



# **Bilateral relations with China, India and South Africa**

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## Executive Summary

This report presents a study of the EU's efforts in promoting human rights towards three partner countries: India, South Africa and China. These three countries were chosen for three reasons. First, they are major global actors, second they are culturally different from the west and finally they all share a level of resentment against Europe promoting its values given their historical legacies (although in greatly different ways).

The question this report aims to answer is how are EU's efforts for human rights promotion received in these three countries. To answer this question four major issue areas were identified as angles of study: 1. Human Rights dialogues and consultations; 2. EU influencing and empowering local actors (such as NGOs or CSOs); 3. the link between Human Rights and economic/trade relations; and finally, 4. criticism formulated by these countries against the EU.

In order to meaningfully answer these questions this report took the approach of introducing these issues from the perspective of the EU's partner countries themselves. Thus, one FRAME partner from each country studied was offered a general framework to work with including specific questions and was asked to draft a case study accordingly. This approach has some obvious merits, but it also has some potential weaknesses. Benefits include that readers get the opportunity to learn about how the EU is seen from the outside, i.e. what aspects of its human rights policies are praised and what aspects of it are criticised. Furthermore, they can also read suggestions on how local experts advise the EU to improve its policies in helping their country to improve human rights conditions. The possible weakness is that this approach emphasises these issues from the partner countries' perspectives, thus, for example, issues which are sensitive to discuss in the partner country may receive less attention in the study.

The first case study focuses on India. Human rights issues first came to the fore in the relations between the EEC and India in the 1990s, while formal human rights dialogues started in 2004. Although these dialogues are cordial, they are not in depth dialogues by experts and India emphasises that it does not want to be lectured by the EU. Since the year 2000 the EU has funded numerous small-scale human rights project in India, yet these are tiny compared to the size of India (and especially small knowing that Sri Lanka being much smaller receives a greater level of support). As a recommendation made by the report is that greater flexibility in administrative requirements could improve the impact of these EU projects. Concerning the link between trade and human rights issues India takes the firm stance that these should be treated separately. Concerning the EU, the Indian report underlines the impression that the 'Europeans come with clichés and stereotypes in their heads' and calls for the EU to be more understanding and self-critical in its stance and point out that, for example, the EU's policy on migration also deserves criticism from a human rights perspective.

For South Africa the EU's (Europe's) role in promoting human rights dates back to the Apartheid era, with the EEC's sanctions against the regime. Since the fall of Apartheid regime the EU has been supporting South Africa's efforts for democratisation and development including human rights. The report introduces the way the EU has engaged South Africa on two crucial human rights issues: LGBTI and women's rights. Discussing the support to civil society in South Africa the report

underlines the positive role the EU played, for example, by establishing and funding the Foundation for Human Rights that administer grants for human rights projects. At the same time challenges are also discussed in the report, including the problem of too stringent administrative requirements set by the EU or the lack of coordination. From the point of view of the relationship of economic policies and human rights issues, the significance of the agricultural sector is pointed out. It is argued that South Africa is in an 'unequal trade relationship' in terms of agricultural goods with the EU, given the EU's internal agricultural subsidies. It is within this context that the trade agreement between South Africa and the EU (since 1999) and the EU and SADC Economic Partnership Agreement in 2014 are discussed. The study concludes that not enough time has passed yet to evaluate the latter, nevertheless there is a fear that it could have a negative impact on employment and aggravate poverty and thereby negatively affect human rights. Finally, the study on South Africa discusses the tension between highly progressive constitutional guarantees and local realities, in case for example of issues such as virginity testing that pose serious challenges for South Africa. The study also reflects briefly on the role of the notion of *Ubuntu* – the traditional normative framework entertained in Africa –, which emphasises communal attachments, contrary to the western conceptions of human rights rooted in individualistic values.

Finally, the third case study focuses on China and offers a detailed critical account of the human rights dialogue, which started in 1995 and already had its 30th round by 2015. Next the role of international NGOs is scrutinised with a detailed account of how their operations are regulated in China. It is explained that for many in China both the concept of human rights and also that of NGOs is new and many lack experience with them. It is suggested that if NGOs want to operate successfully in China they should take a pragmatic attitude and avoid stumbling into topics sensitive for the authorities. On the relations of economic and human rights issues it is pointed out that similarly to India, China is averse to linking them to human rights issues. At the same time, it is also suggested that China is becoming increasingly assertive when using its economic clout and on occasions even warned its European partners that criticising it on human rights issues may have negative impacts on economic relations. The final section of the Chinese case study points out the significance of mutual understanding and explains Chinese fears of the EU using human rights simply as an excuse for gaining control over China.

Following the case studies, the report concludes with a brief summary of the study and a section that highlight the main issues and recommendation raised in the case studies.

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## I. Introduction

The aim of this report is to scrutinise the EU's effect on India, South Africa and China in terms of the EU's normative influence in promoting human rights from the perspective of target countries. The report that follows provides three detailed case studies supplementing FRAME Deliverable 6.1<sup>1</sup> by focusing on how the EU's efforts and various policy instruments from human rights dialogues to direct support to human rights projects are seen by receiving countries. Furthermore, this deliverable also scrutinises how issue linkages work in the field of economic relations and human rights – i.e. how receiving countries react to the EU's efforts to deal with human rights issues not independently, but to integrate them into other spheres of interaction. Finally, in order to make this report complete we asked our researchers in the receiving countries to reflect critically on the EU and to discuss in what sense the three countries under scrutiny regard human rights issues differently from the EU and what are the main points of criticism raised in their countries towards the European Union.

### A. Research question

The core research question that this report aims to answer is:

- **How are the EU's efforts for human rights promotion received in three partner countries: India, South Africa and China?**

The point that makes this report distinct is its approach aiming to see the EU's efforts for the promotion of human rights mainly from the perspective of the EU's partner countries. Thus, in this report what is analysed is not only the EU's effect on human rights in these countries, but also how partner countries react to these efforts. In order to answer to this question the project identified four main issue areas to scrutinise, which will be discussed below. Yet, before that the first point to justify is the case selection.

### B. Case selection

The first question to be answered about this report is its case selection. Why are India, China and South Africa in one report and what is the connection between these three countries? There are two reasons for combining these three countries into one common report despite numerous differences between them.

First, these countries may each be regarded as representatives of a non-European civilisation each rooted in its own cultural self-definition different from those of Europe and the West. This cultural difference is the basis of particular types of reservations concerning European intentions in promoting human rights. In the sceptical reading for these countries human rights may be seen as just a new set of

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<sup>1</sup> See: FRAME Deliverable No. D12.1, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion' <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 1 September 2016.

civilizational standards not really different in function from the civilising ideology, a fundament of the era of Western colonial expansion.<sup>2</sup>

Framed it such a way this is naturally a simplification. It is clearly naïve to see the EU's relation to these countries on the basis of such a dichotomy of the West versus the rest. One justification for this report is exactly to offer a more nuanced picture and not such a simplified and in many ways naïve depiction of the EU's interaction with non-European states.

The second reason for the case selection is based on power considerations. Although there are other states that can claim civilizational difference, the three discussed here are major players on the international field in many respects comparable to the EU in influence and power. Thus, it is reasonable to assume that in the case of these countries the EU is in a position of mutual dependence that only allows for a limited use of power and calls for prudent foreign policy.

Two caveats are necessary here. Clearly there are also other countries that fit this description, such as Japan and Russia, being powerful actors globally, nevertheless culturally somewhat different from the Western core. Yet including the three we study here, that is China, India and South Africa seemed an ambitious enough project in itself, so we decided to concentrate only on these three in this report. Second, making these claims we must underline that culture is a relative concept and talking about cultural boundaries raises numerous difficulties. Nevertheless, elucidating this issue is beyond the purview of this report. This report cannot get into this issue and reflect on conceptual difficulties concerning the study of culture. For this report it suffices to state that the three states under study here all see themselves to be non-western in one way or another and they refer to this in their justification for choosing their particular understanding of human rights – or for explaining the particular difficulties they face in implementing human rights.

Thus this report studies the EU's interactions with countries that are in many ways on an equal footing with the EU, yet hold strong reservations concerning Europe and the West. Given the historical legacies of their interactions with the West and Europe it does not come as a surprise if they are inclined to be suspicious of the West and to be sensitive to any paternalistic behaviour, arrogance and occasional hypocrisy in promoting its values. Without offering a historical analysis of orientalism and Western imperialism here it is enough to say that, for example, in the present day Chinese national identity the 'one hundred years of humiliation' suffered at the hands of the West plays a significant role.<sup>3</sup> Thus, in the case of countries studied here the EU has to deal with partners that entertain reservations concerning its human rights agenda and claim that they have the historical experience with the West that justifies their suspicion. The point of this study is naturally not to take these criticisms at face value, while it is also not intended to engage in a discussion on who did what wrong in the past.<sup>4</sup> Instead the

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<sup>2</sup> Jack Donnelly, 'Human Rights: A New Standard of Civilization?' (1998) 74 *International Affairs* 1.

<sup>3</sup> Zheng Wang, *Never Forget National Humiliation: Historical Memory in Chinese Politics and Foreign Relations* (Columbia University Press 2012)

<sup>4</sup> FRAME Deliverable No. 3, 'Comparative Analysis of Conceptions of Human Rights, Democracy and the Rule of Law in Selected Third Countries' <<http://www.fp7-frame.eu/wp-content/materiale/reports/20-Deliverable-3.3.pdf>> accessed 30 September 2016. Deliverable No .3 includes a historical overview of the evolution of human rights in these countries and also some reflections on this issue.

aim here is to understand the unfolding of the present by offering a more nuanced picture uncovering what is going on in the EU's efforts to promote human rights in India, South Africa and China from the perspective of these countries.

### C. The general framework of the report

Although there are similarities between these countries discussed, it is important to underline that there is probably more that differentiates them than what makes them alike. There are considerable differences in their traditions, their former and present relations with Europe or their constitutional and political arrangements, which makes a straightforward comparison between them difficult. Therefore, what we aim at here instead are three distinct accounts by researchers from these countries offering their accounts from their local perspectives on the results of the human rights dialogues, the effect of the EU in influencing human rights on the ground or the linkages between human rights and other issues in the EU's dealings with the respective countries.

Having said this does not mean that there would be no resemblances from which lessons could be drawn, nevertheless, given the major differences between the three cases this report has not been designed to follow a strict comparison. Yet, a study of these countries together is a very promising endeavour as it could offer insights into the various difficulties the EU faces in promoting its values in its relations and in its interactions with states that aspire to become global players.

Given the above-mentioned constraints, instead of a strict comparison this project has drawn on a loose framework of core issue areas to investigate by our researchers in the three countries. These issue areas are (later they will be justified and elaborated upon briefly):

- Human Rights dialogues and consultations (including more assertive means of communicating positions such as sanctions, demarches)
- Actions on the ground – i.e. attempts to make a difference not through governments (top-down manner), but by empowering actors 'on the ground' (bottom-up interactions)
- The link between Human Rights and economic / trade relations
- Different understandings of Human Rights and critical comments on the EU and the West (i.e. what kinds of criticism these partner countries express against the EU).

In order to prepare the reports local experts in each of the countries were asked to provide a study on these four questions. Although this approach promises many benefits, it has also led to some difficulties. Concerning benefits, the fact that local experts were chosen means that readers can get the insider's view on these countries and their relations with the EU in terms of human rights issues, which may trigger important insights. At the same time asking local experts to write up these reports had the inherent difficulty that some issues may have been too sensitive for our partners to freely discuss. This was the price we were ready to pay in return for receiving the voice of local experts from India, South Africa and China.

In introducing the structure of the report that follows, first we offer an outline and justification for the four core issue areas we asked our partners to focus on in their reports. Discussing these four we can offer a useful overview for our readers to put our approach into context. At the same time much is not touched upon in this outline, because **other reports in the Frame project** offer detailed overviews of those topics to our readers.

Finally, a few additional remarks follow to recapitulate the merits and drawbacks of the approach, raising a few important points for putting our report into context and to make our goals and expectations as well as the inherent limitations of this project clear.

Third there are the three reports by our partners. Here it is important to underline that the following reports are edited, nevertheless each represents the work of the respective partner, and therefore authorship should be recognised accordingly.

Finally, the report ends with a conclusion highlighting the main points of the studies, bringing their findings together and offering a brief overview of the recommendations offered by the individual case studies.

## D. The four core issue areas the reports focus on

Below the four core issue areas are explained that our partners were asked to reflect upon in preparing their country reports. If this introduction comes across with a somewhat sceptical tone this is because the aim here is to raise questions and to point out problems and dilemmas – but also to identify possible entry points for the EU to make a difference – as pointed out by the general literature on the subject. Having said this, the aim below is not a literature review, which is done in other reports,<sup>5</sup> but merely an explanation of the approach this report builds on; raising some issues for putting the reports that follow into perspective.

### 1. Human Rights dialogues and consultations

Focusing on the way the human rights dialogues unfold between the EU and the three countries is an obvious starting point for the country reports, especially as the Commission used to consider these dialogues and related consultations as the most effective approach to promote human rights.<sup>6</sup> Also, the EU explicitly states, for example in its relations with China that it sees this as the: ‘preferred channel for

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<sup>5</sup> See, for example: FRAME Deliverable No. D12.1. - ‘*Report mapping legal and policy instruments of the EU for human rights and democracy support*’; FRAME Deliverable No 7.1, ‘The Positive and Negative Human Rights Impacts of Non-State Actors’ (FRAME Deliverable No. 7.1) <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/04-Deliverable-7.1.pdf>> accessed 27 September 2016. or FRAME Deliverable No.1, ‘The Integration of Human Rights in EU Development and Trade Policies’ 18 <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/07-Deliverable-9.1.pdf>> accessed 30 September 2016.among others.

<sup>6</sup> Communication from the Commission to the Council and the European Parliament, The European Union’s role in promoting human rights and democratization in third countries, Brussels, 8 May 2001, COM(2001) 252, 8. – see: *Deliverable No. D12.1. (n 5)*

working to improve the human rights situation in China.<sup>7</sup> Therefore starting with the dialogue makes sense, even though in the other cases they play a much smaller role, the reasons for which will be explained in the studies.

Thus, there is considerable difference between the dialogues with the three countries under study. In the case of India the EU's human rights dialogue started in 2004, with China the human rights dialogue started in 1995 and had more than 30 meetings, but with South Africa the EU-SA Structured Dialogue Forum was launched only as recently as 2013.<sup>8</sup>

Despite the optimism of the Commission the positive evaluation of the dialogue is not unanimously shared. Some researchers even argue that even though the dialogues create an important institutional framework for consultation over issues of human rights, ultimately these dialogues can rarely go beyond parties paying lip service to human rights issues. Mattlin points out, in the case of the dialogue with China for example, that beyond talks there is little actually getting realised and ironically the dialogue mechanism offers a convenient setup for China to brush-off human rights issues by compartmentalising them. Thus, the dialogues amount to little more than becoming a 'talking shop without much effect'.<sup>9</sup> Concerns similar to Mattlin's were voiced by Kinzelbach arguing that these dialogues trained the Chinese to engage with EU experts in a professional manner in challenging and countering European claims on human rights.<sup>10</sup>

Given these contrasting views on the dialogue we asked our partners in the respective countries to focus on the unfolding of the dialogue in the first parts of their reports. We requested that they summarise its events, evaluate it from the perspective of their respective country and finally to offer recommendations, where possible, for improving them. Thus, this report supplements **Deliverable 3.5** that includes a general evaluation of the dialogues and calls on the EU to take the dialogues as two-way avenues that offer parties opportunities to learn from each other.<sup>11</sup> This report can greatly contribute to this objective by offering the EU's partners the opportunity to voice their opinion on the EU's efforts promoting human rights in their country.

## 2. The EU's human rights projects in South Africa, India and China

Besides conducting top-level dialogues with representatives of partner countries the EU is also aware of the importance of promoting human rights through a bottom-up approach, that is, through capacity

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<sup>7</sup> EU-China Human Rights Dialogue, see: 'European Union - EEAS (European External Action Service) | 2 Human Rights Dialogue' (Eeas.europa.eu, 2016) <[http://eeas.europa.eu/delegations/china/eu\\_china/political\\_relations/humain\\_rights\\_dialogue/index\\_en.htm](http://eeas.europa.eu/delegations/china/eu_china/political_relations/humain_rights_dialogue/index_en.htm)> accessed 27 September 2016.

<sup>8</sup> "PRESS RELEASE 3199th Council Meeting Foreign Affairs Brussels, 19 November 2012" <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/133604.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/133604.pdf)> accessed 27 September 2016., see: FRAME Deliverable No. D12.1 (n 1).

<sup>9</sup> Mikael Mattlin, 'Dead on Arrival: Normative EU Policy towards China' (2012) 10 Asia Europe Journal 181, 190

<sup>10</sup> Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (Routledge 2015) 177.

<sup>11</sup> See: FRAME *Deliverable No. D3.5.* 'Case Studies on EU Human Rights Dialogues'

building at the local level and supporting committed civil society actors. The European Instrument for Democracy and Human Rights (EIDHR) emphasises that partnership with civil society is critical for improving political conditions and also for promoting human rights.<sup>12</sup>

For example, the EU supports the Foundation for Human Rights in South Africa, which is engaged in a wide range of programmes and projects.<sup>13</sup> It supports a programme for the socio-economic rights for vulnerable and marginalised groups for example.<sup>14</sup> As another example we could quote the EU delegation with its range of small projects promoting human rights in India in order to improve the capacities of Civil Society Organisations for human rights.<sup>15</sup>

It is widely argued that although external opinion and pressure may play a role in spreading human rights norms it is foremost domestic pressure that is responsible for policy changes in the field. As Wai pointed out in the case of China:

the progress made [in issues over human rights] is mainly due to the necessities from domestic pressure urging for better governance, rather than a reaction to the pressure from Europe.<sup>16</sup>

Given this, it is a reasonable approach for the EU not to rely only on top-level dialogue, but also to make efforts for domestic capacity building and for spreading the concern for human rights among the domestic population, in order to contribute to this domestic pressure building up gradually.

Kenneth Roth, the executive director of Human Rights Watch, expressed a similar opinion. He pointed out that although external pressure could play a role in improving human rights – for example in the case of the abolition of re-education through labour in China – it was the voice of a growing Chinese middle class and social media that exercised decisive influence leading to policy changes in China (Roth 2014).<sup>17</sup> Thus, Roth argued, instead of focusing on backroom dialogues western states should focus on the general public in promoting human rights.

If these assertions concerning the role of the public are true, then it is crucial to investigate the projects the EU supports and finances in these countries with the aim of promoting human rights in a bottom-up manner, making human rights norms spread widely among the citizens of the target countries. Hence,

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<sup>12</sup> 'EIDHR: How We Support Democracy And Human Rights?' (Eidhr.eu, 2016) <<http://www.eidhr.eu/supporting-dandhrs>> accessed 27 September 2016.

<sup>13</sup> 'Foundation For Human Rights : Programmes' (Fhr.org.za, 2016) <<http://www.fhr.org.za/programmes/>> accessed 27 September 2016.

<sup>14</sup> 'Foundation For Human Rights: Calls For Proposals' (Fhr.org.za, 2016) <<http://www.fhr.org.za/funding/calls-proposals/>> accessed 27 September 2016.

<sup>15</sup> 'European Union Launches Call For Proposals For Human Rights Projects In India – Udine & India' (Udineindia.dimi.uniud.it, 2016) <<http://udineindia.dimi.uniud.it/news/european-union-launches-call-for-proposals-for-human-rights-projects-in-india>> accessed 27 September 2016.

see also on this issue: *EU-India FTA Impacts on Human and Social Rights Issues*1 (2016) <<http://india-fta-impacts.eu/>> accessed 27 September 2016.

<sup>16</sup> Ting Wai, 'Human Rights and EU-China Relations' in Roland Vogt (ed), *Europe and China, Strategic Partners or Rivals?* (Hong Kong University Press 2012) 124.

<sup>17</sup> Kenneth Roth, 'An Interview with Kenneth Roth of Human Rights Watch' (18 March 2014) <<http://www.fletcherforum.org/2014/03/18/roth/>> accessed 11 August 2016.

the second core issue area, which we asked our partners to investigate, was the situation concerning EU funded human rights projects in South Africa, India and China.

At this point, however, a caveat is due. It must be recognised that these are countries of enormous size; consequently these projects funded by the EU might be just like drops in the sea. They might be crucial, however, first mainly in symbolic terms with the EU offering actual support beyond words; and second, if they get publicised, they could become models that encourage the creation of similar projects with domestic funding. (The case studies below, especially on China will reinforce this assertion).

### 3. The link between Human Rights and economic relations / trade relations

In its strategic framework and action plan the EU has called for coherent external policies and stated that: 'The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology ... (Council of the European Union 2012)'.<sup>18</sup>

Emilie M. Hafner-Burton argues that including human rights concerns into negotiations and trade deals can have a positive influence on human rights,<sup>19</sup> while it has also been noted that the European Parliament has shown great concern about the linkage between human rights and trade and development goals.<sup>20</sup> Nevertheless, even though economic relations may offer opportunities for influencing and even forcing states to conform to human rights norms, in the case of such economic heavyweights as China or India the economic power of the EU may be limited. Also, the economic interests of individual member states may trump normative EU-wide considerations.<sup>21</sup>

Furthermore, there is scepticism among partner countries concerning the inclusion of human rights concerns into economic agreements. For example India is opposed to the inclusion of human rights matters into a trade agreement, because India believes that 'the EU is using human rights issues and environmental and labour standards as a protectionist ploy'.<sup>22</sup> That is, partner countries see the EU using human rights as a way to gain economic advantage and they question the sincerity of the EU in linking human rights to economic issues.

Recognising these difficulties we asked our partners to devote a section of their reports to the link between economic issues and human rights. Especially because at the time this project was still under design an even greater optimism prevailed concerning the economic future of the BRICS countries. By

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<sup>18</sup> Council of the European Union, 'Strategic Framework and Action Plan 11855/12', (Luxembourg 25 June 2012) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf)> accessed 21 August 2016, see also: FRAME Deliverable No. D12.1 (n 1) 23.

<sup>19</sup> Hafner-Burton, Emilie M, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press 2013)

<sup>20</sup> See here. FRAME Deliverable No.1.

<sup>21</sup> Mattlin (n 9) 193.

<sup>22</sup> 'Human Rights In The EU-India FTA: Is It A Viable Option? - ECDPM' (ECDPM, 2016) <<http://ecdpm.org/great-insights/trade-and-human-rights/human-rights-eu-india-fta-viable-option/>> accessed 27 September 2016



today, however, this optimism has been partly toned down,<sup>23</sup> with clouds gathering over the Chinese economy and problems arising also in South Africa. Despite of this, states under study here remain dominant economic players in the world economy and crucial trade partners for the European Union.

#### 4. Different understandings of human rights? / Human rights promotion and the EU under criticism

Finally, as the last issue area we asked our partners to reflect on the sense in which in the country they study human rights are interpreted differently than in the West, that is, if there are any conceptual differences hindering the success of dialogues and cooperation. This issue is especially important given the claim that human rights have universal validity. Deliverable 3.3 already approached this topic from the perspective of different conceptions of human rights around the World.<sup>24</sup> This report therefore is not so much aimed at studying conceptual differences, but at understanding why the EU is criticised. For example, why is the EU criticised for its inconsistency in its human rights policy from the Indian perspective (as we can read in the case study below)? Putting it differently this report neatly complements Deliverable 3.3's conceptual inquiry by offering critical reflections on the EU's effort to promote human rights from the perspective of the EU's partners.

Can we claim that human rights – despite recognising their universality – are understood differently in China, India and South Africa? Can we talk about different human rights traditions, while all agreeing on the universality of human rights? And if so, could we not reasonably assume that if there are different human rights traditions, then the paths for fully realising human rights may also be different? Pinghua Sun points out, for example, that human rights protection has undergone dynamic developments in China in the past decade,<sup>25</sup> yet according to Pinghua Sun the West is not aware of this progress.

The fact that human rights were first framed in the West means that they build on western experiences and cultural traditions and carry the imprint of the West, which may easily remain hidden for a western observer, yet could be manifest for someone with a different cultural background. In order to make communication easier between the West and its partners it is important to realise that western norms of human rights when reaching non-western countries do not arrive into a normative vacuum, but meet local customs and norms. For example in the case of South Africa human rights meet traditions of *ubuntu*, that is, local norms that prioritise the community over the individual emphasising that man can only realise him or herself as part of a community. The point to make here is that unless we are aware of these cultural factors it is impossible to enter into a mutually productive dialogue and promote human rights effectively. Having said this, cultural difference should not be accepted as an excuse for ignoring those in need or pursuing unfair practices.

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<sup>23</sup> Tisdall S, 'Has The Brics Bubble Burst?' (the Guardian, 2016) <<https://www.theguardian.com/business/2016/mar/27/brics-bubble-burst-brazil-russia-india-china-south-africa>> accessed 27 September 2016.

<sup>24</sup> FRAME Deliverable No. 3.

<sup>25</sup> Pinghua Sun, *Human Rights Protection System in China* (2014) 21.

Finally, it is also important to underline that Europe's self-understanding as a normative power may invite resentment in its partners given historical legacies. Memories of the colonial era and of western dominance have created an unfavourable context for the West to preach norms and to speak from the moral high ground. Non-European states tend to be sceptical towards the West and the EU and regard its attempts at promoting human rights as inappropriate paternalism and occasionally even hypocrisy. Treating human rights as new standards of civilisation brings memories of an era when Europe was similarly projecting its values to the rest of the world to the fore. One should not forget what Tagore pointed out at a lecture in China already in 1924:

We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, humbled by our own helplessness, and overwhelmed by the speed. We agreed to acknowledge that this chariot-drive was progress, and that progress was civilization. If we ever ventured to ask, 'Progress towards what, and progress for whom,' it was considered to be peculiarly and ridiculously oriental to entertain such doubts about the absoluteness of progress.<sup>26</sup>

Also, it is important to recognise that for China prior to 1949 the era is referred to as the hundred years of humiliation experienced at the hands the West; colonial legacies remembered negatively in India,<sup>27</sup> and in South Africa the greatest violation of human rights were committed by the apartheid regime, by realising the darkest aspects of European civilisation. As one observer noted these states are not banana republics and the EU should recognise both the significance of historical context, and also the limited capacities of poorer countries given the lack of resources they can rely on. Finally, the EU should also take cases when human rights are violated on its own soil more seriously. China for example, when it was heavily criticised for its violent crackdown on Uighur protesters in 2009 suggested that the EU should pay attention to discrimination against the Roma or the rights of migrants in Europe.<sup>28</sup>

In additions to this it is important to realise that Europe is losing its role in offering a model for those that aspire for success to follow. As Jaffrelot explained a few years ago, the Indian 'nouveaux riches (Sic!)' at the time showed disdain for Europe, seeing it as morally and intellectually exhausted.<sup>29</sup>

This sceptical paragraph here is not intended as a bashing of the EU, but simply a call raising attention for the need to understand the nuances of the criticism raised against the EU and the West, because

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<sup>26</sup> Tagore Rabindranath 'Lecture in China' (1924) <<http://www.swaraj.org/tagorecivilization.htm>> accessed 21 August 2016.

<sup>27</sup> Christopher Ogden, *Indian Foreign Policy* (Polity Press 2014) 5.

<sup>28</sup> Sceats, Sonya and Shaun Breslin, China and the International Human Rights System, Chatham House (The Royal Institute of International Affairs 2012), 12 <[https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012\\_sceatsbreslin.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf)> accessed 18 March 2016.

<sup>29</sup> Christophe Jaffrelot, 'India And The European Union: The Charade Of A Strategic Partnership' (CERI-Sciences Po/CNRS 2006) <<http://spire.sciencespo.fr/hdl:/2441/f5vtl5h9a73d5ls974os14q2h/resources/art-cj.pdf>> accessed 11 December 2015.

casting them aside is just as much a mistake on the part of the EU, as it is a mistake on the part of its partners to use these as an excuse for not taking over good practices from Europe. The case studies below are intended to offer a perspective on these issues from the points of view of the EU's partner countries.

## **E. A few comments on the merits and limitations of choosing such an approach**

In choosing our partners for writing the reports it was important to ask local experts to do the job, expecting local insights and perspectives otherwise inaccessible in the corridors of Brussels. This ambition, of course, has its difficulties. Given that these countries are not all fully-fledged democracies according to European standards our research has its trivial limitations, namely these reports should be read understanding that it is a political reality that not all topics are necessarily freely discussable under all circumstances in all places.

Choosing local researchers to do the work meant that our case studies are tainted by local positions even if our researchers tried to distance themselves from the topic and were aiming at an objective analysis. While this could be seen as a deficiency, we believe that once this point is acknowledged this actually can have its merit by giving a local perspective. Having said this we also need to realise that research on human rights is not equally openly conducted in all countries, which can result in limits in accessible data and resources. When reading the reports this caveat should be kept in mind and the reports should be read accordingly.

Reading these reports one should recognise that these are countries of enormous size. Obviously our study cannot attempt to offer in a comprehensive study of how activities supported by the EU unfold in the three countries we study – out of which two countries are twice as large in population than the whole of the EU taken together. Furthermore, it is not merely size but also regional differences that could be quoted as a problem of getting at the 'big picture', with differences greater in these countries than what one can find in the European Union where practices in Denmark are hardly identical to those in Hungary.

Also we had to limit our ambition concerning the depth of these reports. Although we asked our partners to pick a few examples and discuss how in particular projects the EU's supports make a difference, nevertheless these remain just examples, difficult to generalise from. At the same time it was emphasised that local experts should include recommendations and suggestions in their reports on how the EU could promote human rights more efficiently in their respective countries.

Next three independent case studies follow, written autonomously by our Indian, Chinese and South African partners, with each building on the identical framework of the four core issue areas. While we coordinated the work of our partners and provided them with advice the authorship of the three case studies remains fully with our partners, as is indicated below. The case studies are concluded by a

closing section highlighting the main points these studies raised and the recommendations they made for the EU.

## II. India, the European Union and Human Rights

by Rajendra K. Jain

### Introduction

In the early 1990s, there was increasing European sensitivity about human rights violations in India because of growing media attention in the wake of the resurgence of insurgency—Kashmir (which began in 1989), Punjab (which peaked in 1991) and Assam in the northeast. The lack of substantial economic stakes in India also reduced the ‘cost of accusatory human rights diplomacy’ towards India.<sup>30</sup> New Delhi did not claim that there was no violation of human rights, but it stressed that it has an open society, a free Press, and an independent judiciary. It was against this background that human rights were discussed for the first time between India and the European Economic Community (EEC) in March 1990 when Foreign Minister I.K. Gujral visited Brussels for the Troika meeting.<sup>31</sup>

A more substantive discussion on human rights took place two years later when the Troika told Foreign Minister Madhavsingh Solanki that increasing concern in the Community, especially the European Parliament, compelled them to take up such questions with New Delhi. The European Foreign Ministers said they were ‘fully aware’ that they spoke to a partner who, like them, was ‘a full-fledged democracy’. They requested Indian understanding that they spoke as partners and not, in any sense, with a desire to patronise, to lecture or to appear (intrusive) into the legitimate concerns of a sovereign Government.<sup>32</sup> The Indian Foreign Minister responded by giving a detailed exposition on the country’s human rights record and the framework within the country, including the press and judiciary which existed, to take care of allegations of human rights violations as and when they occur. He explained to the Troika the context within which such ‘rare occurrences’ that took place occurred in an ‘extreme’ case of insurgency in two border States (Punjab and Jammu and Kashmir) where ‘a neighbouring country was giving the fullest material and moral support to highly trained and heavily armed terrorists’.<sup>33</sup> In 1993, there was ‘a serious discussion’ on human rights and problem of terrorism and fundamentalism when an Indian delegation visited the European Parliament.<sup>34</sup>

Growing international pressure and criticism by foreign countries as well as national and international human rights groups about human rights violations in India coupled with Pakistani attempts to introduce

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<sup>30</sup> Sanjoy Banerjee, ‘India’s Human Rights Diplomacy: Crisis and Transformation,’ in David P. Forsythe (ed), *Human Rights and Comparative Foreign Policy* (Tokyo: United Nations University Press, 2000) 191.

<sup>31</sup> ‘Foreign Ministers of the Immediate Past Presidency Country, the Present and the next Presidency of the EEC’ (1990) 2 *European Community News* 1.

<sup>32</sup> ‘Statement Issued by the Official Spokesman of the Ministry of External Affairs’ *Foreign Affairs Record* (New Delhi, 1992) 124, 126.

<sup>33</sup> *ibid*

<sup>34</sup> ‘Press Release on the Meeting between Vidya Charan Shukla, Minister for Parliamentary Affairs and Water Resources and Leader of Indian Parliamentary Delegation, with the President of the European Parliament Egon Klepsh’ *Foreign Affairs Record* (1993) 128.

a resolution calling for a fact-finding mission to investigate human rights violations in Kashmir at the United Nations Commission on Human Rights in 1993 and 1994 led to major policy changes. Firstly, New Delhi adopted a policy of greater openness in terms of permitting more NGOs, including the International Committee of the Red Cross (ICRC)<sup>35</sup> to come to India and to visit Kashmir.<sup>36</sup> Secondly, the Indian Government established the National Human Rights Commission (NHRC) – a quasi-judicial body to investigate human rights violations – in October 1993.<sup>37</sup> Thirdly, it initiated a policy of regular visits of Delhi-based Ambassadors, including those from the European Union, to Kashmir to speak to various stakeholders and see ground realities at first hand.<sup>38</sup> This included a study visit by EU Troika Ambassadors (Belgium, Greece and Germany) to Kashmir (7-9 February 1994). Though one observer remarked that it helped ‘seal’ the European abstention,<sup>39</sup> but a more crucial role was played by Iran and China in persuading Pakistan to withdraw the resolution. Fourthly, a course on human rights was introduced in police and paramilitary academies.<sup>40</sup> Fifthly, New Delhi initiated a political process in Kashmir.

In March 1994, the Indian Foreign Minister expressed the hope that the EC delegation would ‘work closely’ with the Indian delegation in Geneva.<sup>41</sup> India ‘briefed’ the Troika Foreign Ministers in 1996 on the human rights situation in Jammu and Kashmir.<sup>42</sup> The European Commission Communication on the EU-India Enhanced Partnership (1999) noted that India had been ‘cautious towards European criticism

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<sup>35</sup>The 1995 MoU with the International Committee of the Red Cross (ICRC) provided it access to Kashmir and gave it a role in the sensitisation of Indian forces so that while the latter went about their work of addressing terrorism they observed the required human rights norms. ICRC representatives visited the jails where terrorists were detained and furnished confidential reports to government on the treatment meted out to them bringing out the shortcomings so that remedial action could be taken. Furthermore, under its guidance human rights sensitization modules on international humanitarian law were run for Indian security personnel in order to create greater awareness about human rights norms and the need to abide by them. Satish Chandra and Arvind Gupta, ‘India–Pakistan Human Rights Imbroglio in Geneva’ (2014) 38 STRATEGIC ANALYSIS 530.

In a decade (1995-2005), ICRC staff had conducted more than 300 sessions with security forces on international humanitarian law in Kashmir and elsewhere, which touched an estimated 20,000 junior grade officers in one way or another. Wikileaks cable, ‘ICRC frustrated with the Indian Government,’ 6 April 2005, at ‘Cable: 05NEWDELHI2606\_A’ (Wikileaks.org, 2016) <[https://wikileaks.org/plusd/cables/05NEWDELHI2606\\_a.html](https://wikileaks.org/plusd/cables/05NEWDELHI2606_a.html)> accessed 27 September 2016.

<sup>36</sup> The years 1993-94 were marked by what the official spokesperson described as ‘Operation Transparency’. In 1993, 6,240 foreigners, including tourists and members of the diplomatic corps, apart from 142 foreign media persons visited the Valley. The International Jurist Commission visited the Valley as well as Jammu, including the migrant camps. However, Amnesty International and Asia Watch were denied permission to visit Kashmir. Kashmir Balraj Puri, *Insurgency and After* (Hyderabad, 2008) 81.

<sup>37</sup> The NHRC is an independent monitoring and advisory body composed of retired judges of the Supreme Court to strengthen the protection of human rights in the country. See Vijayashri Sripati, ‘India’s National Human Rights Commission: A Shackled Commission?’ (2000) 18 Boston University International Law Journal 1 1, 18.

<sup>38</sup> J.N. Dixit, *India’s Foreign Policy 1947-2003* (New Delhi: Picus Books 2003) 252.

<sup>39</sup> S. Banerjee, ‘India’s human rights diplomacy: crisis and transformation’ in D. Forsythe (ed), *Human Rights and Comparative Foreign Policy: Foundations of Peace* (Tokyo, United Nations University Press 2000) 197

<sup>40</sup> Balraj Puri (n 36) 81.

<sup>41</sup> ‘Statement Issued by the Official Spokesman of the Ministry of External Affairs on Call by European Union Troika. Ambassadors Accompanied by the US Charge d’Affaires on the External Affairs Minister’ *Foreign Affairs Record* (1994) 56, 57.

<sup>42</sup> ‘EU Troika to Have Discussion Son Human Rights, Disarmament with India’ *The Times of India* (4 March 1996).

on its human rights record at the UN'.<sup>43</sup> Commissioner Mario Monti cautioned that public declarations made a HRD 'more difficult, at least in the short term'.<sup>44</sup>

With the launch of annual summits in 2000, there were frequent references to human rights in joint statements. The Joint Declaration of the first India-EU Summit emphasised the importance of coordinating efforts to promote and protect human rights.<sup>45</sup> The second India-EU summit (2001) reiterated this<sup>46</sup> and the Agenda for Action stated that democracy and human rights would be discussed as 'an element' in Senior Officials and Ministerial meetings.<sup>47</sup> Human rights, the next summit (2002) resolved, would remain on the agenda of EU-India dialogue 'at various levels'.<sup>48</sup> The fourth summit (2003) underlined the 'equal importance' of civil, political, economic, social and cultural rights and expressed willingness of both sides to discuss human rights 'in a comprehensive manner'.<sup>49</sup> However, New Delhi refused to discuss human rights on a bilateral basis at the 2004 summit. The Dutch Presidency and the EU, therefore, said it would look for a discussion on the topic in multilateral contexts such as the UN and would potentially move it back into a bilateral context in the future. In the area of human rights, India asserts that it is capable of handling developments on its own and takes offense to bilateral discussion as an attack on its status as a developed nation.<sup>50</sup>

## 1. Strategic Partnership

Strategic partnerships have in recent years become a key foreign policy instrument in a multipolar world and are increasingly perceived as both a process and a format in which to conduct foreign relations with

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<sup>43</sup> European Commission, 'Communication from the Commission, EU-India Enhanced Partnership' COM(96) 275 final 16.

<sup>44</sup> Remarks by Commissioner Monti in Debates of the European Parliament, 4. EU-India Enhanced Partnership' 12 March 1999.

<sup>45</sup> 'Joint Declaration Of The First India-EU Summit, Lisbon, 28 June 2000' (2016) <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/021\\_eu\\_india\\_reso\\_1st\\_page2\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/021_eu_india_reso_1st_page2_en.pdf)> accessed 27 September 2016.

<sup>46</sup> 'Joint Communique, Second India-EU Summit New Delhi, 23 November 2001' (2016) <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/021\\_eu\\_india\\_reso\\_2nd\\_page2\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/021_eu_india_reso_2nd_page2_en.pdf)> accessed 27 September 2016.

<sup>47</sup> Ibid.

<sup>48</sup> 'Third EU India Summit: Joint Press Statement Copenhagen, 10 October 2002' (2016) <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/021\\_eu\\_india\\_reso\\_3rd\\_page1\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/021_eu_india_reso_3rd_page1_en.pdf)> accessed 27 September 2016.

<sup>49</sup> 'Fourth EU-India Summit - Joint Press Statement New Delhi, 29 November 2003' (2016) <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/021\\_eu\\_india\\_reso\\_4th\\_page2\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/021_eu_india_reso_4th_page2_en.pdf)> accessed 27 September 2016.

<sup>50</sup> Remarks by Dutch Foreign Office India Desk Officer Louise Huijbens with US Political Counsellor Andrew Schofer, The Hague, 12 November 2004. Cited in Wikileaks cable 'Netherlands/EU/India: "New Partnership" has little substance,' 12 November 2004.

major players. European and Indian perceptions, motivations, and expectations of strategic partnerships vary.<sup>51</sup>

The concept of strategic partnership is apparently rooted in the broader narrative of the EU as a strategic actor. Apart from occasional discursive references to the concept of strategic partnership, there is neither a well-defined narrative around them nor is it clearly defined in any EU document. At a special Council meeting organized by President of the European Council Van Rompuy to discuss strategic partnerships, they were said to provide ‘a useful instrument for pursuing European objectives and interests’.<sup>52</sup> They signified ‘a balance of mutual advantages and commitments’<sup>53</sup> with trade being ‘a cornerstone’ of the strategic partnership.<sup>54</sup>

Strategic partnerships, according to the Indian Government, enable an expansion of ‘policy choices and developmental options’<sup>55</sup> and assume ‘understanding and openness on both sides’.<sup>56</sup> They represent an upgrade, ‘a qualitative transformation’ of mutual interaction,<sup>57</sup> and a ‘maturing’ of the relationship.<sup>58</sup> For New Delhi, a strategic partnership signified ‘a partnership between equals’ and *not one where ‘one side is prescriptive or one side is intrusive and the other side is, in a sense, a passive partner’* and that the relationship should be carried forward on the basis of ‘a mutual recognition that we are dealing with partners, we are dealing with countries which are independent and sovereign’.<sup>59</sup>

The strategic partnership was endorsed at the fifth India–EU summit (2004). a new Political Declaration and a Joint Action Plan (European Commission 2005) divided into four sections (politics, trade and investment, economic policy, and cultural and academic matters) covering issues of mutual concern were adopted at the next summit in September 2005.

<sup>51</sup> Rajendra K Jain, ‘India-EU Strategic Partnership: Perceptions and Perspectives’ (2014) <[http://www.diss.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FU\\_DOCS\\_derivate\\_000000004250/wp1014-india-eu-strategic-partnership\\_0.pdf](http://www.diss.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FU_DOCS_derivate_000000004250/wp1014-india-eu-strategic-partnership_0.pdf)> accessed 27 September 2016.

<sup>52</sup> ‘EUROPEAN COUNCIL 16 SEPTEMBER 2010 CONCLUSIONS’ (2016) <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/116547.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116547.pdf)> accessed 27 September 2016.

<sup>53</sup> Remarks by President of the European Council Herman van Rompuy at the press conference before the G8 meeting at Toronto, 24 June 2010.

<sup>54</sup> Catherine Ashton, ‘EU-India Relations Post-Lisbon: Cooperation in a Changing World,’ speech by EU High Representative for Foreign Affairs and Security Policy at the India International Centre, New Delhi, 23 June 2010.

<sup>55</sup> India, Ministry of External Affairs, ‘Annual Report 2005-2006’ (Mealib.nic.in, 2016) <<http://mealib.nic.in/?pdf2533?000>> accessed 27 September 2016.

<sup>56</sup> Kamal Nath, ‘India-EU Strategic Partnership: Steps Ahead,’ address by Minister for Commerce and Industry at the Federation of Indian Chambers of Commerce and Industry (14 January 2005).

<sup>57</sup> Opening remarks by Prime Minister Manmohan Singh at the press conference with the Dutch Prime Minister and EU leaders (8 November 2004).

<sup>58</sup> Closing Remarks by Additional Secretary Suryakanth Tripathi at the official meeting on the India-EU Strategic Partnership, New Delhi (25 February 2005).

<sup>59</sup> Press conference by Foreign Secretary Shyam Saran on Prime Minister’s forthcoming visit to The Hague for the 5th India-EU Summit, New Delhi (5 November 2004). Emphasis added.



## A. India-EU Human Rights Dialogue

### 5. Human Rights Dialogue: European and Indian Perspectives

In a Communication on 'An EU-India Strategic Partnership' (16 June 2004), the European Commission expressed keen interest in further extending the human rights dialogue in 'a mutually respectful and constructive manner'. Brussels was also keen that synergies should be sought and joint initiatives developed in third countries. The Indian Government, it proposed, should be invited to start regular human rights discussions within the Athens agreed format, including senior officials and ministerial meetings.<sup>60</sup> The Commission also expressed willingness to explore funding projects in India under the European Initiative for Human Rights and Democracy (EIDHR).<sup>61</sup> The European Parliament welcomed that the strategic partnership provided for 'the extension and institutionalization of a human rights dialogue'.<sup>62</sup>

The common objectives of upholding universal principles of human rights, India argued, should be pursued in 'a manner that is non-intrusive and non-prescriptive, with due respect and recognition for each other's democratic processes. Existing channels of dialogue in this area are working satisfactorily and may be constructively utilizing the spirit of mutual respect and understanding.'<sup>63</sup> The shared values including democracy, pluralism, human rights and respect for the rule of law as well as an independent media and judiciary made India and the EU 'natural partners as well as factors of stability in the present world order'.<sup>64</sup>

The Joint Action Plan (JAP) (7 September 2005) stipulated that the two sides proposed to 'continue in a spirit of equality and mutual respect, the dialogue on Human Rights both in a multilateral and bilateral context, with the objective of building greater mutual understanding and expanding common ground in order to strengthen the foundations of the strategic partnership'. It also resolved to 'consult and discuss positions on human rights and democracy issues and look at opportunities for co-sponsoring resolutions on thematic issues in relevant fora such as UN Commission on Human Rights or UNGA Third Committee' and envisaged looking together for 'possible synergies and initiatives to promote human rights and democracy'.<sup>65</sup> The Implementation Report on the Joint Action Plan (2006) noted that the two sides had

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<sup>60</sup> Commission, 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee' (An EU-India Strategic Partnership) COM (2004) 430 final

<sup>61</sup> Ibid.

<sup>62</sup> 'REPORT On EU-India Relations: A Strategic Partnership - A6-0256/2005' (Europarl.europa.eu, 2016) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2005-0256+0+DOC+XML+V0//EN&language=ro>> accessed 27 September 2016.

<sup>63</sup> Closing remarks by Suryakanthi Tripathi, Additional Secretary, MEA, at the meeting on India-EU strategic partnership, New Delhi (25 February 2005).

<sup>64</sup> Opening remarks by Foreign Secretary Shyam Saran at the meeting on India-EU Strategic Partnership, New Delhi (24 February 2005).

<sup>65</sup> 'The India-EU Strategic Partnership, Joint Action Plan' (2016) <[http://commerce.nic.in/trade/India\\_EU\\_jap.pdf](http://commerce.nic.in/trade/India_EU_jap.pdf)> accessed 27 September 2016.

held ‘various consultations’ in New York and Geneva to discuss topics of common interest.<sup>66</sup> However, despite these consultations, there has in practice been little coordination on any of these goals.

During discussions on the Joint Action Plan II, the EU sought to push for ‘long-term commitments’ from India on human rights, but New Delhi resisted making such commitments.<sup>67</sup> Thus the JAP II (2008) merely stated that the two sides would ‘strengthen’ their consultations in the UN Human Rights Council and ‘sustain’ their dialogue on human rights with a view to promoting their universality.<sup>68</sup> The Joint Statement at the 13<sup>th</sup> India-EU summit (30 March 2016), held after a gap of four years, underscored ‘the importance they attach to human rights cooperation and expressed their intention to continue dialogue and enhance interaction in international fora, in particular the U.N. General Assembly and the UN Human Rights Council’.<sup>69</sup>

## 6. Factors that led India to start a human rights dialogue with the EU

Since the early 1990s, India had begun to be severely criticised for human rights abuses in Kashmir from both domestic and international human rights organizations, which put the government on the defensive. New Delhi initially resisted the idea of a separate human rights dialogue with the EU since human rights were being regularly discussed in the Troika<sup>70</sup> ministerial meeting since 1990. India also argued that unlike China – with which the Union had a HRD since 1994 – India was considered a democracy by the EU; therefore, there was no need for a human rights dialogue with India.<sup>71</sup>

By the mid-1990s, India had recognised that human rights would remain a high priority for the EU and that it was unlikely to disappear from the agenda. The EU too belatedly recognised that it could not talk down to India on human rights and democracy and that its strident criticism had been counterproductive.<sup>72</sup>

Five factors seemed to have influenced India’s decision to agree to start an ad-hoc human rights dialogue with the Union at the Athens Troika ministerial meeting (17 January 2003).<sup>73</sup> Firstly, timing was

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<sup>66</sup> ‘EU-INDIA SUMMIT Helsinki, 13 October 2006 EU-India Joint Action Plan: Implementation Report’ (2016) <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/021\\_eu\\_india\\_res\\_7th\\_summit2\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/021_eu_india_res_7th_summit2_en.pdf)> accessed 27 September 2016.

<sup>67</sup> Remarks by Christophe Manet, Counsellor, Political Affairs, EC Delegation, New Delhi in a meeting with US Embassy officials, New Delhi. Wikileaks cable, ‘India-EU summit preview,’ 26 September 2008; ‘17165: India-EU Summit Preview,’ *The Hindu*, 20 March 2011.

<sup>68</sup> ‘EU-INDIA SUMMIT Marseille, 29 September 2008 Global Partners for Global Challenges: The EU-India Joint Action Plan (JAP)’ <[http://eeas.europa.eu/delegations/india/documents/eu\\_india/updated\\_jap\\_en.pdf](http://eeas.europa.eu/delegations/india/documents/eu_india/updated_jap_en.pdf)> accessed 27 September 2016.

<sup>69</sup> ‘Joint Statement on the 13th India-EU Summit’ <[http://europa.eu/rapid/press-release\\_IP-16-1142\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1142_en.htm)> accessed 27 September 2016.

<sup>70</sup> The India-EU Troika meetings began in 1982.

<sup>71</sup> Interview with a former Indian Ambassador to EU (New Delhi, March 2016).

<sup>72</sup> C Raja Mohan, ‘India, E.U. Play down Rights Divide’ *The Hindu* (2003).

<sup>73</sup> In the Council Conclusions on the EU-India Strategic Partnership, the Council recalled that in January 2003, the EU and India agreed on a format for a dialogue for human rights and supports ‘the initiatives which have been undertaken by the EU Heads of Mission in New Delhi together with the Indian Government’. ‘EU-India Strategic

crucial. With growing media and international criticism of the Gujarat communal riots (2002) in International forums, India sought to ‘ensure that those issues in which public opinion and the media have an overriding interest, and where distortions need to be corrected, could be effectively addressed in the future’.<sup>74</sup> Secondly, India recognised that strong pressure on EU institutions and Member States at various levels from domestic constituencies led them to take a tougher posture towards India. Thirdly, both Northern and Southern governments initially incorporated a human rights dialogue for the ‘tactical objective’ of deflecting the pressure of NGO networks.<sup>75</sup> As a senior Indian official remarked: ‘We want to engage the EU to stop it being a nuisance and lecturing us – EU policy is liable to be influenced by NGOs.’<sup>76</sup> Fourthly, as the world’s largest democracy, India felt there was no reason for it to be either defensive or hesitant in discussing human rights issues with anyone. Fifthly, India made ‘a great point’ to be on the United Nations Human Rights Commission and subsequently the UN Human Rights Council<sup>77</sup> and felt that it ‘could contribute to work on human rights on its own terms and perspectives’.<sup>78</sup>

## 7. The Human Rights Dialogues

The ad hoc, local India-EU human rights dialogue has been held in New Delhi more or less annually since the inaugural one on 1 March 2004. A total of eight rounds have been held so far with a gap of two years between the last two. No dialogue has been held since the last one on 27 November 2013 (see Table 1).

**Table 1: India-EU Human Rights Dialogue since 2004**

HRD Meeting	Date
First	1 March 2004
Second	1 December 2005
Third	12 December 2006
Fourth	1 February 2008*
Fifth	27 February 2009
Sixth	25 March 2010

Partnership - Council Conclusions - 11 October 2004’  
<[http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc\\_119899.pdf](http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_119899.pdf)> accessed 27 September 2016.

<sup>74</sup> India, Ministry of External Affairs, ‘EC Communication Titled: “An EU-India Strategic Partnership” – India’s Response,’ 27 August 2004, para 10.

<sup>75</sup> Richard Youngs, *The European Union and the Promotion of Democracy: Europe’s Mediterranean and Asian Policies* (Oxford, Oxford University Press 2001) 6.

<sup>76</sup> Cited in Charles Grant, ‘India and the EU: Strategic Partnership,’ CER Bulletin, Issue 46, February/March 2006 <<http://www.cer.org.uk/publications/archive/bulletin-article/2006/india-and-eu-strategic-partners>> accessed 27 September 2016.

<sup>77</sup> India has been a founding member of the UNHRC and so far had four terms on the Council: 2006-2007, 2007-2010, 2011-2014 and 2015-2017. In 2006, India secured 173 out of 191 votes of the UN General Assembly – the maximum number of votes in the Asian group.

<sup>78</sup> Interview with EU Member State senior official (New Delhi, March 2016).

Seventh	22 March 2011
Eighth	27 November 2013

\* This was the human rights dialogue for 2007, which had been postponed.

The human rights dialogue, which was originally envisaged to be held in March 2012, was postponed for various reasons, including ‘agenda coordination’ issues,<sup>79</sup> understaffing, and an overburdened Joint Secretary (Europe West). In all, there were eight postponements before the next round was finally held on 27 November 2013. Human rights dialogues for 2014 and 2015 have been postponed. After the foreign policy consultations<sup>80</sup> in Brussels on 29 February 2016, the EU Delegation now intends to explore a mutually convenient date for the HRD, which may take place later this year.

Consultations on human rights are also held in New York, but mostly in Geneva in the context of the UN Human Rights Council. Human rights issues are raised at ministerial meetings, foreign policy consultations and on one occasion in the India-EU Round Table.<sup>81</sup> They are seldom raised at summits since ‘the scope for in-depth exchange of views is limited in this particular setting’.<sup>82</sup>

## 8. Actors involved in the India-EU HR Dialogue

### a) EU Participation

Till the Lisbon Treaty came into force (December 2009), European participants comprised Delhi-based EU Troika Ambassadors along with the Ambassador and Head of the Delegation of the European Commission/European Union, who is the Co-Chair of the HRD. After the Lisbon Treaty, participation in the HRD became voluntary and was open to all EU Member States provided a Member State Ambassador or his/her representative was obliged to take the floor. The EU Delegation seeks to include every Member State and to ensure that everyone gets a role. Prior to a HRD, it prepares a one-pager on various human rights issues that are proposed to be raised and succinctly states the EU position, the likely Indian response, and offers a few suggestions as to what points could be raised. It then asks Member States to choose one particular issue; at that point, a Member State can say accept or decline to speak. Those Member States, which do not speak, can attend the HRD as observers.

The number of European participants has varied from dialogue to dialogue depending on the agenda and the ‘topical’ themes under discussion. When the Ambassador of a EU Member State is unable or

<sup>79</sup> ‘Answer given by High Representative/Vice-President Ashton on behalf of the Commission to parliamentary question asked by MEP Ana Gomes’ (S&D) (E-001912-13), 22 February 2013, 12 April 2013) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-001912&language=EN>> accessed on 12 Mar 2016.

<sup>80</sup> Foreign Policy Consultations at the level of Secretaries – Secretary (West), MEA and Chief Operating Officer, European External Action Service -- began in November 2011.

<sup>81</sup> The fifth meeting of the India-EU Round Table (Bangalore, 8-10 March 2003) discussed the issue of ‘Human Rights in the Workplace’ and agreed to discuss this issue at a future meeting. The Round Table was however discontinued after the twelfth meeting in 2008.

<sup>82</sup> Letter of Commissioner Benita Ferrero-Waldner to Rikke Nohrlind, Coordinator (International Dalit Solidarity Network, 26 September 2006, at Antwoord Europese Commissie op brief IDSN, 26 September 2006).

does not wish to attend the HRD, the Deputy Chief of Mission or the political counsellor participate. In the case of large Embassies, two officials usually participate/attend the dialogue. Since the dialogue began in 2004, an average of 7-8 Member State Ambassadors generally attend the human rights dialogue.

### ***b) Indian Participation***

The size of the Indian delegation to the HRD is usually around 15 persons. The Joint Secretary (Europe West) Division is the Co-Chair of the dialogue apart from several Ministry of External Affairs (MEA) officials including Joint Secretary (UNES) [United Nations Economic and Social Division] and official(s) from the Legal and Treaties Division (when issues of a technical nature are likely to come up). Representatives of a number of line ministries, including Ministry of Defence, Ministry of Social Justice and Empowerment, Ministry of Women and Child Development (since 2006), Ministry of Minority Affairs (established in 2006) also participate. The Joint Secretary (Human Rights) of the Ministry of Home Affairs<sup>83</sup> is invariably there in all dialogues. Sometimes official(s) of the Ministry of Commerce and Industry attend. Several constitutional bodies established by an act of parliament are also present, including the National Commission for Minorities and the National Commission of Women (both established in 1992). For most of the dialogues, line ministries are usually represented by a junior officer (Section Officer).

## **9. Agenda-setting and conduct of the HRD**

The agenda of the HRD is mutually agreed upon and the human rights situation in both India and the EU is addressed in each dialogue. Both sides have rarely disagreed on the agenda though sometimes the wording has had to be fine-tuned. Often the issues put on the agenda are the result of questions raised in European national parliaments or the European Parliament.

The HRD usually lasts for around four hours or sometimes less and concludes with a lunch hosted by the Ministry of External Affairs. The human rights dialogue begins with statements by the two Co-Chairs – JS (EW) and the Head of EU Delegation. While the latter's statement is invariably brief (several minutes), his Indian counterpart may sometimes give a longer statement. Thereafter, one of the EU Ambassadors/representative raises a particular issue, which is followed by a response from the Indian side by either the line ministry or concerned official. The two Co-Chairs manage the items on the agreed agenda.

The amount of time taken up by a particular issue is uneven. Sometimes a particular issue(s) may take up more time than anticipated; as a result, the other agenda items are rushed through. The 'whole management of issues and discussions', according to a participant of a key EU Member State in the 2013 HRD, was 'a bit unfortunate; overall disappointing'.<sup>84</sup>

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<sup>83</sup> Who deals with issues concerning Jammu and Kashmir.

<sup>84</sup> Interview with EU Member State senior official (New Delhi, March 2016.)

## 10. Goals and nature of the Human Rights Dialogue

For the European Union, the human rights dialogue is an ‘efficient’ tool<sup>85</sup> to ‘improve the flow of information’ and provide ‘an opportunity for detailed discussion’<sup>86</sup> and a ‘more in-depth exchange of views’.<sup>87</sup> It is ‘a mark of a mature relationship’ since the world’s largest democracies should be able to address all human rights concerns in ‘a frank and open manner’.<sup>88</sup> The HRD is ‘an opportunity for frank discussion’, but not a ‘finger-pointing exercise’.<sup>89</sup> Even an occasional heated debate is not perceived as ‘necessarily negative’.

For the European Union and Member States, the human rights dialogue provides an opportunity to seek information and receive ‘an update’ on new initiatives by Indian authorities.<sup>90</sup> The EU Delegation and Member States get a lot of information in the HRD, which they transmit and relay to Headquarters. It provides ‘the most appropriate and efficient framework to raise human rights concerns’<sup>91</sup> and deliver demarches, which may otherwise be delayed, in order to prioritize individual cases, especially when it comes to the death penalty.<sup>92</sup> Thus, it is ‘an extremely valuable tool’, according to EU Ambassador João Cravinho, which has ‘helped, over the years, develop a mutual understanding of our respective social contexts and our positions’ in the international UN human rights fora.<sup>93</sup>

The goals of the human rights dialogue, according to the Indian Government, are ‘to build greater mutual understanding and expand the existing common ground to strengthen the foundations of the strategic partnership’ and ‘to ensure that those issues in which public opinion and the media have an

<sup>85</sup> ‘EU Annual Report on Human Rights and Democracy in the World in 2013’ <[http://register.consilium.europa.eu/doc/srv?l=EN&f=ST\\_9431\\_2013\\_ADD\\_1\\_REV\\_1](http://register.consilium.europa.eu/doc/srv?l=EN&f=ST_9431_2013_ADD_1_REV_1)> accessed 27 September 2016. 104.

<sup>86</sup> Katrin Kinzelbach, *The EU’s Human Rights Dialogue with China: Quiet Diplomacy and its Limits* (London, Routledge 2015) 30.

<sup>87</sup> ‘Answer given by Ferrero-Waldner to a parliamentary question’ (29 July 2008) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-3340&language=EN>> accessed on 13 March 2016).

<sup>88</sup> ‘Reply by the Commission to question on ‘Role of human rights in the EU-India strategic partnership’ by Sajjad Karim’ (H-0565/05) <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20050908&secondRef=ANN-01&language=EN&detail=H-2005-0565&query=QUESTION>> accessed 27 September 2016

<sup>89</sup> Interview with EU official (March 2016)

<sup>90</sup> ‘Answer given by Mrs Ferrero-Waldner on behalf of the Commission to a parliamentary question by Eoin Ryan’ (E-1654/08, 25 March 2008, 9 April 2008) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-1654&language=EN>> accessed 12 March 2016.

<sup>91</sup> ‘Answer given by High Representative Ferrero Waldner to a parliamentary question by Sajjad Karim’ (3 August 2007) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-3466&language=EN>> accessed 12 March 2016.

<sup>92</sup> There had been a de facto moratorium on executions since April 1995 until the execution of Dhababjoy Chatterjee (14 August 2004). Thereafter, there have been only three executions – Mumbai terror attack convict Ajmal Kasab (2012), Parliament attack (2001) case convict Afzal Guru (2013) and Mumbai serial blasts case convict Yakub Memon (2015).

<sup>93</sup> João Cravinho, ‘India and the EU: strategic partners in a globalised world’ (*FRPC Journal-13, India-EU Relations*, p. 57) <<http://www.frpc.in/pdf/J-13.pdf>> accessed 10 March 2016.

overriding interest, and where distortions need to be corrected, could be effectively addressed'.<sup>94</sup> By and large, the dialogue is informal and cordial. It is essentially a dialogue between diplomats; not an in-depth dialogue among experts. The tenor and atmospherics of the human rights dialogue very often depends on the role played by the Co-Chairs. By and large, the Indians have tended to be reactive and on 'a defensive mode' on issues generally raised by the Europeans in the human rights dialogue.<sup>95</sup>

The European way of presenting the topics, a EU Member State participant in the HRD remarked, particularly prompts the Indian side to react by saying that 'we do not want to be lectured; you have got your problems too'.<sup>96</sup> This view was echoed by an Indian participant in the HRD: 'We do not need your help; if India puts it upfront, they lay off'.<sup>97</sup> Thus, the end result is that 'the more you focus with one side asking questions and obliged to answer and being frustrated and more acrimonious'.<sup>98</sup>

## 11. Content of India–EU HR Dialogue

### c) Issues raised by Europeans

Issues frequently raised by the European Union have included caste discrimination, violence against women, children's rights, Kashmir, conversions, custodial deaths and killings; minority rights (including Dalits), communal violence, torture and security-related legislation, human rights defenders and women's rights.<sup>99</sup> The death penalty invariably comes up in the HRD.

The March 2010 HRD covered issues such as multilateral issues (including the UN Human Rights Council), death penalty, torture, the International Criminal Court as well as bilateral issues, such as the assessment of the ad hoc dialogue mechanism, human rights and counter-terrorism, the rights of persons belonging to minorities, women's and children's enjoyment of their human rights, child rights, descent-based discrimination and human rights defenders.<sup>100</sup>

The primary focus of the 2011 HRD was on the question of minority rights, inter-community violence, torture, the death penalty, decent work, human rights defenders and women's and children's rights, violence against women, and the fight against discrimination in its various forms.<sup>101</sup> The Europeans have had long had problems in understanding 'the dynamics of the caste system'<sup>102</sup> as well as child labour – a theme which constantly recurred. The Dalit issue, the Indians feel, tends to be 'overplayed' by the Europeans even though most local EU Ambassadors recognise the problem in India and appreciate what

<sup>94</sup> EC Communication Titled 'An EU-India Strategic Partnership' –India's Response, 27 August 2004, para 10.

<sup>95</sup> Interview with a former Indian Ambassador to the EU (New Delhi, March 2016).

<sup>96</sup> Interview with Member State senior official (New Delhi, March 2016).

<sup>97</sup> Interview with senior Indian diplomat (Paris, June 2008).

<sup>98</sup> Interview with Deputy Head of Unit, Human Rights and Democracy Unit (Brussels, 10 December 2008).

<sup>99</sup> European Commission, Memo, 'EU-India Relations' (29 January 2013) <[http://europa.eu/rapid/press-release MEMO-13-44 en.htm](http://europa.eu/rapid/press-release_MEMO-13-44_en.htm)> accessed 15 January 2016.

<sup>100</sup> 'Human Rights and Democracy in the World Report in 2010' (2011) 150.

<sup>101</sup> 'Human Rights and Democracy in the World in 2013' (2014).

<sup>102</sup> Interview with a former senior Indian official (Paris, June 2008).

has been done and is being done to ameliorate the problem. The Indians are ‘not defensive on this issue and the Europeans can hear us out’.<sup>103</sup>

The Europeans are well aware of India’s red lines, but some of them nevertheless come up, e.g. Naxalism<sup>104</sup> in the tribal belt. Though caste is ‘an absolute no’ from the Indian standpoint, it still comes up. The Europeans bring it up often because they felt it was a kind of racism. When it does come up, the ‘best man at the Ministry of Home was the Section Officer, who reads out a long statement on the subject for about 20 minutes’.<sup>105</sup> India concedes that child labour is a reality; it is banned by law, but one should also take into consideration the question of support for the family. In recent years, LGBT (lesbian, gay, bisexual, and transgender) issues have become a big concern for Europeans.

Human rights defenders<sup>106</sup> is another red flag for India. The Europeans raised the issue of Binayak Sen<sup>107</sup> because of parliamentary pressure.<sup>108</sup> The usual Indian response is that Brussels should make a proposal, which ‘we will study it and get back to you’. The Indian side ‘simply does not waste time arguing about human rights defenders. The MEA UN Division is seized of it and is very sensitive to allowing the EU Human Rights Special Representative to come to India – this is a big red flag both for the MEA and the Ministry of Home Affairs’.<sup>109</sup>

At the 2013 HRD, a number of multilateral issues were raised including the International Convention on Torture, international humanitarian law; human rights defenders and other human rights international agreements. They also focused on a number of India-specific issues, e.g. freedom of expression, minorities, death penalty, rights of the children, and women’s rights.

#### *d) Issues raised by India*

Amongst the issues taken up by India in the HRD have included human rights violations cited by the UN Human Rights Commission, the issue of minorities, Muslims and minarets, treatment of migrant workers, racism and xenophobia, paedophilia, status of Romas, and above all, issues relating to Indian

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<sup>103</sup> Interview with a former Indian Ambassador to the EU (New Delhi, March 2016).

<sup>104</sup> Naxalism comprises armed cadres of the Communist Party of India (Maoist) which seek to capture political power by violent means. The Maoist insurgency continues to be the biggest internal security challenge for India and is widespread in the “Red Corridor” in the eastern part of the country.

<sup>105</sup> Interview with a former Indian Ambassador to the EU, New Delhi, March 2016.

<sup>106</sup> A ‘human rights defender’ is a term used to describe people who, individually or with others, act to promote or protect human rights. See ‘Who Is a Defender?’ <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>> accessed 27 September 2016.

<sup>107</sup> Binayak Sen, a human rights activist, was convicted of sedition charges by a lower court in Chattisgarh in 2010, but was granted bail by the Supreme Court in 2011. An appeal against the conviction is pending in the Chhattisgarh High Court.

<sup>108</sup> In January 2011, the European Union, with authorization from the MEA, sent a delegation of observers from its Delhi-based missions of Belgium, Denmark, Germany, France, Hungary, Sweden, the UK, and the EU, to attend the court hearing in the case of human rights defender and national vice-president of the People's Union for Civil Liberties, Binayak Sen, as observers. It continued to observe the trial of Binayak Sen, who was released on bail). ‘Human Rights and Democracy in the World: Report on EU Action in 2011’ <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST 9238 2012 INIT>> accessed 27 September 2016. 236.

<sup>109</sup> Interview with a former Indian Ambassador to the EU (New Delhi, March 2016).



citizens. There were a number of issues taken up with the United Kingdom related to the treatment of Indians because of the large Indian origin population. The issue of the Sikh turban, which concerns individual Member States, comes up regularly. The UK has a different position than that of France; both respond by stating their respective legal and constitutional positions. New Delhi also brings up individual cases where there has been a clear violation of human rights. In recent years, New Delhi has more increasingly sought to raise questions about the human rights situation in the EU. But the general feeling persists that the Indian side tends to be reluctant to ask questions.

## B. Human Rights Projects in India

There are two dimensions of its human rights promotion by the European Union in India, viz. conducting a bilateral dialogue with the Indian Government and supporting civil society action.<sup>110</sup>

### 12. EIDHR

The European Initiative for Democracy and Human Rights (EIDHR) was established in 1994 and ran into two phases (1994-2000 and 2000-2006) before it was renamed the European Instrument for Democracy and Human Rights (EIDHR) in 2007. Under EIDHR, decisions on project funding in most instances rest with Country Delegations which awards projects to NGOs through a call for proposals without the consent of governments. The idea is that the EU (co-)funds projects while the local actors own and direct their activities, especially enhancing grassroots engagement by NGOs.

Initially, approximately €100 million was available annually under the EIDHR to support the promotion and defence of human rights, democratisation and conflict prevention activities to be carried out primarily in partnership with NGOs and international organisations. Projects were identified through calls for proposals, with an EU contribution of not less than €300,000 (€100,000 in the case of micro-projects). The Programming Document for 2002-2004 (and its updates 2003 and 2004) identified 29 focus countries to receive the bulk of the assistance, which later became 32 with the addition of Angola and China and Iraq in the 2003 and 2004 updates. In Asia, India was not among the five countries identified (Cambodia, China, Indonesia, Nepal, Pakistan). Within the EIDHR, however, the EU has tended to provide more funding for work on human rights than for the political elements of democracy promotion.

For the period 2007-2013 the EIDHR had a total budget of €1.104 billion and for the period 2014-2020 that of €1.333 billion. The EIDHR remains one of the smallest EU external instruments – €1.104 billion

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<sup>110</sup>Thematic Evaluation of the European Commission Support to Respect of Human Rights and Fundamental Freedoms (Including Solidarity with Victims of Repression), Final Report Volume 2 –Part 1 December 2011, Consortium PARTICIP -ADE-DIE-DRN-ECDPM-ODI' <[http://ec.europa.eu/europeaid/how/evaluation/evaluation\\_reports/reports/2011/1298\\_vol2\\_p1\\_en.pdf](http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2011/1298_vol2_p1_en.pdf)> accessed 2 May 2016.

(budget 2007-2014), which constitutes 0.0013 per cent of the overall EU budget, and 0.78 per cent of EC Official Development Assistance.<sup>111</sup>

### 13. Human rights projects in India

Though the European Initiative for Democracy and Human Rights was established in 1994, it was only six years later that the first project on human rights funded in India was a 10-country research project relating to trafficking in women. Under bilateral development cooperation, the EU funded two projects in 2001, viz. human rights and democracy (€1.947 million) and human rights and Tibetan refugees (€280,000). Human rights have not been a priority in the *Country Strategy Papers* (CSP).<sup>112</sup>

Since 2000, the EU has funded numerous small-scale projects in India, addressing issues of Rule of Law, torture and impunity, human rights education, trafficking and rights of minorities, indigenous peoples and other marginalised groups. The projects cover a wide range of activities such as monitoring violation of human rights, providing legal aid and services, advocacy, awareness generation, abolition of death penalty and helping victims of torture, empowerment and capacity building of local communities, human rights defenders and national institutions, and rehabilitation of victims of torture, trafficking and child labour. A number of projects also deal with issues of gender based violence and discrimination against women with disabilities, and workplace violence and gender wage parity in working environment.

From 2000-2016, the European Union funded a total of 54 projects on human rights various budget lines – bilateral development aid and EIDHR (under both local calls by the EU Delegation in Delhi and global calls by Headquarters in Brussels) amounting to a total of €29.347 million. During 2000-2010, 27 projects amounting to €17.691 million were funded and another 27 projects valued at €11.656 million were funded from 2011-2016.

EIDHR enables the provision of ad hoc financial support to *human rights defenders*, i.e. small grants of up to €10,000 per grant to human rights defenders in need of urgent protection or assistance<sup>113</sup> are awarded by Delegations or EU Headquarters. In 2010, this mechanism allowed to cover the legal defence of eight human rights defenders in India facing criminal charges following their work in raising issues of torture and impunity.<sup>114</sup> This has also involved observing the trial of Binayak Sen. Since 2011

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<sup>111</sup> 'Alessandro Valdambri, DEVCO B1, The European Instrument for Democracy and Human Rights' ( Brussels, 23 September 2013) <[http://www.trialog.or.at/images/doku/study\\_visit\\_croatia\\_ec\\_eidhr\\_meeting\\_2013.pdf](http://www.trialog.or.at/images/doku/study_visit_croatia_ec_eidhr_meeting_2013.pdf)> accessed 3 May 2016.

<sup>112</sup>For instance, the *CSP 2002-2006* listed 13 on-going projects in the field of human rights (six of which were co-financed) to which the EC contributed €3.702 million out of the total cost of €5.351 million. *Country Strategy Paper 2002-2006* 34.

<sup>113</sup> The urgent support may take various forms, including fees for the legal representation of defenders, to cover medical expenses, purchase security material for offices or homes, to pay for the evacuation of a human rights defender to another country, to support the operations of a human rights organisation which finds itself in a dire financial situation, etc. 'Human Rights Defenders' <<http://www.eidhr.eu/human-rights-defenders>> accessed 25 May 2016.

<sup>114</sup> 'Human Rights and Democracy in the World Report in 2010'. 20, 159

the EIDHR has been financing a €1.2 million project aimed at supporting and strengthening the network of indigenous peoples' human rights defenders which monitors and documents violations of human rights of indigenous peoples in eight Asian countries including India.<sup>115</sup>

#### 14. Country-based Support Systems

Since 2009, part of the EIDHR allocations are put at the disposal of the EU Delegation, which makes a local call under the EIDHR Country-based Support Systems (CBSS) in order to support specific initiatives at the local level.<sup>116</sup> In preparation of the CBSS, the Delegation undertakes consultations with various civil society members and human rights institutions. The EU Delegation decides the thematic priority, but it is also cleared by Headquarters. The Development Cooperation section of the EU Delegation makes a presentation to the local monthly Human Rights Group's meeting in order to take Member States on board and take their feedback and approval before announcing the thematic priority. The allocations for this have averaged €900,000 for most years. The focus/thematic priority and allocations have included: strengthening the role of civil society organizations (CSOs) in promoting human rights and democratic reform in India (2009, 2010, 2011), combating gender-based violence and discrimination (2013), and diversity and inclusion (2014, 2015).

After the EU Delegation announces a call for proposals, it normally expects a four-pager outlining the framework, broad objectives, etc. from the applicants. After shortlisting, a check is conducted whether the NGOs actually exist, and examination of their turnover, credibility, the relevance and logic of the proposal and if proposed activities are objectionable in light of the Indian Government's sensitivities.<sup>117</sup> A large number of NGOs fail to qualify when they are asked to confirm whether they conform to local legislation, viz. whether they have the requisite approvals of the Government of India under the Foreign Currency Regulation Act (FCRA) to receive foreign funds. The EU Delegation does a ranking on a points system and specifies a cut-off.

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<sup>115</sup>Human Rights and Democracy in the World: Report on EU Action in 2011', 117-118.

<sup>116</sup>European Instrument For Democracy And Human Rights (EIDHR) Country-Based Support Scheme (CBSS) - Budgets 2014 & 2015' <<https://www.devex.com/funding/grants/european-instrument-for-democracy-and-human-rights-eidhr-country-based-support-scheme-cbss-budgets-2014-2015/5194>> accessed 3 May 2016.

<sup>117</sup> In recent years, the EU Delegation has been increasingly conscious of the sensitivities of the Indian Government in the selection and funding of projects. EU Delegation officials are conscious that the Indian Government would be visibly upset if they were to discover that the Delegation had funded projects involving land acquisition or dam construction. EU officials tend to be very cautious if some projects get even close. In June 2014, an Intelligence Bureau report said 'foreign-funded' NGOs like Greenpeace, Cordaid, Amnesty and ActionAid were 'serving as tools for foreign policy interests of western governments' by sponsoring agitations against nuclear and coal-fired power plants, genetic engineering in agriculture and undermining India's growth rate and economic interests. Ajay Banerjee and Vibha Sharma, 'The cracks in crackdown on NGOs,' *The Tribune*, 5 July 2015. Three years earlier, Prime Minister Manmohan Singh had stated: 'There are NGOs, often funded from the US and the Scandinavian countries, which are not fully appreciative of the development challenges that our country faces.' Interview to the journal *Science*, cited in N Gopal Raj, 'Manmohan Criticises NGOs for Protests in Kundankulam' *The Hindu* (24 February 2012).

## 15. Assessment of 2000-2010 funding

During the period, 2000-2010, out of the total planned allocation of around €131 million (including bilateral development aid) to India, only €21.6 million was actually disbursed (i.e. 16.53 per cent), accounting for 2.08 per cent of the HR envelope. Four South Asian countries were among the top 18 recipients, with Afghanistan being the top recipient (€439.572 million) followed by Bangladesh (€56.062 million), Sri Lanka (€36.923 million), and India (€21.605 million). Bangladesh received more than two and half times as much India whereas Sri Lanka received nearly twice as much as India. This indicates the priority given in terms of financial allocations in HR related work in countries other than South Asia. (Table 2.)

**Table 2: Top recipient countries: commitments and disbursements, 2000-2010**

Country	Planned (in Euro)	Paid (in Euro)	Disbursement rate	Per cent on HR envelope
1.Afghanistan	562,232,398.61	439,572,583.41	78.18%	8.96%
2.Sudan	434,813,685.00	372,860,337,22	85.75%	6.93%
3.West Bank and Gaza Strip	304,872,081.96	275,167,110,41	90.26%	4,86%
4.Indonesia	292,652,045.84	195,200,273,09	66.70%	4.66%
5.Somalia	283,346,574.79	142,821,957,84	50.41%	4.52%
6.Iraq	278,207,688.56	262,426,597,40	94.33%	4.43%
7.Congo (Democratic Republic of the)	248,678,399.80	213,385,553,38	85.81%	3.96%
8.Russia	165,846,241.84	121,255,323,03	73.11%	2.64%
9.Colombia	153,694,649.70	121,976,848,29	79.36%	2.45%
10. Georgia	135,901,745.66	56,014,813,07	41.22%	2.17%
11. India	130,713,569.89	21,604,835,39	16.53%	2.08%
12. Bangladesh	130,664,503.14	56,062,223,76	42.91%	2.08%
13.Ukraine	107,006,339.60	72,891,707,08	68.12%	1.71%
14.South Africa	100,646,499.04	40,112,514,47	39.85%	1.60%
15. Sri Lanka	93,999,548.32	36,923,451,55	39.28%	1.50%
16.Ivory Coast	77,657,804.17	60,421,853,17	77.81%	1.24%

17.Jordan	77,622,918.39	56,646,228,01	72.98%	1.24%
18.Burundi	70,700,393.93	52,505,656,01	74.27%	1.13%
19.Regional	<b>420,955,069.80</b>	<b>191,250,855,48</b>	<b>45.43%</b>	<b>6.71%</b>
20.Global	<b>306,286,982.56</b>	<b>154,362,214,60</b>	<b>50.40%</b>	<b>4.88%</b>

Source: Consortium PARTICIP-ADE-DIE-DRN-ECDPM-ODI, *Thematic Evaluation of the European Commission support to respect of human rights and Fundamental Freedoms (including solidarity with victims of repression), volume 3, Inventory of Human Rights Interventions, December 2011, Evaluation for the European Commission*, pp. 19-20.

## 16. Impact of Human Rights projects in India

It is difficult to assess the impact of EU-funded human rights projects in ushering in major policy changes or transforming the human rights situation on the ground in a large and diverse country like India with a population of 1.25 billion. The EU Delegation in India itself has not undertaken any portfolio assessment or evaluation, which is usually initiated by Headquarters, so far of the impact of EU-funded human rights projects in India.

Beneficiaries or net results cannot be quantified, especially when they seek to enhance awareness and capacity building. EU-funded projects have not resulted in any major policy change relating to human rights in India. It would also be naïve to assume that the Union and Member States realistically expected either the HRD or meagre civil society funding to yield concrete results on the ground. The EU Delegation in India conceded that the Union *'does not have sufficient leverage with the Indian Government to influence policy/action on human rights'* and that *'funding for human rights projects through NGOs is limited, considering the size of the country and the diversity of issues'*.<sup>118</sup>

While main EC policy documents and guidelines related to human rights provide a broad framework for the EU's external action in other countries, in practice the EU Delegation in India has *'to adapt to local expectations, pressures, diplomatic/political positions etc.'* Another shortcoming of the EU's Guidelines is that while *'they talk a lot about providing support to issues on the ground, but this is not always backed by corresponding financial support, and therefore it has limited relevance'*.<sup>119</sup>

EU-funded projects on human rights have succeeded in empowering communities to access human rights. In cases of projects where legal aid is given, it enables people to get their entitlements. A particular achievement is that it is well-received in terms of raising awareness, which leads to human

<sup>118</sup> 'Consortium PARTICIP -ADE-DIE-DRN-ECDPM-ODI, Thematic Evaluation of the European Commission Support to Respect of Human Rights and Fundamental Freedoms (Including Solidarity with Victims of Repression)' (*Final Report, Volume 2 – Annexes- Part 1 December 2011* <[http://ec.europa.eu/europeaid/how/evaluation/evaluation\\_reports/reports/2011/1298\\_vol2\\_p1\\_en.pdf](http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2011/1298_vol2_p1_en.pdf)> accessed 2 May 2016.) Annexe 5, 7. Emphasis added.

<sup>119</sup> Ibid., Annexe 5, 3.

rights being realised. Some of the human rights projects favour the enjoyment of human rights by vulnerable groups by providing access to services or by reducing disparities in the enjoyment of fundamental rights by these groups.

It is possible to gauge the beneficiaries in some of human rights projects which focus on grassroots. For instance, the project 'Empowering the Vulnerable: Strengthening Grassroots Governance and Promotion in Civil Society Action in Conflict Affected Areas of Kashmir', which was implemented in 50 villages in three administrative blocks of two districts in Kashmir from 1 March 2011 to 31 August 2014 had a number of beneficiaries: 1,200 women, 1,000 youth, 100 Halqa Panchayat members, and 250 Village Welfare Committees. One year before the project completed its project cycle, 59 self-help groups (SHGs) became functional with 742 members and 370 SHG members were linked with agriculture department for accessing free vegetable seeds. Moreover, 45 village level youth clubs were organised different awareness programmes in collaboration with government departments. 155 youth have been provided capacity building/skill development training through the Rural Self Employment Training Institute and other resources agencies. Two District Level Awami (People's) Forums has been established having representation from PRI/VWC/Youth group/SHG members/Individuals. The Forums are taking up individual human rights violation cases as well.<sup>120</sup>

The EU Delegation has organized a number of *seminars* from time to time on important themes like Pluralism and Diversity (2005), Minorities in India and the EU (16 March 2007). Some seminars are organized on important days, e.g. the International Human Rights Day,<sup>121</sup> International Day in Support of Victims of Torture (26 June 2012), and Death Penalty (10 October 2012). Some seminars or national consultations are also organised as part of HR projects.<sup>122</sup> Some of these seminars are very useful in bringing together different stakeholders to debate and deliberate and then to make recommendations while laws are being framed.<sup>123</sup>

<sup>120</sup> 'Welthunger Hilfe' <[http://welthungerhilfesouthasia.org/custom\\_page\\_one/empowering-the-vulnerable/](http://welthungerhilfesouthasia.org/custom_page_one/empowering-the-vulnerable/)> accessed 10 May 2016.

<sup>121</sup> See, for example, 'EU-India Update' (2009, no. 6. 5.) <[http://eeas.europa.eu/delegations/india/documents/press\\_corner/newsletter/2009\\_06.pdf](http://eeas.europa.eu/delegations/india/documents/press_corner/newsletter/2009_06.pdf)> accessed 27 September 2016.

<sup>122</sup> For instance, national consultations as part of the EIDHR project 'National Campaign for Prevention of Torture in India' was organised by the Asian Centre for Human Rights, New Delhi. See 'EU-India Update' (no. 3, 2009, 7.) <[http://eeas.europa.eu/delegations/india/documents/press\\_corner/newsletter/2009\\_03.pdf](http://eeas.europa.eu/delegations/india/documents/press_corner/newsletter/2009_03.pdf)> accessed 27 September 2016.

<sup>123</sup> The participants at the National Conference welcomed the Prevention of Torture Bill, 2008 as drafted by the Government of India to ratify the UN Convention Against Torture (UNCAT), and welcomed the opportunity presented by the National Conference to have detailed consultations on the draft bill and make specific recommendations to the Government of India on making the bill a more effective instrument in addressing torture in India. While the purpose of the conference was to study the draft bill of the government and make suitable recommendations, it was also recognised that relating the recommendations to legal amendments that are currently underway in the country, such as the 2008 amendment to the Code of Criminal Procedure, would make the Torture Bill more effective and more in conformity with other legislations. The recommendations to the Torture Bill are being presented by ACHR to the Parliamentarians of both houses, and the Ministry of External Affairs – the nodal ministry for drafting the bill. 'Together against Torture,' *ibid*

## 17. Factors limiting impact of HR projects

The impact of EU-funded human rights projects in India has been limited for a number of reasons. Firstly, when compared with development assistance provided under the EU budget and the European Development Fund, EIDHR funding is relatively small. It is only under call for proposals made by Headquarters that the size of grants are larger, but then they function and focus on a number of countries.

Secondly, funding is not only limited, but grants can only be for a period of three years because of financial regulations. One needs to be able to have a project length of a longer duration in order to have more impact; but there is no mechanism whereby EU Delegation can continue funding beyond the initial project.

Thirdly, the minimum threshold of human rights projects are for a maximum duration of three years €300,000 (subsequently enhanced to €375,000)<sup>124</sup> for local calls has enabled only large and experienced NGOs have been able to apply and meet the selection criteria. In recent years, however, the receipt of additional funds from Headquarters (largely unspent EIDHR funds by some other country) has enabled the EU Delegation in India to fund a few more HR projects over and above its annual allocation of around €900,000.<sup>125</sup> A few of the EU Member States (e.g. Austria and the Netherlands) at times sponsor very small human rights projects of up to €10,000.

Fourthly, the positive impact of most human rights projects is for the most part limited since it focuses on relatively small target groups, and limited geographical focus (in the number of states they cover) out of the whole of India.

Fifthly, since all the projects awarded under the local call are simply too small, the EU Delegation does not have adequate resources, either in terms of manpower or financial support, to handhold them. As a result, the success of the project ultimately depends on the ownership and commitment of implementing agencies themselves.

Sixthly, most of the civil society space and NGOs are based in cities. In three years, they do succeed in penetrating to some extent in the rural areas and just manage to set up support groups. As a result, the level of people's rights consciousness never really rises despite all the financial support.

Seventhly, major constraint is the fragility and aid-dependency of civil society organisations, which indicates that sustainability remains a continuous challenge once funding ceases. Thus, the lack of financial self-sufficiency poses perennial challenges for sustainability of NGO partners.

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<sup>124</sup> From 2009-2013, the ceiling for a EIDHR project under a local call (CBSS) was €300,000; since 2014, it has been raised to €375,000.

<sup>125</sup> Interview with official of EU Delegation in India (May 2016).

Finally, while EIDHR enables the European Union to work with a wide range of civil society organizations and European political foundations, it has been criticised for failing to have ‘a real impact because it lacks administrative flexibility, requires long lead times and tends to favour the capital-based NGOs’.<sup>126</sup>

## 18. Conclusions

The India-EU human rights dialogue has become ‘a diplomatic ritual’<sup>127</sup> in which both sides go through a routine of reiterating their long-held positions on various issues. They have, in fact, become ‘ritualized chat sessions’.<sup>128</sup> They are ‘more about means than ends, with the dialogues themselves held up as evidence of rights advocacy’.<sup>129</sup> The HRD is rarely an interaction where best practices are discussed and shared.

As part of the European Commission’s aid differentiation policy, India is among the sixteen Development Cooperation Instrument (DCI) countries which are not eligible to receive geographical programme/bilateral aid from January 2014 onwards since it has an economy whose GDP represents more than 1 per cent of global GDP. Looking to the future, one must accept that human rights funding is limited and will continue to be limited. In fact, with bilateral development aid having ceased in 2014 as India is increasingly recognised as an emerging and fast growing economy, human rights financial allocations for India under EIDHR are likely to be cut even further and not increased.

To most stakeholders in India, the European Union’s understanding of the social milieu in India and the problems of the 5,000 years old Indian society appear to be ‘incomplete and even superficial’. On many of these issues, the EU’s ‘policies and prescriptions at times, are far too intrusive and even penal in nature, thus rendering them counterproductive.’ What the European Union needs to do is to adopt ‘a more pragmatic and helpful approach’.<sup>130</sup> One former Indian Ambassador to the EU urges India not to be ‘provoked’ by EU advocacy on themes like human rights.<sup>131</sup>

Thus, the diplomacy of human rights ‘remains different, and at places contradictory, in part because the realities and perceptions of strategic interests differ among the developed and developing States and because values, even when otherwise fully shared human rights “values”, acquire different meanings in time, place and circumstance’.<sup>132</sup>

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<sup>126</sup> European Foundation for Democracy, 2006, p. 6, cited in Armine Ishkanian, *Democracy Building and Civil Society in Post-Soviet Armenia* (London, Routledge 2008) 27.

<sup>127</sup> Interview with EU Member State Ambassador (New Delhi, April 2016).

<sup>128</sup> Ming Min, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia, Univ of Pennsylvania Press, 2001) 132, cited in David Webster, ‘Canada and Bilateral Human Rights Dialogues’ (2010) 16 *Canadian Foreign Policy* 54.

<sup>129</sup> *Ibid.*

<sup>130</sup> AN Ram, ‘India and the European Union in the New Millennium: Challenges and Opportunities’ in Rajendra K Jain (ed), *India and the European Union in the 21st Century* (Radiant 2002) 6-7.

<sup>131</sup> Dinkar Khullar, ‘In Search of a New Trajectory: India-Britain Relations Have Been on the Back Burner for Too Long. The Prime Minister Should Explore New Avenues of Cooperation’ *India Today* (23 November 2015).

<sup>132</sup> Upendra Baxi, ‘Towards Understanding the Diplomacy of Human Rights: A Review Essay’ (2010) 50 *Indian Journal of International Law* 9.



India will neither be a rule-breaker (i.e. a nation that stands in gross violation of human rights and the global regime) nor a rule-taker (i.e. a nation that largely accepts the various instruments and conventions of the regime). It is likely to act as ‘a rule-shaper, seeking exceptions for itself whenever possible and generally dragging its feet in cases of proposed humanitarian intervention. It can contribute to new institutions that focus on reconceptualizing human rights as economic rights, e.g. the right to development.’<sup>133</sup> However, in order to have a meaningful and constructive dialogue with the West on human rights, one Indian researcher opines, it is essential that India is ‘a part of the inner circle and its autonomy and status’ are protected. Thus, as ‘a liberal democracy, India has no quarrel in principle with Western ideals of human rights. However, it does differ on how best to achieve human rights protection without straying into the realm of regime change or other political and security side effects’.<sup>134</sup>

While India supports human rights, it does not want ‘to give prescriptive solutions from outside’ to problems in a country.<sup>135</sup> Normatively, New Delhi strikes ‘a middle path’. India is committed to genocide prevention, R2P, human rights, and liberal democracy in principle, but has serious reservations regarding their practical implementation. The commitment is born out of its own national values. The reservations are borne out by its experience too. . . . [India] has been less enthusiastic in enterprises promoting liberal democratic norms, for it is a state primarily concerned with maintaining its own national unity, social transformation, and economic development.’<sup>136</sup>

## C. Human Rights Provisions in Trade Agreements

### 19. The 1993 Trade and Cooperation Agreement and the ‘Essential Clause’

The **Cooperation Agreement between the European Community and the Republic of India on Partnership and Development** (1994) had a provision on human rights (Article 1.1) – the so-called ‘essential clause’<sup>137</sup> This text ‘clearly provides a basis’ for raising questions related to human rights in the context of exchanges and negotiations with India.<sup>138</sup> The Ministry of External Affairs (MEA) was not initially inclined to include such a clause because it was felt that such clauses were ‘irrelevant’ in trade

<sup>133</sup> Rohan Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’ in Doutje Lettinga; Lars van Troost (ed), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 54

<sup>134</sup> Ibid.

<sup>135</sup> Remarks by M.K. Lokesh, Deputy Head of Indian Mission to the European Union. Cited in Kirsty Hughes, ‘The EU in a Globalised World’ (2007) 13 *European Voice*.

<sup>136</sup> Nitin Pai, ‘India and International Norms: R2P, Genocide Prevention, Human Rights and Democracy’ in Waheguru Pal Singh Sidhu; Pratap Bhanu Mehta; Bruce Jones (ed), *Shaping the Emerging World: India and the Multilateral Order* (Washington DC, Brookings 2013) 317.; Shyam Saran, ‘India and Multilateralism: A Practitioner’s Perspective’ in Waheguru Pal Singh Sidhu; Pratap Bhanu Mehta; Bruce Jones (ed), *Shaping the Emerging World: India and the Multilateral Order* (Brookings 2013) 54.

<sup>137</sup> It reaffirmed ‘the importance they attach to the principles of the United Nations Charter and the respect of democratic principles and human rights’. ‘Official Journal L 223, 27/08/1994’ <[http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21994A0827\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21994A0827(01))> accessed 27 September 2016 0024 – 0034.

<sup>138</sup> ‘Answer given External Affairs Commissioner Ferrero-Waldner on behalf of the Commission to a parliamentary question’ (28 January 2009, Official Journal, 23 December 2009) 316.

agreements and because some developing countries themselves. However, it was eventually cleared by the MEA after ‘a good deal of deliberation’.<sup>139</sup>

This clause, according to Brussels, provides ‘a basis for raising questions related to human rights in the context of exchanges and negotiations with India’.<sup>140</sup> The European Commission, however, considered the human rights clause to be ‘a positive instrument’ to promote human rights and democracy and felt that ‘structured exchanges’ on the basis of this clause offered ‘a more realistic way’ of realising its goals.<sup>141</sup> It was described as ‘a dynamic instrument’ through which the Union could advance human rights in ‘a positive manner’ and was intended to signify ‘a negative or punitive approach’.<sup>142</sup> The human rights clauses do not seek to change the basic nature of agreements, they simply constitute a ‘mutual reaffirmation of commonly shared values and principles’ and a ‘precondition for economic and other forms of cooperation’.<sup>143</sup>

In 1994, Portugal challenged the legal basis of the human rights clause included in the 1993 trade and cooperation agreement with India and the implied competence of the European Community to introduce such a clause into its external agreements.<sup>144</sup> Portugal argued that such a clause should contain a reference to Article 235 Treaty establishing the European Community (TEC) which would require unanimous decisions in cases of suspension of development cooperation. The Council, on the other hand, argued that the EU could include such a provision on specific matters without referring to other legal bases. The European Court of Justice gave its judgment in December 1996,<sup>145</sup> finding that there was sufficient legal basis for the inclusion of a human rights clause without referring to Article 235.<sup>146</sup>

The 1993 EU-India trade and cooperation agreement predates the EU guidelines (23 May 1995), which necessitated the inclusion of a ‘non-execution’ clause involving taking of ‘appropriate measures’ in case the other Party failed to fulfil an obligation (‘essential elements’ like human rights) under the

<sup>139</sup> G Sundaram, *India and the European Union* (Allied Publishers 1997) 170,171.

<sup>140</sup> ‘Answer given by High Representative Ferrero-Waldner to Written Question (E-6453/2008, 1 December 2008) by Cristiana Muscardini (UEN), 28 January 2009’ <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-6453&language=EN>> accessed 12 March 2016.

<sup>141</sup> ‘Answer given by Chris Patten, on Behalf of the Commission in Response to a Written Question (E-2903/03, 1 October 2003) by Miet Smet (PPE-DE)’ (2004) C782 Official Journal 103.

<sup>142</sup> *Ibid* 187.

<sup>143</sup> B Brandtner; A Rosas, ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice’ (1998) 9 *European Journal of International Law* 474.

<sup>144</sup> Case C-268/94, *The Portuguese Republic v. The Council of the European Union* [1996], ECJ Reports I-6177. For a more detailed discussion on this, see Vaughne Miller, ‘The Human Rights Clause in the EU’s External Agreements,’ House of Commons Research Paper 04/22, 16 April 2004, 30-31.

<sup>145</sup> *Ibid*.

<sup>146</sup> Johanne Døhlie Saltnes, ‘The EU’s Human Rights Policy Unpacking the Literature on the EU’s Implementation of Aid Conditionality’ (2013) ARENA Working Paper, 2 <<https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2013/wp2-13.pdf>>.

agreement.<sup>147</sup> Some scholars have therefore urged that ‘careful drafting’ would be required in any future trade agreements with these countries to ensure that these agreements are covered by ‘an effective human rights clause’.<sup>148</sup>

## 20. Labour standards

Between 1993 and 2000, increased international competition and growing unemployment prompted most European governments to advocate a binding linkage between labour standards and trade rules. During both the Singapore (1997) and Seattle (1999) rounds of World Trade Organisation negotiations, India was a vocal critic of any such linkages and were apprehensive that the abolition of child labour would be used to restrict market access of developing countries to Europe and undo their comparative advantage in labour-intensive, low-wage production.

India has regarded the developed countries’ demand for the inclusion of social clauses relating to labour and sustainable development as non-trade issues in multilateral negotiations. The European Union established a link between trade and labour standards in 1994 in the context of the relationship with developing countries through the Generalised System of Preferences (GSP). The debate is fundamentally about whether the trade sanctions approach is a legitimate instrument to promote and ensure respect for core labour standards. Trade sanctions, New Delhi maintained, would not secure universal human rights of workers because international labour standards do not cover the vast majority of unorganised and informal sectors wherein the majority of workers in the developing countries is concentrated. Moreover, trade-restrictive measures would adversely affect the interests of workers in both the developed (as higher import costs would result in lower real wages) and developing countries (restrictions on employment opportunities).<sup>149</sup> Without economic growth, there would be no possibility to foster human rights and labour standards in poor, developing countries.

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<sup>147</sup> Commission, ‘Communication from the European Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ COM (95) 216 final, 13 and 15; Council Conclusions, 29 May 1995 cited in L. Bartels, *The application of human rights conditionality in the EU’s bilateral trade agreements and other trade arrangements with third countries* (Brussels: , study requested by the European Parliament. Directorate General External Policies of the Union,, 2008) 3; Tobias Dolle, ‘Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages,’ in N. Weiß, J.-M. Thouvenin (eds.) *The Influence of Human Rights on International Law* (London, Springer 2015) 213-228.

<sup>148</sup> Lorand Bertels, ‘The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’ (*Directorate-General for External Policies of the Union, Directorate B, Policy Department Study*, 2014) 14 para 48. <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN\\_ET\(2014\)433751\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf)> accessed 27 September 2016.

<sup>149</sup> Pradeep S Mehta; Bipul Chatterjee, ‘India, the European Union and Labour Standards’ in Rajendra K Jain; Hartmut Elsenhans (ed), *India, the European Union and the WTO* (New Delhi, Radiant 2006) 200, 216.

## 21. India–EU Bilateral Investment and Trade Agreement (BITA)

On 23 April 2007, the Council approved a mandate for the negotiation of a Free Trade Agreement (FTA) with India as well as requested the Commission to engage India in exploratory talks<sup>150</sup> for the possible negotiation of a Partnership and Cooperation Agreement (PCA) which would require a non-proliferation clause.<sup>151</sup> New Delhi felt no particular need to sign a PCA because the legal basis for India-EU trade and economic relations already existed in the 1994 trade and cooperation agreement (which contained a human rights clause)

The European Parliament (11 May 2011) argued in favour of the inclusion not only of ‘legally binding clauses on human rights’, but also of ‘social and environmental standards and their enforcement, with measures in the event of infringement’.<sup>152</sup> The European Economic and Social Committee (EESC) reiterated this and emphasised that it was essential, whether by way of a new human rights clause, or a carefully drafted linking clause, that the FTA complied with the EU’s stated policy on human rights clauses.<sup>153</sup>

The European Union did not raise non-trade issues like human rights in the first round of EU-India negotiations (June 2007). However, subsequently when the Union called for the inclusion of concerns like weapons of mass destruction, child labour, environment, human rights and democracy, India asserted that that was unacceptable since FTA negotiations, New Delhi maintained, were ‘not the appropriate place’ to discuss these issues and there was ‘no possibility’ of such references being accepted.<sup>154</sup> Commerce and Industry Minister Kamal Nath asserted that there would be ‘no commas and semi-colons on labour laws’.<sup>155</sup> A human rights clause, he added, would be ‘a deal-breaker’ and that what was being negotiated was a specific trade and investment agreement, which ‘it will not be if other elements come into it’.<sup>156</sup> The ‘essential elements’ clause, New Delhi argued, conflicted with India’s

<sup>150</sup> These were launched on 4 September 2007.

<sup>151</sup> This clause comprised a declaratory commitment to non-proliferation, as well as the request to take steps to ratify all relevant international instruments, and to establish an effective system of national export controls. Gerrard Quille, ‘The EU’s Approach to Tackling the Proliferation of Materials and Weapons of Mass Destruction and Prospects for Cooperation on the Eve of a New US Administration’ (2008) <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/sede/dv/sede070909briefingpapernt\\_/se070909briefingpapernt\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede070909briefingpapernt_/se070909briefingpapernt_en.pdf)> accessed 27 September 2016 11.

<sup>152</sup> ‘European Parliament Resolution on the State of Play in the EU-India Free Trade Agreement Negotiations’ <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0224+0+DOC+XML+V0//EN>> accessed 30 April 2016.

<sup>153</sup> Opinion of the European Economic and Social Committee on ‘The role of civil society in the free trade agreement between the EU and India’ (2012/C 24/10) (Rapporteur: Madi Sharma), *Official Journal of the European Union*, 28 January 2012, p. C 24.

<sup>154</sup> Dick Gupwell and Natalia Gupta, ‘EU FTA Negotiations with India, ASEAN and Korea: The Question of Fair Labour Standards’ (2009) 7 *Asia-Europe Journal* 91.; J Adriaansen and M González-Garibay, ‘The Illusion of Choice: The European Union and the Trade-Labor Linkage’ (2013) 9 *Journal of Contemporary European Research* 542.; Montserrat Gonzalez Garibay, ‘The Trade-Labor Linkage from the Eyes of the Developing Countries: A Euphemism for Protectionist Practices’ (2009) 14 *European Foreign Affairs Review* 763.

<sup>155</sup> R Deshpande, ‘India Calls EU Trade Bluff’ *The Times of India* (13 October 2016).

<sup>156</sup> Jo Johnson, ‘EU-India Trade Pact stumbles’ FT (4 March 2007).

longstanding position that economic agreements should not be ‘contaminated’ by political riders.<sup>157</sup> The Commerce Minister’s successor said non-trade issues were ‘extraneous issues’, whose inclusion would be ‘counter-productive’.<sup>158</sup> New Delhi however, reportedly expressed willingness to share data on non-trade matters but would not commit to this in the trade treaty.<sup>159</sup> India was also opposed to the inclusion of non-trade issues in the FTA; it would be compelled to take a similar approach at the multilateral WTO negotiations.

The European Parliament, Trade Commissioner Karel De Gucht remarked in March 2010, would ‘never agree to a deal that remains silent’ on clauses like child labour and environmental issues. These issues, he said, would be ‘on the table but not in a confrontational manner. We will discuss the appropriate language in the agreement and it won’t be in terms of sanctions, but promoting positive evolution. I don’t see these issues as deal breakers. I am sure we can agree on these’.<sup>160</sup>

In this context, Commerce Secretary Rahul Khullar asserted: ‘There are certain non-negotiables for us. If they (the EU) don’t accept FTAs without social clauses, then I’d say tough luck.’ India, he added, would not allow ‘backdoor entry’ of non-trade related issues into the FTA. ‘Whether these issues go under the guise of sustainable development or whether they come in the form of labour or environmental standards, our answer is a simple “no”. Is the FTA about trade or politics, the EU should make up its mind.’ There are forums other than bilateral and multi-lateral trade negotiations where the EU can raise these issues.<sup>161</sup>

In May 2011, Graham Watson, Chair of the European Parliament’s Delegation on Relations with India, suggested that a possible solution would be to have a separate document which dealt with social standards. It might be, he said, ‘a statement. It might be a memorandum of understanding. It might be a commitment to work together on some of these things’.<sup>162</sup>

In September 2014, when asked whether the Union still continued to ‘harp’ on the inclusion of issues like human rights and child labour in the trade agreement, EU Ambassador to India Joao Cravinho responded:

I don’t think we ever harped on those issues. Those have never been a significant part of the negotiations because we have not got on to that chapter. Therefore, it would be premature to say that this is an area of disagreement. There is a sustainable development chapter in all of our trade negotiations. Both the EU and India have international commitments of certain standards in different

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<sup>157</sup> Ibid.

<sup>158</sup> Remarks by Commerce Minister Anand Sharma on the sidelines of the India-EU summit. Cited in ‘Bulletin Quotidien Europe (No. 10014, 7 November 2009)’.

<sup>159</sup> ‘Exchange with EU on Non-Trade Issues to Be Kept out of FTA: India’ *Business Standard* (12 November 2009).

<sup>160</sup> ‘EU Free Trade Pact with India Wants to Address Social Issues’ *The Hindu Business Line* (5 March 2010).

<sup>161</sup> S Arun, ‘India Rejects EU Demand on Social Clauses in Trade Pact’ *The Hindu Businessline* (12 March 2010).

<sup>162</sup> ‘MEP: EU-India FTA Should Not Lead to a Race to the Bottom’ *EurActiv* (9 May 2011).

areas. To be honest, I don't think if we fail to reach an agreement, it will be because of these types of issues. I believe we will be able to find a language that would satisfy both sides.<sup>163</sup>

Trade, India asserts, should not be held hostage to internal European politics about human rights declarations. For the EU to insert human rights into a free trade agreement as 'if they were automobile emission standards' upsets Indian negotiators.<sup>164</sup>

#### D. Different perspectives of human rights

Both India and the European Union come to the HRD with different conceptions and approaches towards human rights. These differences are normal and natural given the different histories, cultures, traditions, political systems, worldviews, geographical and geopolitical realities, and are at different levels of socio-economic development. The absence of jointly shared definitions, according to one European analyst, 'a priori limit and indeed nullify the possibilities of actual meaningful cooperation'.<sup>165</sup>

### 22. Scepticism about the international human rights regime and international agencies

Indian scepticism about the international human rights regime is rooted in India's strategic culture of strategic autonomy, its problematic domestic human rights situation, and the continued domination of the international human rights discourse by the West. The Indian state and society regard with suspicion Western human rights NGOs and Western governmental human rights diplomacy. India also has reservations about the United Nations system with respect to human rights, especially legal intervention by the UN Security Council with regard to international criminal tribunals or courts.<sup>166</sup>

Since the end of the Cold War, India has opposed multiple Western military actions against established states that the intervening states justified on human rights and other grounds. India opposed NATO's role in Kosovo, the American invasion of Iraq (2003), and Western intervention in Libya (2011). New Delhi has been deeply suspicious of Western humanitarian organisations and the implications of their activity to India's national security and concerns that they could become precedents for international intervention in India's internal affairs.

India continues to be sceptical of international agencies. 'The function of the watchdog,' New Delhi argues, 'can be performed only by the people of the country who are the best judge of their needs. Prescriptive norms imposed from outside are counter-productive and contrary' to the sovereign equality

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<sup>163</sup> Mishra Asit Ranjan, 'India, EU Need to Take Their Current Courtship to Marriage: Joao Cravinho' *Livemint* (16 September 2014).

<sup>164</sup> Shashi Tharoor, 'Reconsider Relations with the European Union' *India Today* (18 May 2012).

<sup>165</sup> Axel Berkofsky, 'EU and China: Making Room for a Result-Oriented Dialogue' in Alessias Amighini and Berkofsky Axel (eds), *Xi's Policy Gambles: The Bumpy Road Ahead* (Edizioni Epoke 2015) 87.

<sup>166</sup> Sanjoy Banerjee, 'Human Rights Diplomacy and Performance of a Rising India since 2000' in Lettinga Douthie and Lars van Troost (eds), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 33.

of States recognised in the Universal Declaration of Human Rights.<sup>167</sup> The ‘annual ritual of sitting in judgement over others’ in the UN Human Rights Commission does ‘not move us towards our desired goal.’<sup>168</sup>

Countries that violate the human rights of their people, India contends, ‘must first be engaged by the international community in dialogue and persuasion, followed, where necessary and requested, by offers of technical assistance and cooperation that help in national capacity building. The guiding principle has to be that the measures we adopt are proportional to the problems that they seek to address.’<sup>169</sup> In fact, New Delhi has a clear preference for bilateral dialogue or quiet diplomacy to encourage domestic solutions.<sup>170</sup>

India is reluctant ‘to actively promote human rights abroad or to censure other countries for their violations of human rights. The rare instances in which India does condemn the practices of other countries are due to other impulses than the desire to secure the global human rights order, such as domestic politics or external pressure’.<sup>171</sup> New Delhi is very sceptical of naming and shaming particular countries’ human rights records, and has traditionally abstained on, or opposed, country-specific resolutions in forums like the UN General Assembly and the Human Rights Council.<sup>172</sup> India is not in ‘the naming and shaming business and emphasizes non-interference not only out of pragmatism, but as a moral principle’.<sup>173</sup> In the UN Human Rights Council, India has abstained on ‘one sided or unbalanced resolutions on country specific situations since we believe that “finger pointing” cannot be an elegant or effective solution to such issues’.<sup>174</sup>

India has been critical of the selectivity whereby Western countries choose to enforce human rights. For instance, India has cautioned that the Right to Protect (R2P) cannot turn out to be ‘a tool legitimizing big power intervention on the pretext of protecting populations from violations of human rights and

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<sup>167</sup> Statement by Pankaj Saran, Counsellor, at the 59<sup>th</sup> session of the Commission on Human Rights (27 March 2003); Statement by Foreign Secretary Shri Shashank at the High Level Segment of the 60th Session of the Commission on Human Rights (18 March 2004).

<sup>168</sup> Statement made by Hardeep Singh Puri, Ambassador and Permanent Representative of India at the 61st Session of the Commission on Human Rights (Geneva, 14 March 2005).

<sup>169</sup> *ibid.*

<sup>170</sup> Meenakshi Ganguly, ‘India Can No Longer Remain a Bystander in Foreign Policy’ in Doutje Lettinga and Lars Van Toors (eds), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 44.

<sup>171</sup> Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’. Rohan Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’ in Doutje Lettinga and Lars van Toorst (eds), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 50.

<sup>172</sup> Matthew D Stephen, ‘India, Emerging Powers and Global Human Rights: Yes, But. . .’ in Doutje Lettinga and van Troost Lars (eds), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 61.

<sup>173</sup> M Jaganathana and G Kurtz, ‘Singing the Tune of Sovereignty? India and the Responsibility to Protect’ (2014) 14 *Conflict, Security & Development* 462.

<sup>174</sup> Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’; Bhaswati Mukherjee, ‘Dilemma Confronting UN Human Rights Mechanisms’ (*MEA InFocus*, 2014) <<http://www.mea.gov.in/in-focus-article.htm?23751/Dilemma+confronting+UN+Human+Rights+Mechanisms>> accessed 25 May 2015.

humanitarian law'.<sup>175</sup> India has two genuine concerns with intervention under R2P: firstly about proper authority: who decides, and how, that R2P should be implemented, i.e. about selectivity and political will and secondly, about the unintended, and ultimately non-humanitarian, consequences of an overemphasis on R2P's interventionist pillar.<sup>176</sup>

### 23. Are human rights universal?

There has been much debate whether human rights are universal. The 'grammar of Western human rights language', according to one Indian scholar, is not necessarily similar or identical to the human rights prescriptions and practices of other major civilizations and ancient legal system. The 'grammar of Hindu human rights language stands in sharp contrast to the Western conceptions of human rights in terms of metaphysics, the understanding of human nature and methods of implementation and enforcement of human rights'.<sup>177</sup> The liberal values of North America and Europe, another Indian scholar argues, are 'not necessarily the models by which the rest of the world can be judged'.<sup>178</sup>

Criticising non-Western societies on a liberal understanding of human rights is merely 'an attempt by liberal states to force liberal standards onto the rest of the world'.<sup>179</sup> In most UN bodies, there is a strong North-South divide, especially on sensitive issues like human rights where 'universalism vs. cultural relativism is a never-ending debate' with the European Union seen as 'a representative of 'Western human rights'.<sup>180</sup>

Opponents of the universality of human rights argue that human rights as laid out in international covenants of human rights ignore the traditions, the religions, and the socio-cultural patterns of developing countries. The first argument is philosophical: 'that all rights and values are defined and limited by cultural perceptions. If there is no universal culture, there can be no universal human rights'.<sup>181</sup> The universal conception of human rights is often perceived as 'little more than an attempt to impose alien Western values' on culturally different societies.<sup>182</sup> A number of developing countries like

<sup>175</sup> Hardep Singh, 'Remarks by Permanent Representative at an Informal Interactive Dialogue on the Report of the Secretary-General on Responsibility to Protect: Timely and Decisive Response, on September 5, 2012' (*Website of the Permanent Mission of India to the United Nations*) <<https://www.pminewyork.org/adminpart/uploadpdf/13040ind2058.pdf>> accessed 27 September 2016.

<sup>176</sup> Virk Kudrat, 'Whither the Responsibility to Lead? India and R2P' in Douthett Lettinga and Lars van Troost (eds), *Shifting Power and Human Rights Diplomacy: India* (Amnesty International Netherlands 2015) 108.

<sup>177</sup> BC Nirmal, 'An Ancient Indian Perspective of Human Rights and Its Relevance' (2003) 43 *Indian Journal of International Law* 477.

<sup>178</sup> Rajiv Nair, 'International Human Rights – Universality in Cultural Diversity' (1994) 34 *Indian Journal of International Law* 9.; Subedi Surya P., 'The Universality of Human Rights and the UN Human Rights Agenda: The Impact of the Shift of Power to the East and the Resurgence of the BRICS' (2015) 55 *Indian Journal of International Law* 177-207.

<sup>179</sup> *Ibid.* 26.

<sup>180</sup> Sudeshna Basu, 'The European Union in the Human Rights Council' in Jan Wouters and others (eds), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora* (Palgrave Macmillan 2012) 99.

<sup>181</sup> Shashi Tharoor, 'Are Human Rights Universal?' 46 *World Policy Journal* 1.

<sup>182</sup> *Ibid.* 2.



India played an active and highly influential role in the drafting of the Universal Declaration of Human Rights<sup>183</sup> and it was newly independent developing countries which, in fact, ‘broke the logjam and thereby ended the East-West stalemate’ that had held up the adoption of the human rights covenants for nearly two decades. In defence, however, Tharoor asserts, that the principles of human rights have been ‘widely adopted, imitated and ratified by developing countries. The fact that therefore they were devised by less than a third of the states now in existence is really irrelevant.’ But universality does not ‘presuppose uniformity’.<sup>184</sup>

## 24. Sovereignty

Since independence, both ‘in principle and practice’, India has been wedded to non-interference in the internal affairs of states unlike the European Union which has ‘a penchant for intervention beyond sovereign boundaries’.<sup>185</sup> New Delhi was not ‘very enthusiastic’ about the post-Second World War development of international human rights law, which justified the international community intervening in the domestic affairs of states.<sup>186</sup> The acute sensitivity about sovereignty and internal autonomy against intrusive human rights politics is rooted in India’s colonial and post-colonial experiences. The Western conception of sovereignty, which maintains that sovereignty rests in the society and not the state, has broadened the responsibilities of the state towards society beyond the provision of security. In order ‘to legitimize the exercise of sovereign authority, the state has to grant civil and political rights to its citizens and respect their rights’.<sup>187</sup> Unlike the Indian conception of human rights, which are directed at society, the Western concept is formulated as rights against the state.

India was not hostile to the political significance of human rights because its constitution recognised their importance. What it was opposed to was ‘outside meddling in domestic affairs’ by other states and international organisations on the basis of human rights principles.<sup>188</sup> India’s primary concern has been about the adjudication and selective enforcement of human rights norms by international institutions and major Powers, especially as international institutions and norms have developed into means of curtailing sovereignty rather than enhancing it’.<sup>189</sup>

Within the UN Human Rights Council, India has consistently urged the preservation of the intergovernmental nature of the Council’s mechanism, encouraged enhancing national efforts to realise human rights, and stressed the principles of non-interference, territorial integrity, non-interference in internal affairs of the States, impartiality, non-selectivity and transparency.<sup>190</sup> India’s criticism of the

<sup>183</sup> Manu Bhagwan, ‘A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights’ (2010) 44 *Modern Asian Studies* 311-345

<sup>184</sup> *Ibid.* 3, 67

<sup>185</sup> Shashi Tharoor, *Pax Indica: India and the World of the 21st Century* (Penguin Books 2012) 244

<sup>186</sup> David P. Fidler and Sumit Ganguly, ‘India and Eastphalia’ (2010) 17 *Indiana Journal of Global Legal Studies* 153.

<sup>187</sup> Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press 2007) 36–37.

<sup>188</sup> P. Fidler and Ganguly (n 186) 153.

<sup>189</sup> Mark Mazower, *Governing the World: The History of an Idea* (Allen Lane 2012) 89.

<sup>190</sup> Mukherjee, ‘Dilemma Confronting UN Human Rights Mechanisms’ (n 174).

NATO intervention in Kosovo (1999) was not only because of Western ‘self-contradictory double standards’ on the issue of human rights, self-determination, and sovereignty in international affairs, but also because of a possible precedent in the case of Kashmir. Both issues ‘involve separatist insurgencies encouraged and supported from outside in areas where the majority of the population is Muslim.’<sup>191</sup>

Three of the five major EU foreign policy priorities – the advancement of human rights, prevention of violent conflict and the promotion of good and democratic governance – are ‘areas that are deep in Indian sovereignty minefields’.<sup>192</sup> There is also a fine line between human rights and internal security, which comes under India’s sovereign rights and any external oversight is unwelcome.<sup>193</sup>

India has not signed the optional protocols to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since they allow individuals to file complaints with international monitoring committees regarding the implementation of these rights within countries. This reluctance suggests ‘a persistent concern among decision makers in India about the use of international treaties to interfere with the domestic authority of the state’.<sup>194</sup> Similarly, in debates over criminal accountability under UN auspices and the International Criminal Court (ICC), India ‘privileges the national over the international, emphasizing the importance of domestic judicial and political solutions in all but the most fragile settings’.<sup>195</sup>

India’s approach is, in fact, unique – ‘normatively, it seeks both to promote human rights and to defend sovereignty. This tradition is in contrast to the West, which tends to prioritize human rights over sovereignty’.<sup>196</sup> The entire ongoing process of redefinition of State sovereignty, even the language of human rights, Chimni asserts, is being justified through ‘the ideological apparatuses of Northern States and international institutions it controls’.<sup>197</sup>

## 25. Economic and Social Rights

Historically, developing countries led by India have insisted that all rights including economic, social and cultural as well as civil and political, have the same status and should be respected equally. Given the political and ideological divisions of the Cold War, this perspective of the 1970s, according to one former

<sup>191</sup> AND Haksar, ‘Parallel Seen between Kosovo Crisis and Kashmir’ *India Abroad* (21 May 1999) cited in Ashley J. Tellis, *India’s Emerging Nuclear Posture: Between Recessed Deterrent and Ready Arsenal* (Rand 2001) 32 note 55.

<sup>192</sup> Pramit Pal Chaudhuri, ‘India, Europe and the Rise of China’ in Rajendra K. Jain (ed), *India and the European Union in a Changing World* (Aakar Books 2014) 10.

<sup>193</sup> Interview with key EU Member State official (New Delhi, April 2016).

<sup>194</sup> Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’ (n 133) 50.

<sup>195</sup> Dilip Lahiri, ‘The International Criminal Court Reaches a Milestone: Should India Continue to Stay Out?’ (2010) 50 *Indian Journal of International Law* 444-450.

<sup>196</sup> Pai (n-136) 305.

<sup>197</sup> BS Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law* 3-27.

Indian diplomat, was strongly opposed by the West.<sup>198</sup> The Europeans assert the intangibility of civil and political rights. In other words, social and economic rights 'can be relative, while civil and political rights are absolute rights. In this sense, the latter are more fundamental than the former.'<sup>199</sup> The human rights situation in most developing countries, however, is related to the fundamental developmental problems that they confront, viz. poverty, overpopulation, illiteracy, and scarcity of resources. As a result, the enjoyment and implementation of human rights is contingent on a certain minimum level of economic development.<sup>200</sup>

Developing countries, India argues, are sceptical about many international institutions and mechanisms today, because of 'the absence of matching obligations on the part of developed countries in fields where they clearly have a responsibility'.<sup>201</sup> India therefore raises a legitimate question:

Should claims of universal concern for human rights everywhere not be matched by assumption of legally binding obligations to contribute resources to developing countries so that they can create the economic conditions in which human rights and human dignity would flourish? Can there be authority to intrude, but no responsibility or obligation to help remedy?<sup>202</sup>

Strategies of development and poverty alleviation therefore constitute the means to promote human rights.<sup>203</sup>

The European Union, on the other hand, has 'an excessive focus' on civil and political rights at the expense of social, economic and cultural rights.<sup>204</sup> Following the predominant Western perception on human social rights, the EU considers poverty, including the resulting malnutrition, as well as maternal and infant mortality as a development problem.<sup>205</sup> International human rights organisations (IHROs), Chimni points out, focus more on civil and political rights, as they:

lack the mandate, resources and political backing to seriously influence outcomes in the realm of economic and social rights, they have had only a minimal impact on the welfare of ordinary peoples in the Third World. Indeed, the emphasis on civil and political rights allows the pursuit of the neo-liberal agenda by privileging private rights over collective social and economic rights. It is for this

<sup>198</sup> Mukherjee, 'Dilemma Confronting UN Human Rights Mechanisms' (n 174).

<sup>199</sup> Richard Balme, 'The European Union, China and Human Rights' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008) 152.

<sup>200</sup> VS Mani, 'The European Union's Approach to Human Rights: Implications for India's Trade', *India and the European Union into the 21st Century* (Indian Council of World Affairs 1998) 136.; Shekhar Ghosh, 'Poverty Alleviation and Human Rights: Implications of Globalization' (2001) 57 *India Quarterly* 75–88.

<sup>201</sup> Statements Made by Mr. Hardeep Singh Puri, Ambassador and Permanent Representative of India at the 61st Session of the Commission on Human Rights (Geneva, March 14-April 22, 2005)

<sup>202</sup> Statement by Permanent Representative of India H.S. Puri at the 59<sup>th</sup> session of the Commission on Human Rights (21 March 2003.)

<sup>203</sup> Statement by Foreign Secretary Shashank at the High Level Segment of the 60<sup>th</sup> session of the UN Commission on Human Rights (18 March 2004.)

<sup>204</sup> Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan 2006) 128.

<sup>205</sup> Stephan Kukeleire and Tom Delreux, *The Foreign Policy of the European Union* (Palgrave Macmillan 2014) 141.

reason that the TCC [transnational capitalist class] and Northern states have made the language of human rights their own.<sup>206</sup>

Europe often presents the normative agenda (e.g. social clause and labour standards) in a way that seeks to undermine the competitive advantage of developing countries and to safeguard European interests abroad. This leads most Indians to conclude that economics is the primary driving force behind norm-setting rather than an abiding faith or inherent belief in the values themselves.<sup>207</sup>

India argues that in the absence of a precise or 'clear standard against which to measure a member state's obligation of "progressive realization" [of economic and social rights] based on the "maximum of its available resources"', makes monitoring of compliance at the international level virtually impossible. Such issues are 'best handled in the framework of the legal and judicial systems of each country. Only when we reach a measure of development homogeneity globally, would it be meaningful to seriously embark on an international protocol on a complaints mechanism.'<sup>208</sup> Thus, if 'national capabilities are inadequate or deficient, the gap between standards and implementation will remain, if not widen'.<sup>209</sup>

India therefore asserts:

The development of new international normative instruments, procedures and mechanisms should be based on a careful evaluation of needs and requirements rather than be driven by domestic agendas. Where necessary, such initiatives should be accompanied by the augmentation of resources at the national level by the international community so as to enable states to meet their commitments. If national capabilities are inadequate or deficient, the gap between standards and implementation will remain, if not widen.<sup>210</sup>

## 26. Terrorism and human rights

While India was irritated by the debate on human rights violations in Kashmir in the European Parliament, where bulk of the EU debate took place, it was more troubled by the European Council and Commission's odds raising, even in passing, of the human rights issue in Kashmir, especially in the mid- and late 1990s when India's fortunes against the Kashmir insurgency were at their lowest.<sup>211</sup> India has been critical of Western nations' double standards on human rights – one yardstick for the 'practitioners

<sup>206</sup>BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 14 *European Journal of International Law Review* 11.

<sup>207</sup> Rajendra K Jain, 'Engaging the European Superpower: India and the European Union' in Gaens Bart, Juha Jokela and Eija Limnell (eds), *The Role of the European Union in Asia: China and India as Strategic Partners* (Aldershot 2009) 179.

<sup>208</sup> Statements by Hardeep Singh Puri, Ambassador and Permanent Representative of India, at the 61st Session of the Commission on Human Rights (Geneva, 14 March-22 April 2005)

<sup>209</sup> Statement by Foreign Secretary Shri Shashank at the High Level Segment of the 60th Session of the Commission on Human Rights (18 March 2004).

<sup>210</sup> *ibid*

<sup>211</sup>Prमित Pal Chaudhuri, 'Mars, Venus and Rama: US, Europe and Indian Views on the Kashmir Problem' in Rajendra K Jain (ed), *India, Europe and South Asia* (Radiant 2007) 123.

of terrorism’ and the other for the governments.<sup>212</sup> To India, terrorism is ‘a direct violation of human rights, in particular the most basic rights, the right to life and liberty’.<sup>213</sup>

For India’s political leaders the ‘European insistence on bringing up human rights, however tangentially, was a red flag not the very least because of a belief that Brussels was ignoring the context in which these human rights violations were occurring’.<sup>214</sup> What perhaps infuriated India most about EU policy was its ‘seeming insistence on making the case for human rights in isolation without recognising that restoring human rights could only follow the defeat of militancy and that this, in turn was impossible without restraint on Pakistan’.<sup>215</sup> The Kashmir Assembly elections (2003) were probably more decisive for the EU’s muting of its criticism, however mild, of India’s policies in Kashmir. India’s willingness to allow international observers during the Assembly election ensured that even ‘the traditional alliance of human rights NGOs and smaller north European states had little to complain about’.<sup>216</sup>

## 27. Human rights versus consular issues

The denial of visas, according to Indian officials, is not a visa or consular issue, but constitutes human rights violations especially when a visa is denied to enable a spouse to join his/her partner. There are differences between India and Europe about the right of family. India has found European ideas about disharmony and forcible family separation not to be valid. Interventions by the European state into ‘the private lives of families are not consistent with Indian culture, and India feels it has been treated insensitively by certain European countries’.<sup>217</sup> Denmark’s refusal in 2011 to extradite a person (a mercenary called Niels Holck also known as Kim Davy) involved with airdropping weapons into India due to India’s alleged poor jail conditions and poor human rights record was not well received.<sup>218</sup> There have also been instances of spouses not being allowed to join their husbands despite all requirements having been met. The EU can ‘easily hide behind competences and the border between human rights and access to territory as immigration/consular issues is tenuous’.<sup>219</sup>

<sup>212</sup> see Prime Minister P.V. Narasimha Rao’s address to the Summit meeting of the UN Security Council (January 1992).

<sup>213</sup> ‘Statement by Minister of State for External Affairs Mr. Anand Sharma at the High Level Segment of UN Human Rights Council, Geneva, 19 June 2006’ (2006) <<http://www.mea.gov.in/Speeches-Statements.htm?dtl/2264/Statement+by+Minister+of+State+for+External+Affairs+Mr+Anand+Sharma+at+the+High+Level+Segment+of+UN+Human+Rights+Council+Geneva>> accessed 27 September 2016.

<sup>214</sup> Pal Chaudhuri, ‘Mars, Venus and Rama: US, Europe and Indian Views on the Kashmir Problem’(n 211) .

<sup>215</sup> Ibid. 124.

<sup>216</sup> Ibid. 128.

<sup>217</sup> Krishnan Srinivasan, ‘Europe and India: Dialogue without Intimacy’ in Fredrik Erixon and Krishnan Srinivasan (eds), *Europe in Emerging Asia: Opportunities and Obstacles in Political and Economic Encounters* (Rowman and Littlefield 2015) 32.

<sup>218</sup> Ibid

<sup>219</sup> Interview with Deputy Head of Unit, Human Rights and Democracy Unit (Brussels, 10 December 2008).

## 28. Democracy and human rights promotion

India, as Foreign Secretary Shyam Saran put it, does not 'believe in the export of ideology' or in 'the imposition of democracy or democratic values on any country'. It is willing to share its comprehensive infrastructure and institutional structure like the National Human Rights Commission with any country that wishes to take advantage of this.<sup>220</sup> India has become wiser from practical experience in its neighbourhood. For instance, for many years, when the generals oppressed the popular rising of 1988 in Myanmar, India was on the side of democracy, freedom and human rights, but with rivals who were gaining ground in its backyard, it was losing out and 'the price of pursuing a moral foreign policy simply became too high'.<sup>221</sup>

While India supports human rights, it does not want 'to give prescriptive solutions from outside' to problems in a country.<sup>222</sup> Normatively, New Delhi strikes:

a middle path. India is committed to genocide prevention, R2P, human rights, and liberal democracy in principle, but has serious reservations regarding their practical implementation. The commitment is born out of its own national values. The reservations are borne out by its experience too. ... [India] has been less enthusiastic in enterprises promoting liberal democratic norms, for it is a state primarily concerned with maintaining its own national unity, social transformation, and economic development.<sup>223</sup>

Moreover, the Europeans' 'one size fits all' model for the promotion of human rights, democracy, and the rule of law including the various instruments appears to be 'rather insensitive' for cultural and socio-economic differences and diversity.<sup>224</sup>

## E. Critical Reflections on The West

### 29. Eurocentrism

As the largest democracies in the world, India and the European Union are multilingual, multicultural, pluralist and complex societies. India was established on the basis of unity in diversity, which is the proclaimed objective of the EU. India does confront a number of human rights challenges, but in many

<sup>220</sup> 'India and the Emerging World Order,' Address by Mr. Shyam Saran, Foreign Secretary of India at International Institute of Strategic Studies (London, 25 May 2006).

<sup>221</sup> Shashi Tharoor, 'Can India Afford an Ethical Foreign Policy?' *Times of India* (14 October 2007).

<sup>222</sup> Remarks by M.K. Lokesh, Deputy Head of Indian Mission to the European Union. Cited in Hughes (n 135).

<sup>223</sup> Pai (n 136); Saran (n 136).

<sup>224</sup> Tanja A. Boerzel and Thomas Risse, 'One Size fits all! EU policies for the promotion of human rights, democracy and the rule of law,' paper prepared for the workshop on Democracy Promotion organised by the Center for Development, Democracy and the Rule of Law (Stanford University, 4-5 October 2004) 31.

respects its record is more consistent with European values and norms in areas like freedom of expression and acknowledgement of ethnic and religious diversity.<sup>225</sup>

A fundamental problem in the India-EU human rights dialogue is that the Europeans come with clichés and stereotypes in their heads. They are conditioned by an essentially Eurocentric world-view about India since in European narratives and writings for centuries it was the ‘other’ in Eurocentric world history – which leads them to accord less importance and status to non-Western actors. This leads to falsifications not only of perceptions, but also of interactions and analyses regarding India.<sup>226</sup> The European Union, as Kinzelbach points out, is ‘very clear about the fact that it does not intend to change its own position in the dialogue and rather aims at getting the other actor to accept the EU’s view and, indeed, to act on the EU’s expectations’.<sup>227</sup> The Europeans often regard India with a ‘superiority complex’.<sup>228</sup> Thus, It is only natural for ‘non-European outsiders often react adversely to old-style Eurocentric reasoning and Euro-narcissism’.<sup>229</sup>

### 30. Double standards

Many developing countries perceive the EU as not self-critical enough to admit human rights violations like racism, xenophobia, discrimination, racial and ethnic profiling, rights or migrant workers, etc. The Union’s ‘standard response, that it has legislation in place to deal with these human rights issues, is not convincing for many countries, as they see the violations occurring in spite of these laws’.<sup>230</sup> The standards have to be ‘uniformly applied’.<sup>231</sup>

India has criticised Brussels for its double standards. Indian stakeholders have often wondered how the EU espousal of human rights and its promotion of democracy could be reconciled with the political expediency of hugging military rulers responsible for ousting democratically elected rulers. Indians feel that they do not need any ‘ethical lessons’ from a Europe that has ‘long coddled’ military dictators in its neighbourhood.<sup>232</sup>

<sup>225</sup> Eija Limnell, ‘Conclusions and the Way Forward’ in Bart Gaens, Juha Jokela and Eija Limnell (eds), *The Role of the European Union in Asia: China and India as Strategic Partners* (Ashgate 2009) 212.

<sup>226</sup> Rahul Peter, ‘Das, ‘Between Cultures – Eurocentrism and India: The Case of Germany’ in Klaus Voll and Dorren Beierlein (eds), *Rising India—Europe’s Partner? Foreign and security policy, politics, economics, human rights and social issues, media, civil society and intercultural dimensions* (Mosaic Books 2006) 914, 917.

<sup>227</sup> Katrin Kinzelbach, ‘The EU’s Human Rights Dialogues – Talking to Persuade or Silencing the Debate?’, Paper Presented at KFG Conference: The Transformative Power of Europe (Free University of Berlin, 10-11 December 2009) 15.

<sup>228</sup> Srinivasan (n 217).

<sup>229</sup> Hartmut Mayer, ‘Is It Still Called “Chinese Whispers”? The EU’s Rhetoric and Action as a Responsible Global Institution’ (2008) 84 *International Affairs* 77.

<sup>230</sup> Gjovalin Macaj and Joachim A Koops, ‘Inconvenient Multilateralism: The Challenges of the EU as a Player in the United Nations Human Rights Council’ in Jan Erik Wetzle (ed), *The EU as a ‘Global Player’ in Human Rights* (Routledge 2011) 78–79.

<sup>231</sup> Statement made by Hardeep Singh Puri, Ambassador and Permanent Representative of India at the 61<sup>st</sup> session of the UN Commission on Human Rights (Geneva, 14 March 2005).

<sup>232</sup> Tharoor, ‘Can India Afford an Ethical Foreign Policy?’ (n 221).

### 31. Inconsistency in EU policy

Whereas the EU calls upon third countries to accede to certain UN human rights instruments to which not all Member States are themselves party, e.g. the Optional Protocol to the UN Convention against Torture. Developing countries are also unhappy that while the European Union repeatedly emphasises the universality of human rights standards, no EU Member State has acceded to the UN Convention on the Rights of All Migrant Workers even though the United Nations considers this a core human rights convention.<sup>233</sup> Recent studies of the EU's evolving asylum and immigration policy highlight the prioritisation of 'security' and 'order' issues at the expense of the human rights values that the EU claims to promote in its external relations.<sup>234</sup>

The EU has neither developed minority rights within the *acquis communautaire*, nor do the Member States subscribe to a single standard.<sup>235</sup> Moreover, not all EU Member States accept minority rights: Belgium, Greece and Luxembourg have not ratified the convention, and France has not even signed it.<sup>236</sup> Thus, demonstrable failure by the EU Member States 'to meet the standards they urge on others naturally blunts the EU's international credibility'<sup>237</sup> and lead many beyond Europe to wonder how effective the Union itself is in upholding human rights in its own backyard.

### 32. Aversion to lecturing and hectoring

Indians have 'an allergy' against being lectured to. One of the great failings of the India-EU partnership has been the tendency of Europe 'to preach' to India on matters like human rights which it considers quite competent to handle on its own.<sup>238</sup> India, many diplomats recount, feels that it is 'talked down' to by the EU about prosperity, stability, and human rights with ignorance about the other party's compulsions. India is affronted when even small member states of the EU, such as the Nordic and Baltic countries; deliver sermons on relations with neighbours, human rights, nuclear non-proliferation, and international law.<sup>239</sup>

### 33. India can handle developments on its own

In the area of human rights, India asserts that it is capable of handling developments on its own, that it has the legal and constitutional frameworks and institutions to respond to human rights issues as and

<sup>233</sup> Toby King, 'The European Union as a Human Rights Actor', *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers 2011) 96–97.

<sup>234</sup> Jurado (n 204) 127.

<sup>235</sup> Bruno De Witte, 'Politics Versus Law in the EU's Approach to Ethnic Minorities' (2000) No. RSC.; Gaetano Pentasuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe' (2001) 12 *European Journal of International Law* 3–38.

<sup>236</sup> Karen E Smith, *European Union Foreign Policy in a Changing World* (2nd edn, Polity 2008) 127.

<sup>237</sup> King (n 233) 98.

<sup>238</sup> Tharoor, 'Reconsider Relations with the European Union' (n 164); Shashi Tharoor, 'New India, Old Europe' *Project Syndicate* (15 November 2015).

<sup>239</sup> Srinivasan (n 136) 26.



when necessary. The Europeans, as a former Indian Ambassador to the EU put it, are in ‘no position to judge us, because we have our own traditions, constitution and legal system. We have enough democratic safeguards and are willing to correct, if necessary, on our own.’<sup>240</sup>

For instance, the National Human Rights Commission has been ‘the most forthright and proactive’ in seeking to protect religious minorities even in times of unrest and inter-communal violence. It has demonstrated its ability to use the ‘the full range of their powers even in very politically sensitive areas and at times of serious conflict. Its stand has been principled and courageous, and its recommendations concrete and practical’. However, an NHRC without enforcement power can do little to force the hand of government beyond continuing to put political pressure on the government by reporting abuses in ‘an objective and credible manner’.<sup>241</sup>

India maintains that if ‘a country is responsive and has durable and functioning democratic institutions, then a co-operative approach should be the preferred option. An external stimulus may be necessary only in cases where national systems are inherently repressive and which are either unable, or unwilling, to improve human rights standards.’<sup>242</sup> In fact, there is not a single human rights problem about India that has been exposed by Amnesty International or Human Rights Watch or any European institution, which has not been revealed first by Indian citizens, journalists and NGOs and handled within the democratic Indian political space.<sup>243</sup>

### 34. More understanding necessary

The EU’s espousal of issues like human rights and the so-called social issues appear to lack a clear understanding of countries like India. The European Union, a former Indian Ambassador to the EU stated, does not seem to appreciate the nature and significance of India’s pluralistic multi-religious and cultural secular democratic polity. The EU’s views on fundamentalism and religious extremism appear ‘at times to be confusing and equivocal’.<sup>244</sup>

To most stakeholders in India, the European Union’s understanding of the social milieu in India and the problems of the 5,000 years old Indian society appear to be ‘incomplete and even superficial’. As a former Indian Ambassador to the European Union states:

No country more than India wishes to eradicate the endemic and pervasive evils of child labour, caste and gender discrimination and provide equal constitutional guarantees and opportunities to all its citizens. Indeed, the Indian constitution is a model document in this regard. What India seeks from

<sup>240</sup> ‘Interview with Amb. Amar Nath Ram’ (*FRPC Journal-13, India-EU Relations*) <<http://www.fprc.in/pdf/J-13.pdf>> accessed 10 March 2016.

<sup>241</sup> Carolyn Evans, ‘Human Rights Commissions and Religious Conflict in the Asia-Pacific Region’ (2004) 53 *International and Comparative Law Quarterly*, 726–727.

<sup>242</sup> Statement by Ambassador Hardeep Singh Puri at the 59<sup>th</sup> session of the Commission on Human Rights (Geneva, 21 March 2003.)

<sup>243</sup> Tharoor, ‘Reconsider Relations with the European Union’ (n 164).

<sup>244</sup> Ram (n 130) 5-6.

friends in Europe is understanding and support to effect change as quickly as possible. All these issues are deep-rooted and will take time to be resolved.<sup>245</sup>

Indian society, another former Indian Ambassador to the EU, pointed out is 'vastly different' from European societies. This leads to 'vastly different approaches in addressing human rights issues; the Europeans respect how India is trying to cope with the problem and address the issue, but they don't quite understand our social milieu and situation'.<sup>246</sup> The Europeans simply have no idea of the political skills that are needed and how difficult it is to resolve India's social problems.

The EU's 'staunchly upright stance' on human rights presents problems in its relationship with India. The Union will therefore need to develop 'a new approach, less confrontational and more constructive, and not judge each case within a vacuum'.<sup>247</sup> The EU-India human rights dialogue must not be seen as 'a West-East blame game, but a productive discussion between two mature democracies'.<sup>248</sup>

India clarified its approach as follows:

We believe that a low-key, corrective approach would be much more effective in gaining the cooperation of countries and improving their human rights conditions. We should not dissipate our energies by pushing for resolutions merely to satisfy domestic constituencies or worse, as tools of foreign policies.

### 35. Elite Perceptions

Indian elites felt that the EU displayed arrogance about its prosperity and stability and about human rights, not very understanding about the compulsions of the other parts of the world.<sup>249</sup> Some political elites felt that 'frequent lectures on human rights and human violations' must be avoided and the EU should not try 'to push these values down people's throats'.<sup>250</sup> A political columnist criticised the Union of being extremely 'selective'. When it came to China, many of the elites felt that EU seemed to have 'a different rule-book'.<sup>251</sup> The business elite asserted that the EU's attempts to link trade with 'extraneous' issues like labour standards and environment created obstacles in negotiations.<sup>252</sup>

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<sup>245</sup> Ibid. 7.

<sup>246</sup> Interview with a former Indian Ambassador to the EU (March 2016).

<sup>247</sup> Thomas Renard, 'Strategy Wanted: The European Union and Strategic Partnerships' (*Security Policy Brief, no. 13, September 2010*) 6 <<http://www.egmontinstitute.be/wp-content/uploads/2013/09/SPB13-EU-Strategic-Partnerships.pdf>>.

<sup>248</sup> Gauri Khandekar, 'The EU and India: A Loveless Arranged Marriage' (2011) FRIDE Policy Brief No 90. 9.

<sup>249</sup> Rajendra K Jain and Shreya Pandey, 'The Public Attitudes and Images of the European Union in India' (2012) 68 *India Quarterly* 338.

<sup>250</sup> Political Columnist, Media elite. Interviewed in Delhi (16 March 2012).

<sup>251</sup> Political Columnist, Media elite. Interviewed in Delhi (16 March 2012).

<sup>252</sup> Rajendra K Jain and Shreya Pandey, 'Perceptions and Misperceptions: Images of the European Union in India' in Martin Holland and Natalia Chaban (eds), *Europe and Asia: Perceptions from Afar* (Nomos 2014) 160.

### 36. Role of Civil society

The EU has preferred a ‘bottom-up’ approach that essentially concentrates on civil society and NGOs, which have been the main channels and recipients of aid from the European Commission. The enthusiasm for the role of civil society derives chiefly from it being perceived as key to the implosion of communism in Eastern Europe and the former Soviet Union and to the subsequent transition to democracy there. In the literature on democracy promotion, this approach has been subject to two main criticisms: first, it tends to narrowly identify civil society with NGOs, especially the Western-advocacy type of NGO, and to de-emphasize the role of institutions. Second, it enables the EU to ‘avoid tackling controversial issues’ with partner countries while maintaining the profile of an international actor keen on supporting human rights and democracy.<sup>253</sup> The lever of civil society has however been long ‘overvalued’ and the difficulties of exerting influence on social processes have been underestimated.<sup>254</sup>

Chimni makes a scathing criticism of civil society:

there is an unfortunate tendency of western civil society to represent the domain of human rights violations as imply a relationship between predator and post-colonial states, and its weird leaders, and suffering populations. Removed from the scene is the role of dominant global social forces, international institutions and political structures that lead to gross violations of human rights.<sup>255</sup>

In the ultimate analysis, the responsibility for initiating and implementing the multitude of structural, economic, social and political reforms necessary to improve human rights implementation must be taken by Indians themselves. External players can only play a supportive role and their capacities to bring about fundamental change are necessarily limited.

Some MEPs, however, were critical of the European Parliament’s proclivity of coming up with nothing short of ‘a shopping list’ of all the topics that one could think of in relation to an enormous country like India. For instance, the call for a Commission progress report on human rights<sup>256</sup> in India and the outcomes of the EU-India human rights dialogue. One MEP acknowledged: ‘We are not mature enough

<sup>253</sup> Rosa Balfour, ‘Principles of Democracy and Human Rights: A Review of the European Union’s Strategies Towards Its Neighbours’ in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 118–119.

<sup>254</sup> Miachel Dauderstaedt and Marika Lerch, ‘International Democracy Promotion: Patiently Distributing Power’ (2005) 4 *International Politik und Gesellschaft* 170–171.

<sup>255</sup> BS Chimni, ‘For Epistemological and Prudent Internationalism’ (*Harvard Law School Human Rights Journal*, 2012) <<http://harvardhrj.com/2012/11/for-epistemological-and-prudent-internationalism/>> accessed 4 June 2016.

<sup>256</sup> In 2004, the European Commission proposed that Member States’ Ambassadors in New Delhi should be instructed ‘to produce regular human rights reports with recommendations for the EU-India human rights dialogue’. Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, ‘An EU-India Strategic Partnership,’ COM (2004) 430 final 5.

The suggestion, according to a Delhi think tank, was ‘surprisingly “in your face” and could even lead India to react negatively to the whole idea of ratcheting up the relationship with the EU and the “schoolarm approach” was singularly ineffective’. Delhi Policy Group, Informal Brainstorming Session, ‘India and the EU – A Strategic Partnership,’ (24 August 2004).

to focus on the most important matters; instead, we always get distracted with a long list of all kinds of issues, and that really does narrow our influence. I know we are not taken seriously as a result.<sup>257</sup>

Both the European Union and Member States find the human rights dialogue useful because it enables them to respond to questions raised in the national or European Parliament and state that the issues are being taken up regularly with the Indian side. The EU too has realized that it is desirable to avoid counterproductive confrontations at high-level meetings while India usually agrees to talk about controversial issues as long as confidentiality is guaranteed.<sup>258</sup> Human rights dialogues, a German diplomat remarks, 'must be conducted at a lower and more informal level, where we can take our time to listen to the arguments of both sides and give considered answers. A real dialogue only works if the arguments presented by the other side are taken seriously. Both sides occasionally fail to follow this principle.'<sup>259</sup>

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<sup>257</sup> 'Remarks by Joe Leinien (PSE) While Voting against the Resolution: Preparation of the EU-India Summit' ((Marseille, 29 September 2008) (RC B6-0426/2008)) <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20080924&secondRef=ITEM-011&format=XML&language=EN>> accessed 13 March 2016.

<sup>258</sup> Anne Coulon, 'EU-India Understandings on Major Global Political Issues: Where Do We Stand' in Klaus Voll and Doreen Beierlein (eds), *Rising India – Europe's Partner* (Weißensee Verlag 2006) 343.

<sup>259</sup> Remarks by German Ambassador to China Michael Schaefer. Koerber Stiftung, *147<sup>th</sup> Bergedorf Round Table, Beijing, 2010, Global Governance: How can China and Europe Work Together* (Hamburg, 2011) 52.

### III. Report on Bilateral Relations with South Africa

*by Magnus Killander, Justice Mkhabela, Bright Nkrumah, Kevashinee Pillay*

#### Introduction

On 27 April 1994 South Africa held its first democratic elections and re-joined an international community from which it had been ostracised due to the policy of *apartheid* which had been put in place by South Africa's rulers to protect the privileges of the minority white population group they represented. The 1994 elections were organised under an interim constitution negotiated to bring an end to apartheid. In 1996 President Mandela signed into law the constitution which now governs South Africa. The constitution establishes a strong framework for democratic governance and provides a bill of rights which incorporates both civil and political rights and socio-economic rights. However, despite all the progress made in the more than 20 years of democracy, South Africa remains one of the most unequal countries in the world and a widely divided society.

Upon re-entering the international community some twenty years ago South Africa under the leadership of President Mandela joined international organisations and ratified a number of international human rights treaties. Trade with the rest of the world, which had been limited due to sanctions in the last decades of apartheid, picked up and new trade agreements were concluded.

The EU is a very important partner for South Africa in terms of trade, investment and to a lesser degree development assistance. The importance of South Africa for the EU should also not be underestimated both in terms of trade and as a potential ally in international diplomatic relations.

Prior to the end of apartheid and the first democratic elections the relationship was very different and characterised by confrontation and eventually sanctions imposed by the then European Economic Community (EC).<sup>260</sup> Upon the release of Nelson Mandela in 1990, the EC responded by gradually lifting sanctions.<sup>261</sup>

After the April 1994 elections the EU formalised relations with South Africa.<sup>262</sup> The EU invested in South Africa's democratisation process 'through institution-building programmes and funds to civil society organizations'.<sup>263</sup>

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<sup>260</sup> David L Johnson, 'Sanctions and South Africa' (1978) 19 *Harvard International Law Journal* 887.; Thomas Young, 'Sanctions and South Africa' (1986) 6 *Politics* 9–14.; Philip I. Levy., 'Sanctions on South Africa: What Did They Do?' (1999) 89 *The American Economic Review* 415–420.

<sup>261</sup> Alan Riding, 'European Nations to Lift Sanctions on South Africa' *New York Times* (16 April 1991) <<http://www.nytimes.com/1991/04/16/world/european-nations-to-lift-sanctions-on-south-africa.html>>.

<sup>262</sup> Lorenzo Fioramonti, 'African Perceptions of the European Union: Assessing the Work of the EU in the Field of Democracy Promotion and Peacekeeping' (*International Institute for Democracy and Electoral Assistance*, 2009) 10

South Africa signed the Lomé agreement and became a member of the African, Caribbean and Pacific Group of States (ACP) in 1997.<sup>264</sup> However, South Africa was not given the trade preferences under the Lomé agreement, given that the agreement was reserved for only low-income countries.<sup>265</sup> Instead the EU and South Africa negotiated a separate bilateral trade agreement, the Trade, Development and Co-operation Agreement (TDCA) which was concluded in 1999 and entered into force in 2000.<sup>266</sup> The TDCA provides that '[r]espect for democratic principles and fundamental human rights as laid down in the Universal Declaration of Human Rights, as well as for the principles of the rule of law ... constitutes an essential element of this Agreement.'<sup>267</sup>

In 2007 the EU concluded a Strategic Partnership Agreement (SPA) with South Africa, the only such agreement with an African state.<sup>268</sup> The Strategic Partnership outlines a long-term strategy for political cooperation.<sup>269</sup> It constitutes and enshrines a mutual recognition of the importance of the development of bilateral relations between the EU and South Africa.<sup>270</sup> The EU-SA strategic partnership translates into various fora of cooperation and dialogue, including an annual EU-SA Summit.<sup>271</sup> At the summit in Pretoria in 2013, the two partners highlighted their commitment to advance 'human rights, democracy and the rule of law'.<sup>272</sup> However, no summit has been held since then despite the provision for an annual summit in the SPA. The reason for not holding summits the last couple of years is seemingly more lack of time than genuine disinterest from any of the sides. Federica Mogherini, the EU's High Representative for Foreign Affairs and Security Policy noted after a meeting with the South African Minister for International Relations and Cooperation in February 2016 that the partnership 'has strong roots and a bright future' since South Africa and the EU has a 'common shared vision of working

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<<http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=35206>> accessed 23 April 2016.

<sup>263</sup> Ibid.

<sup>264</sup> Stephen R. Hurt, 'Co-Operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24 *Third World Quarterly* 161–176.; Magdalena F. Larsén, 'Trade Negotiations between the EU and South Africa: A Three-Level Game' (2007) 45 *JCMS: Journal of Common Market Studies* 857–888.

<sup>265</sup> Richard Gibb, 'Post-Lomé: The European Union and the South' (2000) 21 *Third World Quarterly* 457–481.

<sup>266</sup> Margaret C. Lee, 'The European Union-South Africa Free Trade Agreement: In Whose Interest?' (2002) 20 *Journal of Contemporary African Studies* 81–106.; Philip Lowe., 'Main parameters of the EU-SA partnership' (The EU-SA agreement: South Africa, Southern Africa and the European Union) (2000) 39–45.

<sup>267</sup> 'TDCA Protocol 1 on Rules of Origin' (*PROTOCOL CONCERNING THE DEFINITION OF THE CONCEPT OF 'ORIGINATING PRODUCTS' AND METHODS OF ADMINISTRATIVE COOPERATION*) s 2 <[http://wits.worldbank.org/GPTAD/PDF/annexes/EC-SouthAfrica\\_protocol.pdf](http://wits.worldbank.org/GPTAD/PDF/annexes/EC-SouthAfrica_protocol.pdf)> accessed 27 September 2016.

<sup>268</sup> Council of the European Union 'The South Africa-European Union Strategic Partnership Joint Action Plan' (Brussels, 15 May 2007, 9650/07 Presse 105).

<sup>269</sup> Andre Jordaan and Patrick Kanda, 'Analysing the Trade Effects of the EU-SA & SADC Trading Agreements: A Panel Data Approach' (2011) 14 *South African Journal of Economic and Management Sciences* ss 229–244.

<sup>270</sup> 'EU Relations with South Africa' (*European Union External Action*, 2016) <[http://eeas.europa.eu/south\\_africa/index\\_en.htm](http://eeas.europa.eu/south_africa/index_en.htm)> accessed 29 June 2016.; Lesley Masters, 'The EU and South Africa: Towards a New Partnership for Development' [2014] *ESP* ss 1–9.

<sup>271</sup> Lennart Petersson., '6. The EU and South Africa: Trade and Diversification' *The European Union and Developing Countries: Trade, Aid and Growth in an Integrating World* (2007) 97.

<sup>272</sup> Magnus Killander, 'The Role of Human Rights in South Africa-EU Relations' in Doutje Letting and Lars van Troost (eds), *Shifting power and human rights diplomacy – South Africa* (Amnesty International Netherlands 2016) ss 43–50.

together for the sake of peace, reducing inequalities, guaranteeing access and real rights to the people - our people and the people of the world for justice and ending poverty in the world.<sup>273</sup> One EU official pointed out that '[d]iscussions on political topics are frank and open, including on sensitive issues where views diverge'.<sup>274</sup> However, the discussions on these issues often take place behind closed doors and mainly relate to divergence in opinion with regard to multilateral issues.

The Strategic Partnership represents a shift from solely political dialogue to the engagement of shared objectives and strategic cooperation on various issues relating to the protection of human rights.<sup>275</sup> Further, the objectives of the partnership are to 'strengthen and to bring added value' to the already existing relations 'while being fully consistent with international human rights obligations'.<sup>276</sup> The Joint Action Plan of the Strategic Partnership notes the 'common commitment to promoting an agenda of liberty, peace, security and stability in the world, and in Africa in particular'.<sup>277</sup>

## A. Human Rights Dialogue with South Africa

### 37. Introduction

Throughout the democratic era in South Africa, the EU has through dialogue engaged South Africa on issues of interest to it, including democracy, rule of law and human rights.<sup>278</sup> In 2012 an annual formal human rights dialogue (EU-SA Structured Dialogue Forum (SDF)) on human rights was agreed between the EU and South Africa.<sup>279</sup> The first human rights dialogue was held in May 2013. The human rights dialogue is held annually at a high level and has been co-chaired by the EU Special Representative on Human Rights and the Director General of the South African Department of International Relations and

<sup>273</sup> 'Remarks by Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission, at the Joint Press Stakeout with Maite Nkoana-Mashabane, Minister for International Relations and Coopera' <[http://eeas.europa.eu/statements-eeas/2016/160226\\_03\\_en.htm](http://eeas.europa.eu/statements-eeas/2016/160226_03_en.htm)> accessed 27 September 2016. See also 'Joint Press Release: 13th South Africa – European Union Ministerial Political Dialogue (MPD) Meeting Held on 26 February 2016, in Pretoria, South Africa' <<http://www.dfa.gov.za/docs/2016/eu0229.htm>>.

<sup>274</sup> Interview with EU official (2016).

<sup>275</sup> Merle Holden and Vanessa T.Tang, 'Competitive Bilateralism or Regionalism: A South African Perspective' in Emmanuel Fanta, M Shaw Timothy and T Tang Vanessa (eds), *Comparative Regionalisms for Development in the 21st Century* (Ashgate 2016) <<http://www.gbv.de/dms/zbw/751391182.pdf>>. 9.

<sup>276</sup> 'Embassy of the Republic of South Africa to the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Mission to the European Union (2016)' (*SA-EU Strategic*) <<http://www.southafrica.be/sa-eu-strategic-partnership>> accessed 29 June 2016.

<sup>277</sup> Council of the European Union 'The South Africa-European Union Strategic Partnership Joint Action Plan' (Brussels, 15 May 2007, 9650/07, Presse 105) 2.

<sup>278</sup> On the dialogue see also Killander.(n 272).

<sup>279</sup> 'Council Conclusions on the Establishment of a Human Rights Dialogue with South Africa, 3199th Foreign Affairs Council Meeting' (*Brussels, 19 November 2012*) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/133571.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133571.pdf)> accessed 27 September 2016.

Cooperation (DIRCO).<sup>280</sup> The participation of other South African government departments in the dialogue is limited which may have contributed to the increased focus on multilateral issues in the dialogue.<sup>281</sup>

### 38. Aim and structure of the dialogue

The dialogue sets out to cover developments both in the EU and South Africa and the role of government and civil society in the promotion and protection of human rights. An important aspect from the outset has also been discussion of cooperation in international fora, in particular in relation to the work of the UN Human Rights Council. Ahead of each dialogue the EU and South Africa agrees on 'a limited number of themes'. The EU Council conclusions establishing the dialogue highlight a number of thematic issues that could be raised in the dialogue such as right to development, human rights approach to MDGs, business and human rights, gender equality, children's rights, rights of persons with disabilities, non-discrimination, rule of law and respect for democratic principles and the role of civil society in the promotion and protection of human rights.<sup>282</sup>

With regard to the human rights situation at the domestic level, the first dialogue in 2013 discussed policing and human rights, violence against women and migration. With regard to multilateral issues the discussion focused on the Durban process with regard to racism, the MDGs and post 2015 development agenda, LGBTI, business and human rights, the ICC and the death penalty.<sup>283</sup> The 2014 dialogue mainly discussed multilateral cooperation but also discussed 'domestic topics such as racism and xenophobia and policing and human rights' which are clearly a concern both in South Africa and within the EU.<sup>284</sup> The EU solicited the views of CSOs through a meeting organised the day before the dialogue and some CSO concerns were raised in the dialogue.<sup>285</sup> However, given the confidential nature of the dialogue it is not possible to assess if all concerns were raised by the EU delegation. The view expressed by the EU with regard to domestic issues is that no one is perfect but that the best way to improve any situation is to ensure independence of institutions.<sup>286</sup> The 2015 dialogue focused almost exclusively on cooperation in

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<sup>280</sup> 'Joint Press Release – South Africa and European Union Launch Human Rights Dialogue' (*European Union - EEAS (European External Action Service) | The 3rd EU-South Africa Structured Dialogue Forum on Human Rights, Pretoria, 27 May 2013*)

<[http://eeas.europa.eu/delegations/south\\_africa/documents/press\\_corner/final\\_joint\\_press\\_release\\_en.pdf](http://eeas.europa.eu/delegations/south_africa/documents/press_corner/final_joint_press_release_en.pdf)>.

<sup>281</sup> Interview, EU official (2016).

<sup>282</sup> 'Joint Press Release – South Africa and European Union Launch Human Rights Dialogue' (*Pretoria, 27 May 2013*)

<[http://eeas.europa.eu/delegations/south\\_africa/documents/press\\_corner/final\\_joint\\_press\\_release\\_en.pdf](http://eeas.europa.eu/delegations/south_africa/documents/press_corner/final_joint_press_release_en.pdf)>

accessed 27 September 2016.

<sup>283</sup> On the different approaches of the EU and South Africa on some of these issues see Killander (n 272).

<sup>284</sup> 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2014) 267

<<http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-human-rights-report/>>.

<sup>285</sup> Ibid.

<sup>286</sup> Interview with EU official (2016).



the context of intergovernmental organisations such as the UN, to the exclusion of discussion of the situation of human rights in South Africa and EU member states.<sup>287</sup>

It should be noted that in terms of engagement at the UN level, the human rights relationship between the EU and South Africa has not been a smooth sail. Controversial issues include whether the UN should adopt country specific resolutions which South Africa generally opposes. For instance, whereas the EU voted in favour of the Security Council's resolution to address the grave and deteriorating human rights and humanitarian situation in the Syria, South Africa abstained from voting claiming 'the resolution was worded in favour of one side of the conflict'.<sup>288</sup> There are also divergent positions with regard to many other issues such as the International Criminal Court, business and human rights and UN thematic human rights resolutions such as on peace full assembly.<sup>289</sup> However it should also be noted that there has been constructive engagement and collaboration between South Africa and the EU on some thematic issues, for example the death penalty, and on country situations such as Burundi.<sup>290</sup>

The EU has a very strong commitment to civil society, recognising its role 'in supporting good governance, democracy and human rights'.<sup>291</sup> However, civil society does not participate directly in the dialogue. Instead the EU invites civil society organisations (CSOs) to a meeting to present their concerns ahead of the dialogue between the EU representatives and the representatives of the South African government.<sup>292</sup> The EU guidelines commit to transparency of the dialogue in relation to civil society but does not go as far as suggesting that civil society organisations should participate directly in the dialogue.<sup>293</sup> This is reiterated in the EU Council conclusions on the establishment of a Human Rights Dialogue with South Africa.<sup>294</sup> Since 2013, the EU organises a yearly CSO consultation in connection with

<sup>287</sup> "European Union - EEAS (European External Action Service) | The 3rd EU-South Africa Structured Dialogue Forum on Human Rights." See also E'EU Annual Report on Human Rights and Democracy in the World in 2015' (2015) s Thematic Part <<http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-human-rights-report-2015/>> accessed 27 September 2016. – Thematic Part.

<sup>288</sup> Khadija Patel, 'Analysis: Tracking South Africa's Syria Policy' (*Daily Maverick*) <[http://www.dailymaverick.co.za/article/2012-07-23-analysis-tracking-south-africas-syria-policy/#.V3dwS\\_I97IV](http://www.dailymaverick.co.za/article/2012-07-23-analysis-tracking-south-africas-syria-policy/#.V3dwS_I97IV)> accessed 1 July 2016. Also see ThisIsSierraLeone 'South Africa Abstained from a Vote on a Western-Backed United Nations Security Council Resolution Aimed at Syria' <<http://www.thissierraleone.com/south-africa-abstained-from-a-vote-on-a-western-backed-united-nations-security-council-resolution-aimed-at-syria/>> accessed 2 July 2016.

<sup>289</sup> Killander. (n 272)

<sup>290</sup> Interview with EU official (2016).

<sup>291</sup> 'Council of the European Union, Council Conclusions on the Establishment of a Human Rights Dialogue with South Africa' (*Brussels 19 November 2012*) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/133571.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/133571.pdf)> accessed 23 April 2016.

<sup>292</sup> 'Delegation of the European Union to the Republic of South Africa "Civil Society Dialogue"' <[http://eeas.europa.eu/delegations/south\\_africa/eu\\_south\\_africa/civil\\_society\\_dialogue/index\\_en.htm](http://eeas.europa.eu/delegations/south_africa/eu_south_africa/civil_society_dialogue/index_en.htm)> accessed 2 July 2016.

<sup>293</sup> European Union Guidelines on Human Rights Dialogues.

<sup>294</sup> 'Council of the European Union ' Council Conclusions on the Establishment of a Human Rights Dialogue with South Africa' (*3199th FOREIGN AFFAIRS Council meeting, Brussels, 19 November 2012*) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/133571.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/133571.pdf)> accessed 22 September 2016.

the human rights dialogue on broad range of issues of interest to South African CSOs. However, considering the focus on multilateral issues in the dialogue few of South African NGOs main concerns are likely to be reflected in the dialogue. However, it should be noted that the EU engages South African government officials in many other dialogues and informal consultations mainly related to issues where the EU provide extensive support to South Africa such as health and education.

The EU also approaches CSOs and other stakeholders such as the South African Human Rights Commission for their views on selected human rights issues in preparation of the human rights country strategy.<sup>295</sup> Financial support by the EU to South African CSOs is discussed in the section on EU support to human rights projects in South Africa.

The following section discusses South Africa's approach to two of the EU's priority areas, LGBTI rights and women's rights, and the extent to which the EU has engaged South Africa on these issues domestically and differences in the EU's and South Africa on these issues as a matter of foreign policy.

### 39. South Africa and EU: Engagement on selected human rights

#### *a) The rights of Lesbians, Gays, Bisexual, Transgender and Intersex People*

The Constitution of the Republic of South Africa adopted in 1996 in section 9(3) prohibits discrimination on the basis of among others gender and sexual orientation.<sup>296</sup> On this basis, the criminal offence of sodomy and other forms of discrimination on the basis of sexual orientation has been successfully challenged in the courts.<sup>297</sup> This culminated in the recognition of same sex marriages by the adoption of the Civil Unions Act.<sup>298</sup>

Despite the constitutional provision it is clear that more than twenty years into democracy, gays and lesbians in South Africa still face a stubborn quagmire of rejection and discrimination. The constitutional

<sup>295</sup> In 2016 the EU approached CSOs to comment on issues of impunity and the rule of law; socio-economic rights, gender equality and women empowerment; inclusion (related to persons with disabilities, migrants, racism and xenophobia); and democracy (specifically relation to parliament, freedom of expression, and civil society organisations). See letter from Ambassador Marcus Cornaro, head of the European Union delegation to South Africa to Prof Frans Viljoen, director, Centre for Human Rights (University of Pretoria, 5 July 2016.)

<sup>296</sup> Constitutional Court of South Africa, 'Gay and Lesbian Rights'

<<http://www.constitutionalcourt.org.za/text/rights/know/homosexual.html>> accessed 24 April 2016.

<sup>297</sup> *National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission v The Minister of Justice and others* 1998 (12) BCLR 1517 (CC); *Satchwell v President of the Republic of South Africa and Another* (CCT48/02) [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) (17 March 2003).

<sup>298</sup> Civil Union Act 2006 Act no 17.

protection for LGBTI persons has not translated into practice mainly because the majority of South Africans still adhere to conservative values.<sup>299</sup>

The EU has made great strides in the protection of LGBTI persons, both from a legislative perspective, but importantly also in changing societal attitudes. This progress among the EU member states have been accompanied with an increased focus on the promotion of LGBTI rights in terms of foreign policy.<sup>300</sup> It is noticeable that LGBTI rights is not singled out as a general area of focus in the human rights dialogue with South Africa but highlighted in the context of foreign policy. This may be because South Africa is viewed as having a progressive legislative framework. However, as noted above this has not proved sufficient to ensure change in societal attitudes.

One particular aspect of violence based on sexual orientation in South Africa is what is known as 'corrective rape', that is men raping lesbian women because they are lesbian, emanating from the view that homosexuality is 'un-African'.<sup>301</sup> There are also widespread views in particular in the countryside portraying gays and lesbians as carriers of 'evil spirits' and HIV/AIDS.<sup>302</sup>

Civil society in South Africa has taken bold steps to confront the brutality perpetrated against LGBTI persons. For example the NGO *Luleki Sizwe* in Cape Town has for over a decade vigorously contested incidents of 'corrective rape'.<sup>303</sup> Also in Gauteng's East Rand Township of Kwa-Thema, there has been a surge in protests to the local police station demanding an end to 'corrective rape' and murder of lesbians.<sup>304</sup> Consequently, the Department of Justice and Constitutional Development established a 'task force' intended to combat hate crimes against LGBTI persons.<sup>305</sup> The discrepancy between the progressive constitutional provision and jurisprudence on the one hand and the violence faced by many LGBTI persons in South Africa has not gone unnoticed by the EU. For example in 2012 the European Parliament adopted a resolution 'on violence against lesbian women and the rights of lesbian, gay,

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<sup>299</sup> 'Cath Everett., South Africa Progressive on LGBT Rights but Gays Still Battle for Social Reform' (*October 22 2014*) <<http://www.ibtimes.co.uk/south-africa-progressive-lgbt-rights-gays-still-battle-social-reform-1471213>> accessed 23 April 2016.

<sup>300</sup> See 'Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons' (*Council of the European Union, 24 June 2013*) <[https://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/137584.pdf](https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf)> accessed 20 May 2016.

<sup>301</sup> Udoka Okafor, 'Corrective' Rape in South Africa: Targeted Violence Against Homosexual Women' *Huffington Post* (2 February 2016) <[http://www.huffingtonpost.com/udoka-okafor/corrective-rape-in-south-africa\\_b\\_4292271.html](http://www.huffingtonpost.com/udoka-okafor/corrective-rape-in-south-africa_b_4292271.html), date 9aAccessed 09 April 2016>.

<sup>302</sup> Rebecca Davis, 'How Rape Became South Africa's Enduring Nightmare' *The Guardian* (29 September 2015).

<sup>303</sup> Mwareya Mhondera, 'South Africa's Brave Struggle against Lesbian Hate Crimes' (3 March ) <<http://wagingnonviolence.org/feature/south-africas-brave-struggle-against-lesbian-hate-crimes/>>.

<sup>304</sup> Sibongile Nkosi, 'Solve Rape Cases, Activists Demand' *Mail and Guardian* (26 August 2011) <<http://mg.co.za/article/2011-08-26-solve-rape-cases-activists-demand>>.

<sup>305</sup> 'Team Starts Work on Anti-Gay Hate Crimes' (2011) <<http://www.news24.com/SouthAfrica/News/Team-starts-work-on-anti-gay-hate-crimes-20110810>> accessed 23 April 2016.

bisexual, transgender and intersex (LGBTI) persons in Africa' which included a section on South Africa with particular focus on the practice of 'corrective rape'.<sup>306</sup>

At the international level, South Africa has played an active role by participating in the presentation and adoption of the UN resolution on 'sexual orientation and gender identity', the 'United Nations Free and Equal Global Campaign'.<sup>307</sup> However, South Africa's role on the global stage in relation to the protection of LGBTI persons is contradictory. To give an instance, while South Africa at the 2013 United Nations General Assembly (in New York) stressed its plan to organise a seminar to discuss the rights of LGBTI persons with other African countries, it failed to participate in the ministerial event meant to confirm the rights of this marginalised group.<sup>308</sup> Thus, South Africa has been described as being 'inconsistent and obstructionist'.<sup>309</sup> By way of illustration, foreign affairs minister Maite Nkoana-Mashabane promised that South Africa was ready to handle the issue of LGBTI rights through 'constructive dialogue bilaterally and within the context of the work of the African Union'. However, such dialogue still had to be undertaken.<sup>310</sup> South Africa refused to classify gay rights under the 2001 Durban Declaration against 'racism, racial discrimination and xenophobia' arguing that including gay rights in the declaration would undermine the rights of people who suffered racial discrimination.<sup>311</sup>

Even so, at an African regional level South Africa has supported the African Commission on Human and Peoples' Rights' 'Resolution on Protection against Violence and Human Rights Violations against Persons' on the basis of their real or imputed Sexual Orientation or Gender Identity' adopted in 2014.<sup>312</sup>

The ruling party in South Africa, the ANC, which has a majority in parliament, refused to support a motion to discuss the anti-homosexuality law in Uganda, in the South African parliament.<sup>313</sup> The 2014 Uganda Anti-Homosexuality Act sought to broaden the criminalisation of LGBTI persons and those seen

<sup>306</sup> European Parliament Resolution of 5 July 2012 on violence against lesbian women and the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Africa (2012/2701(RSP))

<sup>307</sup> 'Historic Decisions at the United Nations' (*Human Rights Watch*, 11 June 2011)

<<https://www.hrw.org/news/2011/06/17/historic-decision-united-nations>> accessed 23 April 2016.

<sup>308</sup> Graeme Reid, 'South Africa's Worrying Prevarication on LGBT Rights' (*Human Rights Watch* 2013, 22 September 2014) <<https://www.hrw.org/news/2014/09/22/south-africas-worrying-prevarication-lgbt-rights>> accessed 23 April 2016.

<sup>309</sup> Ibid.

<sup>310</sup> Chris Williams, 'Behind South Africa's Reluctance to Champion Gay Rights on the Continent' (*The Conversation*, 10 July 2016) <<http://theconversation.com/behind-south-africa-reluctance-to-champion-gay-rights-on-the-continent-44321>> accessed 23 April 2016.

<sup>311</sup> 'Gay Rights Are Not the Only Rights' (*The Star Newspaper*, 7 March 2014) <<http://www.iol.co.za/the-star/gay-rights-are-not-the-only-rights-1658121>> accessed 26 April 2016.

<sup>312</sup> 'Address by the Minister of Justice and Correctional Services, TM Masutha, MP (Adv) at the Africa Regional Seminar on Finding Practical Solutions for Addressing Violence and Discrimination Against Persons Based on Sexual Orientation, Gender Identity and Ex' (*Department of Justice and Constitutional Development*) <<http://www.iol.co.za/the-star/gay-rights-are-not-the-only-rights-1658121>> accessed 6 May 2016.

<sup>313</sup> 'South Africa: Ruling ANC Refuses to Address Uganda's Gay Bill' (*PANA*, 25 February 2014) <<http://www.panapress.com/South-Africa--Ruling-ANC-refuses-to-address-Uganda-s-Gay-Bill--12-898800-25-lang2-index.html>> accessed 20 May 2016.

to 'aid or abet' them.<sup>314</sup> The South African government emphasised the need to respect Uganda's right to sovereignty especially when it comes to the fact that meddling with Uganda's sovereignty may lead to tensions within the African Union.<sup>315</sup> In responding to parliamentary question on South Africa's human rights-based foreign policy vis-à-vis Uganda's anti-homosexuality law, President Jacob Zuma touted that 'South Africa respects the sovereign rights of other countries to adopt their own legislation'.<sup>316</sup> This is in line with South Africa's foreign policy where openly criticising other African states is seen as going against the national interest. It must be noted that South Africa's failure to act decisively on this issue completely contradicts 'its proud history of fighting injustice.'<sup>317</sup> In contrast some EU member states responded by cutting aid to Uganda and the European Parliament adopted a resolution calling for article 96 consultations under the Cotonou Agreement with a view of imposing sanctions against Uganda and Nigeria where a similar law had been adopted.<sup>318</sup> The Ugandan law was eventually repealed by the Ugandan Constitutional Court on a technicality.

### b) *The rights of women*

South Africa has passed a variety of legislation and policies seeking to empower women through the abolishment of gender discriminatory practices, including violence against women. The Domestic Violence Act 116 of 1998 provides for protection orders for people suffering domestic abuse, especially women and children.<sup>319</sup> Every year, the South African government launches '16 Days of Activism for No Violence against Women and Children' which educates South Africans about the importance of ending violence against women.<sup>320</sup>

Despite legislation, policy and the institutional framework in place to strengthen gender equality, the majority of black South African women are still excluded in key sectors of economic and political spheres. South Africa still battles to overcome the patriarchal traditional culture that subordinates African women to an inferior status in comparison to their male counterparts.<sup>321</sup> However, the South

<sup>314</sup> 'Uganda Anti-Homosexuality Act' (2014) <<http://www.refworld.org/pdfid/530c4bc64.pdf>> accessed 22 September 2016.

<sup>315</sup> Esa Alexander, 'South Africa Respects Uganda Anti-Gay Laws: Zuma' (*Times Newspaper*, 8 April 2014) <<http://www.timeslive.co.za/politics/2014/04/08/south-africa-respects-uganda-anti-gay-laws-zuma>> accessed 23 April 2016.

<sup>316</sup> South African Press Association, 'SA Respects Uganda Anti-Gay Laws: Zuma' *IOL News* (8 April 2014).

<sup>317</sup> 'South Africa: Ruling ANC Refuses to Address Uganda's Gay Bill'. (n 313).

<sup>318</sup> 'European Parliament Resolution of 13 March 2014 on Launching Consultations to Suspend Uganda and Nigeria from the Cotonou Agreement in View of Recent Legislation Further Criminalising Homosexuality (2014/2634(RSP))' <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0254&format=XML&language=EN>> accessed 27 September 2016.

<sup>319</sup> Domestic Violence Act 116 of 1998 1999.

<sup>320</sup> 'Sixteen (16) Days of Activism 2015' <<http://www.gov.za/16-days-activism-no-violence-against-women-and-children-2015-0>> accessed 26 April 2016.

<sup>321</sup> Nompumelelo Motlafi, 'Why Black Women in South Africa Don't Fully Embrace the Feminist Discourse' (*Mail and Guardian*, 7 August 2016) <<http://mg.co.za/article/2015-08-07-why-black-women-in-south-africa-dont-fully-embrace-the-feminist-discourse>> accessed 23 April 2016.

African government has continuously committed itself to the mission of ensuring equal gender representation in the workplace and business sectors.<sup>322</sup>

The EU views itself as a custodian of women's rights.<sup>323</sup> Both article 2 of the EU Treaty and article 23 of the EU Charter of Fundamental Rights of the European Union stress the significance of gender equity through women empowerment and the elimination of violence and discrimination against women.<sup>324</sup> Such a commitment was followed by the adoption of the 'EU Plan of Action on Gender Equality and Women's Empowerment in Development', which seeks among other things to, improve the economic status of women living in poor countries, and abolish practices such as female genital mutilation, violence and ending forced marriages.<sup>325</sup>

At the bilateral level, both the EU and SA have agreed to address issues surrounding the rights of women. For example, gender-based violence is an area set as a benchmark for South Africa-EU human rights co-operation. In the context of the human rights dialogue, the two partners have agreed on a need to spearhead campaigns against gender-based discrimination.<sup>326</sup>

In June 2015 an event titled *South Africa's progress towards gender quality – celebrating progress, highlighting challenges* was held at the EU residence in Pretoria.<sup>327</sup> The event was aimed at highlighting success and discussing challenges that were faced by South Africa.<sup>328</sup> During the panel discussion, the Representative of UN Women South Africa Multi-Country Office, Dr Auxilia Ponga presented key findings of her organisation's report 'Progress of the World's Women 2015-16' which sets out a comprehensive agenda towards the realisation the protection and promotion of women.<sup>329</sup> The participation of the EU at this event is evidence of the relationship between the EU and South Africa on the advancement of women's rights and the already open dialogue on this issue between the two parties.

On foreign policy matters, the EU and South Africa have been involved in programmes both jointly and in association with other organisations for the promotion and the protection of women's rights. Both the EU and South Africa support a number of UN instruments and institutions for the promotion of the rights of women including UN Resolution 1325 on women, peace and security, the UN Special

<sup>322</sup> Coleen Goko, 'New Gender Equality Bill Aims to "change Landscape" for SA Women' (*Business Day*, 19 August 2013) <<http://www.bdlive.co.za/business/2013/08/19/new-gender-equality-bill-aims-to-change-landscape-for-sa-women>> accessed 23 April 2016.

<sup>323</sup> Annamaria Toth, 'The European Union and Women's Rights: Between Economic Efficiency and Fundamental Rights' <<http://www.nouvelle-europe.eu/en/european-union-and-women-s-rights-between-economic-efficiency-and-fundamental-rights>> accessed 25 April 2016.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid

<sup>326</sup> Council of the European Union, 'Council Conclusions on the Establishment of a Human Rights Dialogue with South Africa' (*Brussels, 2012*) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/133571.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/133571.pdf)> accessed 25 April 2016.

<sup>327</sup> 'South Africa's Progress towards Gender Quality – Celebrating Progress, Highlighting Challenges' (*Pretoria, United Nations Information Centre –2015*) <<http://unicpretoria.org.za/2015/06/19/south-africas-progress-towards-gender-quality-celebrating-progress-highlighting-challenges/>> accessed 3 November 2015.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

Rapporteur on violence against women, the UN Agenda for Women's Empowerment and the UN Commission on the Status of Women.

Nevertheless one should recognise that both South Africa and the EU are still confronted with gender-based violence despite having made a variety of attempts and agreements aimed at eradicating it. As of 2014 around a third of women in the EU member states still encountered 'physical, sexual and psychological violence'.<sup>330</sup> Comparably, it has been highlighted that the plague of rape in South Africa is still prevalent and there is a habit of victims remaining silent for fear of embarrassment despite public awareness campaigns aimed at empowering women.<sup>331</sup>

#### 40. Conclusion

The EU engages South Africa in dialogue on a multitude of issues. The human rights dialogue is aimed at discussion of both issues of concern within South Africa and the EU as well as multilateral cooperation. However, it is clear that the latter, in particular engagement in relation to positions before UN human rights bodies, have come to dominate the dialogue. Civil society has a role to play but it is uncertain how much their concerns feature in the actual dialogue. There has been some engagement on national interventions in relation to certain EU priority areas such as the rights of women but little engagement on other priority areas such as LGBTI rights.

The almost exclusive focus on multilateral issues in the human rights dialogue has left little time for discussion of challenges at the national level, whether in EU member states or in South Africa. The same applies to other high level meetings such as the High-Level Political Dialogue.<sup>332</sup>

Of course the human rights dialogue is not the only possibility for the EU to engage South Africa on human rights issues. For example the head of the EU delegation to South Africa participated in a partnership roundtable of the Department of Basic Education in July 2016 and presented a paper on 'improving the quality of basic education: A key aspect of our relationship with South Africa'.<sup>333</sup> However, it is important that the EU engages widely with South African civil society on issues of concern and also promote transparency.

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<sup>330</sup> Bethany Bell, 'Violence against Women: One-Third of EU Women Affected – Survey' *British Broadcasting Corporation* (4 March 2014) <<http://www.bbc.com/news/world-26444655>>.

<sup>331</sup> Davis. (n 302)

<sup>332</sup> *ibid* 2.

<sup>333</sup> 'Youth Empowerment'

<[http://eeas.europa.eu/delegations/south\\_africa/eu\\_south\\_africa/support\\_civil\\_society/south\\_africa\\_prog/youth\\_empowerment/index\\_en.htm](http://eeas.europa.eu/delegations/south_africa/eu_south_africa/support_civil_society/south_africa_prog/youth_empowerment/index_en.htm)>  
accessed 25 April 2016

## B. EU Human Rights Projects in South Africa

### 41. Introduction

The EU is one of the major providers of development assistance in the world.<sup>334</sup> In 2014 the EU and its member states contributed €58.2 billion in development aid. This accounted for more than half of the world's aid donations.<sup>335</sup> A small fragment of this development assistance goes to South Africa and will be further reduced in the coming years. The EU aid envelope for South Africa for 2014-2020 stands at Euro 241 million, down from Euro 980 million in the previous seven-year framework (2007-2013).<sup>336</sup>

EU development assistance to South Africa is governed among others by the TDCA which provides in article 65:

1. Development cooperation between the Community and South Africa shall be conducted in a context of policy dialogue and partnership, and shall support the policies and reforms carried out by the national authorities.
2. In particular, development cooperation shall contribute to South Africa's harmonious and sustainable economic and social development and to its insertion into the world economy and to consolidate the foundations laid for a democratic society and a state governed by the rule of law in which human rights in their political, social and cultural aspects and fundamental freedoms are respected.
3. Within this context, priority shall be given to supporting operations, which help the fight against poverty.

Support from the EU to South African civil society dates back to the days of apartheid. The EC provided financial assistance to anti-apartheid organisations in South Africa, including to assist black South Africans gain access to higher education. The EC established a programme known as 'Special Programme for the victims of apartheid' which ensured money was channelled to local civil society actors in order to enhance programmes intended to promote 'non-racialism' and community development projects.<sup>337</sup>

<sup>334</sup> Together the EU and its member states were the largest donor worldwide in 2015. See 'European Commission 'EU Official Development Assistance Reaches Highest-Ever Share of Gross National Income' (*Press release, Brussels, 13 April 2016*) <[http://europa.eu/rapid/press-release\\_IP-16-1362\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1362_en.htm)> accessed 22 September 2016.

<sup>335</sup> 'EU Remains World's Largest Aid Donor in 2014' *Xinhua News* (8 August 2015)

<[http://news.xinhuanet.com/english/2015-04/08/c\\_134134651.htm](http://news.xinhuanet.com/english/2015-04/08/c_134134651.htm)>.

<sup>336</sup> 'Embassy of the Republic of South Africa to the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Mission to the European Union (2016)' (n 276).

<sup>337</sup> Lorenzo Fioramonti, 'The European Union Promoting Democracy in South Africa' (*University of Siena, 2004*) 4–10 <<http://www.business.mmu.ac.uk/edpsg/docs/DP30.pdf>> accessed 16 April 2016.; Lorenzo Fioramonti, *European Union Democracy Aid: Supporting Civil Society in Post-Apartheid South Africa* (Routledge 2010) 64. Among the (non-religious and non-union) organisations that benefitted from the initiative were the Kagiso Trust, trade unions, the Southern African Catholic Bishops' Conference, and the South African Council of Churches.



This section discusses the EU's financial support to South Africa with a particular focus on human rights interventions. It discusses both support to government and civil society organisations.

#### 42. Support provided by the EU to government and civil society

Prior to 1994, anti-apartheid civil society organisations had to endure persecution such as police harassment, arrest and censorship. Despite this the number of CSOs grew and by 1990 there were more than 5000 CSOs in the country.<sup>338</sup> They survived police confrontation, arrests and death threats.<sup>339</sup> While experiencing intimidation from the apartheid authorities, CSOs were viewed as reliable collaborators for channelling money to apartheid victims. Considering that the apartheid regime was regarded as illegitimate, civil society became a trusted recipient of donations.<sup>340</sup> In order to prevent this the apartheid regime passed the Prohibition of Foreign Financing of Political Parties Act in order to halt foreign donations to CSOs.<sup>341</sup> Yet despite such regulations, between 1986 and 1991 the European Commission provided more financial aid to South African CSOs than to CSOs in any other country in the world.<sup>342</sup> In the democratic era many CSOs have been involved in development projects and social upliftment and many also serve as custodians of democracy through research and policy recommendations.<sup>343</sup>

Since 1994, a considerable amount of EU assistance has been provided to the South African government. Recent support includes assistance to universities and teachers' colleges, scholarships for masters' students, support to provide public schools with textbooks, support for the 'Expanded Public Works Programme' offered through the Development Bank of Southern Africa<sup>344</sup> and support to the Department of Cooperative Governance and Traditional Affairs to promote community engagement in local government programmes such as policy formulation and service delivery.<sup>345</sup> The EU also provides budget support to the South African Department of Health.<sup>346</sup>

<sup>338</sup> Adam Habib and Rupert Taylor, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) 10 *International Journal of Voluntary and Nonprofit Organizations* 2–3. By 2013 there were more than 100 000 registered CSOs and roughly 50 000 unregistered ones. See 'The South African Nonprofit Sector: Struggling to Survive, Needing to Thrive' (*SANGONET (9 April 2013)*) <<http://www.ngopulse.org/article/south-african-nonprofit-sector-struggling-survive-needing-thrive>> accessed 9 April 2013.

<sup>339</sup> *Ibid.*

<sup>340</sup> Caroline Kihato, 'Shifting Sands: The Relationship between Foreign Donors and South African Civil Society during and after Apartheid' [2001] Centre for Policy Studies <[http://www.cps.org.za/cps\\_pdf/RR86.pdf](http://www.cps.org.za/cps_pdf/RR86.pdf)>.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> Bev Russell and Mark Swilling, 'The Size and Scope of the Non-Profit Sector in South Africa' [2015] Centre for Civil Society, University of Natal 1–19.; Richard Pithouse, 'NGOs and Urban Movements: Notes from South Africa' (2013) 17 *City* 253–257.

<sup>344</sup> Roeland van der Geer, 'South Africa and the European Union: 1994-2014, Trends, Developments and a Perspective on the Future' 5–7 <<http://www.unisa.ac.za/news/wp-content/uploads/2014/11/SA-and-the-European-Union-final.pdf>> accessed 21 April 2016.

<sup>345</sup> 'Delegation of the European Union to the Republic of South Africa: Governance' <[http://eeas.europa.eu/delegations/south\\_africa/eu\\_south\\_africa/dev\\_coop/governance/index\\_en.](http://eeas.europa.eu/delegations/south_africa/eu_south_africa/dev_coop/governance/index_en.)> accessed 29 June 2016.; 'Multiannual Indicative Programme between the Republic of South Africa and the European Union for

Since 1999, several ‘Multi-Annual Indicative Programmes’ (MIPs) between South Africa and the EU have been adopted. Their main areas of focus (aligned to the South African National Development Plan) are: (i) employment creation; (ii) education, training and innovation; and (iii) building a capable and developmental state.<sup>347</sup> The MIPs specifically mentions gender equality, women’s empowerment, environment/climate change, HIV/AIDS alleviation and service delivery to be mainstreamed in all areas of assistance.<sup>348</sup>

Support for civil society is either channelled through government as in the case of the SA-EU Youth Empowerment Programme (YEP)<sup>349</sup> or directly to civil society through call for proposals issued by the EU, such as with regard to the Primary Health Care Sector Policy Support Programme, and through the European Instrument for Democracy and Human Rights.<sup>350</sup>

The EU is engaged in a variety of programmes and projects seeking to capacitate both civil society and government in South Africa as discussed below.

One major EU supported programme is the Programme to Support Pro-poor Policy Development (PSPPD). The programme seeks to reduce poverty and inequality through the improvement of policy formulation and operationalisation.<sup>351</sup> The PSPPD is managed by the Department of Planning, Monitoring and Evaluation.<sup>352</sup> In the first phase (2007-2012) the programme ‘awarded 13 research projects to nine universities and the Human Sciences Research Council (HSRC) to contribute to the body of evidence around child poverty, education, employment and livelihood strategies, health, and social cohesion.’<sup>353</sup> The PSPPD is now in its second phase (2012-2017). While this phase maintained the focus of the first, it has launched a complementary programme termed the National Income Dynamics Study

the Period 2014-2020’ <[https://ec.europa.eu/europeaid/sites/devco/files/mip-south-africa-edf11-2014\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/mip-south-africa-edf11-2014_en.pdf)> accessed 29 June 2016.

<sup>346</sup> ‘Primary Health Care’

<[http://eeas.europa.eu/delegations/south\\_africa/eu\\_south\\_africa/support\\_civil\\_society/south\\_africa\\_prog/primary\\_health\\_care/index\\_en.htm](http://eeas.europa.eu/delegations/south_africa/eu_south_africa/support_civil_society/south_africa_prog/primary_health_care/index_en.htm)> accessed 27 September 2016.

<sup>347</sup> ‘Multiannual Indicative Programme between the Republic of South Africa and the European Union for the Period 2014-2020’. (n 345)

<sup>348</sup> Ibid

<sup>349</sup> ‘Youth Empowerment’

<[http://eeas.europa.eu/delegations/south\\_africa/eu\\_south\\_africa/support\\_civil\\_society/south\\_africa\\_prog/youth\\_empowerment/index\\_en.htm](http://eeas.europa.eu/delegations/south_africa/eu_south_africa/support_civil_society/south_africa_prog/youth_empowerment/index_en.htm)> accessed 27 September 2016.

<sup>350</sup> Ibid

<sup>351</sup> ‘Press Release: Researchers and Policy Makers Meet to Review Important Research on Poverty Reduction’ (*European Union Delegation to the Republic of South*, 2015) <[http://eeas.europa.eu/delegations/south\\_africa/documents/press\\_corner/20150821\\_en.pdf](http://eeas.europa.eu/delegations/south_africa/documents/press_corner/20150821_en.pdf)> accessed 2 July 2016.

<sup>352</sup> ‘Researchers and Policy Makers Meet to Review Important Research on Poverty Reduction’ (*The European Union Delegation to South Africa*) 1

<[http://eeas.europa.eu/delegations/south\\_africa/documents/press\\_corner/20150821\\_en.pdf](http://eeas.europa.eu/delegations/south_africa/documents/press_corner/20150821_en.pdf)> accessed 18 April 2016.

<sup>353</sup> Danya-Zee Pedra, ‘The PSPPD: Informing Policymakers and Researchers for over a Decade’ (23 October 2015) <<http://mg.co.za/article/2015-10-23-00-the-psppd-informing-policymakers-and-researchers-for-over-a-decade>> accessed 14 July 2016.

which seeks to understand the shifting face of poverty, as well as related issues such as spending patterns, birth and death and internal migration.<sup>354</sup>

The EU has played a central role in strengthening South African NGOs among others through the establishment and funding of the Foundation for Human Rights (FHR) whose objectives are to administer grants for human rights projects and support civil society as an important counterbalance to government institutions.<sup>355</sup>

The FHR highlights the importance of community-based organisations (CBOs) in realising access to justice.<sup>356</sup> Recognising the need for strong civil society FHR offer capacity building at the request of CBOs and other CSOs in for example administration and financial management.<sup>357</sup> To receive project funding CSOs must show 'their ability to implement the project and to transfer knowledge at local level ... [and] demonstrate that they have basic financial management and report-writing skills'.<sup>358</sup>

FHR supported projects include funding the Anti-Privatisation Forum in its drive to challenge evictions, electricity cut offs and to raise awareness about the plight of the poor at the World Summit on Sustainable Development.<sup>359</sup> FHR also contributed to the funding of the Treatment Action Campaign's celebrated legal battle against the state's failure to provide nevirapine to HIV positive pregnant women.<sup>360</sup>

On land restitution issues, the FHR operates the National Farm Dwellers Programme which aspires to improve the living conditions of farm dwellers and workers in terms of access to quality food, good working conditions, reasonable wages and access to land.<sup>361</sup> Following the 2012 farm workers' protests for better wages and housing in Boland, Western Cape, the FHR in partnership with the Department of Justice and Constitutional Development held workshops with 100,000 farm workers who were taught about their constitutional rights in terms of living wages and better housing.<sup>362</sup>

<sup>354</sup> Southern African Labour and Development Research Unit, 'National Income Dynamics Study - NIDS' 2016' <<https://www.saldru.uct.ac.za/projects/current-projects/national-income-dynamics-study-nids>> accessed 22 September 2016.

<sup>355</sup> Foundation for Human Rights, 'Awareness: Raising Human Rights Awareness Through Events Between January and May 2014' <[http://www.fhr.org.za/files/61113/8123/6471/Human\\_Rights\\_Events\\_Call\\_GuidelinesJan-May\\_2014.pdf](http://www.fhr.org.za/files/61113/8123/6471/Human_Rights_Events_Call_GuidelinesJan-May_2014.pdf)> accessed 18 April 2016.

<sup>356</sup> Foundation for Human Rights, 'Access to Justice' <<http://www.fhr.org.za/index.php/programmes/access-justice/>> accessed 18 April 2016.

<sup>357</sup> Foundation for Human Rights, 'Capacity Building' <<http://www.fhr.org.za/index.php/funding/capacity-building>> accessed 18 April 2016.

<sup>358</sup> Foundation for Human Rights, 'Eligibility Criteria' <<http://www.fhr.org.za/index.php/funding/eligibility-criteria/>> accessed 18 April 2016.

<sup>359</sup> Fioramonti, *European Union Democracy Aid: Supporting Civil Society in Post-Apartheid South Africa* (n 337) 74..

<sup>360</sup> Ibid.

<sup>361</sup> 'Farm Worker and Farm Dweller Rights Programme-National Strategic Engagement' (*Department of Justice and Constitutional Development*, 2015) <[http://www.justice.gov.za/m\\_statements/2015/20150805-Programme-CTNatStratEngt-Farmworkers7-9Aug15.pdf](http://www.justice.gov.za/m_statements/2015/20150805-Programme-CTNatStratEngt-Farmworkers7-9Aug15.pdf)> accessed 20 April 2016.

<sup>362</sup> 'Justice Hosts National Strategic Engagement Session on Rights of Farm Workers and Farm Dwellers, 7 to 9 Aug' (*South African Government*) <<http://www.gov.za/speeches/justice-committed-protection-farm-workers-and-farm-dwellers-rights-5-aug-2015-0000>> accessed 5 May 2016.

The EU also promotes human rights and democracy in South Africa through the European Instrument for Democracy and Human Rights (EIDHR). In 2010 South Africa was allocated €600,000 under the 'Country-Based Support Scheme' (CBSS) of the EIDHR.<sup>363</sup> The primary objective of this allocation was for the 'strengthening of the role of civil society in promoting human rights and democratic reform'. Through this initiative, CSO recipients are expected to utilise advocacy to end violence against women, protect children's rights at the provincial and national level, and enhance integration of migrants and marginalised groups. On going projects include initiatives to curb violence against women and children.<sup>364</sup>

In relation to upholding the rule of law through good governance, democracy and human rights, the EU through partnership with the Department of Justice and Constitutional Development, supports the Community Law Centre's Parliamentary Programme in Cape Town which has developed monitoring indicators in order to assess the performance of national and selected provincial legislatures in promotion human rights and social justice.<sup>365</sup>

#### 43. Assessment of EU's human rights intervention: benefits and challenges

It should be noted that South Africa as a country is not aid dependent.<sup>366</sup> However, many CSOs are dependent on foreign donor funding for their survival. The EU has recently decided to drastically reduce aid to South Africa. The cut in the development assistance is part of the EU's Agenda for Change reform drive which seeks to scale back its aid to middle-income countries.<sup>367</sup> In explaining the broader strategic reasoning behind this cut, European Commission's representative for development, Alexandre Polack avowed that 'We cannot work with China or Brazil [or South Africa] as we work with, say, Liberia or Zambia. The EU must seek to target its resources where they are needed most and where they can make the most difference'.<sup>368</sup> Thus, the EU has made 241 million Euros available under the Development

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<sup>363</sup> Fondation for Human Rights, 'Eligibility Criteria' (n 358).

<sup>364</sup> Ibid.

<sup>365</sup> Dullah Omar Institute, 'Learning & Development Facilitator – Community Development & Parliamentary Programme, Community Law Centre, University of the Western Cape (1 Year Fixed Term Contract Position)' <<http://dullahomarainstitute.org.za/news/learning-development-facilitator-2013-community-development-parliamentary-programme-community-law-centre-university-of-the-western-cape-1-year-fixed-term-contract-position>> accessed 29 June 2016.

<sup>366</sup> According to the World Bank, net ODA received as percentage of GNI was 0.3 for South Africa in 2014, 'World Bank' <<http://data.worldbank.org/indicator/DT.ODA.ODAT.GN.ZS>> accessed 27 September 2016.

<sup>367</sup> Lorenzo Piccio, 'It's (Almost) Final: EU to Slash Aid to Middle-Income Countries' <<https://www.devex.com/news/it-s-almost-final-eu-to-slash-aid-to-middle-income-countries-82686>> accessed 22 September 2016.

For a detailed discussion of EU's Agenda for Change reform, see Mikaela Gavas, Siân Herbert and Simon Maxwell, 'An Agenda for Change for EU Development Policy' <<https://www.odi.org/comment/6040-eu-development-policy-agenda-change>> accessed 22 September 2016.

<sup>368</sup> As cited in Lorenzo Piccio (n 367).

Cooperation Instrument (DCI) for support to South Africa for the period 2014-2020 compared to 980 million Euro for 2007 to 2013.<sup>369</sup>

It should be noted that South Africa receives funding from the EU under other financial instruments. These include the European Instrument for Democracy and Human Rights (EIDHR), Horizon 2020 (and its predecessor FP7) for research,<sup>370</sup> Erasmus Mundus for academic mobility.<sup>371</sup> As noted above the EIDHR provides support directly to civil society organisations for their work in support of democracy, rule of law and human rights.<sup>372</sup> The total envelope for the call for proposals for EIDHR grants to South African NGOs announced in March 2016 is 1,17 million Euros.<sup>373</sup> The previous South Africa specific call in May 2014 had an envelope of 1,1 million Euros.<sup>374</sup> The sums available directly to civil society through the EIDHR is thus much smaller than the support available to South Africa under the DCI.

Some of the achievements of projects supported by the EU have been set out above. However, this does not mean that there are no challenges. One challenge is fragmentation with assistance being provided by many actors with little sign of coordinating of the efforts.<sup>375</sup> The EU's approach to channel much of its assistance via the government could be viewed as aimed at improving the prospect of coordination of initiatives.<sup>376</sup> However, a concern is that state organs themselves are often ineffective and uncoordinated.<sup>377</sup>

Some observers have expressed concern over lack of legitimacy of some urban-based NGOs that purport to represent the concerns of those living in rural areas.<sup>378</sup> However, such NGOs may still attract donor funding over community-based organisations (CBOs) as the latter often 'lack the capacity to manage donor requirements'.<sup>379</sup> This is of particular concern as CBOs have the potential to impact greatly at the grassroots level specifically with regard to the realisation of socioeconomic rights. However, as noted

<sup>369</sup> European Union External Action, 'EU Relations with South Africa' <[http://eeas.europa.eu/south\\_africa/index\\_en.htm](http://eeas.europa.eu/south_africa/index_en.htm)> accessed 29 June 2016.

<sup>370</sup> 'Next Framework Programme: Horizon 2020' <<http://www.esastap.org.za/horizon2020/index.php>> accessed 27 September 2016.

<sup>371</sup> 'Erasmus Mundus Action 2 for South Africa' <<http://www.ema2sa.eu/>> accessed 27 September 2016.

<sup>372</sup> 'European Instrument for Democracy & Human Rights (EIDHR)' <[http://ec.europa.eu/europeaid/how/finance/eidhr\\_en.htm\\_en](http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm_en)> accessed 27 September 2016.

<sup>373</sup> 'EIDHR - CBSS - South Africa - 2016' <[http://www.welcomeurope.com/europe-funding-opportunities/eidhr-south-africa-2016-7181+7081.html#tab=onglet\\_details](http://www.welcomeurope.com/europe-funding-opportunities/eidhr-south-africa-2016-7181+7081.html#tab=onglet_details)> accessed 27 September 2016.

<sup>374</sup> 'EIDHR Country Based Support Scheme for South Africa 2014' <<https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1474874557800&do=publi.detPUB&searchtype=AS&Pgm=7573843&zgeo=35648&debpub=&orderby=upd&orderbyad=Desc&nbPubliList=25&page=1&aoref=134918>> accessed 27 September 2016.

<sup>375</sup> 'Critical Perspectives on Sustainability of the South African Civil Society Sector' [2012] Coalition on Civil Society Resource Mobilisation 24.

<sup>376</sup> 'EU Engagement with Civil Society in South Africa' (*European Union External Action*) <[https://eeas.europa.eu/delegations/south\\_africa/documents/press\\_corner/roadmap\\_brochure\\_en.pdf](https://eeas.europa.eu/delegations/south_africa/documents/press_corner/roadmap_brochure_en.pdf)> accessed 29 June 2016.

<sup>377</sup> 'Critical Perspectives on Sustainability of the South African Civil Society Sector' (n 375) 22.

<sup>378</sup> *Ibid* 24.

<sup>379</sup> *ibid*.

above there is some acknowledgment of the issue as illustrated by the practice of the Foundation for Human Rights of providing capacity building to organisations in need of this.

An example of a collapsed project is support to a network of service providers known as Themba Lesizwe (Hope for the Nation), an alliance between thirty-five NGOs and social movements that functioned under the South African Network of Trauma Service Providers.<sup>380</sup> This project established in 2001 grew into a network of 269 NGOs but collapsed in 2007 after the EU withdrew a €20 million fund it had pledged to the organisation over the next three years.<sup>381</sup> The deal was supposed to be finalised and funds received by the network, but delays from the Department of Social Development (which was the lead negotiator from the South African side) and stringent bureaucratic requirements from the EU brought the deal to a standstill.<sup>382</sup>

#### 44. Conclusion

As highlighted in this section, the EU is one of the institutions which played a crucial role in strengthening democratic institutions in the country. Prior to the dawn of democracy in 1994, the then EC openly expressed its disapproval of the apartheid system. The bloc took major steps in funding human rights organisations opposed to the apartheid government through the establishment of a fund meant for victims and sufferers of apartheid. Further, the EC pressurised the then National Party government through trade sanctions and funding to anti-apartheid organisations operating in the country. However such an action did not go without constraints, the apartheid state retaliated by introducing a variety of measures to criminalise anti-apartheid civil society funding. In addition to that the effectiveness of sanctions against South Africa did not urgently bring about a change of heart; South Africa stubbornly went ahead with the apartheid policy amid trade restriction. Despite this, the community's opposition to apartheid has represented its commitment to human rights in South Africa.

After 1994, cooperation between the EU and South Africa strengthened. This included increased funding for human rights groups. The EU has supported, among others, projects to fight against racism, gender based violence, homophobia and curbing the spread of HIV/AIDS in the country. While the South African government has in some cases cooperated with CSOs to operationalise an EU funded project such as the PSPPD, it remains to be seen whether without the backing of EU financial support, it will have the same willingness to support projects previously funded by the EU.

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<sup>380</sup> Terence Creamer, 'R5m for 35 NGOs to Support Victims of Violence' Polity <<http://www.polity.org.za/article/r5m-for-35-ngos-to-support-victims-of-violence-2003-01-10>>.

<sup>381</sup> Vicki Robinson, 'I Don't Know How I Can Keep Helping' *Mail and Guardian* (10 May 2007) <<http://mg.co.za/article/2007-05-10-i-dont-know-how-can-keep-helping>>[accessed 22 April 2016].

<sup>382</sup> Ibid.

## C. EU–South Africa: Human Rights and Economic Relations

### 45. Introduction

The National Development Plan (NDP) 2030 was adopted by the government in 2012 and is meant to eliminate poverty and reduce inequality by 2030.<sup>383</sup> The 400-page plan sets out numerous interventions to achieve this goal. There is little direct reference to human rights. However, many proposed interventions linked to employment creation, education, health, social protection and building safer communities are clearly linked to human rights. Furthermore, realising the extensive socio-economic rights guaranteed in the South African constitution requires significant resources. At the same time although human rights in general are not directly linked to levels of economic development it would be naïve to claim that realising and promoting human rights would not demand resources, while it is also reasonable to argue that economic hardships hardly provide an ideal setting for human rights promotion. In this sense all economic relations of a country may have an, albeit indirect, effect on realising human rights.

One of the chapters of the NDP is headed ‘positioning South Africa in the world’. The chapter highlights the importance of regional integration in particular in the context of the Southern African Development Community (SADC) but also South Africa’s role in the BRICS group.<sup>384</sup> China is singled out as important in particular, because of its interest in mining, an important sector in the South African economy.<sup>385</sup> The National Development Plan calls for engagement with China on ‘minerals, mining, research and development and infrastructure expansion on the continent.’ China and other BRICS states are important for South Africa. However, from an economic perspective the EU and other Western states are even more important. For ideological reasons South Africa chooses to put more emphasis on its relationship with BRICS than its relationship with Western states.<sup>386</sup> Participating in the group according to the South African government does not only provide political benefits, such as increasing its voice in the international arena, but also provides economic benefits through increased trade and investment opportunities.<sup>387</sup> It was against this backdrop that President Jacob Zuma touted in 2011 that South Africa’s membership in the group is a great achievement, considering that the emerging economies have an important role to play in the restructuring of the international economic, financial and political institutions to become more balanced and equitable.<sup>388</sup>

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<sup>383</sup> National Development Plan 2030 – Our future – make it work (2012).

<sup>384</sup> Brazil, Russia, India, China and South Africa.

<sup>385</sup> National Development Plan (n 124) 239.

<sup>386</sup> Ross Anthony, ‘South Africa and China: Behind the Smoke and Mirrors’ *Mail & Guardian* (11 August 2016) <<http://mg.co.za/article/2016-01-11-south-africa-and-china-behind-the-smoke-and-mirrors>> accessed 30 August 2016.

<sup>387</sup> Gauteng Provincial Treasury, ‘South Africa’s Position in BRICS’ [2013] Quarterly Bulletin 8 <[http://www.treasury.gpg.gov.za/Documents/South African position in BRICS.pdf](http://www.treasury.gpg.gov.za/Documents/South%20African%20position%20in%20BRICS.pdf)>.

<sup>388</sup> N Yanshuo, ‘Adding South Africa to the BRICS Mix’ (*Beijing Review*, 2011) as cited in Hany Besada, Evren Tok and Kristen Winters, ‘South Africa in the BRICS: Opportunities, Challenges and Prospects’ (2013) 42 *Africa Insight* 1.

Yet, acknowledging the importance of the EU market, the NDP notes that any ‘collaboration must include maintaining sanitary and phyto-sanitary standards to ensure that South Africa's products can continue to gain access to European markets.’ The mention of the importance of access to European markets should come as no surprise given that South Africa is the EU’s largest trading partner in Africa.<sup>389</sup> In 2015 the EU’s imports from South Africa totalled €19.4 billion. However the trade balance still favours the EU with South African imports from the EU reaching €25.5 billion in the same year.<sup>390</sup>

This section assesses the impact of Trade, Development and Cooperation Agreement (TDCA) in fostering respect for human rights in South Africa. The section also evaluates the prospect of the EU-SADC Economic Partnership Agreement, which will when it enters into force modify the TDCA.<sup>391</sup> Finally the section discusses the issue of foreign investment protection.

#### 46. The EU-SA Trade, Development and Co-operation Agreement

South Africa and the EU signed the TDCA in 1999. The agreement commenced on 1 January 2000.<sup>392</sup> The TDCA granted 95 percent of South African goods duty-free access to EU markets ‘within’ ten years.<sup>393</sup> At the same time, the agreement ‘liberalised’ 86 percent of EU exports to South Africa markets.<sup>394</sup> The aim of the TDCA was to assist in rebuilding South Africa’s economy after years of isolation and revitalise ‘long term economic growth.’<sup>395</sup> The agreement included cooperation in the areas of trade, social and political spheres, but most importantly the expansion of the EU in terms of size and population meant South Africa gained access to a large market.<sup>396</sup>

South Africa inherited numerous obstacles from apartheid witnessed by poverty and racial inequalities. In this regard the EU’s economic power was regarded a vehicle to spearhead economic stability.<sup>397</sup> Even so, the agreement has been constrained by differing expectations. The EU sought an FTA agreement that would mirror the World Trade Organisation’s requirements while South Africa’s desire was to grab

<sup>389</sup> European Commission, ‘Trade’ <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>> accessed 6 May 2016.

<sup>390</sup> Ibid.

<sup>391</sup> See ‘Protocol 4 to the EU-SADC EPA’ <[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153915.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf)> accessed 27 September 2016.

<sup>392</sup> ‘Procedures for the Application, Administration and Allocation of Export Permits under the Trade, Development and Cooperation Agreement between the European Union and the Republic of South Africa for the Year 2015, Notice 1084 of 2014’ (*Department of Agriculture, Forestry and Fisheries*) 1

<[http://www.gov.za/sites/www.gov.za/files/38260\\_gen1084.pdf](http://www.gov.za/sites/www.gov.za/files/38260_gen1084.pdf)> accessed 6 May 2016.

<sup>393</sup> Ibid 3.

<sup>394</sup> Ibid 3.

<sup>395</sup> Oscar van Heerden, ‘South Africa’s Experience of the Trade, Development and Cooperation Agreement (TDCA) with the European Union from 1995 to 2005’ (*Centre for International Studies*) 5

<[http://www.open.ac.uk/socialsciences/bisa-africa/workshop/van\\_heerden.pdf](http://www.open.ac.uk/socialsciences/bisa-africa/workshop/van_heerden.pdf)> accessed 28 April 2016.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid, 7.



the status awarded to ACP states under the Lomé Convention which included free access to EU markets and financial aid.<sup>398</sup>

#### 47. Implications of the SA-EU Free Trade Agreement on human rights

Negotiations between the EU and South Africa around the TDCA were quarrelsome and tense as the country was denied the trade benefits attached to Lomé in favour of the TDCA which emphasised free market cooperation between the two partners.<sup>399</sup> A South African diplomat commented 'Our forte lies in that in which we have a comparative advantage and that would be in the agricultural areas... that would have been a natural way to address the developmental aspects that we sought to achieve in our negotiations. We can make a difference in the lives of people.'<sup>400</sup> The comments by the diplomat serve as a clear indication of the different priorities of the two sides in the negotiations.

The EU did not regard South Africa as a tough rival when it came to the industrial sector; it was only in agricultural sectors that South Africa was seen as rival.<sup>401</sup> The EU was thus protectionist with regard to agricultural products such as wine where South Africa was regarded as a tough competitor.<sup>402</sup> The EU was lambasted for employing protectionism and heavily subsidising its farmers while it had a larger economy in comparison to South Africa's farmers who are poorly supported by the state.<sup>403</sup>

Despite the uneasiness over the TDCA agreement at the time of negotiation, the agreement has meant substantial increases in South African exports to the EU.<sup>404</sup> However, the fact remains that South Africa has 'exposed' itself to an 'unequal trade relationship' where heavily subsidised EU farmers are granted free access to the country's markets.<sup>405</sup> In this context it is noticeable that 'agriculture's potential impact on empowerment and poverty relief is much larger than its actual weight in the economy suggests'.<sup>406</sup>

In this regard the EU's perspective of South Africa as a developed country despite massive socio-economic problems experienced by South Africa is problematic.<sup>407</sup> The EU's sincerity and commitment to enhance economic development in South Africa and the SADC region has been duped 'commercial

<sup>398</sup> Richard Gibb, 'Globalisation and Africa's Economic Recovery: A Case Study of the European Union–South Africa Post-Apartheid Trading Regime' (2003) 29 *Journal of Southern African Studies* 82.

<sup>399</sup> *Ibid.*, 89.

<sup>400</sup> *Ibid.*

<sup>401</sup> Johanna Assarson, 'The Impacts of the European Union - South Africa Free Trade Agreement' (*Uppsala University*, 2005) 8 <<https://www.diva-portal.org/smash/get/diva2:130505/FULLTEXT01.pdf>> accessed 28 April 2016.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*

<sup>404</sup> *Ibid.*, 20.

<sup>405</sup> Theo Kneifel, 'FAIR TRADE Or/and FREE TRADE? A European NGO – Perspective on the Trade Negotiations between South Africa and the EU' (*KASA, Heidelberg*) <<http://bocs.hu/korg/english/material/theo-e1.htm>> accessed 28 April 2016.

<sup>406</sup> 'Agriculture' (*South African Government*) <<http://www.gov.za/about-sa/agriculture>> accessed 27 September 2016.

<sup>407</sup> C. Lee.(n 266)

haggling by wealthy Europeans'.<sup>408</sup> Although this is the case, the European Commission has maintained that free trade is vital for job creation and economic expansion.<sup>409</sup> There is no question that unemployment is a serious challenge in South Africa and that the success of any trade agreement should be viewed in the light of whether it has contributed to increased employment. South Africa's unemployment rate remains around 25%, the same as when the TDCA was concluded.<sup>410</sup>

It is difficult to assess the role that the TDCA has played in achieving the objective of 'harmonious and sustainable economic and social development'.<sup>411</sup> A highly critical 2006 European Parliament report noted:<sup>412</sup>

The greater burden of the TDCA in terms of tariff adjustments currently falls on South Africa, with an significant impact on government revenue collection capacity and consequently on its investment capacity in the social sector and health care.

The National Development Plan, in line with the constitutional mandate, put great emphasis on strengthening employment creation, education, healthcare and social protection. If the TDCA does not live up to the promise of promoting economic and social development, and through this the realisation of socio-economic rights, this is clearly something that both parties, and in particular the EU, should have assessed in their negotiations of the agreement that will replace the TDCA, the EU-SADC Economic Partnership Agreement.

## 48. The EU-SADC Economic Partnership Agreement (EPA)

### a) *Benefits of the EU-SADC EPA*

After many years of negotiations (starting in 2002) the EU-Southern African Development Community (SADC) EPA was concluded in July 2014.<sup>413</sup> It should be noted that this is an agreement not between the EU and whole of the 15-member bloc of the SADC but only covers South Africa, Botswana, Lesotho, Namibia, Swaziland and Mozambique. Of these all but Mozambique are members of the Southern

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<sup>408</sup> Ibid, 92.

<sup>409</sup> 'Free Trade Is a Source of Economic Growth' (*European Commission*) 5

<[http://europa.eu/pol/pdf/flipbook/en/trade\\_en.pdf](http://europa.eu/pol/pdf/flipbook/en/trade_en.pdf)> accessed 28 April 2016.

<sup>410</sup> 'South Africa Unemployment: 1994-2015' *Business Tech* (21 January 2015) <<http://businesstech.co.za/news/general/77737/south-africa-unemployment-1994-2015>>.

<sup>411</sup> 'Trade, Development and Cooperation Agreement (TDCA)' <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar12201>> accessed 27 September 2016.

<sup>412</sup> European Parliament 'Report on an EU-South Africa Strategic Partnership (2006/2234(INI)) 11.

<sup>413</sup> 'Conclusion of the Economic Partnership Agreement' (*Department of Trade and Industry, 17 July 2015*) <<https://www.thedti.gov.za/editmedia.jsp?id=3079>> accessed 28 April 2016.

African Customs Union (SACU). As in other EU trade negotiations there was little, if any, civil society participation in the negotiations leading up to the agreement.<sup>414</sup>

Two reasons account for the seemingly endless negotiation. First, whilst the European Commission aimed to negotiate comprehensive free trade agreements encompassing trade in goods and services which might stimulate structural reforms, South Africa and other members of the SADC EPA group avowed that there is the need to build administrative and institutional capacity first before addressing such reforms.<sup>415</sup> Second the members of the SADC EPA group became increasingly dissatisfied with the negotiation process, which they perceived was dominated by the European Commission without adequate contribution from them. Third, the SADC group was increasingly unhappy about the lack of EPA-related financial support.<sup>416</sup>

One of the objectives of the EPA is ‘contributing to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement’.<sup>417</sup> Part II of the EPA establishes an asymmetric free trade area taking into consideration ‘the specific needs and capacity constraints of the SADC EPA states’.<sup>418</sup> South Africa pushed for the acceleration of her access to EU markets ‘over and above’ the opportunity it enjoyed under TDCA.<sup>419</sup> South Africa managed to secure guarantees for improved duty free access to the EU, including for agricultural goods such as wine, sugar and ethanol.<sup>420</sup> With regard to imports from the EU South Africa managed to secure assurances that ‘the EU will eliminate export subsidies on agricultural goods destined to SACU, as well as more effective safeguards to address damaging surge of imports.’<sup>421</sup> These are important safeguards in terms of levelling the playing field. However, arguably they do not go far enough to address the shortcomings of the TDCA.

#### 49. Implications of the EU-SADC EPA on human rights in Southern Africa

Those opposed to the EPAs warn that most nations in the African continent may end up losing millions of dollars of ‘import revenues’ and that this development will lead to massive economic troubles for local populations.<sup>422</sup> Investigations have suggested that if EU agricultural goods entered African markets duty free, African states would lose 25 per cent of their ‘trade taxes’ and around six per cent of their

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<sup>414</sup> Clair Gammage, ‘Protecting Human Rights in the Context of Free Trade? The Case of the SADC Group Economic Partnership Agreement’ (2014) 20 *European Law Journal* 779, 789.

<sup>415</sup> Talitha Bertelsmann-Scott, ‘South Africa and the EU: Where Lies the Strategic Partnership’ in Adekeye Adebajo and Kaye Whiteman (eds), *The EU and Africa* (2012).

<sup>416</sup> *Ibid.*

<sup>417</sup> EPA article 1(a). The Cotonou Agreement sets out key provisions for development, with stronger emphasis on issues as supporting regional-based economic cooperation, reciprocal trade and integration, democracy, good governance and human rights.

<sup>418</sup> EPA article 20.

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

total tax revenue.<sup>423</sup> Because of the removal of many tariffs already through the TDCA these concerns are less applicable to South Africa than to other African states. However, the impact of the EU's agricultural subsidies on local producers in South Africa remains a concern.<sup>424</sup> The practice of dumping (or exporting at prices far below the costs of production) holds the potential of destroying domestic markets and exacerbating poverty since the EU's agricultural commodities that enter South Africa's market are heavily subsidised.<sup>425</sup> As mentioned above the EPA removes export subsidies but these have anyway been reduced significantly in recent years and are rarely applied to exports to Africa.<sup>426</sup> However, other forms of support such as direct payments which make up on average 30% of agricultural incomes of EU farmers will result in imbalanced trade as South African agricultural subsidies are only around 3%.<sup>427</sup> Some argue that African farmer's stand a chance of losing out to the EU which could lead to food insecurity in the continent thus aggravating poverty.<sup>428</sup> This should be seen against the challenge of about 30 million people in the SADC region as a whole facing food shortage as a result of drought.<sup>429</sup>

In addition to this, there has been criticism of the EPA by the Congress of Southern African Trade Unions (COSATU).<sup>430</sup> The trade union federation feared that the EPA would lead to further de-industrialisation and was critical of the proposed prohibition of export taxes under the EPA as it views such taxes as 'necessary in order to ensure that minerals are processed and jobs are created in SA'.<sup>431</sup> The EPA provides that no new export taxes may be introduced.<sup>432</sup>

The change from the TDCA to the EPA framework is unlikely to be as dramatic for South Africa as for the other members of the SADC EPA group. For example prior to the EPA, Namibia and Botswana's 'beef industries' benefited from the Cotonou preferences, which were erased under the EU-SADC EPA. The outcome of this is the shrinking of their profitability since they can no longer compete with more

<sup>423</sup> Romain Perez and S Karingi, 'Will the Economic Partnership Agreements Foster Sub-Saharan African Development', *GTAP conference* (2006) 3.

<sup>424</sup> Peg Murray-Evans, 'Regionalism and African Agency: Negotiating an Economic Partnership Agreement between the European Union and SADC-Minus' (2015) 36 *Third World Quarterly* 1845,1865.; Brendan Vickers, 'Towards a New Aid Paradigm: South Africa as African Development Partner' (2012) 25 *Cambridge Review of International Affairs* 535,556.

<sup>425</sup> William Brown and Sophie Harman, *African Agency in International Politics* (2nd edn, Routledge 2013) 12–37. Serges D Kamga, 'Economic Partnership Agreements', *Unite or Perish: Africa Fifty Years after the Founding of the OAU* (2015) 24.

<sup>426</sup> 'The Common Agricultural Policy (CAP) and Agriculture in Europe – Frequently Asked Questions' (*European Commission*) <[http://europa.eu/rapid/press-release\\_MEMO-13-631\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-631_en.htm)> accessed 27 September 2016.

<sup>427</sup> Ibid; 'Farm Subsidies Rising in World's Biggest Economies' <<http://phys.org/news/2013-09-farm-subsidies-world-biggest-economies.html>> accessed 27 September 2016.

<sup>428</sup> Brendan Vickers, 'Africa and the Rising Powers: Bargaining for the 'marginalized Many' (2013) 89 *International Affairs* 673–693.

<sup>429</sup> 'SADC Declares Drought a Regional Disaster' (*News 24*, 18 March ) <<http://www.news24.com/Africa/News/sadc-declares-drought-a-regional-disaster-20160318>> accessed 6 May 2016.

<sup>430</sup> Mduzuzi Magagula and Sibongil, 'COSATU Calls for Rejection of EU-SADC Partnership Agreement' (2009) <<http://www.bilaterals.org/?cosatu-calls-for-rejection-of-eu>> accessed 29 June 2016.

<sup>431</sup> 'COSATU Calls on the Department of Trade and Industry to Be Firm on Export Taxes' <<http://www.cosatu.org.za/show.php?ID=9180#sthash.P9eUcJl2.dpuf>> accessed 29 June 2016.

<sup>432</sup> Article 26.

advanced beef exporting nations.<sup>433</sup> Although in theory the EPA's goals seemed promising, economists and commentators contend that the EU prioritised its economic 'self-interest' above 'developmental needs'.<sup>434</sup> The EPAs (among others) require member states of the ACP group to remove tariffs on most imports from the EU. The impact of eliminating tariffs on imports from the EU might generate undue competition and thereby pose a threat to local producers in South Africa (especially in instances where the EU is as a source of imports. It was against this backdrop that Oliver Morrissey and Evious Zgovu touted that 'there are potential welfare losses where cheaper imports from the EU displace more efficient producers' in (South) Africa, and 'adjustment cost where cheaper imports from the EU undermine domestic production or intra-regional trade.'<sup>435</sup>

Many of the concerns expressed over the TDCA have not been addressed in the EPA and it thus seems clear that while South Africa has secured some concessions from the EU, the EPA may have a negative effect on South Africa's possibilities of realising the goals set out in the National Development Plan and thus the realisation of its obligations under the South African Constitution.

## 50. Bilateral investment treaties

Around 2010 South Africa started to cancel or not renew bilateral investment treaties (BITs) concluded in the 1990s as the government considered that these BITs, mainly concluded with European states, limited its policy space.<sup>436</sup> To replace these treaties the Promotion and Protection of Investment Act was signed into law by President Zuma at the end of 2015.<sup>437</sup> The replacement of the BITs by the Act has been criticised by foreign investors including the European Chambers of Commerce. The Act affirms South Africa's right to 'regulate investments in the public interest' and applies to both foreign and domestic investment.

Although the Preamble of the Act avers that it seeks to strengthen and modernise South Africa's foreign policy approach to investment, critics argue that it waters down investors' rights to seek redress in the case of expropriation of their investments. This Act, coupled with the recently approved land expropriation bill by parliament in May 2016 has raised serious cause for concern among foreign investors, including in the EU.<sup>438</sup> One controversial aspect is in relation to shareholding of Black

<sup>433</sup> 'Impacts of EPAs on Agriculture and Rural Livelihoods in the SADC Region' (*Economic Justice Network of FOCCISA*) 46 <[http://www.ejn.org.za/images/stories/Learning\\_Centre/EPA\\_Issues/1\\_EJN\\_Research/Implications\\_epas\\_agriculture\\_livelihoods\\_Web.pdf](http://www.ejn.org.za/images/stories/Learning_Centre/EPA_Issues/1_EJN_Research/Implications_epas_agriculture_livelihoods_Web.pdf)> accessed 29 April 2016.

<sup>434</sup> Bjorn-Oliver Magsig, *Economic partnership agreements-a panacea for development?* University of Dundee, 8.

<sup>435</sup> Oliver Morrissey and Evious Zgovu, '3 The Impact of EPAs on ACP Imports and Welfare' (2010) 85 *Assessing Prospective Trade Policy: Methods Applied to EU-ACP Economic Partnership Agreements* 60.

<sup>436</sup> Jonathan Lang, 'Bilateral Investment Treaties – a Shield or a Sword?' <<http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>> accessed 28 September 2016.

<sup>437</sup> 'SA'S NEW INVESTMENT LEGISLATION SLIPS IN UNDER THE RADAR' <<http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law>> accessed 27 September 2016.

<sup>438</sup> Delwyn Versamy, 'Parliament Approves Land Expropriation Bill' (*Mail & Guardian*, 26 May ) <<http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill>> accessed 23 September 2016.

Economic Empowerment partners in relation to being able to compete for government contracts.<sup>439</sup> Another major worry is that foreign companies based in South Africa will no longer have recourse to an alternative dispute settlement in the form of international arbitration (usually under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes) as previously guaranteed in the BITs.<sup>440</sup> The EU itself has not taken an official position with regard to this, but is clearly interested in protecting the investments of its companies abroad. The main concern from a human rights perspective is that the Act would deter future foreign investment in South Africa which would lead to a decrease in employment and therefore government revenue.

## 51. Conclusion

The EU is an economic giant. This fact helped South Africa in the final years of apartheid when the then EC puts its economic might behind a sanctions regime to push for change. The EU's economic power has arguably been used for less noble reasons in pushing for free trade in the areas where free trade benefits the EU. With regard to agriculture where South Africa, and the rest of the region, would have a competitive advantage in a level playing field, the EU has given fewer concessions.

Whether the EPA will lead to significant changes compared to the TDCA for South Africa remains to be seen. Increased export revenue could be beneficial but must be balanced against increased competition for local producers from EU imports. The human rights related impact is in relation to employment, important in a country like South Africa with massive unemployment, and tax generation. The latter takes on particular importance in a situation where donors such as the EU are providing less and less financial assistance to South Africa as discussed elsewhere in this chapter. South Africa has extensive guarantees for socio-economic rights in its constitution. However, realising these rights requires significant resources. The EPA includes provisions on the importance of poverty reduction and sustainable development. However, its concrete impact remains to be seen, as Gammage suggests:<sup>441</sup>

Assessing the real impact of the EPA on human rights standards in Southern Africa will take considerable time, once the full agreement has been implemented. However, what is clear at this moment is that the protection of socio-economic rights is extremely important to safeguard the livelihoods of Southern Africa's population, of which approximately 80 per cent are 'rural'. If drafted in a way that is sensitive to the economic reality of the Southern African region, the EPA could provide an alternative means through which human rights protection is strengthened.

Gammage wrote this shortly before the negotiations on the SADC EPA were concluded. As the discussion above has shown, the EPA as adopted may do more harm than good.

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<sup>439</sup> 'Moneyweb: Rules for Investing in SA Changing Too Drastically and Too Quickly' (31 May 2016) <<http://www.euchamber.co.za/in-the-media/2016/5/31/moneyweb-rules-for-investing-in-sa-changing-too-dramatically-and-too-quickly>> accessed 27 September 2016.

<sup>440</sup> 'New Protection of Investment Act – The Implications for Foreign Investors' (*Caveat Legal*) <<http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/#sthash.FGYTeW5x.dpuf>> accessed 23 September 2016.

<sup>441</sup> Gammage (n 155) 787.

## D. Critical Reflections on the West from the South African Perspective

### 52. Introduction

In December 1948, the same year that apartheid was adopted as government policy in South Africa, a UN General Assembly dominated by the West adopted the Universal Declaration on Human Rights (UDHR). The preamble of the UDHR specifically affirms that the Declaration shall serve as a 'common standard of achievement for all peoples and all nations'.

Every social grouping in world has specific traditional cultural beliefs and practices which reflect the values held by members of that particular group or community (or a dominant part of the community) for periods often spanning generations. Akin to several other African countries, some traditional cultural beliefs and practices in South Africa are beneficial to all members of the community, while others are harmful to a particular section of the group, especially women.

In South Africa today, the Constitution guarantees everyone living in the country human rights, include the right to live a life in dignity and protection of socio-economic rights. However, the lived reality of many South Africans is far from the promise of its Bill of Rights. There is limited awareness of human rights and it is generally only highly educated liberal persons who demonstrate deeper knowledge of the Western notion of human rights.<sup>442</sup> In contrast, some sections of South African society through their practices oppose aspects of the Western notion of human rights. For instance, there is a clash between guarantees enshrined in the country's constitutional democracy and virginity testing.<sup>443</sup> Proponents of virginity testing portray it as a culturally appropriate solution to curb pre-marital sexual activities and the HIV/AIDS epidemic.<sup>444</sup>

In February 2016, there was a furore over a KwaZulu Natal municipality's decision to put in place a bursary project for women provided that they remained virgins.<sup>445</sup> Advocates of the bursary scheme asserted that the Constitution protects cultural practices like virginity testing.<sup>446</sup> Critics of the practice have argued that it is 'unconstitutional', and it contravenes the rights of women as it undermines the dignity of their bodies.<sup>447</sup> Virginity testing and some other traditional practices clash with Western

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<sup>442</sup> Jonathan Crush, 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2002) 38 *International Migration* 9.

<sup>443</sup> Erika George, 'Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health' (*California Law Review*, 2008) 1450–1462 <[https://www.researchgate.net/publication/228144034\\_Virginity\\_Testing\\_and\\_South\\_Africa's\\_HIVAIDS\\_Crisis\\_Beyond\\_Rights\\_Universalism\\_and\\_Cultural\\_Relativism\\_Toward\\_Health\\_Capabilities](https://www.researchgate.net/publication/228144034_Virginity_Testing_and_South_Africa's_HIVAIDS_Crisis_Beyond_Rights_Universalism_and_Cultural_Relativism_Toward_Health_Capabilities)> accessed 2 May 2016.

<sup>444</sup> *Ibid* 1457.

<sup>445</sup> 'Forced Virginity Testing Is Unlawful and Offensive' (2016) <<https://www.enca.com/opinion/forced-virginity-testing-unlawful-and-offensive>> accessed 5 May 2016.

<sup>446</sup> George. (n 443)

<sup>447</sup> *Ibid*, 1460.

concepts such as human dignity and the right to privacy of the individual.<sup>448</sup> The UN World Health Organisation regards virginity testing as discriminatory and breaching women's rights to dignity and privacy.<sup>449</sup> Although many within South Africa and abroad have expressed concern about this practice, some South Africans still believe it is the antidote to address the HIV/AIDS pandemic. It was in this light that one Zulu traditional woman and virginity tester mooted: 'People say to me, "Why, why are you doing this?" . . . And I say to them, "What have you done to stop AIDS, to limit abortion?"... "We are going ahead with our virginity testing because we have nothing else."<sup>450</sup> Polygamy is another practice in most African countries, including South Africa, which has been criticised on the basis of international human rights law as being prone to gender discrimination and marital strife.<sup>451</sup>

The aforementioned debates raise serious questions about the country's commitment to Western notions of universal human rights amid the existence of cultural practices views as being contrary to a western notion of human rights.

The contestation between traditional practices and power relations mainly plays out between South African actors. In referring to shared values with South Africa, the EU is clearly referring to what is set out in the Constitution. The lived reality of many South Africans is quite different from this ideal. It is noticeable in this context that the EU remains concerned with a lack of implementation of an 'ambitious legal framework' and 'deep conservatism at a local and rural level' including customary law discriminating against women.<sup>452</sup> However, as can be seen from what has been discussed above with regard to the EU's human rights engagement with South Africa, the issue of human rights and culture does not feature high on the agenda.

### 53. Tracing the imposition of Western ideas on South Africans

The Western notion of human rights is a challenge in multi-cultural societies such as South Africa. The cultural practices of the majority African population have for generations been ridiculed in favour of norms and values brought by colonialism.<sup>453</sup> As a result, there are discrepancies between the male dominated African traditional customs and the Western leaning Constitution which prioritise gender equality.<sup>454</sup> The Constitution is clear that in striking a balance between cultural practices and constitutional values, the latter will prevail.

<sup>448</sup> Ibid, 1462.

<sup>449</sup> 'UN: WHO Condemns "Virginity Tests"' (*Human Rights Watch*) <<https://www.hrw.org/news/2014/12/01/un-who-condemns-virginity-tests>> accessed 2 May 2016.

<sup>450</sup> As cited in George (n 443) 1447.

<sup>451</sup> Brittany Kuhn, 'Universal Human Rights vs. Traditional Rights' 59 <<http://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf>> accessed 4 May 2016.

<sup>452</sup> Interview with EU official (2016).

<sup>453</sup> Evadne Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa' (2006) 50 *Journal of African Law* 3–10 <[http://www.jurisafrica.org/docs/articles/viii\\_50\\_JAL\\_2\\_In\\_Re\\_Bhe.pdf](http://www.jurisafrica.org/docs/articles/viii_50_JAL_2_In_Re_Bhe.pdf)>.

<sup>454</sup> Ibid, 4.



Under the Black Administration Act of 1927 (BAA), black Africans were excluded from the legal system which governed the settler colonial white community.<sup>455</sup> This system created a 'dual system of law', where by the BAA dealt with matters pertaining to black communities, including through the nomination of chiefs and land distribution.<sup>456</sup> The law served as a mechanism to implement 'indirect rule' approach whereby traditional leaders served as frontmen for the white colonial state.<sup>457</sup> In this regard, the Act successfully divided the black and white communities in the country. Customary law was an 'inferior' legal system which was utilised to facilitate oppression and discrimination against African communities, while the colonial state's 'common law' was well organised with rights enshrined to protect the white community.<sup>458</sup> In the democratic era customary law was included in the system under the belief that it enhanced African 'culture and values'.<sup>459</sup> As a result, antagonists of customary laws and practices argue that the system benefits traditional leadership at the detriment of 'democratic principles and equal citizenship'.<sup>460</sup>

#### 54. African versus Western concept of human rights

Given the fact that South Africa is multicultural country, there is a need for both native and western conceptions of human rights to be granted equal representation, traditional conceptions of human rights – embodied for example in the concept of *ubuntu* - are also essential in African communities.<sup>461</sup>

The modern South African Constitution is being applauded for promoting reconciliation, 'freedoms and equal citizenship for all' and entrenching the value of *ubuntu*.<sup>462</sup> Like many African philosophies, the notion of *ubuntu* is not easily definable. To explain an African concept in a western language can be elusive, and presumably defy the very essence of the African world-view. For this reason, the section will not attempt to define the concept but set out some of the perspectives expressed by authors discussing *ubuntu*.

*Ubuntu* is perceived as a metaphor that describes the solidarity of a group, where such solidarity is crucial to the preservation and survival of communities confronted with scarce resources.<sup>463</sup> The word *ubuntu*, is in fact part of the Zulu phrase '*Ubuntu ngumuntu ngabantu*', which literally implies 'I am

<sup>455</sup>Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (*Human Rights Brief*) 1–5

<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1131&context=hrbrief>>.

<sup>456</sup> Ibid, 2.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> Ibid, 4.

<sup>461</sup> Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 4–6

<<http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/98v1mokg.pdf>> accessed 2 May 2016.

<sup>462</sup> Yvonne Makgoro, 'Ubuntu and the Law in South' (1997) 1 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1–11.

<sup>463</sup> Fredrick Muyia Nafukho, 'Ubuntu Worldview: A Traditional African View of Adult Learning in the Workplace' (2006) 8 *Advances in Developing Human Resources* 408–415.

because of you'.<sup>464</sup> In its most fundamental sense, it symbolises morality, humaneness, humanity and personhood.<sup>465</sup> A person's whole existence is seen as relative to that of the group.<sup>466</sup> Thus, besides being seen as a philosophy of life, *ubuntu* simply implies a person can only be a person through others.<sup>467</sup> Further, it is essentially an anti-individualistic as well as humanistic orientation towards fellow beings.<sup>468</sup> It could simply be summarised as 'I am what I am because of who we all are'.<sup>469</sup>

*Ubuntu* and other traditional conceptions of humanity can be utilised to ensure that western conceptions of fundamental rights accommodate African conceptions of rights, morality and 'humanity'.<sup>470</sup> In fact *ubuntu* could serve as a realisation of socio-economic rights. It champions the spirit of 'sharing, generosity' and taking care of the poor and the orphaned,<sup>471</sup> and it guides human beings in terms of 'code of conduct' and discipline.<sup>472</sup> However, the extreme inequality that defines South Africa makes one wonder to what extent *ubuntu* is really practised beyond the village.

Ubuntu provides a gateway for an African legal concept and ethos to instil and define South Africa's legal system.<sup>473</sup> South Africa's 'participatory' democracy reflects age-old African idea and formula of governance, in fact the idea of sharing, peace and harmony contributed to the triumph of the country's constitutional democracy and reconciliation.<sup>474</sup>

During the Truth and Reconciliation epoch, *ubuntu* was persistently referred to in order to enforce the principle of 'justice'.<sup>475</sup> In this instance, *ubuntu* plays a central role in infusing unity, and in its basic meaning it puts more emphasis on peace and reconciliation instead of conflicts.<sup>476</sup> *Ubuntu* enhances the

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<sup>464</sup> Nkem Ifejika, 'What Does Ubuntu Really Mean?' *The Guardian* (29 September 2006); Clifford G. Christians, 'Ubuntu and Communitarianism in Media Ethics' (2004) 25 *Ecquid Novi: African Journalism Studies* 235–256.

<sup>465</sup> Nkonko M. Kamwangamalu, 'Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan-African Concept' (1999) 13 *Critical arts* 24–41.

<sup>466</sup> Thaddeus Metz and Joseph BR Gaie, 'The African Ethic of Ubuntu/Botho: Implications for Research on Morality' (2010) 39 *Journal of moral education* 273–290.

<sup>467</sup> Angela Thompsell, 'The Meaning of Ubuntu' (1 July 2015) <<http://africanhistory.about.com/od/African-History-and-Politics/fl/The-Meaning-of-Ubuntu.htm>> accessed 1 July 2016.

<sup>468</sup> Penny Enslin and Kai Horsthemke, 'Can Ubuntu Provide a Model for Citizenship Education in African Democracies?' (2004) 40 *Comparative education* 545–558.

<sup>469</sup> 'The Ubuntu Story' (*Ubuntu.com*, 2016) <<http://www.ubuntu.com/about/about-ubuntu>> accessed 1 July 2016.

<sup>470</sup> Luchien Karsten and Honorine Illa, 'Ubuntu as a Key African Management Concept: Contextual Background and Practical Insights for Knowledge Application' (2005) 20 *Journal of Managerial Psychology* 607–620.

<sup>471</sup> 'Ubuntu (Philosophy)', , *New World Encyclopedia* <[http://www.newworldencyclopedia.org/entry/Ubuntu\\_\(philosophy\)](http://www.newworldencyclopedia.org/entry/Ubuntu_(philosophy))>.

<sup>472</sup> Barbara Nussbaum, 'African Culture and Ubuntu' (2003) 17 *Perspectives* 1,12.net

<sup>473</sup> Thomas Bennett, 'Ubuntu: African Equity' (*PER/PELI*) 32 <[http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per\\_old/issuepages/2011volume14no4/2011x14x4UbuntuBennett.pdf](http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4UbuntuBennett.pdf)> accessed 4 May 2016.

<sup>474</sup> *Ibid.*

<sup>475</sup> Erasmus D. Prinsloo, 'Ubuntu Culture and Participatory Management' [1998] *The African philosophy reader* 41–51.

<sup>476</sup> Elza Venter, 'The Notion of Ubuntu and Communalism in African Educational Discourse' (2004) 23 *Studies in Philosophy and Education* 149–160..

course of 'social harmony,' it inspires harmony in criminal justice matters by persuading the transgressor, 'victim' and the public in general to choose peace rather than revenge.<sup>477</sup>

There have been disputes over the application of the Universal Declaration of Human Rights (UDHR) in the African continent. Arguably, the African conceptualisation of human dignity has been neglected in international human rights law.<sup>478</sup> There should be a diversification of human rights definitions across cultural lines, including human rights definitions from Africa, Asia and the Pacific.<sup>479</sup> This debate sparks accusations that international human rights jurisprudence conveys Western pretence aimed at undermining African sovereignty.<sup>480</sup> Western governments are in this regard suspected of maintaining the belief that there are no 'indigenous' definitions of human rights in the African continent.<sup>481</sup> Yet at the same time there is also a debate that if the notion that international human rights laws are foreign to Africa is permitted, African leaders may commit human rights atrocities without external watch.<sup>482</sup> The African perspective of this debate is that the continent has a rich human rights heritage based on 'human dignity and humanness.'<sup>483</sup> Yet, a comparison of the Western and African social organisation evidently portrays the importance of kinship to the African lifestyle and the cohesiveness of the African society. A philosophy of existence for the African can therefore be summarised as: 'I am because we are, and because we are therefore I am'.<sup>484</sup> While Westerners, unlike Africans, often able to isolate themselves from other kin and carry out family life in the form of nuclear family, the latter do not have the notion of a nuclear family and function within a broader arena of the community or extended family.<sup>485</sup>

Western human rights laws derived from liberalism tend to clash with the African cultural notions where, it is argued, the wellbeing of the whole community prevails.<sup>486</sup> As a result, the African perspective of individual freedoms is that individual rights always have to be balanced with community rights.<sup>487</sup> Western legal systems brought the notion that traditional African practices' failure to recognise individual rights was tantamount to repression.<sup>488</sup>

<sup>477</sup> Timothy Murithi, 'Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu' (2006) 1 *The Journal of Pan African studies* 25–34.

<sup>478</sup> Timothy Murithi, 'A Local Response to the Global Human Rights Standard: The Ubuntu Perspective on Human Dignity' (2016) 278–284 <<http://www.tandfonline.com/doi/pdf/10.1080/14767720701661966>>.

<sup>479</sup> Ngair Blankenberg, 'In Search of a Real Freedom: Ubuntu and the Media' (1999) 13 *Critical Arts* 42–65.

<sup>480</sup> Mzamo P. Mangaliso, 'Building Competitive Advantage from Ubuntu: Management Lessons from South Africa' (2001) 15 *The Academy of Management Executive* 23–33..

<sup>481</sup> Christoph Marx, 'Politikon: South African Journal of Political Studies' (2002) 29 *Politikon: South African Journal of Political Studies* 49–69.

<sup>482</sup> Mogobe B. Ramose, 'The Ethics of Ubuntu' (2002) 2 *Philosophy from Africa* 324–330.

<sup>483</sup> *Ibid.*

<sup>484</sup> John S. Mbiti, *African Religions and Philosophy* (Doubleday 1970) 171.

<sup>485</sup> Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 320–321.

<sup>486</sup> *Ibid.*

<sup>487</sup> *Ibid.*, 321.

<sup>488</sup> Thomas Bennett, 'Human Rights and the African Cultural Tradition' 33 <[http://pdfproc.lib.msu.edu/?file=/DMC/African Journals/pdfs/transformation/tran022/tran022004.pdf](http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/transformation/tran022/tran022004.pdf)> accessed 4 May 2016.

## 55. Western and customary conceptions of human rights in South Africa: challenges

It has been argued that the inclusion of ‘cultural rights’ in the constitution served as an attempt to empower African cultural practices following years of discrimination against them during apartheid.<sup>489</sup> However, South Africa still grapples with how to balance ‘indigenous’ traditions and customs and the other rights enshrined in the Constitution.<sup>490</sup> Section 30 of the Constitution provides that every citizen can partake in or practice any cultural activity of choice but that ‘exercising these rights may not do so in a manner inconsistent with any provision of the Bill of Rights.’

Whilst the Bill of Rights proscribes harmful practices, virginity testing proponents have persistently stressed their right to keep girls virgin until marriage, regarding this as a revival of Zulu culture.<sup>491</sup> However, the South African Human Rights Commission for Human Rights regards the practice as violating the rights of the girls involved.<sup>492</sup>

Despite condemnation by institutions created to safeguard the Constitution many cultural practices that are viewed as contradicting the human rights standards set out in the Constitution continue to flourish. Practices such as virginity testing and *ukuthwala* (forced marriage) continue to thrive amid the Bill of Rights.<sup>493</sup> Traditions are extremely rooted in the country’s rural African community and as a consequence attempts to abolish traditional customs through ‘western’ constitutional law mostly fail.<sup>494</sup> Contributing to this is that a large section of South Africans hold the opinion that the country is ‘too westernised’.<sup>495</sup> This can be contrasted with the fact that ‘[t]here is a pervasive privileging of western culture in the majority of engagements in public and scholarly discourses’.<sup>496</sup>

Traditional authorities argue that African traditional customs are under attack from a constitution that was supposed to serve as a custodian of African dignity.<sup>497</sup> This sentiment has in fact been echoed by the impression that the state gives preference to western culture in most of its public engagements. The consequence of this is the habit of viewing every sphere of life along western norms by people who

<sup>489</sup> John Cantius Mubangizi, ‘A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions’ (*Journal of International Women’s Studies*, 2012) 34–44 <<http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1030&context=jiws>> accessed 4 May 2016.

<sup>490</sup> ‘Harmful Social and Cultural Practices – Virginity Testing?’ (*South African Human Rights Commission*) 2 <[http://www.sahrc.org.za/home/21/files/30\\_SAHRC\\_Submission\\_on\\_Childrens\\_Bill\\_-\\_Virginity\\_Testing\\_\(Parl.\)\\_Oct\\_2005.pdf](http://www.sahrc.org.za/home/21/files/30_SAHRC_Submission_on_Childrens_Bill_-_Virginity_Testing_(Parl.)_Oct_2005.pdf)> accessed 4 May 2016.

<sup>491</sup> Ibid 3.

<sup>492</sup> Ibid 5.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid 44.

<sup>495</sup> Thandabantu Nhlapho, ‘Unease Reigns as Culture and the Constitution Collide in South Africa’ (*The Conversation*, May 18 2015) <<http://theconversation.com/unease-reigns-as-culture-and-the-constitution-collide-in-south-africa-41795>> accessed 4 May 2016.

<sup>496</sup> Ibid.

<sup>497</sup> Ibid.

disregard traditional African practices.<sup>498</sup> The 2015 Customary Marriages Act is yet another evidence of tensions existing between western constitutional democracy and customary law. The Zulu king has lamented the government's failure to consult traditional leadership prior to passing it.<sup>499</sup> Traditional leaders have been concerned by the Act's order that polygamous men should get permission from their wives prior to marrying another woman. This incident reveals the hostility between Western notions of women's rights to information as opposed to male unilateral decision-making through customary law.<sup>500</sup>

## 56. Conclusion

In South Africa, the importance of equality of cultures and values cannot be underestimated. Culture does not only provide individuals with ways of identity and self-gratification, but it can also serve as a vehicle for promoting and not violating human rights. This section has attempted to underscore that the West espouses a notion of human dignity grounded on individualist and natural rights framework. On the contrary, African societies operate within a communal system whereby a person's honour and dignity flow from his transcendental obligation as a cultural being. It is, inevitable to anticipate that within a changing world some components of South African customs and traditional practices will be transformed. Despite this transformation, it is imperative to intimate that certain fundamental principles still remain, and that these principles should be accommodated into the global dialogue on human rights.

In the long run, what is fundamental is for all people of all ethnicities to have a belief that their norms and values are equally represented in the human rights dialogue in the international community of cultures. This is the only way that the international community can formulate authentic and convincing human rights standards. In summary, in a period where the debate on the rights to development is gaining grounds in Africa and Europe, the Afrocentric (and not the Western) perspective of society may undoubtedly be a useful tool for the revaluation of the responsibilities that a moral society owes to the individual and the individual to his society.

The institutional framework of South Africa is westernised, albeit with constitutional protection of the right to culture and an institutionalised role for traditional leadership. There is clearly a clash that will need to be addressed.

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<sup>498</sup> Ibid.

<sup>499</sup> Bulelwa Dayimani, 'Zwelithini's Comments about the Customary Marriages Act' (*Mail and Guardian*, 4 May 2015) <<http://www.destinyman.com/2015/05/04/gender-activists-criticise-king-zwelithinis-comments-about-the-customary-marriages-act/>> accessed 4 May 2016.

<sup>500</sup> Ibid.

## IV. Bilateral Relations with China

*by Zirong Zhou, Lingying Yin, Fei He, Lifan Li*

### Introduction

This report aims to give a general reflection on the EU's role in the development of human rights in China. We will go through a general reflection and remarks on the EU-China Human Rights Dialogue comprised of its introduction, China's attitude and reactions; then the NGOs in China by reviewing its introduction, activities, roles, difficulties and giving some recommendations; after it we will have a look at the human rights and business covering the economic way the EU adopted to promote human rights in China, problems, solutions and conclusions; finally, we will find out Chinese perspectives on human rights, including the Chinese interpreted human rights perspective, the scepticism of the EU's human rights concept, discussion and recommendations.

As a bi-annual intergovernmental dialogue mechanism focused on human rights issues, the EU-China Human Rights Dialogue is in line with the EU's foreign diplomacy objectives and the needs of EU-China relations. The themes discussed show that the EU's primary concerns are over civil and political rights and related issues, whereas China's emphasis is on economic, social and cultural rights. The Chinese attitude towards the mechanism changes with time, which is evident in the long run as we will see below. For capturing the nature of the dialogue in general it could be said that China tends to respond in a selective way, emphasising the Chinese perspective and theories, while leaving out problems considered politically sensitive. Although the mechanism does have influence it also has numerous shortcomings. All these should remind the EU of the importance of clearly understanding the limits of its influence, acting on the basis of mutual understanding and equality and showing respect for cultural differences.

International NGOs have played a critical role in China's development. Through their activities and projects, international NGOs have promoted human rights in China, encouraged beneficial social transformation, made government decision-making more scientific and democratic and boosted the development of domestic NGOs. However, due to reasons such as the restrictions of policy and law, the lack of professionals, and the restrictions of traditional concepts in China, there are still some obstacles that restrict the capacities of international NGOs to promote human rights in China. To overcome these obstacles, we raise some recommendations, such as proposing a constructive dialogue between NGOs and the Chinese government, the providing of training for NGO personnel and more resources to expand the influence of NGOs.

In EU-China relations, the human rights and business relations are woven together. At the same time linking human rights with economic and trade relations faces numerous obstacles such as contradictory objectives within European organizations, but also cultural differences or the rapid development of China may create difficulties. Addressing these issues calls for understanding Chinese values, while it is

also important to recognise that there could be a tension between economic globalisation and the protection of human rights. Although policies adopted by the EU can make a difference in improving human rights conditions in China it is advisable for the EU to avoid interfering in China's internal affairs.

With the increasing cooperation between the EU and China in the fields of politics, economy and culture, there is a trend that these two regions have more consistent opinion in terms of human rights, however, there still exist several differences between China and EU in terms of human rights concepts. The reasons for China's scepticism concerning the EU's understanding of human rights include political and economic differences, cultural legacies and basic differences in their value systems. In spite of these the EU and China cooperate widely for the purpose of maintaining good and stable trade and economic relations. Given that building these stable relations took a long time to establish, both the EU and China are advised to treat human rights issues cautiously and disagreements between the EU and China in terms of human rights should be negotiated through a constructive dialogue based on mutual respect and understanding.

In this report we point out that both the Human Rights Dialogue mechanism at the macro level and support to NGOs in China at the micro level have influenced human rights protection in China. Nevertheless, they are both trapped in the unpleasant interference in China's internal affairs and lack of sensitivity towards cultural differences. Below we suggest that during sensitive times such as the present it is essential for political dialogues and attempts for promoting human rights to respect cultural differences, equality and be based on mutual understanding.

## **A. EU-China Human Rights Dialogue: Overview, Reaction, Remarks**

### **1. EU-China Human Rights Dialogue (1995-2015): An overview**

#### ***a) The definition***

Before we jump into specific areas of the EU-China Human Rights Dialogue, we have to define what we will look into. In other words, what does the EU-China Human Rights Dialogue refer to?

In a narrow sense, the dialogue we are focusing on here is the official EU-China Human Rights Dialogue. According to the European External Action Service (EEAS), the EU-China Human Rights Dialogue is a private intergovernmental dialogue that takes place on a bi-annual basis, as an ad hoc mechanism, which serves as both a channel for the EU to express its concerns about human rights issues in China and as a forum for China to respond.<sup>501</sup> As an active way to improve the human rights situation in China, this mechanism is in tune with the EU's consistent commitment to global promotion of human rights. From the EU's perspective, it is considered one of the most significant approaches in the EU-China political

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<sup>501</sup> See 'Human Rights Dialogue from Delegation of the European Union to China Official Website' <[http://eeas.europa.eu/delegations/china/eu\\_china/political\\_relations/human\\_rights\\_dialogue/index\\_en.htm](http://eeas.europa.eu/delegations/china/eu_china/political_relations/human_rights_dialogue/index_en.htm)> accessed 25 May 2016.

dialogue framework. While from the Chinese perspective, the mechanism is a significant platform where China and the EU can handle human rights problems in a constructive manner.<sup>502</sup> It is also believed to be a way to promote mutual understanding,<sup>503</sup> narrow divergences and expand consensus in it is conducted on the basis of equality, mutual respect, objectivity and fairness.<sup>504</sup>

### *b) The establishment of the EU-China Human Rights Dialogue*

In order to understand the mechanism it is important to look into its origins.

One of the most detailed accounts of the human rights dialogue is offered by Katrin Kinzelbach. First, we will briefly summarise the account she offers on the origins of the dialogue and second we will supplement it with a contrasting position offered by Professor Liu Hainian.

The question of Human rights in China came to the fore with the events at Tiananmen Square in 1989. Following this the West introduced sanctions against China. The human rights dialogue could be seen as a change of policy on the part of the West recognising that its sanctions and strident declarations were not bearing fruit,<sup>505</sup> and efforts by China to avoid criticism and resolutions against China.

The first steps towards the dialogue were made in 1995 as a joint effort following China's suggestion – according to the Commission's Communication: A Long-term Policy for EU-China Relations from 1995.<sup>506</sup> Nevertheless, the dialogues were put on hold for two years by the Chinese side because of attempts by the EU to have resolutions condemning China passed in the UN. Yet once, following 1997, the EU took its policy turn towards a 'constructive dialogue' obstacles faded away and since 1997 the dialogues have taken place regularly every two years. Not all agreed with this new strategy and the EU received harsh criticism for selling out the human rights cause, with Human Rights Watch claiming that the EU had 'capitulated' on the human rights cause.<sup>507</sup> Evaluating this policy shift succinctly in Kinzelbach's judgment the dialogue on human rights between China and the EU: 'can be viewed as a political deal and substitute for the resolution'.<sup>508</sup> Concerning the underlying objective Marina Svensson has a very sceptical opinion, regarding China's positive attitude to the dialogue in 1997 rooted in strategic

<sup>502</sup> See 'China and the EU Held 28th Human Rights Dialogue from Ministry of Foreign Affairs of the People's Republic of China Official Website' (2016) <[http://www.fmprc.gov.cn/web/wjbxw\\_673019/t628284.shtml](http://www.fmprc.gov.cn/web/wjbxw_673019/t628284.shtml)> accessed 8 August 2016.

<sup>503</sup> See 'Joint Statement of the 7th China-EU Summit from Ministry of Foreign Affairs of the People's Republic of China Official Website' <[http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/t174512.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t174512.shtml)> accessed 10 August 2016.

<sup>504</sup> See 'The 31st Human Rights Dialogue Held in Brussels from Ministry of Foreign Affairs of the People's Republic of China Official Website' <<http://www.fmprc.gov.cn/ce/cgmb/chn/wjbxw/t936882.htm>> accessed 9 August 2016.

<sup>505</sup> 'Long Term Policy for China-EU Relations' (*communication of the Commission*, 1995) <[https://eeas.europa.eu/china/docs/com95\\_279\\_en.pdf](https://eeas.europa.eu/china/docs/com95_279_en.pdf)>.

<sup>506</sup> *Ibid* 7.

<sup>507</sup> Katrin Kinzelbach 30.

<sup>508</sup> Katrin Kinzelbach and Hatla Thelle, 'Taking Human Rights to China: An Assessment of the EU's Approach' (2015) 205 *The China Quarterly* 60, 61.



calculation amounting to nothing more than a ‘conscious tactic on part of the Chinese government to try to split the West’.<sup>509</sup>

Besides Kinzelbach’s and Svensson’s research, there are other viewpoints and different accounts of China’s engagement in the human rights dialogue with the EU. Liu Hainian, a researcher at the Institute of Law, as well as the head of the Center for Human Rights Studies, Chinese Academy of Social Sciences (CASS), offers a detailed comprehensive account of China’s initiatives and participation in the elaboration of the human rights dialogues – and other mechanisms – in his book *Sixty Years of the Protection and Development of Human Rights in China*. According to him the process started with changes in the ideological climate offering the possibility for opening discussions about human rights, providing the possibility for the dialogue in the first place.<sup>510</sup> This changing of the ideological climate had a complex international and domestic background.

In Liu’s account the international situation in the late 1980s and early 1990s could be summarised as the era of the collapse of the Soviet Union and drastic changes in the East European countries including riots, which were caused – at least partially – by the western countries. It is since those events that the focus of the West turned to China and China became the main target of western criticism led by the U.S. These criticisms overlooked that during this period China faced exacerbated social contradictions, which needed to be handled carefully to maintain stability. Yet China’s efforts were only reciprocated with accusations by Western countries.<sup>511</sup>

In 1991, Jiang Zemin in a letter to Chinese scientist Zhou Guangzhao gave instructions to study human rights together with a group of European and American scientists, admitting that human rights was an important topic, which required serious study. The outcome of these was seminars and research papers, which became the preliminary resource China’s of human rights theories and practice. Liu points out that China’s main motivation was to deal with the foreign demonisation of China and to achieve the termination of sanctions against China. These were necessary for constructing a good international environment for China in which she could implement the transformation to a socialist market economy in the 1990s.<sup>512</sup>

When reviewing 60 years’ development of human rights in China in terms of the rule of law, he pointed out that China’s commencement of the dialogue was a good and reasonable choice. Its temperate manner offered an adequate response to the double-standard practice of countries like the U.S. while it also offered the opportunity for China to preserve its national dignity. Furthermore, these efforts not only placed the overall situation of international human rights into perspective, but also made western politicians understand that confrontations and the isolation of China was not a productive strategy.

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<sup>509</sup> Marina Svensson, *Debating Human Rights in China: A Conceptual and Political History* (Rowman & Littlefield 2002) 266.

<sup>510</sup> Liu Hainian, ‘Sixty Years of the Protection and Development of Human Rights in China’ [2012] China Social Sciences Press 349.

<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid* 350.

### c) *The themes of EU-China Human Rights Dialogue*

As the dialogue is a communicative mechanism on human rights it is important to see know what issues have been raised and how they were discussed. This is the topic this section turns to.

To get started, some problems should be clarified. Up to now, there had been altogether 34 rounds of the dialogue. Although it is impossible to point out one overarching single theme and frame of the dialogues, there are some general characteristics that could be pointed out. For instance, it can be seen that human rights issues raised each year are generally compliant with major social events or international trends (not always, of course). Thus, they are – at least partially – linked to global and national developments. Second, the sources of information are far from satisfactory. Exactly, for the late ones around 2010-2015, the available related documents are mainly press statements from official website of Chinese Foreign Ministry and other related ministries, news or video from official media websites like Xinhuanet, ChinaNews, CNR, CRI, CCTV and so on. These documents are limited to basic information about the dialogue such as the place, date, the topic (without details), occasional public statements by the heads of the delegations, but in general there are few comments introducing the perspectives of the parties.

Because details about Human Rights Dialogue from 1995-2005 were rarely collected and sorted neither in the official documents nor in the news, we will mostly rely on the research of Katrin Kinzelbach, an independent researcher, *The EU's Human Rights Dialogue with China: Quiet diplomacy and its limits*, which gives the best available picture about the unfolding of the dialogue. Occasionally we supplement the information she offers by news excerpts from the China Society for Human Rights Studies and others.

Evaluating the dialogue Kinzelbach points out that almost no single round of dialogue can escape the routine of selective introduction and discussion with rare concrete results, which is a more and more evident feature of this mechanism. In other words, during the dialogue sessions parties are fluctuating from one issue to another. In general, the EU side always focuses on the problems related to the civil and political rights, some politically sensitive areas such as Xinjiang and Tibet (along with such issues as the death penalty, freedom of religion, freedom of speech, association and assembly, freedom of expression, association and assembly, re-education through labour system, administrative detentions), and individual cases related to these themes. The Chinese side's questions to the EU typically focus on xenophobia and racial discrimination, while the Chinese side strongly advocates for diversity in human rights realization and voices its position that China has its own way of human rights development.

### d) *Chronology and topic of EU-China Human Rights Dialogue*

Events of the years 1995-2005 are based on Kinzelbach's study.<sup>513</sup>

year	topics discussed	Issue raised by China	Comments
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<sup>513</sup> The table is based on: Katrin Kinzelbach (n 507).

1995	political and minority rights		
1996	EU shows concern over individual cases, religious discrimination, and violations of human rights in detention and arrest, and the situation of orphanages in China		China withdraws from the scheduled dialogue after the EU co-sponsors a resolution against China
1997	EU raises sensitive individual cases and expresses its wish to send a Troika mission to Tibet		
1998	EU reiterates that China should sign and ratify the ICCPR EU mentions an EU-funded cooperation programme on the rule of law, suggesting a project on legal awareness targeting women death penalty: Chinese side is asked to provide data on the number of death sentences passed, executions carried out and successful appeals against death sentences in specific years anti-racism, racial discrimination, and Tibet issues were raised	Proposal of a training programme designed for lawyers, judges as well as prosecutors	
1999	arrest, imprisonment and sentencing of the China Democratic Party members Restrictions on freedom of opinion, expression and assembly, the extensive use of the death penalty, arbitrary detentions, and the re-education through labour system, the treatment of religious and cultural minorities, including the patriotic education campaign	China showed willingness to invite the Special Rapporteur on Torture, as well as a technical follow-up mission to the OHCHR's visit the year before	

	that took place in Tibet		
2000	<p>EU repeated its desire to implement the cooperation programs: ratification of the two covenants.</p> <p>the situation of minority in Xinjiang and Tibet</p> <p>specific issues: the relation between counter-revolutionary crime and crimes against national security</p>	<p>China again showed its welcome to the Special Rapporteur on Torture</p>	
2001	<p>crackdown on Falun Gong believers; refugees from North Korea</p> <p>death penalty, labour rights</p>		<p>The controversy on North Korea had two aspects. The first was whether North Koreans who cross borders to enter China could be regarded as refugees, where the EU thought so but China didn't. The second was about whether China's action of returning North Koreans forcibly constituted the violation of the principle of non-refoulement.</p> <p>The head of EU delegation announced after the session that both sides disagreed sharply in both the fact and principles.</p>
2002	<p>EU repeated its concern over the right to organise and to form independent trade unions, urging China to ratify No.87 and No.98 ILO conventions.</p> <p>Religious freedom</p> <p>The imperative to ensure all anti-terrorism measures uphold international human</p>	<p>China introduced its amendments of trade union law.</p> <p>China committed to invite the Special Rapporteur on Education for a visit to China</p>	

	rights standards		
2003	new themes include: a new cooperation project concerning the prevention of torture opinions on the International Criminal Court situation of the border-crossing North Koreans in China attitudes towards previous Special Rapporteurs re-education through labour system		
2004	attitudes towards North Korea; Kang Byong Sop; death penalty; freedom of expression, association and religion, torture, and minority rights, re-education system	China shows the plan of the amendment to the Constitution which introduced human rights.	
2005	human rights, the rule of law, right to a fair trial, abolishment of the death penalty China's new regulations on religious organisations		

The 21st round of dialogue was held in Vienna, Austria, from May 25th to May 26th, 2006. During the introduction the Chinese side gave an overview of the Chinese government's efforts to put the so-called 'people-oriented theory' into practice, respecting and protecting human rights and constructing a harmonious socialist society. As for the discussion part, parties discussed ratification and implementation of international human rights conventions, cooperation with UN human rights institutions, governmental management of NGOs, human rights education and so on. They also exchanged their views on the work of the newly established UN Human Rights Council. They further agreed that, launching dialogue on human rights on the basis of equality and mutual respect reflected the maturity of EU-China relations and deep mutual trust.<sup>514</sup>

The 22nd round of dialogue was held on October 19th, 2006, in Beijing, China. In its introduction phase the Chinese side mainly dealt with China's progress in advancing judicial reform, strengthening

<sup>514</sup> See the news 'The 21st Round of China-EU Human Rights Dialogue Ended in Vienna' <[http://news.xinhuanet.com/newscenter/2006-05/27/content\\_4606816.htm](http://news.xinhuanet.com/newscenter/2006-05/27/content_4606816.htm)> accessed 30 November 2015.

administrative and judicial supervision and the rights and interests of farmers and vulnerable groups. In addition, they clarified the Chinese government's positive steps in putting the constitutional principle of human rights protection and the idea of building a harmonious society into practice, by combining the sixth plenary session of the 16th Communist Party of China Central Committee's decision of some major issues concerning building a harmonious socialist community. The Chinese side also showed its confidence and determination in persistence of promotion of the cause of human rights and willingness to get useful experience from countries including the EU Member States as a member of the Human Rights Council. The EU spoke highly of China's progress in the field of human rights and the Chinese leadership's governing philosophy of people-oriented approach for building a harmonious society. The EU considered China to be an important and responsible actor in the field of international human rights, and was willing to strengthen the communication and collaboration with China in the field of human rights. During the discussion issues such as human rights, anti-racism, human rights protection in criminal justice, cooperation in UN human rights institutions were raised among others.<sup>515</sup>

The 23rd round of dialogue was held in Berlin, Germany, from May 15th to 16th, 2007. In the introduction, the Chinese side introduced its measures to promote and protect human rights by accelerating law-making concerning human rights, deepening judicial reform, promoting open administration, strengthening the role of public participation in government affairs, protecting labour rights, passing the real rights law, reforming the household registration system as well as protecting the rights and interests of migrant workers. Furthermore the Chinese side stressed that the Chinese government was putting the scientific outlook on development into practice fully and constructing a harmonious society, trying to solve problems related to medical treatment, education, housing, employment, social security and so on. At the same time, the Chinese government was advancing democracy and the construction of the legal system as well as the reform of the political system, constantly increasing the degree to which people enjoy all kinds of human rights.<sup>516</sup> Next the discussion focused on the reform of the criminal justice system, freedom of speech, minority rights and protection of migrant workers' rights as well as China-EU collaboration in the field of UN human rights and so on.<sup>517</sup>

The 24th round of dialogue was held in Beijing, China, on October 17th, 2007. The Chinese side introduced China's new progress in improving legislation related to human rights, advancing judicial reform, protecting the rights and interests of labourers, establishing the social security system and so on. The Chinese side pointed out that in the opening report of the 17th National People's Congress, General Secretary Hu Jintao had mapped out a grand blueprint of human rights protection and improvement of people's livelihood in the near future. As China had made progress in every aspect like the economy, society and democracy and the rule of law, the cause of human rights in China would continue to make new progress. Subsequently the party discussed the reform of the criminal justice

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<sup>515</sup> 'The 22nd Round of China-EU Human Rights Dialogue Held in Beijing' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zjzg\\_673183/gjs\\_673893/xwlb\\_673895/t276925.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/gjs_673893/xwlb_673895/t276925.shtml)> accessed 1 December 2015.

<sup>516</sup> 'The 23rd China-EU Human Rights Dialogue Held in Berlin' <[http://news.xinhuanet.com/world/2007-05/17/content\\_6115177.htm](http://news.xinhuanet.com/world/2007-05/17/content_6115177.htm)> accessed 30 November 2015.

<sup>517</sup> *Ibid.*

system, freedom of speech and religious belief, the right to work, racism, EU-China cooperation in the field of international human rights and so on, which deepened mutual understanding.<sup>518</sup>

The 25th round of the dialogue was held in Ljubljana, Slovenia, from May 15th to 16th, 2008. During the introduction both sides offered an overview of new progress in human rights. During the discussion, they focused on the freedom of speech and media responsibility, the right to peaceful assembly, minority rights, and cooperation in the field of international human rights. Using data and specific examples, the Chinese side introduced the recent measures taken to promote and protect human rights from three aspects, democracy, the rule of law and people's livelihood. The Chinese side emphasised that the Chinese government was comprehensively advancing the building of democratic politics, deepening judicial system reform, focusing on resolving livelihood issues that were closely related to people's daily life, such as education, medical treatment, and social security. The EU introduced its new measures of promoting human rights, saying that the Lisbon Treaty introduced substantive human rights provisions, which would result in the Charter of Fundamental Rights of The European Union being legally binding thus leading to the expansion of human rights like the right to housing, a clean environment and so on. The EU side answered some questions raised by the Chinese side about the position and measures on defamation of Islam, racism, xenophobia and so on.<sup>519</sup>

The 26th round of dialogue was held in Beijing, on November 28th, 2008. The themes covered the freedom of religion and belief, labour rights, women's and children's rights, the rights of migrants, with the old ones of the ratification of the ICCPR, prevention of the torture, reform of the re-education through labour system, the extensive use of the death penalty in China, the cooperation in UN mechanisms,<sup>520</sup> the field visit and individual cases.<sup>521</sup> The discussion on the death penalty and human rights defenders was a bit tense. During this session, because of the riots in Lhasa, Tibet, the Chinese side declined the request of several visits to these sites, but offered to organise a visit to a re-education camp through labour. The Chinese side also refused to provide any answers to specific cases. During the visit to the re-education through labour camp, according to one member of the European delegation, everything was planned and the sphere was limited, it was almost impossible to gather the information they need.

The 27th round of dialogue, was held in Prague, Czech Republic, from May 14th to 15th, 2009. This time, in the by now ritualistic introduction, the Chinese side laid stress on the National Human Rights Action Plan of China (09-10), the first national action plan that focused on human rights. This showed the Chinese government's strong determination in promoting and protecting human rights. As for the

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<sup>518</sup> 'The 24th Round of China-EU Human Rights Dialogue Held in Beijing' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/gjs\\_673893/xwlb\\_673895/t373461.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjs_673893/xwlb_673895/t373461.shtml)> accessed 1 December 2015.

<sup>519</sup> 'The 25th Round of China-EU Human Rights Dialogue Held in Slovenia' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/gjs\\_673893/xwlb\\_673895/t453719.>](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjs_673893/xwlb_673895/t453719.>)> accessed 1 December 2015.

<sup>520</sup> Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (Routledge 2015) 166.

<sup>521</sup> *Ibid* 167.

discussion part, the theme was about the right to freedom of speech, the function of civil society, the right to health, enhancing the collaboration in the field of international human rights and so on.<sup>522</sup>

The 28th round of the dialogue was held in Beijing, China, on November 20th, 2009. During the discussion, the Chinese side focused on its specific measures of furthering reform of the judicial system, ensuring judicial justice, participation in cooperation in the field of international human rights and so on. The EU introduced the new legislation and measures on promoting human rights in EU Member States. Both sides had a heated discussion on the rule of law (in light of the crackdown on the weiquan lawyers) in the discussion part,<sup>523</sup> cooperation in the field of international human rights and so on.<sup>524</sup> When discussing the rule of law, the head of China's side insisted that there were different ways of achieving it and China was building its own way.<sup>525</sup> He was said to have said that the party's interest overrules written law in China. The Chinese delegation also denied that there was any interception of petitioners and the existence of black jails. Instead, they said that those are guesthouses that serve to give shelter to and feed those petitioners. The head of the Chinese delegation also mentioned the discrimination of Sami people and turned down the EU's request to visit individual detainees, saying that this was both an interference in China's internal affairs and also a violation of the Vienna Convention on Diplomatic Relations. During the session, China also gave an answer list on individual cases except Tibetan and Uighur cases.

The 29th round of dialogue was held in Madrid, Spain, on June 29th, 2010. During the introduction, Chinese side focused on measures for overcoming the effects of the financial crisis, improving people's livelihood, advancing the cause of social security, building of democracy and legal system and so on. The Chinese side emphasised that China was a country under the rule of law, so judicial authorities will handle cases independently according to law. The EU introduced measures on protecting the rights of migrant workers and so on. In the discussion, both sides exchanged views on issues like cooperation in multilateral field of human rights.<sup>526</sup>

The 30th round of dialogue was held in Beijing, China, from June 16th to 17th, 2011. During the introduction the Chinese side introduced recent measures and progress on strengthening the rule of law, improving people's livelihood, promoting the overall and sustainable development of minority nationality regions. Again, the Chinese side stressed the principle of the rule of law and highlighted that judicial authorities handled cases independently. The EU introduced the protection of minority groups in

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<sup>522</sup> 'The 27th Round of China-EU Human Rights Dialogue Held in Prague' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/gjs\\_673893/xwlb\\_673895/t563041.>](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjs_673893/xwlb_673895/t563041.>) accessed 15 November 2015.

<sup>523</sup> Kinzelbach 176.

<sup>524</sup> 'China and the EU Held the 28th Round of China-EU Human Rights Dialogue' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/gjs\\_673893/xwlb\\_673895/t628284.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjs_673893/xwlb_673895/t628284.shtml)> accessed 1 December 2015.

<sup>525</sup> Kinzelbach 180.

<sup>526</sup> 'China and the EU Held China-EU Human Rights Dialogue' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/gjs\\_673893/xwlb\\_673895/t713155.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjs_673893/xwlb_673895/t713155.shtml)>.



the EU's Member States as a response to China. In discussion, both sides focused on cooperation in the field of international human rights, minority rights and the rule of law.<sup>527</sup>

The 31st round of the dialogue was held in Brussels, Belgium, on May 15th, 2012. In the introduction, Chinese side introduced its new measures and progress on recent amendment of Criminal Procedure Law, criminal judicial reform, social security and so on. Also, the Chinese side clarified its principles and position on issues related to Tibet, Xinjiang and some individual cases. The Chinese side emphasised that China was a country under the rule of law, and judicial authorities would handle cases according to law. The Chinese side also strongly urged the EU to truly respect the interests and concerns of the Chinese side without interference in internal affairs, and to take an objective attitude towards human rights in China. The Chinese side raised questions of xenophobia and racial discrimination as well. The EU introduced how it was protecting immigrants and minority rights. In the discussion, both sides exchanged views on international cooperation on human rights, criminal penalties, xenophobia, and racial discrimination.<sup>528</sup>

The 32nd round of dialogue held on June 25th, in 2013, in Guiyang (the first time ever outside of Beijing), China. The Chinese side introduced recent new policies and new achievements on enhancing the rule of law, improving people's livelihood, promoting coordinated development of different kinds of human rights and so on. In the discussion, both sides had an exchange of views on cooperation in the field of human rights, minorities and criminal penalties. The Chinese side raised the question of treatment of ethnic minorities in Europe, including Romani people, Muslim, and some cases involving Chinese citizens in EU member countries. Additionally, China enquired to what extent the financial crisis will influence the social and economic rights including rights to medical treatment, education and housing, and intensifying the xenophobia of Europeans. Also, the Chinese side put forward the discrimination Chinese citizens faced in the Europe, which was answered preliminarily by the EU side. The EU raised questions on China's measures to ratify ICCPR. The Chinese side also expounded their principled position on Tibet-related and Xinjiang-related problems and individual judicial cases, etc. They also stressed that the Chinese judicial authorities would handle cases according to law and they were strongly against any foreign interference in internal affairs.<sup>529</sup> The Chinese side insisted that both sides should persistently abide by the three basic principles in human rights development. The first principle came as equal treatment and mutual respect, the second was the accurate orientation of the goal and the achievements of the dialogue. The third was coping with divergences and differences in a constructive way. Chinese side highlighted that, the world we live in was a diversified and colourful one. To be precise, it was impossible to make countries of varying stages of development subject to a

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<sup>527</sup> 'The 30th Round of China-EU Human Rights Dialogue Held in Beijing' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zjzg\\_673183/gjs\\_673893/xwlb\\_673895/t831667.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/gjs_673893/xwlb_673895/t831667.shtml)> accessed 1 December 2015.

<sup>528</sup> 'The 31st Round of China-EU Human Rights Dialogue Held in Brussels' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zjzg\\_673183/gjs\\_673893/xwlb\\_673895/t936882.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/gjs_673893/xwlb_673895/t936882.shtml)> accessed 1 December 2015.

<sup>529</sup> 'The 32nd Round of China-EU Human Rights Dialogue Held in China' (*Foreign Ministry of the People's Republic of China*) <[http://www.fmprc.gov.cn/web/wjb\\_673085/zjzg\\_673183/gjs\\_673893/xwlb\\_673895/t1053507.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/gjs_673893/xwlb_673895/t1053507.shtml)> accessed 1 December 2015.

standard and unified mode; diversity and tolerance should be allowed. The Chinese side hoped the EU could think over how to improve the dialogue mechanism with a new horizon and new thinking. The Chinese side held firmly that the right to development was the greatest human rights, in that no single human right shall be discussed without the realisation of the whole population. Only when the Chinese Dream was realised could the human rights of Chinese people be fully protected.<sup>530</sup>

On December 8<sup>th</sup>, in 2014, the 33rd dialogue was held in Brussels, Belgium. During this dialogue, the central issues were raised as: international cooperation on human rights and women's rights. Chinese side thoroughly introduced China's progress in human rights field, especially the decision of the rule of law from the fourth plenary session of the 18th Communist Party of China Central Committee. By introducing the progress, Chinese side pointed out that China had already found the approach to the development of human rights which was in line with the domestic conditions. Again, the Chinese side urged the EU to take an objective attitude towards China's new progress in human rights development, based on the principle of equality and mutual respect. The Chinese side held firmly that only then could both sides gain fuller understating of issues and engage in constructive cooperation. In addition, Chinese side also expressed its concern about the problems the EU was facing in protection of Romani people and women's rights.<sup>531</sup>

On November 30th, in 2015, the latest dialogue (34<sup>th</sup>) was held in Beijing, China. The issues discussed were the present status of development of human rights in the EU and China, Europe's migrant crisis and other issues as the heart of the discussion. Recent progress in human rights field were exchanged as well. Also, ways to strengthen collaboration in the field of human rights were discussed. Chinese side introduced its 13th five-year-plan's meaning in advancing the cause of human rights in China. At the joint press conference, Chinese side recognised the consensus both sides reached that we should address not only the symptoms but also the cause of the migrant crisis, take various levels into account, and adopt comprehensive policies. Thus, Chinese side urged that both the EU and China should support and encourage the UN specialized agencies to have more positive influence. The EU side expressed willingness to continue to prevent and combat all manifestations of xenophobia and racism. Both sides unanimously agreed to hold human rights dialogues and facilitate communication in the field of human rights.

### 57. An observation of China's reaction

To see whether the mechanism bears fruit, we should focus on China's reaction, both in attitude and actions. Our discussion includes examples of Chinese experts commenting on the dialogue.

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<sup>530</sup> 'The 32nd Round of China-EU Human Rights Dialogue Held in Guizho' (*Xinhuanet*) <[http://news.xinhuanet.com/local/2013-06/26/c\\_116287135.htm](http://news.xinhuanet.com/local/2013-06/26/c_116287135.htm)> accessed 2 December 2015.

<sup>531</sup> 'China and the EU Held the 33rd Round of China-EU Human Rights Dialogue' (*Foreign Ministry of the People's Republic of China*) <[http://news.xinhuanet.com/local/2013-06/26/c\\_116287135.htm](http://news.xinhuanet.com/local/2013-06/26/c_116287135.htm)> accessed 15 November 2015.

## 58. Role of the media

Firstly, of course, is about the attitude. In the short run, the influence is mainly exerted through media, the mechanism is having more media exposure than before, and so the influence may be getting stronger and stronger. In other words, due to the instant nature of the media (for example the TV news, newspapers, mainstream official social media of the newspaper or TV stations) the information of dialogue can be quickly spread to the public. Usually it's the quickest way for the general public to get the available information at the start. Thanks to the fast development of technology and the ways people use it, the mechanism is being more and more exposed to the media. Therefore, in the same period, the influence of the dialogue will be greater. However, due to the media's characteristics and the secrecy of the dialogue, even now it cannot make a difference immediately to the general public through media. The valid information about the contents of the dialogue in the media was limited.

In the long run, it will affect both the government and the general public's perception of human rights. While there is no way to measure it, we can reasonably argue that the general attitude towards human rights is changing. At least, human rights became a matter to look into and not merely a 'tool' in politics. That is, Chinese government has gradually understood the meaning and value of human rights and tries to apply it into policy-making. For instance, while previously human rights was regarded as a political term related to the capital class, by now the Chinese government has passed several National Human Rights Action Plans, and introduce the human rights education to the schools. This change in can also be pinpointed in Chinese official documents. For example, in a public document published by the Chinese government related to the Human Rights Dialogue, *The Joint Declaration of the 9th China-EU Summit*, at its ninth point stresses devotion to the protection and promotion of human rights, and attaches great importance to China-EU Human Rights Dialogue. It also emphasizes the importance of taking concrete steps in the human rights field in a way to generate more meaningful and positive tangible benefits. IT also reaffirms cooperation and exchanges in this field on the basis of mutual respect and equality. Both sides confirm to cooperate with the UN human rights protection mechanisms, respect the international standards in relevant international human rights instruments, including minority rights. When it comes to global effort to combat war crime and crimes against humanity the document states that both sides are aware of the importance of the ICC. Both sides are dedicated to support UNHRC's work. According to solution 251, adopted by the General Assembly on 60th session, both sides will strengthen the exchanges and coordination in this field.<sup>532</sup>

## 59. Expert opinions

Also, the views expressed by government officials are instructive here. On the whole, government officials take similar lines in viewing this mechanism. Li Junhua, Director-General of the Department of International Organizations and Conferences of the Foreign Ministry(MFA), made his comment on this mechanism in the joint press conference after the 34<sup>th</sup> EU-China Human Rights Dialogue in Beijing. As he

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<sup>532</sup> See the official website of 'Central People's Government of the People's Republic of China' <[http://www.gov.cn/jrzg/2006-09/10/content\\_383483.htm](http://www.gov.cn/jrzg/2006-09/10/content_383483.htm)> accessed 2 December 2015.

observed, through the exchange, both sides wanted to have better understanding of the other side's opinion. Dialogue wasn't empty talk, but a process to enhance exchanges and understanding. He further stressed that parties should cooperate more in practical issues.

Cai Mingzhao, the head of State Council Information Office in 2013 (President of Xinhua News Agency since December of 2014), represented his view generally and indirectly in his remarks in the opening ceremony of Beijing Forum on Human Rights. In the 6<sup>th</sup> Beijing Forum on Human Rights in 2013, which focused on constructing a sustainable environment for human rights development, he placed the dialogue mechanism in a rather broad context of common development. He held that the Chinese Dream shares the universal core goal of development with other 'dreams' around the world. When pursuing the Chinese Dream, China also contributed to the whole world's development by keeping up with the pace of global trends and holding on to peaceful, open and cooperative development. More exactly, China offered opportunities to the world and shoulders responsibility in the field of human rights. At the same time he underlined that sovereign states were the single units ultimately responsible for applying the standards of human rights. As a response to various modes of human rights development resulting from history, social regimes, economic development, on the basis of equality and mutual respect, having dialogues with countries worldwide was a great choice for China, which helped promoting understanding, narrowing the differences, learning from each other and finally the realisation of common development. Again, in his remarks at the 7<sup>th</sup> Beijing Forum on Human Rights in 2014 he stressed that the method China adopted in its active participation in international communication and cooperation on human rights, running the dialogue mechanism (including the EU) had benefited the mutual understanding of both parties. This view was proposed while reviewing China's new measures relating to human rights protection and new progress in human rights for the realisation of 'Two Centenary Goals' set for the Chinese Dream. While summing up the experience of success in constructing a nationally applicable road map of human rights development, he explained the significance of persistence in international dialogue and cooperation in the context of the world human rights development and an even broader context of global development. He held that only through equal dialogue and practical cooperation between countries of different regimes and levels of development could they succeed together in international human rights development. This view was also reflected in China's attitude towards human rights problems, which encouraged the dialogue and condemned confrontations especially interference in domestic affairs of other states under the excuse of protecting human rights. The latter, he stressed would go against the doctrine of democracy. Force he argued is not the means through which it is possible to contribute to the breeding of a culture of human rights. China, he emphasised, glorified respect, understanding, learning, and support between different civilisations. Therefore, dialogue was one necessary way of starting conversations, exchanges and cooperation in order to promote the worlds' development including human rights, and even achieve a brighter future for all human beings.

Liu Hua, Special Representative for Human Rights Affairs of the China Ministry of Foreign Affairs (MFA), expressed her perspective in the first sub-topic named the meaning of the Chinese Dream in terms of human rights, which was a part of the 7<sup>th</sup> Beijing Forum on Human Rights. Here what she used as 'dialogue was not restricted to the mechanism, but a method in a broader sense. To make greater

contribution to the international human rights dialogue as a specific mechanism was one aspect of the constructive dialogue and cooperation measure that should be kept. This was because in operating the dialogue mechanism at the bilateral and multilateral levels, China had played a positive role and met parties from all over the five continents. Also, this mechanism was in line with the spirit of constructive dialogue and cooperation measure, which primarily came from the irresistible trend of peaceful development and the win-win cooperation in the field of human rights that had gained China respect and appreciation in the face of human rights problems.

### 60. Attitude of the general public

Given China's size and internal diversity it is difficult to evaluate the attitude of the general public towards human rights. Wealth, education, age, environment, living standards differ significantly, with sharp differences between urban and rural areas, coastal regions and inland areas, grown-ups and adolescents, people with low literacy and well-educated people. While some are more open to internalising notions of human rights others are much less so. For example, people who have studied abroad are more exposed to the opinions and cultures of human rights. Thus they tend to have a clearer idea. What could be said in general is that opinion of the general public about human rights is primarily influenced by efforts of the government. In other words, the dialogue and its mechanism have their direct influence on the government, while they have only an indirect effect on the general public.

Having said this, it is important to note that besides government officials there are also NGOs commenting on human rights, such as the China Society for Human Rights Studies, which offered its position in its 2015 Annual Report on China's human rights (Blue Book of China's Human Rights). Luo Yanhua, Professor of the School of International Studies of Peking University, reviewed China's progress in international human rights cooperation and exchanges of 2014, saying that conducting Human-Rights Dialogue was one aspect of the tradition of international human rights exchanges that China would maintain. In general, in 2014, China adopted a positive attitude towards international human rights exchanges and put it into practice. When making predictions, she held that China paid great attention to these activities and therefore would continue to conduct exchanges in a serious and careful manner, constantly creating new ways of cooperation and exchanges. She also pointed out the challenges China would continue to face, which were, among others: the West's misunderstanding and stereotyping of China, or hostile NGOs attacking China undermining its reputation. To resolve these problems, China should both fight them, but at the same time also try its best to make them understand China's real situation and remove their prejudice.

She also made some suggestions concerning the role of NGOs. She pointed out that the influence of NGOs, especially those hostile to China in the field of international human rights, was getting stronger and stronger and their activities in the international human rights forum had a negative influence on China. To face this problem of hostile NGOs, she considered it more feasible for relevant ministries and academia to put more efforts into research on human rights NGOs, especially the countermeasures. At

the same time, she also suggested more exchanges with foreign NGOs that enhanced mutual understanding.

Generally, it is reasonable to argue that China's attitude towards this mechanism has undergone a shift from a passive one to a more positive one. Of course, the positive attitude does not always mean that China swallows every idea. In these changes, we have to be clear that some will just annoy the Chinese government, while some are embraced. The former specifically means that the Chinese government thinks that some issues or suggestions raised are just uninvited interference into China's domestic affairs in disguise, especially issues concerning civil and political rights and some individual political cases. China calls for carefulness and prudence in these issues.

### 61. Follow-up actions

The next issue we need to pay attention to is what China does. This aspect should be discussed on the basis of the first. Usually, the factors that contribute to one single action are difficult to tell. Moreover, it is complicated to find out whether a specific action is conducted as a response to the issues or suggestions that were brought up in the dialogue, or simply guided by other theories that already exist or come from other research and seminars. The available documents and data in China are not sufficient to infer any direct connections here.

China, for example, did sign the ICCPR and ICESCR, and ratified the ICESCR. What is more, given the more and more evident interactive feature of this mechanism, China is gradually addressing shared issues that are similarly present in the EU. For example, China has indeed introduced the provision of respect and protection for human rights into its constitution, promoted judicial reform and signed the two covenants. Also, China gradually promoted human rights education such as allowing the introduction of human rights courses in its universities. As for Criminal judicial reform, China is making efforts as well. For instance, the amendment of the Criminal Procedure Law may be a result. Additionally, China is ever more likely to act according to its own theory, such as the rule of law, and building of a harmonious socialist society.

Of course, there are some aspects where China does not follow ideas raised in the dialogue. For example, the ratification of ICCPR has long been the focus of discussion (the EU also showed its welcome of China's commitment to ratify the ICCPR as soon as possible in *The Joint Declaration of the 9<sup>th</sup> China-EU Summit* ) to which China did not react immediately. Although China's position is, according to its statement that it is making preparations for implementing other international conventions, sending experts or attending consultations, nevertheless it cannot be determined whether China is really making preparations or not, yet simply these claims make China to engage more in the group of international human rights.

Another thing we cannot say for sure is how China reacted on individual cases put forward as problematic by the EU. This kind of information is unavailable in Chinese mainstream media. Through some NGOs' websites and also through Katrin Kinzelbach's research we can infer that China is mostly

unwilling to handle these cases, regarding these as political interference into its internal affairs. Nevertheless, on occasions China did reply to some of these individual cases.

## 62. Reactions of the scholars

Thirdly, we have to take a good look at what is prevailing in academic circles. In Chinese academic circles there are few researchers who solely focus on this mechanism and there are hardly any articles discussing it. In general, Chinese researchers' voices do not seem to be polarised. But due to the whole cultural and political context which are undergoing drastic changes, and their multiple roles while they are being involved in the dialogue or other social activities, subtle changes are emerging in their ideas.

Liu Hainian, a researcher at the Institute of Law, as well as the head of the Center for Human Rights Studies of the Chinese Academy of Social Sciences (CASS), who has experience participating in the human rights dialogues with the U.S., EU, Canada, etc., gives a whole description of the dialogue mechanism (not only with the EU) from various aspects. He holds the view that the human rights dialogue at inter-governmental level plays a dual role where China can both fight against and communicate with the West.<sup>533</sup> Here there is a huge difference between the Chinese and the EU's views on this mechanism. The Chinese view remains that the mechanism is born with a political goal to overturn the present CPC authorities. People tend to believe that this mechanism was just a platform where the EU can unreasonably accuse China on certain issues, which directly imposes pressure on the CPC authorities. They believe it is also a platform where the EU can influence Chinese policy-making and perceptions little by little, which can be in tune with the efforts made by NGOs at the grassroots level. Just like those actions of the NGOs, the Chinese side usually perceives it as interference into its domestic affairs, a tool to demonise China's international reputation. But at the same time, he also admitted that by reflecting on the history of the mechanism the Chinese government can sum up experience which shall bring a further improved human rights protection system and better performance in foreign exchanges and fights on human rights issues.<sup>534</sup> On evaluating the effects of this mechanism, Liu considers it a practical way to unfold problems, to give full reasoning to issues and to enhance mutual understanding.<sup>535</sup> Furthermore, not only does this mechanism benefit related research in China, but it also improves the Chinese legislative and judiciary system.<sup>536</sup>

He believes that the shift of attitude of some western scholars towards China is based in a rational judgment to take the peaceful route instead of a confrontational stance on human rights issues.<sup>537</sup> At the same time he fiercely criticises the disrespect for China of some attendees from the EU. In his eyes, some of them are merely defending their national interests or even harming China's interests by groundless charges despite basic principles of human rights and the purpose of the dialogue mechanism.

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<sup>533</sup> Hainian 347.

<sup>534</sup> Ibid.Hainian.

<sup>535</sup> Ibid 352.

<sup>536</sup> Ibid 353.

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Liu Jie, Director of the Institute of Politics and Public Administration Studies and Human Rights Research Center of the Shanghai Academy of Social Sciences (SASS), presented his opinions on EU-China Human Rights Dialogue in the context of expounding the meaning of universality of 'China's Road of Human Rights', which referred to developing human rights through opening-up and cooperation. More precisely, while insisting on its own road of human rights, China did not refuse to admit the reasonability of other roads or to draw lesson from related experience. Based on the autonomous choice, China will always promote the human rights development in China under the idea of openness and cooperation trying to realise effective interaction between the domestic human rights development and world human rights development. His view on the EU-China Human Rights Dialogue is one dimension in the strategic vision of the comprehensive participation and promotion of China in world human rights that was gaining growing importance in China's process of participating and promoting the world human rights development. Here, conducting dialogue with various countries (including the EU) on the principle of 'seeking common points while preserving difference' and 'harmony in diversity', China tried hard to enhance the exchange and understanding with countries of different stands on human rights. He believed the dialogues helped a lot in enhancing understanding, narrowing the differences and expanding the consensus.

Luo Yanhua, Professor of the School of International Studies of Peking University, together with Ma Jing, teacher at the China Meteorological Administration Training Center, explained their perspective on this mechanism in the 7<sup>th</sup> Beijing Forum on Human Rights, under the second sub-topic, intercultural communication of human rights. While analysing the effect of the inclusion of a human rights clause in the Chinese constitution and bringing up China's participation in exchanges of international human rights, they agreed that the bilateral human rights dialogue mechanism in which China participated was getting more and more institutionalised since the inclusion of human rights clause in Chinese constitution took place. Nevertheless, in general the dialogue mechanism (not only with the EU) was still affected by bilateral political relations and other emergencies. China attached great importance to this official bilateral human rights communication mechanism, and hoped to enhance the understanding and reach a consensus.

Xian Kailin, Director of the Human Rights Theories Research Center of the College of Marxism of Dongbei University of Finance & Economics, along with Liu Xiaoliang, Teaching assistant at the School of Agriculture of Henan University of Science and Technology, presented their opinion on the mechanism in the second sub-topic intercultural communication of human rights of the 7<sup>th</sup> Beijing Forum on Human Rights. Their view also focused on the more general concept of the dialogue rather than on a specific mechanism. In the process of fostering healthy development of international human rights while pursuing the Chinese Dream, they stressed the insistence on the combination of international human rights cooperation as well as dialogue and the protection of core national interests. First, as an embodiment of China's advocacy of new perceptions of human rights values, which aimed at a just and reasonable international political and economic order, China never harmed or threatened other countries in the human rights dialogues. Second, they took defending the state's core interests as a red line and a premise of the foreign exchanges and international human rights dialogue, which helped cultivate new



human rights values of shaping close and win-win relationships between countries and protecting core national interests together.

Luo Haocai, Constitution Law and Administrative Law scholar, Adjunct Professor of Peking University Law School, the honorary President of the Third National Council of China Society for Human Rights Studies, gave his view on this mechanism in his speech at the opening ceremony of the 7<sup>th</sup> Beijing Forum on Human Rights in 2014. To summarise the new progress of human rights in China the year before, he mentioned human rights dialogue China held with different parties (including the EU) as one aspect of China's deep involvement in the field of international human rights. He held that it was one sign that it was common for China to have exchanges and cooperation with international society and China's human rights development had become an integral part of the world's human rights development. In his book, which collected his speech and papers, his views were more sophisticated. His speech in the Seminar on 30 years of China's reform, opening-up and human rights development (December, 2008), which reviewed China's progress in human rights in the 30 years after the reform and opening-up policy, regarded the Human-Rights Dialogue with the EU as one of the elements in the progress of exchanges and international cooperation of human rights. He evaluated the achievement of these dialogues as enhancing understanding, reducing the differences and expanding the common ground. In the Second China Work Experience Exchange Meeting of Human Rights Research Institutions in 2010, when the EU-China Human Rights Dialogue resumed, he pointed out that there were many human rights problems between the EU and China that remained to be solved. He thought all the situation required was for human rights research institutions to do more research and conduct exchanges. With these China could not only show its progress in human rights theories and practice but also learn the experience of human rights construction and protection from others, thus promoting human rights in China. During his visit to the U.S. and Cuba as the head of the China Society for Human Rights Studies delegation in May of 2013, his speech also kept the idea that China used the Human Rights Dialogue as a way to enhance the understanding and a chance to learn from each other. In addition, he also considered the dialogue as an effort made to promote a just, objective way of solving human rights problems.

Liu Huawen, Assistant Director and Research Fellow of the Institute of International Law, Chinese Academy of Social Sciences (CASS), Deputy Director and Secretary-General of the Center for Human Rights Studies, shared his view on dialogue (in a broader sense) in the clarification of China's perspective on human rights with Chinese characteristics. He laid special emphasis on having constructive dialogue, exchanges and cooperation on the basis of equality and mutual respect, when he mentioned China's active participation in international cooperation of human rights which did good to the healthy development of world's human rights development as one of the aspects of China's perspective. This could reflect his view on the specific mechanism in a way.

### 63. Remarks

To comment on this mechanism is not easy given the complexity of the issues raised at the dialogues. Still, we can argue with reason that it is clear that the motivation of this set-up is not purely for human rights. It is considered to be under the umbrella of EU-China political and strategic relations. In addition,

the mechanism itself is an approach in the EU-China policy, where once human rights meet politics things become more complicated. For instance, during the discussion, now and then, certain areas of human rights protection may be ignored deliberately, and replaced by those more in tune with the political aim. Although we cannot deny the political nature of human rights, it is still reasonable to take human rights protection seriously. It cannot and will not solely function as an individual human rights mechanism, which results in its limitation in influence. It is advisable to have a more regular agenda agreed by both sides without the interference of political factors.

Secondly, as we observed, the dialogue has limitations in its influence. As an intergovernmental mechanism with limited public access and little media exposure, it may directly influence officials who attend. As for the general public, the influence is mainly decided by governments' decisions on what to do and how to do it. In other words, to what extent will the general public be influenced depends on the Chinese government. In our judgment, usually an average citizen will not know much about those sensitive individual cases (because many quickly disappeared from his or her usual circle and the information would get very likely banned in the press or other media), or because they are the professional and abstract topics of a legal nature. People are likely to know topics that are related to their daily lives or have huge social impact. For example, the death penalty, democracy, arbitrary detention, petition and so on. But usually they will not know the EU's role in these topics. Of course, it will not be a problem but simply a feature if the mechanism is examined in a broader cultural, social and political context. However it does bring about some shortages. For instance, the lack of influence at certain levels or in certain areas may arouse greater divergences between different groups of people. Also, even when the government decides to fulfil its promise on human rights protection or other related activities, it takes knowledge and time to make this known to the public.

Thirdly, we should point out a clear trend in the dialogue mechanism. Namely, the Chinese voice has been getting louder and louder, with a more rational and neutral attitude. China is no longer a pure listener and defender in this mechanism. It is becoming more active in discussion and more critical towards the EU's suggestions. China has put its new theories like harmonious socialist society and others forward increasingly in its statements. This is a result of the positive influence of the mechanism and this pushes them to learn more quickly about human rights.

Fourthly, it is high time the EU got used to the interactive feature of this mechanism. Nowadays, this dialogue can serve as a way to discuss and solve common issues on human rights, which is in tune with dialogue's characteristics. So China can perhaps benefit from the discussion on an equal basis, which is also a positive influence that the mechanism has.

Fifthly, parties should respect cultural difference. Culture is something that nourishes a country's soul, including its notions and perspectives of human rights. Till now, what we call Chinese perceptions were limited to perceptions recognised in Mainland China, because of the current situation of Taiwan and Mainland China. There are certain things that are beyond the difference in human rights, of course. For example, the universality of human rights was also acknowledged in China. Li Buyun, a researcher from the institute of law of Chinese Academy of Social Sciences, shared his view on the universality of human rights in his article, saying that the foundation of the universality lay in the universality of the subject.

However, in general the EU gets the EU's way, China, perhaps, in the future will completely have its own too. Sometimes it hinders the success of the dialogue. This calls for both sides to reflect on their position and approach in this mechanism. China will perhaps develop its own way; even now it is learning the Western one. The EU can perhaps take this into account when posing questions and making suggestions. The Chinese side can also be careful of the difference in this communication.

## **B. NGOs in China and Their Role in Promoting Human Rights**

In this part of the report we will first give a brief introduction of the situation of NGOs in China, which includes the history and the laws related to the operation of NGOs in China. Then we will discuss the activities of international NGOs in China, mainly focus on the international NGOs interaction with Chinese government, domestic NGOs and Chinese society. Next we discuss the role international NGOs played in China; after that, it comes to the discussion about difficulties that the NGOs might confront in China.

### **64. A brief introduction of the NGOs in China**

Since the reform and opening up, China opened the door to the international community, more and more international NGO are involved in China's political, economic and cultural activities playing a role in strengthening Chinese grassroots democracy, social governance, economic development, environmental protection and social welfare. Through poverty alleviation and development, environmental protection, charitable aid, public health and other social welfare activities in China, International NGO also plays an active role in promoting China's political progress, economic development, respect for human rights, protection of the environment, promotion of man and society, the harmonious development of man and nature. With the further development of civil society in China and reforms towards the decentralisation of the Chinese government, organizations including international non-governmental organisations would be more developed and could play a more a more important role in social life becoming useful supplement of the government in managing the community.

Because there is no united registration system for international NGOs it is difficult to calculate how many international NGOs are active in China. Wang Ming, director of the non-governmental organisation research centre of Tsinghua believes that 'there are 3000-6000 international NGOs in China, which includes about 2000 foundations, 1000 execution groups, 2500 chambers of commerce, and 1000 organizations of the integrity.'<sup>538</sup> Fu Yin, the deputy secretary-general and the spokeswoman of the third session of the 12<sup>th</sup> National People's Congress said, 'In China, international NGO are very active, and there are nearly 6,000 international NGOs according to online data.'<sup>539</sup> According to Wu Shan, a reporter from Caijing Magazine, the number international NGOs in China operating for a longer

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<sup>538</sup> Ming Wang, 'Development of China's NGO and Policy' (2007) 6 Public Administration Review 5.

<sup>539</sup> '傅莹：要通过立法使境外非政府组织在华活动有法可依' <<http://www.chinanews.com/gn/2015/03-04/7100385.shtml>> accessed 11 October 2015.

time is approximately 1000. This number can reach 4000 to 6000 if we also count those international NGOs that have short-term cooperation programmes.<sup>540</sup> A reporter from The Beijing News even considers this number to be around 7000.<sup>541</sup> At the same time, though important, it is hard to estimate the number of NGOs that are involved in human rights issues in China.

## 65. A brief history of NGOs in China

### a) *From 1978 to 1989*

The reform and opening up renewed Chinese society. It was following the end of the 'Cultural Revolution' that the first batch of NGOs were re-established or started their activities, with numerous organisations and social groups established before the 'Cultural Revolution' being restored. In addition, more and more social groups emerged in the central and local governments. With the deepening of reform, the domestic NGO development reaches the first climax in the past decade. Throughout the 1980s, China was in the process of emancipating the mind, bringing order out of chaos and exploring the development. At that time, the reform of the political and economic system had just begun, so policies and laws were lacking for these kinds of activities. Neither a registration nor a regulatory or legal system of social groups had been formed yet. Hence, the government did not supervise the development of social organisations in general.

It was with the reform of the economic system that appeared in China for the first time. Relatively speaking, the circumstances of political and economic development were loose in China at that time, which benefited the development of social organisations and foundations, resulting in all kinds of social organisations emerging quickly in a short time. At this stage, activities of international NGOs in China were in their infancy. They rarely set up offices in China, and they mostly provided assistance to the implementation of various projects in China. Although the input of their funds increased every year, overall it was not significant. 1989 was a year of reversal for many international NGOs – including Greenpeace – as they had to withdraw their operations from China. Although some lucky ones survived they had to scale down their operations and the whole NGO sector was soon driven into a ditch.

### b) *1990s*

In the 1990s, with the arrival of a new round of economic reform after Deng Xiaoping's southern tour speech market economy has been gradually implemented. In order to promote rapid and healthy development of the economy and improve people's living standards in China, the government decided to change the concept of governance, and tried its best to transform its employees into public servants. It is a significant decade that international NGOs gradually transformed from the downturn into a rapid development in China and by the mid-1990s it was a new period of rapid development for the sector

<sup>540</sup> See the article: 'N' <<http://news.sina.com.cn/c/2015-05-25/154231873546.shtml>> accessed 10 August 2016.

<sup>541</sup> See the news report: '媒体：或有7000个境外非政府组织在华活动' <<http://news.sohu.com/20150727/n417559425.shtml>,> accessed 10 August 2016.

with the number and scope of activities of international NGO continuously expanding. During these years international NOGs not only continued cooperation with local government, but they have gradually begun to explore nurturing local grassroots organizations or cooperate with domestic NGOs to implement activities. More and more international NGOs opened their offices, such as World Vision, Save the Children UK, Salvation Army, Oxfam, etc. In addition, the network of contacts between regions also began to form.

### *c) Since 2000*

Since the 21st century, with the impetus of the direction of government reforms to the depth, the joint to the WTO and the diversification of interest groups in China, international NGOs have achieved rapid development in various fields and increasingly active and showed active and strong development momentum increasingly. Accordingly, they reached their third climax of development. Besides, more and more international NGOs in China accelerated the localization process, and gradually integrated into Chinese society. Through close cooperation with all levels of government, these organizations involved in public service including community service, pension services, community correction, many public services, AIDS relief, poverty alleviation and development, environmental protection and so on.

### *d) Laws related to NGOs*

For regulating NGOs in China there are several core regulations such as the < Law of the People's Republic of China on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China><sup>542</sup>, < Regulation on Foundation Administration>(2004), <Interim Provisions on the Administration of Foreign Chambers of Commerce> (2013 Revision) ,<Regulation on Registration and Administration of Social Organizations >(1998), <Interim Regulations on Registration Administration of Private Non-enterprise Units >(1998). Only the formal two regulations are related with the international NGOs. Besides these other regulations may also be involved in the management of NGOs, as the < Law of the People's Republic of China on Donations for Public Welfare >, (1999) <Interim Regulations of the People's Republic of China Concerning the Control of Resident Offices of Foreign Enterprises > (1980), and so on.

As mentioned above, there are no special laws in force to regulate NGOs in China; 'NGO' was not used in the official texts in the laws of China. NGOs were classified into the foundation, social organisations, private non-enterprise units, representative offices of the international foundation, international associations and so on.<sup>543</sup> However, with the passing of the Law on the Administration of Activities of Overseas Non-Governmental Organizations passed within the Territory of China led to a great change in this field. But why has this change been introduced? Different sources come up with different

<sup>542</sup> See the website: '中华人民共和国境外非政府组织境内活动管理法' <[http://www.npc.gov.cn/npc/xinwen/2016-04/29/content\\_1988748.htm](http://www.npc.gov.cn/npc/xinwen/2016-04/29/content_1988748.htm)> accessed 24 September 2016.

<sup>543</sup> See the official website of the 'Ministry of Civil Affairs of the Peoples Republic of China' <<http://www.chinanpo.gov.cn/search/searchOrgList.do?action=searchOrgList>,> accessed 11 October 2015.

interpretations. The China Daily, for example, held the view that this law aimed at facilitating the legal operations of these NGOs in Mainland China while helped fighting against activities that threatened the national security. In the news report from China Philanthropy Times, this law was also for the public interests. What's more, this law also promoted the opening-up of Chinese society, overall economic development and also plays a role in China's constructive participation in international society. From our perspective, this law was not only designed to have more legalized operation of NGOs in China and defend national security and other interests above , but it also offered an answer to the fact of fast growing number of NGOs in China. Also, this was also a fruit of Chinese government's exploration into appropriate methods of social governance, which was quite different from the past.

## 66. The activities of international NGOs in China

### *e) Interactions with the governments*

Although the Chinese government has expelled some international NGOs for their involvement in politically sensitive issues it has also actively supported certain types of international NGOs. As a result, those international NGOs working in poverty alleviation, environmental protection, health, education and assistive services are welcomed by the Chinese Government. Usually in most situations they will not be regarded as pure human rights NGOs. There are no common standards for classifying human rights NGOs and non-human-rights NGOs, the topic which is rarely discussed. For example, to alleviate poverty, the government willing accepts help from international NGOs and signed cooperation agreements with many international NGOs working in China. Environmental experts showed positive attitudes towards the international NGOs working in environment protection. They believe that these NGO can mobilise large numbers of volunteers to act for the cause of a non-controversial area such as recycling, tree planting or actions against littering. Furthermore, environmental officials welcomed the NGOs working on anti-corruption or malfeasance and on enhancing environmental protection.

In some sense China is more concerned about the international community's views and attitudes than ever before, while at the same time China is facing increasing pressure to meet international standards. Given the special status of international NGOs in the international community, cooperation with international NGOs will undoubtedly make it easier for China to get closer to its goals of global recognition and influence. Therefore, the cooperation with international NGOs was considered as part of the reform and opening policy, and also became an indispensable element in the pursuit of globalisation.

Meanwhile, the Chinese government also holds a cautious attitude towards international NGOs. In 2006, 'Study Times', the official newspaper of the Party School of the CPC Central Committee published an article written by Professor Zhao Liqing entitled 'how to look at international NGOs in China'. Professor Zhao believes that international NGOs have played a positive role in promoting China's social development; nevertheless, he also showed concerns about the negative role of the international NGOs. He warned that some foreign NGOs in China are 'spying and collecting information on China's military, political and economic intelligence.' His article also stressed that foreign NGOs have expanded not only

in the grassroots, but penetrated into universities, government agencies, the party, and even representatives of the congress at all levels.<sup>544</sup>

The cautious attitude comes from among other things from the fear of **uncontrolled development of international NGOs**. Development of NGOs is bound to bring certain events along including civil disorder events occasionally, such as the '7 • 5' or Lu Feng disorders. Officials believe that behind such civil disorders, there was the support of some 'foreign forces'.<sup>545</sup> The expression 'foreign forces' tends to refer to some international NGOs that are often regarded to have been penetrated by Western ideology. The government feels threatened if these NGOs go too far, and is afraid of losing control of civil society. The activity of international NGOs may intensify social tensions and could lead to the adoption of Western freedom of thought. These concerns were further strengthened over the past few years' civil disorder events. In the late 1990s, due to the fear of the development of some illegal NGOs, the government carried out 'rectification' activities towards NGOs. NGOs were required to register with the Department of RPC at the Ministry of Civil Affairs and a number of NGOs were banned. Here, according to some research studies combined with our own understanding events of civil disorder were closely related to the protection of human rights issues. This process is often accompanied by the violation of human rights within the group or outside. The failure of meeting the need it shows will cause the deterioration of human rights issues or even a chain reaction; other potential issues will arise.

Another concern is of '**peaceful evolution**'. Namely, the government is concerned that some international NGOs supported by Western governments may have ambitions to subvert the existing regime in China through 'peaceful evolution', as happened in some countries in North Africa and West Asia, such as 'colour revolutions' in Egypt and Libya. The key feature of those revolutions was that some western NGOs directly participated in them by providing funding in order to help the domestic opposition – including radical young students – to subvert the existing regime. Because of this, the Chinese government pays special attention to those NGOs whose funding was from international foundations or from other NGOs to prevent them from becoming a driving force to launch 'colour revolutions' in China.

Finally, the third typical concern is related to sovereignty. The acceptance of international human rights conventions makes the sovereignty more fragile when responding to international pressure for political reform. The common strategy the international human rights NGO take is to cooperate with domestic human rights groups or human rights actor. The Chinese government holds that human rights issue is the internal affairs of a country, thus the assessments of human rights situation in China by international NGOs is not welcomed by the government. The government claims that the criticism of human rights situation in China by western NGOs is interference into China's internal affairs and leads to social instability. Meanwhile, the government also strongly opposes foreign forces intervening in China's political independence or territorial integrity on issues such as the: 'East Turkistan separatists', 'Tibetan separatist', 'Hong Kong independence' issues. For example, according to reports there was international NGO support behind, 314 vandalism incidents in Lhasa or the Urumqi 7.5 event. When we trace back to

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<sup>544</sup> Zhao Li qing, 'How to Look at International NGOs in China' (2006) 9 Study Times.

<sup>545</sup> See the news: <<http://news.qq.com/a/20111210/000023.htm>, > accessed 4 October 2015.

the original reports, many of which do not use direct words to describe sensitive information, we will find, usually, in the press, that there were no specific NGOs in these reports, more often, the terms used refer to ‘the anti-China forces within and outside China’. The actions against NGOs depend on Chinese government’s overall judgment and are usually indirect or secret. Usually the Western press will keep to their lines, saying that there were violations of human rights in Tibet or Xinjiang.

### *f) Interactions with domestic NGOs*

In the decades after the reforms and the opening of China a large number of domestic NGOs were established in China that have close contacts with international NGOs, or were created with the support international NGOs provided. On the one hand international NGOs seek domestic partners because local governments encourage the establishment of social organisations, thus making it easier for their presence in China. On the other hand domestic NGOs seek international NGOs as they can provide them with links to international networks, funding and thereby assist the activities of small grassroots NGOs.

Take the project Overall Objectives funded by EU as an example.<sup>546</sup> The aim of the project is to promote CSO awareness to publicly represent marginalised groups and interact with state actors in order to advocate policies that serve these groups, particularly in resolving problems created by urbanisation. The EU has contributed close to 43.000 Euros to this project. The implementing organisation is Beijing Civil Society Development Research Center, Ltd. Its aim is to build CSO capacity by developing and introducing specialised advocacy methods that will enable CSOs to fulfil the aforementioned responsibilities. The main activities of the project are as follows: Regional advocacy Workshops, Creation of a Website devoted to sharing advocacy case studies and methods, Elaborations of Brochures on CSO advocacy in China, on public interest lawsuits, on CSO needs for public interest lawyers and on CSO role in policy-making process. Plus they have created an advocacy Newsletter and 3 annual advocacy Handbooks for Chinese CSOs. The organisation also holds such social events as a conference on advocacy methods and a media salon and produces advocacy material for Central Party School courses. Furthermore, the organisation has also created the China Development Brief website.

Together with the China Charity Federation and the China Association for NGO Cooperation, these three websites became the most influential NGO websites in the NGO field. The China Development Brief website provides a platform for domestic and international NGOs and while on one hand it offers services to NGOs, on the other hand it has also contributed to expanding the influence of NGOs in China. In addition to these the China Development Brief website has also carried out some activities of its own, such as training, and also undertakes research on the situation of NGOs in China while also providing suggestions for legislation and government decision-making.<sup>547</sup>

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<sup>546</sup> See the website <[https://ec.europa.eu/europeaid/projects/developing-cso-capacity-participate-policy-making-and-represent-marginalized-groups\\_en](https://ec.europa.eu/europeaid/projects/developing-cso-capacity-participate-policy-making-and-represent-marginalized-groups_en)> accessed 14 October 2015

<sup>547</sup> See the official website: <<http://chinadevelopmentbrief.cn/>> accessed 14 October 2015.



### *g) Interactions with China society*

By constantly carrying out projects and activities NGOs have expanded their influence in Chinese society. However, due to historical factors, such as the ancient Chinese government's habit of suppressing civil society organisations, although NGO's influence is far better than that of the government, the recognition of NGOs in grassroots society is far behind the government. Scholars have investigated the activities and influence of international NGOs operating in China in fields such as education, health care, poverty alleviation and community development, domestic NGO capacity-building in China, environmental and animal protection.<sup>548</sup> In different fields the influence that NGOs exercised was quite different. NGOs were more influential in academic than in grassroots settings. While NGOs and their goals are understood within academic circles and many NGOs are well connected to academia (some NGOs are even active participants in research activities), they and their activities are less known by the general public, partly because of the tradition of suppression they had to face from the government. Furthermore, the fact that many NGOs are not active 'on the field' also weakens their influence at the grassroots level.

#### **67. The role international NGOs played in China**

Briefly speaking, through their activities and projects, international NGOs have promoted human rights situation in China, promoted the beneficial social transformation, promoted government decision-making to be more scientific and democratic and boosted the development of domestic NGOs.

As China continued implementing its opening policy international NGOs integrated into every aspect of Chinese society. Their activities covered health, education, environment and animal protection, poverty alleviation and social development, disaster relief and reconstruction, child development and so on. Their projects fully made up for the shortage of government and market, directly improved the life standards of citizens, and directly improved the human rights situation in China.

Let us take another project funded by the EU as an example.<sup>549</sup> The project implemented by Associazione Italiana Amici Di Raoul Follereau - Aifo - Organizzazione per La Cooperazione Sanitaria Internazionale Onlus (hereinafter referred to as AIFO) aimed at promoting an inclusive and equitable society in China for people with mental health conditions. They provided integrated mental and physical treatment for people with mental health conditions; for members of Social Cooperatives helped to acquire sufficient skills to manage income activities; encouraged and supported people with mental health conditions and their family to advocate for their needs, which included the organisation of a grassroots association at district level; while they promoted the sharing of best practices on community based mental health services among different academic and research centres and finally aimed at

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<sup>548</sup> Han Junkui, *Foreign NGOs in Mainland of China: Working Together Towards China's Opening* (social sciences academic press 2011).

<sup>549</sup> See the website <[https://ec.europa.eu/europeaid/projects/strengthening-role-and-capacity-chinese-non-state-actors-towards-rightful-inclusion-society\\_en](https://ec.europa.eu/europeaid/projects/strengthening-role-and-capacity-chinese-non-state-actors-towards-rightful-inclusion-society_en)>, accessed 14 October 2015

increasing awareness of communities on the availability and functioning of community based psychiatric services.

According to some media reports, AIFO cooperated with Peking University Sixth Hospital and some local government departments (such as health, public security, CDPF) to implement the project. The project established community mental health centres in selected project areas and promoted the integration of hospital and community with remarkable results.<sup>550</sup> In fact eight Community Mental Health Services opened in the four cities and hundreds of health operators, users and family were trained; four associations of family members and four self-help groups were established or are about to be established.

Furthermore, an international network and a website were created in order to exchange and share the experience of NGOs working on mental health issues in China. This project has raised widespread attention in society towards the 'deinstitutionalisation' approach to cure mental illness.<sup>551</sup>

International NGOs can benignly stimulate government actions by supporting new issues raised by the globalisation trend, and actively encouraging the government to face public issues, furthermore, they could receive or replace part of the functions of the government, which could greatly contribute to the promotion of human rights in China.

### **68. The promotion in government decision-making**

Practice has proved that international NGOs can play a role stimulating the Chinese government in scientific and democratisation decision-making. International NGOs can make a difference by supervising the government, whether it acts according to the law (they can also promote law making and implementation in relation to civil society organisations). With the deepening cooperation between the international NGOs and the Chinese government, it is clear that international NGOs have gained more influence towards the government in healthcare, basic education, children's aid, agricultural science and technology and other fields all related in one way or another to human rights.

International NGOs can stimulate the development in the reform of social fields in China. The entry of numerous reputable international NGOs into China can alleviate the birth, growth and development of domestic NGOs. This is important for encouraging the gathering of resources and also the promotion in general of human rights. They have helped China to train a large number of professional practitioners for NGOs and have carried out a number of projects in China in these recent years. Through the implementation of assistance projects by international NGOs at the grassroots level they have helped the opening up of grassroots government (county-level) channel of economic and technological communication with foreign countries and have helped train a number of management personnel to work in cooperation with the projects of international NGOs. In this way they have contributed to broadening the vision of local government employees and local residents. Thanks to the project

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<sup>550</sup> See the news report: <[http://www.tl.gov.cn/art/2013/9/26/art\\_40\\_107206.html](http://www.tl.gov.cn/art/2013/9/26/art_40_107206.html)> accessed 14 October 2015

<sup>551</sup> See the news report: <<http://www.jkb.com.cn/news/industryNews/2015/1014/378359.html>> accessed 14 October 2015

cooperation with international NGOs since the establishment of the China Association for NGO Cooperation 23 years ago, more than 10000 project managers were trained offering their talents to Chinese social organisation.<sup>552</sup>

### 69. It helped change Chinese social attitudes

Traditionally, CSOs were taboos, thus the Chinese government suppressed them immediately at the moment of their founding, which is why at the beginning civil society organisations in China developed with difficulty. Given this background, Chinese society was cautious towards NGOs. However, with the expanding influence of NGOs, not only is the recognition of NGOs rising in China, but the concept of Chinese society is also changing. The contribution these NGOs have made to human rights in China has gained them a good image, although it must be noted that their impact causes some people to be cautious and concerned about where they would lead Chinese society.

At the present stage of social transformation in China international NGOs proposing volunteerism, and promoting a social model built on the ethic of making a contribution to society. This is highly significant as with economic and productivity growth also social injustice has risen at the same time and many new vulnerable groups and other social problems have arisen. With rapid economic development and the establishment of the market system, traditional culture, lifestyle and social structure changed with undesirable side effects, such as the alienation or indifference between people. When it comes to the value orientation of social development and meeting the objective needs of human self-realisation, international NGOs focusing on volunteerism of caring for others play a vital role. They can strengthen solidarity between members of society in a period of social transformation and contribute to the building of a harmonious society by promoting social integration.

### 70. Difficulties that NGOs face

There is no doubt that China's continued reform, modernisation and opening up has provided a broadening space for NGO activities. Nevertheless, there are still some obstacles that restrict the international NGOs when promoting human rights situations in China.

The law for international NGOs registration and management is very confused in China; there are many legal loopholes or defects. However, generally speaking, the law and policy circumstances are not strict for international NGOs, unless they have touched a red line of the government. As mentioned earlier, most foreign NGOs are not registered in China, thus they are not recognised as 'legitimate', this however does not affect their activities in China.

Having said this, China was about to regulate the activities of international NGOs in China. Recently, the draft act of 'International NGOs Management Act'<sup>553</sup> was introduced to the public calling for comments.

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<sup>552</sup> Huang Haoming, 'What Have the International NGOs Brought to China?' <[http://www.21ccom.net/articles/world/zlwj/20150814127913\\_all.html](http://www.21ccom.net/articles/world/zlwj/20150814127913_all.html)> accessed 14 October 2015.

This has raised public awareness towards international NGOs operating in China. Combined with the fact that the Chinese national security department established two years ago, some scholars, NGO representatives and foreign consulate officials hold the view that the draft act shows the Chinese government is trying to strengthen control over foreign NGOs, thus it is reasonable to assume that the situation of foreign NGOs would become more difficult. For example, Xi jin jia, an associate professor of Tsinghua University School of Public Administration, stressed that '(the Act) will have an influence on all the cooperation between the domestic individuals and organizations with the overseas non-profit organizations.' Article 25 of the draft provided that, '[u]nless otherwise specified by the State Council foreign NGO and representative offices in China should not be allowed to accept donations in China.' Some of the representative offices questioned why international NGOs might not receive donations from China. They pointed out that this violates the principle of fairness. Xi Jinjia comments the draft that: 'If it is strictly enforced in accordance with the provision of this Act, it is not a national security issue, it will influence far more than the charity in China, the openness of the whole Chinese society and overall economic development will be greatly influenced, furthermore international relations [of China] will be affected.'<sup>554</sup>

The official opinion on the issue is different. Xu Xianming, NPC vice chairman of the NPC Law Committee, reiterated that the three principles would not change, 'China's reform and opening policies will not change, the goal for the rule of law will not change, the principle of integrating management into services will not change.'<sup>555</sup> In his view, the legislation for international NGOs management is an objective requirement of the comprehensively promoting the rule of law in China and building a socialist country ruled by law. Besides, the act also offers a guide for the activities of international NGOs in China, and offers protection for the legitimate rights and interests of international NGOs in China. Guo Sheng kun, State Councillor and Minister of Public Security, holds a similar view that the Act gives legal protection for the rights and interests of international NGOs in China by giving a legal status for recognised international NGOs.<sup>556</sup>

#### *h) The lack of professionals*

The mechanism of personnel training and reserving of domestic NGOs in China has not been established, so the society is relatively short of professional social workers and NGO workers. The personnel currently engaged in this profession are mostly employed by the organisations that train the applicants themselves.<sup>557</sup> Many universities have set up undergraduate and master's degrees on social work, which is a very new subject in China. It is regrettable that most university teachers occupied with social work in China, who have neither studied social work nor participated in project activities and

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<sup>553</sup> See the official text of the Act(draft): <[http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2015-05/05/content\\_1935666.htm?1430902103677](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2015-05/05/content_1935666.htm?1430902103677)> accessed 14 October 2015

<sup>554</sup> See the news report : <<http://www.gongyishibao.com/html/yaowen/8031.html>> accessed 14 October 2015

<sup>555</sup> See the news report : <[http://www.guancha.cn/FaZhi/2015\\_07\\_26\\_328239.shtml](http://www.guancha.cn/FaZhi/2015_07_26_328239.shtml), > accessed 14 October 2015

<sup>556</sup> See the news report : <[http://news.china.com.cn/2015-07/27/content\\_36151774.htm](http://news.china.com.cn/2015-07/27/content_36151774.htm)> accessed 14 October 2015

<sup>557</sup> Wang xu, "The Study of Human Resources Management in Non-government Organization in China". 7

management of social works, now compile textbooks by reading and digesting the materials from foreign countries.

When it comes to internal training in organisations, international NGOs emphasise more education and training and they also have a more mature approach to the management or operation of projects. In addition, they offer training programmes that include internal training and professional training for their professionals. Compared with this, grassroots NGOs have limited funds, so it is not only difficult for them to develop adequate training programmes, but it is also difficult to pay the cost of professional training institutions. Furthermore, due to funding constraints, it is difficult for grassroots NGOs to hire talented individuals, as those tend to move to the commercial sector or choose international NGOs. Most employees of NGOs are only trained in-house, and it is difficult for them to obtain a high level of professional training support, which creates human resources problems in terms of professionals at organisations.

In addition, the fact that much funding is coming from foreign countries means that they can only employ most of their employees per project, but once that is over they cannot retain the necessary professional staff. Once the project runs out they need to be laid off. This means that even if they apply successfully for funds for a new project they have to recruit and re-train. Although many members of staff of grassroots NGOs are relatively stable, their pay is very low. They are motivated entirely by their dedication to the cause of their organisation. The consequence of these financial difficulties causes a talent bottleneck, which affects the management of the agency, the implementation of projects and the capacity of the organisation to apply for further funding, creating a vicious circle for grassroots NGOs.

Under these conditions it is clear that the participation of European NGOs will be of great help to alleviate much of the stress born by the parties involved. They can build close relationships with related parties and help them to overcome the above-discussed difficulties. For example, they can send professional staff to related universities and institutes to give speeches or hold discussions on a regular basis to help them expand their horizons in practical areas. They can also help NGOs in China to introduce standards and the process of training domestic professional staffs using their own experience, or they can even invite some excellent trainees to these NGOs in China. They can also use their own social networks and experience to help NGOs in China to raise the funds they need.

## 71. Recommendations

Whether human rights or other NGOs, the concept of NGO is alien for most Chinese. Ordinary people still need time to grasp and understand the concept of human rights and the role of NGOs. Also it is important to realise that most people in China do not yet know grassroots NGOs or international NGOs as they have had experience only with foundations with official background so far. This clearly limits the development of a positive and welcoming attitude towards NGOs and grassroots organisations. Probably once people would have a better understanding of the role of NGOs and human rights could NGOs play a more effective role in promoting human rights in China.

Having said this it must not be overlooked that the Chinese government stands in severe opposition to certain non-governmental human rights organisations, such as *Freedom House*, *Amnesty International*, *the Chinese Human Rights Defenders organization*, *Oxfam* and so on. In January 2012, Human Rights Watch released its annual report reviewing of the global human rights situation in China, 'Global Annual Report (2012)', The People's Daily, part the Chinese government's official media, published an article refuting the claims of the report and heavily criticised the political stance of Human Rights Watch.<sup>558</sup> Similarly, the relationship between Amnesty International and the Chinese government has always been bad, some Chinese media reported that, '*Amnesty International*, *Reporters Without Borders* and other international NGOs are intertwined with mainstream Western political and financial power and frequently they are but mouthpieces of the Western powers.'<sup>559</sup> The critical voice of these international NGOs cannot be known to the Chinese public, thus their efforts to promote human rights in China are in vain.

At the same time if an NGO takes a more pragmatic attitude, which means it only gives a hand in the situation where help is really needed with enough respect to China's sovereignty, while at the same time it actively cooperates with the Chinese government, then its influence may expand greatly with domestic NGOs and it could achieve more fruitful results. By breeding a more open, mature social environment, and promoting China's revolution from the bottom, it will be more efficient in improving the human rights situation in China.

In addition to this the place where NGOs could make a difference is in the training of personnel. As mentioned earlier, NGOs in China struggle with an extreme lack of appropriate personnel, and joining NGOs has little appeal for young people in China. NGOs can cooperate with universities or high schools by which they cannot only recruit trained personnel, but can also expand their influence.

### C. Human rights and economic relations

The communication between China and the European Union is very frequent and covers many areas. In this part of the report we intend to discuss the relationship between human rights and business/trade in relations between the European Union and China.

In 2004, the EU became China's largest trading partner, and China was the EU's second largest trading partner. In 2009, China became the EU's third largest export market. While economic and trade exchanges are important in China-EU relations, at the same time, human rights issues have been an important part of the communication with China on the part of the European Union. Although some works have argued that the EU has pressed for a normative approach toward China,<sup>560</sup> it is better to say that the EU has occasionally adopted a hesitant and inconsistent approach towards compelling change

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<sup>558</sup> "'Human Rights Watch', Please Watch Yourself' <[http://news.xinhuanet.com/politics/2012-01/26/c\\_111461430.htm](http://news.xinhuanet.com/politics/2012-01/26/c_111461430.htm)> accessed 14 October 2015.

<sup>559</sup> See the article 'Amnesty International, One of the West's Most Paranoid Factor' <[http://www.guancha.cn/HuanQiuShiBao/2015\\_02\\_27\\_310390.shtml](http://www.guancha.cn/HuanQiuShiBao/2015_02_27_310390.shtml)> accessed 14 October 2015.

<sup>560</sup> (for example, Crookes, 2013)

in China's human rights policy.<sup>561</sup> Thus, even though in its general statements the EU is for the coupling of economic relations with human rights concerns, as the European Parliament's resolution recommends in 2007: '...that the human rights dialogue should not be treated as separate from the rest of Sino-European relations; to that end, urges the Commission to ensure that its trading relationship with China is linked to human rights reforms, and calls in this regard on the Council to carry out a comprehensive evaluation of the human rights situation before finalising any new partnership and cooperation framework agreement'<sup>562</sup>, in reality European states are reluctant to use economic issues to pressure China on human rights concerns. As China has become an economic giant it increasingly has the power to reject attempts of others at lecturing it, while at the same time it is also ready to use its economic might to put pressure on others.

## 72. From the sanctions of 1989 to a dynamic partnership

The history of EU-China economic and trade relations is marked with two great events – the 1989 Tiananmen Incident and the 2005 Textile Crises, with the latter signifying that China is becoming an equal power standing up as Europe's equal in economic terms. With those two symbolic events, EU-China economic history can be divided into four periods: the starting-up period (1975–1988), the 'Low Tide' Period (1989–1992), the 'Honeymoon' period (1993–2005), and the 'Turbulent' period (2006 till now).<sup>563</sup>

Following the Tiananmen Square atrocities the EU introduced sanctions against China. Yet, these sanctions were short-lived and nowadays economic and trade issues are rarely used as means for trying to influence China to alter its human rights policies. By 1995 in its communication towards China the EU had already admitted that sanctions were frequently ineffective. In fact many of the sanctions had a short lifespan and were withdrawn by 1992.<sup>564</sup> (Another issue is the arms embargo against China, which is still in place in 2016).<sup>565</sup> In parallel with this the EU changed its attitude to China and decided to delink China's human rights record from the improvement of bilateral relations. The new strategy was for the EU to integrate China gradually into international society via trade and economic ties.<sup>566</sup>

Zhang calls the period between 1993–2005 the honeymoon of China-EU relations. Even though the main issue during this period was achieving access to the other partner's market, Zhang points out that the EU did not merely aim at China's economic opening up, but it also hoped to push China towards further

<sup>561</sup> Ayse Kaya, *The EU's China Problem: A Battle over Norms*, Department of Political Science, Swarthmore College, Swarthmore (1981).

<sup>562</sup> 'European Parliament Resolution of 6 September 2007 on the Functioning of the Human Rights Dialogues and Consultations on Human Rights with Third Countries (2007/2001(INI))' <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0381+0+DOC+XML+V0//EN>> accessed 27 September 2016.

<sup>563</sup> Zhang Xiaotong, 'EU-China Economic Diplomacy: When Economics Meets Politics' (2014) 19 *European Foreign Affairs Review* 57.

<sup>564</sup> Xiaotong (n 561) 60.

<sup>565</sup> 'The EU Continues to Uphold the Arms Embargo vis-à-vis China -' <[https://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](https://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)> accessed 27 September 2016.

<sup>566</sup> Xiaotong, 'EU-China Economic Diplomacy: When Economics Meets Politics' (n 561) 61.

domestic reforms.<sup>567</sup> In 2005, however, EU-China relations entered a turbulent period foremost as the EU was increasingly forced to realise China's economic power in negotiations. Peter Mandelson, the European trade commissioner, in a letter to the European Commission president, José Manuel Barroso noted that: 'to some extent the Chinese juggernaut is out of control'.<sup>568</sup> As China was becoming an economic giant, it also triggered negative sentiments against it as a competitor and invited comments such as the ones by French President Nicolas Sarkozy for the end of too much naïveté towards China demanding reciprocity.<sup>569</sup>

During the following years human rights were not prioritised upon and not raised in conjunction with other issues in China-EU discussions. In fact, human rights concerns were side-lined and the focus turned to establishing smooth economic relations. Thus, for example, following the Lisbon Treaty at the 13<sup>th</sup> EU-China summit (October 6, 2010) Herman van Rompuy pointed out that China and the EU had developed a dynamic partnership and had come a long way since the EU-China first Summit in London in 1998.<sup>570</sup> Although numerous issues were touched upon during the summit, in the Joint Press communiqué issued afterwards neither the issue of human rights nor the arms embargo were mentioned.<sup>571</sup>

### 73. Pre-eminence of economic issues

Although there are times when human rights issues are mentioned in negotiations, the emphasis tends nevertheless to be on economic relations. At the 4<sup>th</sup> Europe-China Forum Premier Li Keqiang gave a speech emphasizing that both China and the EU stood at a critical stage of development, thus the two sides should have work together in planning the 'overall blueprint' of development in trade, pushing the investment onto the 'fast track', opening up a 'bathyal zone' in innovative cooperation and joining efforts to address global challenges. It was further note at the Forum by Men Jing, (Director of the EU China Research Centre at the College of Europe) that 'Now China is proactive and taking initiatives in the world.' Responding to the Chinese remarks Jean-Claude Juncker, President of the European Commission said: 'The EU must work hand-in-hand with China on climate change, environmental protection, international development, human rights and social inclusiveness.'<sup>572</sup> Thus, human rights issues were – and are – not off the EU agenda, yet it is reasonable to argue that economic issues far outweigh them.

<sup>567</sup> Ibid 64.

<sup>568</sup> Stephen Castle, 'U Trade Chief Calls for Aggressive Action against China' *The New York Times* (7 October 2007).

<sup>569</sup> Zhang Xiaotong, 'EU-China Economic Diplomacy: When Economics Meets Politics' <<https://www.kluwerlawonline.com/document.php?id=EERR2014021&PHPSESSID=eks2ej2gmuvh1cpdoe9ftlem33>> accessed 27 September 2016.

<sup>570</sup> 'Introductory Remarks by Herman van Rompuy, President of the European Council, at the EU-China Summit' (Brussels, 6 October 2010) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/116905.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116905.pdf)>.

<sup>571</sup> Finn Laursen, 'The EU's Strategic Partnerships: The Case of EU-China Relations' (2011) Dalhousie EUCE Occasional Paper No. 10.

<sup>572</sup> '4th Europe China Forum' <<http://www.friendsofeurope.org/event/4th-europe-china-forum/>> accessed 27 September 2016.



The reason for this is the EU's carefulness recognising China's sensitivity of and aversion against coupling human rights issues and economic deals, because the direct relationship China sees between human rights and domestic affairs.

China is cautious about human rights dialogue and the 'human rights provision' which was incorporated into commercial and trade documents between the EU and China.<sup>573</sup> China always insists on a 'Non-interference Principle' in the diplomatic field, as a consequence, China would not easily accept human rights policy recommendations during the economic or political cooperation process, because China is afraid that EU would use human rights policy as a tool to keep China down in the field of commercial and trade cooperation. For China, there are some unexpected risks if China has to accept human rights provisions: if China accepts the human rights provisions stipulated in the trade cooperation programmes, the EU's criticism of China's human rights issues would be more valid on the basis of the trade cooperation documents. Considering such a political consequence, China is bound to treat the EU's human rights policy cautiously.

In fact China is not only very sensitive to the EU's criticism on human rights issues, but occasionally hints at the possibility of deteriorating economic relations if the EU does not stop lecturing it on human rights issues. This took place, for example, when the EU considered not participating in the Beijing Olympics if China did not change its stance on Tibet, but also relatively recently in 2011, when the Chinese Prime Minister told to the British Prime Minister David Cameron that human rights are a sensitive issue and if the EU does not stop lecturing China on them it could have a negative impact on trade relations.<sup>574</sup>

Despite the limited ability to influence human rights through trade negotiations there are other trade and economy related means through which the EU can make an impact, for example through promoting corporate social responsibility of European companies operating in China. Corporate social responsibility means that companies are supposed to go beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities. The European Commission encourages companies to apply fair employment practices that respect human rights, particularly where products come from outside the EU. For example, the WTO uses some regulation to force companies to do or not to do some things, which could force the companies to protect human rights. This covers a range of areas: Europe 2020 (especially new skills and jobs, youth, local development), Business and human rights, CSR reporting, socially responsible public procurement.<sup>575</sup> The European Commission encourages companies to apply fair employment practices that respect human rights, particularly where products come from outside the EU.

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<sup>573</sup> Some Chinese academics named the provision relevant to human rights and democracy as "human right provision". In fact, when EU and china were planed to initiate the partnership and cooperation agreement in September, 2006, EU had shown its great concern to incorporate the item of "human rights" into the agreement.

<sup>574</sup> Fernando Delage and Garcia Abad, 'China's Foreign Policy, a European Perspective' in José Maria Beneyto, Xinning Song and Chun Ding (eds), *China and the European Union: Future Directions* (2013) 123.

<sup>575</sup> such as the GATT, GATS, TRPs Agreement. Some general regulation about the equal treatment, and the right to know the truth, the right to the property can be found in the mentioned documents.

## 74. Ongoing negotiations

During the 16<sup>th</sup> EU-China Summit in November 2013 China and the EU agreed to start negotiations on a comprehensive EU-China Investment Agreement.<sup>576</sup> By 2015 the sides had agreed on the scope of the agreement and now it is in the phase of hammering out its details. Concerning trade and human rights Cecilia Malmström, the Commissioner for Trade, expressed worries about China's recent steps back in the field of human rights affecting the business climate negatively at the 2016 meeting of the China Britain Business Council.<sup>577</sup> Meanwhile human rights groups do not tone down their criticism against China's human rights record and claim that the EU should do more. Sophie Richardson, the China Director at Human Rights Watch argues, for example, that it is clear by now that persuasion did not work in convincing China that respecting human rights is in its own interest. Thus, she calls for a more assertive stance, even if the EU risks a backlash of anti-Western sentiments with this.<sup>578</sup> As the *Institut français des relations internationales* in its report *Mapping Europe-China Relations* points out, European states must make hard choices between economic interests and their political ideals and we can witness a weakening of willingness of European states to raise human rights issues along economic ones in bilateral negotiations. This is especially so, as they can count decreasingly on the support of their fellow EU partner states.<sup>579</sup>

## 75. Conclusion

To conclude, despite the intention of linking economic goals with promoting human rights European policies towards China frequently tend to prioritise on smooth economic relations. As Ayse Kaya suggests 'instead of using its internal market as a tool to extract change in China's policies, the EU has been in the spell of China's market potential.'<sup>580</sup> The fact that China is firm on excluding any human rights issues from trade negotiations<sup>581</sup> – that is from a Free Trade Agreement – does not make the European position easy in its commitment to promote human rights by linking it up with other issue areas including economic relations. In particular, it should not be overlooked that trade negotiations include many difficult issues to deal with, on which there is disagreement between the EU and China, from economic degradation, to pirated and counterfeit goods or non-tariff barriers, even without involving any human rights issues.<sup>582</sup>

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<sup>576</sup> 'Countries and Regions China' (*European Commission*) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/>> accessed 27 September 2016.

<sup>577</sup> Cecilia Malmström, 'The EU and China: Trade and Investment in the Global Economy' (*European Commission*, 2016) <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154322.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154322.pdf)> accessed 27 September 2016.

<sup>578</sup> 'How to Deal With China's Human Rights Abuses' (*China File*) <<https://www.chinafile.com/viewpoint/how-deal-chinas-human-rights-abuses>> accessed 29 September 2016.

<sup>579</sup> 'Mapping Europe-China Relations' <<https://www.ifri.org/en/publications/ouvrages-de-lifri/mapping-europe-china-relations>> accessed 29 September 2016.

<sup>580</sup> Kaya 224.

<sup>581</sup> Qingjiang Kong, 'China-EU Trade Disputes and Their Management' [2012] World Scientific 71.

<sup>582</sup> Ibid 69.

## D. Chinese perspectives of human rights

### 76. Human Rights Perspective of China under Its Own Culture and Values

It is undeniable that there are certain similarities between China and the EU in terms of the method of human rights diplomacy, which emphasise cooperation and dialogue instead of confrontation in human rights field. Since 1995 when the first human rights dialogue between China and EU began, China has strived to eliminate poverty, improve people's livelihoods, strengthen social warfare and construct democracy and rule of law, and has achieved great success. However, because of the fundamental differences in political ideology, the level of economy and cultural background, there are several divergences in terms of human rights concept, details as follows.

### 77. Sovereignty

The relationship between human rights and national sovereignty is the most sensitive issue among the topics of the human rights dialogue. Due to the loss of national sovereignty and the gross violation of human rights during the Modern Age in China, the Chinese People realised the significance of national sovereignty for protecting human rights. 'The highest interest of each state and its people is protecting national independence and sovereignty. There are no human rights without national sovereignty.'<sup>583</sup>

From the practice of human rights protection, the major part of human rights issues is within a country's jurisdiction. Improving the human rights situation of a country, in the final analysis, depends on the efforts of the government and the people. Firstly, states must maintain their independence to achieve national prosperity and be free from violation by external forces. The history of China is the best example here. From 1840 to 1949, China experienced several eruptions of large-scale war, which were caused by other countries leading to the death of hundreds and thousands of Chinese people. The loss of national sovereignty, looting of the wealth of society made Chinese people lose their basic living conditions. The achievement of human rights, as a result, became impossible in China which totally lost its sovereignty. Besides, countries must develop their economies and create good material and spiritual living conditions for their people. These are only within a sovereign state's capacity to implement.

The Chinese government aims at providing long-term stability and maintains economic growth in order to reduce poverty and to improve significantly the life of the people, effectively safeguarding their rights to subsistence and development. At the same time, the implementation of the nine-year compulsory education free of charge, and the establishment of a sound social security system and public cultural service system, and through legislation to be an institutional guarantee, ensure that citizens of different gender, national, regional and religious beliefs, as well as the elderly and disabled people can enjoy equal rights.

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<sup>583</sup> Wang Lixing, 'Rights of Man' [2003] Shandong People's Press 41.

The EU's attitude towards the relationship between human rights and sovereignty is different from that of China. In the perspective of European countries, the fundamental purpose of human rights is preventing states from possessing excessive power, and allowing people freedom from public authorities represented by states. China has already proposed the Five Principles of Peaceful Coexistence put forward by Zhou Enlai in 1953, the contents of the Five Principles are: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affair, equality and mutual benefit, and peaceful coexistence. This proposal not only shows that China cherishes the national sovereignty extremely, but also affirms the unequivocal position of defending for national sovereignty and opposing interference. The Chinese Government always insists that 'In essence, human rights is an issue which is subject to domestic jurisdiction, respecting national sovereignty and non-interference in internal affairs are the widely-recognised principle of international law.'<sup>584</sup> In China's perspective, even though globalisation has transformed the world significantly, the Form of State has still been existed, thus excepting those issues which would threaten the world peace and security and should prevented the international community, such as colonialism, genocide, military invasion, terrorism, etc., human rights issues are not cross-border issues that could be handled by any state authority but issues that should be only be subject to domestic jurisdiction. However, according to the European countries, the Non-interference Principle is of relativism, which means that with the development of globalisation and the frequent interaction among different states, national sovereignty can be restricted for the protection of human rights. In practice, some Western countries tend to interfere with human rights issues of certain countries. As a consequence, there is a stark contrast between the EU and China; one is aiming at breaking the national boundary to realise universalism, and the other is aiming at protecting national interests and national sovereignty to realise nationalism.<sup>585</sup>

### 78. Individualism and collectivism

Because of the development of capitalism and the bourgeois revolution, individual rights is one of the most essential elements in the EU's human rights concept, which results in a sharp contrast when comparing it with the Chinese human rights concept. One of the main elements of the Chinese human rights concept is collectivism, which calls for wholehearted devotion to public duty; whereas European countries hold the opinion that the main subject of human rights is the individual, thereby collective rights is the expansion of individual rights. It has taken a long time for European countries to accept the concept of collective rights. In the past centuries the common perspective towards human rights in Europe was that individual rights are superior to collective rights. Nowadays, the EU still seems to pay more attention to the development of civil rights and political rights in China. China, as a state, which was always a feudal society in the past, has a traditional notion that individuals shall live in a certain community, under a public authority that can deal with conflicts between individual interests effectively on behalf of community interests. As a result, public authority is the basis for social stability; it can both

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<sup>584</sup>The State Council Information Office of the PRC: Human Rights in China (1991)' <[http://news.xinhuanet.com/ziliao/2003-01/20/content\\_697545.htm](http://news.xinhuanet.com/ziliao/2003-01/20/content_697545.htm)> accessed 19 September 2015.

<sup>585</sup> Liu Xiaolin, 'Discussion on China and EU in Terms of the Difference of Human Rights Concept and Elements of Identity' (2000) 5 *Journal of the European* 27, 33.

realise public interests and protect individual interests simultaneously. The different concept in terms of the relationship between individualisms and collectivism can also be exemplified by the human rights protection approaches chosen by different countries. For instance, European countries developed a human rights approach that attaches great importance to individual rights rather than collective rights. The Reformation and the bourgeois revolution liberated nation states from religious authority, afterwards, with the development of European integration, which was keep pace with globalisation, the public authority of national states has been relatively weakened, the protection of individual rights has been increasingly strengthened thanks to the cross-border judicial jurisdiction. When it comes to China, there is a totally different approach for promoting human rights. On the basis of historical experiences and lessons, China finds a collectivism approach to realise human rights, which is giving priority to the development of productive forces, upholding the principle of common prosperity and putting the right of existence and right of development in the first place in order to create the basis for ensuring political, economic, cultural rights and other individual or collective rights to be developed fully.<sup>586</sup>

### 79. Universalism and particularism

Due to the theory of natural rights, universalism of human rights is one of the main elements of the European concept of human rights. Although China has recognised universalism, there is a difference in the understanding of the concept of 'universalism'. According to China, universalism means 'the universality of the subject of human rights, the universality of the content of human rights and the universality of the purpose of human rights',<sup>587</sup> which does not mean the universality of human rights protection standards and models. Meanwhile, China values the influence of its own historical and cultural traditions on human rights development highly. Even though the EU also emphasises the importance of cultural diversity, it opposes the 'use [of] the interests of state, religion and culture as an excuse to derogate human rights'.<sup>588</sup> Especially, the Chinese Government recognises that human rights include both civil, political rights and economic, social and cultural rights, they are inadvisable and interdependent, and however, the universality should not prohibit states from giving priority to certain human rights. Giving priority to certain human rights is not in contradiction with the universal values of human rights. The Chinese government has never refused to admit the characteristic of the universality of human rights, but it pointed out that at different levels of economic development of society, people are faced with different human rights issues. Every state has the right to arrange the resources in the fulfilment of different human rights within its own proper consideration. Furthermore, because of the differences in social systems, cultural traditions and different levels of economic development, each country is likely to adopt different measures to assure the implementation and realisation of human rights. In the Chinese perspective the development of economy and society is the most significant element for promoting human rights. Developing human rights without economic development would bring negative effect on human rights promotion. Chinese people have undergone a time of stark

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<sup>586</sup> 'The State Council Information Office of the PRC: The Development of Human Rights in China for 50 Year' (2000) <[http://www.gov.cn/gongbao/content/2000/content\\_60013.htm](http://www.gov.cn/gongbao/content/2000/content_60013.htm)> accessed 29 September 2015.

<sup>587</sup> Lixing( n 578) .

<sup>588</sup> European Committees 'European Union Annual Report on Human Rights 1999' (Luxembourg, 1999) 3

poverty in the early days of the state's founding, and this circumstance was transformed dramatically after the enforcement of the Reform and Opening-up Policy. This history has made Chinese people believe that under conditions of resource shortage, giving priority to social and economic rights is the prerequisite for human rights promotion. However, this perspective has also been criticised by European countries. They think the economic, social and cultural rights cannot be realised without public discussion and participation, thus the freedom of speech, the freedom of association and the freedom to form parties and unions should not be ignored.

### 80. The relationship between human rights and democracy

Although both the EU and China realise the significance of democracy, there are several different ways to understand this in terms of the connotation of democracy and the relationship between human rights and democracy. According to Chinese scholars and public officials, democracy is a type of state system and a form of state, which is equal to rule by majority. In addition, democracy is also a kind of political system and political principle, which means the country should be operated under the principle of majority rule. Democracy can also be interpreted as a political procedure or political method, which means the resolution should be decided under the principle of majority rule.<sup>589</sup> China insists that establishing a good democratic regime is the prerequisite for the development of human rights. In practice, China has initiated numerous measures to ensure people's political freedom and rights during the process of democracy development, such as establishing specific rules for the People's Congress Deputy electoral procedure.

In the EU's perspective, democracy means individuals are free to express their opinions and pursue their interests and freedom. They even think the Separation of Powers, multiparty elections and a parliamentary mechanism are also essential parts of a real democracy. China holds the opinion that human rights can be promoted by different forms of democracy, as a result, China established the system of the People's Congress and the system of Multiparty Cooperation and Political Consultation under the Leadership of the Communist Party of China. These systems are entirely different from the forms of western countries, and some of the western countries even consider them as a form of centralism, for example, The European Parliament issued criticism that the Communist Party of China is a 'state within a state' that does not obey the constitutional order.<sup>590</sup>

At this point it is necessary to briefly touch upon the model offered by Taiwan, which is equally sharing China's tradition, nevertheless realises a different type of constitutional order from the mainland. In the late 1980s, opposition forces in Taiwan promoted the country's democratisation and the country gradually realised a transition from authoritarian rule to democracy, making commendable progress throughout the years. It has moved away from a 'martial law regime' and arrived at a system characterised by freedom of speech, the freedom of assembly and association as well as freedom of demonstration. Furthermore, public officials at all levels – including political leaders – are elected

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<sup>589</sup> Cheng Qiuyong, 'Discussion on Democracy and Theoretical System of Socialism with Chinese Characteristics' (2013) 1 Theory Research 39.

<sup>590</sup> European Parliament 'Resolution on EU-China Relations' (Brussels, 2006).

directly. For decades two ruling parties competed in the absence of violence and bloodshed in a peaceful environment where protection of human rights, care for people's livelihood and the promotion of social development made substantial achievements.

But accompanying democratisation there is also regrettable alienation and populism, characterising especially the DPP through its promotion of various forms of binary oppositions, such as: 'love Taiwan, selling out Taiwan', 'Taiwan, China' and 'local political parties, foreign political party'. Secondly, Taiwan's independence forces are hindering the process of democracy in Taiwan – for example, Lee Teng-hui, Chen Shui-bian – by directing the legitimate aspirations of the people for democratic rights towards the dangerous direction of 'Taiwan's independence'. Finally, although Taiwan is much respected for its democratic elections and historical development in western society, it is reasonable to argue that those simply establishing democratic procedures do not suffice.

These are the three current problems democratic development in Taiwan faces today.

### **81. The sceptical voice of the EU's human rights concept**

In general, with the increasing cooperation between EU and China in the field of politics, economy and culture, there is a trend that these two regions have more consistent opinions in terms of human rights, this fact could be proved by the phenomenon that China and EU countries are actively participating in drafting and implementing international human rights conventions to promote human rights, as well as performing international human rights obligations effectively. In addition, China and the EU have reached a consensus on the indivisibility and interdependence of human rights, and have initiated some cooperation in terms of events that threaten world peace such as massive violation of human rights and international terrorism. Indivisibility of human rights is reflected in the universal character of human rights. At the same time countries may legitimately interpret human rights on the basis of their own national identity and characteristics – including their historical, cultural and religious background – emphasising particular aspects of human rights in different historical periods. As a result of this, even if there is agreement that all human rights are equally important, there are still differences between China and the EU in terms of their human rights concepts. The reasons for China's scepticism towards the EU's human rights concepts are as follows:

China's EU Policy Paper states that, 'Due to the difference in historical and cultural tradition, political system and the level of economic development, it is no surprise that EU and China hold different opinion on certain issues.'<sup>591</sup> This statement shows China's attitude towards human rights issues: in the aspect of historical and cultural tradition, the EU and China derived from different civilisations. While Europe underwent the Renaissance, the Enlightenment and the bourgeois revolution, praising individual freedom and equality; China has been in a constant state of feudal society and has emphasised stability, autocracy and the centralisation of state power. Because of these differences, people in European countries dare to challenge public authority for the purpose of fighting for individual rights, while the

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<sup>591</sup> 'The China's EU Policy Paper' (*the Chinese Ministry of Foreign Affairs*) <[http://www.gov.cn/xinwen/2014-04/02/content\\_2651490\\_2.htm](http://www.gov.cn/xinwen/2014-04/02/content_2651490_2.htm)> accessed 30 September 2016.

Chinese people, under the influence of feudal autocracy and Confucianism, tend to compromise with authority and do not have any consciousness of human rights. Furthermore, in terms of their political systems they also differ. The EU promotes a capitalist system based on individuals' pursuit of personal property, property that is considered sacred and inviolable, making it the state's main obligation to protect personal property. China, however, is a socialist country attaching great importance to collective property, and considering communism as the ultimate goal to pursue. In addition to this there is considerable difference in terms of economic development between them. The EU is a region of developed countries with sound social welfare mechanisms, while China still has poverty issues because of its large-scale population and its extensive territory. It is given this difference in economic development that China insists on giving priority to social and economic rights while the EU objects to this.

In terms of the human rights concept itself, there are a large number of differences between China and EU. Because the concept of human rights is a form of ideology, it is fairly hard to transform or accept another kind of ideology coming from a different civilisation; therefore, it is no surprise that Chinese people are reluctant to accept the EU's human rights concept. Specifically, during most of China's feudal society, the dominant ideology was Confucianism, which considers Ren, Yi, Li<sup>592</sup> as the core of this ideology, and there was no Human Rights concept in those periods. Although this ideology did contain some elements of human rights such as 'harmony is precious', it aimed at safeguarding the feudal economy and the autocratic feudal system. Meanwhile, the conceptions proposed by Confucianism such as the thought of People-oriented and the thought of enriching people served for the ruling class to control the ruled class more effectively. Overall, Confucianism is an ideology that was established for protecting the feudal system and for making people obedient to the ruling class. Confucianism also includes some concepts that are opposite to the EU's human rights concept, such as the thought of strict hierarchy, inequality and suppression of people's desire. In addition to this Confucianism does not combine with law, which is the main reason for explaining why there are huge differences between China and the EU.

In contemporary China, China's human rights concept is mainly based on the Marx's Materialism, which makes a sharp criticism of bourgeois concepts of human rights and proposes some original human rights perspectives such as looking at human rights' historical, class and social natures.<sup>593</sup> Combined with Confucianism and Marx's Materialism, China established its own human rights concept, which includes the following precepts:

1) the individual is a social being, individual rights must be realised in social community and shall bear obligations to others and society

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<sup>592</sup> In English, Ren means benevolence, Yi means righteousness, and Li means etiquette. All of these language elements are symbols of moral ritual, which emphasise everyone should do good onto others and should self-discipline.

<sup>593</sup> Wu Kai, 'Marx's Criticism on Bourgeois Concept of Human Rights' (2008) 10 Study Monthly 13.



2) a strong sense of Morality Concern, Confucianism emphasises morality and Chinese people inherited this traditional thought, considering morality as a tool to keep social harmony and to remind individuals to do good onto others

3) particularism of human rights. The development of human rights is consistent with a certain level of social and economic development, and in China only under socialism with Chinese characteristics could human rights be promoted and protected effectively.<sup>594</sup>

In terms of historical reason, due to the history of invasion in the 19<sup>th</sup> century which, was initiated by imperialists, China treated national sovereignty as the most essential element for the development of the state, and as a result, China emphasises the importance of collective rights rather than individual rights. In all of Modern China the history of the imperialist's invasion is a history of fighting for national sovereignty. Because of the loss of sovereignty the right to subsistence and right to development of Chinese people have been violated seriously, which made China realise that political and national independence is the prerequisite for human rights promotion and protection. That is, human rights could be realised only under the condition of national independence and integrity of national sovereignty. Afterwards, when from 1919 to 1949, the Chinese people experienced the New-Democratic Revolution and finally established the People's Republic of China (hereinafter referred to as 'PRC'), this historical event made Chinese people understand the significance of national sovereignty more deeply. Therefore, Chinese people are rather sensitive about those events which infringe upon national sovereignty, especially those cases that use human rights as an excuse to interfere with China's internal affairs.

In addition, after the establishment of PRC, because of a series of problems such as a large population, the shortage of resources, the infestation of various natural disasters as well as the social order that was destroyed and ruined by the Chinese civil war, it was rather difficult to rehabilitate the land. A huge number of Chinese people lived under extremely poor conditions and the development of industries almost ceased. As a consequence, according to the Chinese Government, economic development is the fundamental step for eliminating poverty, which is also the prerequisite for human rights development. Thus, economic development came to be seen as the cornerstone for solving China's problems. It is firmly believed that economic development and the enhancement of national strength is the fundamental solution to the basic human rights problems of China. Economic development is inseparable from the protection of human rights. The subsequent achievements of the Chinese Government are sufficient evidence to prove China has chosen a reasonable approach to realise human rights. This approach was formulated on the basis of the national condition of China; a large developing country with 1.4 billion people, a rather unevenly developed economy, as well as poverty. Under such conditions the main obstacle for realising human rights are economic, thus it is by boosting productive forces that people's rights to subsistence and the right to development could be realised. This focus on economic development has the corollary that perhaps other human rights such as civil and political rights could only be fully realised in the long run.

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<sup>594</sup> Sha Qiguang, 'Traditional Culture of China and the Human Rights Concept of China' (2003) 4 40.

In promoting the universal application of international human rights standards the EU tends to attribute the particularism of human rights to different rooted in culture between the two sides. China puts an emphasis on the particularism of human rights and is very cautious about western countries using human rights as an excuse to interfere into China's internal affair. For example, it seems that the EU increasingly prefers to promote its human rights concept linking it to economic cooperation with non-EU countries and insist on incorporating a 'human rights provision' in trade cooperation documents. China, however, firmly opposes these because they increase the risk of foreigners controlling the economic development of China, on the pretext that the Chinese Government did not follow the human rights provision stipulated by the documents.

In addition to this, during human rights dialogues between the EU and China, the EU has always combined human rights with democracy, freedom and rule of law, aiming at advocating its democratic system and political values to China, and hoping to transform China's political direction. At the same time the EU constantly criticises China's policies such as its Family Planning Policy (always from the standpoint of its own social modes and experiences). Furthermore the EU also criticised China for the 'Liu Xiaobo Events' or conditions in Tibet and even invited the Dalai Lama to give a speech in the European Parliament. All of these actions made China act with suspicion concerning the EU's intentions for interfering into China's internal affairs, infringing China's sovereignty. Consequently, China feels sceptical about the human rights concepts promoted by the EU and shows reluctance to accept the EU's human rights policy.

## 82. Recommendations

Overall, there are both issues of agreement and debate between the EU and China in terms of human rights concept. In the case of global issues related to peace and security, such as the Iraq War, North Korea's nuclear weapons programme, or the Middle East, the EU and China reached a consensus, thus these are promising signs for deepening cooperation and relationship between the EU and China, expand the sphere of consensus in terms of the human rights concept. At the same time it is undeniable that there are great many issues of disagreement between the EU and China, such as the relationship of individual rights and collective rights, the universality and particularism of human rights, the meaning of democracy, etc. Fortunately, both the EU and China are willing to initiate human rights dialogue on the basis of mutual respect to deal with all of these conflictions because they realise that human rights dialogue is not only a reasonable approach to exchange ideas in terms of human rights issues, but also an important way to promote healthy development of the EU-China relationship. Even though it is hard for China to accept human rights policies proposed by the EU, China is aware of the importance of preventing frictions and avoiding side effects on the strategic partnership between EU and China. After all, China needs the technical and financial support from EU to boost its economy, while EU cannot lose such a large market.<sup>595</sup>

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<sup>595</sup> Zhu Liyu and Zhang Xiaojin, 'The Difference and Similarities of Human Rights Concept between China and EU and Its Influence on China-EU Relations' (2002) 4 The Journal of National school of Administration 87.

Therefore, for the purpose of maintaining a good and stable trade and economic relationship, both the EU and China should treat human rights issues cautiously, China should treat human rights policy proposed by the EU more objectively and should not reject it blindly, and it should not immediately regard all critiques over human rights issues as an interference into its domestic affairs. Furthermore, China should promote its own human rights concept to Western countries to make them understand that China has strived to protect human rights in a rational way in accordance with its national condition. Meanwhile, EU should not always criticise or blame China's policy on human rights promotion, through dialogue or communication would be more reasonable and more acceptable for China. All in all, respecting and understanding the difference and confliction in terms of human rights concept is one of the most effective approaches to increase the positive effect of human rights dialogue.

## V. Conclusion

The three case studies above discussed countries that differ greatly in terms of their cultural, historical, and political background. The three case studies also showed that the policy instruments used and the nature of interaction between these countries and the EU differ considerably. Thus, whereas there have been more than 30 rounds of human rights dialogues with China, only a few such events took place with South Africa. Despite the differences that characterise the relations of the EU with these countries, there are a few general remarks and suggestions that could be derived from these reports.

The main lesson, which could be drawn from these studies, is that the EU should not overlook the historical legacies and cultural differences of its partners and keep in mind that they may entertain different conceptions of human rights, democracy or the rule of law from that of Europe. This finding is in line with the conclusion of Deliverable 3.5, which has scrutinised the human rights dialogue in case of five countries. At the same time however, this present report supplements these findings in two important ways:

First, it underlines the importance of local knowledge for conducting and supporting projects of NGOs, civil society actors or others efficiently. That is, without knowing the situation of local groups, without recognising their practical needs, the EU's assistance cannot reach those most in need and may not have its full possible impact.

Second, this report offers an overview of the EU's efforts in promoting human rights from the perspective of the EU's partners. It shows why particular issues these countries are highly sensitive about and at what points partner countries find the actions and the ambition of the EU worrisome.

In addition to these two points the case studies suggest that the EU should pursue a pragmatic approach. Firstly, our researchers suggest for the EU to concentrate on issues where there is some level of mutual agreement – such as promoting environmental issues, poverty alleviation or for example social development in the case of China; while secondly, they call on the EU not to be over-ambitious, and for example, not to link economic issues with human rights ones. The reasons for both are rooted in the sensitivity of the partner countries easily reading these as attempts at interfering in their sovereignty. Here, however, a caveat should be made. It must be acknowledged that the case studies in these three reports were composed by local researchers, thus this suggestion for a pragmatic and non-confrontational strategy may come naturally for them when writing a report for the EU.

The three case studies in this report focused on three issue areas in order to evaluate the EU's efforts at improving human rights in these countries. These were: 1) the human rights dialogues seen from the perspective of the target countries; 2) actions on the ground – i.e. the EU's support offered for local groups and projects; 3) the link between human rights and economic / trade relations; and finally 4) different understandings of human right in these countries and critics that are typically raised in these

countries against the EU and the West in general. Below we reflect on each of these in turn briefly. Finally, a brief summary of the main points raised by the individual case studies concludes the report.

## A. Human Rights Dialogues

In the first part of the case studies the researchers aimed at offering a detailed description of the unfolding of the human rights dialogue between their respective countries and the EU. In case of India and China the dialogues – even if reported to have been productive and fruitful – take place between parties with different conceptions of human rights. This *difference* in the case of the Chinese vocabulary could be rephrased saying that China and the EU have different priorities. Namely, whereas China sees economic development as a precondition for providing human rights, the EU is averse to any hints that suggest that some human rights may take precedence over others. The case of India is somewhat similar, although here the difference in approach to human rights is not so pronounced. What matters here more are Indian aversions to being lectured and the significance of cultural and financial limitations in realising human rights ideals. Furthermore, it is interesting to note that Indians have the impression that the Europeans treat the Chinese differently (see report), i.e. the EU is more careful and forbearing with them. The case studies offered an evaluation of the dialogues and introduced local opinions on how the dialogues are seen by the EU's partners in the respective countries.

One point, which is important to note here is that the South African case differs radically from the other two cases. The reason for this is that whereas at the constitutional and governmental level there is a general agreement between the EU and South Africa, there are many domestic conflicts within South Africa between those supporting the constitution and those standing for traditional authorities and values. Thus, here the EU meets a partner at the governmental level, with which it is mainly in agreement, contrary to the cases of China and India. This makes the tone of discussions radically different. (Having said this one should remember that there are still disagreements between the EU and South Africa on how to promote human rights internationally, and whether UN resolutions are useful instruments for this.)

## B. Human rights projects

Each of the case studies offers an overview of human rights projects and the situation of NGOs in their respective countries (The actual focus in case of each study was chosen by the authors of the reports, on the basis of the issues they saw of great relevance for offering an overview of the context in which the EU's human rights projects were to be realised). As the three cases differ substantially it makes little sense trying to draw a general conclusion. There are two important points, however, which are worth highlighting.

The first one is the importance of local knowledge. The reports suggest that the EU does not have enough information to design its projects in such a way to realise their full potential. The South African study points out, for example, that the EU's support for human rights projects is mostly accessible only

for professionalised actors in urban areas. The problem is not that others are unaware of opportunities – although this may also be a problem – but that it is only actors and organizations that have the necessary administrative capacity to fulfil the bureaucratic requirements created by the EU for acquiring these funds. This example shows that many NGOs, civil actors and activists may lack capacities and skills to absorb the EU's support. In case of China similarly lack of capacities is pointed out. The case study on China pinpoints the dire conditions that local NGOs face in terms of human resources and skills. Being aware of these local problems and designing projects accordingly may make the EUs projects more efficient.

The second point suggested by local experts for the EU is to cooperate with local authorities, or in other words to take a pragmatic approach in deciding what to support. Pragmatism here may mean looking for local partners, but foremost engaging in projects, which are supported, but at least not regarded with hostility by the authorities. This may be important in case it is regarded important for these projects to have publicity and its example to have an impact in general on the local population. The problem that comes to the fore here is access to information and access to the media. For example in China because the media is under state control efforts with an official support are much easier to inform the wider audience about. The more people know about the project the bigger effect it may have in changing attitudes concerning human rights and educating the general public.

This, however, raises an obvious dilemma concerning a trade-off. Putting it in very simple terms pragmatism means catering to official preferences, which means that certain important concerns may not get attended to, nevertheless those where resources are directed with official consent would get publicity. The point, which is important to see here, is that support has two objectives. On the one hand it is about those in need, but on the other hand it is also about changing the general attitude of people concerning human rights. Pragmatism may mean not only cooperation with authorities, but also the balancing between these two objectives. The Chinese case study, for example, clearly shows that in China not only the notion of human rights, but also the notion of grassroots organisations, NGOs etc. are totally unknown for many. Thus, awareness building and spreading information about human rights issues is highly important for promoting human rights in China. Taking a confrontational stance by the EU may actually undermine this ambition even if at the same time it can be an important act of solidarity and a stand-up for universal values of human rights. Arguably the proper decisions how to balance between these objectives can only be made with prudence by weighting different objectives. Yet, as the Indian case study makes it clear, all efforts of influencing these countries must be made very carefully, as they are easily interpreted by the EU's partners as just new steps in the 'naming and shaming business', where the West tries to impose its values on others.

### **C. Economic relations and human rights**

The next issue our studies focused on was the relationship between trade/economic issues and human rights. This is an essential topic to discuss given that these countries have shown impressive economic growth in the past decades and they are important economic partners of the EU. At the same time what makes these case extremely is that these are not banana republics, as one commentator noted. That is,

while in case of smaller partners the EU's economic might may be used as force to achieve compliance in terms of human rights issues with the countries under study here the EU is negotiating with economic giants (less so in case of South-Africa), thus strong mutual dependence between them and the EU defines the background of negotiations in general.

Our case studies suggest that although the EU would like to link up human rights issues with economic ones, the partner countries are strongly against this. As the Commerce and Industry Minister of India pointed out including a human rights clause in the EU-India Bilateral Free Trade Agreement would have been a 'deal breaker.' The case is similar in China. It is important to note that by now economy became a field where parties could mutually hurt one another, which is illustrated by the Chinese Prime Minister's comments suggesting in 2011 that lecturing China on human rights issues could have a negative impact on trade relations.<sup>596</sup> Thus, the EU's clout in using economic issues for making human rights concessions seems extremely limited.

This discussion above on the EU playing in the same league in terms of economic might is true for China and India, but not for South-Africa, where dissimilarities in economic power are obvious. Here the South-African complaint is that the EU is actually not linking trade issue with human rights, but takes advantage of its economic clout and the trade deals it offers for South-Africa does not take into consideration that an unfavourable trade deal for South-Africa could lead to the impoverishment and deterioration of life conditions for rural South-Africans. Thus, on the basis of the South-African case study it can be argued that the EU should pay attention to the linking of economic and human rights issues not only for forcing its partners to respect human rights, but that the EU should also consider that a beneficial economic deal forced upon its partner may have negative impact on life conditions and thereby also on human rights in its partner's country. (In the South-African case study the possible negative effects of EPA were raised for consideration in this respect).

#### **D. Different understandings of human right, critic of the West**

The three case studies offered summaries on the way human rights are conceptualized in the respective countries and also made remarks on why these countries see problems with the policies and the attitude of the EU in promoting human rights.

What we can conclude from this reverberates other reports that the EU should not overlook cultural differences and historical legacies that provide the backdrop for interactions with its partner countries. The EU should not overlook the colonial experience of these countries and their scepticism towards the EU, that is their inclination to interpret the EU's actions as unjust and hypocritical, differing little from European arrogance and attitude of the colonial era.

It is important to underline here that the issue is not so much whether the EU is right or wrong in its claims at particular occasions, but the fact that its partners are very sensitive to moral lecturing. If we

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<sup>596</sup> Delage and Abad (n 572) 126.

take South-Africa for example, we see that the Apartheid regime was a European import and even though Europe made great efforts to support dismantling it, the legacies of apartheid are still present and provide the general background for South African politics today. The situation is similar in case of China. In China the century before the creation of the Peoples Republic of China is remembered as the century of humiliation. It is remembered as the century when western powers – joined by Japan – encroached on Chinese and sovereignty and exploited China for their own interest (this is true even if the Chinese took their fair share in ruining their own country). No wonder with this legacy any attempts by the EU for pushing for its norms and values are easily interpreted as threat to national sovereignty. Along these lines the question breaks down to the issue of global responsibility equally in the Chinese and India case study, but perhaps also in the case of South Africa. Namely, here the question of responsibility comes to the fore in terms of resources, because clearly it is naïve to assert that realizing human rights have no financial implications (While respecting human rights may come at no costs, but empowering people, institutions, courts, information etc. does). From this it is just a small step to raise the issue whether the universality of human rights should not also be interpreted also as a universal responsibility to realise them? As a representative of India quoted in the Indian report put it very succinctly:

Should claims of universal concern for human rights everywhere not be matched by assumption of legally binding obligations to contribute resources to developing countries so that they can create the economic conditions in which human rights and human dignity would flourish? Can there be authority to intrude, but no responsibility or obligation to help remedy?<sup>597</sup>

## E. Country Specific Comments and Recommendations

Following these general comments, the following last part of this report includes a brief summary of country specific concerns and recommendations, discussed in the three case studies.

### 1. India

In the case of India human rights dialogues started in 2004 and according to the Indian partner although they are cordial in their atmosphere, they are not dialogues between experts. Given that the Indian side is very sensitive to any comment by the EU that could be interpreted as lecturing it is advisable for the EU to take this Indian sensitivity into consideration.

Concerning human rights projects although these clearly make a difference they are very few in number considering the sheer size of India and it is not easy to evaluate their actual impact as proper assessment is lacking. Having said this, the Indian partner underlined a few points for consideration in designing future projects. First, EU supported projects typically only run for three years, which greatly limits their potential impact. Second, given the selection criteria applied, only large and experienced

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<sup>597</sup>Statement by Permanent Representative of India H.S. Puri at the 59<sup>th</sup> session of the Commission on Human Rights (21 March 2003).



NGOs have a chance to successfully apply for funding (although there are a few exceptions recently that offer both larger and smaller projects). In other words the EU is criticised for its lack of administrative flexibility, which may also contribute to the failure of its projects to reach out to the more rural areas of India. Finally, the problem that is important to underline is that many civil society groups are highly aid-dependent, thus once the EU support runs out they have to stop operating. Therefore, there is lack of sustainability and hence it is questionable if these projects can also contribute to the goal of creating a self-sustaining civil society in the long run.

Regarding the linking of trade and human rights issues India takes the firm stance that these two should be treated separately and that the EU should not try to insert human rights clauses into a free trade agreement as 'if they [human rights issues] were automobile emission standards'.<sup>598</sup>

Finally, India is sceptical about the international human rights regime and emphasises the country's strategic autonomy. India sees the UN Human Rights Commission's actions as an 'annual ritual of sitting in judgement over others',<sup>599</sup> a misplaced practice that can hardly achieve its desired objectives. India is also suspicious of the West seeing the promotion of human rights as a means of imposing western values and points out that the West's lack of concern for issues of economic development, ignoring that at least a minimal level of these are the prerequisite of guaranteeing civil and political rights. Furthermore, India also points out the lack of understanding for the nature of the challenges it faces, for example, in the region of Kashmir. The India case study calls on the EU to take a more understanding and self-critical stance, for example, to admit its deficiencies in fulfilling its human rights obligations in immigration issues. Finally, it is also noted in the case study that the Indian side has the impression that the EU takes a different position in negotiating with China than it does it with India.

## 2. South Africa

In the case of South Africa, the EU's (Europe's) role in promoting human rights dates back to the Apartheid era, with EEC's sanctions against the regime. Since the fall of Apartheid the EU has been supporting South Africa's efforts for democratisation and development including human rights. A formal human rights dialogue started with South Africa in 2012. Although there is a general agreement between the EU and South Africa, their opinion differs, for example, on country specific resolutions of the UN.

The South African case study introduced the problem of LGBTI and women's rights in detail. It has pointed out that despite progressive constitutional provisions violations against LGBTI persons is a problem in South Africa, which triggered a resolution by the EU in 2012. Also in promoting women's rights the positive role of the EU has been noted. At the same time there were also a few critical remarks. That is, the report criticised dialogues for focusing mainly on multilateral issues – for example, UN resolutions – and not on national issues. In connection to this, it has also been pointed out that civil

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<sup>598</sup> Tharoor, 'Reconsider Relations with the European Union' (n 164).

<sup>599</sup> Statement made by Hardeep Singh Puri, Ambassador and Permanent Representative of India at the 61st Session of the Commission on Human Rights (Geneva, 14 March 2005).

society groups are not involved in the dialogue, although these groups call for discussing domestically relevant issues.

Next the study discussed the EU's role in supporting civil society in South Africa. Here a few examples were discussed such as the Foundation for Human Rights, which was established with the support of the EU, with the aim of administering grants for human rights projects. The case study discussed challenges that these projects face. First, it was pointed out that the EU's support for civil society is not well coordinated. It was also noted that channelling EU support through South African governmental organs may be of little help, as they are themselves ineffective and uncoordinated. Furthermore, the study pointed out that EU support faces problems reaching rural areas, while the stringent regulatory requirements of the EU may also undermine the efficiency of the programmes (A similar observation was made in the Indian contribution).

In evaluating the relationship between economic relations and human rights issues the report points out that the EU and South Africa concluded a Trade, Development and Co-operation Agreement (TDCA) in 1999, while the EU-SADC Economic Partnership Agreement (EPA) was concluded in 2014. As only two years have passed since 2014, it is difficult to evaluate the actual impact of the latter. Nevertheless it is a general concern how these agreements effect South-African agricultural sector. In case the impact would be negative – given among others the competition with highly subsidised European agricultural products – the final outcome could lead to increasing unemployment and could perhaps aggravate poverty in South Africa, leading to deteriorating human rights conditions. As the case study points out even though there are provisions in the EPA for poverty reduction and sustainable development its concrete impact remains to be seen.

The final section of the South African study points out the tension between the country's commitment to western understandings of universal human rights and the existence of cultural practices contrary to these within the country. Here, it is important to highlight that in the South African case the conflict between traditional (non-European) norms and human rights are played out by South African actors, thus problems here differ radically from the Chinese and Indian case. Finally, in order to highlight the background of the conflict the study discussed *ubuntu*, the core notion of the traditional value system of Africa rooted in communal belonging, proposing an alternative to western values rooted in individualism and human dignity.

### 3. China

EU-China dialogues have the longest history. The first round of dialogues was held in 1995 and by 2015 already the 33<sup>rd</sup> dialogue had taken place. As a general assessment the study concludes that China's attitude towards this mechanism has shifted from a passive to a more positive stance. At the same time it is pointed out that the dialogues have little media coverage, thus it is reasonable to say that it remains an 'elite level interaction', with little direct implication for the public.

On international NGOs and the support to NGOs by the EU the analysis points out the difficulties NGOs face if they attempt to operate in China, first. Next, it is highlighted that Chinese society lacks experience and understanding of both human rights and also the role NGOs may play in a society. As a recommendation the sections advises international actors to take a pragmatic stance and focus on issues, which are not sensitive for the government and thereby they could not only achieve their goals, but could also create a welcoming atmosphere for NGOs in general. It is by taking such a bottom up approach for creating a more open social environment that human rights could be efficiently promoted in China.

In the case of the relationship between economic/trade relations and human rights, similarly to India the Chinese government is averse to linking the two issue areas. Furthermore, as the study highlights China tends to take an increasingly assertive tone and uses its economic clout suggesting that criticising it on human rights may have negative effects on economic relations.

In discussing the Chinese criticism towards the EU the case study points out the EU's lack of understanding for the enormous significance sovereignty and order has in China. Since the 19<sup>th</sup> century and following the humiliation from the West, China treats national sovereignty as the most essential element for development and believes that the enhancement of national strength and economic development are fundamental for realising human rights. Resistance to human rights in China is rooted in the fear that human rights are only used as a pretext by the West for increasing control over China and changing its political direction. Here the authors recommend that the EU approach the human rights issue more cautiously. Europeans should understand China's position and realise that China acts in a rational way given its domestic conditions.

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