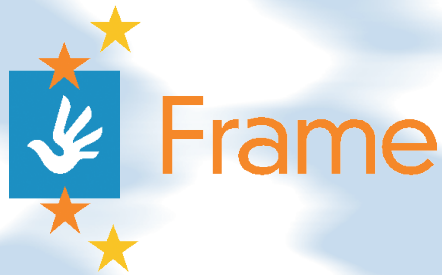# THE DANISH INSTITUTE FOR HUMAN RIGHTS

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FACTORS WHICH ENABLE OR HINDER THE PROTECTION OF HUMAN RIGHTS

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Factors which enable or hinder
the protection of human rights

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Preface

The EU today stands at a crossroads with regard to human rights: although human rights are high on its agenda the EU is facing multiple challenges of carrying the torch of human rights, within EU Member States and in relation to the wider world.

These challenges are the focus of FRAME, an interdisciplinary research project on Fostering Human Rights Among European (External and Internal) Policies. FRAME is a large-scale, collaborative research project funded under the EU's Seventh Framework Programme (FP7), coordinated by the Leuven Centre for Global Governance Studies and involving 19 research institutes from around the world. Our research focuses on the contribution of the EU's internal and external policies to the promotion of human rights worldwide.

In this series of publications, we have collected some of the work carried out by researchers and other experts at the Danish Institute for Human Rights, in collaboration with researchers from other universities, as part of the FRAME project. The four publications have been written with contributions from scholars and experts from The Ludwig Boltzmann Institute of Human Rights, Vienna; European Training and Research Centre for Human Rights and Democracy, Graz; University of Seville; Leuven Centre for Global Governance Studies, KU Leuven, and the Danish Institute for Human Rights.

In our work we have aimed at illuminating contemporary human rights challenges by way of analysing the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that both facilitate and hamper the efforts of the EU in its efforts to promote and protect human rights, within the EU and in the world at large.

It is hoped the insights gained from this research may contribute to informing the debate – among human rights academics, practitioners, civil society, and policy-makers - about the EU's future direction in the important field of human rights.

April 2017

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Executive Summary

In assessing the factors that influence the protection and promotion of human rights in the European Union (EU), this report elucidates those factors that cut across the catalogue of human rights. This report seeks to examine contemporary human rights challenges in this context by mapping the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that both facilitate and hamper human rights in the EU.

This report is part of Work Package 2 'Challenges and Factors' of the EU's Seventh Framework Programme (FP7) project Fostering Human Rights among European Policies (FRAME). This first cluster of FRAME constitutes the foundations of a sound knowledge base for the assessment of EU human rights policies, encompassing the evolving factors, concepts, institutions and instruments that underlie human rights protection and promotion.

The objective of the report is to analyse these crucial factors while taking into account challenges brought about by globalisation, with a focus on access to basic rights. The report does this through the provision of a qualitative mapping addressing the major topics related to each factor. The report is divided into 10 chapters and provides a chapter on each of the above cross-cutting factors, including an overview of the factor drawn from a literature review, an assessment of current knowledge of the factor and its impact on human rights in the EU, and challenges and gaps requiring further study.

The report canvasses the major landmarks in EU history, with a view both to its external and internal policies (Chapter II, Historical), before addressing the inherently political nature of human rights themselves and the importance of States, sovereignty, ideologies, power, citizenship and democracy to their implementation (Chapter III, Political). Turning to legal factors, the report considers the coherence of obligations within the EU; whether the EU is bound by human rights obligations when acting externally; the relationship of human rights obligations and other international law norms; and finally shared human rights responsibility between the EU and Member States (Chapter IV, Legal).

Taking post-crisis Europe as its departure point, the report analyses the economic dimensions of human rights in the EU, including the significance of economic decline, the internal market, poverty, employment, foreign policy, and development and trade (Chapter V, Economic). Turning to social factors, the report addresses the importance of the principle of non-discrimination in EU policy and institutions, before specifically considering the aspects of gender, sexual orientation, disability and age (Chapter VI, Social).

The report then zooms in on cultural and religious factors. Taking a dualistic approach, this chapter focuses on those cultural and religious factors which may hinder or facilitate EU human rights policies as well as topical human rights issues which have a substantial impact on the space provided for culture and religion in a human rights context (Chapter VII, Cultural and Religious). Closely related to cultural and religious factors, the report proceeds to ethnical factors, addressing in particular ethnic minorities and their enjoyment of basic rights (Chapter VIII, Ethnical).

The report goes on to consider the importance of technological factors in relation to human rights policies in the EU. This chapter analyses non-discriminatory access to the internet; protecting internet freedoms;

freedom of expression and self-regulation; privacy, surveillance, and cyber security; and internet governance (Chapter IX, Technological). Finally, the report concludes with a summary of the chapters, key insights from each factor, and recommendations for further study and analysis.

The EU today stands at a crossroads with regard to human rights. Taking into account, historical, political, legal, economic social, cultural, religious, ethnical and technological factors that enable or hinder human rights protection, this report sets out the cross-cutting issues that may inform the Union's future direction.

List of abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AR5	The Assessment Report on Climate Change 2014: Impact, Adaptation and Vulnerability
BRIC	Brazil, Russia, India and China
CEO	Chief Executive Officer
CERD	Committee for the Elimination of All Forms of Racial Discrimination
CERT	Computer Emergency Response Teams
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of European Union
CoE	Council of Europe
COHOM	Human Rights Working Group of the Council of Europe
COHRE	Centre on Housing Rights and Evictions, European Committee of Social Rights
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organizations
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court of Human Rights
EDRi	European Digital Rights
EEAS	European External Action Service
EEC	European Economic Community
EFSF	European Financial Stability Facility
EIDHR	European Instrument of Democracy and Human Rights
EPAP	European Platform Against Poverty

ESM	European Stability Mechanism
EU	European Union
EURODIG	European Governance Forum
FRA	European Union Agency for Fundamental Rights
HRC	UN Human Rights Committee
IANA	Internet Assigned Numbers Authority
ICANN	International Corporation for Assigning Names and Numbers
ICCPR	International Convenant on Civil and Political Rights
ICJ	International Court of Justice
ICT	Information and Communication Technology
IGF	Internet Governance Forum
IHRL	International Human Rights Law
ILC	International Law Commission
IMF	International Monetary Fund
IPCC	The United Nations Intergovernmental Panel of Experts on Climate Change
IPR	Intellectual Property Rights
ISP	Internet Service Provider
LAs	Local Authorities
LGTB(IQ)	Lesbian, Gay, Bisexual, Transgender, (Intersex, Questioning)
LIBE	The Committee on Civil Liberties, Justice and Home Affairs
MDG	Millennium Development Goals
OHCHR	United Nations Office of the High Commission for Human Rights
OIC	Organisation of Islamic Cooperation
OJ	Official Journal of European Union
OMC	Open Method of Coordination

OMT	Outright Monetary Transactions
PI	Privacy International
PRISM	Electronic surveillance launched by the US National Security Agency (NSA)
TCN	Third-country national
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFEU	Treaty on the Functioning of the European Union
TNCs	Transnational Companies
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WG II	The Working Group No 2 of the IPCC
WSIS	UN World Summit on the Information Society
WTO	World Trade Organization
WW2	World War2

Table of Contents

I.   Introduction

A.   Mapping key cultural, economic, ethnical, historical, legal, political, religious, social and technological factors

Regional and international differences notwithstanding, a number of factors cut across the catalogue of human rights and significantly influence the protection of the rights of the individual as well as those regional and international mechanisms and instruments entrusted to make human rights a reality. Among the most decisive are historical, political, legal, economic, social, cultural, religious, ethnical and technological factors. The present report provides a mapping of how these factors enable or hinder the protection of human rights in the context of the European Union's (EU) external and internal policies, taking into account challenges brought about by globalisation. The report addresses these factors with a particular focus on the access to basic rights but within the framework of a holistic approach to human rights, acknowledging the indivisibility of human rights as laid down in international as well as EU human rights law.

The report provides an overview of the factors, and, based on a literature review and available data, an assessment of the current knowledge on the impact of these factors on the protection of human rights in the context of the EU. The report furthermore points to challenges and gaps that need further exploration and analysis (for the most part to be carried out in future work under the auspices of FRAME).

B.   Methodology

For the purpose of this report, the term 'factor' has been defined as an element, circumstance or distinguishing feature which in the context of the EU's external and internal policies significantly enables or hinders the protection of human rights. A factor is to be understood in a dynamic way, developing in interaction with changes in society and law.

The report has the nature of a qualitative mapping. Therefore, whilst the aim has not been to give an in-depth study of the field, the authors have strived to provide a comprehensive mapping in the sense that major topics related to each factor are illuminated.

The report is divided into a total of 10 chapters: following the introductory chapter and chapter on historical factors (which also serves as an overarching framework for the entire report), a majority of the chapters have been structured as follows:

- An introduction to the literature covering the given factors with an emphasis on scientific literature.
- The Global context. This section provides a contextualisation of the factor at the global level, identifying issues which hinder or enable the protection of human rights in EU's external and internal policies.
- The European context. This section makes up the substantial part of the chapters. Based on a literature review and an introduction to the relevant EU institutions, instruments, policies and actions, the chapters aim to identify and discuss a series of issues within the given factor which hinder or

enable the protection of human rights in the context of EU external and internal policies. The mapping exercise will be conducted in view of, for instance, the policies and practices of the EEAS and of the most relevant directorates-generals of the European Commission such as DG Trade, DG DevCo, DG JUST, DG Home and DG CONNECT. The following elements have been considered when analysing the literature and documents: human rights implications and impact of the factors in question; the main instruments and policies dealing with the issue; and the social actors involved (such as civil society and societal movements).

The chapters on political and social factors respectively have mostly but not entirely followed this structure. To contextualise political factors in a global context would for example have gone beyond the scope of this report. Thus the chapter on political factors focuses on a short definition of the different factors followed by a brief discussion on the most important ways in which the respective political factor hinders or enables human rights protection. Subsequently, the chapter elaborates on the role of the respective factors in the EU context. Equally, social factors are more dependent on aspects which refer to the nature and constitution of the EU and less dependent on the global context.

C. Contents of the report

Chapter I, the Introduction, contains the main preface to reading the report.

Chapter II sets the scene for the report by pointing to historical factors (circumstances or events) that have been hindering or facilitating the EU's development of human rights protection and policies, in its internal and external actions. The chapter includes historical landmarks from post-war Europe until today. The chapter shows how the EU responded to the historical circumstances or events in ways which have had a bearing on its present-day human rights positions as well as on current challenges (for instance the scope of EU human rights law and elements of incoherence between the EU's internal and external policies). The historical evolution of important human rights institutions and instruments, which emerged, directly or indirectly, as a result of the response of the European Community to historical circumstances is outlined. The chapter also includes historical factors on the global scene which have had an enabling or hindering influence on the EU in its human rights position.

Chapter III concerns political factors enabling or hindering protection of human rights, themselves deeply political. They are defined in a political context by political actors or within political institutions. They are used as political instruments in political campaigns and the definition of human rights norms and standards are political issues, sometimes highly contested. It is important to emphasise that political factors that hinder or enable human rights are relevant to several political dimensions: the dimension of politics, which refers to political processes, as well as the policy dimension, meaning the content or substance of politics, and, in addition, political structures. Thus, the following political factors were identified to be crucial aspects concerning the implementation of human rights in EU policies: States and state sovereignty, ideologies, power, citizenship and democracy.

In Chapter IV, focus is on legal factors, with four main topics discussed. Firstly, to what extent the EU and Member States implementing EU law are bound by clear and consistent human rights obligations when acting internally within the EU area. There is a specific focus on the EU Charter on Fundamental Rights

(CFREU) and the accession of the EU to the European Convention on Human Rights (ECHR) and eventually to other international human rights conventions. Secondly, whether the EU is bound by human rights obligations when acting externally and more specifically whether the CFREU is applicable when the EU is acting in third States. Thirdly, the relationship between EU human rights obligations and other international law obligations; and finally the question of shared human rights responsibility between the EU and EU Member States is briefly touched upon.

Chapter V concerns economic factors. The point of departure for the analysis is the situation in Europe after 2008 when the economic and financial crisis developed. The overview focuses on the economic decline, the functioning of the internal market, poverty and social exclusion, employment, and development and trade. The implications of the crisis affected human rights protection more profoundly internally than externally. The chapter demonstrates how internally, the economic and financial crisis contributed to a deterioration of adequate living standards, social security, and a growing sense of exclusion. The crisis also resulted in growing unemployment and exclusion of a high proportion of the youth from the labour market. Surveys, moreover, demonstrate a lack of trust in the benefits of the internal market.

Chapter VI focuses on social factors. The EU has made significant efforts to address social factors which enable or hinder the protection of human rights in its policies. The EU has not only stipulated equality as a basic principle in its primary law but also explicitly enabled EU institutions to take measures to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Furthermore, CFREU widened the scope of grounds of discrimination by prohibiting discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The chapter aims at elaborating on the aspects of gender, sexual orientation, disability and age.

Chapter VII zooms in on cultural and religious factors. The approach of the chapter is dualistic, focusing on those cultural and religious factors which may hinder or facilitate EU human rights policies as well as topical human rights issues which have a substantial impact on the space provided for culture and religion in a human rights context. The chapter starts with an introduction to the topic at a global level, going back to the Universal Declaration of Human Rights (UDHR) and introducing the different phases of the universality debate. After a presentation of the European context of the interplay between human rights, culture and religion, the chapter proceeds to map the following overarching themes, which are amongst the most topical in human rights discourses globally and within the EU, its Member States and third countries today: women and gender in the context of cultural and religious diversity (with focus on external policies); promoting religious freedom and religious and cultural diversity and tolerance; the state, religion and culture.

Chapter VIII concerns ethnic factors. After an introduction to the concepts of intersectional and multiple discrimination, the chapter proceeds to a mapping of major international instruments related to ethnicity and human rights. Then follows an analysis of the instruments and policies of the EU as well gaps and challenges vis-à-vis policies and implementation, followed by an introduction to a number of selected

factors that within the EU and its Member states are of crucial importance to the enjoyment of basic rights of individuals belonging to ethnic minorities, namely access to the labour market, access to health services, access to information, and hate crime. Finally, a section is dedicated to the Roma, the largest ethnic minority group of Europe. A concluding section then sums up the mapping, pointing to gaps and challenges and suggesting avenues for further research and analysis.

In Chapter IX, technological factors are analysed. Technological factors are understood as issues related to the use of information and communication technology (ICT) that have an impact on the way individuals are able to enjoy their human rights. ICT is a broad and not clearly defined term that refers to a broad array of communication devices and/or applications. In this chapter emphasis is on human rights issues related to the use of the internet, reflecting the attention the internet has received in the scholarly literature and policy debate pertaining to its potential impact on individuals' enjoyment of rights such as freedom of expression and privacy. The chapter is structured according to five selected factors: non-discriminatory access to the internet; protecting internet freedoms; freedom of expression and self-regulation; privacy, surveillance, and cyber security; and internet governance.

Chapter X, Conclusions, contains a summary of the chapters and the most important insights to be gained from each of the factors, a reflection on cross-cutting issues, and recommendations for further study and analysis.

The authors of the chapters are credited at the beginning of each chapter. Unmarked chapters (Chapters I and X) were written by Eva Maria Lassen, in collaboration with the group of authors.

II.   Historical factors*

A.   Introduction

This chapter sets the scene for the report by pointing to historical factors (circumstances or events) that have been hindering or facilitating the European Union's (EU) development of human rights policies, in its internal and external actions. The chapter includes historical landmarks from post-war Europe until today. The chapter shows how the EU (and its forerunners) responded to the historical circumstances and events in ways which have had a bearing on the present-day human rights positions (for instance the scope of EU human rights law and elements of incoherence between the EU's internal and external policies). The historical evolution of important human rights institutions and instruments, which emerged, directly or indirectly, as a result of the response of the EU (and its forerunners) to historical circumstances will be outlined. In this sense, the chapter also provides a mapping of how human rights themselves came to be a key feature of the EU architecture. Finally, the chapter includes historical factors at the global level which have had an enabling or hindering influence on the EU in its human rights position.

B.   Structure and methodology

By addressing historical factors, the chapter illuminates three dimensions of the EU: human rights in the EU and its internal policies; EU and its accession policies vis-à-vis new Member States; and human rights in the EU's external policies. The chapter will outline how these historical factors had an impact on the EU (and its forerunners) in these three dimensions.

The chapter largely follows a linear, historically progressing structure, pointing out historical factors which resulted in the gradual evolution of human rights in the context of the internal and external policies of the European Economic Community (EEC), the European Community (EC) and the EU.[1] The chapter is based on a literature review together with a reading of the most important documents reflecting the historical evolution.

1.   Literature review

Scholarship on the history of EU human rights is still in its infancy, as indeed is the history of human rights in general. The history of human rights in Europe is for the most part written by historians and in particular legal scholars, who often provide a brief historical account of the development of, for instance, a given human rights instrument or practice. Scholars of other disciplines have occasionally analysed aspects of the EU human rights history (for instance scholars of philosophy).

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* The author of this chapter is Dr. Eva Maria Lassen, Senior Researcher, the Danish Institute for Human Rights.
[1] A detailed mapping of EU institutions, mechanisms and instruments will not be provided, as these are the object of another WP within the context of FRAME (WP 4.1), and, in addition, described in Chapter IV on Legal factors of the present report.

C.   Discovering human rights: landmarks in the history of the EU

1.   A new beginning: Europe after WW2

The origin of the EU dates back to post-war Europe, with the creation of, firstly, the European Coal and Steel Community in 1951, then the EEC and the European Atomic Energy Community in 1957. The EEC had six founding members. The overall objective of this early constellation was to promote economic integration within Europe.

The human rights project was not part of EEC objectives and hence not a building block of the EEC foundation and structure. The European Parliament pushed for human rights recognition within the EEC as early as the 1950s and 1960s (van Haersolte and Wiebenga 2013), but only much later did human rights enter centre stage.

The European human rights project was left to other regional organisations, notably the Council of Europe, established in 1949. The European human rights project closely followed the human rights agenda of the newly established United Nations, notably expressed in the Universal Declaration of Human Rights (UDHR).

Post-war Europe was a Europe divided. The Cold War and the division of Europe for most of the second half of the 20th century were the most important historical factors as concerns the development of human rights and democracy in the Eastern and Western parts of Europe respectively.

2.   Historical landmarks in EU legal history: the evolution of a human rights architecture and instruments

This section will look at the evolution of the approach of the EEC/EC/EU to human rights, tracing the development from almost silence on the matter to the present day's comprehensive – albeit often disputed – embrace of the human rights project by the EU in the context of its internal and external policies. Major historical landmarks influenced this development.

a)   ECHR, UDHR, and landmark cases of the European Court of Justice (ECJ)

Two historical factors had momentous influence on the eventual emergence of human rights in the make-up of the EU. First, the creation of the European Convention of Human Rights (ECHR) of 1950 (1953) within the framework of the Council of Europe, and the accompanying European Court of Human Rights (ECtHR). ECHR and the jurisprudence of the ECtHR were to be a source of inspiration for the ECJ.

The second historical factor is the adoption of the UDHR of 1948, a result of the attempt of the global community to create a new world based on human rights (Rosas 2009: 418). This declaration is not legally binding upon States, and exactly this fact provided the EEC - which could not ratify UN conventions - with the opportunity to point to the UDHR as 'guiding' and a source of 'inspiration' (Rosas 2009: 417; Rosas 2013). Thus the UDHR had a more inspirational influence on the ECJ than in the Member States, which had ratified the European Convention and other binding documents and therefore saw no need to consult the UDHR as a source of influence (Jaichand and Suksi 2009; Lassen 2009). This had a bearing on the approach of the EEC/EU to the catalogue of human rights. Whereas the ECHR is primarily concerned with

political and civil rights, the UDHR emphasises the interdependence and indivisibility of international human rights, and hence the entire catalogue of human rights. The EU human rights jurisprudence and primary law, which were to emerge, emphasised as the UDHR the indivisibility of human rights, and included not only political and civil rights but also economic, social and cultural rights.

The EEC had no bill of rights, but finding inspiration in the above legal documents and case law, this did not keep the ECJ from gradually building jurisprudence when dealing with matters of relevance vis-à-vis human rights.

A number of landmark ECJ judgments emerged in the 1960s and 1970s, among which the following three deserve mentioning. First, in its judgment of 1969 in *Stauder*, the Court laid down that fundamental rights form part of the general principles of Community law (Rosas 2009: 418; Case 29/69 *Stauder* [1969] ECR 419). Second, in *Internationale Handelsgesellschaft*, the so-called Solange case of 1970, the Court made reference to the 'constitutional traditions common to Member States' (Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125). Third, the judgment of *Nold* in 1974 positions the Community law in the broader perspective of ECHR and internal law: '[…] international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'. Since then, the ECJ has been using ECHR and international human rights instruments when 'applying fundamental rights as *general principles of Community law*' (Rosas 2009: 419; Case 4/73 *Nold* [1974] ECR 491).

b)   *The fall of the Berlin Wall: a new Europe*

The 1990s witnessed the culmination of a decade-long process – and in the late 1980s spurred by the fall of the Berlin Wall and the end of the Cold War, which were to create an entirely new political situation in Europe (Piris 2010: 8) - towards writing human rights into the Community's primary law. The EC replaced the EEC by the Treaty of Maastricht in 1992. The concept of the EU was established by the same treaty, and with the entry into force of the Lisbon Treaty in 2009, the EU legally replaced the EC. This change of language reflected that the European economic integration communities had developed into a political as well as an economic entity.

By the same token, human rights were proclaimed as foundational. Human rights became a cornerstone of the reconstructed Community. In the Treaty of Maastricht, human rights were proclaimed as fundamental to the EU, thus in Art. F(2) of the Treaty on the European Union (TEU):

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The Treaty of Lisbon, entered into force in 2009, further cemented human rights as foundational for the EU, namely in the new Art. 2 of the then amended TEU:

> 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. (Art. 1a)

The EU Constitutional Treaty of 2004 promised to be of major historical significance. However, as the constitution was rejected by popular referendum in 2005 by France and the Netherlands, this important document never came into force (van Haersolte and Wiebenga 2013: 163).

Instead, a milestone in EU human rights history occurred in 2000 with the creation of the Charter of Fundamental Rights of the European Union (CFREU). This constitutional documents proclaims that:

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

> Conscious of its spiritual and moral heritage, the Union is founded on indivisible, universal values of human dignity, freedom, equality and solidarity; it is supported on the principle of democracy and the principle of the rule of law. It places the person in the centre of its actions, establishing the citizenship of the European Union and creating a space of freedom, security and justice (Preamble).

In 2009 the Charter became legally binding, in accordance with the Treaty of Lisbon. The catalogue of rights found in the Charter is more comprehensive than the ECHR. Not only does the Charter contain economic, social and cultural rights but, for instance, rights concerning data protection and bioethics. At the same time, however, the scope of the Charter is more limited than ECHR, notably in the sense that the Charter explicitly only applies to EU institutions and Member States when they implement EU law (Art. 51(1)). Other limitations apply and ambiguities embedded in the Charter and interpretations thereof have resulted in the scope, vis-à-vis both Member States and third countries, being continuously negotiated and subject to debate (see also Chapter IV.C.1.a).

Another milestone in EU history is the possibility of acceding to the ECHR and of ratifying international conventions. According to the Lisbon Treaty, the EU is bound to accede to the ECHR, and the process of accession is currently underway. As far as international conventions are concerned, so far only one convention has been ratified by the EU, namely the UN Convention on the Rights of People with Disabilities (ratified in 2011, see Chapter VI on Social factors, Section D). Although the ratification of international conventions as well as accession to the ECHR open up the possibility of a strengthening of the human rights regime of the EU, uncertainties about the scope and limitations vis-à-vis Member States as well as third countries abound (see also Chapter IV).

c)   *New Member States*

Whereas today the EU regulates the protection and promotion of human rights in Member States to a limited extent only, the ECC/EC/EU has historically been focused on its request for candidate countries to adhere to human rights nationally. In fact, the emphasis on human rights in the accession policy of the EU was a major step towards putting human rights on the map in the EU. In the accession policy of the Community can be observed a pronounced 'before and after' the end of the Cold War.

In the first phase, in which a number of Western European states were admitted to the Community, human rights were to various degrees an implicit condition (Williams 2004: 53-59).[2]

The second phase came as a response to the fall of the Berlin Wall in 1989, the collapse of the Soviet Union, and the devastating conflicts in the Western Balkans - all dramatic historical events, which were to have monumental influence on the development of human rights in the EU. It was not a foregone conclusion how the EU should react to these events. However, the Community chose to embrace the European peace project, endeavouring to promote stability and security in the region, and invited Central and Eastern European countries of the former Soviet Union to become members.

The enlargement has been called a 'milestone in the creation of modern European peace' and the 'most consequential codification of a transition to market-based liberal democracy' (Tassinari 2013: 29). The enlargement was a historic step in facilitating the democratisation process and the endorsement of human rights in a united Europe. This achievement led to the EU receiving the Nobel Prize in 2012.

In this second phase of the enlargement of the Community following the collapse of the Soviet Union, *explicit conditionality* was central (Williams 2004: 59-61). Thus human rights clauses were included in the European agreements concluded with candidate countries before the accession to the EU in 2004 (10 new members), 2007 (two new members), and 2013 (one new member) respectively (Rosas 2009: 426). The 'Copenhagen criteria' of 1993 laid down criteria for accession of new countries to become members of the EU. According to the Copenhagen criteria a new Member State must, prior to accession, *inter alia*, be able to demonstrate that they have 'institutions that guarantee democracy, the rule of law, human rights and respect for an protection of minorities' (European Council 1993). With comprehensive approval procedures put in place, these conditions supported the democratisation processes in candidate countries (Williams 2004: 64) and thus facilitated increased human rights protection.

The fall of the Soviet Union and the ways in which the EU chose to respond to these historical events had implications for human rights protection in the EU's policies in a broader sense, going beyond the policies vis-à-vis candidate countries. First, with the increased focus on the importance of candidate countries' adherence to human rights within their jurisdiction, attention was almost automatically drawn to the human rights situation of existing EU Member States as well, and charges of incoherence in the position of the EU vis-à-vis Member States and candidate countries respectively were raised. Second, the enlargement of the EU has, potentially at least, made the EU a more forceful player at the global level.

d)   *Adapting to historical circumstances: Establishing new institutions*

The ever-increasing importance of human rights to the EU is reflected in the institutions and instruments established alongside the reconstruction of the European Communities in the 1990s as well as later structural changes and innovations. For example, the position of Commissioner for Justice, Fundamental Rights and Citizenship, with the concurrent Directorate-General for Justice, was created in 2010, following the division of the former Justice, Freedom and Security. In addition, specific human rights are increasingly being dealt with by relevant Commissioners, for instance related to health, climate, and education (for

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[2] For the date of accession of new Member States in the period 1973 – 1995, see Piris 2010: 3.

institutions engaged in EU external policies, see below). Also worth mentioning is the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).

EU primary law on human rights is applicable to the EU and its institutions only, with the exception of areas where EU law applies to the Member States, who would otherwise adhere to human rights as laid down in national legislation, the ECHR and international human rights conventions and standards. But what about the role of the EU in *monitoring* the human rights situation in Member States more broadly?

This was a core question prior to the establishment of the European Union Agency for Fundamental Rights (FRA) in 2007. It was debated whether the Agency should have a monitoring or, more modestly, an advisory role vis-à-vis Member States. The debate about the Agency's mandate provides an illustration of a political and deeply rooted disagreement about the relationship between the EU with regard to the promotion and protection of human rights in Member States – a disagreement which has never been put to rest. In the end, FRA was given an advisory role, mandated 'to provide evidence-based advice on a wide range of fundamental rights, in line with the EU Charter of Fundamental Rights' (van Haersolte and Wiebenga 2013: 163).[3]

On the basis of its mandate, FRA aims at supporting Member States in their protection and promotion of human rights, as stated in its overall vision:

> The European Union (EU) Member States have a long tradition of safeguarding fundamental rights. The EU itself is built on these values and is committed to guaranteeing the rights proclaimed in the Charter of Fundamental Rights of the European Union. The European Union Agency for Fundamental Rights (FRA) was set up as an independent body to support this endeavour.

> Despite this heritage, many challenges prevent the delivery in practice of fundamental rights. Through the collection and analysis of data in the EU, the FRA assists EU institutions and EU Member States in understanding and tackling these challenges. Working in partnership with the EU institutions, the EU Member States and other organisations at the international, European and national levels, the FRA plays an important role in helping to make fundamental rights a reality for everyone living in the EU.[4]

FRA works with thematic areas, formulated in a five-year 'Multi-annual Framework'[5], within which tasks are carried out as prescribed in an Annual Work Programme.[6] In addition, the Agency each year publishes an annual report on the situation of human rights in the EU Member States. In this way FRA provides the

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[3] 'Who we are' <http://fra.europa.eu/en/about-fra/who-we-are>. Last accessed 1 June 2014.

[4] <http://fra.europa.eu/en/about-fundamental-rights>. Last accessed 1 June 2014.

[5] For the five-year plan 2013-17, and the institutions involved in determining the plan, see <http://fra.europa.eu/en/about-fra/what-we-do/areas-of-work/multi-annual-framework-2013-2017>. Last accessed 28 May 2014.

[6] In 2013, for instance, the Agency carried out a survey on Discrimination and Hate Crime against Jews in selected EU Member States: experiences and perceptions of antisemitism. <http://fra.europa.eu/en/publication/2013/discrimination-and-hate-crime-against-jews-eu-member-states-experiences-and>. Last accessed 28 May 2014.

EU institutions and Member States with independent, evidence-based advice on fundamental rights, aiming at contributing 'towards ensuring full respect for fundamental rights across the EU'.

In sum, the mandate of FRA is limited in the sense that the institution can only offer advice, but it is expansive in the sense that the spectrum of human rights in focus is all-encompassing, covering the whole catalogue of human rights as laid out in the EU Charter. The scope of the FRA mandate is a subject of continuous debate – among EU parliamentarians, national policy makers, scholars, experts, and civil society (Toggenburg 2014: 1623 f. van Haersolte and Wiebenga 2013: 167).

3.   Historical milestones in the era of globalisation

a)   *Decolonisation and development policies*

A historical factor of enormous significance globally was the decolonisation of Asia and Africa, which took place in the immediate aftermath of WW2 and the next decades. Following decolonisation, new forms of interactions between Western and non-Western countries emerged. The evolution of development policies was of major historical importance to establishing a new rapport (Broberg 2013).

The development policies of the EU (and its forerunners) are historic milestones in the evolution of the EU's external human rights policies. In the formative period of the EEC in the 1950s and 1960s human rights did not play a significant role in its policies vis-à-vis colonies and ex-colonies, although occasionally touched upon (Williams 2004: 17-25).

This situation changed in the period from the 1970s to 1991. In this period human rights became part of the development policies of the Community. The four Lomé Conventions (Lomé I-IV) are important landmarks in the Community's integration of human rights in its development policy in this period (the Conventions were signed in 1975, 1979, 1984, and 1989 respectively) (Williams 2004: 25-34).

In the post-Cold War period, with the Maastricht Treaty and the Cotonou Agreement as major markers, human rights came to play an essential part of the development policies of the EU (Williams 2004: 34-40). Today, 'all trade and cooperation agreements with third countries contain a clause stipulating that human rights are an essential element in relations between the parties'[7] (see also Chapter V.C.5).

But the EU human rights policies have expanded far beyond development policies and trade and cooperation agreements. This expansion is the topic of the following section.

b)   *The globalisation of human rights and the EU response*

Historically, human rights developed rapidly from the 1990s as a factor on the global scene. New regional and global structures and instruments (for instance the creation of the UN Human Rights Council) were introduced to meet the human rights challenges at a regional and global level.

A central aspect of the globalisation of human rights is that the different cultures and religions to a large degree have taken ownership of human rights, thus paving the way for enhanced possibilities of implementing human rights locally. The universality of human rights and its different expressions over

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[7] http://eeas.europa.eu/human_rights/index_en.htm. Last accessed 8 June 2014.

time as well as human rights as a common global language are described in Chapter VII on Cultural and religious factors of this report (VII.B.1).

By embedding its external human rights policies in the context of universal and indivisible human rights inspired by the UDHR, the EU seems well equipped to act as a global human rights player. Thus in its external actions, the EU can embed its human rights policies in a universal human rights context. The fact that the UDHR has always played a large role as a 'guiding principle' fits very well into its non-legally binding documents and guidelines.

From the 1990s it was clear that the EU would have a comprehensive understanding of its role as a player in the advancement of human rights globally (Broberg 2013). Accordingly, Art. 3 of TEU states that:

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Following the evolution of the role of human rights in EU external relations, instruments and mechanisms have grown proportionally.[8] A recent reflection of the prominence of human rights on the EU agenda was the creation of the EU Special Representative for Human Rights in 2012.

With regard to instruments, the extensive 'toolbox' developed by the EU to engage with third countries should be noted, among them human rights guidelines, démarches and declarations, and human rights dialogues.[9] The Guidelines, for example, are meant as instructions for EU officials (and Member States) in their engagement with third countries, international organisations and civil society. A total of 11 Guidelines have been adopted by the Council, for instance Guidelines on Freedom of Religion or Belief, and Guidelines on LGBTI rights (Lesbian, Gay, Bisexual, Transgender, Intersex). The EU holds regular dialogues on human rights with third countries, and to this end the EU Guidelines on Human Rights dialogues have been developed.[10]

With the framework of the European External Action Service (EEAS), the EU adopts a multi-faceted and often progressive approach to its human rights policies. Two examples are illustrative of this. First, civil society is paid much attention as a human rights actor in third countries, as a vital player in the promotion and protection of human rights in specific contexts (for instance cultural and religious). The EU therefore engages with and supports (including financially) local and regional civil society in various ways.

Second, the EU is concerned with facilitating human rights education at various academic levels, endeavouring to create a human rights knowledge base among future academics, civil servants and policy makers, in EU institutions, Member States and around the globe. Noteworthy in this regard are the human

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[8] For the different instruments, please consult WP4.1. on mapping of EU Human Rights institutions.

[9] See here <http://www.eeas.europa.eu/human_rights/how/index_en.htm>. Last accessed 5 June 2014.

[10] <http://eeas.europa.eu/human_rights/dialogues/index_en.htm>. Last accessed 1 June 2014.

rights master programmes supported by the EU. In 1996, the European Masters Degree in Human Rights and Democratisation, E.MA, was established. This programme, based in Venice and managed by the European Inter-University Centre for Human Rights and Democratisation (EIUC) involves 41 universities from all EU countries, and offers an inter-disciplinary curriculum that reflects the indivisible links between human rights, democracy, peace and development. The E.MA has inspired the creation of similar inter-university programmes in human rights and democratisation. Thus today the E.MA/EIUC and five other regional master programmes on five continents carry out their work, with the support of the EU, under the auspices of the Global Campus of Master Programmes and Diplomas in Human Rights and Democratisation.[11]

The awareness of the EU of the need to create a harmony between external and internal human rights policies can be seen as leading to initiatives like FRAME – Fostering Human Rights among European Policies – a large-scale FP7 collaborative research project, involving researchers from EU Member States as well as third countries and making the coherence between external and internal policies a key object for scholarly scrutiny.

In sum, the EU has set in motion many substantive initiatives, including instruments, to facilitate the promotion and protection of human rights in a new global world order.

A recent historical factor which may have a hindering influence on the EU's external human rights policies is the challenged position of the EU on the global scene. With the formation of new political and/or economic alliances – for instance the BRIC countries and Organisation of Islamic Cooperation (OIC) – the influence of the EU in the world is challenged. In this connection, a particular effect of diverse cultures having increasingly declared ownership of human rights is that the interpretation of human rights as endorsed by the EU and international human rights standards are in some instances substantially questioned or contested by some countries (see Chapter VII.B.1). Issues of coherence and incoherence between EU internal and external human rights policies are among the factors challenging the EU in its actions at the multilateral as well as engagement with third countries at the bilateral level (See also Chapter III.B.1.c). There are positive indications that the EU – in its internal and external affairs and vis-à-vis candidate countries – has become aware of the problems of incoherence between internal and external policies, and that it is responding to the call for greater coherence. An interesting illustration of this is the 'European Parliament resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious difference'. Here the Parliament faces the issue of coherence head on, namely in a section entitled 'Credibility, coherence and consistency of EU policy'. The European Parliament 'considers that the effectiveness of EU action rests on its exemplariness and consistency between internal and external actions' (26). The resolution proceeds to the issue of cultural and religious diversity (the topic of the resolution), and the Parliament 'calls on all Member States to repeal any existing laws which contradict the fundamental freedom of religion and conscience and freedom of expression' (27).

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[11] <http://www.eiuc.org/education/global-campus-regional-masters.html >. Last accessed 9 June 2014.

D. Conclusions and future perspectives

FRA states that 'The European Union (EU) Member States have a long tradition of safeguarding fundamental rights. The EU itself is built on these values and is committed to guaranteeing the rights proclaimed in the Charter of Fundamental Rights of the European Union' (see above). As we have seen, however, the human rights project was not part of the objectives of the institutions preceding the present EU. The EU has historical roots in a construction of which human rights were not an essential part.

The chapter has analysed major historical landmarks in the EU history and discussed the potential in the historical events and circumstances, which to a large degree the EU responded to by facilitating the expansion of the human rights sphere, in its internal as well as external actions. It also demonstrated how historical events and circumstances to some extent had a hindering influence on human rights protection.

The chapter shows that the EU still is a human rights project in the making. The EU has been more at ease developing extensive human rights policies with application when engaging with third countries. When it comes to the EU vis-à-vis Member States, the picture is more blurred, and the political debate often marked by EU scepticism caused by Member States' opposition to extending the competence of the EU in the area of human rights (see also Chapter III.B.5.c).

As human rights have increasingly found a place in EU's internal and external affairs and vis-à-vis candidate countries, the relationship between the internal and external policies has drawn the attention of policy makers, officials, academics and civil society and caused widespread criticism, within EU Member States and globally.

History constantly provides new factors enabling or hindering the development of human rights. Of the concrete events/historical factors which have hindered or facilitated the EU human rights internal policies, an example is the economic and financial crisis starting in 2008, globally and within the EU and its Member States (see Chapter III.B). Other examples are the rise of the extreme right in Europe and the increase of racism (see Chapter III.B.2.c).

With law still in the process of being implemented, conventions still to be ratified, the ECHR still to be acceded to and charges of too many ambiguities and too much incoherence, the EU today stands at a crossroads in a unique position to rise above challenges caused in part by its history.

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III.   Political factors[*]

A. Introduction

Human rights are deeply political. They are defined in a political context and by political actors or within political institution. They are used as political instruments in political campaigns. The definition of human rights norms and standards are political issues and sometimes highly contested (e.g. LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) rights). They are embedded in a political structure, i.e. States, which on the one hand are one of the most serious human rights abusers and, on the other hand, have the duty to respect, protect and fulfil human rights. Thus, human rights play an important role not only as or in relation to political structures but also in the political process. Human rights are violated, abused, used, fought for or defended by political actors. This indicates that the political dimensions and aspects of human rights are complex and multi-layered. They refer to the nature and architecture of the political institutions and structures as well as other basic political concepts such as power, citizenship and political ideologies.

The question what are the political factors which enable or hinder the protection of human rights in general and concerning the European Union's (EU) external and internal policies in particular is hard to grasp. Political factors that enable or hinder the protection of human rights involves taking into account several political dimensions:

Political activity and processes of political action (politics), which include a broad range of activities such as political negotiations about human rights standards, human rights activism such as those of non-governmental organisations (NGOs) or diverse forms of cooperation within and outside of established political structures. Addressing the question of political factors that enable or hinder the protection of human rights in this context involves, for example, analysing power relations between actors or taking into consideration the inclusiveness or exclusiveness of processes of participation in the political realm such as democratic processes.

Another dimension is the substance or content of political activities. Human rights policies include contentious and delicate issues and may contradict other norms and values such as hegemonic ideologies (e.g. nationalism, neo-liberalism).

Above all, human rights norms and standards are dependent on adequate political structures. The polity dimension is significant as it provides the context or framework in which human rights policies and politics are embedded. The most important political entity in this context is the State. State structures may hinder or facilitate human rights policies, they may provide a framework in which human rights are guaranteed or, on the contrary, are systematically violated. Another important structural dimension is the question of citizenship, which defines the relationship (rights and duties) between the individual and the community (States) and, thus, is quite a powerful instrument, which also determines different degrees of exclusion and inclusion.

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[*] The author of this chapter is Dr. Monika Mayrhofer, Ludwig Boltzmann Institute of Human Rights.

1.   Structure and content of the chapter

The remarks above indicate several aspects or topics, which are not only key concepts of political science and discourse but also are crucial aspects concerning the guarantee and implementation of human rights. These aspects form a crucial dimension when it comes to the question of political factors that enable or hinder human rights:

- States and state sovereignty
- Ideologies (Nationalism, Liberalism, Socialism, etc.)
- Power
- Citizenship
- Democracy.

In the following chapter, each factor will be discussed in detail, starting with a definition or a discussion of concepts of each factor and followed by a short analysis on how this factor enables or hinders human rights protection in general. In conclusion, it will briefly be discussed in what way this factor may enable or hinder human rights protection in the EU.

B.   Political factors which enable or hinder the protection of human rights in the EU's external and internal policies

1.   States and state sovereignty

a)   Definitions and concepts of State and state sovereignty

'Modern societies, especially in the twentieth century, have increasingly come to be organized around states guaranteeing to their citizens (rather than subjects), as matters of entitlement, an extensive array of civil, political, economic, social, and cultural goods, services, and opportunities.' (Donnelly 2003: 59)

Human rights evolved in the context of the formation of the modern State. The two developments are deeply interlinked. The gradual replacement of a fragmented feudal system by an international State system was accompanied by the development of constitutional States and the codification of fundamental rights as a basic principle thereof. The role of the State in the context of the human rights system is crucial. Although human rights norms are very often developed and adopted at an international level, it is first and foremost the State that is responsible for their implementation.

The concept of the State is not only one of the most central notions of political discourse and analysis (Hay and Lister 2006: 1), it is also one of the most controversial. There are many approaches and theories to grasp this concept and its developments. One of the most important definitions, which is still relevant today, was coined by the political sociologist Max Weber. He defines the State as follows:

> A compulsory political organization with continuous operations will be called a 'state' insofar as its administrative staff successfully upholds the claims to the monopoly of the legitimate use of physical force in the enforcement of its order... [The modern state] possesses an administrative and legal order subject to change by legislation, to which the organized activities of the

administrative staff, which are also controlled by regulations, are oriented. This system of orders claims binding authority, not only over members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent over all action taking place in the area of its jurisdiction. It is thus a compulsory organization with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it... The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and continuous operation. (Weber 1978: 54-56, quoted after Pierson 2004: 6)

Based on this definition, Pierson (Pierson 2004: 6-26) distinguishes the following features as being relevant for defining the State, several of which have a human rights dimension and will be explored in this report:

1. (Monopoly) control of the means of violence
2. Territoriality
3. Sovereignty
4. Constitutionality
5. Impersonal power
6. The public bureaucracy
7. Authority/legitimacy
8. Citizenship.

Some of these principles will be discussed in separate chapters below as they represent crucial factors with regard to hindering or enabling human rights. The principle of sovereignty is probably the factor discussed most in the context of the implementation of international human rights law. Sovereignty is the founding principle of the international order since the Peace of Westphalia in 1648 and has an internal as well as an external dimension. The latter basically refers to the notion of non-interference in another State's internal affairs and is also defined as a basic principle by the Charter of the United Nations. The internal dimension denotes that 'the classical state sovereign has exclusive authority over a particular territory, in other words freedom from outside interference' (Clunan 2009: 7).

b)   *How does the State enable or hinder human rights protection?*

'Internationally recognized human rights impose obligations on and are exercised against sovereign territorial states' (Donnelly 2003: 34). The State has a broad range of responsibilities when it comes to human rights protection. It has responsibility to respect, protect and fulfil human rights:

- Under the State's obligation to respect human rights 'states have a negative obligation not to take any measures that result in a violation of a given right. They should not consciously violate rights, either through their organs (for example, parliament or the executive) or through their agents (such as, civil servants, the policy, or the army)' (Mégret 2010: 130).

- The obligation to protect human rights means that States actively have to ensure that the rights of individuals are not violated by third parties.

- The State has the further obligation to fulfil human rights, 'by which it is understood that states should proactively engage in activities that have as a consequence the greater enjoyment of rights' (Ibid.: 131).

In the following, the most crucial points are outlined with regard to the State as an enabling or hindering factor of human rights:

In order to meet their obligations to respect, protect and fulfil human rights States have to develop capacities and set up structures, invest financial resources, educate personnel and develop institutions capable to carry out these tasks. Thus, adequately respecting, protecting and fulfilling human rights is demanding for a State. There are several challenges which might limit a government's ability to meet its obligations including a lack of financial resources, inadequate commitment of political leadership, inadequate capacities and commitment of governmental personnel, inconsistent, misinterpreted and flawed laws, paucity of affordable legal services or a lack of knowledge about successful human rights activities and strategies (Golub 2003: 1-7).

There is generally a tension between State sovereignty and implementation of international human rights norms: 'The principle and practice of state sovereignty are, therefore, strong barriers to the implementation of international human-rights standards' (Freeman 2002: 132). In its internal dimension, sovereignty hierarchically defines the relationship between the individual and the State. The State wields authority over its citizens through its administrative and executive powers. This makes the State prone to being a human rights abuser itself which creates tensions to fulfil its crucial role concerning human rights protection. In addition, the external dimension of sovereignty with its basic principle of non-interference in the domestic affairs of other States makes it harder to prevent and pursue human rights obligations of States. International human rights protection is therefore dependent on the voluntary cooperation of States to commit themselves to international human rights norms and institutions. 'Human rights are seen as a critical challenge to state sovereignty, as they challenge its central premise of the State as the ultimate legal and political authority in world politics' (Clunan 2009: 7).

The principle of State sovereignty in international relations, however, still poses challenges to address human rights questions in international politics as the means and functioning of the international realm is fundamentally different from the functioning of a State. The rules adopted are very often soft law and benign measures of international cooperation, very often largely symbolic (Donnelly 2003: 166). Furthermore, there is often a trade-off between human rights and other national interests. Human rights policies are very often subordinated to security as well as economic interests (Ibid.). This has consequences for the protection of the rights of the individual: 'State interests rather than personal rights often prevail, interpersonal equality often gives way to disrespect for – if not hatred of – "others," violent conflict is persistent, and weak international institutions are easily demonstrated' (Forsythe 2003: 217).

In the context of globalisation, States are altering their structures, functions and traditional tasks. New actors such as international companies or regional cooperation and integration of States (e.g. the EU) are increasingly gaining importance and pose a challenge to the 'traditional' role of the State concerning the protection of human rights.

c) How does the State enable or hinder human rights protection in the EU – gaps and challenges

The question as to what kind of political structure and entity we are dealing with when it comes to the European Union has puzzled political scientists for quite a while. It is hard to grasp this development with conventional terms used in political science as the EU seems to be more than an international organisation but less than a traditional State. Thus, to address the question of how the State enables or hinders human rights protection in the EU two dimensions are of importance.

The first dimension concerns the position of the Member States within the structural position and power relation of the EU. EU integration theories (theories which aim at grasping the dynamics and structures of European integration) provide different answers to this question. Some assume that the Member States are still the most important players in this context (liberal intergovernmentalism, see e.g. Moravcsik and Schimmelfennig 2009) while others – e.g. advocates of multilevel governance theories – argue that States have to share decision making powers with other levels/actors (such as EU institutions, NGOs etc. see e.g. Hooghe and Marks 2001; Peters and Pierre 2009; Wiener and Diez 2009). In reference to human rights protection, Member States remain a decisive force in the EU framework 'despite the regular invocation of human rights in official discourse and documents, there is a great reluctance to specify any clear role for the EU in relation to the action of Member States as far as human rights compliance is concerned' (de Búrca 2011: 484).

Nevertheless, the EU has made significant efforts to strengthen its human rights dimension (through the Treaty of Lisbon). Not least because of its non-discrimination law, the EU 'has developed into the regional authority on social rights, overtaking some of the earlier work on the Council of Europe in importance as the Community's rights are enforceable' (Smith 2012: 116). The adoption of the Charter of Fundamental Rights of the European Union (CFREU) and the envisaged accession of the EU to the European Convention on Human Rights (ECHR) are further favourable developments in regard to enhancing a comprehensive European human rights protection system, although the limited scope of application of CFREU has to be stressed in this context. Gráinne de Búrca argues that the formal constitutional framework is limited and any legal and constitutional discussion of human rights issues is 'accompanied by assertions on the part of the Council and the Member States of the limited competences of the EU, and a narrow view is taken of the legitimate scope of human right law and policy within the EU' (de Búrca 2011: 491). Yet, this is often inconsistent with the evolving human rights practices of European governance such as the EU anti-discrimination regime, the activities of the European Commission or the Fundamental Rights Agency (de Búrca 2011: 496).

The second dimension concerns the shape and configuration of the EU as an actor. This includes issues such as the institutional set-up of the EU and the question whether the EU is an international organisation or a supranational organisation which might act in some situations as a State. Since the entering into force of the Lisbon Treaty the EU has significantly strengthened its institutional and legal human rights framework by e.g. making the EU Charter of Fundamental Rights legally binding on EU institutions as well as Member States and by establishing a European External Action Service (EEAS). Yet, the 'EU's very *design* reveals its limited capability as a human rights organisation. The Charter of Fundamental Rights does not declare a freestanding fundamental rights competence for the EU but only applies to EU institutions and

to the Member States in certain circumstances' (Douglas-Scott 2011: 680; see also Chapter IV.C.1).[12] Douglas-Scott further points out that that in the wake of the Lisbon Treaty not the human rights protection itself but its complexity has increased and that objective is not primarily the 'development of a coherent substantive fundamental rights law' (Ibid.).

Concerning the relation between the internal and external dimension of EU human rights protection the 'major emphasis of the EU's constitutional regime of human rights protection today (…) is externally focused, setting up a distinct difference between external and internal policies' (De Búrca 2011: 491). Further weaknesses of the EU human rights framework are the incoherence of the institutional and legal framework, the failure to address a range of important human rights issues, a lack of coherently taking human rights into consideration in all EU policy fields and 'lack of political will to make full use of the different instruments in the tool box of the EU human rights policy' (Theuermann 2013: 33). In addition, a lack of consistency and transparency concerning human rights is said to undermine 'the Union's legitimacy and will eventually have a negative impact on its normative power, both internally vis-à-vis its member states and even more so towards third states' (Kinzelbach and Kozma 2009: 617).

2.   Ideologies

a)   Definitions and concepts of ideologies

In everyday language, ideologies have a negative connotation. They are associated with the notion of false beliefs, deceit or manipulation. The term ideology is fuzzy and hard to grasp. Andrew Heywood lists in his book *Political Ideologies* several meanings that have been attached to ideology, such as a political belief system, an action-orientated set of political ideas, the ideas of the ruling class, the worldview of a particular social class or social group, political ideas that embody or articulate class or social interests, ideas that propagate false consciousness amongst the exploited or oppressed, ideas that situate the individual within a social context and generate a sense of collective belonging, an officially sanctioned set of ideas used to legitimise a political system or regime, an all-embracing political doctrine that claims a monopoly of truth or an abstract and highly systematic set of political ideals (Heywood 2003: 6).

Basically, it is important to distinguish between ideology as a political doctrine and ideology as a concept of political analysis. The first refers to the idea of ideology as a worldview or political beliefs that influences political motives, political action and processes, the second labels a scientific concept used to guide political analysis. This differentiation roughly correspondents with Chiapello's distinction between ideology in a Marxist sense of the term and ideology in the culturalist sense of the term (Chiapello 2003: 157-159). Marxist conception of ideology was very influential and referred to the ideas of the ruling class in order to gain influence over the society (Marx and Engels 1846).

Since the 1960s, the concept of ideology has been used in a more neutral and 'objective' way:

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[12] See Charter of Fundamental Rights of the European Union, Art. 51: '1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

Ideologies are rather complex belief systems that people use to interpret their environment, physical or social, and to define their response and behavior. Political ideologies deal with social relations related to power. They embody values and ideals, and as systems, they establish logical connections among ideals, justify structures, and prescribe the essentials of good life and governance. (...) and since ideologies usually promise a better state of affairs and a vision of change, political leaders and social movements develop and utilize ideologies to mobilize people. (Arat 2008: 907)

b)   *How do ideologies enable or hinder human rights protection?*

Ideologies have influenced the development of human rights to a great extent and, in so doing, have also enabled and enhanced specific meanings and hindered or disabled others. The following influences were decisive for the development of human rights norms:

The evolution of human rights are deeply linked to the decline of the medieval feudal system and the emergence of the modern nation State embedded in an international State system. A crucial Influence in this process was the liberal body of thought (e.g. John Locke, Thomas Hobbes). This primacy of liberalism in the development of human rights resulted in the establishment of the so-called first generation of rights, which include first and foremost civil and political rights (Ishay 2008: 63-116). 'The international law of human rights is based on liberalism,' (Forsythe 2003: 217) they have an individual focus, they are based on the norm of an independent liberal subject (see e.g. Kapur 2006) and, compared to the other generations of rights, they are well-protected and institutionalised.

The liberal focus is very often criticised as limiting the human rights project. Mutua delineates these limitations as follows: human rights are characterised by 'indeterminacy, elasticity and the double-edged nature of the rights discourse' (Mutua 2008: 1028) which fails to address a deeply unjust society and is open to misuse; further the focus on individualism is not able to capture the realities in regions where communities and groups are the central units of the society; the liberal bias towards civil and political rights neglects to adequately take into consideration the importance of social and economic rights which seriously impedes the human rights of many. Kapur has further stressed that the liberal subject of human rights correlates with the 'assumptions about the "Other", who needs to be cabined or contained lest she destabilises or undermines this subject' (Kapur 2006: 666).

The focus of the liberal tradition on civil and political rights[13] was challenged by the socialist movement. Karl Marx not only called for political but first and foremost stressed the necessity of economic emancipation (Ishay 2008: 130-131). A very strong wing of the socialist movement were socialist feminists who not only demanded universal suffrage but also called attention to the (gendered) economic foundation of industrialised society which undermines the claims of liberal rights. In general, socialist

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[13] It has to be noted that this early demand for rights for all did not mean that all individuals were included in this project. In the contrary, the notion of equality was restricted to a certain group of the society. Ishay emphasises that "the Enlightenment offered all white men the option to become voting members of society should they acquire enough property, earn a sufficient income, and pay adequate tax." (Ishay 2008: 135) In reality, this meant the exclusion of a wide proportion of the population (i.e. the poor, women).

mobilization in pursuit of political rights was directly linked to activism on behalf of economic and social rights. Social welfare for the poor would no longer be left to whimsical, charitable impulses at the margins of a market-driven distribution of wealth, but would now be demanded as a right by a working-class electorate. (Ishay 2008: 160)

Nationalism and racism have seriously challenged and also undermined the institutionalisation and implementation of human rights. Hannah Arendt analysed the negative impact of nationalism on the protection of human rights of refugees, stateless persons and minorities. She stressed that as soon as 'the transformation of the State from an instrument of the law into an instrument of the nation had been completed; the nation had conquered the State, national interest had priority over law' (Arendt 1973: 275). Nationalist tendencies further hamper the institutionalisation of effective international human rights protection system. However, on a more positive note, in the context of post-colonial developments it is also argued that it has led to the evolution of the collective right to national self-determination.

Historically, racism has had a serious impact on the realisation of human rights by excluding the racialised 'Other' from the human rights project. Critics argue that racism in the context of human rights still is deeply embedded in human rights language and continues to produce racial stereotypes (see e.g. Kapur 2006 or Mutua 2001).

There is also a strand of discussion that conceptualises human rights as an ideology by itself. Zehra F. Kabasakal Arat argues that human rights show all four components which qualify for an ideology: diagnosis, prognosis, rationale and strategy and, thus, that

> the international conceptualization of human rights has emerged as an ideology that encompasses an emancipatory potential, which is instinctively attractive to subjugate people, yet unrecognized by some of its most vocal advocates in academia and international organizations. (Arat 2008: 907)

She further points out that ideologies are complex and multi-dimensional and closely connected to power relations in reference to their position on the State, on property and on discrimination (Arat 2008: 910).

c)   *How do ideologies enable or hinder human rights protection in the EU – gaps and challenges*

Although there is little academic discussion and research on how ideologies enable or hinder human rights protection in the EU, the dimensions discussed above are also of importance in the context of human rights protection in the EU.

The EU has made a serious effort to introduce a comprehensive human rights system. Not least because of its non-discrimination law, the EU 'has a strong enforceable system of securing social rights and regulating the rights of workers in the labour market' (Smith 2012: 116). The accession to the ECHR or the adoption of CFREU not only codifies civil and political rights but also social, economic and cultural rights. However, despite the fact that the EU has moved away from being a mere economic organisation concentrating on the completion of an internal market towards a multilevel system, which goes beyond the narrow economic focus, the main focus still is on the economic sector. Hermann argues 'that the

European integration process was used to adopt mainstream neoliberal policies and thereby circumvent and erode those state traditions and national compromises that, in the past, gave Europe its distinctiveness compared to other countries' (Hermann 2007: 61). By 'traditions' Hermann refers to a broad range of social rights of the welfare state. This development is associated with a broad range of changes that are hindering human rights protection: increasing poverty, dismantling of the welfare state, a concentration on workfare policies or a growing gap between poor and rich. Thus, the neoliberal economic values shows serious limitations for the implementation but also for the adjudication of human rights by the European Court of Justice (ECJ).

> The difficulty lies in the ideological position upon which the ECJ bases its reasoning whereby market considerations take prominence. The influence of free market thinking on the promotion and protection of human rights has been subject to a number of studies and the threats it poses to human rights have been clearly laid out. (Burchill 2011: 23)

Also concerning external relations, neo-liberal concepts seem to outshine normative considerations, as Farrell has argued in the context of the Cotonou Agreement. She has demonstrated 'that the rhetoric on partnership reflects less a normative agenda than a trenchant pursuit of what are really neo–liberal goals and the extension of economic liberalisation in the interests of the EU' (Farrell 2005: 276).

Nationalist influences can seriously impede the EU human rights project, as political developments in many Member States have demonstrated (e.g. Austria, France, Hungary, Greece and the United Kingdom). They not only lead to the rejection or questioning of human rights instruments but may also have the consequence that issues that need a European solution such as the regulation of migration or asylum are not adequately addressed. Carrera and Wiesbrock (2009) have demonstrated with the example of 'civic integration' programmes and tests for third-country nationals (TCN) that the EU Framework on Integration has led to 'a profound change in the traditional understandings of the integration of TCNs in EC law and policy, which now allow room for nationalism to play a role when determining the allocation of EU rights and freedoms to TCNs' (Carrera and Wiesbrock 2009: 6). The result is that the focus has moved away from TCNs' 'social inclusion, security of residence and access to rights to seeing integration as an instrument of a restrictive immigration policy, in the form of conditions in immigration law for having access to a visa or a residence permit' (Ibid.: 38-39).

3. Power

a) Definitions and concepts of power

The definition of power is elusive, yet one of the most important concepts in political science. There are several dimensions of power which were discussed under the heading of the 'faces' of power. The first three faces are based on the assumption, 'that power is a relation and that it is a relation among people' (Dahl 1957: 203). Concerning the first face of power, the actors in a power relation are defined as 'individuals, groups, roles, offices, governments, nation-states, or other human aggregates' (Ibid.) that have a certain source, means, amount or scope of power. The simple formula of this dimension is that a certain actor A has power over a certain actor B. Bachrach and Baratz challenged this notion (second face) by claiming that it is not only important who has power over the action of another person but also who

can influence the decision-making process concerning the issues which are selected as being important to be put on the agenda.

> The distinction between important and unimportant issues, we believe, cannot be made intelligently in the absence of an analysis of the 'mobilization of bias' in the community; of the dominant values and the political myths, rituals, and institutions which tend to favor the vested interests of one or more groups, relative to other (Bachrach and Baratz, 1962, 950).

The third face of power was introduced by Steven Lukes who insisted that power is not only about making or preventing someone to do something but also about succeeding in shaping the preferences of others:

> (…) is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial? To assume that the absence of grievance equals genuine consensus is simply to rule out the possibility of false or manipulated consensus by definitional fiat' (Lukes 2005: 28).

The so-called fourth face of power was developed on basis of Michel Foucault's conceptualisation of power and discourse. It assumes that power is not in possession of certain individuals. Rather

> in human relations (…) power is always present (…) these relationships of power are changeable relations, i.e., they can modify themselves, they are not given once and for all (…). The thought that there could be a state of communication which would be such that the games of truth could circulate freely without obstacles, without constraint and without coercive effects, seems to me to be utopian. It is being blind to the fact that relations of power are not something bad in themselves, from which one must free one's self. I don't believe there can be a society without relations of power (Foucault 1987: 129).

b)   How does power enable or hinder human rights protection?

Mertus distinguishes between two ways in which power is interlinked with human rights: power over versus power with:

- 'The "power over" scenario captures the direct and indirect ways in which States bind themselves to international human rights norms and compete with one another as human rights friend or foe. The traditional 'power over' tactic is also employed by NGOs with their strategy of 'naming, blaming, and shaming' to promote human rights' (Mertus 2010: 92).

- '"Power with" approaches replace competition with coordination, and focus on creating networks for information exchange, solidarity, and encouragement. (…) Also known as 'social empowerment', 'power with' uses a vision of equality and self-knowledge to advance civil, political, economic, social and cultural rights' (Mertus 2010: 93).

In addition, power relations are apparent in the human rights framework in several dimensions:

Power relations influence the formulation and standard-setting of human rights. They determine who has influence and whose interests are represented. Human rights declarations, for instance, are 'always a political outcome, a compromise, or a diplomatic resolution of competing interests' (Langlois 2009: 23). Which norms are prevailing in human rights standards therefore is the result of power practice. Feminists, for example, have criticised the implicit androcentrism of human rights, in the sense that human rights are based on specific norms and values which mostly correspond to the experience of men (see e.g. Stark 2000: 342-343 and Reilly 2009).

Different forms of power are apparent in human rights mechanisms and struggles. Thus, power in this sense is operative in the context of the interaction of human rights actors such as States, NGOs, human rights defenders or individuals. Ishay notes 'that a universal human rights agenda insensitive to existing power relations may serve as a tool with which to mask the particular national interests of powerful countries' (Ishay 2008: 11). However, power in this context has not only a repressive aspect, such as more powerful actors repressing other States or individuals, it also refers to the idea 'that rights empower rights-holders. Power is a social relation, and legitimate power is restrained by rules that protect the rights of others' (Freeman 2002: 74).

Human rights can be seen as a powerful concept in itself. By drawing from Foucault's notion of power Manokah (2009) conceptualises the human rights based on the notion of discourse which is closely interlinked with a conception of power that rejects the idea that power is possessed by actors. In contrast, it emphasises the discursive structure of human rights that '"produces" behaviour that is in conformity with the dominant standard of normality or acceptability' (Manokah 2009: 430).

c)   *How does power enable or hinder human rights protection in the EU – gaps and challenges*

The role of power in the context of EU human rights protection and policies are so far scarcely covered by scientific literature, except the discussion on the EU as a normative power in international politics (see below). The following aspects are possible entry points for discussing the role of power with regard to enabling or hindering human rights protection in the EU.

As the institutional and legal human rights framework of the EU is quite unique a starting point for analysing the role of power might focus on the question which institutions, States, bodies, actors, interest groups, NGOs are influencing – i.e. enabling or hindering – the human rights discourse in what way. The discussion on the adoption of a new non-discrimination directive demonstrates the power of different actors in human rights matters. On 2 July 2008, the European Commission proposed a draft of a new directive prohibiting discrimination on grounds of religion or belief, disability age or sexual orientation beyond the workplace. The European Parliament supported the proposal on 2 April 2009 (see European Parliament 2009). Up to now, the Council has refused the adoption of the directive and, thus, prevented the adoption and implementation of a more comprehensive non-discrimination law.

Closely related with the above, it is important to focus on the exclusionary patterns of the EU human rights system or in particular the questions about who are the key political agents and whose human rights interests are marginalised in the political process of the EU concerning human rights policies. It matters

which actors have a say concerning the EU human rights standard setting and who is included in expert groups. For example the COHOM, the Human Rights Working Group under the Council of the European Union, is composed of Directors for Human Rights and delegates from EU Member States, the Commission and the EEAS (see Theuermann 2012: 186), which means there are no representatives of NGOs included in the Working Group who might have alternative views on human rights matter.

Another point of interest which provides insight into the enabling and hindering power factors concerning EU human rights policies relates to the analysis of which topics appear on the EU human rights agenda in what way. For example, efforts to tackle discrimination on grounds of gender were first introduced in 1957 when the European Economic Community (EEC) was founded by the Treaty establishing the European Economic Community (TEEC). The TEEC introduced the principle of equal remuneration for equal work between male and female workers in order to remove the obstacles to the free movement of persons, goods, services and capital and realise a common market. This economic impetus however hindered the realisation of a more comprehensive non-discrimination policy for a very long time. Although EU political structures have provided an opportunity to enhance gender policy to a very large extent they have also powerfully influenced gender relations – to the disadvantage of women. For example, 'the language in EU texts has shifted from one of "sharing" family responsibilities to one of "reconciling" work and family. This shift has served to legitimize the flexibilization of labour relations, create a secondary feminized labour market and leave unchanged the distribution of unpaid labour in the family' (Locher and Prügl 2009: 187; see also Stratigaki 2004).

In reference to EU's external relations it is important to take into consideration how human rights are conceptualised in EU's external relations and in what way they interact with other interests. There is a considerable debate on the role of the EU as a 'normative power' (Bickerton 2011; Manners 2002; Scheipers and Sicurelli 2007; Sjursen 2006). The concept of the EU as a normative power was coined to a large extent by Ian Manners who suggested

> that not only is the EU constructed on a normative basis, but importantly that this predisposes it to act in a normative way in world politics. (…) the EU can be *conceptualized* as a changer of norms in the international system; a positivist quantity to it – that the EU *acts* to change norms in the international system; and a normative quality to it – that the EU *should* act to extend its norms into the international system (Manners 2002: 252).

Human rights are an important part of the norms, the EU is based on and is extending into the international system. However, it has also been argued that the EU's normative power is repeatedly limited by economic and national interests of the Member States (e.g. Bickerton 2011; Erickson 2013; Hyde-Price 2006).

The EU further lost influence at the UN concerning human rights issues: 'Europe has lost ground because of a reluctance to use its leverage, and a tendency to look inwards (…) rather than talk to others. It is also weakened by a failure to address flaws in its reputation as a leader on human rights and multilateralism' (Gowan and Brantner 2008: 1).

4.   Citizenship

a)   *Definitions and concepts of citizenship*

In general, citizenship is about the interrelation between the individual and the community: 'Citizenship is a relationship between the individual and state, in which the two are bound together by reciprocal rights and duties' (Heywood 2000: 119). Citizenship refers to the membership in a political community and therefore exhibits dynamics of inclusion and exclusion 'between those deemed eligible for citizenship and those who are denied the right to become members' (Kivisto and Faist 2007: 1). Today, citizenship is a broad and complex concept because being a citizen does not only give access to the enjoyment of a broad range of political, civil, social, economic or cultural rights or is related to the duties of a person in relation to a given state or community. It also refers to more fuzzy but nevertheless important aspects of identity and belonging. Citizenship is extremely important concerning the participation in and access to all fields of society and is closely related to principles of equality and non-discrimination. In its inclusive dimension it defines the members of a State or society and concerning its exclusive aspects it demarcates non-members who have no or only limited access to rights as well as to certain areas of society.

One of the most distinguished authors in the field of citizenship theory was Thomas H. Marshall who defined the following three elements of citizenship which are usually also deployed concerning the classification of human rights:

> The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice […] By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body […] By the social element I mean the whole range from the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society (Marshall and Bottomore 1992: 8).

b)   *How does citizenship enable or hinder human rights protection?*

Individuals enjoy their human rights to a great extent through the rights they are entitled to on the basis of citizenship: 'Human rights and citizenship have long been closely entwined; indeed historically they share similar roots in liberal individualism' (Nash 2009: 1068). Although human rights are assumed to be held by all human beings equally, they are always dependent on the recognition by a political community or entity. 'Rights are not and can never be simply intrinsic justified claims. (…) Rights conversely only exist in the context of complex relational structures of social recognition; that recognition is tied to the nature of political association' (Vincent 2010: 207). With the example of the vast number of stateless people and the question of minorities Hannah Arendt profoundly challenged the idea that individuals have rights merely because they are human beings. 'The Rights of man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state' (Arendt 1973: 293).

Thus, in reality fundamental rights are primarily guaranteed and safeguarded through the membership of a political community, i.e. being a citizen of a State. One of the most problematic aspects of citizenship is

its exclusionary effect which does not only refer to the exclusion of non-citizens from a broad range of rights (social, political etc.) but also various degrees of exclusion of citizens, depending, for instance, on their gender, sexuality, social class, ethnic group, and disability. The concept of human rights aims at counteracting this exclusionary aspect by decoupling rights from belonging to a – mostly nationally defined – State. 'While national citizenship is understood as a broad legal and social framework used of designating membership of a territoriality limited polis, human rights doctrine projects this legal framework beyond territories and national sovereignty' (Estévez 2011: 1154). However, there are two major disadvantages of human rights in comparison to citizenship:

- Enforcement and accountability: Citizenship is strongly interlinked with the institutional set up of the nation state and, thus, the institutional mechanisms to enable and enforce citizen's rights are intrinsically linked with state structures. Human rights lack a 'robust institutional underpinning' (Brysk and Shafir 2004: 5), they are also dependent primarily on state institutions in terms of enforcement as international enforcement mechanisms are relatively weak.

- Citizenship gap: Compared to citizens, a growing number of non-citizens (e.g. migrants, refugees, certain ethnic groups) 'are often granted a lesser, conditional, or ambiguous status. This means that they may be ineligible for rights of political participation, social services, and sometimes even international recognition of their status' (Brysk and Shafir 2004: 6). Those people are often hampered or even denied access to justice, goods, participation and services, they are marginalised in various field of society such as work, housing or education. Thus, 'the concept of rights beyond the bounds of the sovereign state, without a mechanism of making these new rights accountable to their subjects' (Chandler 2002: 115).

It is argued that currently citizenship is characterised by a proliferation of status groups of which members enjoy 'a different package of formal and substantive rights according to their situation as citizens or non-citizens, the way in which states administer human rights, and their access to material and moral resources within that state' (Nash 2009: 1072). Her typology is divided into super-citizens who have all the rights of citizens, marginal citizens who although having full citizenship do not enjoy full citizenship status, quasi-citizens who although not having citizenship of the State they are residing in are enjoying human rights to a high degree, sub-citizens who have no status as citizens and also limited access to human rights and un-citizens such as undocumented migrants 'who have no recognized status in receiving countries' (Nash 2009: 1078).

c) *How does citizenship enable or hinder human rights protection in the EU – gaps and challenges*

Citizenship of the European Union was introduced by the Treaty of Maastricht. Article 9 of the Treaty on European Union (TEU) says: 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' Ever since, the meaning and scope of European citizenship has been a topic of controversial academic and political discussions (see e.g. Bellamy 2008; Kochenov 2013; Shaw 2012). The following dimensions are of importance in relation to human rights:

EU citizenship adds to the proliferation of status groups as mentioned above. EU citizenship has been labelled as a 'fragmented concept' which refers to European citizens primarily in terms of economic or occupational aspects (Wiener 1998: 280). 'EU citizenship is thus *normatively* limited to precisely the extent that EU integration is also *normatively* limited, by reference to the terms of the present constitutional settlement' (Shaw 2012: 5).

On the basis of case law of the ECJ, Kochenov argues that although EU citizenship has gained in importance within the context of EU law, the ECJ nevertheless fails to clearly define the 'substance of rights' of EU citizenship:

> The unpredictable outcomes of the recent cases, caused by the Court's failure to clarify what this 'substance of rights' actually means, multiplies contradictions, resulting in a massive assault on clarity and legal certainty. (…) What kind of rights, the much alluded to 'substance of rights' includes, is as unclear as ever, potentially promoting 'citizenship without respect (Kochenov 2013: 512).

Kochenov addresses two further problems: Firstly, the role of the Member States' courts might undermine the uniformity of application of EU law with regard to EU citizenship. Secondly, EU citizenship and the Charter of Fundamental Rights might be 'potentially competing vehicles of EU human rights protection' (Kochenov 2013: 515).

EU citizenship is very closely connected with the concept of fundamental rights. The fragmented concept of EU citizenship might have negative effects on fundamental rights protection as it does not grant full rights compared to national citizenship (see Wiener 1997). Furthermore, the range of rights of EU citizenship is limited in comparison to national citizenship. In addition, the access to individual complaint mechanism is difficult or even missing (e.g. ECJ).

Although EU citizenship is a limited concept it nevertheless creates a citizenship gap in reference to non-EU citizens which puts immigrants from third countries and asylum seekers in a very weak position concerning the enjoyment and guarantee of their human rights:

> […] Although human rights law is much more institutionalized in Europe than it is in the USA, it is still very unevenly applied in Europe too. This is especially notable where issues of immigration and security tempt political authorities into sacrificing the rights of unpopular minorities – precisely those groups who are most in need of human rights (Nash 2009: 1072).

5.　　Democracy

a)　　Definitions and concepts of democracy

'Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives.' (Schmitter and Karl 1991: 76) This definition of modern representative democracies only represents one of many definitions aiming at grasping diverse forms and compositions of modern democracy. Democracy as a form of governance has a long history and dates back to the

Ancient Greece. However, the ancient Greek model of democracy differs in many aspects from the contemporary model of democracy as it was based on a very selective mode of participation, the value of equality was restricted to the public sphere and the ancient Greek city states were very small in numbers of inhabitants. In contrast, the modern concept of democracy is premised on the idea of equality reaching far beyond the political realm; further important dimensions of modern democracies are participation, representation, transparency, accountability, legitimacy and responsiveness of political institutions.

b)   How does democracy enable or hinder human rights protection?

Democracy and human rights are distinct yet interdependent concepts. The *Vienna Declaration and Programme of Actions* of 1993 states in Art. 8:

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.

Although interdependent it can be argued that the theoretical concepts which human rights and democracy respectively are based on are completely different:

> Democracy is a collective concept, and democratic governments can violate the human rights of individuals. The concept of human rights is designed to limit the power of governments, and, insofar as it subjects governments to popular control, it has a democratic character. But human rights limit the legitimate power of all governments, including democratic governments (Freeman 2002: 72).

Despite this conceptual difference, the Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Civil and Political Rights (ICCPR) contain direct and indirect references to a 'democratic society'. In Art. 25 the ICCPR stipulates that:

> [E]very citizen shall have the right and the opportunity […] (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Despite this strong commitment to democracy, it has to be mentioned that liberal democracies with their focus on the protection of civil and political rights and with their connectedness to capitalism often fail to adequately protect social and economic rights (Chun 2001). Nevertheless, the correlation between democracy and human rights is in general evaluated to be a positive one (see Hafner-Burton 2014: 275). Davenport refers to three dimensions in this context: Firstly, democratic authorities can be voted out of office and, thus, are less likely to use repressive means. Secondly, individuals in democracies are more

prone to support values such as tolerance, communication or deliberation which are in opposition to repressive behaviour. And thirdly, democracies 'provide an alternative mechanism of control through participation and contestation. They also weaken the justification for coercive activity by reducing the likelihood for human conflict and facilitating the conveyance of grievances.' (Davenport 2009: 131)

c)   *How does democracy enable or hinder human rights protection in the EU – gaps and challenges*

The question of democracy is a sore point in the EU integration process. Since several preceding attempts to initiate a political union failed, the establishment of the European Communities (EC) primarily aimed at economic integration. In doing so, it followed a neo-functionalist logic: integration in the economic sector should gradually have a spill-over effect on other sectors and eventually result in a closer cooperation and integration in the political sector as well. During the last decades the EU 'has evolved from a community of states towards a supranational federation' (Benz 2006: 99). Although there have been considerable efforts to enhance the democratic quality of the EU, democratic elements have only been gradually established during the integration process. Although the political system of the EU has experienced a major democratic push forward through the Treaty of Lisbon the democratic quality of the EU is assumed to be flawed although there is considerable disagreement on how and to what extent of the democratic deficit (see e.g. Benz 2006; Chryssochoou 2010; Emmanouilidis and Stratulat 2010; Føllesdal and Hix 2006; Piris 2010, Warleigh-Lack 2003). Thus, if democratic participation and accountability is seen to be an important factor in guaranteeing political rights the political system of the EU has shortcomings in this regard. Thus the following dimensions are discussed as serious issues concerning the EU democratic quality and, thus, affects all rights concerning political participation:

- Compared to national parliaments, which are the main body in order to realise the right of the citizens to take part in the conduct of public affairs (Art. 25(a) ICCPR) at the national level, the EU Parliament (EP) is rather weak although it has experienced a major upgrading due to the Treaty of Lisbon. 'European integration has meant an increase in executive power and a decrease in national parliamentary control' (Føllesdal and Hix 2006: 534). The separation of power at the EU level is still blurred although the Treaty of Lisbon has introduced the ordinary legislative procedure which provides for a joint decision-making power of the EP and the Council as the main legislative procedure of the EU. In addition, EU elections are not comparable to national elections (Ibid.). In short, 'the transfer of legislative powers from national parliaments to the EU institutions has not been matched by an equivalent degree of democratic accountability and legislative input on the part of the EP, the only directly elected institution at EU level' (Chryssochoou 2010: 380).

- Output effectiveness is very often argued to be compensating for the lack of input legitimacy, i.e. the lack of possibilities for participation, strong position of executive bodies (see e.g. Schmidt 2013; Warleigh-Lack 2003: 10). However, there is serious doubt if a lack of input legitimacy can be compensated by output effectiveness, which suggests that the quality and effectiveness of EU decision making can level out the shortcomings with regard to the adequate representation of the people's interests and 'access to political processes at different levels' (Benz 2006: 99). However, for many Europeans, 'the Union is a distant bureaucratic apparatus that lacks the appropriate institutional structures for democratic input' (Emmanouilidis and Stratulat 2010) and

the effectiveness of EU decision making processes is hampered by the involvement of many actors with veto power (Benz 2006: 99). In addition, it has to be questioned whether the policy and legal output of the EU is legitimate from the citizen's point of view. 'The negative outcomes of successive referenda on EU treaties, and the decline in support for European integration and trust in EU institutions documented by opinion polls and voter turnout at European Parliament elections, are all seen as signs of public apathy and growing estrangement' (Ibid.).

- Besides these two most important points, there is also a discussion on the lack of a European demos[14] which is occasionally argued to be necessary for democratic process. The EU lacks a 'transnational demos' which can be defined as 'a composite citizen body, whose members share an active interest in the governance of the larger polity and who can direct their democratic claims to and via the central institutions' (Chryssoucoou 2010: 382). There is no European identity comparable to those of its Member States. The democratic deficit therefore not only refers to an institutional dimension but also has a socio-psychological aspect (Chryssoucoou 2010: 380-382).

- Lack of transparency and lack of accountability are further issues discussed under the heading democratic deficit. The complexity of the multi-level system makes it 'difficult for citizens and members of national parliaments to identify the specific contribution of each responsible actor and to control or sanction the behaviour of the relevant actors' (Benz 2006: 108) as well as it hampers the access to the political system.

The Treaty of Lisbon set out to 'to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action' (Treaty of Lisbon, Preamble). The most important democratic advancements of the Treaty of Lisbon are the strengthening of the role of the EP, defining a clear role of national parliaments and providing for citizen's initiatives (Piris 2010: 113-114). The value of democracy is defined as being a founding principle of the EU in Art. 2 of the TEU. Title II of the TEU contains provisions on democratic principles and defines the EU as a representative democracy. The chapter further lays down that every citizen shall have the right to participate in the democratic life of the EU (Art. 10(3)) as well as the EU's institutions commitment to transparency. Article 11(4) determines the right to citizens' initiative and Art. 12 defines the role of national parliaments in the framework of the EU institutional system and decision-making process.

The TEU also defines principles in reference to EU's external relations. Art. 21 TEU stipulates that the Union's action on the international scene shall be guided by the following principles: '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.' Art. 21(2) says that 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 (…) consolidate and support democracy, the rule of law, human rights and the principles of international law.' On 25 June 2012 the Council of the European Union has released the *EU*

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[14] Chryssoucoou (1998: 89) defined the demos as a "community of citizens linked to each other by strong democratic bonds and pressing to acquire a measure of effective control through formal or informal means over government".

Strategic Framework and Action Plan on Human Rights and Democracy. The document lays down that the principles of human rights, democracy and the rule of law shall 'underpin all aspects of the internal and external policies of the European Union' and defines key areas of EU's action concerning the enhancement of democracy and human rights.

To sum up, setting out as an international organisation focusing on economic integration the EU has only gradually taken steps towards introducing democratic elements. The so-called democratic deficit refers to shortcoming with regard to institutional design of the EU as well as to more socio-psychological issues which hamper EU citizens to realise their right to political participation. However, not least by adopting the Treaty of Lisbon the EU has made considerable efforts to tackle these shortcomings by increasing the role of the EP and the national parliaments, by committing to values such as human rights and transparency and by creating new ways of participation of the citizens. Concerning the historical development of the EU it can be observed that the strengthening of the human rights dimension of the EU goes hand with the effort to strengthen the democratic quality of the EU and, thus, enhancing the EU's citizens rights to political participation.

C.   Conclusions

Human rights are deeply political. They are defined in a political context and by political actors or within political institutions. They are used as political instruments in political campaigns and the definition of human rights norms and standards are political issues, sometimes highly contested. It is important to emphasise that political factors that hinder or enable human rights are relevant for several political dimensions: it concerns the dimension of politics, which refers to political processes, as well as the policy dimension, meaning the content or substance of politics, as well as political structures. Thus, the following political factors were identified to be crucial aspects concerning the implementation of human rights in EU policies: States and state sovereignty, ideologies, power, citizenship and democracy.

Concerning the importance of State structures for the implementation and guarantee of human rights, this aspect is important in regard to two aspects: on the one hand there is the issue of the position of Member States in the political structure of the EU; on the other there is the shape and configuration of the EU as an actor which is of unique structure and therefore differs wildly from 'traditional' State structures normally entrusted with respecting, protecting and fulfilling human rights. Both aspects may either hinder human rights protection at the EU level or open up new windows of human rights opportunity. However, it would be important to do in-depth research on how exactly both dimensions either hinder or advance EU human rights protection.

Neoliberalism and growing nationalism and racism as important ideologies in the EU and its Member States are perceived to be serious threats to the enjoyment of human rights as they may undermine not only social and economic rights and welfare state policies but also civil and political rights and question the human rights project as such or reject the universal application of human rights. Further analysis is necessary to investigate the concrete impact of ideologies on EU human rights protection.

Power relations are crucial when it comes to the implementation of human rights. They refer to the position and influence of political actors in the EU human rights framework as well as to the question

whose interest are included in the EU human rights agenda and whose are marginalised. However, there is little research done so far on how power relations impede or enable EU human rights policies. Thus, additional research is necessary to identify obstacle and opportunities in this context.

Citizenship may be a serious challenge to human rights because of its exclusive dimensions. EU citizenship is a fragmented concept and adds to the proliferation of different status groups whose members enjoy differing access to fundamental rights. In addition, also the concept of EU citizenship creates a citizenship gap in reference to non-EU citizens which may put the latter group in a weak situation, sometimes where there have only limited access to rights.

Democracy as the realisation of political rights is flawed at EU level. Although the EU has seen a remarkable strengthening of its democratic quality through the Treaty of Lisbon, there are still problematic issues when it comes to the democratic legitimacy of the political system of the EU and its political output. A lack of transparency and accountability as well complex political structures which hinder political participation are perceived as negatively impairing the democratic quality of the EU. An important starting point for further research therefore concerns the question of how a strengthening of human rights at EU level can enhance not only the democratic legitimacy of the EU political system but also promote transparency and accountability at EU level.

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IV.   Legal factors[*]

A.   Introduction

This chapter explores legal factors that can hinder or enable the protection of human rights in the European Union (EU). Legal uncertainty about if and to what extent human rights norms are applicable to the EU, and the scope of human rights protection offered by the EU, is an important factor that can hinder or enable human rights protection when the EU is acting both internally and externally.

The chapter focuses on four legal questions or issues that impact individual enjoyment of human rights. *Firstly*, it is discussed to what extent the EU and Member States implementing EU law are bound by clear and consistent human rights obligations when acting internally. This section has a specific focus on the EU Charter on Fundamental Rights (CFREU) and the accession of the EU to the European Convention on Human Rights (ECHR) and eventually to other international human rights conventions. *Secondly*, it is discussed whether the EU is bound by human rights obligations when acting externally, specifically whether the CFREU is applicable when the EU is acting in third States. *Thirdly*, the chapter deals with the relationship between EU human rights obligations and other international law obligations. *Fourthly* and finally the question of shared human rights responsibility between the EU and EU Member States is briefly touched upon.

It is equally important that there exists effective judicial enforcement mechanisms such as courts that can ensure that legal standards on human rights protection are implemented and enforced in practice. However, such enforcement mechanisms are dealt with in this chapter.

B.   Global context

At the global level there has been much debate in recent years about whether and under which circumstances an international organisation – like the EU – can be responsible for violating international law. The UN International Law Commission (ILC) in 2011 adopted a set of draft articles on the responsibility of international organisations for internationally wrongful acts including violations of international human rights law (IHRL). The articles are not directly binding on States but may be an expression of customary international law.

Pursuant to Art. 4 in the draft articles an international organisation is responsible for a wrongful act when *i*) the act can be attributed to the organisation; and *ii*) the act 'constitutes a breach of an international obligation of that organization'. In particular the second criteria has caused discussion. To what extent is an international organisation like the EU bound by international law? The International Court of Justice (ICJ) established in the *WHO Headquarters Agreement case* from 1980 that:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

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[*] The author of this chapter is Dr. Peter Vedel Kessing, Senior Researcher, the Danish Institute for Human Rights.

Thus, an international organisation may be bound by international law in three ways: (i) through 'general rules of international law' – this concept is not clearly defined in international law, but it must include 'general principles of law recognized by civilized nations' (cf. Art. 38(1)(c) in the Statute of the International Court of Justice) and arguably also 'customary international law' (cf. Art. 38(1)(b)); (ii) through the terms of the international organisation's constituent instrument, for example the UN Charter in relation to the United Nations or the Treaty on the European Union (TEU) in relation to the EU; and (iii) if the organisation has become party to an international convention.

Likewise, the International Law Association stated in its final report from 2004 on the *Accountability of International Organizations* with regard to the applicability of IHRL that:

> Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon IOs [international organizations] in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an IO is authorised to become a party to a human rights treaty. The consistent practice of IOs points to a recognition of this.

In addition to this question about whether an international organisation is bound by international law, three other general legal issues concerning IHRL have caused debate at the global level: the extraterritorial application of IHRL; the relationship between IHRL and other international law obligations; and the question of shared responsibility for human rights violations. The legal uncertainty about these four global legal issues have also been reflected in the European context as further discussed below in section C.

C.   European context

1.   The EU and human rights protection within the EU

EU Member States are obviously bound by IHRL instruments they have ratified. But to what extent is the EU as an international organisation bound by IHRL? As mentioned above, it has been debated at the global level to what extent international organisations are bound by international law, including IHRL.

It is stated in the preamble and Art. 2 of the TEU that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Furthermore, it is laid down in Art. 6 that the EU recognises fundamental rights, including human rights. Pursuant to Art. 6 there are three ways fundamental rights and human rights are applicable and relevant to the EU, reflecting the three ways an international organisation can be bound by international law as described in section B above:

- Through CFREU. This will be discussed in section a) below;
- Through the ECHR as an expression of fundamental rights and eventually through the accession of the EU to the ECHR. This will be discussed in section b) below; and
- Through the constitutional traditions common to the Member States, that shall constitute general principles of the Union's law. This will be discussed in section c) below.

In addition, the EU may ratify and thus be bound by international human rights conventions, see section d) below.

a)   The EU Charter of Fundamental Rights

In 2000, the EU proclaimed its own Charter of Fundamental Rights (CFREU), which became legally binding in December 2009 when the Treaty of Lisbon entered into force. The Charter has the same legal value as the EU treaties, as prescribed in Art. 6 of the TEU. The Charter is directly applicable in Member States and according to consistent practice from the Court of Justice of the European Union (CJEU), must be afforded supremacy over national law in case of inconsistency (see e.g. CJEU, *Van Gend en Loos*, Case 26/62, 1963).

The Charter is to be seen as a *constitutional* rather than an international instrument. The Charter is proclaimed by the Union for Union purposes. This is also reflected in the terminology used in the TEU and the CFREU. It is a Charter on 'fundamental rights' rather than on 'human rights' (Rosas 2014: 1685). The Charter brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The Charter entrenches all the rights found in the case law of the ECJ; the rights and freedoms enshrined in the ECHR; and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.

In addition, the Charter contains new so-called 'third generation' rights, such as data protection; guarantees on bioethics; and transparent administration, including a number of rights which traditionally have not been perceived or described as international human rights norms. See in particular Chapter IV in the Charter on solidarity rights, for example Art. 29 on right to access to placement services; Art. 31 on fair and just working conditions; Art. 37 on environmental protection; and Art. 38 on consumer protection.

From a human right perspective it is positive that the CFREU includes a broad range of rights including economic and social rights and new, emerging rights. But there are also certain gaps and shortcomings which can hinder effective protection of human rights in the EU.

No universal scope of application

First, it must be stressed that the CFREU is not a generally applicable human rights convention, like the ECHR. The CFREU only applies for EU institutions and for Member States when implementing Union law.

Art. 51(1) in the CFREU reads:

> 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Hence, the Charter is meant to ensure the compliance of European Union's actions with human rights as laid down in the Charter, and it does not impose another list of rights upon Member States.

The Charter is, therefore, not a free standing bill of rights, but only applies within the field of EU law (Douglas-Scott 2011: 652). The Charter lays down a principle of human rights compliance for all acts attributable to the EU. That includes acts of all EU bodies and also the conduct of Member States when they are implementing EU law (Fontanelli 2014, p. 233).

The CJEU has found that general principles of law, including IHRL, are binding not only on EU bodies, but also on Member States that (*i*) implement EU law, or (*ii*) adopt measures in derogation of EU commitments (see case 5/88, *Wachauf* [1989] ECR 2609 and case C 260/89, *Ellinki Radiophonia Tileorassi* [1993] ECR I-2925).

However, it is not entirely clear from the case law of the CJEU when Member States are 'implementing EU law' with the consequence that the Charter is applicable. The CJEU has in some cases stated that fundamental rights obligations are binding on Member States not just when Member States implement EU law, but every time domestic norms 'do fall within the scope of Community law' (CJEU, *ERT*, case C-260/89, *ERT* [1991]1-2925).

Also, in the academic legal scholarship there has been various views on how to interpret 'implementing EU law' and the CJEU has provided no clear answer. As described by the Advocate General in *Scattolon*:

> While those who favour a restrictive interpretation of the concept of implementation of EU law submit that that concept refers only to a situation in which a Member State acts as a servant of the Union, those who favour a broader view consider that that concept refers more widely to a situation in which national legislation falls within the scope of EU law. (Opinion of Mr Advocate General Bot delivered on 5 April 2011, paras 117, in case C-108/10, *Ivana Scattolon*)

Thus, it can be concluded that there currently exist legal uncertainty about whether, and to what extent, the Charter applies to national measures that are connected to EU law but are not intended to implement it directly. Such a legal uncertainty might affect the position of individuals seeking to assert their fundamental rights before a national judge (Fontanelli 2014, p. 231).

General limitation clause

The CFREU contains a general limitation clause in Art. 52(1), which applies to all the rights in the Charter:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Unlike the Charter, most international human rights conventions only allow limitation of certain enumerated rights such as the right to privacy and association, but also specify that certain rights are of an absolute character with the consequence that they can neither be limited or derogated from.

Distinction between rights and principles

The CFREU distinguishes between rights and principles. The provisions in the Charter that express a principle do not create any directly enforceable right. Pursuant to Art. 52(5):

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.

The distinction between rights and principles is unclear. Article 52(5) does not clarify which provisions in the Charter are to be interpreted as 'rights' and which only as 'principles' requiring legislative or executive implementation to be enforceable. Only three provisions in the Charter explicitly use the word 'principle': Art. 23 (principle of equality between men and women); Art. 37 (sustainable development); and Art. 47 (proportionality and legality of criminal offences). Nevertheless, it is often suggested that 'principles' more broadly refers to economic, social and cultural rights (Douglas-Scott 2011, p. 652).

Scope and interpretation of the rights in the Charter

About half of the rights in the CFREU are derived from the ECHR. In order to avoid different human rights protection in Europe or more specifically in the CJEU and the European Court of Human Rights (ECtHR) it follows from Art. 52(3) in the CFREU that rights in the Charter which correspond to rights guaranteed by the ECHR, shall be given the same meaning and scope as that laid down under the ECHR. However, it is also provided that this shall not prevent Union law from providing a more extensive protection than the ECHR.

The CFREU does not make express reference to the case law from the ECtHR but the CJEU has held that it should follow clear and consistent jurisprudence from the ECtHR. (See e.g. Case C-400/10 PPU *JMcB v LE* [2010] ECR 000). Thus, even though the scope and interpretation of rights in the CFREU and the ECHR are to a large extent 'harmonised', there is an inherent risk of different standards when two different courts are interpreting the same standards.

In general it can be concluded that the CFREU provides a strong legal basis for protection of human rights and more broadly fundamental rights within the EU. Nevertheless, there are certain shortcomings and ambiguities about the precise scope and level of protection, as described above. These shortcomings may eventually hinder the effective protection of human rights.

b)   Accession of the EU to the ECHR

The accession of the EU to the ECHR has been discussed since the late 1970s. The accession became a legal obligation under the TEU (see Art. 6(2)). The legal basis for the accession is provided for by Art. 59 (2) of the ECHR ('the European Union may accede to this Convention'), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010 (Jacqué 2011). Council of Europe Member States and

the European Union finalised a draft accession agreement of the EU to the ECHR in April 2013, which is currently being examined by the CJEU.

In the present situation there is a potential lack of human rights protection since possible violations of the ECHR committed by EU institutions cannot be examined by the ECtHR unless EU law has been implemented by some act on the Member State territory.

The EU's accession will undoubtedly strengthen the protection of human rights in Europe by submitting the EU's legal system to independent external control. It will also close gaps in legal protection by giving citizens in the EU the same protection vis-à-vis acts of the EU as they presently enjoy from member states. Finally, it will arguably also lead to a greater degree of coherence in the field of human rights protection in Europe. In addition to the CFREU and the ECHR the EU is also bound by general principles of law in EU States.

c)   Fundamental Rights as General Principles of Law

As laid down in Art. 6(3) of the TEU, constitutional traditions common to the Member States constitute general principles of the Union's law. The CJEU has, particularly before the Charter became legally binding, integrated human rights into the EU legal order by considering them as general principles of law. The Court has often referred to and used the ECHR as an expression of common European constitutional traditions and has only rarely made its own independent examination and determination of which constitutional traditions in Member States that constitute general principles of law.

d)   EU ratification of international conventions

In addition to the human and fundamental rights which are applicable within the EU as laid down in Art. 6 of the TEU, and described above in sections a)-c), the EU can be bound by IHRL to the extent the EU ratifies international human rights conventions.

The EU may, pursuant to a special procedure in Title V of the TEU, ratify or conclude agreements and conventions with third countries or international organisations. Ratified conventions become binding on the institutions of the Union and on Member States when they are implementing EU law, see Art. 216 of the TEU.

The CJEU has consistently held that once an international agreement concluded by the EU enters into force, the agreement forms an 'integral part' EU law (See e.g. case 181/73 *Hageman* [1974] ECR 449). The Court has also ruled that Member States are in violation of their obligations under EU law where they fail to adopt measures necessary to implement an international agreement concluded by the EU. Hence, international agreements entered into by the EU bind the Member States by virtue of their duties under EU law and not international law (Craig and Búrca 2011, p. 338).

The EU may, thus, ratify international human rights conventions and international humanitarian law conventions, for example the four Geneva conventions that have been ratified by all States, including all EU Member States (Naert 2014).

However the EU is, with one recent exception, not party to any international human rights treaties. The EU ratified the UN Convention on the Rights of People with Disabilities in 2011. It was the first comprehensive human rights treaty to be ratified by the EU as a whole. At the time of ratification the UN convention was signed by all 27 EU Member States and ratified by 16 of these and thus not formally binding in all EU Member States[15].

The EU ratification of the UN Disability Convention can illustrate the fear raised by certain Member States, namely that international human rights conventions and protocols they have chosen not to ratify – maybe deliberately for good reasons – would become applicable in their national legal order by means of EU law. Obligations can be said to be entering 'through the backdoor'.

It is feasible that the EU may want to consider ratifying additional IHRL conventions in the future and it can be envisaged that the process and consequence of EU ratification of such conventions might cause additional legal uncertainty.

2. The EU's human rights obligations in third States

It is proclaimed in Art. 3 of the TEU that the EU in its relations with third countries ('the wider world') shall contribute to the protection of human rights, in particular the rights of the child:

> In its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection if its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Furthermore, pursuant to Art. 21 of the TEU the 'Union's action on the international scene shall be guided by', *inter alia*, international law and human rights. So-called human rights clauses are also included in many bilateral trade and cooperation agreements.

It is noteworthy that the TEU uses the term 'human rights' when describing the EU's relationship with third States. Whereas the term 'fundamental rights' – used in the TEU when regulating human rights within the Union – is not used in the description of the EU's relationship with third States.

The EU is clearly bound by human and fundamental rights within the EU (see section 1 above) and the Union shall, as laid down in the TEU, contribute to the protection of human rights in its external relations. But to what extent is the EU itself legally bound by the EU's human rights obligations, when acting in third countries?

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[15] It was concluded by the Council Decision 2010/48/EC, [2010] OJ L23/35. For more information see <http://europa.eu/rapid/press-release_IP-11-4_en.htm> (last accessed on May 2014).

The geographical scope of Member States' international human rights obligations has been very much debated in recent years (see e.g. Milanovic 2001 with further references). It is laid down in Art. 1 in the ECHR that Member States shall secure ECHR rights to 'everyone within the jurisdiction of the State'.

The ECtHR has dealt with a number of cases on the extraterritorial application of the ECHR and has clearly established that the Convention is applicable extraterritorially when Member States' exercise effective control over *territory* or *individuals* on another State's territory (See *Al-Skeini v. UK*, ECtHR, GC, July 2011).

Likewise, it has been debated whether the CFREU is applicable when the EU – or Member States implementing EU law – are acting in third countries, for example in relation to EU delegations and missions, Frontex, etc. but neither the CJEU nor the ECtHR has ruled on the question.

Pursuant to Art. 51 of the CFREU the Charter is applicable to all EU institutions and Member States when implementing EU law. There are no territorial or jurisdictional delimitation as in Art. 1 of the ECHR and most other international human rights instruments.

Against this background it is argued by some scholars that there are no territorial limits to the application of the Charter. The fundamental rights obligations follow EU activities as well as Member State activities, when implementing EU law including in third States. This follows from the fact that EU human rights obligations are applicable in all areas governed by EU law, or as the CJEU puts it: 'the applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter [CFREU]' (Case C-617/10 Åkerberg Fransson (Grand Chamber, Judgment 26 February 2013) [21]). The only threshold requirement, therefore, is whether EU law applies to the particular circumstances (Moreno-Lax and Costello 2014: 1658).

Other scholars argue with reference to Art. 52(3) in the Charter, discussed above section 1 a), that the CFREU must be interpreted in the light of the ECHR, limiting the scope of application of the Charter to individuals under the 'jurisdiction' of the EU. As spelled out by the ECtHR that would mean that the CFREU is only applicable in situations where the EU exercises effective control over *territory* or *individuals* on another State's territory (Nowak and Charbord 2014: 77).

In this connection it also unclear and debateable whether the EU – and Member States implementing EU law – are bound extraterritorially by fundamental rights that are rooted in the *constitutional traditions of Member States*, which constitute general principles of the Union's law arguably applicable without any territorial limitations, see Art. 6 (3) of the TEU.

Another pertinent question which is becoming increasingly relevant due to technological development is the extent to which human and fundamental rights are applicable when the EU is carrying out an act on EU territory which directly leads to a human rights violation for individuals present on the territory of a third State – e.g. cross-border pollution, data interception, drones etc. – the so called *extraterritorial effect* of human rights obligations. The ECtHR has found in a number of cases that the ECHR is applicable if there is a 'direct and immediate causality' between an act a Member State carries out on its own territory and a human right violation in another State (see by way of illustration *Andreau v. Turkey*, 2008).

The extraterritorial effect of the UN Covenant on Civil and Political Rights (ICCPR) has also been recognised by the UN Human Rights Committee (HRC). Pursuant to the HRC States parties also violate the right to security of persons under Art. 9 of the ICCPR if they from their own territory purport to exercise jurisdiction over a person outside their territory by issuing a *fatwa* or similar death sentence authorising the killing of the victim (UN Human Rights Committee, *Concluding observations*, Islamic Republic of Iran 1992, para. 256.).

It is evident that legal uncertainty about whether the EU is bound by human rights obligations when acting in third States can hinder the effective protection of human rights.

3. EU human rights obligations and the relationship with other bodies of international law

EU Member States and, indeed, the EU as an international organisation are affected by other legal obligations in international law. This relationship can give rise to uncertainty about the scope and level of protection.

There may be situations where EU fundamental rights cannot be harmonised with other obligations in international law and this raises the question of whether fundamental rights in the CFREU can be watered-down or even superseded by other obligations in international law?

Article 103 of the UN Charter provides for the supremacy of Charter obligations over any other obligation in international law ('international agreements'). In the *Kadi* case the CJEU had to deal with a conflict between right to a fair and effective judicial hearing, see Art. 47 in the CFREU, and UN Charter obligations concerning freezing of assets without any hearing (Case C–402/05 P and C–415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351).

The CJEU stated (cited case law omitted):

> 280 The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of jus cogens, and therefore to that extent enjoyed immunity from jurisdiction.

> 281 In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.

> 282   It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred

on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community.

283   In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.

284   It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community.

285   It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286   In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

287   With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

288   However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law…

326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

Hence, the CJEU proclaimed the constitutional autonomy and hegemony of the EU legal order. The EU is a community based on the rule of law and respect for human rights is an integral part of the EU legal order. Therefore, UN Charter obligations could not overrule fundamental rights within the EU. On that

background the Court considered the merits of the case and annulled the EU Council regulation implementing the UN resolution freezing Mr. Kadi's assets since it was in violation of Mr. Kadi's right to defence, especially the right to be heard, and the principle of effective judicial protection.

The Grand Chamber of the ECtHR is currently considering a similar case where the applicants are claiming that the confiscation of their assets (pursuant to a binding resolution from the UN Security Council) had been ordered in the absence of any procedure complying with their right to a fair hearing under Art. 6 in the ECHR (see ECtHR, *Al-Dulimi and Montana Management INC v. Switzerland,* Appl. No. 5809/08, referred to the Grand Chamber in April 2014).

Conflicts between CFREU and other EU obligations under international law can also be envisaged in other areas of international law, e.g. in relation to international law on counter-terrorism, international humanitarian law, etc.

4.   Who is responsible for a possible human rights violation: the EU or Member States ?

In parallel with the increased competence of the EU there may be more situations where the EU is acting together with a Member State and where their joint action leads to a human rights violation.

As laid down in Art. 14 of the ILC's draft articles on the responsibility of international organisations from 2011, an international organisation like the EU which aids or assists a State or another international organisation in the commission of an internationally wrongful act might be internationally responsible for doing so.

In this situation it might be disputed if it is the EU, the Member State or both that are responsible for the human rights violation. These questions have been considered by the CJEU and by the ECtHR (see e.g. Evans and Koutrakos, 2013).

Furthermore, EU accession to the ECHR could prompt a number of difficult and unsettled questions as to the division of responsibility for human rights violations between the EU and Member States. For the most part EU law is implemented by Member States. In some situations Member States are not left with any choice or discretion as to how EU law should be implemented and the responsibility for a possible human rights violation would seem to rest with the EU. In other situations, however, the Member State might be left with a discretion when implementing the EU law and the responsibility for a possible human rights violation could be attributed to the Member State or there may be a situation of shared responsibility between the EU and the Member State.

If the action leading to the violation of human or fundamental rights can be attributed to the EU it might be questioned whether Member States have provided aid or assistance to the EU with the consequence that Member States can also be held accountable for the human rights violation. See the principle in Art. 58 of the ILC's draft Articles on Responsibility of International Organizations dealing with this type of shared responsibility:

Responsibility of a State in connection with the conduct of an international organization

Article 58 Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

D.   Conclusion

It is evident from the TEU, the Treaty on the Functioning of the European Union (TFEU) and the CFREU that fundamental and human rights are an important and integral part of the EU both in its internal and external activities. There is in the TEU, TFEU and the CFREU a strong legal basis for securing human and fundamental rights in EU's internal and external behaviour.

It is notable that when the TEU deals with the protection of rights inside the EU it uses the term 'fundamental rights' including rights which traditionally have not been conceived as or described as human rights in international human rights conventions, see e.g. the Preamble and Art. 6 of the TEU. Whereas the more narrow term 'human rights' is used in the TEU in relation to the EU's contact with third States ('the wider world'), see Art. 3 and 21 of the TEU.

The accession of the EU to the ECHR and the ratification of additional international human rights conventions are important legal factors that can *enable* the protection of IHRL in EU's internal and external behaviour.

Even though there is a strong legal basis for respecting and protecting human rights in the EU, both internally and externally, it is possible to identify certain gaps and shortcomings. Shortcomings that might create legal uncertainty and *hinder* an effective protection of human rights in EU activities.

There are certain ambiguities in the CFREU, for example on the distinction between rights and principles, and on the scope and interpretation of rights in the Charter *vis-à-vis* similar rights in the ECHR. Furthermore, the precise scope of application of the Charter when the EU and Member States implementing EU law are acting in third States is debated and not fully agreed upon. Finally, the question about attribution of responsibility between EU and Member States raises a number of complex and unsettled legal questions.

Some of these legal questions may ultimately be dealt with and clarified by the CJEU on a case by case basis – and eventually also by the ECtHR when the EU has acceded to the Convention – but this might take

time and it can be questioned whether these issues would better be dealt with by a political body – like the EU Council and Parliament – than a court.

In any event, further research and analysis is required particularly concerning the scope of application of the CFREU; shared human rights responsibility between the EU and Member States; and the possibility and consequences of EU ratification of other international human rights and humanitarian law conventions.

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V.   Economic factors[*]

A.   Introduction

The chapter will deal with the economic factors conducive to or preventing human rights protection and consolidation in the European Union (EU). In the context of this chapter, economic factors refer to situations and circumstances with respect to resource endowments and allocation (land, labour, capital, and natural resources) that affect human rights outcomes. Economic policies and institutional change are often a result of broader changes in economic contexts, for instance the economic crisis. Therefore, the selected factors under review in this chapter will often represent a mix of broader trends influencing them and specific policy changes. Economic factors, representing a very dynamic field, are hard to understand without taking into account the internal policy change in the EU. Such policy change in conjunction with other causes will potentially affect economic rights (rights to and conditions of work, and rights to organise and strike) but possibly also social rights (education, health, social security, housing, and rights to adequate living standards). Even cultural rights around enjoyment of scientific progress and cultural heritage and livelihoods may potentially be affected by economic policies. Changing economic circumstances may, however, also impact on access to institutions and may significantly affect the participation of specific groups into the conduct of public affairs.

The chapter will deal with specific economic factors in focus in the recent literature and is based on recent change in economic conditions and circumstances in the Union. The point of departure for the discussion is the situation in Europe after 2008 when the economic and financial crisis developed. The emergence of the crisis was a defining event that altered policy implementation *internally*, created situations of severe austerity and increasing unemployment in a number of countries, and played havoc with social and livelihood opportunities. In terms of *external* human rights implications, the picture is more nuanced, but important in specific areas such as development and trade situations.

The selection of factors in this chapter is based on the recent scientific and official literature. Under each issue discussed, this chapter shall seek to address:

- Policy and institutional change after 2008 affecting a number of selected economic factors
- Human rights implications of the changing circumstances.

What are the most pertinent human rights implications of economic change? The economic literature overview provides the following factors as most important:

- Economic decline and the threat to adequate living standards
- The functioning and legitimacy of the internal market
- Poverty and social exclusion
- Employment
- Development and trade.

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These factors structure the analysis in the chapter. Some of them have overlapping human rights dimensions. Economic decline relates more to adequate living standards, while poverty may relate more to dignity and exclusions as well as to adequate living standards. Many of them relate to economic, social and cultural rights in particular, and typically, changes in economic factors result in challenges to social rights particularly: right to social security, threats of exclusion from particular groups, and rights to housing and health. Nevertheless, economic rights specifically are also in focus, most seriously the right to work. The issue of trade may be important in development contexts as well as in the context of economic decline.

However, before entering into a discussion of the individual factors, an overview of the general economic context as it results from the recent economic crisis is presented in section B.

B.   Global and European context – The 2008 economic crisis and its onslaught on the European economy

The global financial crisis brought about by falls in housing prices in the United States during 2007-08 and the growing number of mortgage defaults resulted in a liquidity and debt crisis in Europe and in the US. This spilled over in a loss of confidence globally resulting in a decline of the 'real' economy: the crisis was originally financial, but turned into a global economic crisis as well. A vicious cycle of falling investments, loss of employment, and negative or low growth ensued. Globally, while growth rates reached 4% across the world during 2004-2007, it fell to 1.4% and –2.1% respectively during 2008 and 2009 (World Bank 2014). In the EU, a situation of low or negative growth was an important policy determinant and with that, a climate of austerity emerged.

The economic crisis forms the point of departure of the present analysis of factors. It had multiplying effects in terms of how the internal market worked, how the economic climate evolved after 2008, and how trends in poverty and employment developed negatively. The economic and financial crisis globally and in Europe forced the EU to address the financial sector, tighten fiscal controls, and institute stricter compliance in monetary policy. As indicated above, in some Member States, the situation created austerity situations which threatened the economic and social rights of some groups in particular. However, the crisis also made it increasing relevant to adapt trade policies to a changing world market.

C.   EU economic factors enabling or hindering the protection of human rights

The analysis of factors below will deal with five factors: the declining economy and its human rights implications, the functioning of the internal market, poverty and social exclusion, employment, and development and trade.

1.   Economic decline and the threat to adequate living standards

The real GDP growth rate of the Euro area averaged -0.5% per annum in 2009-2013, whereas it reached 2.2% on average 2003-08.[16] The decline in real GDP was significant after 2008. However, behind the declining growth trend is not only the financial crisis, but also declining economic productivity and ageing populations (European Commission (a) 2013: 8, 13). In terms of investments, there was a 10.5% reduction in total investments in the EU between 2000 and 2011 (EU 27). Between 2007 and 2011, investments fell from a peak 21.6% of GDP to 18.9% of GDP (European Commission (b) 2013: 49). This trend was largely driven by a sharp fall in private investments. As indicated above, these trends induced policy changes which in turn affected human rights in the EU generally, but with a particular impact in some countries, especially with respect to economic and social rights.

The EU trade balance was negative during most years from 2004 at the time of the enlargement. This was due to a deficit of trade in goods whereas the trade balance in services was positive. During 2006 the combined trade deficit reached EUR 202 million, falling to a deficit of almost EUR 160 million in 2011 (European Commission (e) 2013). The post-2008 economic crisis did not have a notable impact on the EU total trade deficits.

a)   *Policy and institutional change after 2008*

The global financial crisis that erupted in full force in late 2008 challenged the existing architecture of financial services regulation and supervision in the EU. A host of new regulatory initiatives were taken by the EU as a result. New rules were introduced and existing rules were substantially amended, which mainly concerned banking, securities markets and financial supervision. As far as banking was concerned, the global financial crisis brought into the spotlight the inadequacy of the existing Deposit Guarantee Scheme (DGS) directive. At the peak of the crisis, the Commission proposed legislative changes concerning the DGS directive. These changes, which were hurriedly agreed to in 2009, represented an emergency measure designed to restore depositors' confidence by raising the minimum level of coverage for deposits from EUR 20,000 to EUR 100,000.

During the financial crisis, several large banks were bailed out with public funds because they were considered 'too big to fail'. In June 2012, the Commission adopted a legislative proposal for bank recovery and resolution, designed to avoid government bailout of large banks in the future (European Commission (p) 2012: 280/3). The harmonised resolution tools and powers outlined in the directive were designed to ensure that national authorities in all Member States have a common toolkit and roadmap to manage the failure of banks. The legislation would raise contributions from banks proportionate to their liabilities and risk profiles and would not be used to bail out a bank (Quaglia 2013: 17-21).

At the European level, Europe's fiscal compact of 2012 was one important response to the economic and financial crisis. It was formally embodied in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed by all members of the EU, with the exception of the United

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[16] European Commission, Economic and Financial Affairs, *Quarterly Report on the Euro Area* 12, no. 4 (2013), 11. Figures are covering 27 countries. For the growth rate 2003-08, see Eurostats Table on Real GDP growth, European Commission (2013).

Kingdom and the Czech Republic. The compact was scheduled to be activated in January 2013. The compact reflects the latest stage in a historical trend attempting to impose tighter fiscal control in Europe. It seeks to limit the size of fiscal deficits in Member States to no more than 3% of GDP and the amount of debt to no more than 60% of GDP (Bird and Mandilaras 2013: 1-2).

The European Central Bank introduced the OMT (Outright Monetary Transactions) during 2012 as a counter-measure to speculative purchases of bonds in debt-ridden Member States. During 2012, the European Stability Mechanism (ESM) was also introduced as a means to ensure financial stability in the Euro area. This instrument complemented the 2010 European Financial Stability Facility (EFSF) which made it possible to renew loans, for instance in Greece (Verdun 2013: 56-61).

These measures are all indicative of stronger economic control and integration. The era of 'integration by stealth' had revealed its limits (Majone quoted in Natali 2010: 102). These policies also tended to put the Europe 2020 Strategy introduced in 2010 in the background somewhat due to the acuteness of crisis measures (Frazer et al. 2010, 15-27). The Europe 2020 Strategy emphasised smart, sustainable, and inclusive growth. The Strategy intended to deliver high levels of employment, social cohesion, and high productivity. In the sections below, it will become apparent that the economic and financial crisis put these objectives in some jeopardy.

So-called austerity policies and measures to counter the economic crisis were also introduced in a number of countries after 2008, partly as a result of the EU's fiscal and monetary measures. These policies have been the object of much criticism from human rights and civil society actors. It is one of the economic policy areas that have met with the strongest objections from human rights groups. Reviewing policies in six of the economically worst hit countries, the European Commission published an overview of the austerity measures introduced in Estonia, Ireland, Greece, Spain, Portugal, and the United Kingdom. In most countries, austerity measures took the form of some combination of 1. reductions in cash benefits and public pensions; 2. increases in direct taxes and contributions; 3. increases in indirect taxes; 4. reductions in public expenditure that have an indirect impact on the welfare of households using them; 5. reductions in public expenditure such as defence spending; 6. cuts in public sector pay; and 7. cuts in public sector employment (Callan et al. 2011: 8).

Externally, in terms of trade and investment policies, an important rationale in EU trade policy is economic growth and job creation. The EU is the biggest exporter in the world, and the largest economy (European Commission (j) 2010). It is however anticipated in the Commission that much of the growth in international trade will be generated outside Europe, especially in East and South Asia (Ibid.). Some of the objectives in trade policy are therefore refocused on well-known subjects, i.e. liberalisation of markets, standardisation, and competitive capacities. However, other aspects of trade policy addressing the necessary coherence between internal and external strategies are also prioritised, and value elements, present in the Europe 2020 Strategy are incorporated: smart growth, but also inclusive growth with emphasis on principles of human rights, environment protection and good governance (Ibid). Policies are also geared towards fair trade agreements (for instance with South Korea recently) and completion of the Doha round negotiations of the World Trade Organization. Subjects under Doha include agricultural, and non-agricultural market access, intellectual property rights, and dispute settlement (WTO 2014). Lack of

progress under the WTO and Doha made the EU lift a moratorium on free trade agreements during the second half of the 2000s decade, a shift which led the EU to formulate *Trade Growth and World Affairs* in 2010 (European Commission (j) 2010; Ahnlid 2013: 204)

Trade and foreign direct investment are closely linked. The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on foreign direct investment. The Treaty grants the Union exclusive competence to that effect.[17] The Commission sees foreign direct investments into production or business as essential in generating economic growth, jobs, and reducing poverty (European Commission (k) 2014). It is argued by the Commission that an effective global supply chain cannot exist without the vital support of transport, telecommunications, financial, business, and professional services. Services represent 70% of world output, but only a fifth of world trade.

b)   Human rights implications

The economic decline and the ensuing policy changes impacted economic and social rights in particular, such as the right to social security (UDHR Art. 22), the right to an adequate standard of living (UDHR Art. 25), and the right of an access to services of general (economic) interest (EU Charter Art. 36). Also, Arts. 20 and 21 of the Charter of Fundamental Rights on equality and non-discrimination may be affected.

In terms of the impact of the economic and financial crisis on social security and protection, Natali analyses EU coordination on pension policy. The Stability and Growth Pact (its most recent version of 2011) emphasises the need to increase the long-term sustainability of public finances. Privatisation of pension systems has been an emphasis of the more recent versions of the Pact, but this policy may have been counterproductive in certain Eastern EU Member States with re-nationalisation of private pension funds as a result (Natali 2012: 151).

Callan et al. estimate the effect of austerity policies on disposable household incomes in six countries in an analysis from 2011. The figures are therefore not updated with respect to the more recent impact of austerity measures. Especially for Greece, being one of the six countries, this is likely to underestimate the effect.[18] This analysis may provide some understanding of how adequate standards of living were influenced during the first years of the crisis, but it is also indicative of whether particular income deciles were discriminated against. The analysis shows household incomes in Ireland and Estonia to be most severely affected (8.1 and 6.2 percentage reductions), while households in Greece were less severely affected at the time of analysis compared to all five other countries with the exception of the UK (2.2% in Greece, 1.9% in UK against e.g. 3% in Portugal and 2.7% in Spain) (2011: 16). In Ireland, Greece, Spain and Portugal pension levies were substantially increased, while in Ireland and Estonia the worker social

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[17] Art. 206 of the Treaty on the Functioning of the European Union (TFEU) provides that by establishing a customs union in accordance with Arts. 28 to 32, the Union shall contribute, in the common interest, to the progressive abolition of restrictions on international trade and foreign direct investment, and the lowering of customs and other barriers. Article 207 includes foreign direct investment as one of the areas covered by the common commercial policy of the Union. The common commercial policy is an area of exclusive competence pursuant to Art. 3(1) of the TFEU. See European Commission (q) 2010, 2.

[18] Estonia, Ireland, Greece, Spain, Portugal and UK were included in the analysis (Callan et al 2011: 15-20).

insurance contributions were markedly increased. Increasing income tax levies are important in Portugal, Spain, and Ireland, while negative in Greece.

The distribution of austerity measures during these early years of the crisis is regressive in Portugal where the poorest household income deciles share the heaviest burden. In Estonia and Spain the distribution of the austerity measures is relatively flat across deciles, in the UK it is also relatively flat, but the richest decile pays a heavier burden compared to the other groups. In Ireland the poorest decile group together with the five richest groups pay a disproportionate share of the burden of austerity. Pensioners who are concentrated in the middle decile groups, have their income relatively well protected (2011: 19). These data are only indicative of whether the burden of austerity is equitable or not. What they document is that the poorest decile groups certainly are involved in taking a share of austerity costs (2011: 18).[19] These implications of economic change and policy raise issues, therefore, in relation to the articles on equality and non-discrimination of the Charter of Fundamental Rights of the European Union.

The social response to austerity measures at the EU level has mainly derived from quasi-judicial bodies, national human rights institutions and monitoring human rights committees. A coordinated civil society response has been weak, while individual civil society groups have voiced concerns.

A complaint to the European Committee of Social Rights was made by the Federation of Employed Pensioners of Greece. According to the complaint, pensioners under the age of 55 had seen a 40% reduction of their pensions from 1 November 2011, while pensioners aged 55 or above had experienced reductions of 20%. Any primary and auxiliary pensions of pensioners having taken early retirement had allegedly been reduced by approximately 50%. At the end of 2012, the Committee ruled that specific reductions that have been introduced by the government do not in themselves amount to a violation of the European Social Charter, but the cumulative effect of the restrictions was bound to bring significant degradations of living standards of many of the pensioners involved. Even considering the particular situation in Greece, the Committee also found that the government had not conducted a minimum level of research. On these grounds, the Committee found a violation of the Social Charter (European Committee of Social Rights 2012).

In contrast, the European Court of Human Rights examined the consequences of austerity programmes in Greece in *Koufaki and Adedy v. Greece*. The Greek government adopted a series of austerity measures to cut public spending. Such measures applied to all public servants without distinction and implied 20% cuts in public sector salaries and pensions and curtailment of other benefits. The Court dismissed the case on the merits on 7 May 2013, having regard to the public interest which underpinned the measures and the wide margin of appreciation enjoyed by States in the formulation of economic policy. It observed that the

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[19] See also Ball et al. 2013. Using episodes of fiscal consolidation for a sample of 17 OECD countries over the period 1978-2009, it shows that fiscal consolidation has typically led to a significant and persistent increase in inequality, declines in wage income and in the wage share of income, and increases in long-term unemployment.

effect of the cuts on applicants' livelihoods was not such as to threaten their wellbeing (Tulkens 2013: 3).[20]

Addressing the austerity and human rights situation in Europe, the European Network of National Human Rights Institutions and the German Institute for Human Rights also raised concerns over EU-induced austerity measures. Thus, austerity policies had been pursued vigorously in Spain and in Ireland. These two country cases were debated alongside that of Greece. For families in Spain, the crisis had been an emotional shock for middle and working-class families. Exclusion from formal labour markets was a result. In Ireland, one in five Irish people had no health insurance. Asylum seekers' allowances were cut. At the same time, the human rights bodies in Ireland had also been hit by austerity (European Network of National Human Rights Institutions and German Institute for Human Rights 2014: 12-13).

In terms of investment policies, a study has assessed whether EU investments abroad have taken place at the expense of investments at home with consequences for employment and labour salaries. A study was undertaken on these relationships and concluded that the long-term of foreign direct investments are not negative, but employment effects may favour skilled over unskilled labour (Copenhagen Economics 2010: 5). In human rights terms, this indicates therefore that with increasing globalisation unskilled labourers as a group may require specific measures of protection in order to ensure their right to work.

In line with the Europe 2020 Strategy, the EU has pursued social goals that can be seen in the support for ILO policies and treaties, for instance during the negotiations of the ILO's Global Jobs Pact of 2009 which attempts to address the social and employment impacts of the economic and financial crisis by promoting tested policy measures for member countries emphasising employment and social protection alongside protection of environmental sustainability at the centre of crisis response. During the adoption of the Pact, the EU played a key role in cooperating closely with emerging economies and developing countries in the adoption of the Pact. However, as argued by Zahn (2013: 180-181), it is easier for the Union to pursue an external social policy than an internal one. Social integration within the EU would go much deeper than any attempts to reinforce the social side of globalisation.

As far as the involvement of stakeholders is concerned in external trade and investment policies, during 2012 the European Commission presented a new policy on civil society involvement in external relations in a Communication to *inter alia* the Council and the Parliament (European Commission (m) 2012). It is noted that a limited tradition of dialogue prevails in many countries and that the relationship between States and civil society is often delicate. In many contexts, CSOs that focus on human rights, advocacy and gender face limitations in their opportunities to secure funding. In light of this situation, the Commission proposes a more strategic approach with CSOs covering all regions, including developing, neighbourhood, and enlargement countries. Three priorities are envisioned for EU support:

- To enhance efforts to promote a conducive environment for CSOs in partner countries.

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[20] Tulkens mentions another European Court of Human Rights case from 2013 involving Hungary where the Court ruled in favour of the applicant who complained that her entitlements to severance pay was unexpectedly reduced due to the imposition of a 98% tax on severance pay exceeding a certain threshold (3-4). *N.K.M v Hungary* judgement 14 May 2013.

- To promote a meaningful and structured participation of CSOs in domestic policies of partner countries, in the EU programming cycle, and in international processes.
- To increase the capacity of local CSOs to act independently.

The EU will continue to take action in countries where the government fails to recognise civil society with consequences for human rights violations (European Commission (m) 2012: 3-5). The crisis does not seem therefore to have affected EU participatory policies negatively with respect to external engagements. Within the EU Commission, awareness about participatory engagements between duty-bearers and rights-holders seem to prevail although policies are rarely formulated in human rights terms. However, two observations may qualify this general point.

Firstly, the nature of responsibilities of the European Commission towards interest groups is limited and of somewhat technical nature. There are limited structures of direct accountability which means that the sensitivity of the system to outside interests is relatively modest. In addition, the relatively small size of the Commission of 38,000-odd staff (comparable to a medium-sized city) makes it dependent on technical inputs from different sources. It is also argued that Civil Society Organisation (CSO) representation and interaction with the Commission is based on somewhat elitist representation on the part of CSOs (see Greenwood 2011: 3-5 quoting Nugent).

2.   The functioning and legitimacy of the internal market

The Internal Market is a cornerstone of the EU. Its purpose was originally in 1957 to break down barriers between individual Member States and, in doing so, to create 'four freedoms' across the EU: the free movement of people; the free movement of capital; the free movement of goods; and the freedom to provide services (European Commission (f) 2011: 1). Through these freedoms, the EU has been able to achieve further integration, to deliver economies of scale, and to improve the opportunities available to European citizens (Schiek 2013: 9; Vinterskog 2013: 71-91). The relatively comfortable growth rates during the pre-crisis years might have contributed to laying the ground for the ambitious goals of the Europe 2020 Strategy and for the endeavours to combine economic integration of the Union with social policy. Thus, internal market and social policy optimism formed a background to the Lisbon Treaty of 2009 and to the adoption of the Charter of Fundamental Rights of the European Union.

a)   Policy and institutional change after 2008

During 2011-12, the Commission introduced 12 different levers under the Single Market Act to boost growth, jobs and confidence in the single market. From a human rights point of view, the most important measures introduced were those on Social Cohesion and on the Governance of the Single Market (European Commission (o) 2011; European Economic and Social Committee 2011). The former addressed improvements of the Posted Workers Directives, i.e. the protection of workers from one EU country who were stationed by their employers in another member country. During 2014 it is likely that the enforcement of the Posted Workers Directive will begin. Despite the earlier Directive on Posting of Workers, abuses have prevailed with the result that workers have been left without social insurance. For

instance, very complex combinations of subcontractors have been used, set to minimise the amount of social contributions (Jouffe 2014).[21]

Regarding the governance of the internal market, four policy areas have been introduced during recent years: 1. The better involvement of civil society (of which more below); 2. Partnerships among member states; 3. Improved information; and 4. Proper application and transposition of EU rules. Concerning cross-border partnerships, better administrative procedures and also access to information in domestic languages have been important tools. Together with the Member States the Commission has further developed the new Your Europe portal which offers a single avenue for all information on single market rights. A scoreboard has been established for compliance with single market regulations, with a target of reducing cases of non-compliance to 0.5% of all regulations. However, the reality is that by 2012 only 11 Member States (less than half) reached a target of 1% for gaps in the implementation of single market regulations (European Commission (g) 2012: 10).

b) *Human rights implications*

In the aftermath of the Single Market Act and the 2010 Citizenship Report (European Commission (g) 2012: 9) that highlight the gap between the EU legal framework and people's daily enjoyment of their rights, Commission services published a list of the 20 main concerns of citizens and businesses about the single market. This list serves as a diagnostic tool: it identifies citizens' problems and their underlying causes in three interrelated areas: (i) non-adequate or incomplete EU legislation in some areas, (ii) citizens' difficulties in exercising their rights due to a lack of implementation, (iii) lack of understanding of these rights (Ibid).

The Barometer Study on the internal market illustrates these problems vividly:
- Overall there appears to have been a negative shift in opinion towards the internal market since 2009. More people think that the internal market has a negative impact than in 2009, while fewer think it has positive effects.
- Only 32% of people think it benefits poor or disadvantaged people.
- EU citizens have a limited understanding of where to learn more about their rights under the internal market.
- Sixty-two per cent think that the internal market is only for the benefit of big companies (55% in 2009); while 58% feel that the internal market has flooded their country with cheap labour (50% in 2009).
- For 55% of EU citizens, the internal market includes too many different countries (50% in 2009), although, more positively, 52% agree that it provides for more jobs in the EU (64% in 2009). The Internal Market strengthens their own country in competition with the US, Japan or China, according to 51% of EU citizens, as opposed to 70% in 2009 (Commission 2014f: 8-18).

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[21] An example is that of the construction of a nuclear plant in Flamanville (France) in 2011, where Polish Workers were hired through a Cypriote office of an Irish-based temporary work agency. In that case, the workers were not covered by any social insurance; the combination of subcontractors made the task of finding out who should be held responsible for the abuse very difficult (Jouffe 2014,

The survey shows that only 10% of EU citizens have worked in another Member State, only three per cent did so at the time of the survey (Ibid.: 32). The level of labour market integration is therefore limited. This may explain that social pressures to implement and reinforce the functioning of the internal market is relatively modest in the Member States, as noted by the growing implementation deficits above, but it may also explain the *legitimacy deficit* understood as a prevailing understanding among EU citizens that the internal market is not providing adequate benefits. This negative perception has increased during the crisis. In addition, the data from the Barometer Study indicates that information about the internal market or access to information about it is inadequate. However, the Barometer data on perceptions of benefits accruing to big companies and not to disadvantaged people may also indicate that even with better information, citizens may still hold negative opinions about the market. One positive perception, though, is that the majority of citizens think that the internal market provides more jobs and enhances the competitive edge of Member States.

The specific human rights implications of the internal market are therefore mainly related to labour market and social protection, i.e. to economic and social rights. Schiek argues that European national social and economic models converge on a common core: social models share the idea that there is a (possibly minimal) responsibility of societies for the individual's wellbeing. Economic models converge in that the economy is also concerned with organising society: regulation of markets to avoid distortion of competition as well as social injustice are common elements alongside provision of some services, including an accessible and efficient justice system (Schiek 2013: 4). The malfunctioning and growing lack of public legitimacy of the internal market raise questions on the EU as a welfare institutional structure. This also undermines the confidence in EU as delivering economic and social rights.

However, the functioning of the internal market also prompts issues of transparency, right and to information and to take part in the conduct of public affairs. While the Commission seeks to engage civil society to achieve goals under a New Governance[22] agenda and to enhance the legitimacy of the internal market, recent analyses of civil society indicate limited access and impact. Transparency is weakened by the top-down processes of Europeanisation. Economic CSOs (e.g. unions) tend to have more advantages than other types of organisations in gaining access to politically important fora (Gausti 2013: 141-64). Finally, civil society groups are weakened by the relative marginalisation of citizens in the vertical communication of CSOs. The interaction between national civil society groups across the EU is hampered due to ideological positions (EU-critical or supportive) and by East-West divides. In terms of the internal market, it is not the consumers who are empowered, but the Commission. Trade unions and employer associations remain the strongest and most influential players according to the analyses, while groups with social and social rights agendas remain weak (Cseres and Schrauwen 2013: 117-139).

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[22] New Governance relates to the Lisbon Strategy introduced in the 2000. Harmonisation and coordination via directives is one component. Coordination pertains to social policies in particular where EU has no regulatory competence. The Open Method of Coordination of social policy is at the core of the New Governance thinking, the setting of social benchmarks and the elaboration of national action plans in relation to the benchmarks (See Schiek 2013: and Natali 2010: 105).

3.   Poverty and social exclusion

Between 2008 and 2012 the number of people at risk of poverty or social exclusion increased by about 7.5% from a little less than 114 million people in 2008 to 124.4 million people in 2012, i.e. one fourth of the EU population. The 124.4 million people at risk of poverty and social exclusion in 2012 included 85.3 million at risk of monetary poverty, 51 million characterised by severe material deprivation, and 36.9 million living in households with very low work intensity (Ibid. 104-105).[23] About 8.8 million people had to deal with all categories of poverty and exclusion.

By the early 2000s, the EU had placed social issues firmly on its agenda. The first decade of the new century was marked by renewed efforts to make poverty and social exclusion part of EU strategies. During the early 2000s, social cohesion, interpreted as reduction in poverty and social exclusion, was positioned alongside economic growth and job creation. The fields in which these policies were put to work included employment, social exclusion, pensions and health care. However, the principle of subsidiarity granting member countries autonomy in social policy, and the limited EU budget, placed severe restrictions on the new policy goals. The Lisbon Strategy for Growth and Jobs launched by the European Council in 2000, brought two new developments: a. an agreement that Member States would coordinate policy on employment, poverty and social exclusion, and b. the elaboration of a principles of coordination, i.e. the Open Method of Coordination (OMC) (Daly 2010: 143-47).[24] It could be added that the Lisbon Strategy also brought a third important institutional element in the Union, the Charter of Fundamental Rights (see also Zahn 2013: 166-169).

a)   Policy and institutional change after 2008

During the second half of the 2000s, before the establishment of the Europe 2020 Strategy in 2010, poverty and social inclusion became important strategic terms. Daly sees this as a downgrading of independent social goals which had characterised the phase up to 2005 and were indicative of a closer linkage between economic (growth and job creation) and social goals (Ibid. 2010: 147). During 2010, the Council agreed on a target that poverty be reduced by 20 million people by 2020. This was significant as targets in the social domain have always been controversial to define. This included a combined measure of poverty of low income (households with 60% of the median income), material deprivation, and joblessness (Ibid. 155).

In terms of substance, the focus on poverty and inclusion polices has had four strands: *active inclusion*, especially of those furthest from the labour market; *child poverty and child well-being; homelessness and housing exclusion,* and underpinning all, *the importance and availability of social services.* (Daly 2010: 149-50; Frazer and Marlier 2010: 228-29). In order to realise these policies, objectives were to be defined and

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[23] With respect to the disaggregation of poverty and exclusion figures, about 84.4 million people are only affected by one dimension of poverty out of 124.4 million, i.e. about 68%.

[24] The Open Method of Coordination was originally applied to employment policies of Member States as a reaction to the EU's economic integration. It is a soft form of policy-making seeking to spread best practices and greater convergence towards the main EU goals. The OMC moves in stages, first the goals defined by the Council of Ministers, then Member States translate the goals into national and regional policies. Thirdly, specific benchmarks and indicators are defined to measure the best practices agreed upon. Finally, monitoring and evaluation of results. See Eurofound (2010).

with them national action plans and indicators (Frazer and Malier 2010: 227). The framework of governance and realisation was therefore the OMC, a framework of non-binding action plans and benchmark setting at the national level.

b) *Human rights implications*

According to Zahn, the Europe 2020 Strategy served to keep the social agenda alive in EU policies and may have contributed to strengthening social over economic rights (Zahn 2013: 170). The bold objective of reducing poverty substantially can also be interpreted in human rights terms as efforts to enhance adequate living standards and dignity. However, the trajectory of poverty and marginalisation trends during the economic and financial crisis is indicative of negative developments in terms of poverty and inclusion. Large proportions of financially vulnerable Europeans face difficulties in accessing financial services, such as mortgages, loans and credit cards.

> [F]inancially vulnerable Europeans report feeling left out of society far more than respondents as a whole. While 16% of Europeans overall feel excluded, around a third of 'poor' Europeans feel this way. These findings should be considered against the fact that almost one in four persons in EU is at risk of poverty. Almost a quarter, 24.2% of the EU population was at risk of poverty or social exclusion in 2011, up from 23.6% in 2010. This represents about 116 million individuals (FRA 2013: 12).[25]

Additional poverty-related factors pointed out in the FRA review relates to the Roma on whom a FRA survey from 2012 reports that between 70% and 90% live in conditions of severe material deprivation, a proportion significantly higher than found among the non-Roma neighbouring population. Child poverty is an issue as well: 27% of children in the EU are at risk of poverty, i.e. a higher rate than found for the population in general. Women are also more likely than men to be at risk of poverty (25.2% of women in 2011 against 23% of men) (see also Chapter VIII.C.2.e). Finally those at risk of poverty are also likely to report housing problems, such as leaky roofs, damp walls, rot in window frames and floors. For Greece, Ireland, Italy, Portugal, Spain, and the UK, the crisis was identified as the key driver of increased homelessness. Feantasa, the Federation of National Organisations working with the Homeless, observes a trend of more homeless migrants due to cuts in welfare, housing, health, probation services, education and training (FRA 2013: 12-13).[26]

The financial and economic crisis can therefore be argued to result in threatening social rights in the Union, i.e. rights to adequate living standards, rights to housing, rights to social security, and the rights of children. In addition, it seems to have detrimental effects on equality and marginalisation generally.

However, some of the same observations concerning agency and manifestations of protests and struggles apply to poverty, as in the case of austerity measures, notably a weak civil society operating at the Union level. Thus, Barbier argues that the Europe 2020 Strategy lacks credibility, especially in relation to poverty

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[25] The FRA analysis draws on data from Eurobarometer surveys 2010 and 2012 and from Eurostat, *Headline Indicators 2005-2012.*

[26] FRA quotes the European Federation of National Organisations working with homelessness (Feantsa).

(Barbier 2011: 18), but it may also be argued that the anti-poverty objective lacks a proper constituency and sufficiently strong processes of stakeholder empowerment.

Verschueren has examined whether the policy declarations and initiatives of the Europe 2020 Strategy may result in more binding obligations according to Union law. She concludes that there is lack of political will, and perhaps also legal basis, to compel Member States to provide for certain minimum requirements with regard to the citizens' right to minimum subsistence schemes by means of an EU legal instrument. Furthermore, it is uncertain that, considering the limited powers of the Treaty on the Functioning of the European Union regarding combating of social exclusion, there is a legal basis for the EU to take such an initiative (Verschueren 2012: 229). Finally, in its review the Fundamental Rights Agency states that 'Charter-related case law indicates that the EU Charter of Fundamental Rights does not offer judicial tools across the board to guarantee that austerity measures and other public interventions are "social rights compliant"' (FRA 2013: 15).

4.   Employment

Between 2004 and 2008, the employment rate of the EU population in age groups between 20 and 64 increased from just below 68% to a peak of 70.3%, the highest level also since 1997. The employment target set for 2020 was 75%, but as the economic crisis fully hit the European labour market, the employment rate fell to 69% in 2009 and stabilised at 68.5% between 2010 and 2012 (European Commission (b) 2013: 60). In terms of *unemployment*, the EU's rate was more or less stable at about 8.8%. Unemployment fell to a rate of 7.1% in 2008 with a steady decrease between 2005 and 2008. The economic crisis resulted in a steady increase in unemployment that reached 10.5% in 2012, an all-time high (Ibid. 2013: 64). It is well known that this figure covers large regional differences. Young people aged below 25 years have been more severely affected than other groups. Since 2008, unemployment among young people has increased by seven percentage points, reaching 22.9% in 2012.

In terms of gender, the employment gap between men and women was reduced by half between 1997 and 2012 (see also chapter on Key Social Factors). The employment gap was close to 20 percentage points in 1997, but narrowed to 12% in 2012. The economic crisis from 2008 hit men worse than women (due to the impact of the crisis on construction and automobiles that are male dominated industries). Thus, female employment only fell by one percentage point between 2008 and 2012, whereas male employment fell by more than four percentage points (Ibid. 2013, 61). However, these trends should not hide the fact that whereas 74.6% of the male labour force was employed in 2012, only 62.4% of the female labour force was employed. Moreover, strong regional variations occur in employment of women that are not recorded in this brief overview.

The Lisbon Strategy embarked upon in early 2000 was grounded in the notion of the welfare state, where investment in social policy plays a critical role as part of a virtuous circle combining adaptability, flexibility, security, and employability (Cantillon 2011: 14). Ferrera, quoting Gilpin, epitomises the policy as 'Keynes at home, Smith abroad.' (Ferrera 2010: 49).

However, the label of Keynesianism may not be a very accurate description for the crisis and austerity policies of the Union which pursued macro-economic balancing adjustments and conditionalities in the

debt-ridden countries of Southern Europe, while having little leverage over national policies in the social sphere. With respect to the national governments, the labour market policies pursued sought to cushion the worst impact of income losses from unemployment, while at the same time seeking to address the longer term structural problems of the labour markets, such as the mismatch of demand and supply for specific competences of labour.

a)   Policy and institutional change after 2008

During the crisis, reform of the labour market became increasingly focused on macro-structural aspects of employment protection, automatic stabilisers, and the wage-setting framework. Employment protection comprised support for employability (e.g. training), improving matching between job demand and supply, and wage subsidies. The automatic stabilisers related to increases in out-of-work income maintenance, and to unemployment insurance benefits. Wage setting reforms included public regulation, often of a temporary nature aiming to keep wage increases in line with budget deficit targets, while private sector regulation also concerned decentralisation measures in order to combat labour market rigidities (see European Commission (h) 2013: 51-55).

The context within which these measures took place was primarily national, but related to structural reform conditionalities (notably in Greece and Portugal, but also in Spain, Italy and Slovenia) (Ibid. 2013: 51). During 2012, several Member States launched youth employment schemes. Austria, Czech Republic, Finland and Spain began initiatives to create conditions for setting up Youth Guarantee schemes facilitating also school-to-work transitions (Ibid. 2013: 55).

During 2012 a Youth Employment Package was introduced, taking effect in 2013 (European Commission (r) 2012). Through the European Social Fund in particular EUR 10 billion is targeted in the eight EU countries with the highest level of unemployment. At least 658,000 young people and 56,000 small businesses are likely to benefit (Citizens' Summary, 2013).

b)   Human rights implications

The number of people *unemployed continuously for more than a year* increased by 14.3% during the second quarter of 2012 compared to the same quarter of 2011 to reach a total of close to 11 million people. FRA argues that it is likely that this hit migrants and their families particularly hard, threatening previous pre-crisis accomplishments in labour market outcomes (FRA 2013: 11).

During the second quarter of 2013, however, employment growth was positive in the Euro area and in the EU as a whole. Unemployment in the Euro area stabilised at a level of 12.1% in July 2013, while in the EU as a whole, it was 11% during July 2013 (European Commission (h) 2013: 9). Thus, while the growth of employment stopped, the level remained substantial.

It is difficult to assess the employment measures as they address situations that have been unfolding during recent years. The measures introduced might have been successful in preventing a further increase in unemployment whether of youth or of adults (the counter-factual), but this can only be speculative.

What is clear is that there is a direct link between unemployment and poverty. Households with low work intensity are at greater risk of poverty. Analysing data from 2008 and before, Cantillon demonstrates the

relationship (Cantillon 2011: 19). Cantillon also points to a. the importance of unemployment benefits in the nexus between poverty and unemployment, and b. the importance of social security in the same domain. Unemployment mostly affects the low skilled labourers in the low productivity sectors. Cantillon depicts a dilemma between budgetary constraints, income inequality, and employment growth. Some observers have argued that it is possible to pursue two of these goals simultaneously, but not all three. If wage equality is a priority, employment growth can only be generated through employment in the public sector – at the expense of higher taxes or borrowing according to these observers. However, Cantillon argues that the EU indicators and data suggest that welfare states have indeed been able to avoid the social service trilemma: social spending has been kept under control, wage inequalities have remained largely unchanged, while employment has risen significantly. She also underlines that adequate account should be taken of the highly stratified nature of the new social risks. The redistributive agenda should again become focal in social policymaking, thereby prioritising adequate minimum income protection and the reinforcement of the redistributive capacity of social programmes. Even in rich societies, living at risk of poverty remains a handicap for achieving success at school, in the workplace and within the family. Social security and efficient social redistribution are part and parcel of effective investment strategies (Cantillon 2011: 18-23). However, it should be noted that Cantillon builds this line of thinking on the pre-crisis years and the early years of the crisis. The conclusion that the trilemma of jobs, wage equality, and budget restraint can be overcome must therefore be tempered by analyses of data from recent years.

The human rights problems of equality, non-discrimination, and the need for effective and adequate social security and safety nets may therefore be acute in the labour market during these recent years of the crisis. Under the Charter of Fundamental Rights of the Union, the persistence of high levels of unemployment threatens rights under Titles II, III, and IV of the Charter - Art. 15 on Freedom to choose an occupation and right to engage in work under Title II and art. 20-21, and art. 23 on Equality and Non-discrimination under Title III, the latter with respect to Equality between men and women. Under Title IV notably art. 30-31 are under threat, respectively on Protection in the event of unjustified dismissal and on Fair and just working conditions. Lastly under Title IV, art. 34 on Social security and social assistance appears as increasingly relevant.

As part of the Europe 2020 Strategy and in particular the industrial policy flagship initiative of October 2010 and the 'Agenda for new skills and jobs' adopted in November 2010, the Commission adopted the Green Paper on 'Restructuring and anticipation of change: what lessons from recent experience?' A consultation process was held during 2012 receiving responses from 91 stakeholders across the EU, including 23 employer organisations, 18 trade union organisations, 12 individual companies, 13 public authorities, and 25 other types of organisations. Almost all respondents highlighted the role of social dialogue in decision-making as a major factor in building trust and consensus, thereby facilitating change from an economic as well as a social point of view. Many stakeholders underlined that early involvement of stakeholders and long-term manpower planning was useful; small-scale enterprises need specific support in this field. Some respondents mentioned the importance of a legal framework at the EU level. However, this argument was favoured much more by trade unions than by employers' organisations (European Commission (i) 2012: 1-3).

This process illustrates the point made earlier that CSOs working on 'economic rights' have a certain level of access in the EU system. However, the debates between employers and the trade unions are rarely formulated in human rights terms. Nevertheless, the underlying dilemmas, underpayment of posted workers, the employment of immigrants with a resulting downward pressure on wages have human rights implications, not least concerning the equal treatment of workers whose right to free movement within the European Union is guaranteed, but where infringements of rights are threatened in certain Member States (see Pascouau 2013: 23).[27] The European Court of Justice has in cases of procurement of posted workers, for example posted Polish workers in Germany, ruled that the posted workers are entitled to the same minimum wage as stipulated in collective agreements under national law (Vinterskog 2013: 80).

5.   Development and trade

In the following section, the focus is mainly on how human rights are impacted by external dimensions of EU policies and institutions. The primary stakeholders of these dimensions, the recipients of aid, and the participants in trade in developing and neighbourhood countries, exist outside the borders of the Union. This situation implies that the external influence on human rights consolidation and struggles is less pronounced. This situation makes external situations and circumstances less politically sensitive in most cases, affected stakeholders of human rights deterioration or strengthening are not citizens of the union, but beneficiaries with a different actor role compared to citizens.

While the Commission implements 20% of the collective EU aid effort with 80% deriving from Member States, it also acts as coordinator, convener and policy maker, at least this is the perception from the Commission's side (European Commission (n) 2011: 3). In the discussion below the focus is on economic and human rights dimensions of recent development policy.

The Lisbon Treaty anchored development policy firmly within EU external action. The creation of the post of High Representative for Common Foreign and Security Policy/Vice-President of the European Commission, assisted by the European External Action Service (EEAS), offered new opportunities for more effective development cooperation and more integrated policy-making.

a)   Policy and institutional change after 2008[28]

The overriding goal of EU development policy is the eradication of poverty. Looking back on past actions in a Communication to the Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, the Commission argued that the EU has already done much to help reduce poverty and in particular to support the achievements of the Millennium Development Goals (MDGs). Yet

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[27] The Dutch government has levied disproportionate fees on third country nationals and their families to obtain long term resident status. The Commission has raised the issue with the European Court of Justice which has ruled that the charges levied by the Dutch government were disproportionate and liable to create an obstacle to the rights of free movement within the Union. See Pascouau 2013: 23).

[28] Trade and investment policies are relevant generally as well as in the development field. Trade policies will be in focus as the most important economic issue with human rights implications outside development. Environmental and climate dimensions and multilateral policies for instance at the UN level are not treated in this section as these dimensions are not narrowly conceptualised as economic.

the economic crisis and the ensuing shocks have left many developing countries vulnerable. Moreover, people-led movements in North Africa and the Middle East have highlighted that sound progress on the MDGs is essential, but not sufficient (European Commission (n) 2011: 1-10). Two conclusions emanate from this assessment: that the objectives of development, democracy, human rights, good governance, and security are intertwined; and that it is critical to offer a future for young people (Ibid. 2011: 3).

In the Communication, the Commission proposed the following Agenda for Change:

- An increased share of EU country and regional cooperation programmes dedicated to the policy priorities such as human rights and good governance and with an emphasis on inclusive growth;
- The concentration of EU activities in each country on a maximum of three sectors;
- An increased volume and share of EU aid to the countries most in need and where the EU can have a real impact, including fragile states;
- Enhanced importance of human rights, democracy and good governance trends in determining the mix of instruments and aid modalities at country level;
- Continued support for social inclusion and human development through at least 20% of EU aid;
- A greater focus on investing in drivers for inclusive and sustainable economic growth, providing the backbone of efforts to reduce poverty;
- A higher share of EU aid through innovative financial instruments, including under facilities for blending grants and loans;
- A focus on helping reduce developing countries' exposure to global shocks such as climate change, ecosystem and resource degradation, and volatile and escalating energy and agricultural prices, by concentrating investment in sustainable agriculture and energy;
- Tackling the challenges of security, fragility and transition;
- Joint EU and Member States response strategies based on partners' own development strategies, with a sectoral division of labour;
- A common EU results reporting framework (European Commission (n) 2011: 4).

In a Joint Communication to the European Parliament and the Council during 2012, the Commission recognised that the EU had not always been as effective or as joined-up as it might have been. The task ahead was to ensure clarity, coherence, and effectiveness of policy by being smarter and more strategic. The strategy includes the following components and institutional frameworks:

- the EU Delegations (country representations) which would contribute with country-adapted human rights strategies in more than 150 countries;
- the European Neighbourhood Instrument (newly reformed and effective from 2014) supporting countries in North Africa and the Middle East (the South), and countries in South Caucasus and Eastern Europe including Belarus and Ukraine (the East);
- the European Instrument for Democracy and Human Rights (EIDHR) - an important instrument for civil society support in developing countries;

- Finally, the policies on budget support were located under Budget Support and Financial Management of EuropeAid or Development and Cooperation DG. Budget support is financed through EDF, the European Development Fund. (European Commission (m) 2012.

Thus, the revised policy did not envisage cuts in budgets for development activities. Human rights figure prominently, but mixed with foci on democracy, governance, fragile States and security, growth and poverty reduction. In the elaboration of policy elements, human rights are classified as being part of a good governance policy. It is argued, moreover, that should a country loosen its commitment to human rights and democracy, the EU should strengthen its cooperation with non-state actors and local authorities. In some cases, stricter conditionality will be warranted (European Commission (n) 2011: 5).

One policy area which has received increased attention in terms of governance criteria and fundamental rights is budget support. This is also a field where a stricter emphasis on conditionality prevails. The new guidelines on Budget Support stipulate that poverty reduction and also commitment to fundamental values and rights form part of the assessment criteria for country eligibility of EU budget support (EuropeAid 2012c).

Trade policies and preferential access to the European market are seen as complementary to development policies, also with respect to human rights. Human rights clauses have been part of the EU's trade agreements since 1995, originally associated with preferential access to the EU market by developing countries. There are now human rights clauses in agreements with 120 countries and more are under negotiation, i.e. the application of human rights clauses reaches more countries than those considered developing. (European Commission (m) 2011: 11).

The aspiration to do good by linking economically oriented trade goals to wider political issues, such as democracy and human rights, and the rule of law, has been an integral part of the EU's trade policies since 1995, but especially important following the Lisbon Strategy after 2005. Linkages to security, democracy and human rights have been pursued through agreements on 'political clauses'. New guidelines were instituted for political clauses in 2008-09 (Ahnlid 2013: 18). The clauses cover *e.g.* respect for human rights, non-proliferation of weapons of mass destruction, and cooperation with the International Criminal Court. Violation of an 'essential element' (human rights) could lead to suspension of the agreement. Any suspension is to be preceded by consultation between parties, but in the case of a failure of consultations, parties may suspend whole of part of the agreement (Ahnlid 2013: 206). Trade agreements have figured prominently in Ukraine, Turkey, and in North Africa and the Mediterranean countries. Keukeleire and Delreux argue that the political clauses have mainly been applied *reactively* and that they have been applied more *consistently* with respect to the Cotonou Agreement (Africa, Caribbean and Pacific countries) compared to the application in Asia, the Mediterranean, and Latin American countries. According to these scholars, States like India disapprove strongly with the Union's tendency to link trade agreements with political considerations (Keukeleire and Delreux 2014: 206).

b)   *Human rights implications*

Human rights priorities of the EU in its external actions are generally formulated as the promotion of freedom of expression, assembly and association. Freedom of religion and a fight against all forms of discrimination on the grounds of race, ethnicity, age, gender or sexual orientation are also emphasised and are associated with advocacy for the rights of children, minorities, indigenous peoples, refugees, migrants and persons with disabilities and with policies of empowering women. It is also argued that the EU will intensify its efforts to promote economic, social and cultural rights implying also non-discriminatory access to services particularly for vulnerable groups. The EU will also encourage and contribute to implementation of the UN Guiding Principles on Business and Human Rights. The EU will continue its efforts in combatting torture and the death penalty. The fair and impartial administration of justice is seen as essential to safeguard human rights. A final priority area is support for human rights defenders (Council of the European Union 2012: 2).

Within this very broad list of priority areas, the EIDHR prioritised women's rights and gender issues, LGBT rights, and human rights defender protection in its 2012 call for proposals.

Generally, it is left to the country delegations to define human rights priorities that are appropriate in the country context.

The EU is the world's largest donor, and its support for human rights and democracy is substantial even compared to the UN. It is difficult, however, to gain sufficient knowledge through evaluations of the diverse types of EU economic measures: it is hardly possible to retrieve up-to-date evaluations of, for instance, how the human rights clauses have worked, and what kind of impact they have had. Concerning CSO support and channels, an evaluation was undertaken during 2008 regarding the delivery, added value, impact and sustainability of CSO support of the Union. Salient economic and social points with respect to human rights were:

- The participatory aspect is clearly not consistently applied.
- CSO support allows engagement in sensitive areas such as HIV/Aids and gender. In this way CSO may also support advocacy work on human rights.
- CSO support has provided positive results in areas such as food security, housing, and social rights.
- In conflict zones, CSO are important partners in the creation of sustainable development agendas.
- Examples were mentioned in the evaluation report where the EU did not raise concerns over a breach of human rights clauses affecting human rights NGOs in fragile and conflict threatened countries (Evaluation 2008).

Two evaluation reports from 2013 illustrate the scant attention to human rights in EU implementation of development programs outside the framework of EIDHR. In an evaluation of budget support to Tanzania undertaken jointly by a number of agencies, human rights is mentioned once, and in very general terms. The evaluation report which covers a budget support period in Tanzania during the years from 2005-2011/12 does not leave a strong impression of human rights (EuropeAid 2013b: 29).

In the evaluation of two neighbourhood programs (East and South), it is stated: 'Even though the EU is firmly committed to promoting human rights and gender, their mainstreaming within regional

interventions remains ad hoc and unsystematic' (EuropeAid 2013a, Summary). The overall impression that these studies leave is that up to the most recent period, a substantial portion of EU development assistance has been devoted to human rights with an emphasis presently on both civil and political and economic and social rights, but questions are raised on the consistency of how human rights elements are integrated; in some areas like budget support and in neighbourhood programs, human rights seem only to have been integrated in a very superficial manner. It must be recognised, though, that during the most recent period, budget support policies have paid much greater attention to fundamental rights as indicated above. Finally, it is very difficult from the available material to learn to what degree and how the conditionality element has been applied. Regarding the latter it is much too early to assess how the element of human rights conditionality has been integrated in the recent budget support programs.

There is little documentation that trade agreements lead to better long-term human rights practices. However, in the shorter term, Hafner-Burton has argued that preferential trade agreements which combine hard clauses with promises of trade access have led to better human rights compliance. This analysis is, however, not based on more recent data (Hafner-Burton 2005: 594-596).

EU trade policies are, however, part of a broader trend of legalising trade relations, i.e. a movement away from negative prescription of reduction of trade barriers to positive rule-making where the rules of trade become highly precise, strict and binding compared to the GATT era (Akeda 2010: 4).

As stated above, the Commission devised a new strategy of civil society involvement in external relations during 2012. This approach aimed to make interactions with CSOs more systematic and structured, also with respect to partner countries. The international community including the EU has a duty to advocate for a space to operate for both CSOs and individuals. The EU should lead by example, creating peer pressure through diplomacy and political dialogue with governments by publicly raising human rights concerns. It will continue to take action in countries where the government fails to recognise civil society with human rights violations as a consequence. CSO participation in public policy processes and policy dialogue leads to inclusive and effective policies. The EU will support CSOs active at the European and global levels (European Commission (m) 2012).

As part of these measures a Policy Forum which comprises CSOs as well as Local Authorities has been instituted under the External Action Service. The overarching goal of the Policy Forum on Development (PFD) is to offer CSOs and local authorities (LAs) from the EU and partner countries, as well as European institutions, a multi-stakeholder space for dialogue on development issues at EU Headquarters level.

More specifically, the PFD aims at achieving the following objectives:

(i) Facilitating dialogue on cross-cutting issues directly related to the role of CSOs and LAs as relevant development actors;

(ii) Promoting policy debate, consultation and exchange of information and experiences on EU main policies and initiatives in the development field. Priority will be given to topics relating to EuropeAid's mandate, aligned to its Work Programme, including discussions in the preparation of high-level events.

A first meeting was held during November 2013 with representatives from Latin America, Africa, Asia and Pacific, Global Networks, European Platforms, Member States, European Institutions and Bodies, and the European Commission (EU Policy Forum 2013).

However, as indicated above, so far the impact and significance of these interactive processes at the external level seems elusive. It can be hypothesised that the main significance remains at the level where a general concern for upholding values of human rights are maintained whereas the specific impact on human rights respect, standards and advocacy may be more difficult to discern.

The EU-NGO Forum on Human Rights is an annual conference that provides a venue for direct interaction and in depth discussion between representatives of global civil society and the EU institutions, EU Member States and international organisations on various topics related to the promotion and protection of human rights. These Forums are undertaken annually and convened presently by the External Action Service.

Secondly, the diffusion of power which characterises the system may also imply that actors have limited bargaining power. Fragmentation of bargaining power is thus an important element when domestic actors negotiate with EU on international trade and investment contracts (De Man and Wouters 2013: 240-50).

D.   Conclusions

The economic and financial crisis starting in 2008 had global impact. It caused negative growth in the European Union during 2008-13. Fiscal tightening and greater fiscal controls ensued, affecting banking, securities and financial supervision. Unemployment increased to the highest level since 1997 and youth unemployment affected almost a quarter of the younger generation in the EU. Up to a fourth of the EU populations was at risk of poverty.

The analysis of the individual factors demonstrated at the internal level that the period before the economic and financial crisis was marked by efforts to broaden and deepen the level of human rights protection – even though policies were rarely formulated in human rights terms. This happened as part of the Lisbon Strategy under which the EU sought to enhance labour market protection as well as social policies, for instance regarding pensions (social security) and health care. However, with the onset of the crisis, labour market and social protection decreased. The deterioration of economic and social conditions and rights affected citizens' assessment of the internal market. Contributing factors were the austerity measures which led to lay-offs, erosion of pension benefits and income deterioration, especially in countries where the public debt was high. Social actors such as civil society organisations and National Human Rights Institutions rallied against the social implications of austerity measures. Even the ECtHR was mobilised together with the European Committee on Social Rights.

The crisis and the austerity measures undermined the trajectory for a more social and inclusive Europe laid out in the Europe 2020 Strategy. *Incoherence* between stated goals and the reality in Member States, particularly in Southern Europe, made the 2020 Strategy appear unrealistic. The poverty reduction goals of the 2020 Strategy were put in jeopardy. Sixteen per cent of Europeans felt excluded while the core objective of the Lisbon Treaty and the 2020 Strategy was social inclusion. Almost one out of four Europeans was at risk of poverty by 2011. Between 70 and 90 per cent of Roma populations were living

in conditions of severe material deprivation by 2012. These conditions were exacerbated by growing unemployment (12.1% in the Euro area during 2013), while youth employment was at twice that level. The economic and financial crisis resulted therefore in internal deterioration of:

- The right to adequate standard of living
- The right to social security
- The right to housing
- The right to work
- Rights of the child.

These trends were moreover marked by trends of growing differential access to services and influence of particular groups.

The reality of enjoying economic and social rights was therefore only reaching a proportion of European populations. Internally, the crisis resulted in less trust, less inclusion, and ineffective processes of empowerment.

The right to take part in the conduct of public affairs was also threatened. Actors operating in the sphere of economic rights had better access to the Commission and to decision-making bodies. Social rights stakeholders and CSOs operating in that area were deemed to have poorer access and lesser influence.

An enabling factor at the economic level is that the EU seems to have come through the economic and financial crisis without major political upheavals. The employment figures for 2013 indicate that the level of unemployment may be on the way down.

Externally, trade, investments and development assistance have been less severely affected by the crisis. These areas are characterised by legalisation and stronger reference to human rights and to fundamental values, but questions can be raised concerning the impact of the human rights emphasis in external economic actions. CSOs have become increasingly involved in debating such policies, but it is difficult to ascertain the impact of these changes on the ground in developing and neighbourhood countries. Human rights rhetoric is more prevalent in external affairs than internally, but the efforts of instituting rights on the ground externally may be highly varied and not always discernible.

The overall impression from available evaluations is that up to the most recent period, a substantial portion of EU development assistance has been devoted to human rights with an emphasis presently on both civil and political and economic and social rights. However, questions can be raised on the *consistency* with which human rights elements are integrated; in some areas like budget support and in neighbourhood programs, human rights seem only to have been integrated rhetorically or superficially during recent years according to evaluation reports. Finally, it is very difficult from the available material to learn *to what degree* and *how* the conditionality element has been applied and with what kind of consistency and impact. Scholars working on trade agreements point out that conditionality is applied with varying consistency dependent on region, and more as a reactive than a proactive tool. It is much too early to assess how the element of human rights conditionality has been integrated in the newly reformed budget support programs. A positive and enabling factor at the external level is that human

rights prevail as a strong policy element and that there seems to be a will for increasing dialogue between the EU, its third country partners, and civil society groups.

The present literature overview has demonstrated a rich field of research focusing on economic and social change. However, the social rights impact of economic change and of economic policy change could be analysed more thoroughly. The useful study by FRA on *Safeguarding Fundamental Rights in Times of the Crisis* could be complemented by a number of other studies. Rights to social security is an under-researched area in human rights generally, but also within the EU domain. In terms of human rights methodology, the reflection on duty-bearer as well as rights-holder action and struggles is not well documented on the rights-holder side within the European Union. Some human rights studies will not even come close to observing how rights-holders can access power and duty-bearers and how these actors from below can influence duty-bearers in a qualified manner. Lastly, a cross-cutting recent study on the human rights clauses and their importance and impact is warranted.

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VI.   Social factors*

A.   Introduction

Social factors refer to the composition and structure of the society which hierarchically position individuals and persons belonging to certain social groups and influence social, political and economic participation and distribution of wealth, reputation and resources. The structure of a society also has an impact on the enjoyment of human rights as well as on access to justice.

Yet, a fundamental claim of human rights is that they are held equally by all individuals everywhere. This basic principle of equality runs like a thread through all human rights documents. It is the fundamental idea human rights are based on. For example, Art. 1 of the Universal Declaration of Human Rights (UDHR) says that '[a]ll human beings are born free and equal in dignity and rights.' The right to equality not only comprises equality before the law and the right to be equally protected by the State but also means to be equally able to participate in and have equal access to all fields of society, such as education, labour market, culture, politics.

Despite this central significance of equality in the context of human rights, the reality looks somewhat different. In all societies and States the right to equality is not only occasionally infringed but certain groups are systematically and structurally disadvantaged in many areas of society. Human rights law acknowledges this fact by explicitly prohibiting the exclusion of certain groups (e.g. ethnic minorities, women) from particular areas such as education, labour market or access to services. The principle of non-discrimination recognises the fact that specific factors that are rooted in the structure and composition of the society enable or hinder the protection of human rights. For example, Art. 2 of the UDHR stipulates that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Similar provisions are enshrined in EU human rights law. Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) lays down that '[A]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

Furthermore, Art. 19 of the Treaty on the Functioning of the European Union (TFEU) lays down that 'the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Based on this provision several directives to prohibit and combat discrimination on these grounds were adopted.

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The EU non-discrimination clauses are the starting point for the present chapter on social factors which enable or hinder the protection of human rights in the EU's external and internal policies. As the religious and ethnical factors are covered by other sections/reports the report elaborates on the following factors:

- Gender
- Sexual orientation
- Disability
- Age

The question 'What are the key social factors which enable or hinder the protection of human rights in the EU's external and internal policies?' is somehow misleading because it suggests that human rights are a neutral concept, that they are unbiased and impartial towards social positions of individuals and neutral towards social groups. However, human rights are not only embedded in social, economic, cultural or political structures which are biased in terms of social factors such as gender, sexual orientation, disability, social origin, birth and property and age; human rights are characterised by being partial themselves as they embody certain norms and values which are not neutral. For example, feminists have stressed that human rights are based on male norms which are of disadvantage to women (see Stark 2000: 342-343, Reilly 2009) and gay rights activists have criticised that the idea of family embodied in human rights complies with heterosexual family norms and, thus, often exclude persons belonging to sexual minorities (see Phelan 2001: 35 or Wagenknecht 2007). Thus, social factors which enable or hinder the protection of human rights have an internal as well as an external dimension. The internal dimension refers to the intrinsic bias of human rights as they are based on norms that favour certain social groups (e.g. white, male, abled). The external dimension includes social structures and norms which are characteristic for the organisation of a society and hamper the enjoyment of rights of specific groups.

1.   Structure and content of the chapter

In this chapter each social factor will be presented in detail. Firstly, the factor will be explained and defined and, secondly, based on a literature review it will be shortly outlined in what way this factor enables or hinders the protection of human rights and what are biases in human rights law that are of disadvantage to certain groups. Thirdly, there will be a preliminary presentation and discussion of how EU policies and law take into consideration the respective factor and what are gaps and challenges in this context.

B.   Gender

1.   Concepts and definitions of gender and gender inequalities and discrimination

The category of gender is a fundamental social concept. Usually, in the context of academic discussion gender is seen as being a different concept than the term sex. Sex refers to the idea of a dichotomous, 'biological' category of being either a man or a woman and, thus, stands for biological characteristics commonly associated with men or women such as hormones, anatomy, chromosomes or sexual organs. Gender refers to the social construction of stereotypes and roles identified with this dichotomous concept and relates to social behaviour and ascriptions such as 'feminine' or 'masculine'. Meanwhile also the

'biological' concept is challenged as being a social construct and it is proposed that there are more sexes than just men and women (e.g. intersexual, transsexual).

Taking a closer look at the category of gender reveals that today there is a broad range of different scientific approaches, theories and concepts to grasp this phenomenon. It comprises psychological, sociological as well as political approaches. They include social constructivism (Nestvogel 2010: 166-177), structuralism (Kulawik and Sauer 1996: 28), institutionalism (Martin 2004: 1256) or the notion of gender as hegemonic masculinity (Connell and Messerschmidt 2005: 832).

2.   General remarks on gender and human rights

Feminist critique of human rights goes back to the French Revolution in 1789. The proclamation of the Declaration of the Rights of Man and of the Citizen during the revolution counts as an important point of reference in the history of human rights. However, the proclaimed rights only applied to men, although women had played a significant role during the revolution and feminist activists such as Mary Wollstonecraft or Olympe de Gouges had demanded equal rights for women (see e.g. de Gouges 1791). Since then, feminist critique of human rights has prospered and highlighted many gaps and weaknesses in the concept and practice of human rights that are of disadvantage to women. The most important point of criticism refers to the inherent *androcentric conception* of human rights. It is argued that human rights are based on specific norms and values which mostly correspond to the experience of men: 'Some women's advocates have criticised rights discourse as inherently gendered – that is, rights discourse protects that which matters most to men. As a corollary, it has been argued that the rights discourse matters most to those women whose lives are most like men's lives.' (Stark 2000: 342-43) In addition, the liberal influence and its focus on individual rights have been criticised for neglecting structural forms of discrimination and inequality (Lacey 2004: 21) and to uphold the differentiation between private and public and, thus, neglecting and ignoring human rights violations of women and inequalities in the private sphere. The public-private configuration has 'gender-specific implications for how human rights issues are defined and prioritised' (Reilly 2009: 31) and contributes to the devaluation of unpaid care and household work mostly done by women (Charlesworth 1994: 365). Furthermore, a rights-based approach to equality is very often limited as it fails to take into consideration the complexity of social, political and economic organisation. Gender relations are deeply embedded in society and rights very often fall short of addressing this complexity. Thus, 'rights discourse overly simplifies complex power relations and their promise may be thwarted by structural inequalities of power' (Charlesworth 1994: 353).

Not least because of the pressure of feminist political groups, feminist concerns have increasingly been taken into consideration in the human rights discourse. However, it is the liberal feminist approach which has had the most impact in international human rights law (IHRL). This approach has shortcomings as it pursues a very narrow focus of gender equality, does not aim at challenging gendered social, economic and political structures and, thus, perpetuates gendered structures embedded in the society. For example, legal feminist have pointed out that the most important international human rights document that focuses on women's rights, *the UN Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) follows this approach. Although CEDAW includes both equality of opportunity (formal equality) and equality of outcome (*de facto* equality), the language of 'equal rights and equal

opportunities' tacitly reinforces the basic organisation of society. It 'still relies fundamentally on a comparison between women and men' (Otto 2010: 355).

3.   EU policies and legal response to inequalities and discrimination with regard to gender.

a)   Gender in EU law

The EU's history of combating discrimination on grounds of gender dates back to 1957 when the European Economic Community (EEC) was founded by the Treaty establishing the European Economic Community (TEEC). One of the main objectives of the treaty was to set up a common market by, amongst other things, removing the obstacles to the free movement of persons, goods, services and capital. To this end, the TEEC introduced the principle of equal remuneration for equal work between male and female workers (Art. 119). The intention of this stipulation was to avoid distortions of market competition since *inter alia* unequal pay could have provided some Member States competitive advantages due to lower salary rates. The principle of equal pay for men and women was made legally binding through Council Directive (75/117/EEC) of 10 February 1975 and the Equal Treatment Directive (76/207/EEC) of 9 February 1976 stipulated the prohibition of direct and indirect discrimination on grounds of gender in the field of employment. The scope of law and measures concerning equality between men and women was broadened by gradually including issues with regard to pregnancy and parental leave and by introducing action programmes and the principle of gender mainstreaming.

Today, EU primary law[29] contains not only the above mentioned provision on equal pay, which is laid down in in Art. 157 of the Treaty on the Functioning of the European Union (TFEU), stating that each Member State 'shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. The article further stipulates that the

> European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Art. 157 also provides for the possibility of positive measures:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

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[29]Primary law refers to the supreme source of law comprising the founding treaties as well as amendments to these treaties and the treaty of accessions. Secondary law includes all EU law deriving from primary law (e.g. regulations, directives).

Other provisions in EU primary law are to be found in the Treaty on European Union (TEU). Art. 2 of the TEU says that 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.

The TEU also contains a stipulation which defines that the EU shall combat social exclusion and discrimination and promote equality between women and men (Art. 3(3)).

Under Title II the TFEU contains provisions having general application such as the objective to eliminate inequalities and to promote equality between men and women (Art. 8) and the duty to aim at combating discrimination based on sex in defining and implementing its policies and activities (Art. 10). However, the most important provision concerning the non-discrimination on grounds of sex[30] is laid down in Art. 19 of the TFEU which confers on the EU the power to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Art. 153 TFEU stipulates that the Union shall support and complement the activities of the Member States with regard to 'equality between men and women with regard to labour market opportunities and treatment at work.'

The Charter of Fundamental Rights of the European Union (CFREU) includes sex as grounds of discrimination in its non-discrimination clause (Art. 21). In addition, Art. 23 deals with equality between women and men: 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

There are several directives which cover the issue of gender. In the following, the most important will be presented:

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): The recast directive brings together different sex equality directives and incorporates some case law of the European Court of Justice (CJEU). Its aim is 'to clarify and bring together in a single text the main provisions regarding access to employment, including promotion, and to vocational training, as well as working conditions, including pay and occupational social security schemes' (Burri and Prechal 2014: 8).
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

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[30] The wording of EU law usually uses the term sex and not gender.

- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Art. 16 (1) of Directive 89/391/EEC).
- Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

b)   *Policies and practice concerning gender in general*

In addition to the so-called 'hard' law on gender issues mentioned above, the European Commission has developed and implemented the following strategies and programmes:

- *A Roadmap for equality between women and men 2006-2010* determined six priority fields for EU action on gender equality: equal economic independence for women and men; reconciliation of private and professional life; equal representation in decision-making bodies; eradication of all forms of gender-based violence; elimination of gender stereotypes; promotion of gender equality in external and development policies. The Roadmap pursued a 'dual approach of gender equality based on gender mainstreaming (the promotion of gender equality in all policy areas and activities) and specific measures' (COM(2006) 92 final: 2).
- *Strategy for equality between women and men 2010-2015* defines five priority areas for EU action including equal economic independence; equal pay for equal work and work of equal value; equality in decision making, dignity; integrity and an end to gender-based violence and gender equality in external actions as well as a section on horizontal issues such as gender roles and legislation (European Commission 2011). The Strategy is based on the so-called *Women's Charter*, a declaration by the European Commission on the occasion of the 2010 International Women's Day. With the declaration of the Charter the Commission emphasises its objective to 'reiterate and strengthen the European Commission's commitment to making equality between women and men a reality. We will do this by strengthening the gender perspective in all our policies throughout our term of office and by bringing forward specific measures to promote gender equality' (COM(2010)78 final).
- In 2006, the Council of the EU adopted the first *European Pact for Gender Equality*. The pact proposed measures in three areas: closing gender gaps and combating gender stereotypes in the labour market; promoting better work-life balance for all; and reinforcing governance through gender mainstreaming and better monitoring (Council of the European Union 2006: 27-28). A second European Pact for Gender Equality was adopted at the Employment, Social Policy, Health and Consumer Affairs Council meeting on 7 March 2011. The Pact applies to the period 2011-2020 and contains three areas of action:
    - o Closing the gender gaps in employment and social protection, including the gender pay gap and focusing on three main areas including employment, education and promoting social inclusion (reduction of poverty);
    - o Promoting better work-life balance for women and men; and
    - o Combating all forms of violence against women.

Similar to the first Pact, the second Pact also enlists a range of measures for each area.

- On 3 March 2010, the European Commission released the Communication *Europe 2020. A strategy for smart, sustainable and inclusive growth*. The ten-year strategy aims at turning the EU into 'a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion'. The objective of gender equality and special measures in this regard are mentioned in the areas of employment, promotion of life-work balance and poverty reduction.

c)   Policies and practice concerning gender especially with regard to external action

The above-mentioned *Strategy for equality between women and men 2010-2015* contains a section on 'Gender equality in external actions'. The Strategy proposes four key actions to be undertaken by the Commission:

- 'Monitor and support adherence to the Copenhagen criteria for accession to the EU in the field of equal treatment between women and men, and assist Western Balkan countries and Turkey with the transposition and enforcement of legislation.
- Implement the EU Plan of Action on Gender Equality and Women's Empowerment in Development (2010-2015).
- Continue to encourage ENP[31] partner countries to promote gender equality through regular policy dialogue, exchange of experience and by exploring possibilities for assistance under the European Neighbourhood and Partnership Instrument.
- Further integrate gender considerations into EU humanitarian aid.' (European Commission 2011: 30).

The *EU Strategic Framework and Action Plan on Human Rights and Democracy* defines key areas and priorities of EU's human rights action. It emphasises the EU's commitment to fight discrimination in all its forms including discrimination on grounds of gender. The Framework stresses that the 'EU will continue to campaign for the rights and empowerment of women in all contexts through fighting discriminatory legislation, gender-based violence and marginalisation.' (Council of the European Union 2012) To this end, the Action Plan contains several actions in this field such as conducting a targeted campaign on political and economic participation of women with special focus on countries in transition or systematically including gender equality in the mandates of EU missions and operations and in their benchmarks, planning and evaluation (Ibid.; for gender in the context of culture and religion, see Chapter VII.C.2).

d)   Gaps and challenges

Based on the legal provisions and policies mentioned above the EU broadly follows three approaches when it comes to conceptualising and implementing gender policies (Lombardo and Meier 2007: 52-56).[32]

- Formal or legal equality: Equality between men and women is not only an important issue of EU primary law but also well-defined in secondary law as well as case law by the CJEU.

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[31]European Neighbourhood Policy

[32] Consult< http://ec.europa.eu/justice/gender-equality/index_en.htm> Last accessed 16 April 2014.

- Positive or affirmative action are measures with the objective to enhance the underrepresented and disadvantaged sex and promote *de facto* equality.
- Gender mainstreaming aims at including a gender perspective and the principle of gender equality in all its policies, strategies and programmes and, hence, acknowledges the gendered nature of political processes and institutions.

It can be concluded that equality between men and women is a basic principle of EU law. For a long time it has been argued that one of the major shortcomings of EU gender policy and law is its narrow focus on the economic and business sector. Furthermore, 'the lack of clarity, effective implementation, and enforcement of directives – in old and new member states' (Roth 2013: 2) has been criticised. Walby (2004: 6-7) mentions several limitations concerning the EU gender policy: the EU's primary concern with standard employment, the androcentric norms of EU law and the negligence of deep-rooted causes of inequality, the uneven implementation of EU equality directives, the absence of EU intervention in several key areas of gender inequality, the implementation of the principle of gender mainstreaming through hard law interventions or a decline in the support of gender equality. The principle of gender mainstreaming is controversially discussed as having 'the potential to permanently transform the language and images of policy making to become more inclusive and sensitive to diversity beginning with sex' (Woodward 2008: 84) on the one hand, or on the other hand having negative impacts and undermining feminist approaches (Roth 2013: 5). Lombardo and Meier (2007: 72) argue that although the EU has considerably broadened its agenda on gender equality issues beyond the narrow economic focus, this expansion nevertheless is fragmentary and non-binding, and reflects a lack of competence and 'the development of a consistent mainstreaming of gender equality objectives across the various policy areas (Ibid.). Also Loch and Prügl (2009) stress the huge impact the EU has had on advancing gender equality policies in various fields, however, they also highlight the reproduction of gender imbalances in EU policies by not solving the issue of care labour and, thus, by contributing to construct 'gender subordination in a new way. It creates gender divisions of labour by inserting women into the common labour market as flexible workers while ensuring that they remain available for unpaid care work. The EU reveals itself as a new form of the patriarchal state.' (Locher and Prügl 2009: 187)

Gender equality is one of the most important focus regarding EU non-discrimination law and policies. The principle of gender equality has played a significant role in EU politics since the beginning of European integration and is not only anchored as a basic principle in primary law but also the objective of a broad range of secondary law and other policies. In order to address the complexity of gender inequalities the EU pursues a multifaceted gender equality approach comprising not only legal initiatives but also positive or affirmative action and the principle of gender mainstreaming. In addition to the internal dimension, gender equality is integrated in external policies such as humanitarian aid, development policies and the accession process. However, the EU's approach to gender is also criticised for being economically limited, based on androcentric norms, unevenly implemented and for neglecting deep-rooted structures of gender inequality.

C.   Sexual orientation and gender identity

1.   Concepts and definitions of sexual orientation and inequalities and discrimination concerning sexual orientation and gender identity

In everyday language sexual orientation involves the idea that individuals have certain sexual preferences towards either men or women or both or none. The Yogyakarta Principles,[33] which are principles on the application of IHRL in relation to sexual orientation and gender identity, define sexual orientation as follows: 'Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.' (Yogyakarta Principles 2007: 6, 8)

The choice of terminology in reference to the concept of sexual orientation, however, is still quite disputed. As indicated above, the term homosexuality still is shaped by the essentialist and male heritage. At first glance, 'sexual orientation' not only seems to be timeless but also a neutral term. However, it also appears to be problematic because in common language sexual orientation is mostly equated with those forms of sexuality deviating from the heterosexual norm.

Theoretical approaches to capture sexual orientation can roughly be divided into two branches:

- Essentialist approaches conceptualise sexuality and sexual orientation as an ahistorical phenomenon that is a part of a human being irrespective of the cultural context. Thus, homosexuality and heterosexuality are seen as essentially different determined by biological factors such as hormones or genes and independent from cultural influences (see e.g. DeLamater and Hyde 1998).
- Constructivist approaches assume that sexuality and sexual orientation are determined by social and cultural influences and therefore are a contingent and historical construct (see e.g. Butler 1990; Pilcher and Whelehan 2004). The French philosopher Michel Foucault significantly contributed to this debate by revealing the interrelation of power, knowledge and sexuality in modern times (Foucault 1983: 105-106).

The latter also raises questions of gender identity and opens up the possibility of breaking up binary gender structures and norms and to introduce other gender categories such as transgender, transsexual or intersex.

2.   General remarks on sexual orientation and human rights

Law can be seen as an integral aspect of the 'great surface network' through which sexuality is socially produced. It is both an important site at which the 'formation of special knowledges' about sexuality are interpreted and reproduced and a vital nexus at which 'controls and resistances' around sexuality are negotiated. (Johnson 2010: 72)

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[33] The Yogyakarta Principles were drafted by the International Commission of Jurists, the International Service for Human Rights and human rights experts from all over the world. Although the Principles are not legally binding they are increasingly used by international organisations, e.g. Council of Europe, European Union Agency for Fundamental Rights (FRA).

The fact that law in general as well as human rights in particular are biased against sexualities deviating from the heterosexual norm is a crucial point when it comes to the nexus between sexual orientation and human rights. The main point of criticism in this context was and is the explicit and implicit forms of exclusion from the human rights project of those persons not meeting heterosexual norms.

- The *explicit dimension* refers to all forms of legal discrimination against and/or prohibition and criminalisation of same sex relations and/or the exhibition of same sex affection. It includes prohibition and criminalisation of sexual acts and relations that do not correspond with the heterosexual norm or the negligence of sexual orientation as a grounds of discrimination in non-discrimination law.

- The *implicit dimension* refers to implicit norms human rights are based on which are discriminatory and exclusionary regarding persons who do not meet heterosexual norms. The main point of criticism concerns the implicit heteronormativity of (human) rights. Heteronormativity describes practices, ideologies and standards of thinking which place heterosexuality as the norm of gender relations that structures subjectivity, living conditions, symbolic order and social organisation and pushes people into two sexes, the sexual desires of which are directed towards the opposite sex (Wagenknecht 2007: 17). The claim is that (human) rights are implicitly based on heterosexual norms and, hence, are biased against persons deviating from this norm. The institution of marriage and the definition of family are textbook examples for heteronormative practices which are also apparent in human rights law. Excluding sexual minorities from this norm not only leads to social stigmatisation of these groups but also excludes sexual minorities from a broad range of rights and benefits linked to the institution of marriage and other family rights. The meaning of equality enshrined in human rights law conforms to the heterosexual norm. Heteronormativity is exercised through human rights law in a subtle, implicit way: heterosexuality is presumed. It is 'a position that is so unremarkable among heterosexuals that it becomes invisible as a structure' (Phelan 2001: 35). Furthermore, it is highly disputed if including LGTBIQ persons into the human rights project can actually transform its heteronormative bias and guarantee equality. Rahman argues that 'not only do formal rights fail to address the social construction of differences because of their limited scope, but also that the discourse of rights may serve to compound social inequality, since it is too often underpinned by essentialist constructions of differences' (Rahman 1998: 82).

3. EU policies and legal response to inequalities and discrimination with regard to sexual orientation

a) *Sexual orientation in primary and secondary law*

Sexual orientation was not a very high priority item on the EU/EC agenda for many years although the European Parliament started discussing measures against discrimination on grounds of sexual orientation in the 1980s. Due to intensive lobbying by interest groups sexual orientation was included in Art. 13 of the Amsterdam Treaty, which was later renumbered as Art. 19 under the Treaty of Lisbon. This provision gives the EU the power to 'take appropriate action to combat discrimination based on (…) sexual orientation.' In addition, the principle of non-discrimination on grounds of sexual orientation was included in Title II of the TFEU as a provision having general application in defining and implementing EU policies and activities.

Based on Art. 19 TFEU the EU adopted the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation which prohibits amongst others grounds discrimination on grounds of sexual orientation in the employment sector.

Sexual orientation was further included in Art. 21 of CFREU which prohibits 'any discrimination based on any grounds such as sex, (…) or sexual orientation'. Gender identity is not explicitly included in the Charter, but interpretation of case law by the Court of Justice of the European Union (CJEU) clearly sees gender identity with respect to transgender persons who underwent, are undergoing or intend to undergo gender reassignment as covered by EU law.

Sexual orientation is further addressed in the following secondary law:

- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Article 10 says that a particular social group that might fear persecution 'might include a group based on a common characteristic of sexual orientation. (…) Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.'
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States lays down that 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, (…) or sexual orientation.'
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification states that 'Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, (…) or sexual orientation.'
- Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law policies and practice concerning sexual orientation in general.
- The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA considers the existence of specific protection needs of victims of crimes committed based on personal characteristics such as sexual orientation, gender and gender identity or expression.
- On 2 July 2008, the European Commission released a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in order to expand the scope of protection beyond the field of employment and occupation. However, the Directive has not been adopted yet due to a lack of approval by the Member States.

b)   Policies and practice concerning sexual orientation in general

There is a broad range of policies and practices concerning sexual orientation and transphobia in the EU. The following are the most recent developments:

- 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' was adopted by the European Council in December 2009 and defines the policy priorities in the area of justice and home affairs for 2010-2014. It lays down that 'measures to tackle discrimination (…) and homophobia must be vigorously pursued.' (European Council 2009)
- The European Commission Action Plan Implementing the Stockholm Programme lays down that 'all policy instruments available will be deployed (…) to fight all forms of discrimination (…) and homophobia.' (European Commission 2010: 3)
- On 8 June 2010, the Council of the European Union Working Party on Human Rights (COHOM) adopted a *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* with the objective to 'help the EU institutions, EU Member State capitals, EU Delegations, Representations and Embassies to react proactively to violations of the human rights of LGBT people, and to address structural causes behind these violations' (COHOM 2010: 1).
- On 8 January 2013, the European Parliament adopted a Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.
- The European Union Agency for Fundamental Rights (FRA) has repeatedly addressed the topic of LGBT rights and carried out surveys e.g. on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity.

c)   Policies and practice concerning sexual orientation especially with regard to external action

The *EU Strategic Framework and Action Plan on Human Rights and Democracy* which defines key areas and priorities of EU's human rights action, stresses the commitment of the EU to combat all forms of discrimination including discrimination on grounds of sexual orientation. The Action Plan lays down that the Council shall develop public EU guidelines, building upon the EU's LGBT (lesbian, gay, bisexual, transsexual) toolkit and that the Member States and the EEAS shall 'develop an EU strategy on how to cooperate with third countries on human rights of LGBT persons, including within the UN and the Council of Europe. Promoting adoption of commitments in the area of human rights of LGBT within the OSCE, including through organisation of a public event in the OSCE framework' (Council of the European Union 2012). On 24June 2013, the Council of the EU adopted *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex* (LGBTI) persons aiming at enhancing human rights of LGBTI persons within its external action and providing guidance for EU institutions and EU Member States in this context (see also Chapter VII.C.1 and 2).

d)   Gaps and challenges

Although sexual orientation was included in EU non-discrimination law, the scope of EU non-discrimination concerning sexual orientation is restricted to the economic and employment sector. Initiatives to adopt a broader field of application have failed so far. In general, it can be said that EU law is characterised by implicit heteronormativity. Persons deviating from the heterosexual norm, e.g. regarding the definition of family, have only recently, gradually and in a fragmented way been included in

EU norms. A further point of criticism is the 'one size fits all' approach towards multiple forms of discrimination which treats all marginalised groups the same way and 'is based on an incorrect assumption of sameness or equivalence of the social categories connected to inequalities and of the mechanisms and processes that constitute them' (Verloo 2006: 223). In addition, the treatment of sexual orientation as a minority issue is problematic:

> LGBT single issue policies tend to treat this group in isolation, thus adopting a minoritizing perspective which focuses more on the effects of inequality for this group than on the underlying causes. As a result, overlooking the structural dimension leads to generating an LGBT cluster understood in terms of a social reality, without questioning the fact that the very existence of this group is the product of social structures which set up predetermined divisions and hierarchies between bodies, genders and sexualities. (Cruells and Coll-Planas 2013: 134)

Recently, LGBTI issues have not only been addressed by internal policies but also have been increasingly taken into consideration in the context of external relations.

D. Disability

1. Concepts and definitions of disability and inequalities and discrimination concerning disability

Disability is a contested concept which has considerably altered its meaning over the last decades. Article 1 of the *UN Convention on the Rights of Persons with Disabilities* (CRPD) defines disability as follows: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' This definition reflects the more recent developments of disability theory and research, which is based on the assumption that there is a difference between impairment and disability. The Centre for Disability Studies in Leeds defines a disabled person as

> a person with an impairment who experiences disability. Disability is the result of negative interactions that take place between a person with an impairment and her or his social environment. Impairment is thus part of a negative interaction, but it is not the cause of, nor does it justify, disability (Centre for Disability Studies n.d.: 1).

This model, which is also called the 'social model of disability' (Hughes and Paterson 1997; Oliver 1990) can be distinguished from the preceding 'medical' or 'individual' model (Oliver 1990; Siebers 2008). The latter conceptualises disability as a 'personal tragedy' and an individual problem with negative connotations such as dependence, abnormality, faultiness or deficiency. Disabled people are seen as the problem. They have to be cured or adapted in a way to fit into the 'normal' way of living or otherwise isolated or segregated and treated through the means of health care and welfare state. Oliver stresses that

> the very language of welfare provision serves to deny disabled people the right to be treated as fully competent, autonomous individuals, as active citizens. Care in the community, caring for

people, providing services through care managers and care workers all structure the welfare discourse in particular ways and imply a particular view of disabled people (Oliver 1994: n.p.).

In contrast, the social model sees disability as a problem of the society. It refuses to define disability as an individual defect and deficiency, but 'as the product of social injustice, one that requires not the cure or elimination of the defective person but significant changes in the social and built environment' (Siebers 2008: 3). It is not the impairment which is the problem but the norms of the society and the interaction with other individuals which disable these persons. Thus, it is the society which has to be changed and altered because it is the 'society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation.' (Oliver 1990: n.p.)

2.   General remarks on disability and human rights

Viewing disability as a human rights issue is a rather new development which reached its peak in March 2007 when the CRPD was signed and subsequently ratified by 141 States. As indicated above, the CRPD codifies a rather recent notion of disability, which focuses on the society as a whole that erects barriers to exclude people with different needs and that 'fails to consider human differences' (Degener and Quinn 2002). The legal conception of the 'social' model of disability takes into account the discriminating structure of a society. From a human rights point of view, the 'medical' or 'individual' model of disability has to be rejected as it neglects to acknowledge persons with disabilities as equal members of society and implies discriminatory measures and treatment of disabled people. The human rights based approach to disability is commonly perceived to be the single most important political development in the struggle for equal participation by people with mental and physical disabilities (Bickenbach 2001: 565) by disability activists. However, the following points are discussed as problematic issues in this context: The necessity of defining disability in legal terms raises the question how broad or narrow a definition of disability should be and if all persons who might experience discrimination on grounds of disability are covered by the definition (Degener 2006: n.p.). Also the focus on individual rights still remains a problematic challenge for disability rights as they fail to adequately acknowledge the significance of community and inter-relationships and discriminatory structures and institutions.

Brickenbach has argued that there are four 'models of legal expression of human rights for persons with disabilities' (Brickenbach 2001: 568-574). Enforceable antidiscrimination legislation, constitutional guarantees of equality including the non-discrimination of disabled persons, specific entitlement programs that entitle persons with disabilities to claim certain benefits (e.g. educational grants, free assistance, financial privileges) which aim at addressing the distributional injustices which persons with disabilities frequently have to face, and voluntary human rights manifestos expressing social commitments that are 'not enforced by any mechanism of the stated, legal or administrative' (Ibid.: 572).

The anti-discrimination approach has gained immensely in importance over the last decades and has been quite successful to define discrimination against disabled people as a human rights violation. However, this approach also has shortcomings. Besides those mentioned above, non-discrimination law requires

the definition of disabilities protected by non-discrimination law which leaves room for exclusion.[34] Specific entitlements focus on compensating an unfair distribution of resources that restrict the full participation in the society. It has been argued, however that

> the problem with entitlement programs for persons with disabilities is that they are perceived to be for a minority, a special group with special needs and, as such, not part of the mainstream. This has not served the interests of human rights. And this indeed may be the underlying problem that needs to be addressed (Ibid.: 579).

3. EU policies and legal response to inequalities and discrimination with regard to disability

a) Disability in primary and secondary law

There are several provisions in EU primary treaties related to disability. The provisions having general application laid down in Title II of the TFEU include the aim to combat discrimination on grounds of disability in defining and implementing the Union's policies and activities. Furthermore, Art. 19 in the chapter on non-discrimination and citizenship enables the EU to take appropriate action to combat discrimination based on disability. Also CFREU includes disability as a ground in Art. 21 on non-discrimination.

Disability is further covered by the Council Directive 2000/78/EC, which prohibits discrimination in the fields of access to employment, conditions of employment, including dismissals and pay, access to vocational guidance and training and worker and employer organisations.

On 30 March 2007, the EU signed the CRPD and its Optional Protocol. After the Council adopted a decision on the conclusion of the Convention on 26 November 2009, the Convention entered into force with respect to the EU on 22 January 2011.[35] Annex II of the Council Decision states that the EU is bound by the Convention in regard to its competences (Council Decision 2010/48/EC).

b) Policies and practice concerning disability in general

The European Commission declared the year 2003 the European Year of People with Disabilities. Subsequently, the following policy initiatives and programmes were implemented:

- *Communication from the Commission of 30 October 2003*, *Equal opportunities for people with disabilities: a European action plan* (COM(2003) 650 final) was implemented between 2004 and 2010 and aimed at fully implementing the Directive on equal treatment in employment and occupation, mainstreaming disability issues throughout Community policies and improving accessibility for all.
- *European Disability Strategy 2010-2020*: *A Renewed Commitment to a Barrier-Free Europe* (COM(2010) 636 final), a Communication by the European Commission with the objective 'to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society

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[34] Translating disability into a legal definition means laying down 'objective' criteria stipulating what counts as a disability and what not, which might exclude certain forms of disabilities.
[35] See http://ec.europa.eu/justice/discrimination/disabilities/convention/index_en.htm Last accessed 21 Feb 2014.

and in the European economy' (COM(2010) 636 final: 4). Eight areas for action were defined by the Commission: accessibility, participation, equality, employment, education and training, social protection, health and external action.

- On 15 November 2010, the European commission released a *Commission Staff Working Document Accompanying the European Disability Strategy 2010-2020*: A Renewed Commitment to a Barrier-Free Europe. The document 'describes the present situation as regards disability in the EU, refers to evidence and supporting data, underpins the new strategy and summarises the contributions received in the public and the stakeholders' consultation rounds' (SEC(2010) 1323 final).

c)   Policies and practice concerning disability especially concerning external relations

The *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe* also provides for action in the field of external action. It says, that the 'EU and the Member States should promote the rights of people with disabilities in their external action, including EU enlargement, neighbourhood and development programmes.' (COM(2010) 636 final: 9) It further lays down that EU action will support and complement national initiatives to address disability issues and promote agreement and commitment on disability issues in international for a (Ibid).

The *EU Strategic Framework and Action Plan on Human Rights and Democracy* contains a commitment of the EU to advocate for the rights of persons with disabilities. Among the actions laid out in the Action Plan the Commission and the EEAS are responsible for promoting the rights of persons with disabilities in development programmes, in the framework of the European Disability Strategy 2010-2020 and through the implementation of the UN Convention on the Rights of Persons with Disabilities. The Plan further requests the Commission to update the *Guidance Note on Disability and Development*, which was initially drafted in 2004, to be in line with the UN Convention on the Rights of Person with Disabilities. The said Guidance Note 'seeks to raise awareness of the issues among staff working on EU development cooperation at headquarters and in delegations and provide some general guidance on including people with disabilities in development processes' (Guidance Note 2012: 2).

d)   Gaps and challenges

By adopting the CRPD the EU has joined one of the most recent and progressive human rights documents on disability and thus is committed to a definition of disability which focuses on the society as the disabling factor for persons affected. However, in regard to EU non-discrimination law, non-discrimination on grounds of disability falls into the restricted scope of the employment and economic sector and, thus, is quite limited in addressing the issue in a comprehensive way. Furthermore, disability has been increasingly taken into consideration in the context of EU external relations. EU institutions are obliged to enhance the rights of disabled persons in regard to enlargement, neighbourhood and development policies and is raising awareness for the rights of disabled people among its staff working in the external relations sector.

E.   Age

a)   *Concepts and definitions of age and age inequalities and discrimination*

Despite the fact, that 'only age encompasses categories that every living person potentially joins' (North and Fiske 2012: 982), there is little academic research on the concepts and definitions of age and age related inequalities and discrimination. In general, age refers to the life span of a person – consisting of different phases such as childhood, youth, adulthood or old age – in the course of which a person faces physical changes and he or she has or may have altering needs, possibilities, duties and rights. In general, a distinction is made between demographic ageing and social ageing. Demographic ageing refers either to chronological ageing – a change of age all people experience – or prospective ageing – defined by the number of expected remaining years. Social ageing 'is a social construct involving expectations as well as institutional constraints about how older people work and live as they age' (European Centre Vienna 2013: 3). Besides this dimension of 'individual ageing' (Weber 2012: 453) there is a growing discussion on 'population ageing', which refers to 'the process by which older individuals become a proportionally larger share of the total population' (United Nations 2002: 1). This democratic change poses many challenges for governments concerning health systems, retirement schemes, ensuring intergenerational cohesion or social justice.

Originally, the term ageism connoted 'a set of social relations that discriminate against older people and set them apart as being different by defining and understanding them in an oversimplified, generalised way.' (Minichiello, Browne and Kendig 2000: 253) Thus, initially ageism more or less exclusively referred to discrimination and prejudice against older people. The negative consequences of ageism include(d) 'reduced social and economic opportunities, damage to self-esteem, and exacerbated physical health problems' (North and Fiske 2012: 982). Adding to the complexity of the concept of ageism, it has to be mentioned that there is also a positive dimension 'via stereotypes of wisdom and happiness – in addition to practical benefits such special tax breaks, discounts, and housing programs' (Ibid.). Recently, the concept of ageism has been extended and 'is now increasingly used to refer to age discrimination *per se*, whatever the ages of those affected' (Duncan and Loretto 2004: 96). This approach takes into account that also persons of young age might be discriminated against on grounds of their age.

b)   *Age and human rights*

The insight that age may have an effect on the enjoyment of human rights has initially been reflected by the discussion on children's rights. The following dimensions had and still have an important influence on the development and discussion of these specific rights:

- The notion, that children are 'different' than adults had always had a repercussion in law. 'The law has always acknowledged that there are differences between children and adults and, accordingly, it has differentiated in its treatment of children and adults' (Breen 2006: 2) As 'rationality' and 'autonomy' had been considered as being a precondition for having and exercising rights, children had not been classified as 'rights-holders' for a long time. Although the latter has changed 'the initial pre-requisites of rationality and autonomy [...] still have currency as they continue to form the basis for the differential treatment between child and

adult, particularly with regard to analyses concerning the extent to which children may put their rights into effect' (Ibid.: 3).

- There is still the need to balance the necessity of considering children and young people 'as a distinct social group and as bearers of rights in order to find adequate ways of balancing needs for self-determination, autonomy and participation of children [...] while at the same time acknowledging specific vulnerabilities and protection needs of children' (Sax 2012: 423).
- Although meanwhile children's rights are almost universal acknowledged and there are specific legal instruments such as the UN Convention on the Rights of the Child in place to protect the rights of the children there is a huge discrepancy between principles and internationally accepted norms and the concrete practice and implementation of these principles and norms (Sax 2012: 422).

During the last decades there has been growing awareness that not only children are especially vulnerable to human rights violations (Lueger-Schuster 2012), but also adults may face various forms of discrimination and disadvantages on grounds of their age during their lives and increasingly in old age. The debate focuses mainly on the rights of aged persons. Two dimensions are important in this context:

- There has been a growing consensus that human rights of older persons are increasingly at stake. On the one hand, disadvantages on grounds of age is more and more perceived as a problem for individuals, on the other hand population ageing poses serious challenges to states in order to ensure the enjoyment of human rights of their populations. A report published by the UN Secretary-General on the situation of the human rights of older persons distinguishes four major human rights challenges in this regard: discrimination on the basis of age, poverty, violence and abuse of the elderly and a lack of specific measures and services to meet the needs of older persons (UNHCHR 2011).
- Although there is growing awareness that human rights of older persons are endangered 'explicit references to older persons in binding international human rights instruments are scarce. [...] Efforts to protect the rights of older men and women are scattered and insufficient, with a general lack of comprehensive, targeted legal and institutional frameworks' (UNHCHR 2011: 1-2). However, various initiatives have tried to address the issue at an international level and called for the necessity to address the key challenges of population aging (Weber 2012: 455). The Madrid International Plan of Action on Aging adopted in 2002 calls for a mainstreaming of age:

> Mainstreaming ageing into global agendas is essential. A concerted effort is required to move towards a wide and equitable approach to policy integration. The task is to link ageing to other frameworks for social and economic development and human rights [...]. It is essential to recognize the ability of older persons to contribute to society by taking the lead not only in their own betterment but also in that of society as a whole.

These two examples – children's rights on the one hand and the right of the elderly on the other hand – show how complex the relationship between age and human rights is and that, especially concerning the rights of older persons, there is still a lack of specific human rights instruments.

c) EU and legal responses inequalities and discrimination in regard to age

(1) Age in primary and secondary law

Although provisions on age were included into primary law rather late – discrimination on grounds of age has been prohibited only since the Treaty of Maastricht and the commitment to children's rights have been enshrined in the Treaty of Lisbon – nowadays there are numerous references concerning age in EU primary law.

The TEU lays down under Title I Common Provisions in Art. 3 (3) that the Union 'shall promote […] solidarity between generations and protection of the rights of the child'. It lays further down in Art. 3 (5) that the EU shall in 'its relations with the wider world, the Union shall […] contribute to […] the protection of human rights, in particular the rights of the child'. Under Title V on the Area of Freedom, Security and Justice the TEU stipulates in Chapter 2 regarding Policies on Border Checks, Asylum and Immigration in Art. 79 (2) that the EU shall adopt measures inter alia in order to combat trafficking in persons, in particular women and children, and transfers in Art. 83 the competence to the EU to adopt legislative measures in various areas of crime, amongst others concerning the trafficking in human beings and sexual exploitation of women and children.

The TFEU enshrines under Title II Provisions having General Application that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on […] age' (TFEU Art. 10). Discrimination on grounds of age is further prohibited in Art. 19, which enables EU institution to take appropriate (legal) action to combat discrimination based inter alia on age.

CFREU has several references in regard to age. Age is included in Art. 21 on the prohibition of discrimination. Furthermore, Art. 24 is exclusively dedicated to the rights of the child and lists the following stipulations:

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

In addition, CFREU prohibits in Art. 32 child labour. The same article further commits to the protection of young people at work especially in reference to economic exploitation and work which might harm the safety, health or physical, mental, moral or social development or interfere with the education of young people.

CFREU also stipulates in Art. 25 the rights of the elderly, laying down that '[t]he Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.' Art. 24 on social security and social assistance contains a reference to people of old age.

Age is in one or other form included in many secondary legal acts. The most important is Council Directive 200/78/EC, which – as already mentioned above – prohibits discrimination in the fields of access to employment, conditions of employment, including dismissals and pay, access to vocational guidance and training and worker and employer organisations.

There are many directives and other legal acts which include reference to the protection of children and young people (see European Commission 2014). In the following, the most important will be presented:

- Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography
- Commission Directive 2006/125/EC of 5 December 2006 on processed cereal-based foods and baby foods for infants and young children
- Directive 94/33/EC of 22 June 1994 on the protection of young people at work
- Commission Recommendation C(2013)778 final of 20 February 2013 Investing in children: breaking the cycle of disadvantage
- Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the MS (corrigendum published as 2004/58)
- Council Directive 92/85/EC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Art. 16(1) of Directive 89/391/EEC)
- Council Directive 2010/18/EU of 8 March 2010 implementing the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

Concerning the rights of elderly people the legal situation is less favourable. An issue which especially relates to older persons is addressed in the Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights. The Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in order to expand the scope of protection beyond the field of employment and occupation would be important for the protection against discrimination on grounds of age beyond the area of employment. However, as mentioned above, the proposed directive has not been adopted yet.

(2)   Policies and practice concerning age in general

There are a broad range of EU-initiatives and policies concerning the rights of the child and the rights of young people. The following are the most important ones:

- The EU Agenda on the Rights of the Child is a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and was adopted in 2011. The Agenda aims at making justice systems within the EU more child-friendly and enhancing the well-being of children.
- The EU Guidelines on the Protection and Promotion of the Rights of the Child is dedicated to combating all forms of violence against children and was adopted in 2007.
- Decision No 779/2007/EC of the European Parliament and of the Council establishing the DAPHNE III Programme 2007-2013 to prevent and combat violence against children, young people and women.
- In 2010, the EC published an Action Plan on Unaccompanied Minors (2010 – 2014), which is a Communication from the Commission to the European Parliament and the Council, identifying three main areas for action: prevention, regional protection programmes, reception and identification of durable solutions.
- Concerning the situation of young people, the main efforts of the EU are aiming to reduce youth unemployment and increase the youth-employment rate. The main actions include a Communication by the Commission on Working together for Europe's young people – A call to action on youth unemployment and a Youth Employment Initiative, both adopted in 2013, and the 2012 Youth Employment Package.

Concerning the rights of older people, the EU dedicated the year 2012 as the European Year for Active Ageing and Solidarity Between Generations. Other initiatives of significance for the elderly are the Europe 2020 Strategy, A European strategy for smart, sustainable and inclusive growth, which aims at reducing poverty and increasing the employment rate of persons aged 20-64. Another policy initiative is the European Innovation Partnership on Active and Healthy Ageing. With a focus on older persons, the Partnership aims to enhance the health and quality of life or to ensure that health and social care systems are sustainable and efficient.

(3)   Policies and practice concerning age especially with regard to external action

Children's rights are considered in various forms in external relations, including development cooperation and trade and also concerning foreign, security and defence policy. There are numerous policy documents, including

- The Commission Communication of 5 February 2008 (COM(2008)55 final) on a special place for children in EU external action and the European Union's Action Plan on Children's Rights in External Action of 5 February 2008 (SEC(2008)136)
- Commission staff working document on children in emergency and crisis situations (SEC(2008)135 of 5 February 2008

- Commission staff working document combating child labour of December 2010 and the Commission staff working document of 30 April 2013 (SWD(2013)173 final on trade and the worst forms of child labour
- Communication from the Commission to the Council and the European Parliament of 6 March 2002 on education and training in the context of poverty reduction in developing countries (COM(2002)116 final, Commission Communication (COM(2006)249 of 24 May 2006 on promoting decent work for all Council Conclusion of 30 November and 01 December 2006, Commission Staff Working Document (SEC(2008)2184 of 2 July 2008: Report on the EU contribution to the promotion of decent work in the world, Commission staff working document (SWD(2010)121 final) of 4 February 2010 – More and better education in developing countries and Commission Communication (COM(2013)141 final) of 12 March 2013 on enhancing maternal and child nutrition in external assistance
- EU Guidelines on children in armed conflict, adopted in 2003 and updated in 2008, Implementation strategy of 25 April 2006 for the Guidelines on children in armed conflict and Revised implementation strategy on children and armed conflict, of 6 December 2010
- Council Conclusions of 26-27 May on the promotion and protection of the rights of the child in the European Union's external action – the development and humanitarian dimensions

In addition, the *EU Strategic Framework and Action Plan on Human Rights and Democracy* emphasizes the priority to fight discrimination inter alia on grounds of age and to advocate the rights of children. It lists several activities on the promotion of children's rights, however, does not contain any action on the rights of older persons.

(4)   Gaps and challenges

The EU has quite a comprehensive legal and policy framework with regard to children's rights. The rights of the children are not only included as a common provision in the TEU and significantly taken into consideration in CFREU but there is also a broad range of secondary law referring to children's rights. In addition, there are numerous internal and external EU policies and practices addressing child and young people's rights and issues. However, as there is very often a huge gap between the high legal standards of children's rights and the actual realisation of children's rights further research is needed to follow up on the implementation and impact of these laws and policies. Concerning the situation of the rights of older person the situation is less favourable. The diagnosis made by the UNHCHR (2011) on the lack of a comprehensive, targeted legal and institutional framework in regard to the rights of older persons seems also to be true for the EU legal and institutional framework. Compared to children's rights legal and policy initiatives are scarce and unsystematic. As the adoption of an extended equality directive (see above) has failed so far, the scope of legal protection on grounds of age hardly goes beyond the employment sector. The relevant provisions of CFREU are therefore all the more important in this context.

F.   Conclusions

The EU has made significant efforts to address social factors which enable or hinder the protection of human rights in its policies. The EU has not only stipulated equality as a basic principle in its primary law but also explicitly enabled EU institutions to take measures to combat discrimination on grounds of sex,

racial or ethnic origin, religion or belief, disability, age or sexual orientation. Furthermore, CFREU widened the scope of grounds of discrimination by prohibiting discrimination on ground of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The present chapter aimed at elaborating on the aspects of gender, sexual orientation, disability and age, birth and social class.

Especially concerning gender equality, the EU has made major efforts to combat inequalities by not only ensuring gender equality through legal stipulations, but also by enhancing positive and affirmative action and by prescribing the introduction of the principle of gender mainstreaming in all its policies. Gender equality is not only restricted to internal policies, it is also taken into consideration in external relations. Although EU gender policies go beyond the economic scope by for example aiming at tackling gender based violence or eliminating gender stereotypes, some scholars argue that they are nevertheless influenced by an economic agenda and therefore fail to address gender inequalities in a comprehensive way.

Combating discrimination on grounds of sexual orientation is a rather new field of EU law and policies. Although it is included in EU non-discrimination law its scope is restricted to the economic and employment sector. Furthermore, EU policies concerning sexual orientation are criticised because of their implicit heteronormativity and for treating it as a minority issue, which neglects the structural dimension of discrimination on grounds of sexual orientation. In addition, the rights of LGBTI persons are increasingly included in EU external relation policies.

Concerning the aspect of disability, the EU pursues a rather new and progressive approach which focuses on the role of the society in regard to hindering the possibilities of persons with disabilities. Similar to the aspect of sexual orientation, the EU non-discrimination principle on grounds of disability is limited to the economic and employment sector. Furthermore, the rights of disabled persons have also been increasingly taken into consideration in EU external affairs.

The conclusions with regard to rights in relation to age are quite uneven. The EU has an impressive legal and policy framework in place when it comes to children's rights. Concerning the protection of old persons the picture is less advantageous. There is a lack of a coherent policy and legal framework to enhance the enjoyment of the rights of the elderly. However, to get a more profound diagnosis several issues have to be addressed by further research: the question of the actual implementation and impact of children's rights and policies, an in-depth analysis of EU law and policies on how they affect the rights of older persons and how the enjoyment of rights of this group can be ensured by EU law and, finally, the question of the intersection of age with other factors such as disability, ethnicity and social origin.

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VII.   Cultural and religious factors[*]

A.   Introduction

This chapter has a dual focus, first on those cultural and religious factors which may hinder or facilitate the European Union's (EU) human rights policies, second on topical human rights issues which have a substantial impact on the space provided for culture and religion in a human rights context. The chapter will pay particular, albeit far from exclusive, attention to human rights in the inter-linkage between the culture and religion, religion being a vital bearer of culture. It should be noted that cultural factors are also canvassed in other chapters of the report, notably the chapters on social and ethnical factors respectively.

1.   Structure and content

The chapter will start with an introduction to the topic at a global level, going back to the Universal Declaration of Human Rights (UDHR) and introducing the different phases of the universality debate, which since the beginning of the human rights era has had a dominant impact on the perception of how human rights relate to cultural and religious traditions. Then follows an overview of general features of the position of the EU on human rights, culture and religion. The chapter proceeds to set out three overarching themes, which are amongst the most topical in human rights discourses both globally and within the EU, its Member States and third countries today:

- Women and gender in the context of cultural and religious diversity (external policies)
- Promoting religious freedom and religious and cultural diversity and tolerance
- The state, religion and culture.

2.   Methodology

The scope of religious and cultural factors that may have a human rights impact is extremely diverse and potentially vast; hence focus will be on issues that are reflected in contemporary policy discourses at EU level as well as in the scholarly literature and which are topical and pertinent for the EU in its internal and external actions.

3.   Literature review

Over the last decade, the triangle of religion, culture and human rights has been a growing research field. As the holistic approach to human rights – stressing the indivisibility of rights human rights as well as the necessity to take the cultural and historical context into account when implementing human rights – has gained ground over the last two decades, many different academic disciplines (for instance theology, history of religion, anthropology and law) have come into play in the field of human rights, culture and religion. Women's rights and gender are among the most topical research areas, being amongst the most problematic vis-à-vis human rights.

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[*] The author of this chapter is Dr. Eva Maria Lassen, Senior Researcher, the Danish Institute of Human Rights.

As one of the classical human rights, the international protection of freedom of religion or belief has been subject to much, mostly legal, scholarship. The scholarly literature on human rights in relation to religion and culture in the specific context of EU policies is still in its infancy but rapidly developing.

The literature review has included collaborative studies carried out by scholars of religion, law and culture. In the context of the EU, the large collaborative EU research project 'Religare. Religious diversity and secular models in Europe. Innovative approaches to Law and Policy'[36] is worthy of mention.

It is an interesting characteristic of the scholarly literature on the relationship between human rights, culture, and religion that the authors often have both an academic and a 'practitioner' background. An illustrative example of this is the present UN Special Rapporteur of Freedom of Religion or Belief, Heiner Bielefeldt, who is both an eminent human rights scholar and a human rights expert and practitioner.

Reports and analyses of different aspects of the relationship between human rights and religion carried out by faith-based institutions and secular non-governmental organisations (NGOs) are plentiful. The Roman Catholic Church and the European Council of Churches are Christian examples of this. Similarly, inter-religious organisations, such as the International Council of Christian and Jews are publishing reports on, for instance, human rights and the three monotheistic religions Judaism, Christianity and Islam.

In addition, the literature review of policy sources has included policy documents at the level of the UN, Council of Europe and EU pertaining to religion, culture and human rights. At the UN level, key sources include reports of the UN Special Rapporteur on Freedom of Religion or Belief as well as the UN Special Rapporteur in the Field of Culture.

B.   Global context

In what follows, the universality debate is outlined, positioning religion and culture in the landscape of international human rights. Then follows a brief introduction to major international instruments and conventions of particular significance to religion and culture in a human rights context.

1.   Universal human rights?

At the Symposium on Human Rights in the Asia-Pacific Region in January 1998, Mary Robinson, the then UN High Commissioner on Human Rights, took the occasion of the 50th anniversary of the UDHR to describe the relationship between religion, culture and human rights in the following way:

> Today the Universal Declaration of Human Rights stands as a monument to the convictions and determination of its framers who were leaders in their time. It is one of the great documents in world history. The travaux préparatoires are there to remind us that the authors sought to reflect in their work the differing cultural traditions in the world. The result is a distillation of many of the values inherent in the world's major legal systems and religious beliefs including the Buddhist, Christian, Hindu, Islamic and Jewish traditions (quoted from Lassen 2001: 179).

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[36] The project was carried out in the period 2010-2013 and funded under the EU Seventh Framework Programme. <http://www.religareproject.eu/>. Last accessed 1 June 2014.

In line with Mary Robinson's statement, the UDHR has often been proclaimed as reflecting the cultural and religious traditions of the entire world. Often, however, this view has been met by scepticism or outright rejection. And, in fact, the relationship between human rights on the one hand, and cultural and religious traditions on the other hand, is far less evident.

The debates about human rights as universal values have gone through various phases over time. Already in 1948, at the time of the creation of the UDHR, human rights were challenged as a universally applicable concept. In the following decades the debate continued, with the participation of faith communities, other parts of civil society, academics, experts and policy makers at local, regional and international levels (Lassen 2014a).

Moving to the 1980s and 90s, there was a growing sense In the international community that it was vital to find a balance between respect for local religious and cultural traditions and respect for the universal values as reflected international human rights law. This position was expressed in Art. 5 of the Vienna Declaration and Programme of Action of 1993:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. (Vienna Declaration and Programme of Action, Art. 5)

In this way, the Vienna Declaration and Programme of Action stressed that culture and religion must be taken into account when negotiating and implementing human rights. By the same token, it was acknowledged that 'cultural systems' may be in conflict with human rights. This applies, for instance, to women and gender rights. The declaration does not offer any solution to this potential conflict but consolidated the view in the human rights world that it is essential to find a balance between the two systems – international human rights and cultural and religious traditions – if human rights are to be legitimate in the eyes of members of different cultures (Jouannet 2007: 395).

Today the discourse has changed to a large degree when compared to the time of the Vienna Declaration. Thus most States have, in principle at least, taken ownership of human rights. This also applies to States with a strong religious foundation, for instance many Muslim States, such as Iran, Jordan, and Saudi Arabia). The universality of human rights *per se* is no longer so strongly contested. Instead, it is the understanding of *how* human rights relate to religious and cultural traditions which is continuously being negotiated – and here it should be noted that religious and cultural traditions themselves are dynamic and subject to evolution and change. Most importantly, the question is how human rights should be *interpreted* and *balanced against* each other (Lassen 2014a).

The religious belief and practices of the individual is protected by freedom of religion or belief. A problem of a long-standing and multi-faceted nature is the fact that the right to practice one's religion may violate others' rights. The balancing between freedom of religion and other rights is the topic of enormous complexity and subject to much scholarly scrutiny (see e.g. Lagoutte and Lassen 2006).

A particular problem that is on the rise and which represents a very serious hindrance to the human rights of the individual is violation of human rights of religious minorities, both as regards the collective right of religious freedom and the individual's religious freedom and other human rights (UN Special Rapporteur on Freedom of Religion and Belief 2012: 14-54).

a)   Human rights actors

At the same time as different parts of the world are taking ownership of human rights, the number of institutions with a mandate to interpret human rights in given cultural and religious contexts have increased. A non-European example is the new human rights instrument established by the Organization of Islamic Cooperation (OIC), made up of 57 self-declared Muslim States from the Middle East, Asia, Africa and Latin America (Juul Pedersen 2012: 29).

As an integrated part of civil society, religious and cultural communities and organisations are essential local voices of culture and religion. As such, they can both facilitate or hamper the promotion of human rights locally. Religious communities and cultural NGOs in increasing numbers are involved in human rights, at a local, regional or international level. The different religions also meet in inter-religious dialogues aimed at finding common ground in the field of human rights.

The fact that religion plays a central role in most societies has in recent years been illustrated by religion and freedom of religion entering centre stage of the international community and in international fora, as can, for instance, be observed in the UN Human Rights Council (see e.g. Benedek 2012: 66).

Academics are increasingly involved in the debates about the relationship between human rights, culture and religion, and have fertilised the discourse by, for instance, conceptualising the idea of 'overlapping consensus', i.e. to find common denominators for human rights and culture/religion (Bielefeldt, H. 2000; Lassen 2014a). The idea of overlapping consensus between universal human rights and culture and religion has also been taken up by policy makers, international human rights lawyers and other experts. An illustration is the report and project *Protecting Dignity. An Agenda for Human Rights*, authored by a group of eminent human rights experts (Panel on Human Dignity 2011).

In sum, today many human rights actors take part in negotiating how human rights should be interpreted and developed in the context of given cultural and religious traditions. Religious practices and norms are often in conflict with human rights, as are some cultural practices. Thus the relationship between culture, religions and human rights continues to be extremely challenging in many areas, such as gender, LGBTI rights (Lesbian, Gay, Bisexual, Transgender, Intersex), the equality of women, the right to change religion, and the question of balancing religious freedom with other human rights, for instance freedom of expression.

2.   International human rights instruments

The Preamble of the UDHR underlines the importance of freedom of religion: '…a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people', and the universality of human rights is laid down in its first article: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' (Art. 1).

The UDHR proclaims religious freedom in a broad sense, including for instance the right to change religion: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance' (Art. 18). The declaration also refers to the cultural life of the individual: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' (Art. 27,1).

Numerous conventions and declarations have relevance for culture, religion and human rights, amongst the most important are the two covenants of 1966, The UN Covenant on Political and Civil Rights (ICCPR), and the UN Covenant of Economic, Social and Cultural Rights (ICESCR). The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, and the Convention of the Rights of the Child of 1989 are other important documents, which touch upon the cultural and religious rights of women and children respectively.

The UN Special Rapporteur on Freedom of Religion or Belief is mandated to identify factors which may hinder the practice of freedom or religion or belief. The rapporteur provides recommendations which can support the States in their promotion and protection of freedom of religion or belief. The UN Human Rights Committee has issued a General Comment on Freedom of Religion (No. 22). Generally speaking, both the Human Rights Committee and the UN Special Rapporteur are cautious about limitations to freedom of religion or belief unless exceptional reasons call for this, for instance in the case of religious intolerance. The interpretation of religious freedom is frequently being debated in internal fora, the 'defamation of religion' debate of the UN Human Rights Council being a recent example (see e.g. Benedek 2012: 66).

As far as culture and human rights specifically are concerned, the position of UN Special Rapporteur in the Field of Culture was created in 2009. The mandate requests the Rapporteur to, *inter alia*, identify 'best practices in the promotion and protection of cultural rights at the local, national, regional and international levels' and to work 'in cooperation with States in order to foster the adoption of measures at the local, national, regional and international levels aimed at the promotion and protection of cultural rights through concrete proposals enhancing subregional, regional and international cooperation in that regard.'[37]

UNESCO has since its establishment sought to find ways to embed human rights in the context of the world cultures (Lenzerini 2014). Amongst the most important aspects of culture is language, forming an essential part of an individual's, a group's or a people's identity. The protection of linguistic rights as part of cultural rights is pursued at the international and regional level, with UNESCO playing an important part (Mancini and de Witte 2008).

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[37] <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/MandateInfo.aspx>. Last accessed 25 July 2014

C.   The European context

1.   EU policies and legal instruments

The EU has a long tradition of emphasising the universality and indivisibility of human rights and looking to the UDHR as a source of inspiration (See Chapter II on Historical factors). This provides the EU with a suitable ideological platform from which to engage in the international human rights debate.

Religious freedom in Europe is not absolute and can be limited under certain conditions, for instance if religious freedom conflicts with other rights of the individuals, with others individuals' rights, or with, for instance, the public order. Religious freedom is dynamic and constantly changing, because it is being interpreted in light of the actual development of society as well as the knowledge and the values society holds at a given time. The European Court of Human Rights gives a wide margin of appreciation to the State. The history of each Member State of the Council of Europe plays a dominant role in determining how religious freedom is interpreted in the different States. This very much applies to EU Member States, where the principle of separating the State and religion has been expressed in different ways. As a result, scope and limitations of freedom of religion or belief as well as the regulation of the state of religious communities vary considerably.

The EU Charter on Fundamental Rights states in Art. 10 on 'Freedom of thought, conscience and religion' that:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

The EU encourages, then, religious diversity and religious freedom within its Member States. At the same time, the Charter only binds Member States in so far as they are implementing EU law (See ChapterIV.C.1.a); see also McCrea 2014: 291-292). Equally, the EU respects the States' different ways of organising the relationship between state and religion, as expressed in the Treaty on the Functioning of the European Union, Art. 17, which states that the Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States' and undertakes to maintain a structured dialogue with churches and 'philosophical and non-confessional organisations'. It is noteworthy that the EU in this way commits itself to hear the religious and non-religious entities as part of civil society in areas of relevance to religious life within the EU.

Further studies are recommended into the complex role played by civil society in the promotion and protection of religious freedom as well as religious and cultural diversity and tolerance.

The EU generally keeps a low profile with regard to regulating freedom of religion in Member States. Protection against religiously grounded discrimination in the work place is regulated by the EU, but

attempts at extending the regulation outside the workplace have so far not borne fruit, partly due to some Member States' resistance to increased EU regulation in the area of religion.

Language rights are among those heralded by the EU, both to celebrate diversity, and as a cultural right of the individual. The EU Charter lays down that 'The Union shall respect cultural, religious and linguistic diversity' (Art. 22). This language diversity and language right are reflected in the EU itself, which includes the right to use any of the official languages of the EU when engaging with EU institutions, and the right of EU citizens not to be discriminated against on account of language. As far as language rights in relation to the labour market, those rights also applies to third country nationals (Mancini and de Witte 2008: 276-284).

a)   External actions

In contrast to its internal actions, the EU has very detailed external policies in the field of culture and religion. The EU includes respect for religion in its development policies and has much focus on freedom of religion or belief in its external actions because of the increased violation of freedom of religion or belief that takes place globally, for instance in the form of discrimination of religious minorities (UN Special Rapporteur on Freedom of Religion and Belief 2012).

A programmatic document is the EU Strategic Framework and Action Plan on Human Rights and Democracy of June 2012. The document describes the ways in which the EU will pursue its human rights policies, both at a bilateral and multilateral level. The second part of the document contains its Action Plan to be pursued until 31 December 2014.

With regard to Freedom of Religion, three steps are envisioned in the Action Plan: first, the development of 'public EU Guidelines on Freedom of Religion or Belief (FoRB) building upon existing instruments and documents, recalling key principles and containing clearly defined priorities and tools for the promotion of FoRB worldwide'; second, the presentation of 'EU initiatives at the UN level on Freedom of Religion or Belief, including resolutions at General Assembly and Human Rights Council'; third, the promotion of 'initiatives at the level of the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE) and contribute to better implementation of commitments in the area of Freedom of Religion or Belief'. The Action Plan also includes, amongst others, the following EU priority areas: enjoyment of human rights by LGBTI persons, Protection of the rights of women, and protection against gender-based violence, and Respect for economic, social and cultural rights

The above-mentioned EU Guidelines are particularly interesting, as they are pragmatic and detailed tools for officials of the EU and Member States when they engage with third countries, international organisations and civil society (Lassen 2014b). Moreover, they send a political signal:

> EU guidelines are not legally binding, but because they have been adopted at ministerial level, they represent a strong political signal that they are priorities for the Union. Guidelines are

pragmatic instruments of EU Human Rights policy and practical tools to help EU representations in the field better advance our Human Rights policy.[38]

In the process of creating the Guidelines - for instance the Guidelines on Freedom of Religion or Belief – the EU has invited input from religious and non-confessional NGOs and institutions.[39] In general, the EU is focused on including civil society in its promotion of human rights in the different components of its external actions. While this has very positive perspectives, it should be noted that the role played by civil society in the promotion and protection of religious freedom as well as in promoting religious and cultural diversity and tolerance is complex. Therefore further studies in this field are recommended.

Reflecting the increased focus of the EU on religious freedom in its external actions the European Parliament Working Group on Freedom of Religion or Belief was established in December 2012. The Working Group consists of:

> a group of like-minded MEPs dedicated to promote and protect FoRB in the EU's external actions. The role of the EPWG is to work with the EU institutions in monitoring FoRB in third countries and to ensure that necessary actions are taken to address serious FoRB violations. MEPs belonging to our group are committed to undertaking parliamentary work in the European Parliament to promote and protect FoRB (European Parliament Working Group on Freedom of Religion or Belief 2013: 16).

2. Women and gender in the context of cultural and religious diversity (external policies)[40]

The EU has in its external actions a progressive and comprehensive interpretation of freedom of religion or belief and of the indivisibility of religious freedom and other rights, for instance freedom of expression. An area, in which the EU demonstrates a pronounced understanding of and a progressive approach to the different rights which come into play in the context of culture and religion for different groups of individual, for instance LGBTI rights and the rights of women and girls (Lassen 2014b). This progressive approach is evident from the following three EU Guidelines: EU Guidelines on violence against women and girls and combatting all forms of discrimination against them, EU Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, and EU Guidelines on the promotion and protection of Freedom of Religion or Belief.

It is recommended that further studies are carried out with the aim of interpreting this indivisibility of rights in the cultural and religious context of women and gender, and that the role of civil society in promoting religious freedom and tolerance as well as in promoting LGBTI rights and women' and girls rights are included in such studies.

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[38] <http://eeas.europa.eu/human_rights/guidelines/index_en.htm>. Last accessed 1 June 2014.
[39] See e.g. http://eprid.eu/website/news.
[40] For Women and gender in internal policies of the EU, see Chapter VI on Social factors.

3.   Promoting freedom of religion and religious and cultural diversity and tolerance

Intolerance and discrimination based on religion or belief as well as religiously motivated violence have increasingly become the focus of the EU (see, for instance, Human rights and democracy in the world. Report on EU Action in 2011; see also Benedek 2012: 66). At the bilateral level with third countries and at the multilateral level, for instance at the Human Rights Council, the EU has stressed the need to fight religious discrimination (Benedek 2012: 66). Thus the Guidelines on freedom of religion or belief are a response to the global threat to religious freedom: 'Violations or abuses of freedom of religion or belief, committed both by state and non-state actors, are widespread and complex and affect people in all parts of the world, including Europe' (Guidelines, 3. See also Lassen 2014b).

In the spring of 2014 the European Parliament adopted a resolution on cultural and religious tolerance. European Parliament Resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious differences restates the Parliament's will to foster policies which affirm 'respect for cultural diversity and tolerance vis-à-vis different concepts and beliefs, combined with action to combat all forms of extremism and fight inequalities' (1). Acknowledging that cultural and religious differences have been sources of conflict and human rights violations, the resolution states that it is exactly the understanding of religious and cultural diversity which fosters tolerance and reconciliation. Stressing the belief of the EU in the close relationship between freedom of religion or belief and women's rights as well as LGBTI rights, the resolution reaffirms:

> that the protection of persons belonging to vulnerable groups such as ethnic or religious minorities, the promotion of women's rights and their empowerment, representation and participation in economic, political and social processes, and the fight against all forms of violence and discrimination based on gender or sexual orientation must be among the EU's goals in foreign relations (3).

The Resolution 'Calls on the EEAS and the EU Delegations worldwide to further engage with third countries and regional organisations in the promotion of intercultural and interreligious dialogue' (31), and stresses 'the importance of providing EU staff with appropriate training to this end.'

In the same period as progressive policies were adopted vis-à-vis external affairs, the EU Member States experienced serious threat to freedom of religion or belief and to tolerance towards cultural and religious diversity. The Fundamental Rights Agency, FRA, carried out surveys related to religious and cultural minorities, for instance survey on anti-Semitism in EU Member States, which showed that many Jews experienced an increased anti-Semitism (FRA report 2013).

It is recommended that further studies are carried out with the aim of interpreting this indivisibility of rights for religious minority groups in EU Member States (based on relevant FRA reports). In addition, further studies are recommended, which with a basis in FRA reports on discrimination and perceived discrimination of religious minorities in EU Member States analyse the grounds and remedies for religiously based persecution.

4.　The State, religion and culture

The detailed policies on freedom of religion or belief in the EU's external policies compared with the detached role of the EU in the practice of religious freedom in Member States, and combined with indications of serious problems with discrimination based on religious or ethnic ground, have given rise to charges of incoherence – or even hypocrisy – in the EU's internal and external policies. This also applies to the position of the EU on the role of the state vis-à-vis religion.

The competence for EU interference in national models is restricted, as mentioned above. At the same time, although different types of the state-religion relationship can result in different regulation of religious norms and practices, there is a general consensus in Europe - endorsed by the case law of the European Court of Human Rights - that secular human rights law prevails, not allowing for legal pluralism. In other regions of the world, the relationship between state law and religious law is more intertwined, as the influence of Islamic law on state law in a large number of Middle Eastern States demonstrates. In this context the EU takes a very pronounced position as expressed in the Guidelines on freedom of religion or belief. The Guidelines states that 'the EU does not consider the merits of the different religions or beliefs, or the lack thereof, but ensures the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief' (Guidelines, 7). At the same time the EU does not insist on state neutrality of EU Member States. Such apparent inconsistencies have fueled charges of incoherence between EU's external and internal policies. As expressed by the scholar Marco Ventura:

> Without a European consistency in religious laws and policies, Europe lacks the credibility and authority to denounce and counter violations in other parts of the world. No consistency is possible in this field, without a basic reflection on the role of the State. This is why the 2013 EU Guidelines on the promotion of freedom of religion or belief could not avoid starting from an extremely strong assertion of the European Union as 'impartial' and 'not aligned with any specific religion or belief'… Europeans should address their own internal failures and seek consistency in European religious laws and policies, in order to be a legitimate and a credible international promoter of freedom of religion and belief (Ventura 2013: 35).

Further studies are recommended in the area of incoherence between EU external and internal policies with respect to the neutrality of the state vis-à-vis religion. In addition, further studies are needed in the area of the position of the EU with regard to legal pluralism.

D.　Conclusion

Culture and religion have both the potential to hinder or, conversely, to enable human rights promotion. This becomes clear when analysing the global debate about the universality versus the relativity of human rights, as this discourse has developed since the creation of the UDHR. The chapter took this debate as its starting point, demonstrating that the universality debate today is of a fundamentally different nature than at the beginning of the human rights era. Thus, today the principles of human rights are – at least in theory – universally accepted, and it is the interpretation of human rights in the context of culture at the forefront of national, regional and international controversy and debate. The chapter also outlined how

the quest for 'overlapping consensus' between human rights and diverse cultural traditions forms part of recent debates about the universality of human rights.

After a sketch of the international instruments regulating the area, the chapter proceeded to examine the European context, taking its point of departure in the fact that the EU has a long tradition of emphasising the universality and indivisibility of human rights and using the UDHR as a source of inspiration, providing the EU with a good ideological platform from which to engage in the international human rights debate. The chapter set out the most important EU legal documents in the context of religion and culture, and the toolbox employed by the EU in its external actions, including EU Human rights Guidelines. The EU affords civil society (for instance faith-based communities) a substantial role in its external and internal actions, and promotes inter-religious and inter-cultural dialogues on human rights. Further studies are recommended into the complex role played by civil society in the promotion and protection of religious freedom as well as religious and cultural diversity and tolerance.

After a presentation of the European context of human rights, culture and religion, the chapter mapped three overarching themes, all topical in human rights discourses globally and within the EU, its Member States and third countries today. First, women and gender in the context of cultural and religious diversity was canvassed from the point of view of the EU's external actions, in particular the dilemma between freedom of religion, on the one hand, and LGBTI rights and women and girls' rights on the other.

It is recommended that further studies are carried out with the aim of interpreting the indivisibility of rights in the cultural and religious context of women and gender, and that the role of civil society in promoting religious freedom and tolerance as well as in promoting LGBTI rights and women and girls' rights are included in such studies.

Second, the protection of religious freedom as well as religious and cultural diversity and tolerance as a key challenge to the human rights regime, both in the EU Member States and globally. The EU has in its external actions a progressive and comprehensive interpretation of freedom of religion or belief and of the indivisibility of religious freedom and other rights, notably freedom of expression. Similarly, there is a pronounced understanding of the different rights which come into play in the context of culture and religion for different groups of individual, for instance LGBTI rights and the rights of women and girls. As regards EU Member States, FRA reports indicate that the freedom of religion is insufficiently protected within the EU and that for instance the Jewish minorities across Europe perceived a highly increased level of anti-Semitism.

It is recommended that further studies are carried out with the aim of interpreting the indivisibility of rights for religious minority groups in EU Member States (based on relevant FRA reports) as well as in the external policies. In addition, further studies are recommended, which with a basis in FRA reports on discrimination and perceived discrimination of religious minorities in EU Member States analyse the grounds and remedies for religiously based persecution.

The chapter's third theme is 'the State, religion and culture'. This section considers the role of the State with reference to culture and in particular religion. Further studies are recommended in the area of incoherence between EU external and internal policies with respect to the neutrality of the state vis-à-vis

religion. In addition, further studies are needed in the area of the position of the EU with regard to legal pluralism.

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VIII. Ethnic factors[*]

A.   Introduction

In this chapter focus is on ethnic factors enabling or hindering human rights in the context of EU policies. Ethnic factors are understood as issues related to ethnicity which have an impact on the enjoyment of human rights. Society and its demographic composition, legal structures and political climate have an impact on the enjoyment of basic human rights as well as on access to justice (see Chapter VI.A). Therefore the chapter will not look at how ethnicity in itself can hinder or enable human rights (but see here Chapter VII on religious and cultural factors), but rather on how ethnicity in its social context has consequences for the enjoyment of human rights by individuals and groups of particular ethnic origin. In this report, focus will be on non-discrimination of ethnic minorities with regard to their access to basic rights within the EU and its Member States. More particularly, the chapter will focus on non-discrimination vis-à-vis a selected number of areas where people belonging to a specific ethnic minority group may encounter difficulties in the enjoyment of basic human rights.

The literature review has included an overview of scholarship on ethnicity and human rights, together with international and EU legal instruments and policies, surveys and statistics by either Member States or EU institutions, notably the European Union Agency for Fundamental Rights (FRA), and reports by civil society.

1.   Structure and content

After an introduction to the concepts of intersectional and multiple discrimination, including an introduction to how ethnic factors are often combined with other factors, for instance social or economic, the chapter proceeds to a mapping of major international instruments related to ethnicity and human rights. Then follows an analysis of the instruments and policies of the EU as well gaps and challenges vis-a-vis policies or implementation, followed by an introduction to a number of selected issues that within the EU and its Member states are indicative of the relevance of ethnic factors for the enjoyment of basic rights, namely:

- Access to the labour market
- Access to health services
- Access to information
- Hate crime.

This list is not exhaustive but is representative of the most important and illuminating challenges to the enjoyment of basic rights of ethnic minorities. Finally, a section is dedicated to Roma, the largest European ethnic minority group before a concluding section sums up the mapping, point to gap and challenges and suggest avenues for further research and analysis.

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a)   *Concepts of related to discrimination and ethnicity*

The principle of equal treatment between persons irrespective of racial or ethnic origin is a two-sided right: on the one hand, it implies the right to equality before the law in its vertical dimension, normally imposing negative obligations on national authorities (namely legislators and policy makers), but not always. On the other hand, the principle of equal treatment also implies a positive obligation to promote equal treatment and the *right to protection against discrimination – both direct and indirect[41] - for all persons on the ground of racial or ethnic origin*. Thereby the two dimensions must go hand in hand – as a prohibition against discrimination does not eliminate inequalities and needs to be followed up by initiatives and programs that promote equality, for instance by changing public attitudes.

With regard to ethnicity, two types of discrimination may occur: multiple and intersectional. The distinction between the two types is as follows:

> Multiple discrimination occurs when a person is discriminated on the basis of several grounds operating separately, for instance, by being treated less favourably on the ground of origin in one situation and because of gender in another. Intersectional discrimination is referred to where somebody is discriminated against on several grounds at the same time and in such a way that these are inseparable.[42]

Ethnic factors should not be seen in isolation from other factors. For instance, social, economic, gender, disability, and other factors may intersect with ethnic factors. The economic and financial crisis is an example of how societal exclusion can affect ethnic minorities more negatively than the majority population (Woods and Lewis 2005: 210. Nilsson and Wrench 2009: 23). 'Multiple' and 'intersectional' discrimination have been little studied so far but is central to the work of FRA and increasingly a topic of academic studies.

B.   The global context

The principle of equality runs like a thread through all international human rights documents, beginning with Art. 1 of the Universal Declaration of Human Rights (UDHR), which states that '[a]ll human beings are born free and equal in dignity and rights.'

Despite this central significance of equality in the context of human rights, the reality looks somewhat different. In all societies and States the right to equality is not only occasionally infringed upon but certain groups are systematically and structurally disadvantaged in many areas of society. Human rights law acknowledges this fact by explicitly prohibiting the exclusion of certain groups (e.g. ethnic minorities, women) from particular areas such as education, labour market or access to services. The principle of non-discrimination recognises the fact that specific factors rooted in the structure and composition of the

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[41] According to Art. 2 of Council Directive 2000/43/EC of 29 June 2000, direct discrimination refers to one person being treated less favourably than another in a comparable situation on grounds of their racial or ethnic origin. Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice will put persons of a racial or ethnic origin at a particular disadvantage in comparison with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the mean of achieving that aim are appropriate and necessary.

[42] See <http://fra.europa.eu/en/project/2011/multiple-discrimination-healthcare>

society enable or hinder the protection of human rights. Following this, Art. 2 of the UDHR stipulates that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

A number of the core human rights conventions contain a general prohibition of discrimination. Both the UN Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic, Social and Cultural Rights (ICESCR), both of 1966, state that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Art. 2).

Article 20(2) of the ICCPR lays down that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law', whereas Art. 26 asserts equality before the law:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Committee on Economic, Social and Cultural Rights, in its General Comment No. 20, 10 June 2009, has stated that 'race' and 'colour' includes 'ethnic origin' (Committee on Economic, Social and Cultural Rights, 2009).

The UN Convention on the Elimination of All Forms of Racial Discrimination of 1965 has a focus on race and ethnic origin in particular. The Convention defines 'racial discrimination' in the following manner, including discrimination based on ethnic origin:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Art. 1,1).

Article 1 also prescribes the use of 'special measures':

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and

that they shall not be continued after the objectives for which they were taken have been achieved (Art. 1,4).

The Convention further posits that State obligations include taking appropriate measure to eliminate racial discrimination:

> States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation (Art. 2,1).

The Committee on the Elimination of All Forms of Racial Discrimination (CERD) consists of independent experts that monitor the implementation of the Convention by the States, who are obliged to submit reports to CERD every two years. CERD also publishes General Comments with its interpretations of the Convention.

Beyond the comments of CERD, there are other sources of international law that create obligations on States with regard to ethnic discrimination, for instance the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly, 1992).

The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance was first appointed in 1993, and is mandated *inter alia* to undertake country visits and submit annual report to the UN Human Rights Council and the UN General assembly.

C.   European context

1.   EU policies and legal instruments

The demographic landscape of European States has changed considerably since WW2, in some States dramatically. Decolonisation has meant that inhabitants of former colonies have come to Europe, and migrant workers and refugees have transformed societies, as has internal movement within the EU. As a result, a large part of the European population today belongs to an ethnic minority.

Ethnic diversity is celebrated in the EU, and different ethnic groups making up society is considered a positive aspect of cultural diversity and multiculturalism, enrichment and integration of different identities (Westin 2010: 23). It follows that threats to ethnic minorities are extremely adverse to EU fundamental values.

The European Convention on Human Rights (ECHR) contains a prohibition on account of race and ethnic origin (Art. 14). Further, additional Protocol 12 includes a general discrimination prohibition. The European Committee of Social Rights is attached to the European Social Charter with a mandate to monitor that States parties are in conformity in law and in practice with the provisions of the Charter.

European anti-discrimination legislation with a particular focus on race and ethnic origin is among the most extensive in the world .[43] The EU has been proactive in regards to combating discrimination on ground of race and ethnic origin, amply illustrated not only on the European Commission's website but by the case law from European Court of Justice, research and studies carried by independent experts.[44]

The general prohibition of discrimination on *inter alia* ethnic grounds, is included in Art. 21,1-2, of the Fundamental Rights Charter of European Union (FRCEU):

> Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

> Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Unsion, and without prejudice to the special provisions of those treaties, any discrimination on grounds of nationality shall be prohibited

In addition Art. 22 of the Charter lays down that the Union 'shall respect cultural, religious and linguistic diversity'. Language rights also apply to third country nationals and their access to the labour market within the EU (See Chapter VII.C.1). The scope of the FRCEU has limited scope and applies only to areas of EU law (51(1)) (See Chapter IV.C.1.a).

The Treaty on the Functioning of the European Union (TFEU) lays down that 'the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (Art. 19). Based on this provision several directives to prohibit and combat discrimination on these grounds have been adopted.

a)   Two directives

Ethnic factors have an impact on individuals accessing their human rights. In principle, all citizens of the EU are equal before the law and in enjoyment of their rights. In practice the picture is somewhat different when ethnic factors are taken into consideration, as persons who are either perceived to be or who are a member of a particular ethnic group face direct or indirect for that very reason. Discrimination on the ground of race and ethnic origin hinders equal access to rights. In lieu of this factor, the EU has put in place legislation to combat discrimination and initiated a broad range of initiatives to support Member States to promote equal treatment irrespective of race and ethnic origin.

The EU is at the frontline of anti-discrimination in Europe. In 2000 the Council of Ministers unanimously adopted two directives that in particular aim to combat discrimination within and outside of the labor market on the ground of race and ethnic origin. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

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[43] See the *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* – COM (2010) 573 final, 19 October, 2010.

[44] Among many, the European Network of Legal Experts in the non-discrimination Field. See <http://www.non-discrimination.net/>, last accessed 29 July 2014.

(often called the Race Directive) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive). Apart from these two directives the Council also adopted a program of action to encourage projects and campaigns to promote equal treatment at the national level.

Article 13 of the Race Directive requires all Member States, as a minimum, to establish a body or bodies (Equality bodies) with the purpose of providing independent assistance to victims of discrimination in pursuing their complaints of discrimination; conduct independent surveys concerning discrimination; and publish independent reports and make recommendations on any issue relating to such discrimination.

In relation to EU anti-discrimination legislation some argues that protection against discrimination in accessing ones right irrespective of race and ethnicity has been extended by enabling right holders to claim their rights more effectively.[45]

The EU anti-discrimination legislation, especially outside the labour market, does not enable practitioners to lodge cases of multiple discrimination. Jurisprudence illustrates that the judiciary have a tendency to only take one factor into account – even though the case concerns intersection of two grounds of discrimination. The EU Commission has proposed horizontal anti-discrimination in recognition of the multi-layered nature of discrimination. This legislation has as yet not been adopted by the Council of Ministers.

b)   EUMC and FRA

To provide the EU Commission and Parliament with an insight into issues regarding race and ethnic discrimination, the Commission established the EU Monitoring Center (EUMC) in 1999. EUMC was replaced by the EU Agency for Fundamental Rights (FRA) in 2008 (see Chapter II.C.2.d). FRA has a special mandate to monitor non-discrimination in the area of race and ethnicity, a mandate which is reflected in the Working Programme of FRA and has resulted in a large number of surveys and studies in the field.

The EU has taken other initiatives with the aim of promoting equal treatment and protecting against discrimination. For instance, DG Justice has a specific anti-discrimination unit with a focus on race and ethnicity – created at the same time as FRA, at which point the area was transferred from DG Employment to DG Justice, an illustration of the fact that the EU holds a more comprehensive view of discrimination than just in the context of labour.

c)   EU support of NGOs promoting non-discrimination on account of ethnicity

The EU supports NGOs working with different types of discrimination, including religion and ethnicity. These include the European Network Against Racism (ENAR) and the European Social Platform, who are recipients of annual funding from the Commission.

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[45] Equinet, Equality Bodies and National Human Rights Institutions – Making the Link to Maximise Impact. November 2000,   Europe.   <http://www.equineteurope.org/IMG/pdf/EN_-_Equality_Bodies_and_National_Human_Rights_Institutions.pdf> Last accessed 29 July 2014.

The EU also supports the European Network of Equality Bodies (Equinet). Equinet seeks to enable equality bodies, national authorities and EU bodies to achieve equality among others by providing perspectives based on equality body experiences.

d) *Impact and effectiveness of EU instruments*

Although the EU has taken very progressive measure in the field of non-discrimination on account of ethnicity, effective implementation of EU anti-discrimination legislation at Member State level has though proved to be more difficult and uneven than anticipated. Some States have gone beyond the requirements by passing strong legal instruments and independent equality bodies, while others have only just met the minimum requirements (see e.g. Cotter 2006: 296).

Equality bodies, tribunals and ombudsmen play a central role in securing access to justice. They should, in accordance with EU legislation, provide independent assistance to victims of discrimination free of charge. Some equality bodies have experienced serious budgetary cut backs and legislative amendments to their statuary status that render them ineffective since 2008 (Equinet 2011).

2. Specific issues

a) *Access to the labour market*

Ethnic minorities often have a weaker connection to the labour market than the majority population. Moreover, ethnic minorities are in many countries over-represented in low-skilled positions requiring lower levels of education. Also there is a pronounced under-representation of ethnic minorities in senior management positions (for instance in Denmark. See Danish Institute for Human Rights 2013: 23).

The EU Directive on Ethnic Equal Treatment protects against direct and indirect discrimination due to race or ethnic origin. According to the Directive, Member States may adopt special measures to counteract discrimination in the labour market. In Denmark, for instance, there may be institutional barriers preventing ethnic minorities from the labour market. This situation has worsened in recent years as a result of the economic and financial crisis (see Chapter V.C.3).

It is recommended that further studies be conducted with a view to analyse discriminatory institutional barriers that may prevent ethnic minorities being integrated in Member States' labour market.

b) *Access to health services*

FRCEU states in Art. 35 on health care that '[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'.

Multiple and intersectional discrimination in health care - often a factor in access to health care of ethnic minorities – is a little-researched area. To meet this gap, both in knowledge and remedies, FRA has launched a project on multiple discrimination in health care, *i.e.*:

> Access to quality health care is a fundamental right. In consultation with its stakeholders, the FRA has therefore decided to collect the necessary evidence and carry out fieldwork research on

multiple and intersectional discrimination in access to health care on the grounds of age, gender, and ethnicity.

Recognising and studying multiple discrimination brings a novel perspective into the field of human rights. It means taking into account multiple background factors and the complexity of discrimination, thus addressing in a more accurate and precise way the effects of discrimination[46].

A particular vulnerable group of ethnic minorities are refugees and immigrants, who may have difficulties in obtaining the services offered by national health authorities. One difficulty could be that the health authorities in the Member States lack knowledge of diseases. Another is that the individuals lack knowledge of their right to access the health system. A third and seemingly often-occurring obstacle is that the individual does not know the official language of the Member State and that no sufficient translation is in place (Danish Institute for Human Rights 2013: 23-24).

An increasingly acknowledged problem in recent years concerns psychiatric treatment. Data from a number of EU countries, for instance Denmark, show that involuntary admission and the use of force as well as compulsory treatment in psychiatric institutions is more common among ethnic minorities than the majority population. One reason for this seems to be lack of language translation (Danish Institute for Human Rights 2013: 23-24; Nørredam, Garvia-Lopez, Kelding, Krasnik 2010: 143-151).

Further analysis is needed to find out the actual access to health services for refugees and immigrants with a view to acquire common standards and a tool set for health authorities. Similarly, further analysis is needed to find out the psychiatric treatment of ethnic minorities in Member States with a view to acquiring common standards.

c)   *Access to information*

Ethnic minorities often have difficulties in exercising their right to information. As pointed out in Chapter IX of this report, non-discriminatory access to the internet is increasingly central to the participation of the individual in democratic, economic and social life. As a result access to information may be severely limited. Insufficient access to information though the internet and online public services – for instance due to the language used, the information provided by the authorities, or not having a computer – can further marginalise vulnerable groups of individuals, including due to ethnicity (Chapter IX.C.1). This may be vis-à-vis websites and official documents of public authorities, affecting a large number of areas of the everyday life (Danish Institute for Human Rights 2013: 26). A related problem is that public social and health authorities have insufficient use of interpreters. This is also a problem in relation to courts and can thus hinder access to justice.

Further research is needed to illuminate non-discriminatory access to the internet of ethnic minority groups.

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[46] <http://fra.europa.eu/en/project/2011/multiple-discrimination-healthcare>, last accessed 30 July 2014.

d)   Hate crime

Hate crime strikes at the heart of European values. In the words of FRA:

> Violence and offences motivated by racism, xenophobia, religious intolerance, or by bias against a person's disability, sexual orientation or gender identity are all examples of hate crime. These crimes can affect anyone in society. But whoever the victim is, such offences harm not only the individual targeted but also strike at the heart of EU commitments to democracy and the fundamental rights of equality and non-discrimination. To combat hate crime, the EU and its Member States need to make these crimes more visible and hold perpetrators to account. Numerous rulings by the European Court of Human Rights oblige countries to 'unmask' the bias motivation behind criminal offences.[47]

Hate crime may be linked to a number of factors, as stated above, including on account of ethnicity. Hate crime is often intersectional, involving for instance both gender and ethnicity.

There is a basic lack of knowledge in Member States about the characteristics of hate crime on account of ethnicity and related to other motives. There is a further lack of knowledge as to the scope of the problem. Finally, there is a lack of knowledge of how the police in Member States deal with hate crime. FRA has taken a large number of initiatives to support Member States in their fight against hate crime. For instance, a report on LGBT rights surveyed hate speech vis-à-vis LGBT rights[48] (for the FRA survey on anti-Semitism in EU Member States, see VII.C.3).

Further cross-cutting analyses are needed to include the intersectional aspects of hate-crime. It is recommended that the EU support the cooperation between civil society and the police in handling hate-crime on account of *inter alia* ethnic origin.

e)   The case of the Roma

Particular attention is paid to the Roma in Europe as the largest ethnic minority group in the region. At the level of international law and the Council of Europe, CERD has, for instance made recommendations to States to 'take necessary measures, as appropriate, for offering Roma nomadic groups or Travelers camping places for their caravans, with all necessary facilities' (CERD 2000: 27, para. 32), as well as to take measures to promote the access to justice (CERD 2005).

The Roma have access to social service, especially to housing, education, information, and the labour market. The financial and economic crisis has aggravated the problems, as was put forward at the Third Annual Convention of the Platform against Poverty and Social Exclusion, held in Brussels in 26-27, November 2013. The potentially precarious situation of the Roma was illustrated in 2010, where France initiated forced evictions and the mass expulsions of Roma people, an incident condemned by the Decision of 28 June 2011 rendered by the European Committee of Social Rights European and followed by the judgment of the ECtHR of in *Winterstein and others v. France* in 2014.

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[47] <http://fra.europa.eu/en/theme/hate-crime>, last accessed 29 July 2014.
[48] <http://fra.europa.eu/en/theme/hate-crime>, last accessed 29 July 2014.

The EU has addressed the discrimination against Roma people in a series of documents, including the Framework for national Roma integration strategies up to 2020 (Commission Framework 2011), and the Commission's Proposal for a Council Recommendation on effective Roma integration measures in the Member States (Commission Proposal 2013).

In 2011, the European Commission asked FRA 'to contribute to monitoring and assisting EU-wide efforts to implement the EU's plan for Roma integration', which has resulted in the initiation of a series of wide-ranging series of studies and survey[49].

D.   Conclusions

The EU is on the frontline of anti-discrimination in Europe and has been proactive in regards to combating discrimination on ground of race and ethnic origin, putting in place legislation to combat discrimination and initiating a long range of initiatives to support Member States to promote treatment irrespective of race and ethnic origin. Notably, in 2000 the Council of Ministers unanimously adopted two directives that in particular aim to combat discrimination within and outside of labor market on the ground of race and ethnic origin. The EU Monitoring Center (EUMC) created in 1999 was replaced by FRA in 2008, with a special mandate to monitor the area of non-discrimination in the area of race and ethnicity.

Although the EU has taken very progressive measures in the field of non-discrimination on account of ethnicity, effective implementation of EU anti-discrimination legislation at Member State level has proved to be more difficult and uneven than anticipated. Some States have gone beyond the requirements by passing strong legal instruments and independent equality bodies, while others have only just met the minimum requirements. It is recommended that a stronger monitoring is put in place with a view to finding out how Member States apply EU law and protect ethnic minorities in practice, including the functioning and scope of equality bodies in Member States. Moreover, a systematic collection of data on ethnicity in Member States is recommended with a focus on the access to basic rights, with a view to focused research to illuminate the problems in the area.

The chapter highlighted areas which show 'multiple' and 'intersectional' discrimination of ethnic minorities:

- Access to the labour market. In this area it is recommended that further studies are conducted to analyse discriminatory institutional barriers that may prevent ethnic minorities being integrated in Member States' labour market.
- Access to health services. Further analysis is needed to find out actual access to health services for refugees and immigrant with a view to acquire common standards and a tool set for the Health authorities. Further analysis is needed to find out the psychiatric treatment of ethnic minorities in Member States with a view to acquire common standards.
- Access to information. Further research is needed to illuminate non-discriminatory access to the internet of ethnic minority groups.

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[49] <http://fra.europa.eu/en/theme/roma>, last accessed 29 July 2014

- Hate crime. Further cross-cutting analyses are needed to include the intersectional aspects of hate-crime. Recommended that the EU should support the cooperation between civil society and the police in handling hate-crime on account of ethnic origin.

As in the section on the Roma, the representative issues discussed above show that ethnic minorities may be victims of multiple and intersectional discrimination, and often encounter lack of enjoyment of basic rights within the catalogue of economic, social and cultural rights as well as civil and political rights. Further research, based on evidence collected from Member States, is needed in this area.

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IX.   Technological factors[*]

A.   Introduction

In the context of this chapter, technological factors are understood as issues related to the use of information and communication technology (ICT) that have an impact on the way individuals are able to enjoy their human rights. ICT is a broad and not clearly defined term that refers to any communication device or application, encompassing: radio, television, cellular phones, computer and network hardware and software, satellite systems and so on, as well as the various services and applications associated with them (SearchCIO 2011).

Since the scope of technological factors that may have a potential human rights impact is extremely broad and diverse, this chapter prioritises issues that are reflected in contemporary policy discourses at the level of the European Union (EU). The list of factors addressed in this chapter are by no means exclusive but based on an interpretative analysis of scholarly work, policy documents, and civil society reports related to the field. As part of the analysis, dominant cross-cutting themes have been extracted and used to categorise and prioritise issues for analysis.

The literature review on scholarly work pertaining to ICT and the information society[50] has a particular emphasis on research that relates these developments to human rights and democracy. The academic field covering these themes is extremely broad and interdisciplinary, including scholarship from law, communication and media studies, cultural studies, and political science.

The literature review of policy sources includes policy documents at UN, Council of Europe (CoE) and EU level related to ICT and human rights. At UN level, key sources include the first General Assembly Resolutions related to the internet. It also includes various reports from UN special procedures, in particular from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and from the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Key sources from the CoE include the recently adopted Guide on Human Rights for Internet Users, whereas attention has been paid to the numerous standard-setting documents related to ICT and human rights developed over the past ten to fifth teen years within the CoE. Finally, at EU level, sources include a broad array of policy documents and legislation, such as the ongoing reform of the data protection directive, and the recently adopted EU Guidelines on Freedom of Expression Online and Offline.

The review of civil society reports and campaigns have focused on European Digital Rights (EDRI) and Privacy International (PI) as two key European actors within this field. Both EDRI and PI have conducted numerous campaigns and reports related to the human rights implications of, for example, data retention, biometrics, filters and blocking, copyright enforcement, and social media.

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[50] One of the first scholars to introduce the concept information society was Fritz Machlup in *The Production and Distribution of Knowledge in the United States* from 1962. However, the concept became widely known with Daniel Bell's *The Coming of Post- Industrial Society* from 1973.

In the following chapter, emphasis is on human rights issues related to the use of the internet[51], reflecting the attention the internet has received in the scholarly literature and policy debate pertaining to human rights and ICT globally, as well as within Europe.

1.   Structure and content

The subsequent mapping and analysis is structured according to five factors, each representing a core topical issue that has a potential positive or negative impact on the individual's enjoyment of his/her human rights within the context of the EU´s internal or external policies.

The selected factors are: (1) non-discriminatory access to the internet; (2) protecting internet freedoms; (3) freedom of expression and self-regulation; (4) privacy, surveillance, and cyber security; and (5) internet governance.

Several of the factors have both internal and external policy implications, but in the context of this chapter non-discriminatory access to the internet and freedom of expression and self-regulation are related to EU internal policies, whereas internet freedoms and internet governance refer to EU external policies. With respect to privacy, surveillance, and cyber security this is addressed as a factor related to both internal and external EU policies.

B.   Global context

The internet may be seen as a pioneer of the post-national constellation often referred to as globalisation, representing a space where state, society and economy converge and interact in novel ways (Habermas 2001; Castells 2009). Moreover, it has been argued that there are certain qualities of the internet, a 'structural match', that relate it to the characteristics of modern societies (Qvortrup 2003:166). Current societies are confronting immense complexity because so many social actions have become communicatively assessable, and the response or stabilizing factors to deal with this social complexity are communication-based processes of coordination.

Scholars inspired by Castells have emphasised a transformation from classical models of democracy to network models, where the State is decentred and political arenas occur across society. This implies a shift in focus from 'government to governance', as well as broader access to agenda setting by different actors both at national and international level (Hoff, Hansen et al. 2006:18-25). An example of this is the internet's potential to enable political and social networks and to mobilise civil society across borders (Keane 2003; Donk, Loader et al. 2004; Castells 2009).

One of the characteristics of the internet era is the way it changes the modalities for public and private life. On the internet, public life is increasingly recorded, traceable, shareable, and utilised as a commodity to generate income. Private life, on the contrary, requires a special effort, which is an option that one has to activate (Jørgensen 2013:25). Contemporary policy controversies related to internet regulation in many cases concern conflicting interests related to various internet domains and activities as public in relation to private (Jørgensen 2013: 5). These include, for example, privatised law enforcement, protection of user

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[51] The term internet refers to a global information and communication system that is linked together via the TCP/IP protocol (Federal Networking Council (FNC) Resolution October 24, 1995).

rights within private internet platforms, new forms of content control and censorship, exchange of user data between public and private entities, commercial use of personal data, private gatekeepers in the public domain, etc.

After some years with focus on the anarchic nature of the internet, the key question is no longer whether it is possible to regulate the internet, but rather how to do it (Pollicino and Bassini 2011: 2).

In contrast to the initial narrative and presumption of a neutral technology that is by default open and borderless it is now recognised that the technology provides for new levers of control and interference with fundamental rights and freedoms (DeNardis 2012:729). Moreover, the security and copyright interests are increasingly used as driving forces in developing the increased disciplinary capacity of the internet (Wagner 2013:45).

Additionally, and no less important, is the challenge of enforcing regulation and providing users with effective access to remedies in this transnational space. As part of the discourse on internet regulation, IHRL is increasingly referred to as the underlying normative framework (Kettemann 2013:103).

Human rights and fundamental freedoms are guaranteed in various international and regional instruments, which are applicable both to offline and online environments. At the global level, the awareness of the human rights implications of the internet and other types of communication technology has risen steadily over the past years, and has resulted in internet related resolutions adopted by the UN General Assembly in 2012 and 2013, respectively (United Nations General Assembly 2013; United Nations Human Rights Council 2012). Internet related potentials and challenges has also increasingly been addressed by UN special mechanisms such as the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, and the former UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. La Rue has highlighted the internet's potential for strengthening the effective enjoyment of rights such as freedom of expression, freedom of information, freedom of association, freedom of assembly, and the right to take part in the conduct of public affairs, but also highlighted areas where these rights are under increasing pressure (La Rue 2011). La Rue and Scheinin have both emphasised the severe threats to the right to privacy via unprecedented means of surveillance (La Rue 2013; Scheinin 2009).

C.   European context

'The Internet is changing the world. It is not just a trillion-dollar marketplace. It is a forum where people connect, a platform for astounding innovation, and a powerful vehicle for human rights and fundamental freedoms' (Kroes 2011:1).

Regionally, a number of CoE conventions, declarations and recommendations provide human rights orientation for internet related issues. Most recently, the CoE has developed a Guide for Internet Users, which explains in simple terms the relevant IHRL and standards as it relates to the European internet user (Council of Europe 2014). Also, there is an increasing number of internet related cases before the European Court of Human Rights (Council of Europe 2013). The European Court of Human Rights (ECtHR) has affirmed that '[t]he Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation

in activities and discussions concerning political issues and issues of general interest.' (Ahmet Yıldırım v. Turkey, 2012).

At EU level, a large amount of directives, policies and guidelines exist on internet and ICT issues but not necessarily in ways that address the issues from a human rights perspective or ensure a coherent and forward looking approach to the protection of human rights online. Key standard-setting documents related to the EU's internal policy include the Digital Agenda (European Commission 2010), the first of seven initiatives under Europe 2020, the EU's strategy to deliver smart sustainable and inclusive growth. The Digital Agenda provides an overall strategic orientation for EU Member States in the context of technology, with a primary focus on the broadband environment, public digital services, digital skills and jobs, cyber-security, copyright, cloud computing, and the electronics industry. According to the Digital Agenda, the internet is at the heart of seamless cross border services and the 'internet economy' in the EU-28 is expected to grow from 3.8% of GDP in 2010 to 5.7% in 2016 (European Commission 2010: Action 97). As part of the Digital Agenda, an EU Code of Online Rights has been developed (European Commission 2012a). The Code sets out the basic under EU legislation in relation to the digital environment, for example, the right not to be discriminated against when accessing online services, the right to have personal data protected, consumer rights when buying goods and services online, and rights protecting the individual in case of conflict such as access to dispute resolution.

In relation to the global discussions on internet governance, the Compact for the Internet was launched as the EU 'internet essentials' in 2011 (European Commission 2011a). The Compact highlights, among others, that there should be *one* internet governed in a transparent, pro-democracy and multi-stakeholder manner. Moreover, in relation to privacy and security, the recently adopted Cybersecurity Strategy (European Commission 2013a) clarifies the principles that should guide cyber security policy in the EU and internationally. The strategy emphasises that cyber security can only be sound and effective if it is based on fundamental rights and freedoms enshrined in the EU Charter of Fundamental Rights. Any sharing of personal data for the purposes of cyber security should be compliant with EU data protection law and take full account of the individual's rights in this field.

With regard to the EU's external policy, developments such as the Arab Spring have inspired the EU´s commitment to use different types of ICTs to protect and promote human rights. A key point of reference is the EU Strategic Framework on Human Rights and Democracy and the attached Plan of Action (Council of the European Union 2012), as well as the No-Disconnect strategy (European Commission 2011c). The aim of the Strategic Framework is to promote human rights in all areas of the EU's external action, including in relation to technology and telecommunications, internet, and counter-terrorism policy. The framework explicitly states that the EU is committed to promote freedom of expression, opinion, assembly and association, both online and offline, and to entrench human rights in counter-terrorism activities. The No-Disconnect strategy was launched in 2011 but has not materialised to this point. Like the framework, the strategy highlights the EU's commitment to respecting human rights on and offline, and further provides that internet and other communication technology are drivers of political freedom, democratic development and economic growth. Concretely, the strategy proposes to assist people living in non-democratic regimes, for example by providing tools to bypass censorship, to enhance privacy and security, and to raise awareness of risks relating to communication technology.

Moreover, the European Parliament has adopted a Digital Freedom Strategy (European Parliament 2012) that recognises unrestricted access to an open internet as an important enabler of human rights, and suggests that the EU's trade and association agreements, development programs and accession negotiations should be conditional on respect for digital freedoms. It also proposes that the EU should stop the export of technologies used by authoritarian regimes to track and trace human rights activists, journalists and dissidents.

As illustrated above, a number of EU policies exist related to various aspects of technological developments and human rights. The following section will focus on five factors that may potentially enable or hinder the protection of human rights in the EU´s external and internal policies. As part of the mapping and analysis, key EU policy responses will be identified as well as issues that will have to be further explored to ensure an effective and coherent human rights policy. A strategic approach to the way technological developments may positively or negatively impact on human rights may guide the EU through areas where different interests may conflict, and be used to ensure that the EU has robust and coherent strategies and positions to promote and advance human rights internally as well as externally.

The factors relate to: (1) non-discriminatory access to the internet; (2) protecting internet freedoms; (3) freedom of expression and self-regulation; (4) privacy, surveillance, and cyber security; and (5) internet governance.

1. Non-discriminatory access to the internet and to internet services (EU internal policy)

a) Definitions and concepts

In the context of this chapter, non-discrimination refers to a human rights standard that stipulates that everyone is entitled to enjoy human rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs (United Nations 1948: Art. 2).

Standards of equality and non-discrimination are fundamental provisions of international human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and echoed at European level in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFREU). In the following the principle of non-discrimination is related to internet access and services.

b) Potential human rights impact

In the digital era, access to means of communication is intimately linked to power. Most of the approximately 2.5 billion people currently connected to the internet have come to rely on it as an essential tool to participate in democratic, economic and social life. Moreover, people's everyday use of the internet is no longer limited to personal computers but to various mobile devices. As such an increasing percentage of the European population is connected in a ubiquitous fashion. In line with this, access to the internet is increasingly discussed as a fundamental right related to societal participation and to power, as illustrated by the increasing debate at the UN Human Rights Council on these issues.

As EU Member States increasingly move towards delivery of public services and information online, unequal access to the internet can serve to marginalise vulnerable group and reinforce societal disintegration along lines of income, age, ethnicity, geography and disability. Unequal access to the internet relates both to existing 'real world' inequalities such as the ability to afford an internet connection and to the asymmetry in resources more generally but also concerns the architecture of the technology itself, such as the design of hardware and software to support, for example, access for people with disabilities.

Another aspect of non-discriminatory internet access concerns the notion of network neutrality, which has been a highly controversial issue in recent years. The term refers to the principle that internet traffic should be treated without undue discrimination, restriction or interference, so users enjoy the 'greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice' (Council of Europe 2010: para. 4). The controversy concerns the zone between ISPs' legitimate discretion to use traffic management as a tool to, for example, protect the security and integrity of networks, and traffic management that amounts to discriminatory treatment of users or specific services.[52]

c)   EU instruments and policies

In 2012, a group of members from the Parliamentary Assembly of the CoE stressed that internet access is not a question of broadband or wireless, it is about guaranteeing the legal right to equal public services as well as basic human rights (Pelkonen J. and other members of the Assembly, 2012). The claim that internet access is a key enabler for citizens' ability to enjoy a number of human rights echoes international discourses and has been addressed, for example, by La Rue, in his report adopted by the UN Human Rights Council in 2011 (La Rue 2011). The report emphasises that the internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress. As a consequence, ensuring universal access to the internet should be a priority for all States. 'Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population' (La Rue 2011: para. 85). As such, access to the internet is considered a condition and an enabler for human rights and freedoms although not recognised as a human right as such.

Within EU Member States, access to the internet is addressed in the EU Universal Service Directive (2009/136/EC) which stipulates that everyone within the region most be able to access a minimum set of electronic communication services of good quality at an affordable price. Moreover, all reasonable requests for connection at a fixed location to a public communication network must be met by at least one operator.[53] Several EU countries have stipulated the right to access the internet in national

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[52] Within the EU the term internet service provider is defined rather broadly, meaning (1) any public or private entity that provides to users of this service the ability to communicate by means of a computer system and (2) any other entity that processes or stores computer data on behalf of such communication service (European Commission 2011b: 1).

[53] See section 1 of the Code of EU Online Rights, which draws on the Universal Service Directive.

legislation.[54] According to Eurostat 2013, 76% of EU households have broadband internet access, while some eastern European countries have lower levels of household access with Greece, Bulgaria and Romania at 54-56% (European Commission 2013d).

Concerning net neutrality, there is no common regulation at EU level; hence users face inconsistent rules leading to uneven levels of protection across EU Member States. In response to this, a legislative package on a Telecoms Single Market is currently being negotiated (European Commission 2013c). The package aims at establishing EU-wide rules on transparency, switching and traffic management, including a guarantee of net neutrality. The principle of net neutrality has been strongly advocated and campaigned for by civil society groups across Europe, in particular EDRI (EDRI 2013).

d)   Issues for further analysis
The above mapping points to three issues, which would benefit from further exploration. First, examine the need for policy measures to ensure that EU citizens are provided with non-discriminatory access to the internet and online public services as a pre-requisite to participate in democratic life. Second, analyse whether this area should be strengthened as part of EU external policy in order to ensure greater coherence. Third, study the impact of the proposed EU regulation on net neutrality including its potential implications for EU external policy related to telecommunication infrastructure.

2.   Protecting internet freedoms (EU external policy)
'Human rights policy is not just an add-on. It is a silver thread which runs through everything we do. The right to communicate freely is a key part of basic human rights. The Internet and social media have become an important way of promoting freedom of expression. That's why the EU is determined to resist any unjustified restrictions on the Internet and other new media' (Catherine Ashton quoted in European Commission 2011e:1).

a)   Definitions and concepts
Internet freedom is a contested notion with no clear definition. It has, for example, been criticised for the cyber-utopianism and internet-centrism often entailed with its use (Morozov 2011: 318). At EU level, the notion of internet freedoms has been used to characterise the EU´s external policy with regard to individuals' ability to meet, interact and debate freely in the online sphere without illegitimate state interference. It typically relates to the human rights freedoms of expression, information, assembly and association, and the right to privacy, all part of international human rights law. In the following, focus is given to the EU´s role and commitments with regard to internet freedoms in its external policies, with issues pertaining to the EU´s internal policies covered in the subsequent section on freedom of expression and self-regulation. Generally speaking, these internal issues have not been framed as human rights issues to the same degree.

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[54] For example, the parliament of Estonia passed legislation in 2000 declaring internet access a basic human right. The constitutional council of France effectively declared internet access a fundamental right in 2009, and Finland passed a decree in 2009 stating that every internet connection needs to have a speed of at least one Megabit per second (broadband level) (La Rue, 2011:18).

b) Potential human rights impact

The open architecture of the internet has often been emphasised as key to its potential for fostering human rights such as freedom of expression and assembly. This is premised on the notion that lack of barriers and 'gatekeepers' between end-points on a network stimulate the free flow of information and the circulation of innovation, enabling freedom of expression (Benkler 2006; Zittrain 2009). Simultaneously, internet technology also provides for new means and measures to interfere with fundamental rights and freedoms.

According to research by the Open Net Initiative, the first generation of internet controls consisted mainly of firewalls at key internet gateways, while the second generation aims to normalise (or even legalise) internet control. This includes, for example, targeted viruses, distributed denial-of-service attacks, surveillance at key points of the internet's infrastructure, and take-down notices (Deibert, Palfrey et al., 2010:6-7). La Rue (2011: Chapter IV) also provides an overview of some of the ways in which States currently restrict freedoms online, for example via arbitrary blocking or filtering of content; criminalization of legitimate expression; imposition of intermediary liability; disconnecting users from internet access; cyber attacks; and inadequate protection of the right to privacy and data protection. In recent years, increased public awareness and documentation such as that provided by the Open Net Initiative has shed light on many of these practices and their interference with human rights.

c) EU instruments, policies, etc.

Following the Arab Spring the European Parliament initiated a report to address how EU policy could have prevented, mitigated or avoided some of the negative effects of communications technologies during the uprising (Wagner 2012:2). The report recommends building structures, which would enable the Union to support telecommunications operators in critical situations; to develop a technical and diplomatic rapid response capacity for situations like the turning off of internet and mobile phone networks; and calls for stricter regulation of the 'worst of the worst' repressive technologies, as well as to consider regulation of dual use technologies. Also, it is suggested to make public sector funding, financial support and involvement in the creation of communications infrastructure conditional on commitment to human rights standards. Subsequently, the European Parliament in December 2012 adopted its Digital Freedom Strategy in EU's Foreign Policy (European Parliament 2012).

Within the European Commission, the issue of internet freedoms was highlighted in the 'Partnership for Democracy and Shared Prosperity with the Southern Mediterranean' (European Commission 2011d) in which the Commission commits to develop tools to allow the EU to assist civil society organisations or individual citizens to circumvent arbitrary disruptions to access to communications technologies, including the internet. Subsequently, the No Disconnect Strategy was launched in December 2011 to honour the EU's commitment to ensure that human rights and fundamental freedoms are respected in the online environment (European Commission 2011c).

The No Disconnect strategy focuses on (1) Developing and providing technological tools to enhance privacy and security of people living in non-democratic regimes when using ICT; (2) Educating and raising awareness of activists about the opportunities and risks of ICT; (3) Gathering high quality intelligence about what is happening 'on the ground' in order to monitor the level of surveillance and censorship in a

given context; and (4) developing a practical way to ensure that all stakeholders can share information on their activity, promote multilateral action and build cross-regional cooperation to protect human rights. More than two years after the launch, the strategy has still not been substantiated or published. Most recently, the EU Human Rights Guidelines on Freedom of Expression Online and Offline was adopted (Council of the European Union 2014), as part of the EU strategic framework on Human rights and Democracy (Council of the European Union 2012).

One of the areas in which the EU has been criticised for its adverse impact on human rights protection in third countries has been in relation to European export of censorship and surveillance technology and dual-use technology to authoritarian regimes worldwide (Noman and York 2011; Wagner 2012). In response, a European Parliament resolution in 2011 suggested revising EU rules on exports of products that can be used for both civilian and military purposes, such as chemicals, telecommunications devices or software. The proposed EU regime for the control of exports, transfer, brokering and transit of dual-use items would imply a comprehensive system of 'Union General Export Authorisations' with rules that define which products can be exported to which countries (European Parliament 2011). The European Council has not systematically responded to this call, however, in 2012 it introduced additional limitations on export of surveillance technologies to Iran (Council Regulation (EU) No 267/2012) and Syria (Council Regulation (EU) No 36/2012). Human rights concern related to EU export of censorship and surveillance technology has been addressed by civil society groups such as PI.[55]

d)   *Issues for further analysis*

Based on the above three issues are suggested for further analysis. First, examine the implementation of the No Disconnect strategy, for example, what has the EU done to enhance the privacy and security of people living in non-democratic countries? Second, investigate different avenues for countering the adverse human rights impact of European technology export to third countries. Third, analyse how greater coherence may be ensured between the external strategy on internet freedoms and the internal policy in the area of self-regulation (below).

3.   Freedom of expression and self-regulation (EU internal policy)

a)   *Definitions and concepts*

In the following, focus is on self-regulation as a regulatory measure that impacts on the protection of internet freedoms such as freedom of expression and information in relation to the EU's internal policies. Self-regulation usually refers to a process whereby private actors agree to rules regulating their activities, defined and enacted via codes of conduct (Schulz and Held 2001:A-2). It is thus arrangements made between private parties based on voluntary commitment, without any interference by the State.

b)   *Potential human rights impact*

In the online realm, most infrastructure and services are in the hands of private companies, which raises a number of challenges related to human rights protection, rule of law, and access to effective remedies for users. Since the practices of private intermediaries are often based on voluntary codes of conduct

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[55] See e.g. <https://www.privacyinternational.org/blog/exploiting-privacy-surveillance-companies-pushing-zero-day-exploits>, last accessed 12 May 2014.

there is no guarantee that the public interest will ultimately be protected. Scholars have argued that current practices imply that companies in the business of providing access to, and services on, the internet are de facto being used to implement public policy with limited oversight. 'Internet Service Providers are commercial profit- making entities who are increasingly being asked to implement social policy without appropriate oversight or accountability. They operate in a very confusing situation with regards to competing and sometimes contradictory legal requirements. For example between providing high levels of quality of access to the Internet, on the one hand, and blocking access to services, on the other' (Callahan, Gercke et al. 2009: 35).

Clarifying the role and human rights responsibility of internet companies is therefore a crucial component in the transition towards an information society based on human rights. Also, the ECtHR has affirmed that the effective exercise of human rights may require positive measures of protection, even in the sphere of relations between individuals. The responsibility of the State may be engaged as a result of failing to enact appropriate domestic legislation.[56]

In 2011, the UN Guiding Principles for Business and Human Rights set a common and widely agreed upon standard within the field (United Nations Human Rights Council, 2011). The Guiding Principles have been supported by follow-up initiatives such as the EU ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (IHRB and SHIFT for the European Commission 2012b), as well as various multi-stakeholder and/or industry-specific initiatives such as the Global Network Initiative[57] and the Industry Dialogue.[58]

Some of the internet related cases of self-regulation that have caused human rights concerns deal with filtering and blocking of online content and new gatekeepers in the online domain, including privatised law enforcement.

Filtering and blocking of online content, for example carried out by an Internet Service Provider (ISP), interferes with the freedoms of expression and information, and it is therefore essential that any such measure follows the three-part, cumulative test for interference stipulated in human rights law. Such interference must be provided by law, which is clear and accessible to everyone; it must pursue a legitimate purpose; and it must be proven as necessary and the least restrictive means required to achieve the purported aim (La Rue 2011: para. 24). On 24 November 2011, the Court of Justice of the European Union ruled that generalised internet filtering violates Art. 8 (Protection of Personal Data) and Art. 11 (Freedom of Expression and Information) of the Charter of Fundamental Rights of the European Union. The ruling concerned whether Member States are allowed to order an ISP to install a system for filtering all electronic communications in order to identify electronic files in which the applicant claims to hold rights, and subsequently to block the files. The ruling stated that the e-commerce directive 'prohibits national authorities from adopting measures which would require an ISP to carry out general monitoring of the information that it transmits on its network' (SABAM vs. Scarlet (extended), 2011: para. 35) The Court found, among others, that generalised filtering could undermine freedom of information, since

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[56] Vgt Verein gegen Tierfabriken v. Switzerland, no. 24699/94, § 45.
[57] Available at <www.globalnetworkinitiative.org>, last accessed 12 May 2014.
[58] Available at <http://www.telecomindustrydialogue.org/>, last accessed 12 May 2014.

filtering systems might not adequately distinguish between unlawful and lawful content and communications, which could lead to legal downloads being blocked. In 2012, the Court again struck down the legality of filtering systems this time concerning filtering of content stored on web services (SABAM vs. Netlog, 2012). In Sabam vs. Netlog the court ruled that a social network cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work .

Regarding the human rights implications of new gatekeepers in the online domain, Laidlaw distinguishes between micro-gatekeepers (certain content moderators), authority gatekeepers (Facebook, Wikipedia, portals), and macro-gatekeepers (ISPs, search engines) with macro-gatekeepers having the greatest impact on democratic life (Laidlaw 2012: 62). Concern has been raised, for example, with regard to third-party liability for search engine providers in Europe (Hoboken 2011). Since search engines make illegal or unlawful information more easily accessible for internet users, this raises the question of the extent to which providers can be held legally responsible for their role in facilitating such access (Hoboken 2011: 328). The legal uncertainty around liability may incentivise search engine providers to censor content when confronted with notices of alleged illegal content in their index. Moreover it has led to extra-legal pressure on search engines to self-regulate by blocking or using blacklists. Most recently the Court of Justice of the European Union have ruled that an search engine operator may in certain situations be obliged to remove links to personal information published by third parties, for example if the information is outdated (Google Spain vs. the AEPD, 2014). The court finds that by searching automatically and systematically for information published on the internet, the operator of a search engine collects data i.e. acts as data controller within the meaning of the EU Data Protection Directive. In consequence the search engine operator must ensure that its activity complies with the directive´s requirements.

In relation to authority gatekeepers such as Facebook, concern has been raised about the adverse impact that these companies may have on human rights protection on the internet, in particular freedom of expression and the right to privacy (Raynes-Goldie 2012; Wagner 2013).

c)   EU instruments, policies etc.

At the EU level self-regulation has been promoted since the mid-nineties, for example, in relation to ISPs blocking and filtering alleged illegal or harmful content.

Several large EU projects related to child protection (Safer Internet Programme), copyright enforcement (Intellectual Property Rights (IPR) Enforcement Directive 2004/48/EC), and counter-terrorism measures (Clean IT Project) encourage ISPs to block and filter alleged illegal or harmful content.[59] Scholars as well as civil society groups have criticised the Europe-wide practice of delegating powers to ISPs, since the decisions to sanction users and websites are taken administratively rather than judicially (Callahan, Gercke et al. 2009; Brown 2010; Joe McNamee (EDRI) 2011). Examples of this include ISP policing of peer-to-peer networks, privatised enforcement of copyright law, and blocking of websites alleged to contain illegal content, without a court order.

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[59] For research on Europe-wide practices of self-regulation see, for example, Tambini, Leonardi et al. (2008).

According to the EU directive on E-commerce, ISPs are subject to limited liability for the third party content they carry, implying that ISPs are not to be held liable unless they become aware of illegal content and fail to take action. There is, however, a legal grey area surrounding the notification procedure (Patrick Van Eecke and Truyens 2009:19).

In 2012, the international anti-counterfeiting trade agreement (ACTA) was rejected by the European Parliament. ACTA was criticised for encouraging private companies to reach ad hoc agreements for enforcement of copyright law without sufficient due process standards.

In 2012, a 'Notice-and-action procedures' initiative was launched as part of an European Commission (EC) Communication on 'A coherent framework for building trust in the Digital Single Market for e-commerce and online services' (COM (2011) 942 final). The initiative aims to provide greater legal certainty and to ensure adequate due process standards when internet intermediaries engage in self-regulation. Concrete results of the initiative have not yet emerged.

EDRI has repeatedly warned against the human rights implications of filtering and blocking, privatised law enforcement (e.g. ACTA) and more generally lack of due process standards related to self regulation (EDRI, 2012). Recent EU projects that have been criticised for undermining human rights standards include the CEO (Chief Executive Officer) coalition to make the internet a better place for kids and the Clean IT Project.

d)   *Issues for further analysis*

The above mapping points to four issues, which would benefit from further analysis. First, examine the extent to which filtering and blocking schemes applied across EU Member States uphold basic principles of international law. Second, clarify how the EU protects internet freedoms vis-à-vis new gatekeepers such as search engines and authority gatekeepers. Third, examine the follow-up measures related to the EU ICT Sector Guide. Fourth, analyse how greater coherence may be ensured between EU internal and external policy in this area.

4.   Privacy, data protection and cyber security (EU internal and external policy)

a)   *Definitions and concepts*

The right to privacy is stipulated in international human rights law such as the Universal Declaration of Human Rights and the ECHR, In a European context, the right to privacy ('private life') is laid down in Art. 8 of the ECHR, binding upon CoE states. It is also part of the EU Charter of Fundamental Rights and Freedoms (Art. 7 and 8). The right to privacy protects the integrity of the individual and his or her home, family, and correspondence, and is frequently expressed as a precondition for a free and open society, including for the right to freedom of expression. In the following focus is given to informational privacy and related protection measures such as data protection laws and agencies.

Cyber security refers to the expanding but loosely defined field pertaining to the internet as a critical infrastructure that needs to be protected from various threats such as cyber crimes, espionage or 'cyber war' (Deibert 2013).

b) Potential human rights impact

The right to privacy is possibly one of the most under pressure rights in the digital era. The means of harnessing data is unprecedented, while no global standards for data protection exist. Moreover, recent allegations of mass surveillance both inside and outside EU borders have raised the issue to a political level not previously seen.

The threats to privacy and data protection are complex and cover a number of inter-linked issues such as increased and cross-border data collection, storage and use by private and public entities (big data, cloud computing); the human rights challenges of having major infrastructure hubs and internet services located outside the EU, and the increasing focus on cyber security.

In recent years, cyber security has become an important narrative in the regulation of the internet, and numerous cyber security units have been established at national, regional and international level. Scholars have warned that excessive emphasis on cyber security may undermine fundamental freedoms, for example, in the form of 'cyberforces' established within the military framework with limited democratic control and oversight (Deibert 2013; Rid 2013).

The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has urged the UN Human Rights Council to recommend measures for the creation of a global declaration on data protection and data privacy (Scheinin 2009: para. 73). The need for a global standard on privacy has also repeatedly been expressed by the group of Data Protection and Privacy Commissioners at their annual meetings. In response to the Snowden revelations, the UN General Assembly in 2013 adopted its first Resolution on The Right to Privacy in the Digital Age (United Nations General Assembly 2013).

c) EU instruments, policies

In the area of privacy and data protection, it is almost impossible to maintain the traditional division between the EU's internal and external policies – as data flows across borders and violations may occur from internal and external sources.

The EU is often claimed to have one of the strongest data protection regimes worldwide. The EU data protection regime, however, has been under revision since 2010, and several controversies remain. The new data protection regulation proposes, for example, to strengthen user control over their data when using internet services; sanctions for internet services that do not comply with the European data protection regulation including those located abroad, and a right to be forgotten.[60] Additionally, a separate directive is proposed to cover the actions of law enforcement and intelligence services.

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[60] On 13 May 2014, the Court of Justice of the European Union ruled that an internet search engine (Google) is responsible for data collection within the meaning of the EU Data Protection Directive. It follows that Google in certain cases may be obliged to remove links to webpages published by third parties that contain personal information. See <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>, last accessed 14 May 2014.

Recognizing that there are numerous policy issues pertaining to privacy and data protection, the following focuses on four core topics related to cloud computing, big data, extra-territorial data protection, and cyber security.

Firstly, cloud computing refers to storing and accessing of data and programs over the internet (instead of on a computer's hard drive). Cloud computing implies loss of control over data, dependence on the cloud provider and subcontractors, and in particular their adherence to EU data protection standards. The European Commission in 2012 adopted a strategy for 'Unleashing the Potential of Cloud Computing in Europe' (European Commission 2012). One of the aims of the strategy is to develop model contract terms that would regulate issues such as data disclosure and integrity, data location and transfer, ownership of the data, and direct and indirect liability by cloud providers and subcontractors. This reflects a number of challenges related to securing EU data protection standards vis-à-vis cloud providers and subcontractors located outside the EU.

Second, big data refers to the collection and use of large and complex data sets, for example, to predict business trends, prevent diseases, and combat crime (Mayer-Schönberger 2013). Big data raises a number of data protection challenges, including those related to data collected from different jurisdictions, data used for purposes other than those for which they were collected, and different levels of security. These challenges are addressed in Opinion 03/2013 on purpose limitation by the Art. 29 Data Protection Working Party (Art. 29 Data Protection Working Party 2013). Big data is also part of the European Commissions' Data Value Chain Strategy, an initiative that aims to generate the maximum value at the different stages of the data value chain, through a coherent European ecosystem centered on data. The strategy mentions the importance of finding the right balance between individuals' potential privacy concerns and the exploitation and reuse of citizens' data, while also empowering citizens to use their data in any way they wish to.

Third, there is major data protection challenges related to the fact that many infrastructure hubs and internet services are located outside the EU. In response to the Snowden revelations in June 2013, the European Parliament adopted a resolution on the US National Security Agency surveillance programs in July 2013, specifically on how PRISM and other such programs affect Europeans' fundamental rights and freedoms (European Parliament, 2013). In response, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has held a number of hearings and issued several studies on the issue. In January 2014, LIBE rapporteur Claude Moraes proposed a European digital habeas corpus for protecting privacy, including the adoption of the EU data protection reform, and to ensure proper redress mechanisms for EU citizens in case of data transfers from the EU to the US for law enforcement purposes (European Parliament, 2014a). In February 2014 this was followed by an European Parliament resolution suggesting, inter alia, that Safe Harbor should be suspended and the Transatlantic Trade and Investment Partnership (TTIP) should be postponed until the US fully respects EU fundamental rights (European Parliament 2014b).

Fourth, cyber security is a steadily expanding policy area that is closely related to privacy and data protection, and goes beyond internal and external policies. Internet-based attacks can originate from anywhere in the world, and it is often extremely difficult to identify the source of attack. As a result, the boundaries between justice and home affairs policy on the one hand, and foreign policy on the other,

become increasingly blurred (Bendiek 2012: 6). Also, concern has been raised that cyber security units are established with limited democratic oversight and control, and that the strong focus on cyber security may overrule the right to privacy (Deibert 2013; Bendiek and Wagner 2012). Current EU responses related to cyber security include a number of Digital Agenda actions (European Commission 2010), such as the establishment of a network of Computer Emergency Response Teams (CERTs) at national level. Moreover, the EU cyber security strategy (European Commission 2013a) and the proposal for a Directive on Network and Information Security (European Commission 2013b) aim to establish minimum standards in all EU Member States with regard to prevention, resilience and international cooperation.

The field of privacy and data protection has been subject to numerous civil society campaigns, demonstrations and actions over the past years. The area continues to receive considerably attention amongst civil society groups in Europe, in particular groups such as PI and EDRI.

d)   *Issues for further analysis*

Based on the above analysis, three issues are suggested for further exploration. First, examine the implications of the EU data protection reform (if adopted), for example, will it provide sufficient protection of EU users in the era of big data, cloud computing, and social media? Second, study the potential avenues for strengthening the protection of European users when violations occur extra-territorially. Third, clarify how the EU will seek to ensure that the transnational cyber security agenda is bound by human rights and the rule of law.

5.   Internet governance (EU external policy)

a)   *Definitions and concepts*

The internet poses distinct regulatory challenges as an international, decentralised technology that has evolved without strong state control, although the US Department of Commerce has held a special position since its interception (Mueller 2002). Since the UN World Summit on the Information Society (WSIS) 2003-2005, the notion of internet governance has been used to refer to the many interlinked processes that steer the management and development of the internet (Working Group on Internet Governance 2005). A central part of this debate is the role of the US-based International Corporation for Assigning Names and Numbers (ICANN), which is 'the only globally visible body charged with any kind of oversight for the Internet' (Cerf 2004: 9).

b)   *Potential human rights impact*

Since WSIS, the current internet governance model, and ICANN in particular, has repeatedly been criticised for not ensuring that rules, procedures and decision-making are based on human rights standards, including access to effective remedies for internet users. Moreover, it has been iterated time and again that ICANN needs to be more accountable, transparent and inclusive to the global south and the BRIC countries.

Access to remedies for persons whose human rights have been violated is a fundamental part of international human rights law and thus States must ensure that individuals have means of obtaining remedies where violations have occurred. This has proven to be a great challenge in the global information domain, where internet services in many cases are located outside the national jurisdiction.

The Snowden revelations in June 2013, renewed calls for establishing an international framework for internet governance based on democratic values and human rights. At the 68th session of the United Nations General Assembly, in fall 2013, the Brazilian President made a strong case for this and launched a global multi-stakeholder meeting in Sao Paulo in April 2014 to move this agenda forward (NETmundial).[61] The gathering was generally well received; however, several civil society groups were critical towards the final result of the meeting.[62]

c)   EU instruments, policies

Currently, the global debate – among both state and non-state actors – about how to govern the internet have intensified with some countries in favor of strengthening the top-down government control of the internet, whereas EU Member States have favoured a bottom-up multi-stakeholder approach. There is strong concern amongst EU member states that a centralised, top-down mechanism for internet governance determined by governments would diminish human rights protection on the internet and be inconsistent with its open architecture.

In its most recent communication on internet governance (Com (2014) 72 final), the European Commission expresses concern that revelations of mass surveillance programs and increasing fear of cyber crime have negatively affected trust in the internet, which could lead to pressure for new national and regional structures that might cause fragmentation of the internet. The Communication proposes a common European vision for internet governance based on respect for fundamental rights and democratic values; multi-stakeholder governance structures based on clear rules that respect those rights and values; a single, unified network; access to judicial remedies when rights are infringed; a strengthened and reformed Internet Governance Forum; and a globalised Internet Corporation for Assigned Names and Numbers (ICANN) and Internet Assigned Numbers Authority (IANA).

The topic of internet governance has been subject to strong civil society activism and campaigning since the WSIS process began in 2003. Civil society groups such as EDRI remain involved in many of the human rights issues related to internet governance.

d)   Issues for further analysis

Based on the above four issues are suggested for further analysis. First, clarify the Commission's mandate on internet governance as a matter of external policy. Second, investigate possible avenues towards a future model for internet governance based on human rights standards. Third, examine how the multi-stakeholder approach may be further developed to include the Global South and the BRIC countries. Fourth, study possible measures for improving access to remedies for European internet users in the global information domain.

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[61] See <www.netmundial.br> last accessed 14 May 2014.
[62]   For   analysis   of   the   NETmundial   meeting   from   a   civil   society   perspective,   see: <http://infojustice.org/archives/32640> last accessed 14 May 2014.

D.   Conclusion

This chapter has illustrated key technological factors that may enable or hinder the protection of human rights in the EU´s internal or external policies. Related to internal policies, focus has been on non-discriminatory access to the internet and freedom of expression and self-regulation. Concerning external policies, this has included issues related to internet freedoms and internet governance. Finally, privacy, surveillance, and cyber security is addressed as a theme with both internal and external policy implications.

The first (internal policy) factor - *non-discriminatory access to the internet* – highlights that unequal access to the internet can serve to marginalise vulnerable groups and reinforce societal disintegration along lines of income, age, ethnicity, geography and disability. This is particularly important as EU Member States increasingly move towards delivery of public services and information online. The principle of non-discrimination also relates to the user's ability to reach any content or service without undue restrictions (net neutrality). In conclusion, three issues are suggested for further analysis. First, examine the need for policy measures to ensure that EU citizens are provided with non-discriminatory access to the internet and online public services as a pre-requisite to participate in democratic life. Second, analyse whether this area should be strengthened as part of EU external policy in order to ensure greater coherence. Third, study the impact of the proposed EU regulation on net neutrality including its potential implications for EU external policy related to telecommunication infrastructure.

The second (external policy) factor – *protecting internet freedoms* – stresses that the open architecture of the internet have enabled human rights but also lead to new types of restrictions such as blocking or removal of legitimate expression and disconnecting users from internet access. The EU has taken a number of strategic initiatives to promote internet freedoms in third countries, yet has also been criticised for its adverse impact on human rights protection in these countries, for example, in relation to its export of technology used for censorship and surveillance. In conclusion, three issues are suggested for further analysis. First, examine the implementation of the No Disconnect strategy, for example, what has the EU done to enhance the privacy and security of people living in non-democratic countries? Second, investigate different avenues for countering the adverse human rights impact of European technology export to third countries . Third, analyse how greater coherence may be ensured between the external strategy on internet freedoms and the internal policy in the area of self-regulation (below).

The third (internal policy) factor – *freedom of expression and self-regulation* – addresses self-regulation as a widely deployed practice amongst European ISPs, for example to enforce copyright regulation or to block websites with unwanted content. Self-regulation has been criticised for lack of due process standards and for impacting negatively on EU citizens' right to freedom of expression and freedom of information. In conclusion, four issues are suggested for further analysis. First, examine the extent to which filtering and blocking schemes applied across EU Member States uphold basic principles of international law. Second, clarify how the EU protects internet freedoms vis-à-vis new gatekeepers such as search engines and authority gatekeepers. Third, examine the follow-up measures related to the EU ICT Sector Guide. Fourth, analyse how greater coherence may be ensured between EU internal and external policy in this area.

The fourth (internal and external policy) factor - *privacy, surveillance, and cyber security* - highlights the right to privacy as one of the most challenged rights in the digital era. The threats to privacy and data protection are complex and cover a number of interlinked issues such as cross-border data collection, storage and use by private and public entities, extra-territorial violations of the right to privacy, and the increased focus on cyber security. Moreover, no global standard for data protection exists. In conclusion, three issues are suggested for further analysis. First, examine the implications of the EU data protection reform (if adopted), for example, will it provide sufficient protection of EU users in the era of big data, cloud computing, and social media? Second, study the potential avenues for strengthening the protection of European users when violations occur extra-territorially. Third, clarify how the EU will seek to ensure that the transnational cyber security agenda is bound by human rights and the rule of law.

The fifth (external) factor - *internet governance* – addresses human rights challenges related to the processes that steer the management and development of the internet. The current model has been criticised for not ensuring that rules, procedures and decision-making are based on human rights standards, including access to effective remedies for users. The global debate about how to govern the internet are strongly controversial with some countries in favor of strengthening top-down government control, whereas EU Member States have favoured a bottom-up multi-stakeholder approach. In conclusion, four topics are suggested for further analysis. First, clarify the Commission's mandate on internet governance as a matter of external policy. Second, investigate possible avenues towards a future model for internet governance based on human rights standards. Third, examine how the multi-stakeholder approach may be further developed to include the Global South and the BRIC countries. Fourth, study possible measures for improving access to remedies for European internet users in the global information domain.

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X. Conclusions

This report has examined contemporary human rights challenges in the EU context by mapping the historical, political, legal, economic social, cultural, religious, ethnical and technological factors that both facilitate and hamper human rights. Against the backdrop of globalisation in general, and the 2008 economic crisis in particular, this report has provided a literature review, assessment of current knowledge of the above factors and their impact on the human rights policies of the EU, and challenges and gaps requiring further study, with a focus on access to basic rights.

In the following, the main aspects of the factors which hinder or enable the protection of human rights in the EU's external and internal policies are presented, with recommendations of specific areas in need of further scholarly exploration and study. In general terms it can be said that the factors elucidated in this report do not stand alone, but are instead intertwined to varying extents in effecting the facilitation and hampering of human rights policies of the EU. While there is significant overlap and interaction between many of the cross-cutting factors explored in the body of this report, it has been beyond the scope of the report to undertake an extensive analysis of this interaction. Nevertheless, some reflections of cross-cutting issues derived from the mapping of the report will be provided below, after a summary of the subject matter and recommendations for each factor.

1.   Summary and key recommendations for further study

Chapter II on Historical factors sets the scene for the report by pointing to historical factors (circumstances or events) that have been hindering or facilitating the EU's development of human rights protection and policies, in its internal and external actions. The chapter includes historical landmarks from post-war Europe until today, pointing out milestones in the EU architecture vis-à-vis Member States, candidate countries and third countries. The chapter shows that the EU responded to the historical circumstances or events in ways which have had an often very positive bearing on its present-day human rights positions, and that instruments and institutions were established to meet past and current challenges. The chapter also outlines some of the challenges of today, which have a historical basis (for instance the scope of EU human rights law and elements of incoherence between the EU's internal and external policies).

Chapter III on Political factors identifies crucial aspects of the implementation of human rights in EU policies linked to States and state sovereignty, ideologies, power, citizenship and democracy. On the importance of state structures for the implementation and guarantee of human rights, two aspects were singled out: the issue of the position of Member States in the political structure of the EU; and the shape and configuration of the EU as an actor of unique structure. The EU, therefore, differs considerably from 'traditional' state structures normally entrusted with respecting, protecting and fulfilling human rights. Both aspects may either hinder human rights protection at the EU level or open up new windows of opportunity for human rights. However, both dimensions have to be further scrutinised by reference to their role in the realisation of human rights.

With regard to ideologies, neoliberalism, growing nationalism and racism are perceived to be serious threats to the enjoyment of human rights as they may undermine social and economic rights and welfare state policies, question the human rights project as such, or reject the universal application of human

rights. More in-depth research is required to grasp the precise interrelation between ideologies such as neoliberalism, nationalism and racism and the implementation of human rights at the EU level. Power relations refer to the position and influence of political actors in the EU human rights framework as well as to the question of whose interest are included in the EU human rights agenda and whose are marginalised. In addition, human rights play a decisive role in the conception and self-image of the EU as a normative power in the international system. Further research is necessary to identify if the EU actually meets these ambitious standards, especially when it comes to potential contradictions between human rights norms and national and economic interests, and who are the powerful and less powerful actors in the EU human rights process.

Citizenship may be a serious challenge to human rights because of its exclusive dimensions. EU citizenship is a fragmented concept and adds to the proliferation of different status groups whose members enjoy differing access to fundamental rights. In addition, the concept of EU citizenship creates a gap with reference to non-EU citizens and may put the latter group in a weak situation, sometimes having only limited access to certain rights. Further research should address the question of how to close this citizenship gap to grant all individuals affected equal access to their rights.

Democracy as the realisation of political rights is flawed at EU level. Although the EU has seen a remarkable strengthening of its democratic quality through the Treaty of Lisbon, there are still problematic issues when it comes to the democratic legitimacy of the EU's political system and output. A lack of transparency and accountability as well complex structures which hinder political participation are perceived to negatively impair the EU's democratic quality. Therefore, an important starting point for further research concerns how the strengthening of human rights at EU level can enhance not only the democratic legitimacy of the EU political system but also promote transparency and accountability at EU level.

Chapter IV on Legal factors shows that fundamental rights and human rights are an integral part of both internal and external EU activities. In the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU) there exists a strong legal basis for this claim. It is notable that when the TEU deals with the protection of rights inside the EU it uses the term 'fundamental rights' (Preamble and Art. 6). Whereas the arguably more narrow term 'human rights' is used in the TEU in relation to the EU's contact with third States in 'the wider world' (Art. 3 and Art. 21). The accession of the EU to the European Convention of Human Rights (ECHR) and the ratification of additional international human rights conventions are important legal factors that can uphold international human rights law in internal and external EU internal and external behaviour.

Even though there is a strong legal basis for respecting and protecting human rights in the EU both internally and externally it is possible to identify certain gaps and shortcomings. These may create legal uncertainty and hinder effective protection of human rights in EU activities. For example, ambiguities in the CFREU on the distinction between rights and principles; and the scope and interpretation of rights in the Charter vis-à-vis similar rights in the ECHR. Furthermore, the precise scope of application of the Charter when the EU and Member States implementing EU law are acting in third States is contested.

Finally, the question of attribution of responsibility between the EU and Member States raises a number of complex unsettled legal questions. Some of these may ultimately be dealt with and clarified by the Court of Justice of European Union (CJEU) on a case-by-case basis – and eventually also by the European Court of Human Rights (ECtHR) when the EU has acceded to the Convention. But this might take time and it can be questioned whether these issues would better be dealt with by a political body – like the EU Council and Parliament – than a court. Further research and analysis is required concerning the scope of application of the CFREU; shared human rights responsibility between the EU and Member States; and the possibility and consequences of EU ratification of other international human rights and humanitarian law conventions. Such work will create a robust basis for informed decision making either by the CJEU or EU political bodies.

Chapter V on Economic factors takes as its focal point the economic and financial crisis which started in 2008 and its global impact. It affected the European Union by negative growth during 2008-13. Fiscal tightening and greater fiscal controls ensued, affecting banking, securities and financial supervision. Unemployment increased to the highest level since 1997 and youth unemployment affected almost a quarter of the younger generation in the EU. Up to a fourth of the EU population was at risk of poverty. The analyses contained in the chapter demonstrate that the economic crisis and the climate of austerity undermined the trajectory for a more social and inclusive Europe laid out in the Europe 2020 Strategy. *Incoherence* between stated goals and the reality in Member States, particularly in Southern Europe, made the 2020 Strategy appear somewhat unrealistic. The poverty reduction goals of the 2020 Strategy were put in jeopardy. Sixteen per cent of Europeans felt excluded while the emphasis of the Lisbon Treaty and the 2020 Strategy was social inclusion.

The economic and financial crisis resulted in internal deterioration of, notably, the right to an adequate standard of living, rights linked to social security, the right to housing, the right to work, and the rights of the child. These trends were moreover marked by trends of growing differential access to services and influence of particular groups. The reality of enjoying economic and social rights was therefore only reaching a proportion of European populations. The right to take part in the conduct of public affairs was also threatened.

An enabling factor at the economic level is that the economic crisis might abate by now. The employment figures for 2013 indicate that the level of unemployment may be on the way down. The Europe 2020 Strategy and the policies around the internal market still seem to be taken seriously by the Commission and implementation and rights reinforcement of the strategy might be strengthened over the coming years.

Externally, trade and development assistance have been less severely affected by the crisis. These areas are characterised by legalisation and stronger reference to fundamental rights and to fundamental values, but questions can be raised concerning the impact of the human rights emphasis in external economic actions. The chapter raises questions regarding the *consistency* with which human rights elements are integrated into external policies. A positive and enabling factor at the external level is that human rights prevail as a strong *policy element* and that there seems to be a will for increasing dialogue between the EU, its third country partners, and civil society groups.

This literature overview has unveiled a rich field of research focusing on economic and social change. However, the social rights impact of economic change and of economic policy change could be analysed more thoroughly. In terms of human rights methodology, the reflection on duty-bearers' as well as rights-holders' actions and struggles is not well documented on the rights-holders' side within the European Union. Some human rights studies will not even come close to observing how rights-holders can access power and how these actors from below can significantly influence duty-bearers. Lastly, a cross-cutting recent study on the human rights clauses contained in EU economic policy instruments and their importance and impact is needed.

Chapter VI on Social factors focuses on gender, sexual orientation, disability and age. Especially in relation to gender equality, the EU has made major efforts to combat inequalities through legal standards, enhancing positive and affirmative action, and the introduction of the principle of gender mainstreaming in all its policies. Nevertheless, gender inequalities persist at both EU and Member State level. Further research should investigate how the EU can address gender inequalities in a more comprehensive way, reach out to new policy areas and realise the implementation of the principle of gender equality in all its policies.

Combating discrimination on grounds of sexual orientation is a rather new field of EU law and policy. Although sexual orientation is included in EU non-discrimination law as a protected ground, its scope is restricted to the economic and employment sector. Furthermore, EU policies concerning sexual orientation are scrutinised because of their implicit heteronormativity and treatment of the LGBTI community as a minority issue which neglects the structural dimension of discrimination on grounds of sexual orientation. Further research is needed on how EU policies can tackle implicit heteronormativity and the structural dimension of discrimination.

On the aspect of disability, the EU pursues a rather new and progressive approach which focuses on the role of the society in regard to hindering the possibilities of persons with disabilities. As with the prohibition on discrimination on the basis of sexual orientation, the EU non-discrimination principle on grounds of disability is limited to the economic and employment sector. Additional analysis should explore how a progressive approach can be implemented in all EU internal and external policies.

Finally, on the aspect of age, the EU has an impressive legal and policy framework in place when it comes to children's rights. Concerning the protection of old persons the picture is less advantageous. There is a lack of a coherent policy and legal framework to enhance the enjoyment of the rights of the elderly. However, to get a more profound diagnosis several issues have to be addressed by further research: the question of the actual implementation and impact of children's rights and policies, an in-depth analysis of EU law and policies on how they affect the rights of older persons and how the enjoyment of rights of this group can be ensured by EU law and, finally, the question of the intersection of age with other factors such as disability, ethnicity and social origin.

Chapter VII on Cultural and religious factors takes as its starting point the global debate about the universality versus the relativity of human rights, as this discourse has developed since the adoption of the Universal Declaration of Human Rights (UDHR). It shows that the universality debate today is of a

fundamentally different nature than at the beginning of the human rights era. Thus, today the principles of human rights are – at least in theory – universally accepted, and it is the interpretation of human rights in the context of culture which is at the forefront of national, regional and international controversies and debates. The chapter also outlines how the quest for an 'overlapping consensus' between human rights and diverse cultural traditions form part of recent debates about the universality of human rights.

The chapter proceeds to examine the European context, taking its point of departure in the long tradition of the EU in emphasising the universality and indivisibility of human rights and using the UDHR as a source of inspiration. This provides the Union with a good platform from which to engage in the international human rights debate. The chapter outlines the most important EU legal documents in the context of religion and culture, and the toolbox employed by the EU in its external actions, including EU Human Rights Guidelines. The EU affords civil society (for instance faith-based communities) a substantial role in its external and internal actions, and promotes inter-religious and inter-cultural dialogues on human rights. Further studies are recommended into the complex role played by civil society in the promotion and protection of religious freedom as well as religious and cultural diversity and tolerance.

After a presentation of the European context of human rights, culture and religion, the chapter maps three overarching themes, all topical in human rights discourses globally and within the EU, its Member States and third countries today. First, women and gender in the context of cultural and religious diversity is canvassed from the point of view of the EU's external actions, in particular the dilemma between freedom of religion, on the one hand, and LGBTI rights and women and girls' rights on the other.

It is recommended that further studies be carried out with the aim of interpreting this indivisibility of rights in the cultural and religious context of women and gender, and that the role of civil society in promoting religious freedom and tolerance as well as in promoting LGBTI rights and women and girls' rights be included in such studies.

Second, the protection of religious freedom as well as religious and cultural diversity and tolerance as a key challenge to the human rights regime is examined, both in the EU Member States and globally. The EU has in its external actions a progressive and comprehensive interpretation of freedom of religion or belief and of the indivisibility of religious freedom and other rights, notably freedom of expression. As regards EU Member States, the European Union Agency for Fundamental Rights (FRA) reports indicate that the freedom of religion is insufficiently protected within the EU and that for instance the Jewish minorities across Europe perceive a highly increased level of anti-Semitism.

It is recommended that further studies be carried out with the aim of interpreting the indivisibility of rights for religious minority groups in EU Member States (based on relevant FRA reports). In addition, further studies are recommended which, based on FRA reports on discrimination and perceived discrimination of religious minorities in EU Member States, analyse the grounds and remedies for religiously based persecution.

The chapter's third theme is 'the State, religion and culture'. This section considers the role of the State with reference to culture and religion. Further studies are recommended concerning perceived

incoherences between EU external and internal policies with respect to the neutrality of the State vis-à-vis religion. In addition, further studies are needed regarding the position of the EU on legal pluralism.

Chapter VIII on Ethnic factors shows that the EU is on the frontline of anti-discrimination in Europe and has been proactive in combating discrimination on the grounds of race and ethnic origin, putting in place legislation to combat discrimination and initiating a long range of initiatives to support Member States to promote equal treatment irrespective of race and ethnic origin. Notably, in 2000 the Council of Ministers unanimously adopted two directives that particularly aim to combat discrimination within and outside of the labor market on the grounds of race and ethnic origin. The EU Monitoring Center (EUMC) created in 1999 was replaced by FRA in 2008, with a special mandate to monitor cases of discrimination in the area of race and ethnicity.

Although the EU has taken very progressive measures in the field of non-discrimination on account of ethnicity, effective implementation of EU anti-discrimination legislation at Member State level has proved to be more difficult and uneven than anticipated. Some States have gone beyond the requirements by passing strong legal instruments and setting up independent equality bodies, while others have only just met the minimum requirements. It is recommended that a stronger monitoring of Member State policies be put in place with a view to finding out how EU law and protect ethnic minorities are applied in practice, including the functioning and scope of equality bodies in Member States. Moreover, a systematic collection of data on ethnicity in Member States is recommended with a focus on the access to basic rights, so as to foster research seeking to identify problems in the area.

This chapter furthermore highlights instances of 'multiple' and 'intersectional' discrimination of ethnic minorities:

- Access to the labour market: In this area it is recommended that further studies be conducted to analyse discriminatory institutional barriers that may prevent ethnic minorities from being integrated in the Member States' labour market.
- Access to health services: Further analysis is needed to find out the actual conditions of access to health services for refugees and immigrant, so as to designe common standards and toolsets for the health authorities. Further analysis is additionally needed regarding the psychiatric treatment of ethnic minorities in Member States.
- Access to information: Further research is needed to document and prevent discriminatory access to the internet of ethnic minority groups.
- Hate crime: Further cross-cutting analyses are needed that include the intersectional aspects of hate-crime. It is recommended that the EU would support the cooperation between civil society and the police in handling hate-crime on account of ethnic origin.

As the section on the Roma in this chapter demonstrates, the above issues show that ethnic minorities may be the victims of multiple and intersectional discrimination, and often suffer from a lack of enjoyment of basic rights within the catalogue of economic, social and cultural rights as well as civil and political rights. Further research, based on evidence collected from Member States, is needed in this area.

Chapter IX on Technological factors addresses non-discriminatory access to the internet; protection of internet freedoms; freedom of expression and self-regulation; privacy, surveillance, and cyber security; and internet governance. Regarding *non-discriminatory access to the internet*, the chapter highlights that unequal access to the internet can result in the marginalisation of vulnerable groups and reinforce societal disintegration. This is particularly important as EU Member States move towards delivery of public services and information online. In conclusion, it is suggested to examine potential policy measures to ensure that EU citizens are provided with non-discriminatory access to the internet and online public services as a pre-requisite to participation in democratic life.

Concerning *internet freedoms*, the open architecture of the internet has fostered human rights but also led to new types of restrictions. The EU has taken a number of policy initiatives to promote internet freedoms in third countries, yet it has also been criticised for its adverse impact on human rights protection in those countries, for example, in relation to technology export. In conclusion, it is suggested to examine the implementation of the No Disconnect strategy and to investigate different avenues for countering the adverse human rights impact of technology export to third countries.

The theme of *freedom of expression and self-regulation* addresses self-regulation as a widely deployed practice that has been criticised for lack of due process standards and negatively impacting on freedom of expression and information. It is suggested to examine the extent to which filtering and blocking schemes applied across EU Member States uphold basic principles of international law.

In relation to *privacy, surveillance, and cyber security*, the right to privacy is highlighted as one of the most pressured rights in the digital era. The challenges pertain to a number of inter-linked issues such as cross-border data collection, storage and use by private and public entities, extra-territorial violations of the right to privacy, and the escalated focus on cyber-security. In conclusion, suggested areas of study include to examine the implications of the EU data protection reform, and to explore ways of strengthening the protection of European users when violations occur extraterritorially.

Finally, *internet governance* focus on human rights challenges related to the current model, which has been criticised for not ensuring that rules, procedures and decision-making are based on human rights standards. It is suggested to investigate possible avenues towards a model for internet governance based on human rights standards.

2. Cross-cutting themes

As the above summaries have shown, the mapping carried out in this report provides the picture of a diverse, multi-faceted and multi-layered complexity. Whilst the factors are too diverse to draw any one single conclusion as to what enables and hinders the enjoyment of human rights in relation to EU internal and external policies, the following overarching themes emerge

First, the principle of non-discrimination, at the core of human rights, is challenged by various aspects of the factors. This is apparent in Chapter VII on religious and cultural factors, which shows aspects of discrimination against, for instance women and religious minorities. Other examples are found in Chapter VIII on ethic factors, which shows that ethnic minorities are at risk of multiple and intersectional

discrimination, and in Chapter IX on Technological factors, which demonstrates how non-discriminatory access to the internet is being challenged, marginalising already vulnerable groups of individuals.

Second, and linked to the above, the factors often act as a double-edged sword as far as human rights protection is concerned. For example, as shown in Chapter VII on cultural and religious factors, religion and culture often include both elements which hinder and facilitate EU human rights policies in external actions. Another example is found in Chapter IX on Technological factors, which demonstrates how these factors may enhance the rights of individuals in their exercise of, for instance, freedom of expression and access to information but may also undermine the rights of vulnerable groups.

Third, there is a marked overlap between the human rights which are affected, negatively or positively, in the analysed factors. The different factors often influence the same rights, enabling and/or hindering human rights protection. To take freedom of expression as an example, this right may be affected by factors as diverse as social, cultural and religious, technological. This calls for a systematic, holistic and consistent approach to human rights, underlining their indivisibility.

Fourth, human rights as a value have inspired the EU (formerly EEC/EC) since its establishment in post-war Europe, and continue to do so in the development of EU instruments and policies dealing with the rights linked to the different factors. The EU human rights project is still in the making and evolving in a dynamic interaction with the different factors described in this report.

The mapping demonstrates that the EU, in a historically evolving process has addressed the challenges arising from different factors, and that the EU continues to address new challenges and new potential for EU human rights protection (for instance in relation to new technologies or new historical circumstances, such as the economic crisis). The EU often takes a progressive approach to human rights protection (as can, for instance, be observed in the area of disability). The report also shows that the EU takes a progressive approach to the involvement of civil society as a human rights actor.

Fifth, whilst the challenges embedded in the factors often are of a general nature, not applying to the EU in particular (this applies for instance to non-discriminatory access to the internet, and social factors such as age and disability), the mapping also shows a range of issues, gaps and challenges, that apply in particular to the EU, such as the issue of coherence in external and internal policies is an example. As demonstrated in Chapter IV on legal factors, issues of scope and who is responsible for possible human rights violations also still abound.

Sixth, there is frequently a considerable gap between the often progressive human rights policies of the EU and the implementation of these policies in practice. Different factors come into play – for instance political, religious or cultural actors – dependent on the different contexts, internal and external, in which the policies apply. One example of a factor hindering the implementation of human rights policies is found in Chapter III on political factors, which exposes the problems related to democratic legitimacy of the political system of the EU. Another example of a factor in relation to which a gap between policy and implementation can be observed is the economic crisis. Chapter V on economic factors demonstrates how before the economic crisis human rights protection was broadened within the EU internally (for instance with regard to labour market protection and social rights). The crisis created economic factors resulting

in the deterioration of a number of rights, for instance the right to social security and the right to work, and the rights of the child. The chapter also shows that there is a seeming lack of consistency in the way in which conditionality has been implemented in practice in EU development policies.

The above observations call for further research aiming to drive forward the endeavour of the EU to enhance human rights protection. The mapping has identified the need to pursue the following overriding research questions: How can the EU ensure a consistent human rights policy, which cuts across the extremely diverse set of factors which enable or hinder the enjoyment of human rights? How can the EU better implement its human rights policies in areas where certain factors are (potentially) hindering human rights protection as laid out in EU policies?

It is hoped the insights gained from the mapping in this report will serve as a basis from which to conduct further studies within the FRAME project. This applies in particular to the further reports and studies to be conducted in WP2 as well as in on other WPs of FRAME. Future reports in the framework of WP2 will deepen this initial assessment by thoroughly elaborating on the interactions and factors which need further investigations, gaps and challenges.

Bibliography

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Human rights are high on the EU agenda. However, the EU is facing multiple challenges to fulfil its declared commitment to promote and protect human rights.

These challenges are the focus of FRAME, an interdisciplinary research project on Fostering Human Rights Among European (External and Internal) Policies. FRAME is a large-scale, collaborative research project funded under the EU's Seventh Framework Programme (FP7), coordinated by the Leuven Centre for Global Governance Studies and involving 19 research institutes from around the world. Our research focuses on the contribution of the EU's internal and external policies to the promotion of human rights worldwide.

As part of the FRAME project, researchers and other experts at the Danish Institute for Human Rights, in collaboration with researchers from other universities, have been working on key historical, cultural, legal, economic, political, ethnic, religious and technological factors that may impact human rights at the EU, international and national levels.

In this series, we present some of the results of our work.

The research is relevant to human rights academics, practitioners, civil society, and policy-makers at the national, regional, international and EU levels.