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**Sticks, carrots and great expectations:
Human rights conditionality and Turkey's
path towards membership of the European
Union**

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Main conclusions:

1. The European Union's conditionality policy towards Ankara – having stirred the Turkish government to embark on a massive project to reform its human rights regime – has nonetheless been marked by a number of deficiencies and inconsistencies. Among these we can note:
 - a lack of credible material commitment to Turkish accession;
 - imprecisely defined criteria for evaluation;
 - the lack of a comprehensive definition of human rights at the EU level, especially in the framework of the European Union's enlargement policy;
 - vulnerability to accusations of double standards;
 - the diffusion of mixed signals;
 - the threat of politicisation of the human rights criteria – whether in the context of an evaluation, a decision to open accession negotiations, or a decision to admit new members.
2. The conditionality relationship, to that effect, has not been living up to its full potential and, at the same time, has been fuelling a feeling of resentment and suspicion among most Turks.
3. Although the decision to open negotiations with Turkey – a qualitative leap in the conditionality relationship – will do much to remedy this situation, Europe's musings about an alternative to full membership still threaten to undermine the Turkish reform effort in the long run.

I. Introduction

The lack of European Union leverage in high-profile international politics – be it in the prelude to the war in Iraq or in the Israeli-Palestinian conflict – has made it evident that enlargement, or at least the promise thereof, remains by far the most powerful foreign policy instrument that the EU has as its disposal. The extent to which the Union is capable of procuring fundamental policy changes among those states that aspire to become its members is indeed immense: the gross magnitude of legal reform in the Turkish human rights regime is a case in point.

In analysing the mechanisms through which the EU has tried to promote human rights change in Turkey and by evaluating the scale of reforms undertaken, the present paper constitutes an attempt to capture the dynamic – and the shortcomings – of human rights conditionality in the relationship between the European Union and its most 'difficult' candidate state.*

* The present paper has been written on the basis of a Master's thesis (under the same title) submitted by the author to the College of Europe in May 2004.

II. Human rights conditionality: the theoretical framework

In order to gain an understanding of the role of human rights conditionality in the EU's policy towards Turkey, we must first define it. In the broadest of terms, conditionality can be understood as an instrument, which entails "the linking, by a state or international organisation, of benefits desired by another state to the fulfilment of certain conditions."¹ Conditionality, by its very nature, involves a relationship between two (or more) unequal partners, the *actor* and the *recipient*: the first elaborates particular conditions whilst the second is charged with meeting them.²

Taking the lead from Fierro, we can identify two pairs of conditionality types. *Ex post* conditionality, the most commonly encountered manifestation of conditionality, refers to a situation where conditions appear once the parties have concluded a treaty, agreement or any other contractual relationship.³ A typical example is the so-called 'human rights clause' found in the body of most trade-and-cooperation agreements concluded by the EU/EC with third countries. When specified as an essential part of an agreement – which has been standard practice since 1995 – the clause provides the requisite legal grounds for one party to suspend the agreement on the basis of [systematic] human rights violations by the other.

Ex ante conditionality, on the other hand, is present where certain conditions or criteria, usually found in documents which bear the hallmark of soft law, are meant to be fulfilled *before* an agreement is concluded – this usually renders the conditions themselves more political than legal.⁴ Though less widespread than *ex post* conditionality, *ex ante* conditionality oftentimes proves the more effective of the two: a case-in-point, to be discussed in this paper, is the Copenhagen criteria for accession to the European Union.

Positive conditionality, whose definition elaborates the meaning and spirit of *ex ante* conditionality, involves the actor country's promise of benefits – development aid, international recognition, commercial links, etc. – which are to be distributed when the recipient country meets the stipulated conditions.⁵ From the vantage point of the conditionality recipient, positive conditionality is effective only when the incentives to comply are (a) greater (in absolute terms) than the cost of adjustment and (b) tantamount to real, tangible benefits. With this in mind, the prime instrument which positive conditionality has at its disposal is, for the sake of simplicity, often called the 'carrot.' Conversely, negative conditionality – expressed regardless of whether or not the actor and recipient are locked into a contractual relationship – involves "the reduction or suspension of benefits should the recipient not comply with stated conditions."⁶ To that end, it relies on the leverage of the 'stick.' Inevitably confrontational, reactive, punitive,

¹ Smith, Karen E. "The Evolution and Application of EU Membership Conditionality" in Cremona, Marise, ed. *The Enlargement of the European Union*. Oxford, Oxford University, 2003, p. 108

² Fierro, Elena. *The EU's Approach to Human Rights Conditionality in Practice*. The Hague, Martinus Nijhoff, 2003, p. 98

³ See: Fierro.

⁴ Fierro, p. 98

⁵ *Ibid.*, p. 100

⁶ *Ibid.*, p. 100

ad hoc, and often diplomatically suicidal, negative conditionality is regularly less effective than its positive variant: widely publicised examples of its failures include US sanctions against Cuba, Iraq or Iran.

Seeing as how the present analysis of EU-Turkey relations will rely primarily on reference to the theoretical framework of *positive* or *ex ante* conditionality (the two names being used interchangeably hereafter), it would be worth our while to expand on its definition and interpretation. It is worth noting that inasmuch as the United States tends to rely on negative conditionality instruments (sanctions) in its foreign policy, the European Union tends to take the opposite approach in assuming that positive or *ex ante* conditionality – stripped of explicit “big power” domination of the conditionality recipient – will encourage reform more successfully. Seeing as how positive conditionality constitutes a fundamental element of the EU’s identity as a global actor in the area of human rights, development and democracy promotion, it is, parenthetically speaking, disappointing to see that “positive conditionality theory” is not yet fully elaborated in the literature on EU foreign policy.

Any *ex ante* conditionality relationship, in order for it to exist and to develop, must be perceived by all actors involved as a mutually advantageous arrangement: the costs-and-benefits structure must be aligned to the interests of both the conditionality actor and the conditionality recipient. Naturally, in the case of the conditionality recipient, benefits must be seen to outweigh the domestic political and economic costs of compliance and convergence.⁷ When they do not, the conditionality relationship will not take shape. To cite an example: for a regime like Cuba, which already enjoys trade relations with European member states, the prospect of a trade and co-operation agreement with the EU is made conditional on Havana’s improvement of its democratic and human rights record; however, the benefits of any such agreement are not high enough as to outweigh the costs and risks of democratisation (and of opening up to latent domestic opposition).

Under a strategy of ‘reinforcement by reward’, the conditionality actor withholds rewards if and when the target government fails to comply with its conditions, “but does not intervene either coercively or supportively to change the cost-benefit assessment of the target government by inflicting extra costs (reinforcement by punishment) or offering unconditional assistance (reinforcement by support).”⁸ This being said, it is evident that *ex ante* conditionality is a political tool which relies primarily on an asymmetrical relationship between the parties involved – and, as such, is innately susceptible to the application of double standards and to arbitrary imposition by the stronger partner (the conditionality actor). *Ex ante* conditionality is not entirely a one-way relationship, however: inasmuch as it may put pressure on the recipient state to meet certain criteria, it also creates pressure on the actor/donor state to become an ‘anchor’ for reform, and

⁷ Frank Schimmelfennig, Stefan Engert, Heiko Knobel. “Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey.” *JCMS* Volume 41, 2003. Number 3. p. 495–518

⁸ *Ibid.*

to maintain its commitment to grant clear incentives and to distribute benefits (or sanctions) on a proportional and impartial basis.

With all this in mind, it is the purpose of this paper to prove that in the context of EU-Turkey pre-accession relations, the reform-driving power of human rights conditionality – and the commitment to reform on the part of the conditionality recipient (Turkey) – depends to a large degree on the extent to which the conditionality actor (the Union) is willing to offer real, substantial, and precisely defined incentives and rewards for convergence. When such incentives are imprecisely defined, when conditionality is characterised by a sense of ambiguity as to the endgame, when grounds for suspicion of double standards become evident, the conditionality actor will inevitably lose credibility and leverage. As a result, a major incentive for the conditionality recipient to uphold its commitment to human rights reform – along with its capacity to incur the political costs of such reform – will be significantly reduced.

III. Methodological note

In order to put some ‘meat on the bones’ of the theory of human rights conditionality, the present paper will focus less on the specific content of the Union’s policy towards Turkey in the area of human rights, less on the content of the Turkish response – in terms of adopted legislation – and more on the quality, character and the dynamic of the conditionality-defined relationship. With this end in sight, the Union’s approach to defining human rights, its conditionality relationship with Turkey (less in the framework of the Customs Union than in the context of pre-accession) and its leverage in relation to Ankara will all be elaborated. In the second and final part of the paper (part XI and beyond), the study will focus on the particular inadequacies of the EU’s human rights conditionality approach towards Turkey and analyse their real and potential effects on the Union’s ‘anchor capacity.’

Sources used for research on the issue at hand include, for the most part: books and articles on conditionality theory, human rights, EU-Turkey relations, and European foreign policy; official documents and reports published by Union institutions, NGOs, and the Turkish government; press excerpts; the author’s travel through the Turkish Southeast; and finally, interviews held with officials from the Commission, Turkish journalists and diplomats stationed in Ankara. The time frame of the present paper is limited, albeit with some exceptions, to the period between the mid-1990’s to December 2004.

IV. Identifying the Union’s understanding of human rights

Although Article 6(1) of the TEU (as amended by the Treaty of Amsterdam) speaks of the respect for human rights as one of the principles upon which the Union is founded, the definition of ‘human rights’ at the EU level remains incomplete.

Although the Union sometimes cites specific human rights in its official documents⁹ and agreements,¹⁰ although its Member States recognise all human rights included within the framework of the UN Charter and the OSCE, and although the relationship between human rights embedded in the EU members' constitutional foundations and the overall system of human rights protection in the Union has been underlined by the case law of the ECJ (*Nold*, *ERT*, *Opinion 2/94*, etc.), the Union's understanding or definition of the concept of "human rights" has never been elaborated exhaustively in any legally binding text.

On numerous occasions, the EU has mentioned the Universal Declaration on Human Rights as one of the sources from which its understanding of human rights is to be derived. On some, as in the Council's 1999 regulation on development co-operation, it has referred to the general principles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹¹ However, notwithstanding such references, the Union is not a party to any international human rights treaty. Despite its Article 6(2) TEU pledge to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the EU still has not acceded to the Convention. Furthermore, its Charter of Fundamental Rights remains a legally non-binding declaratory text.

Given the above, the Union's understanding and definition of "human rights" – unlike its understanding of "rule of law" (spelled out in the Cotonou Agreement and a 1998 Commission communication on democratisation and the rule of law) – falls far short of providing legal certainty. The scope for interpreting the EU's references to human rights, whether in its trade and co-operation agreements or in the 1993 Copenhagen conclusions, remains wide.

V. Turkey, the EU and *ex post* human rights conditionality: The Customs Union

From a legal perspective, the strength of the European Union's *ex post* conditionality in its relations with Turkey is limited. Unlike the Union's association agreements with most CEECs (other than Poland and Hungary), neither the 1964 Association Agreement with Turkey, nor the 1995 Customs Union include a human rights clause, on the basis of which an agreement could be suspended in case of human rights violations.¹² That the

⁹ See: *Commission communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries*, COM(96)216 Final, Annex 2.

<http://europa.eu.int>

¹⁰ See: Article 9 of the Cotonou Agreement

¹¹ Council Regulation (EC) No. 975/1999 of 29 April 1999.

¹² Technically, the lack of such a clause may fall short of completely precluding the suspension of the agreement (in whole or in part) by the Union on the basis of human rights abuses in Turkey. In *Demirel*, the ECJ described association agreements as creating "special privileged links with a non-member country which must, at least to a certain extent, take part in the Community system." To the extent that respect for human rights constitutes an important element of the Community system, and by reference to Article 310 (which provides the legal grounds for concluding agreements with third countries), the Community is legally competent to take measures in the area of human rights in its relations with associated countries – even without a relevant clause in the agreement.

1964 agreement should not have such a clause is perfectly understandable: it was only in 1989 – within the 4th Lomé Convention – that the ‘human rights clause’ first appeared in a trade-and-cooperation agreement. It began to appear *regularly* in such agreements only as of 1995.

The case with the 1995 accord is slightly more complicated. Some claim that the Customs Union Agreement should not have included a human rights clause for technical legal reasons: it was, and is, after all, simply a protocol, a prolongation of the original Association Agreement. Others, meanwhile, tend to argue that the absence of such a clause may have been the result of a trade-off between the Union and the Turkish government: according to this theory, Brussels ceased in its demands to insert the clause in exchange for an indefinite postponement of Ankara’s ambitions to join the Union.¹³

Either which way, the fact that neither the Commission nor the Council managed to secure so much as a formal promise of progress on human rights from the Turkish authorities in the run up to the signing of the Customs Union did not prevent the European Parliament from trying to emerge as a major conditionality player in EU-Turkish relations.

Through the introduction of the assent procedure in the 1987 Single European Act, the Parliament had been granted the legal means necessary to exercise significant leverage in the association relationship between Turkey and the EU. It did not wait long to make its presence felt. As early as 1987, immediately on the heels of Turkey’s official request for membership – a request turned down by the Council two years later – the EP declared that respect for minorities ought to be a prerequisite for Turkey’s accession. Soon thereafter, in response to the arrest of a number of opposition politicians, it delayed its assent to two protocols concluded within the association agreement.

With negotiations on the Customs Union agreement in full swing, the EP stepped into the Turkish-EU political arena in September 1994 by passing a resolution strongly condemning Turkey’s decision to suspend the parliamentary immunity of several Kurdish MPs. To emphasise its profile as a power broker to be reckoned with inside the EU institutional framework, the EP pointed out that such practices, if perpetrated repeatedly, would threaten any pending agreement on the Customs Union.

“The parliamentary prelude to the actual work on the Customs Union dossier,” as Krauss describes it, “was quite dramatic.”¹⁴ Any and all discussion on whether or not to include a human rights clause was superseded by “a heated debate on whether to give assent to the Customs Union in light of Turkey’s human rights record.”¹⁵ When the same Kurdish MPs whose arrest had already provoked such indignation in September were sentenced to jail in December – in the middle of the last round of negotiations – the EP

¹³ Bulterman, Mielle. *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* Intersentia, Oxford, 2001.

¹⁴ Krauss, Stefan. “The European Parliament in EU External Relations: The Customs Union with Turkey” in *European Foreign Affairs Review*, vol. 5, 2000, no. 2 (Summer 2000), p. 215-237

¹⁵ Fierro, p. 153.

responded immediately by suspending its cooperation with Turkey in the mixed parliamentary committee and requested the Council to suspend negotiations on the Customs Union.¹⁶ Parliament's capacity to reduce the entire Custom Union project to rubble was made clear.

In an effort to appease the Parliament – and as evidence of the fact that the EP was putting conditionality politics to effective use – the Turkish National Assembly, meeting on July 23rd 1995, approved a set of constitutional reforms called the 'package for democracy.' Despite being celebrated as a 'victory of laicism' by the Turkish press, the reforms – whose declared aim was to bolster the role of civil society in Turkish politics – were "piecemeal change rather than the comprehensive overhaul of the legal mechanisms protecting individual rights as had been requested by the EP."¹⁷ Nonetheless, having been the first constitutional reforms carried out by the parliament rather than the army, they did leave quite a bit of room for hope.¹⁸

Though with a heavy heart, and under immense pressure from the Member States, the Parliament assented to the Customs Union by 343 votes to 149. In its accompanying resolution on the human rights situation in Turkey, however, the Parliament emphasised that it was linking its assent to several conditions to be met by Ankara, namely:

- to the application of human rights standards comparable to those of Europe;
- to the improvement of democratic standards by means of constitutional reform;
- to a non-violent, non-military solution of the Kurdish question by means of a recognition of the Kurds as a minority in the Western sense of the word;
- to a solution to the Cyprus problem as a basis for improving its relations with Greece and for reducing the potential for a crisis¹⁹

Of the four conditions, none was to be fulfilled. Human rights abuses in Turkey continued unabated. To add insult to injury, the summer of 1996 saw an eruption of violence in Cyprus, along with Turkish plans to establish a security corridor in Northern Iraq. Of course, there was no way for the Parliament to revoke its decision on the Customs Union. There was, however, a way for the EP to put its budgetary powers to use during the implementation stage of the agreement. With the passage of a September 1996 resolution, which claimed that the political base for assent to the Customs Union agreement had eroded, and a subsequent decision to block most credits allocated to Turkey by the EU budget, this is precisely what it did.²⁰

Although the above example points to the fact that *ex post* human rights conditionality is not altogether absent from the relationship between Brussels and Ankara, it must be said that its real or speculative potential is far weaker and far less visible than the goal-

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ European Parliament, Resolution on the Human Rights Situation in Turkey, 13 December 1995

²⁰ See: Krauss

intensive dynamic of *ex ante* conditionality, as created by the carrot of EU membership.²¹

VI. Turkey, the EU and *ex ante* human rights conditionality: The Copenhagen criteria

Ex ante conditionality for accession into the European Union, founded upon the notion that the introduction of far-reaching conditions for EU membership would induce would-be member states to bring their policies into line with Union standards, found a tangible expression in the conclusions of the 1993 Copenhagen European Council. The so-called Copenhagen criteria – which were later to inspire the content of Article 6 of the Amsterdam Treaty – included, among other things, the provision that “membership [of the Union] requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, *human rights* and respect for and protection of minorities.”²² The 1997 Luxembourg Council elaborated this formula further by stating that compliance with the Copenhagen political criteria is a prerequisite not only for membership but also for the opening of any accession negotiations.²³

From a legal standpoint, and in line with the reasoning of the Commission, the human rights criteria do not impose new obligations upon the prospective member states, nor do not seek to establish new standards in the international protection of human rights. Instead, much like the human rights clauses included in the Union’s agreements with third countries, they are understood to reaffirm what the Council calls “the existing commitments which, as general international law, already bind all states,” and which, owing to their universality and indivisibility, cannot justify derogation on the grounds of cultural relativism.²⁴ In other words, the Copenhagen human rights criteria are defined by the Union as a means of reiterating the candidate states’ responsibility to respect and promote universal values – a responsibility not towards the Union as such but towards the entire international community.²⁵

The importance attached by the Union to the fulfilment of the human rights criteria, whether in regard to Turkey or to the other candidates for accession, is fundamental. To that end, the issue of human rights protection (or rather, the lack thereof) has proven to

²¹ The potential for *ex post* or negative human rights conditionality in EU-Turkey relations lies also in the Union’s capacity to impose unilateral sanctions – sanctions not backed by a UN Security Council resolution – against Ankara in case of systematic human rights violations. Such sanctions, agreed to by the Council in the framework of the CFSP by unanimity (as a common position) and adopted (also by the Council – to implement the parts of the common position that fall within the competence of the Community) by qualified majority on the basis of Article 301 EC, were imposed by the Union against Serbia in 1998 on the heels of violence in Kosovo.

²² European Council, Conclusions of the Copenhagen European Council of 21 and 22 June 1993.
<http://europa.eu.int>

²³ European Council, *Conclusions of the Luxembourg European Council of December 1997*.
<http://europa.eu.int>

²⁴ Council of the European Union, *1999 European Union Annual Report on Human Rights*.
<http://europa.eu.int>

²⁵ This, parenthetically, does not explain – again, from a legal standpoint – why the conditions should include ancillary elements such as “a market economy.”

be one of the biggest hurdles in the way of Turkey's campaign for accession to the EU. Although the European Union is known to adjust its commitment to human rights conditionality with respect to third countries on the basis of strategic and economic interests – as it has done repeatedly with respect to Russia or China – it is far less willing and able to do so in the context of the enlargement project. The fulfilment of the political criteria is a *sine qua non* condition for membership; whether the systems for evaluating any such fulfilment are flawless or not is still another matter.

Given the fact that the Conclusions of the Copenhagen European Council do not expand on the concept of human rights – and seeing as how the definition of human rights is not adequately elaborated in the entire body of EU law – it is helpful to look to the Commission's *Regular Reports on Turkey's progress towards accession* to find some indication of the criteria used by the Union to measure Ankara's performance. In the Reports' sections on "human rights and the protection of minorities," the following subheadings identify the areas to which Brussels looks in weighing up Turkey's human rights record: civil and political rights; the death penalty; torture and ill treatment; pre-trial detention; prison conditions; freedom of expression; freedom of the media; freedom of association and assembly; minority rights; freedom of religion; cultural rights; use of languages other than Turkish; economic, social and cultural rights; the right to equal opportunity; the role of trade unions; children's rights and child labour; and finally, the state of ratification of the ECHR, of its protocols and of international human rights conventions.²⁶

As the Regular Reports, especially prior to the year 2000, contain little in the way of evaluation – if anything, they are broadly descriptive rather than analytical – one must resort to analysing the *tone* of conditionality contained within them for any indication as to the level of confidence which the EU places in particular reforms introduced by Ankara. Even so, blurrily drafted phrases like "gives cause for concern," "constitutes another important step forward," "remains worrying," or "represents an encouraging measure" give few clues as to exactly how the Commission is assessing developments in Turkey – or as to what sort of changes it is expecting. Although the quality of the Regular Reports in this particular respect has steadily and significantly improved ever since the December 11th 1999 Helsinki decision to accept Turkey as a candidate for accession, the practice is still for the Commission's conditionality to be reactive, rather than proactive or prescriptive.

Though often the most quoted, the Commission Reports are only one among a number of modes of communication between Ankara and Brussels on human rights and other issues. The *Accession Partnership Documents* (adopted by the Council in 2001 and 2003) elaborate the Union's priority areas of concern, as identified in the Regular Reports, in an attempt to provide the Turkish government with a single framework for further progress. Each time they are drafted, the APDs elicit Ankara's publication of a *National Programme for the Adoption of the Acquis*, a short- to mid-term strategy for addressing the issues raised by the Union.

²⁶ European Commission, *Regular reports from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

The diffusion of information also takes place by way of EP and Council reports, regular meetings between the Turkish authorities and the EU Troika, ad-hoc communications ranging from normal correspondence to *démarches* or *notes verbales*, exchanges between Turkish and European leaders, CFSP channels, and contacts within the framework of the United Nations.²⁷ On some occasions, so-called diplomatic gestures are made – *vide* the silent attendance of EC Representation officials or EP representatives to the trial of Layla Zana, a Kurdish human rights activist and ex-parliamentary deputy sentenced to 15 years in prison for ‘belonging to a rebel group.’ At the level of higher civil servants, there are regular Political Dialogue meetings. Additionally, the EU and Turkey exchange information and views regarding the human rights criteria in the framework of the Association Council and the Association Committee. As a Commission official reports, it was decided during the Association Committee meetings in 2003 to organise ‘seminars’ in which selected experts from the EU countries could introduce Turkish officials to the solutions used in their countries in areas such as, for example, freedom of religion.²⁸ Additionally, since January 2004 the EC Representation in Ankara holds informal meetings on a number of issues, including human rights, with the Turkish authorities – namely, with members of the Secretariat-General for EU Affairs and some officials from related ministries. Occasionally (that is to say, when asked), the Commission comments on draft texts or commissioned external experts to support the elaboration of texts. This, however, cannot be described as the usual practice.²⁹

The Commission, for its part, keeps track of developments in the area of human rights in Turkey by drawing from all types of sources, from government reports (or government answers to the Commission’s queries), to press sources, academic sources, Council of Europe and OSCE reports, and NGO sources (international, national or local).³⁰ In all likelihood, it also relies on confidential regular reports drafted by the Member States’ embassies in Ankara on developments relating to Turkey’s human rights record.³¹

VII. EU leverage: Turkey and the carrot of enlargement

In order for a legitimate *ex ante* conditionality relationship to have taken root between itself and the Union, the Turkish government must have realised, at one point or another, that the benefits of EU membership significantly outweigh the political and economic

²⁷ During the 54th meeting of the UN Commission on Human Rights, for example, the European Union stepped up the pressure on Turkey by underlining its dubious record on torture, extra-judicial killings and involuntary disappearances.

²⁸ According to the 2003 Commission Report, during a July 2003 seminar the experts concluded “that legal reforms adopted by the Turkish government so far were insufficient, that legislation in this area should be revised on the basis of the generally accepted principles of non discrimination, equality and cooperation, and that an overhaul of the laws on associations and foundations based on EU standards, and taking into account the case law of the ECHR, was necessary.” See: European Commission, *2003 Regular report from the Commission on Turkey’s progress towards accession*. <http://europa.eu.int/comm/enlargement>

²⁹ Letter from an EC official dealing with EU-Turkey relations on a daily basis

³⁰ *Ibid.*

³¹ Information gathered from contacts with European diplomats stationed in Ankara.

costs of compliance and convergence – this much we can gather from Fierro's theoretical framework. What remains to be addressed, however, is the *weight* attached by the Turkish government to the benefits of prospective accession:³² it is this, after all, which is fundamental to our understanding of the strength of the Union's *ex ante* conditionality.

Over the years, Turkish politicians have made it a point to stress that although Turkey desires EU membership, it could just as well prosper without it. "If the EU doesn't take the decision we want," Prime Minister Erdogan said earlier this year, "Turkey will not have any difficulties in finding a new course to follow thanks to its big potential."³³ In believing their country to be more of a "special case" than any of the CEEC accession states, some Turkish officials – especially within the military corps – remain convinced "that the EU needs Turkey as much as Turkey needs EU membership."³⁴ This, parenthetically speaking, seems to be characteristic of the attitude of the bigger candidate states, as such proclamations were oftentimes heard in Poland prior to its accession. That they will be heard even more regularly among the Turks – the inheritors of a proud imperial tradition – is inevitable. This does not mean that they should be dismissed altogether. After all, Turkey is an invaluable security asset for Europe; moreover, with the Customs Union completed in 1995, it already enjoys some of the economic benefits of EU membership. To that effect, claims Tank, it would appear difficult for a Brussels-defined *ex ante* conditionality relationship to steer Ankara towards a change of its human rights regime.³⁵

Political declarations aside, what is needed to gauge the weight of Turkey's interest in acceding to the European Union – and what is essential to our understanding of Brussels' leverage with Ankara – is at least a cursory reference to the theory of material bargaining and social influence mechanisms.³⁶

³² Significantly, the present government does not stand to reap the political benefits of accession, which will certainly not occur before 2015, if ever. To that end, the notion of the 'endgame' for the AKP is limited to the opening of negotiations and the accompanying 'cementation' of Turkey's European vocation.

³³ The Republic of Cyprus Press and Information Office Server, May 5 2004.

³⁴ Tank, Pinar. "Turkey as a "Special Case" for the EU : Will the Generals Retreat from Politics?" in *Security Dialogue*, vol. 32, 2001, no. 2 (June 2001), p. 217-230

³⁵ A study of the Turkish elites' conviction "that the EU needs Turkey more than Turkey needs the EU" – and of the scale to which such a conviction impairs the strength of the Union's conditionality – would make for immensely interesting reading. For the most part, however, the issue lies outside the scope of the present paper.

³⁶ "According to the *material bargaining mechanism*, target countries are offered material or other tangible political rewards in return for compliance – such as financial assistance, market access, technical expertise and participation in international decision-making. Political actors in the target countries then calculate whether the rewards offered by the international organisation are worth the costs of adaptation. If the welfare or power balance is positive, they comply. [...] In contrast, the rewards offered through the *social influence mechanism* are social – such as international recognition and legitimacy, a high status, or a positive image. Social influence is only effective inside the actor's in-group. Thus, the effectiveness of EU social influence will mainly depend on how much non-member actors identify themselves with the EU community. Only actors who regard the EU as their aspiration group strive to be recognised as part of the 'European family of democratic nations' and find it painful to be shamed and shunned."

See: Frank Schimmelfennig, Stefan Engert, Heiko Knobel.

With regard to the material bargaining mechanism: as most power players in Ankara realise, upon joining the EU, Turkey – with its tremendous economic capacity – would be well on its way to becoming a powerful regional leader among all of the Central Asian and Turkic republics.³⁷ Given its extremely low per capita GDP and an agricultural sector that provides work for 40% of its total population, Turkey's net gains under the Union's Common Agricultural Policy and EU structural funds would be immense, nearing 30 billion euro per year. What's more, membership in the Union would help optimise Turkey's latent potential to attract significant foreign direct investment, which, at the moment, registers in at a meagre €1 billion per year.

Inevitably, accession would also ensure the consolidation of institutional and political stability. As the secularists and moderate Islamists in Turkey hope and expect, membership would help deter the radical Islamist threat both from the interior of the country and from the Turkish near-abroad. Furthermore, Turkey's oft-troubled relations with its proximate neighbours would certainly improve. As well-known *Milliyet* journalist Kadri Gursel points out, EU membership – or even the definite perspective of membership – could go a long way in helping solve the Kurdish conflict and in preserving Turkey's territorial integrity. "Turkey's bid for the EU opens new horizons for the Kurds," says Gursel. "It can help them accept Turkey." The EU, with its schemes for minority protection and with its focus on regional development "can be an umbrella for the Turkish Kurds. They can be proud Turkish citizens with a strongly pronounced Kurdish cultural identity."³⁸ It is for this reason, perhaps, that an overwhelming majority of Kurds support Turkish entry into the EU.

To the extent that the material bargaining mechanism explains some of Turkey's essential interest in joining the EU, the social influence mechanism helps clarify the sort of psychological impulse that underpins Turkey's drive for accession to the EU. For most Turks, membership of the Union is a matter of recognition, of putting an end to what Melakopides calls Turkey's "perennial anxiety about identity and belonging" – in other words, of fulfilling Kemal Ataturk's lifelong mission to secure his country's acceptance in the realm of European civilisation.³⁹

With regard to the above examples, it comes as no surprise, first, that approximately 70% of the Turkish population supports membership in the Union and, second, that all major parties (with the exception of the nationalist MHP), even those previously considered "traditionally" Eurosceptic, now support accession. By reference to the social influence and material bargaining mechanisms, this much turns out to be clear: that membership in the Union, already seen as a fundamental goal of Turkish foreign policy, constitutes nothing short of a existential state interest.

³⁷ Melakopides, Costas. "On the Mediterranean 'Fuzzy Edge' of the EU: The Candidacies of Malta, Cyprus and Turkey" in *Journal of European Integration*, vol. 22, 2000, no. 3, p. 299-334

³⁸ Author's interview with Kadri Gursel, August 2003.

³⁹ See: Melakopides

VIII. Problems in assessing the effects of *ex ante* human rights conditionality

To quantify the influence of European conditions (be they demands, suggestions or norms) on the Turkish government – or, for that matter, on the Turkish military or of the civil administration as a whole – is impossible. After all, can one say with utmost certainty that the recent reforms in the Turkish human rights regime were exclusively a response to the carrot of enlargement, to the Helsinki conclusions, or to the prospect of a positive opinion on beginning negotiations in 2004? Could they not have been, at least to some extent, a reaction to the increased sense of security, which accompanied the end of violence in the Southeast and the lifting of the state of emergency in Sirnak and Diyarbakir? Could they not have been, for that matter, a sign of the Turkish government's supposed vow "to go ahead with its program, not because this was vital for EU membership, but because the Turkish people deserved it?"⁴⁰

To some degree, yes. As Smith sees it, "the influence of external pressure on indigenous dynamics within states is not and can never be overwhelming."⁴¹ This much should be said, however (and even this much is acknowledged by the Turkish government): that although the recent changes in the area of human rights in Turkey were indeed a result of numerous factors, they could *not* have taken place without the presence of the EU's human rights conditionality.⁴² The power of conditionality, after all, lies not only in the extent to which it helps *compel* a recipient country to undertake a policy change that it would not have otherwise undertaken – but also in its capacity to *secure* and *consolidate* behaviour that the recipient country would have adopted anyway.⁴³

Though correlating the behaviour of the Turkish government to the conditions set forth by the EU may inevitably be difficult, we must nonetheless seek to find a credible framework for evaluating the successes and failures of EU-imposed human rights conditionality towards Ankara. With this end in sight, it must be reiterated that our evaluation should focus squarely on the nature, function and dynamic of the Brussels-Ankara conditionality relationship, *as determined by the action of EU actors*, *ceteris paribus*. Only those variables inherently and directly related to the quality of the EU's conditionality should be taken into account.

IX. Human rights reform in Turkey (1999-2004)

The scale of legal reforms undertaken by Turkish governments since 1999 – and particularly by the AKP government since 2002 – has been, by all accounts, remarkable.

⁴⁰ With this in mind, Recep Erdogan even dubbed the Copenhagen criteria the "Ankara criteria." See: Gunduz Zuhail, Yesilyurt. "Which Europe for Turkey?" in *Internationale Politik Transatlantic Edition*, vol. 4, 2003, no. 2 (Summer 2003), p. 48-52

⁴¹ Smith, Karen E. "The Evolution and Application of EU Membership Conditionality" in Cremona, Marise ed. *The Enlargement of the European Union*. Oxford, Oxford University, 2003.

⁴² Duner, Bertil and Edward Deverell. *Too Bumpy a Road? Turkey, the European Union and Human Rights*. Stockholm, The Swedish Institute of International Affairs, 2000.

⁴³ Fierro, p 97.

As a comparison of Amnesty International's (or the European Commission's) 1999 and 2004 reports reveals, the improvement in Turkey's overall human rights record has also been impressive. Largely on account of this, in 2003, for the first time ever, the Commission's *Regular report on Turkey's progress towards accession* fell short of declaring that "Turkey did not meet the Copenhagen political criteria." "Overall," its authors concluded, "in the past 12 months Turkey has made further impressive legislative efforts which constitute significant progress towards achieving compliance with the Copenhagen political criteria."⁴⁴ By 2004, the Commission was ready to state that Turkey had "sufficiently fulfilled the political criteria" and to recommend that accession negotiations be opened.

Though the legislative reforms passed by the National Assembly under the eight so-called Harmonisation Packages (adopted between February 2002 and July 2004), the two major constitutional reforms (passed in 2001 and 2004) and the new Civil and Penal Codes (which will enter into force in April 2005) are by far too many to mention, the following chart underlines the most important changes in the Turkish human rights regime.

- the abolition of the death penalty in all circumstances (under Protocol No. 13 to the ECHR) and the eradication of all remaining death penalty provisions in the Constitution;
- the introduction of life imprisonment for crimes against life that are motivated by "tradition and customs" (to be applied, as it appears, in cases of so-called "honour killings") under the Penal Code;
- alignment of the judiciary with European standards; the reduction of the jurisdiction of the State Security Courts;
- the inclusion in domestic legislation of the principle that evidence obtained through torture would be inadmissible in court;
- the restriction of the role of the National Security Council to that of an advisory body;
- the abolition of the state of emergency in the South-east;
- the ban on discrimination on the basis of race, religion, gender, language, ethnicity, philosophical belief, or religion in school text books;
- provisions on the usage of the mother tongue in Turkey;
- constitutional amendments enshrining the supremacy of international and European treaties ratified by Turkey in the area of fundamental freedoms over internal legislation;
- amendments strengthening gender equality;
- amendments to bring legislation in line with the rulings of the European Court of Human Rights;
- amendments to narrow the scope of judicial interpretation of 'separatist propaganda' and 'acts insulting the state';
- laws broadening freedom of the press;
- laws aimed to strengthen the prevention of, and the prosecution against, acts of torture and other cruel, inhuman or degrading treatment;
- laws limiting the possibility for parties to be dissolved;
- and provisions for the compensation of torture victims and the implication of personal responsibility of State officers involved in such crimes.

Compiled from, among others: Prime Ministry of Turkey, Secretariat General for EU Affairs, *Analyses of the harmonisation packages approved by the Turkish Grand National Assembly*, <http://www.mfa.gov.tr>; and European Commission, *2004 Regular report from the Commission on Turkey's progress towards accession*, <http://europa.eu.int/comm/enlargement>

⁴⁴ European Commission, *2004 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

Perhaps more significant than the sheer scale of these legislative acts is the number of sensitive areas they happen to cover. After all, many reforms in the area of democratisation and human & minority rights – such as downgrading the role of the National Security Council and making legal provisions for public use of the Kurdish language – entail “greater risks to the territorial integrity [and] the secular foundations of the Republic, and to some of the institutions established by the Turkish constitution than is generally appreciated in Western Europe.”⁴⁵ What’s more, some are politically hazardous: for instance, a great number of Turks have found it discomfoting to see their government cave in to the EU’s demands to suspend the death penalty against Abdullah Ocalan, a man at least partially responsible for a conflict that has claimed more than 30,000 lives.

Regardless of its recent success in pushing through the Harmonisation Packages, the Turkish government, according to the 2004 Commission Report, must still face up to a plethora of shortcomings in its human rights regime. The following is an abridged summary of the gravest criticism levelled by the Commission against the Turkish legal regime in the area of human rights:

- the Turkish government has not signed the Framework Convention for the Protection of National Minorities or the Revised European Social Charter;
- although the Constitution has been amended to enable Turkey to accede to the Statute of the International Criminal Court, the government has not yet done so;
- Turkey is yet to implement a significant number of decisions of the European Court of Human Rights, especially in the area of freedom of expression (it has allowed, however, for the re-trials of Kurdish human rights activist Leyla Zana and of a number of other Party for Democracy politicians – accused of being members of a terrorist organisation – following judgements of the Court).⁴⁶ On the whole, the Court found that Turkey had violated the European Convention for Human Rights on 132 occasions;
- provisions enabling retrial still do not apply to cases that were pending before the Court prior to 4 February 2003;
- Additional Protocol No.12 to the ECHR on the general prohibition of discrimination by public authorities has not been ratified;
- despite the adoption of a new Labour Law in 2003, Turkey still lacks legislation against discrimination on the basis of all prohibited grounds, such as racial and ethnic origin, religion or belief, age, sexual orientation and disability;
- the current Law on Associations restricts the establishment of an association on the basis of race, ethnicity, religion, sect, region or any other minority group;
- endowed with a 10% threshold for entry into Parliament, the electoral system makes it difficult for minorities to be represented in the National Assembly;

⁴⁵ Brewin, Christopher. “EU Human Rights Policy in The Enlargement Process,” speech delivered at the Liberal Düşünce Topluluğu (Turkish Association for Liberal Thinking), 7 August 2003.

⁴⁶ Having passed a law ordering the retrial of any cases judged to be unfair by the European Court of Human Rights, the Turkish government decided to re-open the Leyla Zana trial on March 28th 2003 in a clear a move to appease European criticism of its human rights record. However, as the Commission was to report later on in the year, the proceedings before the State Security Court did not seem to comply with the provisions of the ECHR on fair trial, particularly in relation to the rights of the defence (European Commission, *2003 Regular report from the Commission on Turkey’s progress towards accession*). An EP delegation which attended the re-trial attested that, in essence, it was no different than the original one in 1994. Predictably enough, on April 24th 2004 the military-dominated Security Court upheld its original verdict of a 15-year prison sentence. Less than two months later, however – when it became evident that the retrial was marred by procedural blunders – the Turkish Court of Cessation ordered the release of Ms. Zana and of three other political prisoners, pending further legal action. On July 14th the Court overruled the March judgement of the State Security Court. A retrial was subsequently ordered.

- a significant number of cases where non-violent expression of opinion is being prosecuted and punished still exist. Moreover when convictions are overturned in line with the amended legislation, full legal redress, such as the restoration of civil and political rights and the deletion of criminal records, is not always guaranteed;
- repealed or amended articles of the Penal Code and Anti-Terror Law, as well as other provisions, are still used to prosecute and convict those who exercise their freedom of expression;
- revised Article 159 of the Penal Code (“insulting the state and the state institutions”) continues to be used to prosecute those who criticise the state institutions in a way that is not in line with the approach of the European Court of Human Rights; Article 159 and a provision criminalising religious personnel for criticising the state, appear virtually unaltered in the new Code;
- the regularity with which cases are filed against members of the press – on the basis of Articles 159, 169 (“adding and abetting terrorist organizations”) and 312 (“incitement to racial, ethnic or religious enmity”) of the Penal Code – represents a significant deterrent to freedom of expression through the media;
- journalists, writers and publishers continue to be sentenced for reasons that contravene the standards of the ECHR – for example, a journalist was sent to prison in May 2004 on the basis of the 1951 Law on Crimes Against Atatürk;
- a new regulation (published in January 2004) establishing the possibility for private national television and radio channels, in addition to the state broadcaster TRT, to broadcast in languages other than Turkish is still rather restrictive, setting narrow time limits for broadcasts in other languages (for television, four hours per week, not exceeding 45 minutes per day and for radio, five hours per week, not exceeding 60 minutes per day). The new regulation does, however, remove the quaint requirement that television presenters wear ‘modern’ clothing;
- restrictions imposed on broadcasters, including the requirement to respect the principle of “the indivisible unity of the state”, remain unchanged;
- according to a May 2004 circular – issued by the Directorate General for Foundations – all foundations, including religious foundations, are obliged to seek permission prior to submitting applications to participate in projects funded by international organisations, including the European Commission;
- non-Muslim religious communities continue to lack legal personality and are subject to a ban on the training of non-Muslim clergy; a number of them – including the Catholic and Protestant communities – are not entitled to establish foundations and are thus deprived of the right to register, acquire and dispose of property; those allowed to establish foundations face interference by the Directorate General for Foundations, which is able to dissolve the foundations, seize their properties, dismiss their trustees without a judicial decision and intervene in the management of their assets and accountancy;
- not officially recognised as a religious community, Turkish Alevis often experience difficulties in opening places of worship – compulsory religious instruction in schools still fails to acknowledge non-Sunni identities;
- although the new Penal Code foresees a prison sentence for those ordering and conducting virginity tests in the absence of a court order, the consent of the woman on whom the test is to be conducted is still not required;
- Turkey has not yet accepted Article 8 of the European Social Charter on the right of employed women to the protection of maternity;
- Turkey has still not accepted Article 7 (“the right of children and young persons to protection”), Article 15 (“on the rights of disabled persons”), and Article 17 (“the right of mothers and children to social and economic protection”) of the European Social Charter;
- trade unions face restrictions on the right to organise and the right to collective bargaining, including the right to strike;
- Turkey has not yet accepted Article 5 (“right to organise”) and Article 6 (“right to bargain collectively” including the right to strike) of the European Social Charter;
- Turkey has not signed the European Charter for Regional and Minority languages;
- Turkey has not yet ratified the Additional Protocol No. 12 to the ECHR on the general prohibition of discrimination by public authorities;

- non-Muslim minorities not usually associated by the authorities with the Treaty of Lausanne, such as the Syriacs, are still not permitted to establish schools;
- legislation preventing Roma from entering Turkey as immigrants is still in force.

Compiled from the *2004 Regular report from the Commission on Turkey's progress towards accession*

X. Human rights reform in Turkey: implementation

As the Commission has begun pointing out in its most recent reports, the major problem with Turkish human rights reform is not so much the drafting of new legislation but its implementation, which the Commission has often referred to as “uneven.”⁴⁷ According to Mehmet Ugur, what helps undermine the implementation and the coherence of many reforms is the top-down nature of legal change and the exclusion of civil society inputs.⁴⁸ To be effective, noted the Commission in 2003, legislation passed by the National Assembly “will need to be implemented in practice by executive and judicial bodies at different levels throughout the country.”⁴⁹ It will take some time, added the authors of the 2004 Report, “before the spirit of the reforms is fully reflected in the attitudes of executive and judicial bodies, at all levels and throughout the country.”⁵⁰

Although a number of amendments have elicited the adoption of regulations or other administrative measures, a disturbing amount of secondary legislation has still not been passed: as the Reports indicate, Turkey still does not have a comprehensive strategy on legislative and administrative provisions against discrimination, nor has it adopted a clear framework addressing the main problems faced by associations. Regrettably, of the secondary laws that *have* been introduced, a number have run counter to – or circumvented – the letter and spirit of the original legislation. “In some cases,” reads the 2003 Commission Report, “executive and judicial bodies entrusted with the implementation of the political reforms relating to fundamental freedoms adopted by Parliament have narrowed the scope of these reforms by establishing restrictive conditions, hindering the objectives initially pursued.”⁵¹ The Civil Registry Law, for example, was amended in 2003 to include permission for parents to name their children “as they desire, provided that such names are considered to comply with ‘moral values’ and do not offend the public.” Additionally, all reference to ‘politically’ offensive names was dropped from the legislation. By the end of 2003, however, a circular restricting the scope of this amendment was issued by the government: the use of names including the letters ‘q,’ ‘w’ and ‘x,’ – commonly used in Kurdish – was banned.⁵²

⁴⁷ European Commission, *2004 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

⁴⁸ Ugur, Mehmet. “Testing times in EU-Turkey relations: the road to Copenhagen and beyond” in *Journal of Southern Europe and the Balkans*, vol. 5, 2003, no. 2 (August 2003), p. 165-183

⁴⁹ European Commission, *2003 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

⁵⁰ European Commission, *2004 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

⁵¹ Ibid.

⁵² Ibid.

The EU's *ex ante* human rights conditionality, according to experts, is known to engender "a problem often encountered under systems of external target-setting and monitoring: the tendency to develop new institutions and policy documents that appear to testify to action, but that may not in fact be addressing the policy problem effectively over the longer term."⁵³ The constitutional changes made by the Turkish government with regard to the makeup of the National Security Council – changes intended to curb the power of the military by means of increasing the number of civilians on the Council and reducing its role to that of an advisory body – have become a case-in-point. Truly formidable on paper, they were initially to prove limited in practice. As the 2002 Commission Report observed, "The NSC has continued to be an important factor in domestic politics. The introduction of a civilian majority of members and the limitation to an advisory role, in line with the Accession Partnership priority, do not appear to have changed the way the NSC operates in practice. Although decisions are taken by majority, opinions of its military members continue to carry great weight."⁵⁴ Making it evident that such changes make very little difference in real life, General Huseyin Kivrikoglu, Chief of the General Staff, was quoted as saying that "if they want 100 civilians as members of the National Security Council, so be it."⁵⁵

Possibly the most problematic human rights issue facing Turkey today – especially from the perspective of implementation – is the still-widespread use of torture in the country. Although legislative reform and the government's policy of zero-tolerance have led to a significant decrease in the scale of torture (the Commission has downgraded the scale of abuse from "systematic" to "very rare"), much remains to be done in the way of addressing the problem exhaustively.

According to the Commission, concerns continue to be expressed with respect to the "de facto impunity of the perpetrators of torture. [...] The independence of the provincial Human Rights Boards – responsible for studying cases of torture and abuse – "has been brought into question, in particular because they are chaired by Governors and include participation from the Governors' administrations;" cases continue to be dropped after trials are discontinued due to an elapse of time; "the prosecution and sanctioning of members of the security forces for torture and ill-treatment are rare [...] and sentences are not commensurate with the gravity of the crime."⁵⁶

Suspension by the arms, beatings, blindfolding, cell isolation, sleep deprivation, the application of electric shocks, squeezing of the testicles or stripping persons naked and hosing them with cold water – methods such as these, though far less common than just

⁵³ "Assessing the Accession Criteria: A Series of Workshops." Report from Workshop 1: Political Dimensions of the Accession Criteria. Conference held at the University of Birmingham, 30 November 2002.

⁵⁴ European Commission, *2002 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

⁵⁵ Carkoglu, Ali and Barry Rubin. *Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamics*. London, Frank Cass, 2003. Parenthetically speaking, there are still representatives of the NSC in civilian boards such as the High Audio Visual Board (RTÜK) and the High Education Board (YÖK)

⁵⁶ European Commission, *2003 and 2004 Regular reports from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

a year ago, are still used occasionally in Turkey, reports the Turkish Human Rights Foundation⁵⁷ According to figures provided by the Turkish Human Rights Foundation, 692 cases of torture were filed with the Foundation's Treatment and Rehabilitation Centres in the first six months of 2004. Although this represents a 29% decrease on the first six months of 2003, "the number of complaints of torture outside of formal detention centres has increased considerably," the Commission points out."⁵⁸

The Turkish government has admitted on many occasions that torture is a considerable problem for the country. Torture, however, as officials in Ankara claim, and as most reports verify, is not the official policy of the state, which is in fact making considerable efforts to combat it on at all rungs of the country's rigid administrative ladder. The blame, as Duner and Deverell argue, "lies less in the lack of will on the part of the political bodies, and more in an entrenched lack of respect for human dignity, a lacking *human rights culture* on lower levels" – it is thus that torture, despite being outlawed, "has become embedded as a method of working in many prisons and police stations."⁵⁹

Accordingly, to the extent that Ankara's introduction of a large body of human rights legislation has been a truly impressive achievement, the situation on the ground speaks for itself. As sources in some of the Member State embassies corroborate, the reforms introduced by Ankara over the last few years are only now beginning to take root in the Kurdish Southeast; to this day, however, local authorities in cities like Sirnak and Diyarbakir appear unwilling to address human rights issues.⁶⁰ Given the current state of affairs, this much begins to become clear: the Turkish government's struggle for human rights seems, at least in part, to be a struggle for the rule of law. It is largely with this in mind that Ankara decided to undertake a series of extensive legal measures to modernise the country's outdated administrative system in July 2004.

The anchoring function – and the force of conditionality – of the EU's human rights regime, according to Ugur, "is fully effective only if the third country with a poor human rights record is already prepared to bear the cost of convergence towards EU standards."⁶¹ The problem with Turkey's weak and inconsistent implementation of human rights norms (and particularly with the government's struggle against the use of torture) owes its existence at least in part to the fact that different power players – especially the military, the judiciary and the regional administrations – are *not* wholeheartedly prepared to bear the costs of *complete* convergence with the Union's human rights criteria. This, to an extent, is because they have not yet been entirely

⁵⁷ Human Rights Foundation of Turkey, *Periodical Reports*, <http://www.tihv.org.tr>

⁵⁸ European Commission, *2004 Regular report from the Commission on Turkey's progress towards accession*. <http://europa.eu.int/comm/enlargement>

⁵⁹ See: Duner, Bertil and Edward Deverell. See also: Manfred Nowak, "On the Prevention of Torture" in Bertil Duner, ed. *An End to Torture. Strategies for its Eradication*. London and New York, Zed Books, 1998.

⁶⁰ In an effort to address this problem, the Turkish Ministry of the Interior, along with Turkish NGOs, has developed an education program on human rights for police and civil servants. The EU, for its part, has been working with a number of Turkish NGOs on the implementation of EIDHR projects. Having focused its attention on implementation problems, it is bound to increase its support to other on-site NGOs.

⁶¹ Ugur, Mehmet. *The European Union and Turkey, An Anchor/Credibility Dilemma*. Aldershot, Ashgate, 1999.

convinced that such costs will be rewarded by Turkish membership – and because the central government, aware of this problem, has been unable to invest all of its political and economic resources into addressing the problem. Thus, it is not only the Turkish government, but the administration at large, down to the lowest civil servants, which must appreciate the credibility of the EU's conditionality policy. Certainly, the push for socialisation of human rights norms must go far beyond proving that 'it is worth it' for the sake of EU membership.⁶² Nonetheless, it would be natural to assume that if the EU were to step up its commitment to Turkish accession, the central government in Ankara would gain significant leverage against those power players who currently obstruct its mission to eradicate human rights abuses.

XI. The deficiencies of the EU's human rights conditionality approach towards Turkey

The chief assumption of this paper – as stated in part II and as substantiated in the present section – is that the commitment to reform on the part of a conditionality recipient depends to a large degree on the extent to which the conditionality actor is willing to offer real, substantial, and precisely defined incentives and rewards for convergence. When the quality of the human rights conditionality on offer is poor, the conditionality actor stands to lose leverage over the conditionality recipient, thereby reducing its capacity to 'anchor' the recipient's reform effort. As a result, a major incentive for the conditionality recipient to uphold its commitment to human rights reform – along with its ability to incur the political costs of such reform – is significantly diminished.

The practical conclusion which stems from the above is that although the Union has helped anchor the Turkish government's human rights reforms to a sizeable extent, its effort – that is, the quality of human rights conditionality – has been far from adequate to the task at hand.

Turkey's problems with human rights arise from a number of factors, whose mention, for the most part, lies outside the scope of the current paper. Naturally, to pin the blame for the significant shortcomings in Turkey's human rights legislation – and in its implementation record – on the deficiencies of the European Union's human rights conditionality would be preposterous.⁶³ However, to recognise ways, in which the quality of EU conditionality has prevented Brussels from emerging as a more powerful anchor for human rights progress in Turkey – that, conversely, would be logical. With that in mind, one should waste no time in identifying them in the form of:

⁶² For theoretical models of 'norms socialization,' see: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge, Cambridge University Press, 1999.

⁶³ It is, on the other hand, "easy for Turkey's governing politicians to put the blame for the disappointing state of affairs on the Europeans and to divert public attention from Ankara's own deficiencies in solidly managing the relationship." The subject of some Turkish politicians' manipulation of the human rights conditionality issue for the consumption of their domestic audience is worthy of a separate study in its own right. See: Kramer, Heinz. *A Changing Turkey: The Challenge to Europe and the United States*. Washington, Brookings Institution Press, 2001.

- a lack of credible material commitment to Turkish accession;
- imprecisely defined criteria for evaluation;
- vulnerability to accusations of double standards;
- the diffusion of mixed signals;
- and the threat of politicising the human rights criteria, whether in the context of an evaluation, a decision to open accession negotiations, or a decision to admit new members.

XI a. Lack of material commitment to Turkish accession

As Villaverde sees it, since the beginning of its relationship with Ankara the EU has pursued an approach that can be summarised as the idea of protecting its interests and encouraging reform in Turkey without adequate economic commitment.⁶⁴ The Union's increasing attention to human rights issues in Turkey has perpetually been at odds with the financial support to which it was linked. Under the Customs Union Agreement, five financial instruments were scheduled for Turkey, including a special financial measure of €375 million over five years, in addition to €750 million worth of loans from the European Investment Bank. However, since its introduction, a large part of this aid package has been blocked by either the Parliament (owing to reasons cited previously) or by Greece (owing to its well-publicised disputes with Turkey). To that effect, even after the completion of the Customs Union – and at least until the Helsinki decision – the scale of financial aid to Turkey has been minimal (between 1995 and 2003, only €1098 million was committed to various programmes in Turkey by the European Union). Mindful of this, Turkish officials have accused Brussels of discriminating against Turkey by providing the Central and Eastern European candidate countries with far better financial packages under their pre-accession strategies: in the 1990s, as Avci calculated, Turkey received less than 5 euro per capita of aid, as compared to levels of 10-45 euros for the CEEC accession countries.⁶⁵

Human rights reform in Turkey, as both Ankara and the Union have acknowledged, and as this paper tries to make clear, is currently a problem of proper implementation. Inevitably, any potentially successful programs to combat human rights abuse – *vide* the torture issue – at the lowest administrative levels require significant financial inputs. According to diplomats stationed in Ankara, the EU ambassadors to Turkey, well aware of the scale of the problem, have begun to stress the need for additional EU financial support and technical cooperation (directed to the authorities *and* to the local NGOs) to bolster the government's human rights campaign. Without such assistance, warns Avci, implementation of the reform effort will slow down significantly.⁶⁶

⁶⁴ Villaverde, Jesús A. "Turkey and the EU: an Endless Hurdle-Race" in *Perceptions*, vol. 3, no. 3, September-November 1998

⁶⁵ Avci, Gamzi. "Putting the Turkish Candidacy into Context" in *European Foreign Affairs Review* vol. 7, 2002, p. 91-110

⁶⁶ see: Avci

XI b. The criteria for evaluation: road signs or roadblocks?

As we have mentioned before, no normative framework for the development of the concept of human rights exists in the legal system of the European Union. Although the definition of human rights under the Copenhagen criteria has been significantly elaborated by the Commission's Regular Reports, *particular* obligations have tended to be unclear. Early (1998, 1999) Commission reports on Turkey are emblematic of the vagueness of the Union's original approach: descriptive rather than analytical or evaluative, they provide little more than a copy-and-paste approach to relating human rights developments in Turkey. For the most part – other than expressing their 'hope' that the death sentence passed on Abdullah Ocalan will not be carried out, that Ankara will continue on the path of democratic reform, and that the Kurdish conflict will come to a quick, peaceful end – the early Reports make very few specific recommendations. Accordingly, the Commission's conceptualisation of "human rights" in these documents emerges not as a deductive process (leading from a definition of human rights towards the enumeration of specific violations of such rights) but as a purely inductive one (leading from the enumeration of specific violations towards a vague notion of what constitutes human rights in the first place).

Prior to the 1999 decision of the Helsinki European Council to grant Turkey candidate state status, the relationship between the EU and Ankara lacked a central component, a component essential to lifting the dynamic of human rights conditionality off the ground: a notion of the endgame. Though the 1998 and 1999 Regular Reports hurled a number of hopelessly vague conditions upon Turkey's shoulders, they did not include any notion of exactly *what* meeting such conditions would lead to. At the time, the only semblance of an endgame in the EU-Turkey relationship – aside from the often overlooked wording of the preamble of the 1963 EEC-Turkey Association Agreement⁶⁷ – was the Commission's ambiguous declaration (found in the *Agenda 2000* document) that Turkey's fulfilment of the EU's conditions would lead to a 'strengthening of links'.

The Helsinki Conclusions, to all intents and purposes, were a watershed in Brussels-Ankara relations, a decision whose role in improving the credibility of the Union's human rights conditionality was fundamental. It was only after the Helsinki decision that the Commission's Reports began to refer regularly and explicitly to Turkey's *progress* (or lack thereof) towards meeting the Copenhagen criteria – in order to avoid giving Ankara the impression that Turkey was a candidate for membership, the Union had regularly abstained from doing so on prior occasions.⁶⁸ The Reports, as of the year 2000, began to set clearer positive obligations on Turkey and to pinpoint areas where work remained to be done. The vague phraseology of years past began to give way to more concrete, precise language. Turkey's reform output after the 1999 decision (see section IX for the description of the legislative packages passed by the National Assembly) was to become "a classic example," according to Ugur, of how an external anchor (the EU)

⁶⁷ The preamble of the 1963 Agreement states clearly: "the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date."

⁶⁸ See: Fierro.

could – by way of proving itself credible – enable a conditionality recipient (the Turkish government) to overcome the absence of a domestic anchor and to legitimize its reform effort.⁶⁹ It was with this in mind that Gunter Verheugen declared, in welcoming the adoption of one of the harmonization packages by the Turkish Parliament: “This decision would not have been possible without a clear European perspective that the EU has developed for Turkey since [...] 1999.”⁷⁰

The Helsinki decision indicated that the EU was willing – at least to some extent – to share the burden of convergence with Ankara. Inasmuch as “Turkey would find it more difficult to avoid compliance with its obligations” after 1999, the EU “would find it more difficult to exercise discretion with respect to Turkey’s membership.”⁷¹ Whereas until Helsinki the EU could get away with leaving it up to Ankara to determine the pace and quality of human rights reform on the one hand while criticising its human rights record on the other, such a policy was found untenable thereafter. In the wake of the decision to pool Turkey together with the other candidate states, the EU could no longer choose to maintain its wait-and-see policy without facing up to the question of whether it wants Turkey as ‘a member of the club.’ To that end, in the last few years the quality of the Union’s human rights conditionality towards Turkey has improved vastly – with visible positive results in Ankara’s human rights record.

As the conferral of candidate status on Turkey was to be followed by the launch of a pre-accession strategy, the Council, meeting on March 8th 2001, adopted the principles, priorities and objectives of the so-called Accession Partnership Document.⁷² By specifying both the necessary reforms and the timeframe within which they should be undertaken, the Accession Partnership Document was meant to reduce the Turkish government’s uncertainty as to its particular obligations under the Copenhagen criteria and to jumpstart the long-stalled political dialogue between Brussels and Ankara.

Furthermore, by clarifying Turkey’s entitlement to EU assistance within the framework of the pre-accession strategy, the first Accession Partnership opened the way to Turkish participation in the relevant EU programmes. To that effect, a Council Regulation set aside a package of €1040 million in EU grants (still a meagre €170 million per annum) and a total of €1470 million in EIB credits for the period of 2000–2006.⁷³ Notably, the Accession Partnership also introduced an element of *ex post* conditionality into the Brussels-Ankara pre-accession relationship in stipulating that “community assistance is conditional on the fulfilment of essential elements, and in particular on progress towards fulfilment of the Copenhagen criteria. Where an essential element is lacking, the

⁶⁹ Ugur, Mehmet. “Testing times in EU-Turkey relations: the road to Copenhagen and beyond” in *Journal of Southern Europe and the Balkans*, vol. 5, 2003, no. 2 (August 2003), p. 165-183

⁷⁰ Tanlak, Pinar. “Turkey EU Relations in the Post Helsinki Phase and the EU Harmonisation Laws Adopted by the Turkish Grand National Assembly in August 2002” in *SEI Working Papers in Contemporary European Studies*, 2002, no. 55

⁷¹ Ugur, Mehmet. “Testing times in EU-Turkey relations: the road to Copenhagen and beyond” in *Journal of Southern Europe and the Balkans*, vol. 5, 2003, no. 2 (August 2003), p. 165-183

⁷² In response, the Turkish government adopted its *National Programme for the Adoption of the Acquis* on March 19th 2001.

⁷³ Council of the European Union, *Regulation 390/2001* of 26 February 2001.

Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance.”⁷⁴

Prior to 2001, reports Gröning, Turkish officials “had repeatedly asked for a precise list of what the EU [was] expecting of Turkey.”⁷⁵ With the Accession Partnership, they got a document only somewhat akin to what they wanted. Though an improvement on the practice of years past, the first Accession Partnership was, as Human Rights Watch saw it at the time, still “far from an exhaustive list of every reform needed in Turkey” – it was rather “a practical baseline that should be addressed through the accession process to tackle the most important abuses.”⁷⁶ The following excerpts from the 2001 APD, in which the Council calls on the Ankara government to heed a number of short- and long-term priorities, certainly do little to contradict such allegations:

- Strengthen legal and constitutional guarantees of the right to freedom of association and peaceful assembly and encourage development of civil society; [...]
- Improve the functioning and efficiency of the judiciary, including the State security court in line with international standards; [...]
- Further develop conditions for the enjoyment of freedom of thought, conscience and religion; [...]
- Ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin.⁷⁷

With clear-cut allusions to numerous human rights conventions and with the elimination of a division between short- and long-term priorities – which, parenthetically, endowed the document with an implicit sense of urgency – the 2003 Accession Partnership was a significant improvement on the previous AP. Nonetheless, it still fell far short of providing the sort of “exhaustive list” solicited by HRW. The criteria of the Accession Partnerships being so open-ended and so susceptible to flexible interpretation, it has been easy for the Turkish authorities to claim – as they often do in their *Analyses of the Harmonisation Packages* – that, through the passage of one or more legislative acts, they have met them completely. To give an example: citing a few non-exhaustive amendments of the Law on Meetings and Demonstration Marches, a government *Analysis* is quick to presume that “the expectation in the Accession Partnership that ‘legal and constitutional guarantees on the right to association and peaceful assembly be reinforced and the strengthening of the civil society be encouraged’ has been met.”⁷⁸

⁷⁴ *Council Decision* of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC)

⁷⁵ Gröning, Friedrich. “Turkey Lost? An Attempt to Find a Roadmap for Turkey’s Integration into Europe.” Weatherhead Center for International Affairs, Harvard University, 1998-99.

⁷⁶ “Turkey’s EU Candidacy: A Human Rights Reform Agenda for EU Accession,” Human Rights Watch, September 6, 2000

⁷⁷ *Council Decision* of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC)

⁷⁸ Prime Ministry of Turkey, Secretariat General for EU Affairs, *An analysis of the harmonisation package approved by the Turkish Grand National Assembly on 3 August 2002.*

Another, more crucial consequence of the Union's application of such vaguely defined criteria and recommendations – whether in the Accession Partnerships or the Commission's Regular Reports – is the Turkish side's suspicion that the Union's application of human rights conditionality is inconsistent, biased and subject to other, more politicised considerations.

Given the lack of 'insider' knowledge, the extent to which such allegations may be true is impossible to gauge. What is of importance, however, is the fact that the non-transparency of the Union's human rights criteria exposes itself to such allegations in the first place – and that this phenomenon alone severely undermines the credibility of the Union's human rights conditionality. After all, neither the Reports nor the APDs – the centrepieces of the accession strategy – contain any clear benchmarking mechanisms for the *evaluation* of human rights developments in Turkey. In point of fact, most of their content contains no hints as to “the minimum degree of fulfilment of the criteria which is necessary and sufficient for the attainment of each stage in the accession process, especially accession itself.”⁷⁹

Of course, many of the requirements falling under the human rights criterion are 'non-quantifiable.' For example, by virtue of having no *acquis communautaire* (except the Racial Equality Directive) to cite and to enforce in the field of minority rights or minority protection, the Union is unable to provide Turkey with any legislative and institutional templates – nor with any benchmark mechanism – by which to judge its progress in this area. On top of that, “[even] where quantitative measures might be available for the assessment of the human rights criterion, the Union has chosen not to develop or use them.”⁸⁰

This is not unexpected. As Selverivik points out, “there is a deliberate unwillingness to state conditions clearly [in an *ex ante* conditionality relationship]. As a general rule, actors appear to want the situation to be ambiguous or vague.”⁸¹ After all, any intractable commitment to explicit conditions or to clear benchmarks on the part of the conditionality actor is certain to reduce its flexibility of analysis and its capacity to judge developments as they uncover. Accordingly, “the large scope of the accession conditions has [...] allowed the EU to stress different issues at different times for the candidates.”⁸²

The major drawback to such a 'dynamic' brand of human rights conditionality, at least from the perspective of the Turkish authorities, is the so-called 'moving target' problem – that is to say, the discomfiting impression that meeting the accession conditions is nigh-impossible because their specific content seems to keep changing perpetually.⁸³

⁷⁹ See: “Assessing the Accession Criteria: A Series of Workshops.”

⁸⁰ Ibid.

⁸¹ Selverivik, H. “Aid as a Tool for the Promotion of Human Rights and Democracy: What can Norway do?” Chr. Michelsen Institute, Evaluation Report no.7, 1997.

⁸² See: “Assessing the Accession Criteria: A Series of Workshops.”

⁸³ See: *ibid.*

As the Union has often indicated, the technical or legal capacity of a candidate state to respect the principles underlined by the Copenhagen criteria is not a sufficient condition for accession (or for opening accession negotiations): “it also has to be demonstrated that the State respects these principles in practice.”⁸⁴ To that end, it was Ankara’s *implementation* of its human rights reforms – and Brussels’ evaluation thereof – which held the key to the Commission’s 2004 recommendation on opening accession negotiations. As the Commission’s spokesperson for enlargement bluntly observed in 2002, “We refer to the situation on the ground whether or not the criteria have been met.”⁸⁵

Unfortunately, it is in precisely in evaluating the implementation of human rights reforms and in analysing “the situation on the ground” that the Union’s criteria are at their most inadequate. To the extent that the conditions are unclear, so is their evaluation.

How, after all, do you make the jump from describing human rights violations to saying that Turkey has not met the Copenhagen criteria? What scale of human rights violations separates a country that has met the Copenhagen criteria from one that has failed to do so? If the level of human rights violations in, say, Romania – be it discrimination against the Roma or abuse at the hands of police officials – is low enough for it to meet the political criteria, and the level of human rights violations in Turkey is high enough for it *not* to meet the criteria, then exactly *what* scale represents the threshold? What does it take to meet the criteria? “Is there,” asks Van Westerling, “a gradation in human rights violations? Are some violations more serious than others, does frequency play a role, and can this be the reason for the inconsistent interpretation of the Copenhagen criteria? If this is *true*: how does the Union decide upon such a gradation and is this legally based?”⁸⁶

It is the persistent, nagging presence of such questions – along with the lack of precise answers to them – which strikes at the very core of the problem with evaluating implementation in the area of human rights. That the Regular Reports’ and Accession Partnerships’ human rights criteria may indeed be intended to be objective is beside the point – as Ankara sees it, and as we must acknowledge, it is their *interpretation* which is open to the threat of politically-motivated bias.

Their lack of transparency and their vulnerability to flexible interpretation helps make the human rights criteria quite unpopular with Ankara politicians, most of whom believe that that the Union’s conditionality towards Turkey – because it is a large Muslim country – is either skewed or disproportionately rigorous. Inevitably, such suspicions have often degenerated into open resentment when European leaders deferred Turkey’s prospects for accession, as they did in 1997 and 2002. It should be said that the open-ended nature of the Union’s human rights conditionality not only exposes the Union’s enlargement policy to allegations of *anti*-Turkish bias in Ankara; it also promises,

⁸⁴ Bulterman, p. 194

⁸⁵ “EU to study reforms before setting date for Turkey” in *EUobserver*, 06/09/2002.

⁸⁶ Van Westerling, Jolanda. “Conditionality and EU Membership: the Case of Turkey and Cyprus” in *European Foreign Affairs Review*, vol. 5, 2000, no. 1 (Spring 2000), p. 95-118

inversely, to open the way for allegations of *pro*-Turkish bias in some European capitals. It is, in other words, a double-edged sword – for inasmuch as Turks may claim that the EU’s evaluations of their country’s human rights record are politically ‘adjusted’ against them (whenever such evaluations are negative), many Europeans may claim that they are politically ‘adjusted’ in Ankara’s favour (whenever they are positive).

Should the Union therefore make it a point to draft its human rights criteria with more precision and increased attention to detail? As a handful of experts claim, Brussels “would need to negotiate any attempt to make its conditions more detailed with considerable care, since the demand from the candidates for more specific and objectively measurable accession criteria co-exists uneasily with a degree of resentment and concern about the imposition of external dictates.”⁸⁷ A Commission official, when asked to address the lack of a clear benchmarking mechanism in the Union’s evaluation of Turkey’s human rights record, responded by noting – quite by the book – that in setting the objectives to be reached, “the EU respects the diverse legal systems and administrative set-ups [...] in the candidate countries.” To that end, it upholds “the concept of ‘institutional and procedural autonomy’ of the [prospective] Member State in implementing EC Law, a concept enshrined in the EC Treaty and regularly highlighted in the case-law of the EC Court of Justice.”⁸⁸

That the EU has urged Turkey to find a solution to the Kurdish problem *without* suggesting one is, on the one hand, expected, appropriate, and in line with the principle of ‘institutional and procedural autonomy’ cited above. In such a sensitive area, after all, leaving the state concerned to decide on the optimal solution is certainly politically preferable to trying to impose a solution from the outside – inevitably, such attempts would expose the Union to charges of paternalism (at best) or of infringement upon Turkish sovereignty (at worst). On the other hand, one should not mistake the exception for the rule by reference to the ‘Kurdish’ example. Inasmuch as any insistent stipulations as to how Turkey should administer the conflict in the Southeast are indeed bound to elicit strong resentment from Ankara, the set-up and consolidation of unambiguous criteria for the evaluation of most other, less sensitive, areas of concern would certainly be welcome. After all, as Gröning has pointed out (see above), this is what Turkish officials have asked for all along.⁸⁹ Yet, to this day, the Union has still neither designed nor implemented any set of clear and objective performance-related tools by which to

⁸⁷ See: “Assessing the Accession Criteria: A Series of Workshops.”

⁸⁸ Letter from an EC official dealing with EU-Turkey relations on a daily basis.

- It needs be said that although the principle of “institutional and procedural autonomy” is indeed enshrined in the Treaties, it is certainly not universally binding on the totality of Union law or action, having been reduced to scale by the development of other principles: effectiveness, direct effect and, most importantly, supremacy of Community law. To that effect, human rights conditionality should not be held hostage to a concept which, within the framework of the Union’s constitutional foundations, is – to a considerable degree – *relative*.

⁸⁹ The Turkish authorities have not been alone in their pleas for more transparency in the Union’s human rights conditionality. As Human Rights Watch declared, “Only a clearly enumerated and transparent process can give the Turkish people confidence that the human rights goalposts will not be moving perpetually out of reach.” See: “Turkey’s EU Candidacy: A Human Rights Reform Agenda for EU Accession,” Human Rights Watch, September 6, 2000

weigh the candidate states' human rights record against the eventual target of membership.

All this is not to say that the Union's conditionality has been applied unevenly or unfairly. It is to say instead that its general *liability* to subjective interpretation leads to suspicion of uneven application – suspicion which, in and of itself, does considerable damage to the leverage of the Union's human rights conditionality with Turkey. Such liability could be resolved by means of Ugur's proposed solution to base the contractual principles governing EU–Turkey relations on transparent rules that provide for effective monitoring of Turkey's convergence towards EU standards.⁹⁰

According to Smith, when conditionality recipients are *confident* of the objective application of particular criteria, their motivation for further reforms – together with the potential quality of said reforms – increases substantially.⁹¹ So, for that matter, does the credibility of the conditionality actor. Conversely, therefore, when the lack of clarity with regard to the interpretation of particular criteria is made evident, the potential strength and efficiency of conditionality begins to sap. For examples of the first pattern within the context of Brussels-Ankara relations, we should look no further than to the immediate consequences of the conditionality “upgrade” which accompanied the Helsinki decision and the publication of the Accession Partnerships. As regards the second pattern, the residual vagueness of the EU's human rights criteria – along with its real and potential effects on Ankara's perception of the Union's commitment to Turkish accession – is a case-in-point.

XI c. Perceptions of a double standard

If criteria imposed on recipients of EU human rights conditionality are based on rules that are clearly defined, shared among the Member States, and coherently applied by the Union as a whole, their ‘compliance pull’ is said to be strong. Alternately, if ‘double standards’ become perceptible in the actor state-target state relationship, conditions will fail to exert the same leverage.⁹²

Inconsistencies in the EU's human rights conditionality in the context of its external action are certainly no novelty: the application of limited sanctions in reaction to electoral violations in Togo and the disinclination to react half as decidedly in response to serious human rights abuse in China – for reasons of commercial, political and strategic interests – is but one example. To that end, one cannot exclude the possibility of double standards in the Union's human rights conditionality in the context of enlargement.

Such a possibility, far from being considered unlikely, is almost taken for granted in Ankara. Years after the 1997 Luxembourg Summit decision to deny Turkey what it saw as its rightful place in the pool of candidate states for EU membership (largely on the

⁹⁰ Ugur, Mehmet. “Testing times in EU-Turkey relations: the road to Copenhagen and beyond” in *Journal of Southern Europe and the Balkans*, vol. 5, 2003, no. 2 (August 2003), p. 165-183

⁹¹ See: Smith, “The Evolution and Application of EU Membership Conditionality.”

⁹² See: Frank Schimmelfennig, Stefan Engert, Heiko Knobel.

basis of its then-appalling human rights record), the overwhelming majority of Turks – in the government and on the street – sense a double standard in the EU’s evaluations of Turkey’s eligibility for membership.

For Turks, the Luxembourg decision was a disaster, made all the more difficult to digest as it was accompanied by the decision to grant candidate status to countries like Slovakia, which – under the administration of Vladimir Meciar – appeared to fall short of meeting the Copenhagen political criteria. It was the European leaders’ assumption (a correct one, as it turned out) that the move to confer such status on Slovakia would help propel democratic change in Bratislava. However, that the EU could not grant candidate status to Turkey on the basis of the same assumption was proof enough for Ankara of the inconsistency of the Union’s human rights policy.⁹³ In the eyes of Turkish leaders, the arbitrary nature of the EU’s decision to upgrade one relationship *in order to address* a poor human rights situation and to downgrade another *because of* a poor human rights situation,⁹⁴ and the partiality with which the accession criteria could be interpreted, were indisputable.⁹⁵ Coming to terms with not even being placed on the same footing as Bulgaria and Romania – countries, which seemed to leap from out of nowhere onto the Union’s list of candidate states – proved intolerable.⁹⁶ Ankara was to freeze its diplomatic relations with the EU shortly following the Luxembourg Summit.

The fact that, following Helsinki, Turkey has been told to respect the Copenhagen minority rights criterion (what with the lack of any reference to ‘minority rights protection’ in the Treaty on European Union, the TEC, or even in the EU Racial Equality Directive), to sign the Fourth Additional Protocol of the ECHR (what with neither Greece, Spain nor the United Kingdom being a party to it), and to adopt the Framework Convention on the Protection of National Minorities (what with five EU member states having never ratified it) has done little to dispel Ankara’s anxiety about implicit double standards in the Union’s human rights conditionality. By having to address the issue of minority rights, particularly in regard to its Kurdish population, the Turkish government has had to face up to a problem, which countries like France, Spain, Italy or Greece have never been pressured to recognise, much less confront, at the EU level.

As Duner and Deverell observe, “for the EU and its member states to ask Turkey to allow freedom of expression to Kurdish political parties is to ask a lot.” After all, owing to security implications, Kurdish nationalism has more far-reaching implications than, for example, Basque, Walloon or Scottish nationalism. So far, argue Duner and Deverell, the EU has expressed comparatively little understanding of the problems facing Turkish security – understanding which would certainly be “psychologically encouraging for the entire accession process.”⁹⁷

⁹³ What Turkish critics failed to acknowledge, perhaps, was the fact that Slovakia’s shortcomings in meeting the Copenhagen criteria were infinitely smaller than Turkey’s.

⁹⁴ Notably, this issue figured prominently in the European Parliament’s debate on whether or not to assent to the Customs Union with Turkey in 1995.

⁹⁵ See: Van Westerling.

⁹⁶ see: Kramer.

⁹⁷ See: Duner, Bertil and Edward Deverell.

As it tends to identify the double standards, of which it accuses Brussels, as expressions of 'Islamophobia' and exclusionism on the part of the Union, a large section of the Turkish political elite have their doubts as to Turkey's prospective EU vocation. Such views, naturally, do not leave the strength of the Union's human rights conditionality untouched: the shared suspicion that the Union would like to exclude Turkey from membership on 'civilisational' grounds casts serious doubt on the credibility of the EU's conditionality policies and, in consequence, reduces Ankara's incentives to comply with EU human rights criteria.

XI d. Contradictory signals

Although the Helsinki decision of 1999 may have reduced the uncertainty about the reward of EU membership for Turkey in exchange for Ankara's compliance with the Copenhagen criteria – as elaborated by the Accession Partnerships and the Regular Reports – it certainly did not eliminate it. To this day, the capitals of Europe have still not provided Turkey with the comfort of knowing that – pending its fulfilment of the Copenhagen criteria – it will have a secure place in the Union. Unlike the Central and Eastern European candidate states who, from 1993 onwards, were practically assured of prospective membership in the EU, Turkey still has every reason to feel uncertain about its chances of accession. Of all the factors cited, it is this one, which best helps explain why the EU is still not a fully effective anchor for Turkey's policy reform in the area of human rights.⁹⁸

Owing to the EU's inconsistent attitude towards the issue of Turkish accession, a threat to the credibility of the Union's human rights conditionality towards Turkey emerges with each European election: overnight, a government committed to Turkish membership (such as the German SPD) can be replaced by a government (such as the CDU/CSU), for which Turkey – whether or not it meets the Copenhagen criteria – is not, and will never be, a legitimate candidate for membership.⁹⁹ To that end, the Turkish candidacy is subject to a double set of conditions: to the Copenhagen criteria and to the whim of Member State politicians, whose capacity to convince European electorates of the 'dangers' of Turkish accession is immense. Naturally, in such a situation, where no certainty exists as to the commitment of the conditionality actor, the driving force of human rights conditionality – the will and capacity to dispense concrete benefits in exchange for meeting certain criteria – is seriously impaired.

Erdogan and Gul may claim that their push for change is not for the sake of the Union but for the sake of the Turkish people. They are well aware, however, that without *any* prospects of EU membership, their government's investment of massive political and economic assets into human rights reform would have been practically unfeasible. While the lack of an unambiguous European *volonté* towards Turkish accession may not necessarily deter the present government's commitment to reform, it inevitably reduces

⁹⁸ See: Arıkan, Harun. *Turkey and the EU: An awkward candidate for EU membership?* Aldershot, Ashgate, 2003.

⁹⁹ Edmund Stoiber's comments – to the effect that his party, once in government, would do "whatever it takes" to prevent Turkey from becoming a full member of the EU – are a case-in-point.

the credibility of such an effort among parts of Turkish civil society, the state administration, the military and, perhaps most importantly, future governments. Owing to the above, efforts at legitimate implementation are severely undermined.

Nearly every day, contradictory positions on the prospects of Turkish accession, ranging from the decidedly 'no'-oriented stance of the German CDU to the more 'Turkey-friendly' view held in Rome, Warsaw and London, ram heads in Europe. Even within the axis of the Union institutions, agreement on the 'Turkish issue' is few and far in between: a case-in-point is the scale of difference between the EP's emphasis on serious concerns as to the state of Turkey's democratic and human rights regime – as elaborated by its recent report¹⁰⁰ – and the far more positive tone of the 2003 and 2004 Commission evaluations.

"La Turquie n'est européenne ni par sa géographie, ni par sa culture, ni par son histoire. Elle n'a donc pas sa place en Europe." this, Nicolas Sarkozy's comment, was only one of a string of 'Turkey does not belong' soliloquies whose authors have included, among others, Laurent Fabius, Poul Nyrup Rasmussen, Michel Barnier, Giscard d'Estaing, Helmut Kohl, Edmund Stoiber, and a significant number of European parliamentarians.¹⁰¹ Needless to say, the strength of its human rights conditionality is sapped when the EU imposes membership criteria on the one hand and when some of its most prominent politicians – and, in Sarkozy's case, future leaders – question membership *itself* on the other.

In line with the *ex ante* (positive) conditionality model, the more that Turkey feels secure about its future role in Europe – the more it seems to enjoy a credible prospect of membership – the greater the efficiency of the Union's human rights conditionality and the greater Ankara's commitment to improve its image. In fact, a brief examination of the timeline of the adoption of the latest constitutional amendment packages reveals that at least their timing – if not their origins and actual content – was evidently linked to the accession process. In point of fact, as Kardas argues, "the reform package of September 2001 consisting of 34 constitutional amendments was an attempt by the Turkish Parliament to meet the short-term criteria in the accession partnership process before the upcoming November 2001 Progress Report of the Commission."¹⁰² The Turkish government's decision to withdraw its proposed ban on adultery from the reformed Penal Code directly ahead of the Commission's 2004 report is another case-in-point. On the other hand, whenever the prospect of accession is removed, the threat of human rights policy reversals – if not policy reversals themselves – returns. In the wake of the 1997 Luxembourg decision, for example, Turkey witnessed the silencing of civil society and of the business community, along with a considerable increase in nationalism, evidenced by the quick rise to power of the radical Nationalist Action Party (MHP).

¹⁰⁰ European Parliament, *Report on the 2003 regular report of the Commission on Turkey's progress towards accession*, 19 March 2004. <http://europa.eu.int/com>

¹⁰¹ AP, May 9th 2004

¹⁰² Kardas, Saban. "Human Rights and Democracy Promotion: The Case of Turkey-EU Relations" in *Alternatives*, vol. 1, no. 3, Fall 2002

To point to a more recent example of the trend outlined above: at the Nice summit of December 2000, the European heads of state and government agreed to institutionalise a new ‘triple majority’ voting system for the Council and elaborated significant provisions the European Security and Defence Policy. Reference to Turkey was not made in either context. “In response to the EU’s stance,” as Brewin tells, “publication of the Turkish National Programme of Reform was delayed until February 2001 and” – lo and behold – “contained considerable ambiguity on crucial human rights questions.”¹⁰³

XI e. Politicisation of the human rights criteria

As we must always bear in mind, the European Union’s human rights criteria in the framework of enlargement, whether included in the Copenhagen Conclusions, the Commission’s Regular Reports or in the Accession Partnership possess political, not legal value.¹⁰⁴ With this in mind, and considering their vague formulation (as outlined in section XI b), such criteria are intrinsically vulnerable to subjective understanding or evaluation. That being said, an objective, ‘purist’ interpretation of their original letter and spirit, even if it were ever possible in the first place, is inherently exposed to the risk of being disregarded in favour of a ‘fudged’ interpretation, made in the name of security, economic or political considerations.

As some researchers have observed, the lack of detailed accession conditions – in the area of human rights and in other areas of concern – raises the Union’s flexibility, “both to use its leverage to respond to new problems in the candidate states, *and to weigh factors other than the fulfilment of accession conditions in its enlargement decision-making.*”¹⁰⁵ From the realist perspective, this is to be welcomed. However, from the perspective of the Union’s self-definition as a community of law – and the vantage point of the Helsinki affirmation that “Turkey is a candidate State destined to join the Union on the basis of the *same criteria* as applied to the other candidate States” – it smacks of hypocrisy.

The issue of EU enlargement and of Turkey’s membership, allege Muftuler-Bac and McLaren, despite many EU officials’ protests to the contrary, goes beyond a relatively simple analysis of whether a particular candidate state is able to meet the Copenhagen criteria. To put it differently, meeting the Copenhagen criteria is probably a *necessary* – albeit not a *sufficient* – condition for an aspirant country to be included in the EU’s enlargement process.¹⁰⁶ That political considerations and particular preferences of the member states can override or distort interpretation of the human rights criteria, at least on the intergovernmental level, is evident. In 1999, after all, it was not any significant improvement of Turkey’s human rights record, but rather the Greek government’s

¹⁰³ Brewin, Christopher. “EU Human Rights Policy in the Enlargement Process,” speech delivered at the Liberal Düşünce Topluluğu (Turkish Association for Liberal Thinking), 7 August 2003.

¹⁰⁴ The one notable exception is the inclusion of the Copenhagen criteria in the Council regulation on the awarding of pre-accession aid within the framework of the Accession Partnership.

¹⁰⁵ See: “Assessing the Accession Criteria: A Series of Workshops.”

¹⁰⁶ Muftuler-Bac, Meltem and Lauren M. McLaren. “Enlargement preferences and policy-making in the European Union: Impacts on Turkey” in *Journal of European Integration*, vol. 25, 2003, no.1 (March 2003), p. 17-30

change of heart and the tireless lobbying of the White House which mattered most in the European Council's decision to award Turkey the status of a candidate country.

It follows, therefore, that the Helsinki promise of applying the same criteria to the Turkish candidacy as to the candidacies of other applicant states is a false one. Nothing can ensure that the decision taken by the European Council on whether or not to invite Ankara to accession negotiations will be a fair or objective one. After all, the intergovernmental method of decision making in the EU within the framework of enlargement decisions allows the EU Member States "to cut deals with one another and [to] bypass the supranational power of the Community institutions." It thus seems "that the decision to grant an aspirant country candidate status is not solely taken in line with that country's ability to meet the Union's criteria but as a result of certain member states' interests and their relative power."¹⁰⁷ It is worth noting, in this context, that although Article 6 of the Treaty on the European Union (as amended by the Amsterdam Treaty) may have given a constitutional basis to the Copenhagen criteria by stating that "the Union is founded on the principles of liberty, democracy and the *respect for human rights* and fundamental reasons which are common to the Member States" and although Article 49 TEU may have strengthened this provision by asserting that "only a European state which respects the principles set out in Article 6 may apply to become a member of the European Union," *neither* Article is subject to the jurisdiction of the European Court of Justice.¹⁰⁸ To that end, and because non-member states have no *locus standi* under Article 230, the Court cannot rule on the legality of a decision to grant or to withhold membership in the Union.¹⁰⁹ It was by virtue of the above provisions that the European Council could get away with overruling the Commission's recommendation and deciding to open negotiations for membership with Greece back in 1975. According to the Council's reasoning in the matter, integration with the Community would have helped consolidate the country's fragile democratic regime. As Smith described it, "political considerations won out over the strict imposition of human rights conditionality."¹¹⁰

There have been suggestions "that major enlargement decisions, such as that to proceed with a 'big bang' enlargement, had in fact been determined on other grounds, and that European Commission assessments of candidates' progress in meeting accession conditions were then finessed to fit."¹¹¹ Evidence of the fact that political and economic interests are capable of overriding meeting the Copenhagen criteria can be collected from the most recent enlargement experience: given the centrality of Polish accession to the entire enlargement project, the immense symbolism of its reconciliation with Germany, and the latter's emergence as Warsaw's chief patron-state in the Union, it was virtually inconceivable to imagine a May 1st 2004 without Poland. To that end, the

¹⁰⁷ Ibid.

¹⁰⁸ On the other hand, the ECJ is fully competent to interpret, and even to rule on the application of, the human rights clauses found in trade and cooperation agreements signed by the Union. See: Fierro

¹⁰⁹ Though Bulterman argues that the Court is legally competent to determine whether an applicant country fulfils the political requirements for membership laid down in Article 6 TEU, most literature (citing *locus standi*) seems to point to the contrary. In either case, as Bulterman claims, owing to the political sensitivities involved, the Court would be unwilling to rule on such an issue. See: Nowak, Fierro.

¹¹⁰ Smith, "The Evolution and Application of EU Membership Conditionality," p. 110

¹¹¹ See: "Assessing the Accession Criteria: A Series of Workshops."

temptation to facilitate Polish entry into the EU regardless of any minor shortcomings it may have had in meeting the Union's [economic] conditions must have been present in at least some quarters of Brussels and Berlin – whether such facilitation (and fudging of the EU's conditionality) actually took place is another matter. In Turkey's case, the fear is that “conditionality fudging”, instead of easing Ankara's way into the European Union, may serve the opposite purpose: to postpone or prevent future accession. For Turks the *threat* of subjugating the interpretation and evaluation of the Copenhagen criteria to political interests (and cultural factors) is very real. Given the lack of transparent benchmarking in the pre-accession process, plenty of room for such manoeuvrings remains.

To address the problem, Nowak argues that “the implementation of human rights ‘conditionality’ [...] vis-à-vis candidate countries in the accession procedure under Article 49 TEU [...] needs to be based on legal and judicial rather than on economic and political criteria. To this end, the relevant organs of the Union, i.e. the Council, the Commission, and the European Parliament, should establish one or more independent and impartial fact-finding bodies in order to monitor the human rights situation in all countries concerned and make their respective decisions in the field of human rights ‘conditionality’ subject to judicial review by the ECJ.”¹¹² It has also been suggested that the Union's use of independent NGO assessments of states' compliance with the human rights criteria could be upgraded, or even institutionalised, as part of the enlargement process.¹¹³

XII. The vicious circles of flawed human rights conditionality

As Ugur argues, the EU can be expected to upgrade the quality of its human rights conditionality towards a third country only when and if the latter's commitment to meeting membership conditions is credible.¹¹⁴ In Turkey's case, the reverse is also true: Turkish commitment to meeting membership conditions may not become fully credible without an upgrade of the quality of the EU's human rights conditionality – an upgrade that would entail a plausible commitment to Turkish membership, as well as transparency and consistency in evaluating its human rights record.

Without such an upgrade, Turkey-EU relations run the risk of becoming a vicious circle, in which the lack of EU commitment to membership will give rise to Turkey's lack of commitment to reform, which will give rise to negative EU evaluations, which will give rise to Turkish resentment... and so on and so forth.

¹¹² Nowak, Manfred. “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU” in Alston, Phillip ed. *The EU and Human Rights*. Oxford, Oxford University, 1999.

¹¹³ See: “Assessing the Accession Criteria: A Series of Workshops.”

¹¹⁴ See: Ugur, *The European Union and Turkey*.

XIII. Conclusion

As Tocci sees it, “in order for European recommendations and thus policies of political conditionality to be effective, the incentive of membership must be credible. Credibility requires trust between donor and recipient, clarity of donor objectives, and a sense of immediacy about the promised reward.”¹¹⁵ With EU human rights conditionality perpetually being hampered by a lack of credible material commitment to Turkish accession, imprecisely defined criteria, vulnerability to accusations of double standards, diffusion of contradictory signals, and politicisation, one would think that the ‘compliance pull’ of the EU pre-accession conditions would be incredibly weak. Weak it is not: the promise of enlargement, albeit vague and inconsistent, has proven to be large enough for Turkey to subscribe to the Union’s human rights agenda. Not large enough, however, to turn the Union into as powerful an anchor for human rights reform in Turkey as the situation requires.

The fact that the present AKP government claims to be committed to reform regardless of the carrot of EU membership is a positive sign. Nonetheless, in order to secure the course of reform on which it Turkey has embarked since Helsinki, and to ensure the proper implementation and socialisation of norms, the EU needs to stay on as an anchor – otherwise a future government, one less committed to reform, may stray off course. As Abdullah Gul – now Foreign Minister – confirmed in 1998, the promise of accession is *the* fundamental engine of human rights reform in Turkey: “We realise,” said the then-deputy of the Virtue Party, “that without integration into Europe, democratic standards of human rights cannot be achieved in this country.”¹¹⁶

“By both setting tough requirements and refusing to set a firm timetable for the opening of negotiations, the procedure up to [the Copenhagen summit of December 2002] enabled the EU to avoid taking a decision on which horn of the dilemma its member states would choose.”¹¹⁷ After the Helsinki and Copenhagen summits, however, the Union – having very little room for the sort of procrastination that it could afford in the past – must make a determined choice. A ‘wait-and-see’ decision, especially in the wake of the Commission’s 2004 recommendation, is no longer a viable option.¹¹⁸

With this in mind, the upcoming decision on whether or not to open accession negotiations with Turkey will have an enormous impact on the conditionality relationship between Ankara and the EU. A ‘yes’ would certainly cement the legitimacy of the government’s reform project and provide the EU with unprecedented leverage with

¹¹⁵ Tocci, Nathalie. “21st Century Kemalism: Redefining Turkey-EU Relations in the Post-Helsinki Era.” *CEPS Working Document No. 170*, September 2001.

¹¹⁶ Howe, Marvin. “The Islamist Agenda in Turkey: Democracy,” *Washington Report on Middle East Affairs*, October 1998.

¹¹⁷ Brewin, Christopher. “A changing Turkey: Europe’s dilemma” in *Journal of Southern Europe and the Balkans*, vol. 5, 2003, no. 2 (August 2003), p. 137-145

¹¹⁸ If (a major if) such a decision is made, the only way for the Union to salvage some of its anchor-capacity would be to combine it with a *precise* roadmap towards launching accession negotiations, a clear benchmarking mechanism and a water-tight, binding promise of membership upon fulfilment of the Copenhagen criteria.

which to exercise its human rights conditionality and with which to reduce the possibility of reversals in Turkey's reform policies. For Turkey, for the first time, the carrot of membership would truly be within reach. A 'no,' on the other hand – a 'no' manifestly grounded in one or more Member States' [unspoken] claim that Turkey is not part of the European 'family' – would have the opposite effect. Even if accompanied by offers of an alternative 'special' relationship, an openly negative decision would inevitably produce an enormous deterioration of the Union's anchor-capacity with respect to Turkey.¹¹⁹ Any intermediate solution that the EU may offer Ankara in lieu of membership would certainly not be enough: a second-rate membership, after all, is not what Turkey is after.

In either case, the EU's decision will not only be a 'simple' one on whether or not to open negotiations with Ankara but also a choice as to what future influence the Union should have on the processes of democratisation and human rights reform in Turkey. If anything is to be gathered from the evidence in this paper, it is this: that in order for the EU to continue to hold significant leverage over the course of Turkish human rights policy in the near future, Turkey's place in Europe must be reaffirmed. Committing themselves to Turkey's vocation as a future member of the Union without sacrificing the integrity of the Copenhagen criteria – whatever the way of doing so may happen to be – would not be a case of 'giving up the stick by handing over the carrot,' as some would tend to argue. Instead, it would be a confirmation that the carrot exists in the first place.

XIV. Post scriptum: December 17, 2004

The carrot materialised. During their December 17, 2004 meeting in Brussels, the European heads of state (meeting as the European Council) decided to open negotiations with Turkey on October 3, 2005. The decision to open negotiations – taken with reference to the Commission's October Recommendation – is bound to have enormous implications for the quality of the EU's human rights conditionality towards Turkey. The Commission Reports and the Accession Partnerships are bound to become more precise, dialogue and monitoring are set to intensify, and financial aid is expected to increase exponentially, at least after 2007. Most importantly, the decision will lend the present Turkish government the credibility and the legitimacy it needs to pursue its human rights agenda deeper and further.

All the same, even in the wake of the European Council's Conclusions the declaration made during the 1999 Helsinki summit – to the effect that Turkey is "a candidate State destined to join the Union on the basis of *the same criteria* as applied to the other candidate States" – still sounds like a dubious promise. Two reasons for this are clear: first, the EU's emphasis on an open-ended negotiation process (behind which lies the option of a "privileged partnership" in lieu of full membership); and second, the prospect of referendums on Turkish accession in a number of EU member states.¹²⁰

¹¹⁹ Not only that: a 'no' that raises suspicions of the Union's self-perception as a 'Christian club' will also sap some of the potential strength of the Union's conditionality with respect to other Muslim countries like Albania or Bosnia-Herzegovina. See: Smith, "The Evolution and Application of EU Membership Conditionality."

¹²⁰ The recognition of Cyprus as an EU member – which crucially, is not synonymous with a legal or formal recognition – can in no way be perceived as an "additional" condition for Turkey. Logically, if a

After what must have been a hard fight between the Turko-enthusiast and Turko-sceptic factions of the European Council, the Conclusions were made to include the crucial provision that “[the] shared objective of the negotiations is accession.”¹²¹ Moreover, any and all French musings about including references to a possible “privileged partnership” as an alternative to accession were scratched.¹²² Instead, a far milder provision was introduced: “if the Candidate State is not in a position to assume in full all the obligations of membership it must be ensured that the Candidate State concerned is fully anchored in the European structures through the strongest possible bond.” Regardless, the European Council chose to follow in the footsteps of the Commission’s October Report and underline that “[the] negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand.”¹²³

That the negotiations are inherently open-ended is perfectly understandable. The EU, after all, must keep up the pressure on Ankara – and any other candidate state – to sustain or increase the pace of human rights reform. To that end, the Conclusions stipulate that:

In the case of a serious and persistent breach in a candidate state of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded, the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council will decide by qualified majority on such a recommendation, after having heard the candidate state, whether to suspend the negotiations and on the conditions for their resumption.¹²⁴

“Open-ended,” in Turkey’s case, implies more than just the fact that the negotiations may be suspended due to such breaches. All accession negotiations in the past were, by their very nature, open-ended processes. However, the fact that Turkey’s case represents the first time when the European Union has chosen to use the phrase

country is to open negotiations with the 25 EU Member States, it must – at least implicitly – recognise all of them. The so-called “permanent safeguards” referred to in the Conclusions are also, at least in their present phrasing, not an unprecedented concession: unlike earlier drafts of the Conclusions, the present text now affirms that it is not the *safeguards* themselves but the *capacity* to use them, which is permanent. It is uncertain, however, whether or not the Union will refurbish this definition in the future and attempt, for example, to close the European job market indefinitely to Turkish workers. Lastly, the capacity of the Union to absorb new members, a condition which appears in the European Council conclusions (albeit almost as an afterthought), cannot be said to be “Turkey-specific” – it is, after all, an oft-forgotten Copenhagen criterion, which is said to apply to all new enlargements.

¹²¹ European Council, *Presidency Conclusions of the Brussels European Council of 16 and 17 December 2004*. <http://europa.eu.int>

¹²² After all, it needs be said that in 1999 Turkey was named as a candidate for accession, not for an “alternate partnership,” “membership minus” or any other such concoction.

¹²³ *Presidency Conclusions of the Brussels European Council of 16 and 17 December 2004*.

¹²⁴ *Ibid.*

explicitly indicates – despite assurances as to the “shared objective” of accession – that the end-game for Ankara may not necessarily be full membership.

Point two: the referendums. The Austrian chancellor, Wolfgang Schüssel, and French president Jacques Chirac – leaders of countries where levels of support for Turkish accession are among the lowest in Europe – have both called for a vote on the issue of Turkish membership. While they are no doubt helpful in developing an EU-level consultative democracy by involving citizens in EU politics, referendums will do little to assuage Turkish fears that EU leaders plan to hide behind their constituencies to back out on their commitment to accept Turkey into the European family. The Turks are likely to sense a double standard: after all, none of the last four enlargements (1981, 1986, 1995 and 2004) was made subject to a national referendum. Only once in the history of the Union was the accession of an EU-hopeful subjected to a public vote in an ‘old’ member state – in 1972 in France.

Judging at least by the reaction of the Turkish media, the overall response of the Turkish public to the December decision was positive. Despite the concessions made by Erdogan on the “open-ended process” issue, on the “safeguard clauses” and on the Cyprus question, the amount of legitimacy his government stands to *win* among the wider Turkish public and the local elites (the sort of legitimacy needed to carry out and implement new reforms) exceeds the legitimacy he may have *lost* among the hard-line nationalists.¹²⁵ With this in mind, the state of the EU-Ankara human rights conditionality relationship seems to have made a huge qualitative leap.

The Turkish government has an enormous amount of work to do over the next decade in order to bring its country’s human rights record up to European standards – however, with the Union’s official stance towards Turkish accession having changed from a “maybe” to a “yes, but” attitude, a major impetus for future reform has emerged.

¹²⁵ Although the Union’s demand for Turkish recognition of Cyprus as an EU member is enormously difficult to swallow for some Ankara hardliners – not least in the military – it is not enough to undermine Erdogan’s credibility among his countrymen.

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