it seeks to address;¹⁸⁴ process or behavioural effectiveness, which designates the extent to which a policy modifies the behaviour of the subjects it applies to;¹⁸⁵ or constitutive effectiveness, which designates the extent to which a policy is accepted and adopted as a norm by the subjects.¹⁸⁶ In this report, we will use the word effectiveness as the measure of the success of EU policies to protect and promote human rights, without going into too much detail as to whether this is the result of induced modifications in behaviour, of creative problem solving, or of a change in a certain normative paradigm. We will also not of course provide a definitive answer to the question whether the EU is or is not effective, i.e. successful, but will rather try to evaluate whether the EU is well-equipped to deliver on its commitment to human rights, or whether challenges wear it down so much that success is out of the question. The answer, as FRAME research suggests, is of course located between these two poles.

One can intuitively feel at this stage that, just like coherence and implementation were linked together, effectiveness also is a function of how well implemented and how coherent EU policies are. We will revert to this particular point in the concluding chapter, but let us from the outset underline the differences between effectiveness and these two other notions. Effectiveness is different from implementation: whereas implementation only descriptively addresses the extent to which stated objectives or adopted policies are being applied on the ground, effectiveness is a normative notion in that it assesses the quality of the results generated by those objectives or policies. Likewise, effectiveness is different from coherence as the latter addresses whether different actors and policies align and concur to the attainment of stated objectives of adopted policies, whereas effectiveness will tell us whether such an alignment of policies is reaching the desired goal.

Below we will examine the issue of effectiveness through three sub-questions:

- Knowing effectiveness when we see it: how to measure the effect of policies?
- How does the EU's level of credibility influence its effectiveness?
- Is the EU delivering results, and when not, why?

¹⁸³ In general, on the different kinds of effectiveness, see Oran R Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press 1994) 140 ff.

¹⁸⁴ See Fritz Scharpf 'Problem-solving effectiveness and democratic accountability in the EU' (2003), *MPIfG working paper No. 03/1*, available at <http://hdl.handle.net/10419/41664>.

¹⁸⁵ See Sylvia I Karlsson-Vinkhuyzen and Antto Vihma, 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework' (2009) 3 *Regulation & Governance* 400, 405.

¹⁸⁶ Young, above n. 183, pp. 147-149.

1. Measuring progress and impact

One of the most difficult challenges in determining whether or not policies are successful is to find out whether they have any impact at all. Related to the question of the EU and human rights, addressing this puzzle necessitates being able to compare the situation of human rights standards across time, and to be able to establish causality between the variation of human rights impacts and EU policies considered.

a) Indicators

A very important tool to determine whether or not there is variation in the situation of human rights is indicators. Human rights indicators are ‘piece[s] of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation’.¹⁸⁷ For example, indicators may provide information about the number of violations of a certain human right during a given year in a given country, or of the extent to which another human right is being fulfilled in another country.¹⁸⁸ Indicators may also aggregate (or ‘index’) several datasets to provide a measure of a more complex phenomenon,¹⁸⁹ such as ‘the rule of law’¹⁹⁰ or ‘worker protection’.¹⁹¹ Indicators are not only useful to determine whether policies are effective *ex post* by comparing numbers over time. At the policy design stage, for instance, they are helpful in determining where the needs are so as to better tailor policies. FRAME research has determined that EU institutions and bodies already used and developed indicators. The FRA, with its research capacity, is a frontrunner in this respect, as it notably developed the EU Justice Scoreboard, which provides ‘objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States.’¹⁹² However, FRAME has also established that the use of indicators in the EU was not yet systematic, and that there was insufficient cooperation and exchange of information amongst institutions in this respect.¹⁹³

However, should an institution decide to build or evaluate its policies on the basis of indicators, it must be careful to choose an appropriate tool. Indicator schemes indeed pullulate, and there is much variation as to whether or not human rights indicators are actually informative, accurate and reliable, as FRAME’s

¹⁸⁷ Maria Green, ‘What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 *Human Rights Quarterly* 1062, 1065.

¹⁸⁸ AnnJanette Rosga and Margaret Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ (2012) 27 *Berkeley Journal of International Law* 253, 263–267.

¹⁸⁹ Kevin Davis, Benedict Kingsbury and Sally Engle Merry, ‘Introduction: Global Governance by Indicators’ in Kevin Davis and others (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press 2012) 6.

¹⁹⁰ See the World Justice Project’s Rule of Law Index, which measures the shape of the rule of law in a number of countries based on 8 ‘factors’ (constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice) measured through 44 indicators. See World Justice Project, ‘Rule of Law Index 2015’, 2015, available at <http://worldjusticeproject.org/factors>.

¹⁹¹ See the ITUC Global Rights Index, which surveys both qualitative data, namely the extent of worker protection in the laws of the country considered, and quantitative data, namely the number of violations recorded in a given year. This yields a ranking of where workers are best protected, and where workers are most at risk. See International Trade Union Confederation (ITUC), ‘2014 Global Rights Index – The Worst Countries for Workers’, 2014, available at http://www.ituc-csi.org/IMG/pdf/survey_ra_2014_eng_v2.pdf.

¹⁹² See http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

¹⁹³ Starl *et al.*, above n. 79, p.

survey of 130 indicator schemes clearly indicates.¹⁹⁴ FRAME research identified in this regard three main features which appropriate indicators need to possess:

- Indicators must acknowledge the interrelated character of all human rights;
- Indicators should be consistent and broadly accepted among states, and allow for a comparative and differentiated analysis;
- Indicators must be based on one or several clearly identified (international) human rights standard(s).¹⁹⁵

Based on interviews, FRAME has reached the conclusion that currently, the ‘structure/process/outcome’ methodology developed by the OHCHR¹⁹⁶ is most suitable for developing indicators responding to the above requirements.¹⁹⁷

b) Impact assessment

Indicators are only one tool which may help the EU determine and enhance the effectiveness of its policies. Based on indicators, one must then make the exercise of linking particular effects to the policies at hand, either in a predictive manner at the policy design stage, or in an evaluative manner after a policy has been incepted and implemented. As indicated above, the Commission has a consistent practice of conducting predictive ‘impact assessments’ of its most important legislative and policy proposals.¹⁹⁸ Some policies such as trade agreements are also assessed a second time for particular impacts based on the concrete terms which are negotiated.¹⁹⁹

These assessments also concern human rights impacts, but FRAME research has evidenced a number of methodological challenges which lead to serious doubts about the ability of impact assessments to actually predict human rights impacts in an accurate and reliable manner. In a nutshell, human rights impacts are evaluated as part of much broader assessments, and are therefore diluted in a wealth of other considerations, allowing for certain trade-offs to be condoned,²⁰⁰ whereas abidance by human rights standards should be assessed in its own right. Second, human rights impacts are identified based on hypothetical modelling exercises which measure the likely impact of a future measure on the state of the general economy. Human rights impacts are then extrapolated. This leads to over-emphasising the

¹⁹⁴ *Ibid.*, Annex I.

¹⁹⁵ *Id.*, p. 83.

¹⁹⁶ Office of the United Nations High Commissioner for Human Rights, ‘Human Rights Indicators – A Guide to Measurement and Implementation’, 2012, available at http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf, pp. 33-38.

¹⁹⁷ *Id.*, pp. 88-90.

¹⁹⁸ European Commission, ‘Better Regulation Guidelines’, 19 May 2015, COM(2015) 215 final, pp. 16-32 for specific guidelines on Impact Assessments. See also European Commission, above n. 11.

¹⁹⁹ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (2006) available online: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf. The 2006 Handbook is being overhauled. See European Commission, ‘Handbook for Trade Sustainability Impact Assessment, 2nd Edition’, Draft for Public Consultation (2015), available online: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153400.pdf.

²⁰⁰ For example, even though trade liberalisation induced by a free trade agreement might increase exports of the local industry and therefore the general rate of employment, such increase may also be accompanied by a raise in inequality and exclusion, notably of those who are driven out of business due to the effects of the FTA.

importance of impacts on social rights while entirely evacuating civil and political rights. Third, whereas stakeholder consultation is supposed to occupy an important place in the conduct and conclusions of impact assessments, and thereby counter-balance and cross-examine the abstract results yielded by modelling, evidence exists that consultations were not conducted seriously, thereby depriving stakeholders of an opportunity to voice concerns about the effects of a policy on their actual daily life.²⁰¹

From an evaluative perspective, FRAME research has not been able to identify any systematic practice of *ex post* impact assessments by the institutions, at least in trade and development policies.²⁰² A study of the impact of free trade agreements containing a human rights clause on the state of two human rights namely freedom of association and collective bargaining in 13 countries (based on data covering 73 countries over 30 years collected by FRAME researchers), has not been able to demonstrate that a positive effect on the situation of those rights after the conclusion of the FTAs concerned. To the contrary, in a number of cases, a decrease in the protection of those rights has been observed. However, one must be very cautious before concluding to the ineffectiveness of human rights clauses, as causality could not be reliably and definitively ascertained.²⁰³

In short, the EU is showing worrisome deficiencies in the measurement of the performance of its policies in human rights terms, which does not allow it to measure precisely the degree of success or failure of its human rights commitment, and therefore to reconsider its policies if necessary.

2. Preserving credibility for more leverage

In a globalised and interdependent world, making an impact on human rights cannot be done single-handedly. The EU depends on many other actors to make its commitment come true: its Member States, civil society, third states, international organisations, etc. To impose its views, garner support and solve disagreement, the EU needs to build a stature, in other words, be credible. Credibility is a function of whether the EU is genuine about its commitment to human rights, and whether it is serious about it.²⁰⁴ As we will see below, credibility is closely related to the EU's 'soft' and 'hard' power.

Whether the EU is genuine about its commitment to universal and indivisible human rights will allow it to accumulate soft power, and therefore secure goodwill from others on its positions, and persuade them to act accordingly. Soft power is particularly important in a multilateral context, particularly at the UN, the most important global human rights actor. The EU is well aware of the importance of multilateral solutions to human rights issues (Art. 21 (1) TEU), and is committed in this regard to 'effective multilateralism'.²⁰⁵

²⁰¹ Brando *et al.*, above n. 11, pp. 96-97.

²⁰² Although the new 'Better Regulation Guidelines' (above n. 198, pp. 42-62) do contain guidance regarding monitoring and fitness checks.

²⁰³ Axel Marx and Jadir Soares, 'Does Integrating Labour Provisions in Free Trade Agreements Make a Difference? An Exploratory Analysis of Freedom of Association and Collective Bargaining Rights in 13 EU Trade Partners' in Jan Wouters and others (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar 2015).

²⁰⁴ Karen Smith, 'Is the European Union's Soft Power in Decline?' (2014) 113 *Current History* 104.

²⁰⁵ Council of the European Union, 'A Secure Europe in a Better World – European Security Strategy', 12 December 2003, p. 9.

In order to be effective on human rights issues in multilateral settings, and particularly at the UN, the EU and its Member States have attempted to better coordinate their actions at the UN, so as to ‘speak with one voice’ and generally be very cohesive as a bloc. FRAME research shows that the EU has indeed made progress on this count,²⁰⁶ though certain areas such as freedom of expression and freedom of religion remain sensitive for some Member States, making common positions difficult to reach.²⁰⁷

However, FRAME research has evidenced that being a strong and cohesive bloc did not necessarily lead to better results in terms of getting proposals across in multilateral settings, nor generally to increasing one’s influence and effectiveness.²⁰⁸ Quite the opposite, the EU’s sheer weight and ‘imperiousness’²⁰⁹ may have caused rejection in others, so that instead of trying to be a leader, the EU had better work on coalition-building to form cross-regional consensus on the issues it seeks to promote.²¹⁰ So far, the EU has experienced difficulties in this regard, and has as a result been considered to be ‘punching below its weight’ at the UN.²¹¹

Arguably, the myriad different statuses which the EU possesses in the different EU bodies complicates matters, but an important factor for the EU’s underwhelming results may derive from a lack of credibility caused notably by the coherence issues outlined above. For example, while the EU is committed to the indivisibility of human rights, it is noticeable that its thematic priorities lie on the side of civil and political rights. For example, whereas the EU has consistently sponsored resolutions on the death penalty, the rights of the child and freedom of religion or belief, it is yet to date to sponsor a resolution on an ESCR-related matter.²¹² This is resented by a number of (developing) countries for which ESC rights are particularly important, and deprives the EU from opportunities to build bridges with other blocs. In this regard, FRAME research urges the EU to also work at the conceptual level to better understand third countries’ conceptions of human rights and their own priorities.²¹³

From the point of view of internal-external coherence, the EU’s normative power takes a blow when third countries have the occasion of pointing to the failures of the EU to protect the human rights of vulnerable

²⁰⁶ Baranowska *et al.*, above n. 48, p. 162, which describes the fine balance to be found by EU Member States, in the Universal Periodic Review, between not appearing to act as a bloc for fear of alienating the other members, and being cohesive enough so as to achieve the EU priorities.

²⁰⁷ Churruca Muguruza *et al.*, above n. 101, p. 81.

²⁰⁸ See Gjovalin Macaj and Kalypto Nicolaïdis, ‘Beyond “one Voice”? Global Europe’s Engagement with Its Own Diversity’ (2014) 21 *Journal of European Public Policy* 1067; Karen E Smith, ‘The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence’ (2010) 17 *Journal of European Public Policy* 224; Daniel C Thomas, ‘Still Punching below Its Weight? Coherence and Effectiveness in European Union Foreign Policy*’ (2012) 50 *JCMS: Journal of Common Market Studies* 457.

²⁰⁹ Smith, above n. 204.

²¹⁰ Baranowska *et al.*, above n. 48, p. 125.

²¹¹ *Id.*, p. 2.

²¹² Though resolutions on the Rights of the Child did contain some elements to that effect. See *Id.*, p. 129.

²¹³ Timmer *et al.*, above n. 17, p. 32.

groups such as the Roma on its own soil, or when it requires, as part of the GSP+, ratification and implementation of international conventions that not all EU Member States are party to.²¹⁴

Likewise, the double human rights standards which the EU is accused of applying in respect of different third countries in its foreign relations is particularly damaging for the EU's credibility and its reputation as a genuine champion of human rights. For instance, the EU is directing most of its country-specific resolutions at Belarus, the DPRK, Myanmar/Burma and Sudan, i.e. weak and politically isolated states, whereas more powerful states or states closer to the EU's interests keep flying under the radar.²¹⁵ This kind of treatment is however not confined to the UN circle, as the EU is also struggling to act consistently in respect of human rights violations in its neighbourhood, as forcefully denounced by Karen Smith, who states that

[u]nfortunately, hypocrisy is not unusual when it comes to the promotion of human rights and democracy around the world, and the EU has always been inconsistent in its pursuit of such goals. Some human rights violators escape its attention while others are targeted by sanctions. But the Arab Spring was arguably more damaging, since the EU had for so long pretended to promote democracy in a region on its doorstep while at the same time tolerating authoritarian rulers. No wonder the bloc struggled to establish links with new interlocutors in some North African countries in 2011.²¹⁶

But credibility is not only measured in terms of truthfulness to principles and commitments. It is also built by being serious and unflinching regarding consequences of a breach of human rights. The EU must not only talk the talk, but also walk the walk and apply hard power when necessary. The EU in this regard disposes of a wide range of coercive tools to leverage third countries or even its own Member States (see Art. 7 TEU) towards better human rights practices. And indeed, in the framework of the CFSP, the EU has applied many restrictive measures such as embargoes, travel bans, asset freezes, etc. against countries, governments or individuals threatening human rights.²¹⁷ These targeted or 'smart' sanctions have proven more or less effective over time.²¹⁸

However, one instrument put in place by the EU to leverage human rights has so far been underwhelming because under-utilised by the EU: conditionality (see above section II.A.3.b)(2)). The EU is going through great lengths to conclude trade agreements with human rights strings attached, at the risk of making negotiations collapse or drag on.²¹⁹ Likewise, the EU is giving up sizeable amounts in tariff revenues

²¹⁴ For example, the Apartheid Convention was included in the list of Conventions until 2012, whereas not all Member States were a party to it. See Beke and Hachez, above n. 70, pp. 194-195.

²¹⁵ Baranowska *et al.*, above n. 48, p. 140.

²¹⁶ Smith, above n. 204, p. 107.

²¹⁷ Churruca Muguruza *et al.*, above n. 101, pp 51-52, discussing the Basic Principles on the Use of Restrictive Measures (Sanctions); the Guidelines on implementation and evaluation of restrictive measures (sanctions); the Best Practices for the effective implementation of restrictive measures.

²¹⁸ See e.g. Clara Portela, 'The EU's Use of "Targeted" Sanctions: Evaluating effectiveness', *CEPS Working Document No. 391*, March 2014, available at <http://www.ceps.eu/publications/eu%E2%80%99s-use-%E2%80%98targeted%E2%80%99-sanctions-evaluating-effectiveness>.

²¹⁹ See above n. 135.

through GSP and GSP+ in exchange for a means to pressure developing countries to commit to human rights and good governance.²²⁰ And yet, conditionality is hardly ever used: only against ACP countries in the case of human rights clauses (and mostly not for reasons of human rights violations), and against three countries only in case of the GSP or GSP+.

This might lead one to think that the EU is not serious about human rights conditionality, and will generally prefer a continued trade relation to the application of sanctions.²²¹ This is lamented notably by the European Parliament and civil society. On the other hand, the Commission and the Council seem to favour a softer approach to human rights issues and deal with them through dialogue before resorting to conditionality only as a solution of last resort.²²² Still, the lack of consistency in the application of conditionality has led to accusations of pusillanimity on the part of the EU, and therefore this tool may have largely lost its clout and no longer be effective in convincing third countries to refrain from violating human rights for fear of seeing their trade benefits repealed as a result.

3. Step up delivery and show results

After examining how policy results were measured, and how the EU could achieve success by building and maintaining soft and hard power, let us now examine a few trends evidenced by FRAME research as to the EU's results in practice. While undeniably, the EU is a positive force for human rights and has good results to show, in many instances it disappoints expectations. As indicated in Chapter II.A, the EU set the bar very high for itself, and as a result it is struggling to implement its commitment. The EU has a tendency to set ambitious objectives, and to settle for unimpressive results. One FRAME report has evidenced that in foreign policy, EU officials defined effectiveness not as achieving actual results, but as being cohesive as an organisation, as all speaking with one voice, which as demonstrated above is insufficient to deliver change.²²³

a) Living up to expectations

Disappointments may arise at different stages of the policy process.

At the policy formulation stage, the EU is struggling to define coherent and relevant priorities. At the UN, the EU is making a point of developing a position on every human rights issue, while FRAME research suggests it should better target where it wants to weigh in on the debate.²²⁴ Likewise, the EU Action Plan

²²⁰ See above n. 69.

²²¹ Churruca Muguruza *et al.*, above n. 101, pp. 38-39.

²²² Beke *et al.*, above n. 68, pp. 28-29.

²²³ Mayrhofer *et al.*, above n. 16, p. 110: 'when it comes to the question of the effectiveness of EU human and fundamental rights politics, there is a tendency to concentrate on 'effectiveness in representation', which means 'that those speaking on behalf of the EU are able to aggregate the different demands into a unified position. The emphasis here is on avoiding a multitude of views being signaled externally and abstaining from acting in an uncoordinated fashion' (M Elsig, 'The EU as an Effective Trade Power? Strategic Choice of Judicial Candidates in the Context of the World Trade Organization' (2013) 27 *International Relations* 325, p. 328). "[E]ffectiveness in impact", which refers to the achievement of goals – and which would require the question of whether EU human rights strategies and policies are actually good for the people on the ground to be dealt with – is neglected.'

²²⁴ Baranowska *et al.*, above n. 48, p. 87.

on Human Rights and Democracy from 2012 contained 97 actions, which was deemed too much. Not all actions could be achieved, despite a satisfactory rate of completion.

At the stage of designing the instruments to implement a policy, the EU may come up with instruments which are not up to the task. As mentioned above, the Commissions' 2014 'New Framework to Strengthen the Rule of Law' is widely believed to be too bland to curb Member States' harmful reforms. Likewise, the much-anticipated new Action Plan 2014-2019, though it improves on its predecessor in a number of respects, is also much vaguer and less practical in a number of respects.²²⁵

At the stage of enforcing human rights obligations, as indicated above the EU is often shying away from applying certain instruments at its disposal, such as trade conditionality.

b) Relying on non-state actors

Therefore, one might ask how to go forward and step up delivery. The EU has set objectives which are so formidable that it should probably rely on external actors to support it and deliver results. We have mentioned above the potential of effective multilateralism and building coalitions with other countries and regional blocs. FRAME research also suggests that the EU should more readily tap into the potential of non-state actors. Indeed, human rights require a 'thick consensus' to flourish, and therefore to deliver results, the EU will need to garner the support of all stakeholders.²²⁶

(1) Civil society

Civil society organisations are perhaps most crucial in this respect. As vehicles for popular participation, they induce social change and raise expectations about human rights compliance.²²⁷ As experts and pressure groups, they assist in the definition of new policies, such as was the case in the process leading to the adoption by the EU of the Convention on the Rights of Persons with Disabilities (CPRD), as well as its implementation into EU law.²²⁸ Finally, as monitors of human rights, they can alert the EU on its own defective practices, or on violations by others. NGO reports are in this regard among the sources which the Commission will review to investigate a potential breach of standards leading potentially to suspension of GSP benefits.²²⁹ Likewise, CSOs are important actors in the supervision of States' commitments in the framework of EU new generation FTA's 'sustainable development chapters'. For example, NGOs have already voiced much concern regarding Korea's compliance with a number of ILO conventions, as a result of being involved in the chapter's 'Domestic Advisory Group'.²³⁰

However, although CSO engagement is a fixture in EU policy making, FRAME research has identified a number of ways in which practices could be improved. For example, engagement could be more inclusive,

²²⁵ See above, section II.A.4.

²²⁶ See in this regard the example of the multistakeholder strategy for enhancing labour rights, Nicolas David, Mary Dowell-Jones, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Aoife Nolan, Petr Pribyla, 'Report on the positive and negative human rights impacts of non-state actors', *FRAME Deliverable 7.1*, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/04-Deliverable-7.1.pdf>, p. 37.

²²⁷ *Id.*, p. 83-84.

²²⁸ *Ibid.*, pp. 70-80.

²²⁹ See Regulation (EU) No 978/2012, above n. 69, recital 15.

²³⁰ Beke *et al.*, above n. 68, p. 79.

as it is now routinely limited to ‘elite’ NGOs with presence in or access to Brussels. Second, the modalities of engagement could be improved, notably to enable more meaningful input.²³¹

(2) Human rights defenders

Another group which is worthy of engagement are human rights defenders. As indicated above, human rights progress cannot be imposed from the top down, but must emerge from the grassroots. In this regard, human rights defenders are a particular target of EU human rights policies. By educating and empowering rights holders, human rights defenders have a potential for social change in problematic regimes, and are often persecuted for that very reason.

This is why the EU has made the protection of human rights defenders a priority,²³² and has taken a number of measures to assist them, such as funding through the EIDHR, the establishment of contact points in EU delegations, or the recent creation of a Human Rights Defenders Mechanism run by a consortium of NGOs.²³³ This policy is however not always pursued in earnest, as FRAME research has demonstrated in relation to the situation in the Balkans, where political stability as an objective has superseded the protection of human rights defenders.²³⁴ Additionally, the EU’s approach to human rights defenders has been criticised as being too reactive, rather than pre-emptive, and as a result defenders have to already be in trouble before the EU begins to take action.²³⁵

(3) Other non-state actors

FRAME research has also insisted on the role of the media, and of the economic world in fostering human rights.

Businesses, for instance, have a responsibility to respect human rights which complements the States’ duty to protect human rights. The EU recognises this and should step up its efforts to ensure that Businesses, notably when based in the EU but operating abroad, do discharge their responsibility to respect. The EU in this regard however seems to be fiercely attached to a non-binding approach, despite promising initiatives for a binding instrument at the UN.²³⁶

Finally, the EU recognises that financing is an important means to leverage human rights, and the EIB is a leading player in making sure that project finance and development banking is exercised in a way that supports human rights, and FRAME research suggests that it should liaise with other IFIs so as to disseminate its best practices.²³⁷

²³¹ Benedek *et al.*, above n. 123, p. 123.

²³² See Council of the European Union, above n. 22, Action 9.

²³³ Benedek *et al.*, above n. 123, p. 160.

²³⁴ Fraczek *et al.*, above n. 2, p. 39.

²³⁵ Benedek *et al.*, above n. 123, p. 156.

²³⁶ See UN General Assembly, ‘Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’, Report of the Chairperson-Rapporteur: Amb. María Fernanda Espinosa Garcés, 10 July 2015, UN Doc. No. forthcoming.

²³⁷ Benedek *et al.*, above n. 123, p. 90.

4. Conclusion on the effectiveness challenge

This section has demonstrated, if this was needed, that effectively delivering on its commitment to human rights, i.e. improving the state of protection of human rights at home and abroad, was more than a challenge.

First of all, results are harder to come by if they cannot be identified and measured properly. In the absence of tools which allow for clear evidence of progress, the EU's record will always be subject to doubt. In this field, the challenges are mostly methodological, both for indicators and impact assessments.

Second, objectives and policies will not produce results by themselves. They must be implemented genuinely, seriously and coherently. The EU must be wary to fail on these accounts, as its credibility depends on it. In EU and global environments in which other actors have competing goals, credibility is a key asset which allows to garner support and create momentum around an agenda. Therefore, the EU needs to work on its credibility to preserve its hard and soft power.

Finally, the EU must fully realise that a top-down approach has its limits when it comes to human rights policy. First of all, human rights are all the time everywhere, they are transversal and cross-cutting. Therefore, even for very well-resourced administrations like the EU institutions, keeping track of, and influencing, all the parameters of its human rights commitment might simply not be possible. But also, and perhaps just as important, the EU and its Member States do not have a spotless human rights record themselves and may therefore need to *take* human rights objectives and policies as much as they are entitled to make them. In this regard, generating a truly participatory movement involving non-state actors seems a promising avenue to realise the EU's ambitious agenda.

III. Conclusions

This report has sought to present ‘integrated conclusions’ from the research conducted by the FRAME project over the first two and a half years of its existence. This task required to make a number of choices, because the ground covered is simply immense. It seemed of limited added value to descriptively record the findings of the more than 20 reports which FRAME has produced so far. On the contrary, it seemed interesting to try to seek what those findings had in common, as a way to identify the core ‘talking points’ of the FRAME project, and consequently also the most salient issues related to the EU’s human rights commitment. Therefore, we have sought to evidence and study more in-depth three general challenges which the EU is facing in relation to its commitment to human rights, and which were underpinning virtually all FRAME reports. These three challenges are implementation, coherence and effectiveness.

Implementation designates the extent to which the EU is putting its commitment into practice, in other words whether the objectives translate into policies, and whether policies translate into actions (by the EU as well as its Member States). Coherence designates the extent to which the EU’s objectives, policies and actions (including those of its Member States) can generally be considered to be in keeping (or ‘coherent’, or ‘consistent’) with its commitment to human rights, and whether, in their interrelations, such objectives, policies and actions may be considered to be ‘pulling in the same direction’. Effectiveness designates the extent to which the EU’s commitment to human rights, and the associated objectives, policies and actions are delivering the desired results, in other words: is the EU actually a driving force for human rights?

It is important to understand that, although FRAME, as was exposed in the chapters above, is making individual recommendations in relation to these three challenges, the EU will only be able to overcome these challenges if it tackles all three of them at the same time. Indeed, these challenges are interrelated, and progress in regard to one of them is likely to lead to progress in the others, and conversely. It might be interesting here to reflect briefly on such interrelations. Implementation and coherence are descriptive terms which speak to the formal qualities of the EU’s human rights initiatives. Effectiveness, for its part carries more normative weight, and rather informs us on the degree of success of such initiatives, whether they should be changed or whether they should be pursued further. From the discussions of the three challenges above, it appears quite clearly that both implementation and coherence influence each other, but also form a complex which seems determinative of the effectiveness of EU human rights policies.

It is quite evident why implementation and coherence influence each other. Lack of implementation, for any reason, often causes incoherence down the line. For example, failure by the EU to implement human rights conditionality most of the time, except against ACP countries, is often interpreted as a sign of external-external incoherence. Likewise, some EU Member States’ failure to abide by fundamental rights qualifies as internal-external incoherence if it is not addressed by the EU as it would be addressed against a third country. Finally, the EU’s failure to properly mainstream human rights in all its policies, and to let some policies run foul of human rights in pursuance of other objectives has been described as internal-internal incoherence.

Likewise, when policies are incoherently designed or applied, or when actors are behaving incoherently, either because institutional structures are not aligned, because policy regimes do not share the same

code, or because interests conflict, these situations will affect the degree to which the EU's human rights commitment is implemented in practice. We have noted that vertical incoherence issues regarding the treatment of migrants hindered the design of EU policies implementing the right to Asylum (Art. 18 of the Charter). Similarly, horizontal coherence issues of the sort encountered by the EU services and institutions involved in the definition of the EU's CSR policy causes the implementation of the EU's commitment to fall short in relation to business impacts on human rights.

Therefore, a healthy implementation-coherence relationship is quite crucial in ensuring that results will ensue, and that effective progress in human rights protection be recorded. The problem with monitoring such a relationship is that it is based on subtle mechanics which only manifest themselves discretely or after a certain period of time. Also, the consequences in terms of effectiveness may be suffered by another actor than the one under-performing. This is why calls have been made in various strands of FRAME research, for the creation of one entity responsible for overseeing the implementation of the EU's human rights commitment (including for what concerns Member States), as well as for keeping track of coherence issues.

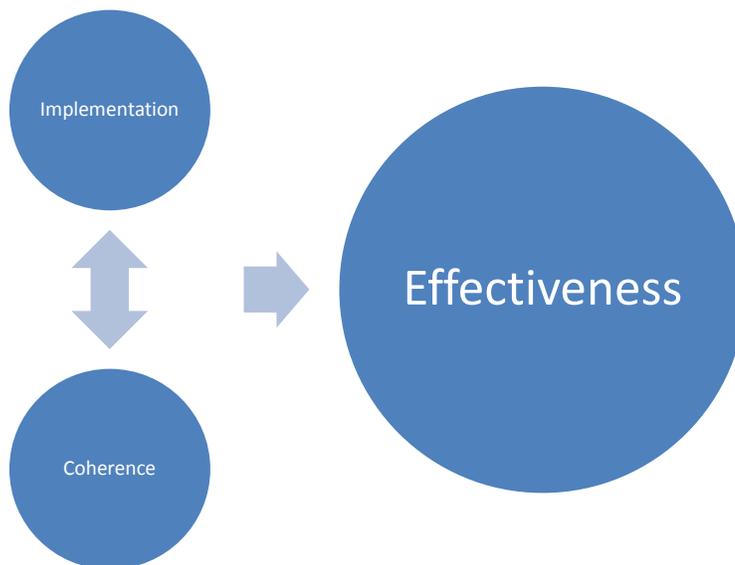


Figure 5: Relationship between implementation, coherence and effectiveness

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