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European Yearbook
on Human Rights

Benedek/Benoît-Rohmer/Kettemann/
Klaushofer/Nowak (Eds.)



2015 saw a world in turmoil. The crisis in Syria and the fate of thousands of refugees on Europe's borders and in Europe's streets made 2015 a year in which human rights mattered more than ever.

Across 31 contributions by 44 authors in five sections, the European Yearbook on Human Rights 2016 explains and contextualizes key developments in human rights in the past year.

Edited jointly by representatives of four major European human rights research, teaching and training institutions, the Yearbook 2016 provides much-needed analysis of the human rights challenges the world is faced with. It covers comprehensively the three main organizations charged with securing human rights in Europe (EU, Council of Europe and OSCE) and remains, in its 8th edition, essential reading for anyone interested in human rights in Europe and the world.



YEARBOOK 16

European Yearbook on Human Rights

edited by

Wolfgang Benedek
Florence Benoît-Rohmer
Matthias C. Kettemann
Reinhard Klaushofer
Manfred Nowak



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Florence Benoît-Rohmer
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Antwerp · Vienna · Graz 2016

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Zsolt KÖRTVÉLYESI

Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations*

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Keywords

European Union, conditionality, human rights, democracy, inconsistency, foreign policy, Common Foreign and Security Policy, human rights promotion, bilateral relations, prioritization

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A Introduction

Inconsistency is a key reference point in the debate on the role that human rights goals play in EU external relations. However, criticism of inconsistency usually does not present a complete picture of where consistency can fail. The importance of identifying inconsistencies cannot be underestimated as they undermine the credibility and efficiency of the EU's engagement in third countries and the very goal of human rights promotion as acknowledged, among others, in the EU's Strategic Framework and Action Plan on Human Rights. This contribution seeks to map the complex terrain of inconsistencies, to see how criticism building on inconsistency, either in application or in policy making, can become a useful analytical tool. In the context under review, inconsistency can be presented as a result of a struggle between values and interests; a gap between rhetoric and action; the inconsistent treatment of third countries; between internal and external policies or even within external policies, across instruments; between levels (supra/national) and institutions (fragmentation and the EU speaking with 'too many voices'); across time; or among types of rights to be promoted. The article looks into all these, assessing actual examples, also showing the limits of the consistency-based criticisms, where apparent inconsistency should rather be seen as either an effective and responsible implementation of human rights goals, applied with sensitivity to context, or flowing from clearly set priorities. To be able to see where to draw the line, we should first be clear about what inconsistency can be in the first place.

It has been widely recognized that inconsistencies undermine the credibility and efficiency of the EU's engagement in third countries and its promotion of human rights.¹ The Strategic Framework and Action Plan on Human Rights and Democracy adopted in 2012 by the Council addresses various aspects of coherence and consistency, and the updated Action Plan emphasizes consistency and coherence even more.² Looking at the changes concerning coherence and consistency, the 2012 document listed "pursuing coherent policy objectives" as one

1 This is not only true for the literature but also for EU institutions. The European Parliament stressed in a recent resolution that "the EU's action regarding third countries has to be consistent for it to be credible and hence effective, and that discrepancies and inconsistencies make its action less effective and sometimes cause its views on human rights not to be heard; recalls that, in spite of the many problems encountered, consistency is still a priority for external policy and that it has to be at the heart of the mandate of all those involved in such policy". European Parliament, Resolution on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter, 2014/2216 (INI) (12 March 2015), para. 27.

2 European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019), Keeping human rights at the heart of the EU Agenda (28 April 2015), JOIN (2015) 16 final, Joint Communication of the Parliament and the Council, https://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf (31 January 2016). The 2012 Action Plan also emphasized coherence goals, even if more on the level of policy objectives, and less directly on the level of implementation. Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (25 June 2012), 11855/12, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (31 January 2016).

of the main goals, including reporting, follow-ups, keeping a geographical balance, cooperation with member states, attention to coherence and consistency between external and internal policies as well as regard to economic, social and cultural rights. In the context of enlargement policy, it requires the consistent application the 'more for more' principle.

The updated (2015-2019) Action Plan includes a detailed list of concrete goals under 'Fostering Better Coherence and Consistency'.

To understand the role of human rights in European foreign policy we need to address the question *whether and to what extent human rights are (and should be) part of European foreign policy*. The descriptive question is, then, whether human rights (values, principles, concepts etc.) play a substantial role in foreign policy decisions, and if they should play a role when we try to explain foreign policy.³ A parallel question to ask is to what extent we should expect them to play a role.

The importance of such considerations cannot be underestimated. The size and weight of the EU warrants that the organization has an impact in the international realm, both in its dealing with international organizations – universal bodies as well as other regional institutions – and other states. Still, there seems to be a certain fear, in research on the role of values, images and principles, from "touching normative issues".⁴ Knud Erik Jørgensen contrasts this to the continuing interest in issues of ethics and identity. Accordingly, there is a renewed opportunity for EU foreign policy research to integrate theoretical insights into the studies of European institutional conduct.⁵

The European Communities/European Union has come a long way from the limited economic cooperation, and has gained competences that reach out to foreign policy and human rights. This in itself requires explanation, and the way we explain this process will also inform our understanding of the relationship between human rights and EU foreign policy today. The unmatched developments of the European integration is usually linked to the power of spill-over and the refined focus of integration, following a step-by-step process. At the same time, the lack of a focus on foreign affairs as well as on human rights, at least in the first decades, is inherent to this approach. Questions of human rights were relegated to organizations like the OSCE and the Council of Europe. (This was, however, not a necessary development.)⁶ The engagement in Kosovo shows that this distinction is still haunting. Katarina Månsson quotes an UNMIK official saying that when it comes to human rights, there is a general perception by the various actors that it is the OSCE – and not the UN or the EU – that is the only competent actor.⁷ Historically, the courts are usually seen to be the first that

3 Knud Erik Jørgensen, *Theoretical Perspectives on the Role of Values, Images and Principles in Foreign Policy*, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles in European Union Foreign Policy* (2006), 43.

4 *Ibid.*

5 *Ibid.*, 57-58.

6 Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, *American Journal of International Law* 105 (2011), 649.

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

directly confronted the question of human rights standards in EU law.⁸ By now, both human rights and foreign policy have solid basis in the primary legal sources, most importantly with the Lisbon Treaty.⁹ In the context of foreign policy, human rights are part of the guiding principles of the EU.¹⁰

The inclusion of human rights concerns has a double effect: all EU policies, including foreign policy, is subject to human rights standards; and human rights promotion, on the international level, is an important goal of foreign policy.¹¹ There are two related questions that this article will confront, the “why” and the “how”. Why is it (good) that human rights have been promoted to this status, and to what extent this discourse reflects a genuine shift in how foreign policy is made? In the following I will address these two questions, one by one.

8 Above all the Court of Justice of the European Union (and of the European Communities). The CJEU incorporated and started to apply basic human rights considerations without express treaty reference, also as a result of pressure from the national level. See, above all, the following cases: ECJ, *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community*, Judgment of the Court of 4 February 1959, Case 1/58; ECJ, *Erich Stauder v. City of Ulm*, Judgment of the Court of 12 November 1969, Case 29-69; ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970, Case 11-70; ECJ, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Judgment of the Court of 14 May 1974, Case 4-73; and ECJ, *Liselotte Hauer v. Land Rheinland-Pfalz*, Judgment of the Court of 13 December 1979, Case 44/79 for the former; and the Solange I Decision of the German Federal Constitutional Court from 1974 (BVerfGE, 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974)) for the latter.

9 In addition to the general human rights clauses (Arts. 2, 3 and 6 of the TEU), the Treaties confirm specifically that human rights are part of the Common Foreign and Security Policy (CFSP) framework, indeed, they form the very basis of the same, as set out in Art. 21 of the TEU.

10 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. Treaty on European Union [2008] OJ C 115 Art. 21 (1). Note that the TEU also stresses that human rights promotion should happen through a high level of international co-operation (TEU Art. 21 (2)). This obligation applies to areas specifically mentioned in the Treaties on the Functioning of the European Union, like foreign commercial policy, development, financial and technical cooperation and humanitarian aid. Arts. 205-221 of the Treaty on the Functioning of the European Union, see Jan Erik Wetzel, Foreword, in: Jan Erik Wetzel (ed.), *The EU as a “Global Player” in Human Rights?* (2011), 8.

11 According to Art. 21 TEU: The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and 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. See also: Josiane Auvret-Finck, *La projection des droits fondamentaux dans les relations extérieures*, in: Joël Rideau, *Les droits fondamentaux dans l’Union européenne*. Dans le sillage de la Constitution européenne (2009), 407.

B Why Are Human Rights Part of EU Foreign Policy?

Considering the history of the European integration and also the long list of criticisms of human rights promotion by the EU, one might wonder how human rights became part of EU policies. Here we will briefly look at the normative arguments, it is, however, also important to keep in mind that there were concrete actors within the EU that actively worked on this shift.

Interests, values, legitimization, positive law and the benefits of aggregation are all interlinked arguments that can justify the move to put human rights to the highest level of decision-making in EU foreign policy. With or without accepting the relativist argument, one can claim that it is the “national interest of liberal democracies to export their norms and values, including human rights norms”.¹² Governments can use human rights arguments in their international dealings to legitimise their power, while furthering human rights goals can bring or maintain order and peace. Finally, human rights are now positive law: there are a growing number of international legal documents dealing with human rights, and this in itself explains that it would be hard to ignore this topic entirely,¹³ not to mention the constitutional traditions of the various member states. The responsibility that the EU takes when assessing the human rights situation in third countries has a basis in international law, as human rights are not the sole responsibility of the concerned states.¹⁴ The idea of a ‘just basis’ for international relations for the Communities appeared already in 1973 when heads of member states agreed on a declaration on Europe’s identity. The Lisbon Treaty marked an important step towards the inclusion of human rights considerations on various levels of policy making in the EU.

Identity plays an important role in structuralist approaches. Human rights might then be seen as a constitutive element for European identity. When we consider these arguments we should keep in mind that identity itself is an ambiguous term¹⁵ and in a sense the whole of EU foreign policy can be seen as constituting an “international identity” of the EU.¹⁶ Sonia Lucarelli argues that existing literature either creates an inherent link between the cultural and political aspects of identity (neo-nationalist, European culturalist and civilizationalist arguments) or sees political identity as something that should be created, not evidently based on an existing cultural identity (communicative and functionalist arguments).¹⁷ In general, a bi-directional formation is present: the identity of the EU is forming foreign policy, and the EU’s international presence is forging its

12 Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (2004) (3rd ed.), 2.

13 See these four arguments, *ibid.*, 2-3.

14 As the (still debated) concept of the Responsibility to Protect more recently underlined.

15 Rogers Brubaker and Frederick Cooper, *Beyond ‘Identity’*, *Theory and Society* 29 (2000), 1-47.

16 See the works of Manners and Whitman, cited in: Sonia Lucarelli and Ian Manners, *Conclusion*, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles in European Union Foreign Policy* (2006).

17 Ian Manners, *The constitutive nature of values, images and principles in the European Union*, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles in European Union Foreign Policy* (2006), 11-13.

identity.¹⁸ It can be argued that the identity based argument goes against the historical developments of human rights in the context of the EU, grounding the identity of the EU in human rights is simply historically inaccurate, i.e. they were originally not central to building this regional economic community.¹⁹ This, of course, does not in itself discredit attempts to include human rights into the building blocks of the EU, it simply points out that the development that led to the inclusion of human rights considerations had important external elements, and was not a strictly internally driven process. It was not until the events in Eastern Europe and the Western Balkan that serious human rights commitment appeared in the EU/EC, which marked a shift from the (lack of) responses to human rights violations in Uganda, South Africa and Chile, countries receiving development assistance from Europe.²⁰ In a sense, Eastern enlargement contributed to the solidification of the EU's identity as it forced the organisation to articulate its preconditions in a normative way, including values like human rights and democracy.

While it is debated to what extent values make an impact on actual foreign policy decisions, it is uncontested that they are present, at least as a discourse. It is part of what is presented as 'Europeanness', or European "values, images and principles".²¹ Human rights constituting an inherent part of the EU's identity was central to the concept of Normative Power Europe introduced by Manners. He argued that "cosmopolitical supranationality" is central to the European self-image, the "belief in multilayered politics shaped by a vibrant international civil society, more equal rights for women, the pooling of sovereignty, and supranational law".²² Inherently linked to the identity argument, we find the criticism about a European exceptionalism regarding human rights protection. This has been widely discussed in the literature, especially after the *Kadi* judgement.²³

18 Lucarelli and Manners (2006) 214. Canada is often mentioned as an example where human rights promotion as a foreign policy goal is closely linked to collective identity, and where internally, too, the adoption of a human rights charter was linked to internal discussions on a Canadian identity.

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

20 *Ibid.*, 124-125.

21 Ian Manners, The constitutive nature of values, images and principles in the European Union, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge 2006. There are distinct but interrelated questions of who defines Europe along these values, what this entails, and whether and to what extent it corresponds to the social and political reality. It can also be problematized whether human rights, if universal, can have a European flavour at all, and if it's possible to discern a genuinely European approach, that is common for all EU countries, but distinct from, e.g. the Northern American one. The strong emphasis on the individual (as opposed to more collective values in Africa or Asia) as well as on solidarity (as opposed to the US; see the insistence of a "social market economy") are often used to emphasise these differences.

22 *Ibid.*, 28.

23 ECJ, *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (2008) ECR I-6351. In this case, the ECJ invalidated the EU implementation of a UN Security Council resolution on freezing assets in the anti-terrorism context. While the decision has been praised on human rights grounds, it can be argued that, at a more general level, such an approach can easily undermine efforts to solidify the international human rights regime.

As human rights considerations are already present in member states foreign policies, a possible – somewhat utilitarian – argument could point out the advantages of harmonising such efforts at the European level. An advantage of elevating human rights promotion to the level of the EU stems from aggregation. Once national governments do pursue human rights goals in their foreign policies, achieving these goals might be more effective at a collective level. This “burden-sharing” means that “a lesser burden is placed on overall bilateral relations”.²⁴ Shifting foreign policy to the European level can lower the stakes also in the sense that retaliation by third states is less likely to happen.²⁵ An obvious drawback is that common action can fall back to the weakest common position,²⁶ and the goal of aggregation might as well turn around and impede collective efforts. In certain cases there might be a (perceived) clash with other interests, e.g. strategic considerations, economic interests, ‘securitisation’ (immigration, terrorism).²⁷ Even if these most likely reflect a false contradiction and distorted assessment of diverging policy goals, such accounts can still have a destabilizing effect, create a backlash or discourage engagement and international cooperation. This should be balanced against the overall gains that include an increased “political and moral weight”, observance of long-term goals, and the role of a “normative power”.²⁸

The ratio of positive and negative aspects will largely depend on what specific instruments are applied in concrete cases, and how the various institutions are involved. The ultimate conclusion will also depend on how successful a human rights based policy can be, how effectively it pursues the goals it seeks to achieve. A key element of the debates around effectiveness concern arguments about the consistency and coherence of the application of these goals in EU foreign policy. What follows is a systematic overview of the often interlinked arguments and criticisms in this area.

Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, *Harvard International Law Journal* 51 (2010), 1. See also Richard Burchill, *Assessing the EU’s Position on Human Rights. Is it a Desirable One?*, in: Jan Erik Wetzel (ed.), *The EU as a “Global Player” in Human Rights?* (2011).

24 Baehr and Castermans-Holleman (2004), 66.

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

26 Baehr and Castermans-Holleman (2004), 66-67.

27 For the detrimental role of security considerations in the case of minority rights, see Will Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford University Press 2007. His description of the phenomenon that “political scientists call the ‘securitization’ of ethnic relations” can be applied more generally to human rights: “Relations between states and minorities are seen, not as a matter of normal democratic politics to be negotiated and debated, but as a matter of national security, in which the state has to limit the normal democratic process in order to protect its very existence.” *Ibid.*, 119.

28 Balfour (2012), 1-3.

C Mapping Inconsistency Arguments

Publicly voiced criticism of the EU's self-proclaimed human rights principles often apply the consistency (or coherence)²⁹ argument. Yet, often very different issues are presented in the cloak of the same term. This section seeks to clarify these different understandings by presenting a systematic overview and typology of inconsistency arguments.

1 Values and Interests

The current approach of EU foreign policy requires, based on Article 21 TEU and spelled out in the EU Strategic Framework on Human Rights and Democracy, that EU policies shall be guided by the protection of human rights and democracy in all its external actions. The Strategic Framework underlines the importance of mainstreaming human rights in all EU external actions. This shows a deeply value-based approach that seeks to guide goal-setting in foreign policy. However, this does not eliminate other policy goals – flowing, e.g., from strategic and economic interests – that can and do conflict with human rights goals and with each other. The EU also seeks to maximise “economic and strategic welfare”, an aim that can easily trump the other goal of human rights promotion.³⁰ In external relations, raising domestic human rights issues can reinforce mutual mistrust, and destabilise countries, undermining the legitimacy of governments, and, as a result, compromise the general goals of peace and security. Even more limited security considerations can be seen as antithetical to human rights. Raising human rights issues in foreign policy can be problematic for various reasons. First, it can imperil prospering interstate relations; especially if concerns are expressed publicly, or if the state in question is a mass human rights violator. Second, such criticism is often seen (and rejected) as a violation of state sovereignty over domestic matters.³¹ Max van der Stoep, former Foreign Minister of the Netherlands, argued that in certain situations, human rights “should not be given absolute priority”. He refers to a hypothetical case where raising human rights concerns would risk “an important breakthrough in arms control negotiations”.³² However, it can be argued that this statement reflects a limited view of human rights. Arms control is also an important human rights concern, without which more lives (as well as other rights) would be threatened, and this balancing can easily be interpreted as a balancing between competing human rights goals.

Rosa Balfour has proposed that we should stop seeing principles and interests as a clear-cut dichotomy and rather place them along a continuum. Human rights and democracy play a role and drive action in foreign policy just like security and stability. She acknowledges, however, that the relationship – between human

29 Bearing in mind the differences between the two terms, I will use the term “(in)consistency”. While in some contexts one is more apt than in others, consistency is the more often applied term, I hope that the different usages of the term will make it clear that the typology presented here is more decisive than what term describes it.

30 Jurado (2006), 128.

31 Baehr and Castermans-Holleman (2004), 45-46.

32 Max van der Stoep, *De Rechten van de Mens in de Oost-West betrekkingen*, in: Ph. P. Everts and J. L. Heldring (eds.), *Nederland en de Rechten van de Mens* (1981), 79, quoted in: Baehr and Castermans-Holleman (2004), 48.

rights and democracy, on the one hand, and other goals on the other – is often dialectic.³³ While in the Central and Eastern as well as in the South-Eastern European Context, the EU made democracy and human rights an integral part of foreign policy (or enlargement) strategy, this was not the case in the Mediterranean context where these values proved to be secondary to maintaining stability.³⁴ Also, somewhat paradoxically, human rights issues can become important precisely because they touch upon sensitive issues, because action on these questions can put key interests at risk.³⁵

Sonia Lucarelli summarises the diverging approaches to what role human rights can play in foreign policy as follows:³⁶ (1) they can provide road maps helping choice among possible courses of actions; or (2) serve as final aims of foreign policy; (3) they might only inform the selection of the appropriate instruments; and finally (4) they can be used as basis for legitimizing discourse. This will also mean that arguments based on human rights can be more or less powerful as opposed to arguments based on direct gains. In certain cases, the link between rhetoric and action might not be as weak as commonly assumed. At the micro-level, a shared understanding of human rights might be crucial, or even a precursor, for actual implementation.³⁷ Urfan Khaliq,³⁸ after a review of EU responses to events in Myanmar, Nigeria and Pakistan, argues that “[e]thical considerations are now an established part of the equation in the Union’s dealing with third states”. Which is not to say that they will override basic state interests in security and “relations with vital allies and trade links”.³⁹ Reactions to comparable events might fundamentally differ, and will be applied on an ad hoc basis.⁴⁰

All approaches acknowledge that there are competing foreign policy goals that can (and do) override human rights considerations. Among such goals, a country might want to maintain friendly relations, further security and peace, build up economic relations, and pursue development goals.⁴¹ But these goals should be compatible with human rights considerations, according to the EU’s own commitments.

2 Rhetoric and Action

While it is hard to deny that human rights are part of EU foreign policy, there is a virtual consensus among scholars that there is a gap, or at least some inconsistency, between rhetoric and principles and actual performance, the commitment to human rights values expressed in various policy documents and statements

33 Rosa Balfour, Principles of Democracy and Human Rights, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles in European Union Foreign Policy* (2006), 115.

34 *Ibid.*, 115.

35 Balfour (2012), 138.

36 Sonia Lucarelli, Introduction, in: Sonia Lucarelli and Ian Manners (eds.), *Values and Principles*, in: *European Union Foreign Policy* (2006), 14-15.

37 See, in the context of peace operations, Månsson (2009).

38 Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (2008), 272.

39 *Ibid.*, 273.

40 *Ibid.*, 447-448.

41 See Baehr and Castermans-Holleman (2004).

on the one hand, and the role human rights actually play in decision-making.⁴² It applies as a general rule that the legitimacy of “producing and disseminating human rights [...] depends on the system’s ability to develop substantive and procedural rules which apply to all”.⁴³ The adoption of the EU Strategic Framework and Action Plan, together with the human rights country strategies and the thematic human rights guidelines mark an important development in this respect, seeking to address just these types of criticism. Addressing more specifically the EU’s response to the Arab Spring, a 2011 joint communication of the European Union and the European Council cites criticism toward the EU’s role.⁴⁴

A less frequently assessed aspect of the EU’s approach is the very fact of formalization. Rosa Balfour contrasts the process to entrench the goals of promoting human rights and democracy through EU foreign policy to the less formal approach of large states: “No other large state has put on paper that its foreign policy objectives include international action in support of human rights and democratic principles and has created a legal basis to do so”.⁴⁵ She argues that this formalisation provides for an added protection against political change and manipulation – but this does not mean that it also guarantees that these goals are implemented. Elena Jurado talks about legitimate (as opposed to illegitimate) expectations towards the EU concerning human rights promotion, and that we should always keep in mind that the EU is not and should not primarily be a human rights organisation. Common criticisms often fail to consider the limits of the EU, although they can be read as pointing to the inadequate cooperation between the EU and other organisations like the Council of Europe and the UN.⁴⁶

Formalization means that the institutions of the European Union have the obligation to follow the values enshrined in Article 2 TEU in all of their policies and to “consolidate and support democracy, the rule of law, human rights and the principles of international law” (Article 21 TEU) in foreign policy, too. This goal is served by human rights mainstreaming in the foreign policy framework of the European Union, which requires that human rights promotion be part of decisions concerning all tools and instruments of EU foreign policy. The Strategic Framework explicitly states that it will integrate the promotion of human rights “into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy”.⁴⁷ The Action Plan serves as an important guideline for the everyday work within the EEAS.⁴⁸ The EU Special Representative for Human Rights also contributes to the implementation of the Action Plan.

42 Balfour (2012), 2.

43 Jurado, (2006), 124.

44 European Parliament and the Council, Human Rights and Democracy at the Heart of EU External Action – Towards A More Effective Approach, COM (2011) 886 final, Joint Communication to the European Parliament and the Council (12 December 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF> (31 January 2016), 6.

45 Balfour (2006), 127.

46 Jurado (2006).

47 Council of the European Union (2012), 2.

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

In compliance with this goal the Union adopted several documents on mainstreaming human rights among CFSP policies.⁴⁹ This is a targeted response to the inconsistency arguments raised in this section, and marks a conscious, structured, institutional effort from the part of the EU. To cite an example, an interesting pattern of inconsistency is reflected in how the EU uses the Generalised System of Preferences framework to further human rights goals, the withdrawal of benefits showing a clearer stance than the attribution of benefits.⁵⁰

Goals like security and economic development should be compatible with human rights considerations. The Strategic Framework states that achieving “sustainable peace, development and prosperity [is] possible only when grounded upon respect for human rights, democracy and the rule of law”.⁵¹ This creates a framework where any incompatibility with the promotion of human rights directly translates into a serious dysfunction.

Policies developed in various areas like the European Enlargement Policy, the European Neighbourhood Policy, relations with ACP countries and bilateral cooperation with emerging economies, all contain, at least on paper, elements that could be identified as human rights considerations.⁵² However, these elements do not provide for a comprehensive framework – with the exception of the enlargement context – only ‘bullet points’ that can inform the process.⁵³ After the adoption of the Strategic Framework and Action Plan on Human Rights and Democracy, the question arises mostly on the level of application. On a more critical note, Jørgensen argues that human rights considerations can be seen as mere “window dressing” or “luxury goods” that will be dropped as soon as they conflict with weighty (state or EU) interests.⁵⁴

49 See, e.g. General Secretariat of the Council, Mainstreaming human rights and gender into European Security and Defence Policy. Compilation of relevant documents (2008), http://eeas.europa.eu/csdp/documents/pdf/news144_en.pdf (31 January 2016); Council of the European Union, Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions (30 November 2010), 17138/1/10, REV 1.

50 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 (30 September 2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf> (3 March 2016), 35.

51 Council of the European Union (2012), 1.

52 Human rights are made part of bilateral (and multilateral) dialogues at all levels. “European Union undertakes to intensify the process of integrating human rights and democratisation objectives (‘mainstreaming’) into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of mission or the Commission. It will further ensure that the issue of human rights, democracy and the rule of law is included in programming discussions and in country strategy papers.” Council, EU Guidelines on human rights dialogues with third countries – Update, adopted in 2001 and reviewed in 2009, http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf (31 January 2016), 5.

53 Balfour (2012), 137. But see the elaborate mechanism in Art. 96 of the Cotonou Agreement.

54 Jørgensen (2006), 42.

3 Inconsistency Among Third Countries

The consistency argument concerning different third states can be seen as an extension of the non-discrimination principle: there should be genuinely universal rules in place that are, in turn, applied to third states equally, regardless of their power and importance for the EU. Yet, the effect of conditionality, e.g., will largely depend on the relative position of the EU and the target countries. It has been argued that the normative power of the EU has the strongest leverage where there is a relative (power) symmetry between the EU and the respective partner state.⁵⁵ Rosa Balfour argues that, paradoxically, the importance of human rights and democracy can increase with the rise of importance of the country in question.⁵⁶ In the case of Ukraine and Egypt, CFSP was used most in the case of human rights and democracy related issues, at least after 2000.⁵⁷ In such cases, human rights and democracy that are in themselves not first priorities can nevertheless guide policy as third country governments see a danger in these issues interfering with EU foreign policy.⁵⁸ Urfan Khaliq sums up the primary concern with the lack of consistency as follows:

“Any policy aimed at promoting and protecting certain values and principles in all third countries, to be credible and principled, must be coherent and consistent, with little regard to the strategic or economic importance of a third state or the historical considerations that continue to exist in relations with some third states.”⁵⁹

Furthermore, the EU itself can have divergent goals concerning various third countries. The EU as an international actor can be seen as a “multifaceted” actor, with different attitudes towards the Eastern European region (pursuing normative goals) as opposed to other regions, e.g. Russia and Syria where strategic interests played an important role (“Realpolitik”); in conflict zones like Kosovo and Israel-Palestine (“imperialism”); and also in Ukraine and North Africa where the EU is best described as a “status quo player”.⁶⁰ Countries like Australia, China or the United States might seem less scrutinised than other countries.

A general concern towards human rights promotion in EU foreign policy is the patronising attitude that might remind certain third countries of colonialism.⁶¹ This, in addition to the relativist argument, might suggest that human rights promotion in EU foreign policy is nothing more than a new form of imposing Western values and interests on third countries. The very term of “cooperation” and “dialogue” might not be more than a euphemism, if we consider the power balance between the EU and most third countries.⁶²

55 Nathalie Tocci (ed.), *The European Union as a Normative Foreign Policy Actor*, CEPS Working Document No. 281, Centre for European Policy Studies 2008, <http://aei.pitt.edu/7582/1/Wd281.pdf> (31 January 2016).

56 Balfour (2012), 138.

57 *Ibid.*, 141.

58 *Ibid.*, 143.

59 Khaliq (2008), 452.

60 Tocci (2008).

61 Wetzel (2011), 12.

62 As Khaliq notes: “Inconsistency in application, in particular, between developed and developing states and the use of conditionality in relations with the latter, exposes the Union to the accusation of cultural imperialism.” Khaliq (2008), 452.

The relativist argument says that even if states do consider human rights, it is not universal norms that they are furthering, but what is part of their identity, principles flowing from their culture. This might easily slip into an argument underlining human rights promotion in third countries as cultural imperialism. The very fact that human rights promotion is linked to democratisation in EU foreign policy can be seen as a cultural bias.⁶³ If we contrast these objections to the state of international law today, their validity can only be limited: human rights are part of international law and international relations; they are, at least to what could be labelled as core obligations, to be applied universally. The extent of this will of course depend on a number of factors that require a targeted analysis of specific countries and specific rights.

4 Internal and External Policies and Instruments

A 1998 report commissioned by the EU identified the internal versus external inconsistency as the single most serious challenge that is especially detrimental to credibility (with other problems like the marginal position of human rights, informational inadequacies and institutional fragmentation).⁶⁴ The internal and external inconsistency that is pointed out by a wide array of authors (e.g. Jurado, Khaliq, Williams, Wetzel) stems partly from the fact that EU foreign policy itself cuts across various policy areas. Stefania Panebianco describes the comprehensive approach as involving three fundamental components: international trade, with strong economic and financial interests, other political and security considerations in external relations, as well as a social and human dimension.⁶⁵ Jan Erik Wetzel summarises the common criticism as inconsistent behaviour and 'double standards' in trade relations, sanctions, recognition, i.e. between external entities; and "stricter, better sourced, and more effective" external monitoring compared to the internal one.⁶⁶ The common critique blames the EU as an organisation that fails to live up, internally, to the expectations it applies externally. The most notable example is probably the treatment of immigrants and asylum seekers. Because of this, it is hard for the EU to present itself as the promoter of – what Manners identifies as – "the Kantian cosmopolitan rights of hospitality to strangers".⁶⁷ The image of the EU as a human rights model is weakened considerably by the poor immigration record, criticised, e.g. by the UNHCR, on its foundational levels.⁶⁸ The most recent migration challenge seems to be detrimental to this image. In many cases this is actually criticism concerning the human rights practices of the member states rather than the EU as such, see, e.g., the situation of the Roma.

63 Jurado (2006), 129.

64 Antonio Cassese, *Leading by Example: A Human Rights Agenda for the Year 2000: Agenda of the Comité des Sages and Final Project Report*, European University Institute 1998, cited in: Jurado (2006), 119.

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

66 Wetzel (2011), 12-13.

67 Manners (2006), 39.

68 Jurado (2006), 127; claiming that EU policies violate the UN Refugee Convention.

Smith argues that it seems to be “easier to reach agreement on issues surrounding rights in accession candidate countries and rights in third countries than to secure agreement on statements intra member states”.⁶⁹ Enlargement is itself at the boundary between external relations and internal policies,⁷⁰ where a distinct type of inconsistency has been voiced, i.e. that higher standards are applied to applicants than to member states themselves.⁷¹ Lina Grip shows how inter-institutional fragmentation plays a role in inconsistency between policies as well as internal versus external policies.⁷² In addition to inconsistency between internal and external policy, we can identify inconsistency across internal policies as well.⁷³ The following section will review the institutional aspect.⁷⁴

5 Fragmentation Across Levels and Institutions: “Too Many Voices”

The picture gets complicated once we consider that what appears at the international level as EU foreign policy falls partly under national and partly under EU competence. As a consequence, different EU bodies might have a decisive role, also depending on whether the action in question is trade-related or more strictly a security consideration. Often, most common issues with human rights promotion as part of EU foreign policy are related to the lack of harmonisation between institutions, departments, and “their ad hoc planning methods”.⁷⁵ It should be noted that the establishment of the EU External Action Service and its efforts towards better cooperation and more consistency (e.g. Council Working Party on Human Rights, COHOM; the Commission’s Inter-Service Group on Human Rights; Contact Group on Human Rights)⁷⁶ seek to address this problem.

69 Rhona K.M. Smith, *Monitoring and Enforcing Fundamental Rights. Can the European Union Measure Up Against Other International Organizations?*, in: Jan Erik Wetzell (ed.), *The EU as a “Global Player” in Human Rights?* (2011), 38.

70 Balfour (2006), 119.

71 See, e.g. in the field of minority rights James Hughes and Gwendolyn Sasse, *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*, *Journal on Ethnopolitics and Minority Issues in Europe* 1 (2003), 1-36; and Michael Johns, ‘Does as I say, not as I do’: *The European Union, Eastern Europe, and Minority Rights*, *Eastern European Politics and Societies* 17 (2003) 4, 682-699, or Christophe Hillion, *Enlargement of the European Union – The Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities*, *Fordham International Law Journal* 27 (2003), 715.

72 Lina Grip, *Mapping the European Union’s Institutional Actors Related to WMD Non-Proliferation*, *Non-Proliferation Papers* 1 (2011), EU Non-Proliferation Consortium.

73 Khaliq (2008), 451.

74 For a review of coherence and consistency on the institutional level and the interplay between internal and external policies in this respect, see Tamara Lewis, with contributions from Wolfgang Benedek, Adina Raducanu Daniela Amann, Anna Müller-Funk, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies*, *FRAME Deliverable 8.1* (29 September 2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> (4 March 2016).

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

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

EU and national foreign policy instruments can support each other, in their dealings with third states – like bilateral and multilateral methods can be effectively used in combination⁷⁷ – but one can just as well weaken the others. The institutional fragmentation, also within one institution (e.g. the Commission) can also aggravate the inconsistency.⁷⁸ The most recent example is the migration and the treatment of asylum-seekers. Criticism of the lack of unified action should not hide the fact, however, that in many cases collective action with dissenting voices is still better than action by the individual member states, even if internal division hinders not only decision-making, but implementation as well, limiting the role the EU plays on the political level.⁷⁹

Considering this heterogeneity, it is not surprising that the most common criticism is exactly the fact that the EU speaks with too many voices at the international level. Most would add that until it manages to overcome this diversity, it will never be effective in pursuing its foreign policy goals, and this situation has been aggravated by the consequent enlargements.⁸⁰ E.g. concerning the EU's presence at the level of the UN, there has been attempts to address this and research has shown that “[u]nder the Lisbon Treaty, there is a visibly better strategic planning for and coordination of the EU actions at the UN human rights fora”.⁸¹

While it is inconsistency that is most feared and criticised, reducing the EU to ‘one voice’ might not be an attractive option from a pluralist perspective. A lesson learned from the totalitarian past of Europe,⁸² and a requirement of consistency on a different level, the approach valuing diversity is essential to maintain plurality. (With an obvious limitation that a member state invoking plurality against EU intrusion should observe plurality internally.)⁸³ Marton Varju argues that “European human rights law as a product of Europe to export [...] is a legal compound characterised not only by its shared principles or concepts, but also by its internal diversity, which is its intrinsic and protected characteristic and value”.⁸⁴ The EU is usually seen (or presents itself) as a champion of diversity. This comes from its internal structure, composed of member states with varying constitutional traditions and approaches that nevertheless show common elements that arguably amount to a common European constitutional tradition. The EU could, building on these experiences, show sensitivity to cultural differences in its external relations all the while maintaining strong and truly universal human rights standards.

77 Janne Haaland Matlary, *Intervention for Human Rights in Europe* (2002), 57.

78 Jurado (2006), 127.

79 Urfan Khaliq identifies the lack of confidence and credibility as one of the main problems in the EU's approach to the Israeli-Palestine conflict. Khaliq (2008), 395-403.

80 Ibid., 450-451.

81 Grażyna Baranowska, Anna-Luise Chané, David D'Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki and Anna Połczyńska, *Report on the analysis and critical assessment of EU engagement in UN bodies*, FRAME Deliverable 5.1 (30 November 2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf> (7 March 2016), 225.

82 Lucarelli and Manners (2006), 214.

83 See Matej Avbelj, *The Hungarian Dilemma from a Pluralist Perspective*, *Verfassungsblog* (8 May 2013), <http://www.verfassungsblog.de/the-hungarian-dilemma-from-a-pluralist-perspective> (31 January 2016).

84 Marton Varju, *European Human Rights Law as a Multi-Layered Human Rights Regime. Preserving Diversity and Promoting Human Rights*, in: Jan Erik Wetzel (ed.), *The EU as a “Global Player” in Human Rights?* (2011), 65.

Yet, plurality and diversity can never compromise minimum standards. For a constant balancing endeavour, central to human rights, see e.g. the margin of appreciation doctrine of the European Court of Human Rights.

Finally, there are areas of action on the international level, like in the UN Human Rights Council, where the lack of (internal) unity cannot be blamed for the waning influence; there it is due to growing opposition coming from various developing countries.⁸⁵ Seeking internal cohesion will not solve this problem, and we might need to look more into the content of foreign policy strategies.

6 Inconsistency in Content: What Kinds of Rights?

An important aspect of inconsistency that I cannot address here in detail⁸⁶ is to what extent the EU's actions follow the idea of indivisibility of human rights. The universality of human rights is emphasised in all relevant EU statements and documents.⁸⁷ The common criticism is that socio-economic rights get less attention in external relations. Williams argues, on the other hand, that the situation was actually better (pre-Lisbon) in foreign policy, and the term 'human rights' itself bore a different meaning in the external and the internal context: while it was understood broadly in the former, when applied to internal EU policies, they were often restricted to political and civil rights, sometimes including social, economic, and cultural rights.⁸⁸ This has arguably changed with the entry into force of the Charter of Fundamental Rights.⁸⁹

Inconsistency can happen within the realm of civil and political rights as well. Khaliq points out that there is a certain inconsistency as for the internal standards of human rights considerations, e.g. freedom of expression gaining more attention than cases of torture and slavery.⁹⁰ One possible standard of consistency might be to contrast the EU's approach to international legal standards. Here Khaliq finds a mismatch between the international law framework and certain EU foreign policy decisions. While punitive actions based on gross and systematic violations of human rights have more foundation in international law,⁹¹ the European diverts from these standards by intermingling them with democracy.⁹² This does not by itself render the EU's approach inconsistent. It can actually make it a

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

86 For a more complete overview, see the relevant section of the FRAME report: Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, *Report on mapping, analysing and implementing instruments*, FRAME Deliverable 6.1 (31 December 2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf> (31 January 2016), 63-69.

87 See, e.g. Council of the European Union (2012).

88 Andrew Williams, *EU Human Rights Policies. A Study In Irony* (2004).

89 See especially its chapter "Solidarity".

90 Khaliq argues that, with its responses to breaches of democratic principles, the EU is actually contributing to an emerging customary norm. Khaliq (2008), 271.

91 See, e.g., the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147 of 16 December 2005.

92 *Ibid.*, 449.

genuinely European approach to dealing with systemic violations, seeking to trigger change on the political level, which then will lower the danger of future violations. What it means is that there might be a tension between the European agenda (pushing for democratic changes, at least on the level of stated goals) and the international legal approach (considerably weaker when it comes to democratic goals).

Inconsistency on the level of the various rights that the EU seeks to promote might be a result on what we have identified earlier as a tension between human rights norms and (narrowly construed, often directly trade-driven) interests (section C.1 above). Burchill reckons that the main issue is not so much a 'double standard', but the dependence of human rights enforcement on the goals of economic integration that is present both internally and externally.⁹³ He draws a parallel between the Washington Consensus and the 'Brussels Consensus', both of which mark an approach that allows the free market to trump human rights.⁹⁴ A quote from a Commission document might exemplify this agenda:

"the Union works with other countries and international organisations to bring everyone the benefits of open markets, economic growth and stability in an increasingly interdependent world. At the same time, the EU defends its legitimate economic and commercial interests in the international arena."⁹⁵

The difficulty arises partly from the fact that the content of rights, values and principles is contested. They do not necessarily have a shared meaning, and can themselves be heterogeneous or, as Knud Erik Jørgensen put it, not "playing in the same league".⁹⁶

A point of departure to build a shared understanding is a comprehensive list of human rights areas, the substance and the scope of human rights promotion. The Action Plan implementing the EU Strategic Framework and the EU Annual Report on Human Rights and Democracy in the World in 2012 identify the priorities that cover a wide range of human rights issues.⁹⁷ The list shows the priorities of the EU, manifesting a strong emphasis on what is usually termed "first generation rights", with the notable exception of "economic, social and cultural rights, labour standards". Yet, the Union seeks to promote all types of rights.⁹⁸ Takács

93 Burchill (2011).

94 Ibid., 31.

95 European Commission, *A World Player: The European Union's External Relations*, Luxembourg, EC Publications (2004), 3, quoted in: Burchill (2011), 29-31.

96 Jørgensen (2006), 42-43.

97 These are: fight against death penalty; torture, cruel, inhuman and degrading treatment; freedom of expression, religion and belief; democracy, electoral process; children's rights; women's rights, gender-based violence, gender mainstreaming; LGBT rights; minority and indigenous rights; disability rights; economic, social and cultural rights, labour standards; development cooperation; trade policy, business and human rights; accountability; administration of justice; support to human rights defenders; terrorism and human trafficking; and international humanitarian law. Council of the European Union (2012), 14-21; Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012* (13 May 2013), 9431/13, 71-121.

98 The European Union promotes respect for human rights at home and abroad. It focuses on civil, political, economic, social and cultural rights. It also seeks to promote the rights of women and children as well as of minorities and displaced persons. European Commission (2004), 7, quoted in Burchill (2011), 29-31.

emphasises the problem that bilateral solutions create by adding to the fragmentation (going against universal enforcement of existing ILO standards) and the perception of favouritism, based on the relative negotiating power.⁹⁹ The EU's weak record in the field of economic and social rights often manifests itself at the level of tools and instruments, too. See, e.g. the EU policy guidelines on human rights dialogues with third countries adopted by the Council.¹⁰⁰ A contradiction, already pointed out in the context of enlargement, is present regarding minority rights.

The Strategic Framework specifically addresses this issue, pledging to “intensify [...] efforts to promote economic, social and cultural rights”, implying that not enough attention had been paid to this area.¹⁰¹ Furthermore, the updated Action Plan adopted in 2015 “[r]eaffirm[s] the EU commitment to increase its focus on ESCR in EU's external policy”, specifically addressing the question of corporate social responsibility “as regards both civil and political rights and economic, cultural and social rights”.¹⁰²

7 Reactive and Proactive Approaches, Synergies and Vagueness

Even when human rights are driving foreign policy choices, the use of EU instruments remains reactive, and on that level, too, they fail to follow the occasional improvements in the respective partner countries, as happened in the case of the Orange Revolution in Ukraine and that of the Arab Spring.¹⁰³ The Council of the European Union, in its report on the implementation of the European Security Strategy, acknowledges that there is a need to strengthen the proactive approach: the EU “must be ready to shape events”, the EU should become “more strategic in [its] thinking, and more effective and visible around the world”, as success can be best achieved if the EU “operate[s] in a timely and coherent manner”.¹⁰⁴

The Strategic Framework acknowledges this challenge as a problem with coherence. Under the title “pursuing coherent objectives” it mentions the goal to prevent violations and help victims and the need to “strengthen its capability and mechanisms for early warning and prevention of crises liable to entail human

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

100 EEAS, EU guidelines on human rights dialogues with third countries – Update (2001), Review adopted 19 January 2009, http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf (31 January 2016).

101 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (25 June 2012), 11855/12, 2, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (31 January 2016).

102 European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019), Keeping human rights at the heart of the EU Agenda (28 April 2015), JOIN (2015) 16 final, Joint Communication of the Parliament and the Council, https://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf (31 January 2016), 13-14.

103 Balfour (2012), 136.

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

rights violations”.¹⁰⁵ If human rights conditionality is largely reaction-driven, that might result in measures that are sporadic and ad hoc, consistency will suffer. Furthermore, as the response of the EU to human rights developments in third countries remains largely reactionary, it fails to trigger change. Rosa Balfour argues that despite the diverse elements at the EU’s disposal, from foreign aid to negative instruments, without capitalising on the synergies between these components, the EU will not have the impact it could and seeks to have.¹⁰⁶ Largely as a consequence of information scarcity, traditional diplomatic instruments can lack the specificity required for effective human rights promotion. If démarches and other statements remain too vague, this can raise “doubts on the EU’s commitments to the human rights principles it claims to stand for”.¹⁰⁷

8 Change Over Time, Prioritization and Depth

There are three aspects of inconsistency arguments that are probably the hardest to assess, namely the temporal element, prioritization and the depth of the changes sought. Shifting priorities, over time, and decisions on prioritization might be a result of valid concerns as well as of arbitrary differentiation. The lack of prioritisation itself lead to inconsistency and uncertainty. In the European Neighbourhood Policy and the European Security Strategy it has been defined as of equal importance “to spread democracy, human rights and good governance outside the Union’s borders as well as to create a ‘ring of friends’ for the pursuit of stability and security”.¹⁰⁸ Lucarelli and Manners argue that the requirement of consistency unavoidably conflicts with the need for pragmatism. Double standards – clearly contradicting the application of principles – hurt the normative power that the EU claims in its international dealings.¹⁰⁹ What some call incoherence, ‘mismatch,’ or ‘bifurcation’,¹¹⁰ others might call a “flexible adherence to principles” required by a compromise between idealism and pragmatism.¹¹¹

It is impossible to judge, in the abstract, whether shifting priorities and uneven emphasis on various human rights issues is a result of delicate and sensitive balancing or simply incoherent policy. E.g., in the case of enlargement conditionality in the Western Balkans, eased conditions might be justified with the goal to keep countries on the integration path, most importantly Bosnia and Herzegovina, doing otherwise would risk domestic and regional destabilisation and the general frustration of the EU’s human rights goals, instead of limited backsliding.¹¹² A contrary view could hold that it is exactly the move to give too much flexibility

105 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (25 June 2012), 11855/12, 2, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (31 January 2016).

106 Balfour (2012), 136.

107 Jurado (2006), 126.

108 Balfour (2012), 145.

109 Lucarelli and Manners (2006), 207-208.

110 Williams (2004).

111 Balfour (2006), 128, referring to Knud Erik Jørgensen; and Jack Donnelly and Chris Brown, see Lucarelli and Manners (2006), 213.

112 For an overview focusing on Bosnia and Herzegovina and Serbia, see Susanne Fraczek, Beáta Huszka and Zsolt Körtvélyesi, The role of human rights in the EU’s external action in the Western Balkans and Turkey, FRAME Deliverable 6.2 (forthcoming), Chapters II-III.

that puts human rights conditionality at risk, by rewarding reluctance and non-compliance with eased standards.

Finally, differentiation and prioritization should be sensitive to difference in the “depth” of changes, going beyond the application of “flat” consistency. Too much emphasis on formal measures – e.g. reforms on the level of legislative changes, creating institutions without challenging the existing social and power structures – might risk easy backsliding after accession happens as the case of Hungary aptly shows, with Poland catching up quickly. Rewarding easy changes pushes domestic decision-makers towards reforms that are equally easy to revert, questioning the ultimate goal of human rights conditionality.

D Conclusion

We have seen that promoting human rights raises issues both from the perspective of foreign policy and human rights. This article has provided an overview of the various sources of criticism of human rights promotion in EU foreign policy, with the assessment of the theoretical background. Inconsistency arguments remain central to debates about the role of the EU in human rights promotion, and this phenomenon was elevated to a new level with the EU’s inability to deal with asylum seekers. The overview has showed that inconsistency might mean a series of distinct considerations, even if they are often interrelated. While the tension between what are termed ‘values’ and ‘interests’ usually reflects a distorted view of both concepts, there is a true tension between words and action. One challenge to this is presented by institutional fragmentation. While diversity is as much an asset as a challenge, plurality of opinions across member states and EU institutions – both internally and along the internal-external divide – can easily frustrate efforts to effective human rights conditionality. There should be a sustained effort to maintain coherence and consistency regarding the relations with different third states and concerning various types of human rights, taking the idea of indivisibility seriously.

A more complex picture emerges when we look at further aspects of the inconsistency argument. It is hard to attain consistency when the application of foreign policy tools and instruments remain reactive rather than proactive. Finally it is important to keep in mind that variation might be as much a result of arbitrariness and inconsistency as fine-tuned prioritization. In many cases it is exactly the lack of prioritization that ends up impeding efforts to improve the human rights situation. This can take the form, e.g., of a lack of regard to the depth of changes, rewarding formal compliance, which goes against the overall goals of human rights conditionality. These are all considerations that should play into our assessment of whether EU human rights conditionality is coherent and coherence, otherwise we risk a consistency review that is itself inconsistent.