Rule of Law in European Union External Action:
Guiding Principles, Practices and Lessons Learned

Isabelle Ioannides

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Dr Isabelle Ioannides*

History has taught Europeans that they cannot take peace for granted. In 2014 in particular, one century since the beginning of the First World War—a war that tore Europe apart, and was followed by the tragedies of the Second World War—we are reminded that the European project goes far beyond the economy, a leitmotif in recent years. The European Union (EU) is first a project of peace that touches the very foundations of society. It has brought former enemies around the same table to work together toward a common future, safeguard democracy and the rule of law, protect citizens' rights and uphold constitutional governance. Thus democracy and related notions constitute pillars of the EU.

The Union was set up as a 'community of law'; its cornerstones are respect for the rule of law and the fundamental rights on which it is founded—as stipulated in Article 2 of the Treaty on European Union (TEU)[i]. EU law was given precedence over national law and direct effect, as evidence of the significance of mutual trust among its member states and their respective legal systems. Therefore, how the rule of law is implemented at the national level plays a key role: the confidence of EU citizens and national authorities in the functioning of the rule of law enables its further development into 'an area of freedom, security and justice without internal frontiers'[ii] .The TEU stipulates far-reaching sanctions for breaches of these fundamental values, and anyone whose rights under EU law are violated has the right to an effective remedy before an independent tribunal.

When supporting rule of law reform and constitution building in other regions, the EU aims to ensure the same level of respect for fundamental values and democratic culture as in its own member states. These values were at the heart of the transitions to democracy in Central and Eastern Europe that led to their accession to the Union through its enlargement policy, as well as in its relations with countries and regions further away. Since its

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foundation, the European Community (now Union) has been engaged in supporting respect for the rule of law abroad throughout the crisis cycle through preventive strategies, post-crisis rehabilitation and reconstruction, long-term development and peace building. To do so, it has developed new organizations (e.g., the European External Action Service), revised its strategies (e.g., the elaboration of the 'comprehensive approach', a reviewed neighbourhood policy and a refined enlargement policy), adapted old mechanisms and developed new ones (e.g., conditionality, funding for civil society groups, sanctions, Common Security and Defence Policy (CSDP) missions, high-level dialogue and the strengthening of EU delegations).

Against this background, this paper examines the EU's approach to supporting rule of law and good governance reforms in non-member countries by analysing the principles guiding its action, the implementation of such efforts and the lessons learned from its experience. It first situates European fundamental values in its mandates to demonstrate how values are embedded in the European project internally and externally. It then analyses the translation of these values into strategies for action not only *for* the citizen but also *with* the citizen in the context of human security (engaging civil society in the reform process).[iii] Last but not least, the report examines the tools available to the Union to put these strategies into practice and draws lessons from the EU's long and diverse experience. It argues that the EU has consistently aimed to put rule of law concerns at the centre of its actions when supporting good governance abroad, and has made much progress in refining its approach. In a world characterized by shifting social, political and economic paradigms, however, the Union must still overcome important challenges in order for its support of the rule of law to be effective.

EU Treaty and European fundamental values

The EU promotes a broad and substantive understanding of the rule of law whereby this concept is viewed as intertwined with (and mutually reinforcing of) the principles of democracy and respect for human rights, all of which underpin political stability and sustained economic and social development. The TEU preamble requires signatory countries to abide by 'the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. In that vein, the EU's focus on protecting fundamental rights has become more and more prominent over the years.

This tradition has led to the adoption of the Charter of Fundamental Rights of the EU, which gained legal force as primary EU law in December 2009

(with the entry into force of the Lisbon Treaty). In concrete terms, this has meant that since 2010 all EU legislative proposals and legal acts are not only systematically checked for their economic, social and environmental effects, but also undergo a detailed assessment of their possible impact on fundamental rights. The increasing and stricter judicial application of the Charter is a significant development; the Court of Justice of the EU has found on two occasions that certain provisions of EU legislation did not comply with the Charter.[iv] Furthermore, national courts increasingly refer to the Charter and request preliminary rulings from the Court of Justice of the EU on its interpretation. EU institutions and citizens are also more informed about fundamental rights and about where to turn to obtain redress when they believe their rights have been violated. The EU's Agency for Fundamental Rights, established in 2007, has become a recognized source of objective, reliable and comparable data on the situation of fundamental rights in the EU.

Another key legal prerogative in support of democracy and safeguarding human rights and the rule of law is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe—the watchdog of human rights in Europe, which has a membership far larger than the EU.[v] The accession of the EU to the ECHR could further strengthen respect for EU fundamental values and rights by enabling individuals to use the European Court of Human Rights in Strasbourg to challenge an act of the EU, which is not possible today. The effectiveness of fundamental rights is indispensable for establishing a genuine European area of justice inside and outside the EU. It is vital not only for the people living in the EU, but also for the development of the EU itself. And it has become particularly pertinent today at a time of economic hardship and rising populism.

Mirroring its internal policies, the EU seeks to prevent violations of human rights throughout the world and, where they occur, to ensure that victims have access to justice and redress and that those responsible are held accountable. In that light, the EU and its member states remain committed to an effective multilateral system with a strong United Nations (UN) at its core. Accordingly, the Union reaffirms its commitment to the promotion and protection of all human rights—including civil, political, economic, social and cultural—guided by the universal democratic values and principles embodied in the UN Charter. The EU calls on all states to implement the provisions of the Universal Declaration of Human Rights and to ratify and implement the key international human rights treaties, including core labour rights conventions and regional human rights instruments. EU support to

the universality of the Rome Statute also forms part and parcel of its dialogue with other regions, and cooperation with the International Criminal Court is central to EU external action.

Since the EU treaties lack a formal definition of the rule of law and precise legal obligations, they serve as a 'soft' ideal (Pech 2012). In fact, the EU falls back on the often-referenced formulation established by the UN, which describes the rule of law as:

> [a] principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency (UNSC 2004: 4).

The EU Charter of Fundamental Rights, mentioned above, is binding on European institutions' internal and external policies when implementing EU law: it includes a legal obligation to ensure that *all* EU actions promote and respect human rights and fundamental freedoms. In the framework of peace building, the EU aims to 'promote peace, its values and the well-being of its peoples' (TEU, Article 3(1) as amended by the Lisbon Treaty) and to 'preserve peace, prevent conflicts and strengthen international security' [Article 21(2)]. More specifically, Europe's external action is explicitly and constitutionally based on the same principles as its internal organization, as described in the Lisbon Treaty (Article 21):

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

Countries aspiring to join the Union are asked to demonstrate their practical commitment to EU fundamental values at all stages of the accession process. The first step is for the country to meet the key criteria for accession as defined in the so-called Copenhagen criteria, including having 'achieved stability of institutions guaranteeing democracy, the rule of law, human

rights and respect for and protection of minorities' (CEU 1993: 13). During the next step of the accession process, the country must demonstrate that it has reformed all its laws to meet all current EU rules (the 35 chapters of the *acquis communautaire*). Among the non-negotiable conditions for membership are the adoption, implementation and enforcement of Chapter 23 on 'judiciary and fundamental rights' and Chapter 24 on 'justice, freedom and security'. Similarly, TEU Article 49 stipulates respect for the rule of law as a precondition for EU membership.

Importantly, the rule of law is not only referred to as a common foundational value in the EU constitutional framework, but is also used as a transversal foreign policy objective and a benchmark against which to assess the actions of candidate countries (Pech 2012: 10). To this end, the EU has aimed to step up its efforts to promote human rights, democracy and the rule of law across all aspects of its external actions. It has sought to strengthen its capability and mechanisms for early warning and preventing crises that are likely to involve human rights violations. It has also worked to deepen its cooperation with partner countries, international organizations and civil society, and to build new partnerships to adapt to changing circumstances.

In that vein, the EU has assisted, for example, in developing representative and transparent democratic institutions that service all citizens. In the context of supporting reforms in non-member countries, the rule of law refers to a strong judiciary that is independent and adequately empowered, financed, equipped and trained to uphold human rights in the administration of justice. Equally important are the other institutions of the justice sector, including lawful police, intelligence services, border guards and customs officers, humane prison services, fair prosecutions and capable associations of criminal defence lawyers. The EU has also endeavoured to ensure the principle of civilian control and oversight of the functioning of the justice system by strengthening the capacity of national parliaments, ombudsmen, independent human rights institutions, civil society and other non-state actors. It has promoted good governance and accountability by fighting corruption, illegality and abuse of power by authorities. The next section examines how EU fundamental values are conceptualized in its strategies to ensure respect for the rule of law when supporting reforms in other regions.

EU strategies in support of the rule of law abroad

Three key lessons of the past decade have influenced the reorientation of EU thinking, planning and practice of supporting the rule of law abroad. The first lesson is the recognition of the need to move from working on EU rule of law issues in silos to better linking it to other policies (e.g., security and/ or development), other instruments (across timeframes and fields) and other actors (EU institutions and missions on the ground, international and regional organizations, civil society and national authorities). The 'comprehensive approach', as this new working method has come to be known, brings together all the different EU elements: military and civilian missions; development work (programmatic, expert and financial assistance); political engagement at all levels (dialogues with partners, mediation and negotiation); and security assistance and civil society capacity building.

Second, in line with the UN's work on peace building, in which the citizen is increasingly central to security, the EU has aimed to develop inclusive policies that reach out to citizens. In 2006 the European Commission (EC) argued that the concept of security should be extended beyond the territorial integrity of states and institutions to include the status of people.[vi] The centrality of citizen endorsement and local ownership was formally acknowledged at the EU Council level in its agenda for action on democracy support in foreign relations, which stated that 'democracy cannot be imposed from outside' (CEU 2009d: 1). In that light, the Union has moved away from tackling rule of law reforms (i.e., police, justice and penal) as merely technical processes; it also increasingly focuses on overseeing institutions and their overall governance. This approach to civil society capacity building will enable non-state actors to play an important role in the oversight of security institutions through the monitoring of parliamentary and decision-making procedures, as well as monitoring the conduct of the police, judiciary and penal systems.

Third, the evolution of all EU strategies and instruments for external action has involved legislative mainstreaming of the rule of law both horizontally and vertically. The fact that the EU treaties constantly link the rule of law to the principles of democratic governance and human rights protection suggests that these principles must be understood and promoted as interconnected and interdependent. It is also consistent with the enshrinement of these foundational values as transversal principles that cut across all EU institutions, which must guide EU action across policies and at all levels. Thus EU support to the rule of law has been included in several interlocking agendas, spanning from security and crisis management to development, good governance and enlargement.

When it comes to safeguarding human rights, the EU is committed to implementing the UN *Guiding Principles on Business and Human Rights*. The Joint Communication of the EC and EU High Representative for Foreign Affairs and Security Policy, titled *Human Rights and Democracy at the Heart of EU External Action—Towards a More Effective Approach*, includes elements for developing an EU human rights strategy and proposes areas for further action, including freedom of expression, opinion, assembly and association, both online and offline. It also calls for the promotion of freedom of religion or belief and the fight against discrimination in all its forms (race, ethnicity, age, gender or sexual orientation) and advocates for the rights of children, persons belonging to minorities, indigenous peoples, refugees, migrants and persons with disabilities. Campaigning for the rights and empowerment of women in all contexts by fighting discriminatory legislation, gender-based violence and marginalization is also a key objective. It continues its long-standing campaign against the death penalty, encouraged by the growing momentum for its abolition worldwide. It also continues to vigorously fight against torture and cruel, inhuman and degrading treatment.

More broadly, the EU's new approach is to ensure that the protection of human rights guides every EU policy—whether in trade, development, the environment or counterterrorism. This means that the Union aims to highlight human rights violations where and when they occur, and works closely with international multilateral organizations and its member states on guaranteeing respect for human rights. Unsurprisingly then, the EU situates human rights in the framework of good governance—i.e., the state's ability to serve its citizens—which it also intimately links to its development agenda (EC 2003, 2006b). Good governance is approached from a wider angle, taking into account all its dimensions (political, economic, environmental and social). It is understood as more than tackling corruption; it includes access to health, education and justice, pluralism in the media, the functioning of parliament, and the management of public accounts and natural resources. More recently, the EC has reiterated the development-security nexus, considering that 'the objectives of development democracy, human rights, good governance and security are intertwined' and that 'the EU's development, foreign and security policy initiatives should be linked so as to create a more coherent approach to peace, state building, poverty reduction and the underlying causes of conflict' (EC 2011: 3, 11). In 2012 the EU Council placed governance at the centre of EU partnerships, calling for 'a rights-based approach, promoting in particular the right to universal and non-discriminatory access to basic services, participation in democratic political processes, transparency and accountability, justice and the rule of law, and with a focus on poor and vulnerable groups' (CEU 2012a: 2). By extension, good governance is also a 'fundamental element' of the EU

partnership with African, Caribbean and Pacific countries under Article 9 of the Cotonou Agreement, and is included in the European Neighbourhood Policy and EU relations with Latin America and Asia.

The 2003 European Security Strategy and the follow-up report on its implementation, which enumerate the EU's strategic priorities, also put the rule of law, respect for human rights and the protection of minorities at the centre of the Union's external action (CEU 2003a, 2008). CSDP missions, which draw on civilian and military assets, have played a key role in supporting these objectives. Since 2003 the Union has launched more than 30 peace support operations to contribute to stabilization and security in Europe and beyond. As with other facets of EU external action, CSDP missions—both military and civilian—have incorporated respect for human rights, universal values and the establishment of democratic rule of law at their core. Specialist EU training—for example, the 3,600 soldiers of the Somali National Armed Forces trained by European Union Training Mission (EUTM) Somalia—has addressed issues of military police, civilian-military cooperation, intelligence, international humanitarian law and human rights, and the protection of civilians.

In the framework of its CSDP, the EU first launched police missions to conflict spots in the Western Balkans. A comprehensive concept for CSDP police strengthening missions, which constitute the core activity of EU rule of law reforms abroad, was initially drafted in 2002 and updated in 2009. Its stated general objective is:

> [T]o (re)establish or to strengthen and improve, under local ownership, a sustainable, transparent and accountable police system in the host country, to improve its police/law enforcement capacities and to ensure the home country police/law enforcement services are able to undertake the full range of law enforcement functions with strict respect for human rights, fundamental freedoms and within a broader Rule of Law perspective in accordance with the demands of a democratic society' (CEU 2009c: 13).

The police reform process is seen, for example, as a measurement of the pulse of society, and is embedded in the dictum of 'winning the hearts and minds' of the population in conflict-torn environments (Ioannides and Collantes-Celador 2011: 424–25).

In an effort to ensure that police reform becomes an integral part of its state-building/peace-building approach, the EU has recognized that it is imperative to tackle the rule of law in a comprehensive manner in line with the good

governance agenda. Thus, reform of the judiciary and penitentiary systems in a conflict-torn country are tackled in parallel with the police (CEU 2003a: 12). The significance of this synergetic approach—an important lesson identified in the police missions in the Western Balkans—is also spelled out in the revised 2009 EU comprehensive concept for police support missions. The EU Rule of Law (EULEX) Kosovo mission, which is engaged in reforming the entire spectrum of civilian law enforcement institutions through a combination of executive and non-executive powers, is a good example of this lesson learned. Similarly, the EU Border Assistance Mission for the Rafah crossing point (EUBAM Rafah), on the border between the Gaza Strip and Egypt, monitors and verifies the performance of the Palestinian Authority border and customs authorities. EUPOL COPPS, the EU's police strengthening mission deployed in the occupied Palestinian territories is an important parallel element for improving security and further strengthening law and order.

The Council's document on Security Sector Reform (SSR), which constitutes a broader framework for action on police reform, contains similar objectives to those outlined above. It maintains that

> 'security sector reform will contribute to an accountable, effective and efficient security system, operating under civilian control consistent with democratic norms and principles of good governance, transparency and the rule of law, and acting according to international standards and respecting human rights, which can be a force for peace and stability, fostering democracy and promoting local and regional stability' (CEU 2005b: 4).

Similarly, in the parallel Concept for European Community Support for SSR, one of the stated objectives of SSR is to contribute explicitly to the rule of law and the protection of human rights.

As the report of former UN Secretary-General Kofi Annan on the rule of law and transitional justice in conflict and post-conflict environments argues, strategies for expediting a return to the rule of law must be integrated with plans to reintegrate both displaced civilians and former fighters. Disarmament, Demobilization and Reintegration (DDR) processes are key elements of a transition out of conflict and back to normalcy (UNSC 2004: 11). Similarly, the EU's Concept for Support to DDR, which complements the policy framework for EU support to SSR, states that DDR needs to be carried out in a comprehensive peace-building framework and linked to transitional justice provisions (CEU/EU 2006: 23). The imperative of the rule of law—which requires prosecuting offenders within the security forces and justice institutions, as well as excluding serious offenders from

new offices through vetting processes—highlights the short-term trade-offs between justice, successful reform and security provision. While serious challenges exist when ex-combatants are embedded in security forces and stand to lose from reforms or when former rebels are to be integrated into the security forces as part of peace deals, establishing a secure and transparent environment is a prerequisite for the successful implementation of transitional justice mechanisms (Chandra et al. 2012).

Transitional justice is a multidimensional long-term undertaking described as 'a framework for confronting past abuse as a component of a major political transformation—from war to peace or from authoritarian rule to democracy' (CEU 2006a: 2). This broad crisis management context—which is in line with the 'comprehensive approach'—highlights the EU's commitment to the human rights dimension, and by proxy to the rule of law. This undertaking may consist of judicial and non-judicial mechanisms that focus on accountability for past abuses as well as the establishment of a sustainable, just and peaceful future. EU mediation activities are also meant to be sensitive to transitional justice and human rights issues (CEU 2009a). In this light, grassroots-level dialogue and mediation are seen as helpful in involving former combatants in dialogue with communities and victims in order to support reconciliation processes. This outreach to civil society complements high-level negotiations, where the success of transitional justice measures is assessed.[vii]

Last but not least, as new security challenges continue to emerge, Europe's internal and external security dimensions are increasingly interlinked, which influences the understanding and practice of the rule of law. Although the EU's 'area of freedom, security and justice' is primarily an internal political project—that touches on citizens' rights; issues of migration, asylum and police and judicial cooperation—it is also intimately connected to the EU's external action. Indeed, responses to such challenges (for example, organized crime, human and drug trafficking, terrorism and illegal immigration) can have a major international dimension. They are seen not only as a cause of the lack of rule of law in transitional countries, but also as an inhibiting factor to progress in rule of law reforms (Ioannides 2014: 113–17). In response, specific guidelines were developed in the 2005 Strategy on the External Dimension of Justice and Home Affairs, which constituted an attempt to achieve a more consistent and coherent policy output and to overcome the predominantly piecemeal approach that had been followed until then. It organized existing instruments around key principles and guidelines, including 'geographical prioritization', whereby internal security issues would be addressed with countries with which the EU prioritizes its relations (namely candidate and neighbouring countries) (CEU 2005a: 8–9). As a result, 'increased synergies

between CSDP and Freedom/Security/Justice actors to tackle horizontal issues such as illegal migration, organised crime and terrorism; [and] progress in developing CSDP support for third states and regions, in order to help them to improve border management' have pushed forward (European Council 2013: 4).

EU rule of law support abroad in practice

The challenge is arguably to translate these EU strategies that include elements of the rule of law into effective action. To do so, the Union works *inter alia* to strengthen domestic law enforcement and justice institutions; facilitate national consultations on rule of law reform; coordinate international rule of law assistance; monitor and report on court proceedings; train national justice, police and customs sector officials; and support and advise host country rule of law institutions. Through its financial assistance and peace support operations, the EU has helped national actors vet and select national police, judges and prosecutors; support the drafting of constitutions; revise legislation; inform and educate the public; develop ombudsman institutions and human rights commissions; strengthen training institutes and build civil society capacity to monitor the rule of law sector. EU missions and programmes have also helped host countries address past human rights abuses by establishing truth and reconciliation mechanisms and victim reparation programmes. This section does not aim to enumerate the array of EU instruments for supporting the rule of law. Rather, it tries to exemplify some of the ways in which the EU promotes its values. The Union utilizes (sometimes simultaneously) various tools, including unilateral trade instruments, technical and financial assistance instruments, bilateral 'soft' instruments and crisis management missions; develops special 'partnerships'; or makes EU fundamental values an essential element of a contractual relationship.[viii]

One of the 'soft' instruments for promoting respect for the rule of law and good governance in partner countries is political dialogue, in which the EC aims to encourage partner governments to integrate democracy and human rights into their development plans while also trying to identify opportunities for EC assistance on them. Human rights issues are also raised in all forms of counterterrorism dialogue with non-member countries. The EU has now established nearly 40 dialogues and other dedicated discussion forums with non-member countries (including Russia, China and Belarus), in which the rule of law has been identified as one of the priority issues (CEU 2009b: 24). Political dialogues amount to meetings between officials once or twice a year, with civil society seminars on the fringes. A case in point is the Eastern

Partnership (EaP) between the EU and seven of its Eastern neighbours (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine and Russia) that was launched in 2009 and constitutes the eastern component of the European Neighbourhood Partnership (ENP).[ix] This policy does not hold the promise of EU membership but rather 'issue[s] specific rewards', such as visa-free travel for progress in key areas (e.g., human trafficking and illegal immigration). One of the four thematic platforms of the EaP is entitled 'democracy, good governance and stability' and focuses on improving the functioning of the judiciary, the fight against corruption, public administration reform and border management (EC 2008: 9–10). The EaP also includes a Civil Society Forum that provides a more structured approach to engagement with a wider variety of civil society organizations than previously was the case. Another avenue for dialogue is Euronest, a parliamentary assembly that brings together members of the European Parliament and delegates from ENP countries, which has been running since May 2011. While political dialogues have been of great diplomatic value to the EU, allowing it to maintain links with a country when relations with the partner are at a standstill, they have also been the object of criticism. The European Parliament has called for the development of specific quantifiable indices and benchmarks to measure the effectiveness of dialogues on human rights in order to avoid repeated failures of EU human rights consultations. In a similar fashion, a recent report by Human Rights Watch highlighted the need for concrete and publicly articulated benchmarks to give clear direction to the dialogue and make participants accountable for concrete results (Pech 2012: 16).

Beyond political dialogue, the extensive EU human rights toolbox can raise questions on how the rule of law is implemented in a country or region through human rights guidelines, démarches and declarations, and Council decisions. The Council has frequently cited upholding human rights as a justification for imposing restrictive measures on governmental leaders who established brutal rule in a country (e.g., Myanmar and Zimbabwe) or engaged in violent regime change (e.g., Guinea). Another approach is to include specific provisions on the rule of law and related notions in bilateral agreements. For instance, the Cotonou Agreement commits its signatories to engage in 'comprehensive, balanced and deep' dialogue in the context of 'a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance' (EU 2010).

Furthermore, the EC mainstreams democratic values in all its development instruments. These tools include geographical instruments for implementing the policy at the national and regional levels, such as the European Development Fund (for the African, Caribbean and Pacific countries), the Development

Cooperation Instrument (for Latin America, Asia and South Africa) and the European Neighbourhood and Partnership Instrument (for the southern and eastern regions to the EU). Its Instrument for Pre-Accession (IPA) provides financing to help pre-accession countries align their administrative and legal frameworks with EU standards and policies. Article 2 of the IPA regulation requires that these political reform activities support a wide range of institution- and capacity-building measures in beneficiary countries to strengthen *inter alia* the rule of law, 'including its enforcement', human rights, the protection of minorities and civil society development. Technical assistance is also available in the form of administrative cooperation measures involving public sector experts dispatched from member states (EU 2006).

Lessons from the past enlargement phases (especially to Romania and Bulgaria), where there have been difficulties with implementing the rule of law post-enlargement, have pushed the EC to adopt a new approach to negotiating rule of law reforms. It now requires a solid track record of reform implementation to be developed throughout the negotiations process, within a given timeframe. While the criteria and conditions for membership remain the same, the EC has developed country-specific, tailor-made approaches to dealing with difficult blockages in the accession process. The reforms need to be deeply entrenched, with the aim of irreversibility. As a result, the EU pushes for the opening of negotiations on chapters 23 (judiciary and fundamental rights) and 24 (justice, freedom and security) of the EU *acquis communautaire* much earlier to ensure that persisting problems with corruption, organized crime and administrative capacity are tackled early on in the accession process. This approach was reflected in the negotiating framework adopted in June 2012 for negotiations with Montenegro, which firmly anchored the rule of law at the centre of the accession process and laid the foundations for future negotiations.

In this new approach, the process is accompanied by safeguards and corrective measures to allow, for example, the updating of benchmarks and to ensure an overall balance in the progress of negotiations across chapters. The new approach also foresees greater transparency and inclusiveness in the negotiations and reform process; candidates are encouraged to develop their reform priorities through a process of consultation with relevant stakeholders to ensure maximum support for their implementation. This focus on the rule of law has had some results in the former Yugoslav Republic of Macedonia (fYROM), where a High Level Accession Dialogue, launched in March 2012, pushed EU integration to the forefront of the domestic agenda, giving it a new boost by ensuring a structured, high-level discussion on the main reform challenges and opportunities. The key issues include freedom

of expression, rule of law, ethnic relations, challenges for electoral reform, public administration reform, strengthening the market economy and good neighbourly relations. In June 2012 the EU launched a similar high-level dialogue in Bosnia-Herzegovina to help the country move forward in the EU accession process by explaining the requirements and the methodology of the accession negotiations, and especially to maintain the political momentum on the EU agenda despite the ongoing political crisis. The EC and Kosovo launched a Structured Dialogue on the Rule of Law in May 2012 to focus on the challenges in the judiciary and the fight against organized crime and corruption.

Whether in geographic or thematic EC instruments, principles such as political participation, representation, accountability, transparency and equality are integrated in the planning, design, implementation, and monitoring of policies and programmes. Negative effects on the respect for EU fundamental values are also flagged in line with the logic of conditionality:[x] suspension clauses have been quasi-systematically included in financial programmes dedicated to candidate countries and the financing of cooperation actions with countries in the neighbourhood. The other side of the coin is an incentive-based approach, for example the 2011 revamped ENP that introduced the 'more for more' principle. According to this approach, the EU develops stronger partnerships and offers greater incentives to countries that make more progress toward democratic reform—for example, free and fair elections; freedom of expression, assembly and association; judicial independence; the fight against corruption; and democratic control over the armed forces (European Commission and High Representative of the European Union for the Foreign Affairs and Security Policy 2011: 5). With the aim of putting the relationship on a somewhat more equal footing, the new EU assistance policies have also introduced the notion of 'mutual accountability', in which the beneficiaries have a bigger role in policy design and according to which the EU can also be made to keep its promises. Benchmarks for progress on rule of law commitments (i.e., judicial independence, fighting corruption, depoliticized civil service) and reforms that are also linked to respect for human rights (i.e., UN and Council of Europe conventions) are carefully reflected in Cooperation Agreements, Country Strategy Papers, National Indicative Programmes and subsequent Action Plans (Simmons 2012: 14).

The use of reporting—a robust analysis conducted by the relevant Directorate Generals in Brussels and the Delegations in cooperation with the national authorities and local non-governmental organizations (NGOs)—is one of the strongest monitoring tools of the progress (or lack thereof) that the beneficiaries have made on the rule of law. For the EU, these regular

reports are a useful way to control the pace of negotiations toward accession for the candidate countries and to assess the pace of reform in the partner developing countries. For the beneficiaries (especially in the pre-accession countries), the regular reports have an important political function: they are seen by political elites as a transcript of their grades, they generate much domestic media attention and they give civil society actors advocacy material with which they can leverage domestic reform. When examining the use of 'mutual accountability' in the EU neighbourhood more closely, however, experts argue that while 'the EU has tools and procedures to use negative conditionality should it want to (regardless of the fact that in practice it rarely does so) there are no mechanisms for the EU's partners to hold it accountable for delivering on its promises' (Balfour 2012: 26). Other experts remind us that manipulation is a two-way street. Although the EU managed to establish solid cooperation with the Moldovan government, evidence from the sector level underlines that these achievements were instead based on strategic calculations by the Moldovan government. While the government fulfilled sector-specific conditionality to reach trade facilitation, it blocked every change that would have threatened its political dominance and did not truly change its mind with regards to its external allegiance. Even though it reaped the benefits of a closer relationship with the EU,[xi] it did not fulfil its demands where 'common values' were concerned. Indeed, the case of Moldova shows that governments in the contested Eastern Neighbourhood of the EU can block undesired demands for change by instrumentalizing the presence of major external powers (e.g., EU and Russia) (Hagemann 2013: 780–81).

The EU tends to favour positive instruments that reward reform efforts over negative ones, but it uses sanctions against certain states that are found to have violated international law or human rights, or that carry out policies that are disrespectful of the rule of law or democratic principles. One of the stated objectives of the EU's use of sanctions is 'to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms' (TEU, Article 11). To do so, the EU has designated diplomatic or economic sanctions that it may impose to target governments of non-member countries, or non-state entities and individuals (e.g., terrorist groups and individual terrorists). These measures can comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa or travel bans) or other measures, as appropriate. The standards for such restrictive measures are set out in the EU basic guidelines and EU Best Practices for the Effective Implementation of Restrictive Measures, which contains non-exhaustive recommendations (CEU 2003b, 2004, 2006b, 2007). As Giumelli and Ivan (2013: v) argue, 'sanctions contribute to shaping the image of the EU, provide diplomatic

alternatives through the use of more nuanced and targeted policies and ensure that the EU has some "teeth" to carry out its foreign policy and stand by its values'. The Council's decision to sanction the 'conflict spoilers' in the aftermath of the so-called Arab Spring is an example of the EU's diplomatic prowess. This decision indicated EU support for the recognized institutions, since restrictions on a number of individuals connected with the former regime were imposed.

The EU has not only sharpened its targeted sanctions against individuals (such as freezing assets and implementing travel bans); it is also using broader embargoes when and where needed. For example in Syria, which has experienced indiscriminate violations of human rights during its four-year civil war, sanctions were tightened not only with the listing, but also with the quality of the measures imposed. The travel ban and financial restrictions were extended to include an arms embargo, a ban on the import of crude oil, the suspension of new European Investment Bank investments, and the suspension of gold and minted coin imports. The sanctions were also extended to al-Assad's family and other individuals and entities that benefited from supporting the regime (Giumelli and Ivan 2013: 21).

As mentioned above, NGOs and civil society more broadly play a crucial role in protecting human rights, defending the rule of law worldwide and synchronizing human rights and development cooperation activities. Their presence on the ground makes them well placed to obtain information and help determine priorities for action. In this context, the EC has established thematic instruments, primarily the Civil Society Facility (CSF) and the European Instrument for Democracy and Human Rights (EIDHR), to complement its geographic instruments. The CSF, which is the biggest budget line available for supporting civil society development in the neighbourhood and candidate counties, consists of three strands: support for national and local civic initiatives and capacity building to strengthen the role of civil society in the region; support for activities carried out in partnership between civil society organizations from across the region and from EU member states with the aim of developing networks and promoting the transfer of knowledge and experience; a 'People-2-People' programme supporting visits to EU institutions and the exchange of experience, know-how and good practice between local civil society, the EU and civil society in member states. The overall objective of this initiative is to boost the development of a civil society that actively participates in the public debate on democracy, human rights, social inclusion and the rule of law, and can influence policy and decision-making processes (European Commission and High Representative of the European Union for the Foreign Affairs and Security Policy 2011: 4).

The EIDHR funding line seeks to contribute 'to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental freedoms,' within the framework of the EU's development and cooperation policy with non-member countries (EU 2014: 89). The EIDHR is unique due to its global scope and the fact that it allows financial assistance to be granted directly to civil society groups without the consent of local authorities. It has therefore played a key role in providing aid to civil society organizations in countries where there is no direct cooperation with the government, and has allowed for a focus on politically sensitive issues. Over EUR 1.1 billion was made available between 2007 and 2013 for projects addressing topics such as participatory and representative democracy; the freedoms of association and assembly, opinion and expression; the rule of law and the independence of the judiciary; and the peaceful conciliation of group interests.[xii]

The EU established the European Endowment for Democracy after the Arab Spring in order to support emerging political actors and small unregistered NGOs or trade unions struggling to develop, pro-democracy movements and other social partners that had not been able to benefit from EU support so far. It is designed to complement the ENP instrument and the EIDHR. The added value of this instrument is its flexibility (no need for calls for tenders or cumbersome administrative procedures), and its quick reaction (no set dates for application, needs-based funding).[xiii] And while it is currently concentrating on the neighbourhood countries—initially on those of the south, but since the outbreak of hostilities between Ukraine and Russia, on the east—the goal is for the instrument to extend its geographic scope to be global.

Civil society is a resource that the EU further capitalizes on with the appointment of civil society liaisons in its Delegations in line with the adoption of the Lisbon Treaty. It called for reinforcing the EU Delegations as political actors, especially since they represent EU positions in non-member countries. Furthermore, diplomatic consular staff have received appropriate education and training to detect and handle cases of suspected trafficking in order to ensure that human rights underpin the external dimension of work in the 'area of freedom, security and justice', particularly in the fight against human trafficking. At the same time, the EU has reinforced its relations with key civil society stakeholders at the headquarters level. It holds regular (as well as *ad hoc*) consultations with NGO networks such as the European NGO confederation for Relief and Development (CONCORD), the European Network of Foundations for Democracy Support, the European Network of Independent Political Foundations in Democracy Promotion

and Development Cooperation, the European Peacebuilding Liaison Office, and the Human Rights and Democracy Network. This allows NGOs to contribute their insight prior to Human Rights Dialogues and consultations with non-EU countries, during the drafting of priorities for the next funding period of financial instruments (e.g., the EIDHR) or during the evaluation of EC programmes and CSDP missions.

Following the adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy, the first-ever Special Representative for Human Rights and the first-ever thematic EU envoy was appointed to enhance the effectiveness and visibility of EU human rights policy.[xiv] The envoy's mandate is broad and flexible, allowing an adaptation to circumstances. Given the developments in the Union's neighbourhood (in particular following the Arab Spring uprisings), the action plan emphasizes human rights NGOs and civil society organizations, including human rights defenders. For example, the envoy has made sure that the EU operational guidance to ensure that human rights—and, where applicable, international humanitarian law—are taken into account in the planning and implementation of counterterrorism assistance projects with non-member countries, particularly regarding respect for due process requirements (presumption of innocence, fair trial, rights of the defence).

Contrary to the EC's long-term approach, CSDP police and rule of law missions were designed to help establish secure environments in which the rule of law is applied and human rights are respected quickly. Out of the 34 EU missions deployed since 2003, most incorporated components related to developing the rule of law, and more broadly the security sector. Most have focused on building the capacity of police forces, border guards and security forces (e.g., in Bosnia-Herzegovina, fYROM, Kosovo, Afghanistan, Democratic Republic of Congo and Georgia) and developing the culture and institutions of the rule of law (e.g., in Kosovo, Georgia, Aceh, and the occupied Palestinian Territories and Gaza). SSR has also emerged as a vital agenda item for other countries in the Middle East and North Africa that are undergoing profound political change, especially in Libya (Dursun-Ozkancaa and Vandemoortele 2012: 140). On a more practical level, the EU deployed personnel to work directly with the security and rule of law staff in the host country. For instance, EU police officers in strengthening police missions are 'co-located' in local police institutions to carry out the formula of 'monitoring, mentoring and advising': they are deployed at different hierarchical and territorial levels and are involved in a variety of tasks ranging from monitoring and teaching techniques of investigation, examination, search and territory control to hands-on training for personnel (Ioannides

and Collantes-Celador 2011: 424). This model was used in the EU missions in the Western Balkans. Similarly, the EU Integrated Rule of Law Mission for Iraq (EUJUST LEX-Iraq) is a civilian crisis management mission established to strengthen the rule of law and promote a culture of respect for human rights in Iraq by providing professional development opportunities for high- and mid-level Iraqi officials in the criminal justice system. Interestingly, the mission has achieved considerable progress in mainstreaming human rights and gender into its training activities with positive feedback from the Iraqi participants.[xv]

Looking back and moving forward

The rule of law is generally viewed as essential for the proper functioning of a state, to the point that 'no other single political ideal has ever achieved global endorsement' (Tamanaha 2004: 3–4), not only from a legal and political point of view but also from an economic one—the *Economist* (2008: 83) asserts that it has 'become the motherhood and apple pie of development economics.' The EU project in its constant evolution has continuously put the rule of law at the centre of its concerns. Internally, it has moved toward further integration through the creation of monitoring mechanisms; externally, it has learned from its experience and adapted accordingly at the programmatic and policy levels. The evolution of EU institutions and treaties, the rolling institutional cycle and the economic crisis have forced the EU to question its policies and instruments and push forward.

The persisting challenge of applying instruments consistently and effectively has affected EU rule of law efforts from all policy perspectives (e.g., security, governance, development). This realization encouraged the development of the 'comprehensive approach' that aims for an holistic, integrated and coordinated EU external action—so the Union can link multiple policies together across institutions and between levels (at headquarters and in the field). The aim is also to work toward a smoother transition from humanitarian aid to crisis response, and then to long-term development cooperation. And it also refers to the mainstreaming of democratic values in all EU external action instruments—such as political participation, representation, accountability, transparency and equality—at all stages of the programme cycle (planning, design, implementation and monitoring). While much progress has been achieved on these goals, the EU must take a more active leadership role, as mandated by the Lisbon Treaty, and put forward proposals that make European aid more effective. It should intensify its joined-up approach to security and poverty, where necessary adapting its legal bases and procedures.

To that end, the EU's development and foreign and security policy initiatives should be linked and made mutually reinforcing so as to create a more coherent approach to peace, state building, poverty reduction and addressing the underlying causes of conflict.

If the EU discourse and policymaking on rule of law reform have evolved to a certain degree, the actual cooperation among the EU institutions, international organizations and member states that is necessary for its successful implementation still lags behind. This is due to a number of reasons: a culture of cooperation has not yet been cemented in the not-so-new European External Action Service; EU foreign policy sits uncomfortably at the crossroads of EU member state policies and budgets, on the one hand, and EU institutions and policies, on the other; and the competing and overlapping mandates of engaged international/regional organizations on the ground turn assistance into a competitive market in which everyone wants to be able to call their mission a success. Yet, against the backdrop of austerity across Europe, the 'comprehensive approach' could help EU member states weather the current economic crisis better, without a major decline in their ability to achieve their foreign and security policy objectives. The 'comprehensive approach' would entail dealing with security threats as part of a broader strategy that includes international partners, a better division of labour among international stakeholders, and mobilizing EU resources to address complex problems through pooling and sharing. Furthermore, on a more substantive (rather than procedural) level, the concern is that the consequences of an uncoordinated intervention in rule of law reform could lead to the deterioration of already fragile regions. Mali and Libya are good examples of the impact of the uncontained spillover effects of conflicts, unreformed security forces, and the proliferation of small arms and light weapons (Ioannides 2014: 126).

Coordination also means cooperation. This is particularly important when it comes to working with partner countries/beneficiaries. In that respect, the Union has addressed the need to integrate local ownership across its rule of law strategies and to respond to problems that result from a lack of local ownership. Especially in its near abroad, it has learned that formal *adoption* of rules is not enough: effective external governance crucially depends on the subsequent *application* of rules. While EU rule of law activities have largely been organized as 'top down' (i.e., engaging with local political elites to reform the relevant state institutions and administration), a parallel 'bottom-up' approach of engaging with civil society actors is on the rise. More particularly, an explicit commitment to consult and include civil society in EU cooperation with partners was made, as *inter alia* reflected in the creation

of the Civil Society Facility and the European Endowment for Democracy. The more holistic approach to guaranteeing the implementation of reforms and the oversight of rule of law institutions also strengthens the role of civil society organizations. However, there are still some unresolved issues. First, continuous and consistent dialogue with local partners is needed to ensure that the reforms are implemented and that the political discourse is changing accordingly. Second, local ownership needs to be constantly updated to maximize local participation. In that sense, civil society development is not an end in itself, but rather a means to better governance. Last but not least is the need to carefully choose which civil society groups (and leaders) to engage with, to avoid enshrining existing power imbalances and inequalities. Indeed, the fluctuating allegiances of non-state actors in countries and regions in conflict should not be underestimated; for them it is a strategy for survival.[xvi]

The concept of local ownership entails finding the right balance between the EU fundamental values and norms that underpin the rule of law and the need for a tailored approach that takes into consideration the local context and the needs of the beneficiary country. Other organizations and international actors also struggle with this challenge. More often than not, national authorities and citizens perceive rule of law reforms as externally driven policies at best, and as foreign-imposed models at worst. To address these challenges, the EU has developed specific financial and technical assistance programmes—long term vs. short term, regional vs. bilateral aid, geographic vs. functional financial tools—and has tried to seamlessly link them. These programmes serve as a concrete expression of EU support to promote the practice of universal values. The Union has also elaborated intricate mechanisms to safeguard the implementation of the reforms. For example, if a country loosens its commitment to human rights and democracy, the Union strengthens its cooperation with non-state actors and local authorities and uses forms of aid that provide the poor with the support they need. It is less clear when the EU should sever relations with governments, how it could maintain contact with them if that happens, and how strict conditionality needs to be to bring the desired results.

The EU takes a values-based approach to addressing the unbearable violations of human rights and the rule of law in such places as Syria, where over the past four years the world's conscience has been tested. Yet to ensure that its efforts in the rule of law abroad will be effective and sustainable, the Union will need to use its resources wisely and conduct the necessary reforms at home in order for its economic and socio-political model to be seen as credible and attractive.

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Notes

ⁱ According to Article 2 of the TEU on the categories and areas of Union competence, '[t]he Union shall set itself the following objectives: […] to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; […] to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime; to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community'.

ⁱⁱ See Articles 3(2) TEU and 67 TFEU.

ⁱⁱⁱ Coined by the development community following the Cold War, 'human security' recognizes the importance of addressing citizens' security in addition to state security. With the proliferation of intrastate wars and the privatization of conflict in poorly governed and failing states, the international community began to recognize that, more often than not, individuals and social groups (rather than the state) need to be protected. UNDP (1994) is considered a milestone publication in the field of human security, with its argument that ensuring 'freedom from want' and 'freedom from fear' for all persons is the best way to tackle the problem of global insecurity.

^{iv} In 2013 the EU Court of Justice, in the Kadi II case (C-584/10), clarified certain procedural rights of people suspected of association with terrorism and against whom penalties and restrictive measures are taken, including the right to good administration, the right to an effective remedy and the right to a fair trial (Articles 41 and 47). The Court ensured the protection of fundamental rights and freedoms whilst recognising the imperative need to combat international terrorism. In the Besselink case (T-331/11), the General Court gave effect to the right of access to documents, enshrined in Article 42 of the Charter, and it annulled in part a decision by the Council refusing access to a document on the EU's accession to the ECHR.

^v See CoE (1950), preamble and CoE (1949), Article 3.

^{vi} EC (2006a) presents policies and financial instruments that can help develop the governance side of police reform/assistance, such as civilian oversight, de-politicization and civil society relations.

vii   These actors often provide valuable input to ongoing debates, and can play an important part in the implementation of justice mechanisms by countering war rhetoric and perceptions of helplessness.

viii   See, for example, Cremona (2011), p. 293.

ix   The ENP was launched in 2004 and revised in 2011 following the Arab Spring uprisings. Its stated objective is to support partners that undertake reform to transition to democracy and respect for rule of law and human rights; to contribute to their inclusive economic development and promote a partnership with societies alongside EU relations with governments. The renewed ENP is strengthening cooperation in the political and security spheres, supporting economic and social development, growth and jobs, boosting trade and enhancing cooperation in other sectors.

x   Conditionality refers to a process in which the EU attaches strings to requirements, therefore linking the tailor-made political reforms for individual countries to economic incentives that it can provide once the country makes progress, in an effort to enhance the attraction and credibility of reforms and for these to be carried out effectively.

xi   The EU became Moldova's most important trading partner in 2005, sent an assistance mission (EUBAM) to help the government control the Transnistrian border and opened a delegation office in Chisinau.

xii   See <https://storify.com/EUintheWorld/human-rights-the-silver-thread>, accessed 30 July 2014.

xiii   For a good analysis of the potential and challenges of this new European instrument, see Leininger and Richter (2012).

xiv   CEU 2012b. A number of European commissioners have a human rights role with, in some cases, large budgets to deal with neighbourhood policy, enlargement or immigration. The External Action Service has more than 150 delegations internationally to conduct the EU's foreign policy, including its human rights policy. A number of member states are extremely active on human rights through their own embassies, missions and foreign policy establishments.

xv   For an overview of the work of EUJUST LEX-Iraq mission, see Christova (2013), pp. 424–39.

xvi   For a good analysis on this subject, see Pouligny (2004).