



Human rights concepts in EU Human Rights Dialogues

Balázs Majtényi
Lorena Sosa
Alexandra Timmer



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Authors	Balázs Majtényi, Lorena Sosa, Alexandra Timmer, with the collaboration of Rajendra Jain (India), Renato Constantino Caycho and Chiara Marinelli (Peru), Jeremy Gunn, Alvaro Lacuesta and Sara Benjelloun (Morocco), Magnus Killander, Mona Kareithi and Bright Nkrumah (African Union), Zihan Yan (China).

Executive Summary

This report presents five **case studies on EU Human Rights Dialogues** (HRDs). The case studies concern the HRDs with the African Union, China, India, Morocco and Peru. Building on the findings of the previous reports in Work Package 3 of the FRAME project, the aim of this report is to explore how domestic and organisation-based conceptions of human rights, democracy and rule of law emerge in HRDs and what consequences these conceptions entails for the HRDs' goals.

The report starts with a description of the methodology used (Chapter II). Next, Chapter III puts HRDs in context by examining their institutional setting. The Chapter specifically focuses on three key issues: respect for sovereignty and the equality of participants; transparency; and the priorities of the dialogues.

Chapter IV is dedicated to the case studies. The Chapter is divided in two parts: the first part focuses on General Human Rights Dialogues and the second on Formal Human Rights Dialogues. General HRD's are Dialogues of a general nature based on regional or bilateral treaties, agreements or conventions or strategic partnerships dealing systematically with the issue of human rights. The first case study in this category concerns **India**. This is an elaborate study. It fills a gap in the scholarly literature since the EU-India HRD has so far been little researched. One of the main difficulties that the case study highlights with the HRD is that the EU is conditioned by an essentially Eurocentric world-view about India. The next case study in this first part of the Chapter concerns **Peru**. The research shows that although the EU's conceptions of human rights differ in some respects from the Peruvian, the Dialogue has been productive. The last case study in the part of General HRD's concerns European Neighbourhood Policy (ENP), more specifically **Morocco**. This too is an elaborate case study which presents a much-needed addition to the academic literature. It details the institutional setting of the dialogue and describes to what extent diverging conceptions of human rights appear in the dialogue, and what the sensitive issues are in this respect. Despite the conceptual differences, this is probably the most successful dialogue of the ones analysed in this report.

The second part of the Chapter, the part on Formal HRDs, starts with a brief case study on the **African Union**. In this dialogue there are real points of contention between the two partners, such as the views on the International Criminal Court and concerning the issue of migration. The case study raises the asymmetry of the bilateral relation rooted in the colonial past. It closes with a brief case study on the HRD with **China**. It highlights that the EU and China conceptualise human rights, democracy and rule of law differently. These differences are emphasised often by the Chinese. Guarding its national sovereignty, China is cautious about the suggestions made by other powers.

In Chapter V the reports concludes with discussing how the institutional settings of the Dialogues impacts their content. It then reflects on key overarching topics, namely state sovereignty; the critique of double standards; universality and cultural diversity; indivisibility; when conceptions patter; and the politicisation of conceptual differences. It closes with some suggestions on how the HRD's could be strengthened.

Abbreviations

AA	Association Agreement
ACHR	Arab Charter on Human Rights
AP	Action Plan
APALD	Authority for Parity and the Fight against All Forms of Discrimination
CC	Constitutional Court
CCDH	Advisory Council on Human Rights
CCR	Consultative Committee on Regionalism
CDHRI	Cairo Declaration of Human Rights in Islam
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFSP	EU Common Foreign and Security Policy (1993, enhanced after 1999)
CNDH	National Council for Human rights
CoE	Council of Europe
COHOM	Working Party on Human Rights
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
DCFTA	Deep and Comprehensive Free Trade Area (ALECA in French)
DIDH	Inter-Ministerial Delegation for Human Rights
DUE	Delegation of the European Union
EAEC	European Atomic Energy Community
EC	Commission of the European
ECDL	European Commission for Democracy through Law (commonly known as the Venice Commission)
ECOSOCC	Economic, Social and Cultural Council
ECSC	European Coal and Steel Community
EEAS	European External Action Service (launched 2011)
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
EMHRN	Euro-Mediterranean Human Rights Network
EMP	Euro-Mediterranean Partnership (1995)
ENI	European Neighbourhood Instrument (2014)
ENP	European Neighbourhood Policy (2004) (PEV in French)
	European Neighbourhood Partnership (2007) (16 countries east and south)
ENPI	European Neighbourhood and Partnership Instrument (ended 2013 see ENI)
EPAS	Enlarged Partial Agreement on Sport
EU	European Union (and predecessor organizations)
EU MS	European Union Member States
FDI	Foreign Direct Investment
FIDH	International Federation for Human Rights
FTA	Free Trade Area
GADEM	The Anti-Racist Group for the Support and Defence of Foreigners and Migrants

GMP	Global Mediterranean Policy
HR	Human Rights
HR/VP	High Representative of the European Union and Vice-President of the European Commission
HRD	Human Rights Dialogue
HRDGs	EU Guidelines on Human Rights Dialogues with Third Countries
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IER	Equity and Reconciliation Commission
ILO	International Labour Organization
JAES	Joint Africa-EU Strategy
JS-EW	Joint Secretary (Europe West)
JS-HR	Joint Secretary (Human Rights)
JS-UNES	Joint Secretary (United Nations Economic & Social Division)
LAS	League of Arab States
MAEC	Ministry of Foreign Affairs and Cooperation
MEDA	Mediterranean Agreements (ceases 2011 with ENPI)
MFA	Ministry of Foreign Affairs
MINURSO	UN Mission for the Referendum in Western Sahara
MOU	Memorandum of understanding for the establishment of a mechanism for bilateral consultations
MRTA	Movimiento Revolucionario Tupac Amaru
MTC	Mediterranean Third Countries
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
NSC	North-South Centre of the Council of Europe
ODA	Official Development Assistance
OIC	Organisation of the Islamic Conference (until 2011) Organisation of Islamic Cooperation (after 2011)
PACE	Parliamentary Assembly of the Council of Europe
PCA	Partnership and Cooperation Agreement
PCP	Peruvian Communist Party
PEV	Politique Européenne de Voisinage (ENP in English)
QPC	Priority Preliminary Ruling on the issue of Constitutionality
RP	Renewed Partnership
SGG	Secretary General of the Government
SL	Sendero Luminoso
SMCs	Southern Mediterranean Countries
UDHR	Universal Declaration of Human Rights
UfM	Union for the Mediterranean (2008) (43 countries)
UN	United Nations
UNGA	UN General Assembly
UPR	Universal Periodic Review
VIP	Voluntary Interruption of Pregnancy

Table of Contents

Executive Summary.....	ii
I. General Introduction	1
II. Methodology	3
III. Human rights dialogues in context.....	5
A. Introducing HRDs.....	5
B. Respect for sovereignty and equality of participants of HRDs.....	7
C. The issue of transparency.....	8
D. Priorities of dialogues.....	10
IV. Case Studies.....	12
A. General Human Rights Dialogues.....	12
1. Bilateral Relationships	12
2. European Neighbourhood Policy.....	37
B. Formal Human Rights Dialogues	58
1. African Union	59
2. China	66
V. Conclusions.....	71
A. Institutional setting of the dialogues	71
B. Reflections on cross-cutting issues	72
1. State sovereignty	73
2. Double standards.....	73
3. Universality and cultural diversity	73
4. Indivisibility.....	74
5. (When) Conceptions matter	74
6. Role of politics: politicisation of conceptual difference	75
C. Final suggestions.....	75
Bibliography	77
Legal and policy instruments	77
Literature	79
Other	82
Annex I	87

Tables and Figures

Tables

Table 1: India-EU HRDs since 2004	14
Table 2: Core and periphery elements of the Peruvian conceptualisation of human rights	33

I. General Introduction

The purpose of Work Package 3 of the FRAME project, of which this deliverable forms part, is to explore the different meanings given to the concepts of human rights, democracy and the rule of law in different settings related to EU internal and external action. Deliverable 3.1, the first report in this work package, provided a state-of-the-art literature review of those concepts, revealing how these remain contested and are continually subject to questioning and revision.¹ Deliverable 3.2 focused on the conceptions of human rights, democracy and rule of law that can be found in European Union (EU) internal and external action, as well as conceptions found at Member State level (with a case study on Hungary).² Deliverable 3.3 offered an analysis of the different domestic understandings and perspectives on human rights, democracy and rule of law in several third countries with which the EU has established bilateral cooperation (*i.e.* China, India, Peru and South Africa).³ Deliverable 3.4 focused on conceptualisations of human rights, democracy and rule of law promoted by international organisations.⁴ These included the United Nations (UN), the African Union (AU), the League of Arab States (LAS) and the Organisation of Islamic Cooperation (OIC), given their impact on global and regional policy-making and the EU's frequent dealings with them. The analysis provided insight into the inconsistencies between formulation and use of the concepts, and the shortcomings that the organisations face in the implementation of those conceptions.

The present study is the fifth and last report in Work Package 3. It focuses on a specific setting in which different conceptions of human rights, democracy and the rule of law arise: the human rights dialogues (HRD) which are organised by the EU in combination with the third country or organisation participating in the dialogue. There are different types of dialogues between the EU and third countries and international organisations. This report focuses on two main categories of human rights dialogues identified by the EU Guidelines on Human Rights Dialogues with Third Countries⁵ (HRDGs or Guidelines), which are:

- Dialogues of a general nature based on regional or bilateral treaties, agreements or conventions or strategic partnerships dealing systematically with the issue of human rights, including:
 - Relations between the EU and Latin America;
 - The Barcelona process (Mediterranean countries) and the neighbourhood policy;
 - Bilateral relations in the framework of association and cooperation agreements.
- Regular, institutionalised dialogues devoted solely to human rights between the European Union and a third country or regional organisation. These are referred to in this report as 'formal human rights dialogues'.

¹ FRAME Deliverable 3.1.

² FRAME Deliverable 3.2.

³ FRAME Deliverable 3.3.

⁴ FRAME Deliverable 3.4 (submitted for approval by the European Commission on 11 April 2016).

⁵ EEAS, 'EU Guidelines on Human Rights Dialogues with Third Countries – Update' (2009) <http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf> accessed 14 April 2016 (EEAS Guidelines).

This report provides a general overview of these two types of dialogues and their differences, which are further examined in practice by case studies focusing on specific countries and regional organisations. We have selected the EU Human Rights Dialogues with the African Union, China, India, Morocco and Peru in order to provide an overview of the different types of dialogues in place. Building on the findings of the previous reports, the aim of this report is to explore how domestic and organisation-based conceptions of human rights, democracy and rule of law emerge in HRDs and what consequences these conceptions entails for the HRD' goals.

The structure of the report is as follows. Chapter II provides detailed description of the methodology used, and explains some of the practical and methodological choices we made. Chapter III discusses some preliminary aspects to be considered in relation to the HRDs, namely the issue of transparency and the priorities of the dialogues. Chapter 0 is dedicated to the case studies. Section IV.A focuses on general human rights dialogues taking place in the context of bilateral relations between the EU and third countries. Two mechanisms are discussed: bilateral relationships (strategic partnerships and political dialogues) and the European Neighbourhood Policy (ENP). The case studies on bilateral relationships focus on the strategic relationship with India (Section IV.A.1.a)), and the political dialogue with Peru (Section IV.A.1.b). Among the ENP states, we have selected Morocco (Section 0). Section IV.B focuses on formal human rights dialogues. Section IV.B examines the conceptualisations emerging in the HRD with the AU, which is so far, the only formal dialogue with a regional organisation, while **Error! Reference source not found.** explores conceptualisations emerging in the HRD with China, probably the most well-known HRD of all. Chapter **Error! Reference source not found.** includes this report with final observations and overarching reflections.

II. Methodology

This report draws on the conceptualisations of democracy, rule of law, and human rights, that have been previously identified in FRAME Work Package 3, particularly in Deliverable 3.2, Deliverable 3.3 and Deliverable 3.4. For a detailed understanding of the concepts emerging in HRDs, and their social and political aspects and points of contention, we therefore refer to those reports.

This report is partially based on a desk review of primary sources (agreements and other policy documents) and secondary literature. The level of information available on the different HRD varies considerably however. While there is a significant amount of research and publications on the HRD with China (which started in 1994),⁶ there is less academic literature regarding India-EU, Morocco-EU, Peru-EU and African Union HRDs.

In addition to primary and secondary sources, semi-structured interviews with HRD participants and experts have been conducted to fulfil gaps in information in all case studies. Due to the sensitive nature of the HRD, interviewees will remain anonymous and only basic data concerning their identity is provided.

The fact that there is very little research on the India-EU human rights dialogue (taking place since 2004) is largely due to confidentiality issues. The human rights dialogue is held behind closed doors with no statement or report issued after the dialogue. This case study on India largely draws from public statements, confidential interviews with Indian and EU officials, short references in the EU's Annual Report on Human Rights; responses by the European Commission or the Council to questions raised in the European Parliament; official documents and statements by Indian leaders and officials.

The case study on Morocco relies on primary and secondary sources and selected interviews with Moroccan and European External Action Service (EEAS) officials. In the case of Morocco, since this country was not included in Deliverable 3.3, an elaboration of the domestic conceptualisations of human rights, democracy and rule of law is attached in the Annex to this report.

The case study on Peru also relies mainly on primary sources, with very limited attention to secondary sources. This is because there is a lack of investigation regarding HRD with the EU (taking place since 2011) and most research is solely focused on the free trade agreement (FTA).⁷ This could also be the result of the general lack of investigation regarding international cooperation or foreign affairs in the case of Peru.

The case study on the African Union relies on primary sources and selected interviews with AU and EU officials, participants of AU-EU HRDs.

Regarding the structure of the selected case studies, these are two-tiered. They start with a general introduction to the specific HRD under review describing the institutional setting of the dialogue

⁶ See eg Philip Baker, 'Human Rights, Europe, and the People's Republic of China' (2002) 169 *China Qrt* 45; Georg Wiessala, 'Duality, Dialogue, Discourse: Some Perspectives on Human Rights in EU-China Relations' (2009) *Europ Stud* 83; Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (Routledge 2015) 200.

⁷ Jorge Valdez and Farit Docarmo, 'El Acuerdo Comercial con la Unión Europea: Un Largo Camino para Abrir la Puerta a Oportunidades y Desafíos' (2010) 17 *Agenda Internacional* 9.

(participants involved, agenda setting, general aspects, *etc*). The case studies then discuss the conceptualisation of human rights, democracy and rule of law, highlighting the most common issues arising and the perspectives of each side.

The level of analysis of the different case studies varies: the studies on India and Morocco are the most elaborate. There is less depth in the Chinese case study, however for completeness sake this study is included in the report. The EU-China HRD is covered also elsewhere in the FRAME project, namely in forthcoming Deliverable 12.3.

III. Human rights dialogues in context

A. Introducing HRDs

The protection and promotion of human rights are one of the general principles of European law.⁸ As Deliverable 3.2 analysed in detail, the respect for human rights is one of the core values of the EU (Article 2 TEU).⁹ Their protection and promotion outside the EU is ‘a part of the European Union’s international identity, whereby it represents itself as an entity constructed on a normative basis.’¹⁰ The EU is guided in its external action by principles such as the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity (Article 21 TEU).¹¹

Human Rights Dialogues are one of the human rights-specific foreign policy tools and instruments of the European Union.¹² In 2015 the EU held human rights dialogues and consultations¹³ with more than 40 countries and regional groups of states, as well as with international organisations.¹⁴ In spite of their name the HRDs regularly cover the issues of democracy and the rule of law besides human rights.¹⁵ Human rights dialogues are initiated by Council decisions, based on a proposal by the Council Working Party on Human Rights (COHOM). COHOM is responsible for evaluating the dialogues, if possible every two years.

The aim of HRDs is to promote the EU human rights policy in third countries and regional organisations through discussions.¹⁶ They intend not only to get and exchange information, but also to improve the human rights situation of the participating states or organisations, open spaces for relevant stakeholders (NGOs, journalists, judiciary, lawyers) and give visibility to HRs issues in bilateral relations. The HRDs

⁸ Márton Varjú, *European Union Human Rights Law The Dynamics of Interpretation and Context* (Edward Elgar 2014) 11.

⁹ TEU art 2 proclaims that:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

¹⁰ Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP 2008) 10.

¹¹ TEU art 21 states that:

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

¹² One can make a distinction between human rights specific and non-specific tools.

¹³ See FRAME Deliverable 12.1 for an overview on legal and policy instruments of the EU for human rights and democracy support, pp. 48-50.

¹⁴ EEAS, ‘Factsheet on Human Rights Dialogues’ <http://eeas.europa.eu/factsheets/docs/factsheets_europe_day_2014/factsheet_human-rights_dialogues_en.pdf> accessed 12 November 2015 (EEAS Factsheet).

¹⁵ Khaliq (n 10) 92.

¹⁶ Commission, ‘The EU’s Role in Promoting Human Rights and Democratisation in Third Countries’ (Communication COM(2001) 252 final, 8.

belong to the realm of ethical foreign policy tools¹⁷ (*idealpolitik*) as they promote moral values and principles (e.g. equality, dignity) of the EU human rights protection system. However, according to the HRDGs ‘pragmatism and flexibility’ are also important elements.¹⁸

For the purpose of analysing the human rights dialogues in the context of the foreign policy tools and instruments of the EU, it is worth taking a look at the different categorisations of tools and instruments. FRAME Deliverable 6.1 scrutinised the possible categorisations that can help to map the common characteristics of the various types of human rights dialogues.¹⁹

Every dialogue should be a ‘dialectical, mutually constitutive, co-determined relationship between actors’.²⁰ They can review best practices and use recommendations from other treaty mechanisms (e.g. the Universal Periodic Review of the UN Human Rights Council).²¹ They work by exerting negative or positive incentives (labelled ‘sticks and carrots’).²²

Consequently, HRDs are a non-coercive targeted HR-specific policy tool, and as such they are to be based on cooperation, persuasion and co-optation. Dialogues seek to achieve human rights goals directly and can be applied in a bilateral way. In the diplomatic-economic-military axis HRDs belong to diplomatic instruments.²³ Matlár lists HRDs among soft power measures (in the soft power – hard power dichotomy) in bilateral relations.²⁴ Its soft power character means that human rights dialogues, like other traditional diplomatic instruments, do not foresee sanctions. HRDs can be public or confidential – a factor which, as discussed below, has an enormous impact on effectiveness.²⁵ All in all, the peculiarities of HRDs are as follows: soft power, diplomatic, HR-specific, bilateral, soft and targeted.

As Deliverable 6.1 underlines, EU actions never work in a vacuum.²⁶ The changing behaviour of other actors of international relations influences the functioning of the various instruments of the EU²⁷ –this is also true in the case of human rights dialogues. The cooperation with international organisations in this field, like the Council of Europe (CoE) or the UN, and with EU Member States (EU MS), is indispensable.²⁸ For example, during HRD’s the EU often makes reference to the implementation of UPR recommendations, within the frame of which there are dialogues among countries on human rights, too.

¹⁷ Khaliq (n 10).

¹⁸ EEAS Guidelines (n 5) para 3; and Khaliq (n 10) 99.

¹⁹ See FRAME Deliverable 6.1.

²⁰ Georg Wiessala, *Re-orienting the Fundamentals: Human Rights and New Connections in EU–Asia Relations* (Ashgate 2016) 4.

²¹ See also Council, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ (Brussels, 13 May 2013) No 9431/13, 129–133.

²² FRAME Deliverable 12.1, p. 124.

²³ This distinction is applied in Peter R Baehr and Monique Castermans-Holleman (eds), *The Role of Human Rights in Foreign Policy* (3rd edn, Palgrave 2004) 69–86.

²⁴ Janne H Matlár, *Intervention for Human Rights in Europe* (Palgrave 2002) 56.

²⁵ *ibid* 196–197.

²⁶ See FRAME Deliverable 6.1.

²⁷ Hans Kundnani and others, ‘Why Europe Needs a New Global Strategy’ (2013) European Council on Foreign Relations Policy Brief No 90, 6 <http://ecfr.eu/page/-/ECFR90_STRATEGY_BRIEF_AW.pdf> accessed 11 May 2016.

²⁸ See also Council, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’ (Luxembourg, 25 June 2012) No 11855/12, 3–4 (EU Action Plan).

In some cases, the dialogues carried out in the context of the UPR might be more important for the states than the dialogues with the EU. Of course the context of the UPR dialogues is different from the EU HRDs, because they are public global dialogues.²⁹ Parallel to the EU HRDs, EU MS can also initiate dialogues with non-EU countries. Member States and international organisations' actions (especially the UN's) shape the context in which the EU HRDs take place.

If a dialogue fulfils its original objectives, it can be suspended.³⁰ However, it is hard to imagine a situation where there is no more need for discussion and exchange of information among different legal systems, which have partly differing conceptions on human rights, democracy and the rule of law. The dialogues can also be unsuccessful and ineffective –these are called 'impotent' by scholars.³¹ Such opinion is not unknown among EU politicians: according to Heidi Hautala, Finnish Green Member of the European Parliament, HRDs 'risk being empty rituals that the other party does not take very seriously'.³²

The EU itself focuses on human rights mainstreaming in all policies³³ and supports the concept of democratic rule of law with human rights. However, according to some EU documents on HRDs it is possible for a dialogue to focus only on human rights issues, which seems to be a contradiction because the Guidelines mention the rule of law and democracy among the aims with which the dialogues should deal. Furthermore, it is questionable how it is possible to disregard democracy and the rule of law when examining human rights. As Deliverable 3.2 accentuated, recently scholars have been speaking of the 'triangular relationship' between fundamental rights, democracy and the rule of law in the EU,³⁴ implying that the three notions function together like 'the three legs of a stool'³⁵ ('democratic rule of law with fundamental rights').³⁶ This implies that if the EU deals with human rights, the other two (the rule of law and democracy) will be invariably affected.

B. Respect for sovereignty and equality of participants of HRDs

Every relation among states and the EU should be based on the sovereign equality of states,³⁷ a basic principle of international law. Respect for this principle includes the recognition of the other participant of the dialogue as an equal negotiating partner. Title V of the TEU defines several aims to be achieved through the common foreign and security policies, and among them lists the principles of international

²⁹ FRAME Deliverable 3.5.

³⁰ EEAS Guidelines (n 5) (According to the Guidelines: 'Likewise, a decision may be taken to suspend a dialogue which has proved successful and has therefore become redundant').

³¹ Kinzelbach (n 6) 200.

³² See Christopher J Bickerton, *European Union Foreign Policy: From Effectiveness to Functionality* (Palgrave Macmillan 2011) 68.

³³ EU Action Plan (n 28) Action 29(d).

³⁴ FRAME Deliverable 3.2; see also Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism' (PE 493.031, European Parliament, 2013) <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET\(2013\)493031_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf)> accessed 11 November 2015.

³⁵ *ibid* 30.

³⁶ *id.*

³⁷ Pascaline Winand, Marika Vicziany and Poonam Datar, *The European Union and India: Rhetoric or Meaningful Partnership?* (Edward Elgar 2015) 160.

law.³⁸ Non-interference in the internal affairs of another state as a basic principle of international law determines the legality of the Union's foreign policy tools too – foreign policy tools that are based on dialogues and agreements between the parties, like the HRDs themselves, are in compliance with this principle.³⁹ This means that in an ideal case dialogues mutually reinforce the human rights situation of both parties, 'they are held on a reciprocal basis, which enables the third country to raise the human rights situation in the European Union'.⁴⁰ Several of the case studies will show, however, that sovereignty concerns continue to pervade HRD's.

C. The issue of transparency

There are secret and transparent tools and instruments of EU foreign policy –human rights dialogues can be both. Quiet diplomacy has been a classic method in the international arena. One of the major concerns of modern international law has been to limit the tools of secret diplomacy and to ensure the publicity of treaties and other international documents. Nevertheless, secrecy has remained a significant element of diplomacy until today: it appears in European foreign policy as well and is usually argued as necessary for effectiveness in certain cases. Refuting the argument of effectiveness, however, the problem with secret foreign policy tools is that in the absence of information no one can be sure whether quiet diplomacy works, because such deductions can be 'based merely on speculation'.⁴¹ This is an acute shortcoming of the dialogues too: in the absence of comparable data, it is unclear on what basis it can be argued that the confidential dialogue is more effective than the public one. This report submits that secrecy is not the ideal way for HRDs in spite of the fact that sometimes it is the only accepted way by the partners.

Secrecy is also to be challenged on theoretical grounds, as it goes against accountability and reinforces the democratic deficit of the EU. Since all instruments of EU foreign policy, even those that are secretive, have to be compatible with the values of the European Union enshrined in Article 2 (e.g. human rights, democracy, the rule of law), the application of non-public instruments should be kept to a minimum. According to the HRDGs themselves, 'the EU will as far as possible give the human rights dialogues a degree of genuine transparency vis-à-vis civil society'.⁴² Pointing out that the majority of the instruments of democratic rule of law with human rights work only if they are public, Matlár highlights the 'democratization' of foreign policy upon the influence of mass media coverage and the Internet, both working against traditional diplomatic approaches.⁴³ Such 'democratization' could have a positive impact on HR dialogues, too. The publication of press releases, for example, at the end of the dialogues, 'where appropriate',⁴⁴ does not seem to be an effective means to ensure the transparency of dialogues because these short documents provide no genuine and valuable information about the dialogues themselves. The

³⁸ Cf TEU art 21(1).

³⁹ Khaliq (n 10) 29.

⁴⁰ EEAS Guidelines (n 5) 6.

⁴¹ Kinzelbach (n 6) 2.

⁴² EEAS Guidelines (n 5) 11.

⁴³ Matlár (n 24) 51.

⁴⁴ EEAS Guidelines (n 5) 10.

following statements from the press release on the EU and Belarus dialogues, for example, sufficiently indicate the level of generality on which the whole document remains:

“The talks demonstrated the commitment of the EU and Belarus to deepen their relations including in the area of human rights. They allowed for a frank and respectful preliminary exchange on issues of substance with a view to building trust, promoting reforms and developing cooperation.”⁴⁵

In this case, the only hint at the specific content of the HRD in the entire document is the reference to individual cases where the EU raised the issues of the ‘detention of human rights defenders and political prisoners’. In cases like this, there is vague diplomatic language and little content.

Besides lack of genuine information, press releases are sometimes misleading in regard to the atmosphere of the dialogues. For example, the official press release on the EU – China HRD stated that the ‘atmosphere of the dialogue’⁴⁶ was frank. According to Kinzelbach, however, a European participant described the atmosphere of the same dialogue in an interview as ‘frosty and aggressive’.⁴⁷ Furthermore, Kinzelbach quotes another European participant claiming that ‘nobody in the EU expects concrete results from this process. If public statements on the Dialogue mention results anywhere, then that’s just public relation-speak.’⁴⁸ Discrepancy between press releases and statements by participants involved in the process suggests that the press releases are not only resources without informative details but they might be misleading and dishonest —leaving confidentiality and secrecy behind and stepping out into the public would enhance transparency and efficiency.

There is a tendency to invoke pragmatic reasons to refute the argument on transparency. In the dialogue between the EU and China,⁴⁹ the subject of one of the case studies, as a pragmatic reason of confidentiality it is mentioned that the EU and its Member States prioritise trade and other relevant issues for the EU and MS (climate change, cooperation in the framework of International Financial Institutions) over the public human rights criticism of China. Such an approach is supported by point 7 of the HRDG, which states that ‘flexibility and pragmatism are the keywords in the context of the practical arrangements for human rights dialogues’.⁵⁰ However, critics seriously challenge the results of such pragmatism. According to Wang, ‘when governments play the game of not speaking out, the Chinese see them as weak and vulnerable –not just on rights but on trade and other matters’.⁵¹ Or, as Kinzelbach summarises the ‘efforts’ of this dialogue: we have very little knowledge about a HRD that has been going on since 1995, because

⁴⁵ EEAS, ‘The EU and Belarus Hold A Dialogue on Human Rights’ (Brussels, 28 July 2015) Press Release No 150728/02 <http://www.eeas.europa.eu/statements-eeas/2015/150728_02_en.htm> accessed 11 May 2016.

⁴⁶ European Union, ‘EU-China Dialogues on Human Rights’ (Brussels, 25 June 2013) Press Release A347/13 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137607.pdf> accessed 11 May 2016.

⁴⁷ Kinzelbach (n 6) 280.

⁴⁸ *ibid* 195.

⁴⁹ *ibid* 2-3.

⁵⁰ *ibid* 7.

⁵¹ Maya Wang, ‘Bishop Must Pressure the Chinese on Human Rights’ (*Human Rights Watch*, 5 December 2013) <<https://www.hrw.org/news/2013/12/05/bishop-must-pressure-chinese-human-rights>> accessed 11 November 2015.

it is, according to Fierro, under the ‘veil of secrecy’.⁵² The EU and China disagree on ‘principles, facts and process’,⁵³ and after some time the human rights dialogue became isolated from high-level political dialogue as the Chinese partner found better tools, e.g. the Confucian Institutes, to achieve its diplomatic aims.⁵⁴ The EU – China HRD is now functioning in an unproductive though sustainable way.⁵⁵ The fact that it is a venue for speaking freely ensures the sustainability of the dialogue. As the Indian case study points out, HRDs are venues for speaking frankly on human rights separately from other political dialogue meetings.

To conclude, the publicity of the HRDs is an essential issue that creates differences among HRDs and leads to theoretical concerns. Agreement on behalf of the EU to take effective minutes and audio records of HRD meetings would help to achieve transparency.

D. Priorities of dialogues

The European Union defines priority issues that should be put on every human rights dialogue’s agenda. These priorities include ‘the abolition of the death penalty, the signing, ratification and implementation of UN human rights instruments, cooperation with international human rights procedures and mechanisms, combating torture, eliminating all forms of discrimination, children’s rights, women’s rights, freedom of expression and the role of civil society.’⁵⁶ Beyond supporting the UN human rights protection system and human rights NGOs, the list of priorities focuses on some specific human rights issues, like the rights of some vulnerable groups.

There is not much risk in promoting the ratification of UN instruments on behalf of the EU, since its Member States have accepted more universal human rights instruments than other powerful players of international relations.⁵⁷ Sometimes there are conceptual issues behind the non-ratification of universal human rights documents and issues of sovereignty and cultural relativism appear in this context too. The Indian case study underlines that the Western concept of sovereignty has been contested by some developing countries. India has not signed protocols of international human rights conventions⁵⁸ that provide for the possibility of individuals’ complaints to international monitoring mechanisms as, according to their view, these documents prioritise human rights over sovereignty. The situation in the field of the protection of NGOs is almost the same as the case of the ratification of universal human rights documents,

⁵² Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 208.

⁵³ Kinzelbach (n 6) 195.

⁵⁴ *ibid* 197.

⁵⁵ *ibid* 198.

⁵⁶ EEAS, ‘Factsheet EU Action Plan on Human Rights and Democracy 2015-2019’ <http://eeas.europa.eu/factsheets/news/150720_eu_action_plan_on_human_rights_and_democracy_2015-2019_factsheet_en.htm> accessed 12 November 2015.

⁵⁷ See Deliverable 3.5.

⁵⁸ 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).

although in the near past there were governmental attacks against human rights NGOs in EU Member States.⁵⁹

Importantly, the HRDG only list aspects of human rights in which the European level of protection is relatively strong. Human rights issues in which the EU does not excel, such as social rights, the rights of migrants and asylum seekers, and the rights of national and ethnic minorities, are missing from the priority list. These are intensely debated issues within the EU, and the Member States have very different views, policies and legislation in these areas, which might account for the lack of a unified stance, and even for the lack of their discussion in the HRDs.

The lack of social rights in the agenda of HRDs is in contradiction with the principle of the indivisibility of human rights. In spite of the fact that the EU MS have good records in that area (social welfare systems, social rights), the HRDG did not devote attention to economic, social and cultural rights. The reasons for this are partly conceptual as was analysed in Deliverable 3.2. The disregard of these rights can also be interpreted as an attempt to narrow the debates on social rights by developed countries. The Indian case study clearly disapproves the EU-centric creation of global norms: an excessive focus on political and civic rights might mean that the EU considers poverty to be a development problem and rejects serious international engagement in this field. Furthermore, according to the official EU factsheets on human rights dialogues, ‘an increasing number of third countries raise issues of concerns about human rights in the EU and its Member States. The concerns most often voiced related to the treatment of migrants, minorities, in particular the Roma community, and acts of racism/discrimination’.⁶⁰ Similar to bilateral dialogues, the protection of kin minorities as a human rights issue also appears in HRDs sometimes. The Indian Chapter mentions the situation of Indian migrants in European Member States as a human rights issue.

⁵⁹ TASZ, ‘Governmental Attacks Against Hungarian NGO Sphere’ <http://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hungarian_ngos_20140921.pdf> accessed 12 November 2015; and Balázs Majtényi, ‘The Nation’s Will as Trump in the Hungarian Fundamental Law’ (2015) 15 EU Yrbk Hum Rts 247.

⁶⁰ EEAS Factsheet (n 14).

IV. Case Studies

A. General Human Rights Dialogues

1. Bilateral Relationships

a) *Strategic partnership: India*

In recent years, strategic partnerships have 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 major players. European and Indian perceptions, motivations, and expectations of strategic partnerships vary.⁶¹

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 organised 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’.⁶² They signified ‘a balance of mutual advantages and commitments’⁶³ with trade being ‘a cornerstone’ of the strategic partnership.⁶⁴

The motivations of the EU’s strategic partnerships are said to include the need (a) to address the emergence of new powers; (b) provide an alternative for reinvigorating diplomacy in which bilateral approaches seem to dominate international relations; (c) an attempt to assert the growing importance of the EU over the national diplomacy of the Member States;⁶⁵ and ‘a blueprint for a smart use of the EU’s (and therefore Europe’s) power’.⁶⁶

Strategic partnerships, according to the Indian Government, enable an expansion of ‘policy choices and developmental options’⁶⁷ and assume ‘understanding and openness on both sides’.⁶⁸ They represent an

⁶¹ See Rajendra K Jain, ‘India-EU Strategic Partnership: Perceptions and Perspectives’ (2014) NFG Working Paper No 10/2014 <http://www.diss.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUDOCTYPE_derivate_000000004250/wp1014-india-eu-strategic-partnership_0.pdf> accessed 4 May 2016.

⁶² European Council, ‘General Secretariat – Conclusions’ (Brussels, 16 September 2010) EUCO 21/10, 3.

⁶³ Herman van Rompuy, ‘Remarks by the President of the European Council at the G8 Meeting Press Conference’ (Toronto, 24 June 2010).

⁶⁴ Catherine Ashton, ‘EU-India Relations Post-Lisbon: Cooperation in a Changing World’ (India International Centre, New Delhi, 23 June 2010).

⁶⁵ Thomas Renard and Sven Biscop, ‘From Global Disorder to an Effective Multilateral Order: An Agenda for the EU’ in Thomas Renard and Sven Biscop (eds), *The European Union and Emerging Powers in the 21st Century: How Europe can Shape a New Global Order* (Ashgate 2012) 196-197.

⁶⁶ Thomas Renard, ‘The Treachery of Strategies: A Call for True EU Strategic Partnerships’ (2011) Egmont Paper 45, 6 <<http://www.egmontinstitute.be/wp-content/uploads/2013/09/ep45.pdf>> accessed 4 May 2016.

⁶⁷ Ministry of External Affairs of India, *Annual Report 2005-2006* (New Delhi 2006) ii.

⁶⁸ Kamal Nath, ‘India-EU Strategic Partnership: Steps Ahead’ (Federation of Indian Chambers of Commerce and Industry, New Delhi, 14 January 2005).

upgrade, ‘a qualitative transformation’ of mutual interaction,⁶⁹ and a ‘maturing’ of the relationship.⁷⁰ 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’.⁷¹

(1) Institutional setting of the Dialogue

(a) Introduction

While the European Union conducts human rights dialogues with more than forty non-EU countries, the EU is the only entity with which India conducts a human rights dialogue. Human rights began to be discussed between India and the European Economic Community (EEC)/EU in the 1990s in the ministerial Troika as a result of growing activism on human rights within the Community, the commencement of the insurgency in Jammu and Kashmir and Punjab and growing media attention to human rights violations. The Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (1994) also had a provision on human rights (Article 1.1) –the so-called ‘essential elements clause’.⁷² Every joint statement issued at the end of annual summits held since 2000 invariably made references to the importance of coordinating efforts to promote and protect human rights and that human rights would remain on the agenda of EU-India dialogue at various levels.

The ad hoc India-EU human rights dialogue has been held in New Delhi more or less annually since the inaugural one on 1 March 2004. The human rights dialogue originally envisaged to be held in March 2012 was reportedly postponed by for various reasons: ‘agenda coordination’ issues, understaffing of MEA, an overburdened Joint Secretary (Europe West) (JS-EW) for whom the HRD is not really a priority as well as his personal circumstances.⁷³ In all, there were eight postponements before the next round was finally held on 27 November 2013. .

To a large extent, the 2013 HRD was the result of the initiative of the new Secretary (West), Ministry of External Affairs, who had just returned as Ambassador from Brussels⁷⁴ and was therefore well aware of

⁶⁹ Manmohan Singh, ‘Opening Remarks at the Press Conference with the Dutch Prime Minister and EU Leaders’ (8 November 2004).

⁷⁰ Suryakanth Tripathi, ‘Closing Remarks at the Official Meeting on the India-EU Strategic Partnership’ (New Delhi, 25 February 2005).

⁷¹ Shyam Saran, ‘On the Prime Minister’s Forthcoming Visit to The Hague for the 5th India-EU Summit’ (New Delhi, 5 November 2004).

⁷² It reaffirmed ‘the importance they attach to the principles of the United Nations Charter and the respect of democratic principles and human rights’. See Cooperation Agreement between the European Community and the Republic of India on Partnership and Development [1994] OJ L223/24.

⁷³ Answer by High Representative/Vice-President Ashton on behalf of the Commission to Ana Gomes, ‘VP/HR — EU-India Human Rights Dialogue’ (12 April 2013, E-001912-13) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-001912&language=EN>> accessed 12 March 2016.

⁷⁴ Dinkar Khullar had served as Ambassador to the European Union from 4 September 2012 to 13 October 2013.

the frequent pressure exerted on him at Brussels at various levels.⁷⁵ The Europeans consider the 2013 dialogue to be the best one so far because of the much more senior representation (at the level of Joint Secretaries) –for the first time ever– from virtually all line ministries. These joint secretaries were in the know of things and could respond more pointedly and eloquently on the issues that came up for discussion. Moreover, for the first time political clearance was given by the MEA enabling Delhi-based EU Ambassadors to directly meet the Joint Secretary (Human Rights) (JS-HR) of the Ministry of Home Affairs.⁷⁶

Human rights dialogues for 2014 and 2015 have been postponed. After the foreign policy consultations⁷⁷ 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.

In sum, as illustrated in Table 1, 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.

HRD Meeting	Date
1 st	1 March 2004
2 nd	1 December 2005
3 rd	12 December 2006
4 th	1 February 2008 ⁷⁸
5 th	27 February 2009
6 th	25 March 2010
7 th	22 March 2011
8 th	27 November 2013

Table 1: India-EU HRDs since 2004

(i) *No Joint Report*

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'.⁷⁹ The suggestion 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'.⁸⁰ While the EU Delegation makes its own report on each human rights dialogue and circulates it amongst Member States' embassies in New Delhi. India has never been willing to even consider it because 'human rights and politics do not mix. Indian politicians do not like the subject. No major Indian political party will ever agree to anything like a joint report on human rights; it just cannot be sold to the political establishment'.⁸¹ This, however, is not necessarily perceived as affecting the effectiveness of the Dialogue.

⁷⁵ For instance, whenever he met David O'Sullivan, Chief Operating Officer of the EEAS, the HRD was among the issues invariably raised.

⁷⁶ It could not be ascertained whether the practice still continues.

⁷⁷ Foreign Policy Consultations at the level of Secretaries –Secretary (West), MEA and Chief Operating Officer, European External Action Service– began in November 2011.

⁷⁸ This was the dialogue for 2007, which had been postponed.

⁷⁹ Commission, 'An EU-India Strategic Partnership' (Communication) COM(2004) 430 final, 5.

⁸⁰ Delhi Policy Group, 'India and the EU – A Strategic Partnership' (Informal Brainstorm Session, 24 August 2004).

⁸¹ Interview with former Senior Indian Official 1 (New Delhi, India, March 2016) (Interview SIO 1).

*(b) Actors involved in the India-EU HR Dialogue**(i) EU Participation*

Until 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. The EU Ambassador is accompanied by several EU Delegation officials including those dealing with Political Affairs and attachés dealing with the domestic situation as well as human rights,⁸² appointed in each of the EU Delegations.

After the Lisbon Treaty, participation in the HRD became voluntary and was open to all EU MS subject to the condition that a Member State Ambassador or his/her representative was obliged to take the floor and not be a mere observer. The EU Delegation seeks to include every Member State and to ensure that everyone gets a role. Prior to a HRD, the Delegation 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 accept or decline to speak.

The number of European participants has varied from dialogue to dialogue depending on the agenda and the 'topical' character of the themes under discussion. When the Ambassador of a EU Member State is unable or 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, which is 'a very important event for "old Europe"',⁸³ that is, the old EU Member States rather than new ones. Since the mutually agreed format of the HRD is a New Delhi-based dialogue, no one comes from EU institutions to attend it.

(ii) Indian Participation

The Indian participants in the HRD are generally drawn up on the basis of the questions that are likely to be raised by the Europeans. The size of the Indian delegation is usually around 15 persons. The JS-EW is the Co-Chair of the dialogue apart from several MEA officials including the Joint Secretary (United Nations Economic & Social Division) (JS-UNES) and official(s) from the Legal and Treaties Division (when issues of a technical nature are likely to come up).

There are also 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). The JS-HR of the Ministry of Home Affairs⁸⁴ 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), which tends to give rise to

⁸² This is not a new appointment, but an existing official has been given extra responsibilities. A few Member States also have an official which looks after the domestic situation as well as the human rights situation in India.

⁸³ Interview SIO 1 (n 81).

⁸⁴ Who deals with issues concerning Jammu and Kashmir.

feelings amongst the Europeans that the dialogue was treated somewhat frivolously.

(c) *Structure of the dialogue*

(i) *Levels of discussions on human rights*

The India-EU human rights dialogue is conducted at various levels. Apart from an ad hoc HRD in New Delhi, consultations are held in New York, but mostly in Geneva in the context of the UN Human Rights Council. Human rights have also been discussed in the India-EU Round Table⁸⁵ on one occasion.⁸⁶ Human rights issues are raised at ministerial meetings, foreign policy consultations as well as meetings with officials of the Indian embassy in Brussels. They are rarely raised at India-EU summits since an in-depth exchange of views is not possible in this setting.

(d) *New Delhi or Brussels?*

In a 31-page detailed response –the first-ever official strategy paper on relations with the EU– prepared by the Indian embassy to Brussels to the EC Communication on ‘An EU-India Strategic Partnership’ (June 2004), New Delhi proposed that issues of interest to both sides be taken up informally either in Brussels or in New Delhi. India eventually only agreed to a local, informal and confidential dialogue on human rights in New Delhi. Subsequently, on several occasions some Member States have suggested that the HRD be held alternately in New Delhi and Brussels.⁸⁷ India has been cold to the idea primarily because EU Ambassadors based in the Indian capital are better aware of ground realities in the country. The moment one starts a HRD in Brussels, all sorts of criticism/pressures, apart from unwelcome media attention, would come to bear on the Indian side from different quarters. In Brussels, ‘most of the people have no stake in the relationship; they will attack you on virtually every subject’.⁸⁸

The HRD generally lasts for around four hours or sometimes less. It concludes with a lunch hosted by the Ministry of External Affairs. The short duration precludes any discussion in depth of the many issues.

(i) *Agenda-setting*

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. No country in the world, including EU MS, the European Commission maintains, has ‘a perfect human rights record; therefore no State should be immune from international

⁸⁵ Composed of members of the European Economic and Social Committee and representatives of Indian civil society, the India-EU Round Table was inaugurated in January 2001. The objective of the Round Table was to create a permanent forum for dialogue at civil society level and foster closer people-to-people interaction as well as to generate proposals to be presented to Government of India and European Institutions.

⁸⁶ 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.

⁸⁷ For instance, the idea was raised by the Portuguese Ambassador during his country’s Presidency (July-December 2007). The MEA dismissed the idea and assured the European envoy that India would conduct the dialogue annually. See Interview SIO 1 (n 81).

⁸⁸ *id.*

scrutiny'.⁸⁹ 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 national parliaments or questions raised by Pakistani-origin MEPs in the European Parliament to both the Commission and the Council, some of which are repetitive at times. Indian officials cannot prevent a Member State from asking questions that may not have appeared on the original agenda. The EU Delegation can also raise issues if a partner NGO, under the European Instrument for Democracy and Human Rights (EIDHR), is facing some issues. At times, EU Delegation officials engage in an informal discussion with MEA officials (*e.g.* EU Desk Officer) to gauge which way the wind is blowing and to explore what could be conveyed in the dialogue in what manner.

(ii) *Conduct of the dialogue*

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 generally brief (several minutes), his Indian counterpart may sometimes give a longer statement at times of around 10 minutes. 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. For instance, in the 2013 HRD, considerable time was taken up by the first few items. In fact, the first Member State Ambassador spoke for about half an hour; a few other European Ambassadors also spoke too long. At times, there are lengthy Indian interventions; sometimes the EU Co-Chair also makes a long opening statement (as in the 2013 HRD).

While responding to a question, it is not uncommon for an Indian official to read out a three page 'note' prepared on the issue; the official does not stop until he has finished reading it. In so doing, he goes into the genesis of the issue and the various steps his ministry has taken so far to eradicate or ameliorate the problem. As a result, the EU Ambassador is left with no choice but to bunch a number of the remaining items on the agenda and have a combined discussion. A participant from a key EU Member State was 'overall underwhelmed' by the quality of the 2013 HRD. To him, the 'whole management of issues and discussions was a bit unfortunate; overall disappointing'.⁹⁰ Moreover, the Indian and European participants at the HRD sit opposite one another on a large table. The very sitting arrangement tends to be confrontational.⁹¹

(iii) *Coordination*

There is internal coordination between EU Delegation, the India Desk and Human Rights Unit in the EEAS to have an overall agenda in Delhi. The perspective of Headquarters, especially the Human Rights Unit is

⁸⁹ Reply by the European Commission to Sajjad Karim, 'The Role of Human Rights in the EU-India Strategic Partnership' (25 June 2005, 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 11 May 2016.

⁹⁰ Interview with Senior EU Member State Official 1 (New Delhi, India, March 2016) (Interview SMSO 1).

⁹¹ *id.*

such that they neither change their attitudes nor their perceptions. A monthly meeting of the Human Rights Group ensures a continuous dialogue amongst the EU-28 internally on India-specific issues. It ensures preparedness of HRD quite thoroughly and enables outline of the specific priorities and availability of each Member State for the forthcoming dialogue. The EU Delegation conducts a debriefing after each HRD, which is especially useful for those Member States that do not take part in the dialogue. On the Indian side, however, there is hardly any meaningful cooperation or coordination among line ministries like what is prevalent in the EU system. There is often a conflict over turfs. Generally, Indian officials lack an understanding of a complex, supranational and postmodern entity like the European Union as well as the nuances of the workings of EU institutions.

(iv) *Tone of the dialogue*

By and large, the dialogue is informal and cordial. It is essentially a dialogue between foreign policy personnel; not an in-depth dialogue among experts.⁹² The tenor and atmosphere of the human rights dialogue very often depend on the role played by the Co-Chairs. Generally, the Indians have tended to be reactive and on 'a defensive mode' on issues generally raised by the Europeans in the human rights dialogues.⁹³

What is perhaps more significant is the attitude –the way of interaction, of the use of words and of how one presents what one is doing in terms of initiatives. The European way of presenting the topics, an 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'.⁹⁴ This view echoed by an Indian participant in the HRD: 'We do not need your help; if India puts it upfront, they lay off'.⁹⁵ 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'.⁹⁶

The atmosphere of the dialogues often depends on the work of the Co-Chair(s). At times, acrimony in the HRD was not the result of fundamental disagreements, but the choice of words. For instance, while the 2011 HRD was overall a cordial one, towards the end the then EU Ambassador emphasised the difficult relationship with the MEA and the Ministry of Commerce. These remarks, which were perceived as a direct attack on the MEA, led to a considerable unpleasantness.⁹⁷

⁹² While some European Member States would like to organise a dialogue among experts in the various Ministries, the Ministry of External Affairs has not been receptive to the proposal.

⁹³ Interview SIO 1 (n 81).

⁹⁴ Interview SMSO 1 (n 90).

⁹⁵ Interview with Senior Indian Diplomat (Paris, France, June 2008) (Interview SID).

⁹⁶ Interview with Deputy Head of Unit, Human Rights and Democracy Unit (Brussels, Belgium, December 2008) (Interview DHU).

⁹⁷ Interview SIO 1 (n 81).

(e) *Goals of the Human Rights Dialogue*(i) *EU goals*

For the European Union, the human rights dialogues are an ‘efficient’ tool⁹⁸ to ‘improve the flow of information’ and provide ‘an opportunity for detailed discussion’⁹⁹ and a ‘more in-depth exchange of views’.¹⁰⁰ 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’. The HRD is ‘an opportunity for frank discussion’, but not a ‘finger-pointing exercise’.¹⁰¹ Even an occasional heated debate is not perceived as ‘necessarily negative’.

For the EU and Member States, the human rights dialogue provides an opportunity to seek information and receive ‘an update’ on new initiatives by Indian authorities.¹⁰² The EU Delegation and Member States gets 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’¹⁰³ and deliver demarches, which may otherwise be delayed, in order to prioritise individual cases, especially when it comes to the death penalty. NGOs view it as an important opportunity for the EU ‘to help India turn intentions into real changes’.¹⁰⁴ 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.¹⁰⁵

(ii) *Indian goals*

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 overriding interest, and where distortions need to be corrected, could be effectively addressed’.¹⁰⁶ Since human

⁹⁸ Council, ‘EU Annual Report on Human Rights and Democracy in the World in 2013’ (Brussels, 23 June 2014) No 11107/14, 104 <http://eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf> accessed 11 May 2016.

⁹⁹ Kinzelbach (n 6) 30.

¹⁰⁰ Answer by Mrs. Ferrero-Waldner on behalf of the Commission to Margrete Auken and others, ‘Caste-based Discrimination’ (29 July 2008, E-3340/08) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-3340&language=EN>> accessed 13 March 2016.

¹⁰¹ Interview SMSO 1 (n 90).

¹⁰² Answer by Mrs. Ferrero-Waldner on behalf of the Commission to Eoin Ryan, ‘Human Rights Situation in Orissa State, India’ (9 April 2008, E-1654/08) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-1654&language=EN>> accessed 12 March 2016.

¹⁰³ Answer by Mrs. Ferrero-Waldner on behalf of the Commission to Sajjad Karim, ‘India – Convention Against Torture’ (3 August 2007, E-3466/07) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-3466&language=EN>> accessed 12 March 2016.

¹⁰⁴ ‘India: EU Rights Dialogue Should Promote Accountability’ (*Human Rights Watch*, 21 January 2013) <<https://www.hrw.org/news/2013/01/21/india-eu-rights-dialogue-should-promote-accountability>> accessed 9 March 2016.

¹⁰⁵ João Cravinho, ‘India and the EU: Strategic Partners in a Globalised World’ (2013) 1 FRPC Journal 55, 57 <<http://www.frpc.in/pdf/J-13.pdf>> accessed 10 March 2016.

¹⁰⁶ Ministry of External Affairs of India, ‘An EU-India Strategic Partnership – India’s Response’ (27 August 2004) para 10.

rights is ‘a very sensitive subject in Europe; you just have to discuss it in a reasonable manner; then everyone is happy. The Commission can report to the European Parliament that their concerns and issues are being taken up and addressed, that there are legislations in India’.¹⁰⁷ Third countries may prefer to concentrate discussion of human rights in one annual human rights dialogue with the EU in order to prevent human rights from ‘contaminating’ other political dialogue meetings.¹⁰⁸

(2) Conceptualisations of human rights, democracy and rule of law emerging in the dialogues.

(a) *Issues raised by the EU*

Since the inaugural human rights dialogue (1 March 2004) apparently focused on a limited number of issues, the European Commission felt the HRD could be broadened to include issues such as the role of the International Criminal Court (ICC), the abolition of the death penalty, the strengthening of the Convention against Torture, gender discrimination, child labour, labour rights, Corporate Social Responsibility and religious freedom.¹⁰⁹ After the first HRD, India, according to one researcher, remained reluctant to address bilateral matters and tried to limit the dialogue to multilateral issues. Synergies should be sought and joint initiatives developed in third countries.¹¹⁰

The March 2010 HRD covered issues such as multilateral issues (including the Human Rights Council), death penalty, torture and 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.¹¹¹

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.¹¹² Europeans have had long had problems in understanding ‘the dynamics of the caste system’¹¹³ as well as child labour – a theme which constantly recurred.

The Dalit issue is emphasised by the Europeans even though most local EU Ambassadors recognise the problem in India and appreciate what 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’.¹¹⁴

¹⁰⁷ Interview SIO 1 (n 81).

¹⁰⁸ Toby King, ‘The European Union as a Human Rights Actor’ in Michael O’Flaherty (ed), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers 2011) 89.

¹⁰⁹ COM(2004) 430 final (n 79) para 2.1.6.

¹¹⁰ 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? Foreign and Security Policy, Politics, Economics, Human Rights, Social Issues, Media, Civil Society and Intercultural Dimensions* (Weissensee Verlag 2006) 343.

¹¹¹ EEAS, *EU Annual Report on Human Rights and Democracy in the World in 2010* (EEAS 2011) 150.

¹¹² Council, ‘Human Rights and Democracy 2013’ (n 98) 301.

¹¹³ Interview SID (n 95).

¹¹⁴ Interview SIO 1 (n 81).

The Europeans are well aware of India's red lines, but some of them come up. One example is Naxalism in the tribal belt. Similarly, although caste is 'an absolute no' talking point from the Indian standpoint, it still comes up. The EU brings it up often because they regard it as a kind of racism. When it does come up, the 'best man at the Ministry of Home was the Section Officer, who read out a long statement on the subject for about 20 minutes'.¹¹⁵ India concedes that child labour is a reality; banned by law, but argues that the question of support for the family should also be taken into consideration. In recent years, LGBTI (lesbian, gay, bisexual, transgender, and intersex) issues have become 'a big concern' for the EU.

Human rights defenders are another red flag for India.¹¹⁶ The EU raises it nevertheless. For instance, it raised the issue of Binayak Sen because of parliamentary pressure.¹¹⁷ 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'.¹¹⁸

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.

In sum, 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.¹¹⁹ The death penalty invariably comes up in the HRD.

(b) 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 Council, the issue of minorities, Muslims and minarets, treatment of migrant workers, racism and xenophobia, paedophilia, status of Roma, and above all, issues relating to Indian citizens. There were a number of issues taken up with the United Kingdom related to the treatment of Indians because of the large population of Indian origin. The issue of the Sikh turban, which concerns individual Member States, comes up regularly. The UK has a different position than France; both respond by stating their

¹¹⁵ *id.*

¹¹⁶ A 'human rights defender' is a term used to describe people who, individually or with others, act to promote or protect human rights. See OHCHR, 'Who is a Defender?' <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>> accessed 6 April 2016.

¹¹⁷ 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. See Council, 'Human Rights and Democracy in the World: Report on EU Action in 2011' (Brussels, 6 June 2012) No 9238/12, 236 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209238%202012%20INIT>> accessed 11 May 2016.

¹¹⁸ Interview SIO 1 (n 81).

¹¹⁹ Commission, 'EU-India Relations' (29 January 2013) MEMO/13/44 <http://europa.eu/rapid/press-release_MEMO-13-44_en.htm> accessed 15 January 2016.

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. In fact, since 2008, the JS-EW MEA, began to request Indian embassies to send an annual report on the human rights situation in EU MS and especially focus on issues beyond those concerning Indians. The general feeling among both Indian and European participants in the HRD is that the Indian side tends to be reluctant to ask questions.

(c) *Different conceptualisations*

Both India and the EU MS are democracies, but both of them come to the human rights dialogue with different conceptions and approaches towards human rights. This leads some scholars to conclude that the absence of jointly shared definitions 'a priori limit and indeed nullify the possibilities of actual meaningful cooperation'.¹²⁰

(i) *Sovereignty*

Since independence, both 'in principle and practice', India is wedded to non-interference in the internal affairs of states unlike the European Union which has 'a penchant for intervention beyond sovereign boundaries'.¹²¹ 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 based on the notion that popular sovereignty rests in the society, not the state, has been contested by developing countries like India. 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'.¹²² Unlike the Indian conception of human rights, which are directed at society, the Western concept is formulated as rights against the state. International institutions and norms, in fact, have developed into means of curtailing sovereignty rather than enhancing it.¹²³

India's primary concern has been about the adjudication and selective enforcement of human rights norms by international institutions and major Powers. 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 territorial integrity, non-interference in internal affairs of the States, impartiality, non-selectivity and transparency.¹²⁴ India's criticism of the 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

¹²⁰ Axel Berkofsky, 'EU and China: Making Room for a Result-Oriented Dialogue' in Alessias Amighini and Axel Berkofsky (eds), *Xi's Policy Gambles: The Bumpy Road Ahead* (Edizioni Epoke 2015) 87.

¹²¹ Shashi Tharoor, *Pax Indica: India and the World of the 21st Century* (Penguin Books 2012) 244.

¹²² Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (OUP 2007) 36-37.

¹²³ Mark Mazower, *Governing the World: The History of an Idea* (Allen Lane 2012) 89.

¹²⁴ Bhaswati Mukherjee, 'Dilemma Confronting UN Human Rights Mechanisms' (*MEA InFocus*, 27 July 2014) <<http://www.mea.gov.in/in-focus-article.htm?23751/Dilemma+confronting+UN+Human+Rights+Mechanisms>> accessed 25 March 2016.

issues ‘involve separatist insurgencies encouraged and supported from outside in areas where the majority of the population is Muslim.’¹²⁵

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’.¹²⁶ 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.

India deals with the EU in a strongly realist tradition and remains wary about humanitarian intervention¹²⁷ and the circumstances in which force may be used. India has tended to equate the resort to coercive measures for human rights protection with Western expansionism and ambition to shape, and dominate, the world order.¹²⁸

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’.¹²⁹ Similarly, in debates over criminal accountability under UN auspices and the ICC, India privileges the national over the international, emphasising the importance of domestic judicial and political solutions in all but the most fragile settings.¹³⁰

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 prioritise human rights over sovereignty, and also of authoritarian powers like China, which do the opposite.’¹³¹

(ii) *Economic and social rights*

Historically, developing countries led by India had 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

¹²⁵ See AND Haksar, ‘Parallel Seen between Kosovo Crisis and Kashmir’ (*India Abroad*, 21 May 1999).

¹²⁶ Pramt P 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.

¹²⁷ Bhupinder S Chimni, ‘The International Law of Humanitarian Intervention’ in Institute for Defence Studies and Analyses (ed), *State Sovereignty in the 21st Century: Concept, Relevance and Limits* (IDSA 2001).

¹²⁸ Kudrat Virk, ‘Whither the Responsibility to Lead? India and R2P’ in Douthie Lettinga and Lars van Troost (eds), *Shifting Power and Human Rights Diplomacy: India* (AI Netherlands 2015) 109.

¹²⁹ Rohan Mukherjee, ‘Indian Multilateralism and the Global Human Rights Order’ in Douthie Lettinga and Lars van Troost (eds), *Shifting Power and Human Rights Diplomacy: India* (AI Netherlands 2015) 50.

¹³⁰ Usha Ramanathan, ‘India and the ICC’ (2005) 3 JICJ 627.

¹³¹ Nitin Pai, ‘India and International Norms: R2P, Genocide Prevention, Human Rights and Democracy’ in Waheguru PS Sidhu, Pratap B Mehta and Bruce Jones (eds), *Shaping the Emerging World: India and the Multilateral Order* (Brookings 2013) 305.

Indian diplomat, was strongly opposed by the West.¹³² The Europeans emphasised the pre-eminence 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.’¹³³

The human rights situation in most developing countries is related to the fundamental developmental problems that they confront, viz. poverty, overpopulation, illiteracy, and scarcity of resources. The enjoyment and implementation of human rights is contingent on a certain minimum level of economic development.¹³⁴ The right to development is emphasised in Indian perspectives and often rejected by western perspectives, including European views. The position of the EU toward solidarity rights such as the right to development suggests a contradiction in the EU’s approach to the indivisibility and interdependence of human rights.

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’.¹³⁵ 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?”¹³⁶

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.¹³⁷ 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.¹³⁸

(iii) *Perceived postmodernism*

The European approach to state sovereignty and responsibility is perceived by Indian scholars and policy makers as a ‘postmodern’ approach, contrary to the principles of non-interference in internal affairs and traditional security threats that remain central to Indian foreign and security policy. Postmodernism is not

¹³² See Mukherjee (n 124).

¹³³ 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.

¹³⁴ Venkateshwara S Mani, ‘The European Union’s Approach to Human Rights: Implications for India’s Trade’ in Hardev S Chopra (ed), *India and the European Union into the 21st Century* (ICWA 1998) 136.

¹³⁵ Hardeep S Puri, ‘Statements by the Ambassador and Permanent Representative of India at the 61st Session of the Commission on Human Rights’ (Geneva, 14 March 2005).

¹³⁶ Hardeep S Puri, ‘Statement by Permanent Representative of India at the 59th Session of the Commission on Human Rights’ (Geneva, 21 March 2003).

¹³⁷ 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.

¹³⁸ Stephan Kukeleire and Tom Delreux, *The Foreign Policy of the European Union* (2nd edn, Palgrave Macmillan 2014) 141.

only 'alien but baffling for the Indian system'.¹³⁹ To Indian policy-makers, the 'postmodern vocabulary and discourse does not persuade practitioners to make decisions, but on the basis of choices and risks in objective reality'.¹⁴⁰ Amongst EU MS, the nations where the postmodern view has taken root the strongest ones are the smaller nations, especially the Scandinavian and Benelux countries, which are 'the most willing to argue for a foreign policy based on values, *idealpolitik* rather than *realpolitik*'.¹⁴¹

(iv) *Normative narrative contested*

Since the end of the Second World War, India and its emerging international legal scholarship legitimately argued for the major concerns of the developing world and in the process questioned the Eurocentric notion of creation of global norms.¹⁴² Postmodernist Europe has increasingly become a 'norms entrepreneur', which propagates and seeks to reflexively impose social, economic and ideological norms as global public goods that have been so successful in Europe at the global level, irrespective of other countries' stage of development, historical background, and social and cultural peculiarities.¹⁴³ Thus, Western states and Western NGOs can often shape the outcome of debates about norms in accordance with their principles and interests, as they have the material and human resources available to support their views in the discourse. This is reflected, for example, in the narrowing of the debate about human rights away from social and economic rights, claimed by developing countries, to political rights, endorsed by industrialised Western states,¹⁴⁴ regardless of the formal recognition of the indivisibility of human rights included in Article 21(1) of the Lisbon Treaty. The EU engages in the practice of 'othering' wherein it represents the other as 'different' and inferior, as an entity not yet able to achieve universal principles. As a result, it needs to show others how things are done.¹⁴⁵

Postmodern Europeans contend that norms can be interpreted in a way where the practical implications are applying to all the participants in the international system 'quasi-objectively'. While 'realist' developing countries share in support of most of the norms, but they admit that interpretations may vary. As a result, interpretations and applications have to be negotiated.¹⁴⁶ In fact, the idea that 'practical requirements for behaviour can be deduced from universal norms without their being negotiated between equally respected partners appears to be preposterous'.¹⁴⁷

¹³⁹ Primit P Chaudhuri, 'Europe and the Rise of Asia' (Jean Monnet Lecture, School of International Studies, Jawaharlal Nehru University, New Delhi, 17 October 2011).

¹⁴⁰ Shiv S Menon, 'Strategic Culture and IR Studies' (National Security Advisor, 3rd International Studies Convention, Jawaharlal Nehru University, New Delhi, 11 December 2013).

¹⁴¹ Primit P 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) 122.

¹⁴² VG Hegde, 'India, the European Union and Global Norms' in Rajendra K Jain (ed), *India and the European Union in a Changing World* (Aakar Books 2014) 63-64.

¹⁴³ See Rajendra K Jain and Shreya Pandey, 'Indian Elites and the EU as a Normative Power' (2013) 3 *Balt J Europ Stud* 105, 121.

¹⁴⁴ Zaum (n 122) 12.

¹⁴⁵ Thomas Diez, 'Constructing the Self and Changing Others: Reconsidering "Normative Power Europe"' (2005) 33 *J Int Stud* 613, 628-629.

¹⁴⁶ Hartmut Elsenhans, 'Europe and India in a Multipolar World: New Meanings of Nation, Nation-building and the Balance of Power' in Rajendra K Jain (ed), *India and the European Union in a Changing World* (Aakar Books 2014) 10.

¹⁴⁷ *ibid* 43.

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.’¹⁴⁸ Thus, if ‘national capabilities are inadequate or deficient, the gap between standards and implementation will remain, if not widen’.¹⁴⁹

(v) *Terrorism and human rights*

While India was irritated by the debate on human rights violations in Kashmir in the European Parliament, where the bulk of the EU debate took place, it was more troubled by the European Council and Commission’s 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.¹⁵⁰ India has been critical of Western nations’ double standards on human rights –one yardstick for the ‘practitioners of terrorism’ and the other for the governments.¹⁵¹ To India, terrorism is ‘a direct violation of human rights, in particular the most basic rights, the right to life and liberty’.¹⁵²

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’.¹⁵³ What perhaps infuriated India most about EU policy was its ‘seeming insistence on making the case for human rights in isolation without recognizing that restoring human rights could only follow the defeat of militancy and that this, in turn was impossible without restraint on Pakistan’.¹⁵⁴ 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’.¹⁵⁵

(vi) *Human rights versus consular issues*

The denial of visas, according to Indian officials, constitutes a human rights violation especially when a visa is denied to enable a spouse to join her partner. There are different views between India and Europe about the right to a family as stipulated in the International Labour Organization (ILO) Convention. India has found European ideas about disharmony and forcible family separation not to be valid. Interventions

¹⁴⁸ Hardeep S Puri, ‘Statements at 61st Session Commission on Human Rights’ (n 135).

¹⁴⁹ Shri Shashank, ‘Statements by the Foreign Secretary at the High Level Segment of the 60th Session of the Commission on Human Rights’ (Geneva, 18 March 2004).

¹⁵⁰ Chaudhuri, ‘Mars, Venus and Rama’ (n 141) 123.

¹⁵¹ See PV Narasimha Rao, ‘Prime Minister of India Address to the Summit Meeting of the UN Security Council’ (Geneva, January 1992).

¹⁵² Anand Sharma, ‘Statement by the Minister of State for External Affairs at the High Level Segment of UN Human Rights Council (Geneva, 19 June 2006).

¹⁵³ Chaudhuri, ‘Mars, Venus and Rama’ (n 141) 123.

¹⁵⁴ *ibid* 124.

¹⁵⁵ *ibid* 128.

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’.¹⁵⁶ Denmark’s refusal in 2011 to extradite a person involved with airdropping weapons into India due to India’s alleged poor jail conditions and poor human rights record was not well received.¹⁵⁷ There have also been instances of spouses not being allowed to join their husbands despite all requirements having been met.¹⁵⁸ The EU can ‘easily hide behind competences and the border between human rights and access to territory as immigration/consular issues is tenuous’.¹⁵⁹

(3) Analysis and reflexions

(a) Eurocentric views

A fundamental problem in the India-EU human rights dialogue is that the EU is conditioned by an essentially Eurocentric world-view about India. European narratives and writings for centuries have regarded Indians as the ‘other’ in Eurocentric world history –leading them to underestimate the importance and status of non-Western actors. This often results in mistaken perceptions, interactions and analyses regarding India.¹⁶⁰ 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’.¹⁶¹ The Europeans often regard India with ‘the superiority complex befitting a repository of reason and enlightenment’.¹⁶² Thus, it is only natural that ‘non-European outsiders often react adversely to old-style Eurocentric reasoning and Euro-narcissism’.¹⁶³

Europeans, as one EU Member State participant in the HRD put it, are opinionated and ‘come to the table with pre-conceived notions’. Europeans, he adds, ‘do not know a thing about caste; therefore they tend to judge from a very Eurocentric, romanticised and politicised angle’. As a result, the agenda is ‘already overloaded. The Indians cringe and view it as an accusation’.¹⁶⁴ They feel that Europeans have the ‘the luxury to give recommendations, which are not relevant in the Indian context’.¹⁶⁵

¹⁵⁶ 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.

¹⁵⁷ id.

¹⁵⁸ Interview SIO 1 (n 81).

¹⁵⁹ Interview DHU (n 96).

¹⁶⁰ Rahul P 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, Social Issues, Media, Civil Society and Intercultural Dimensions* (Weissensee Verlag 2006) 914, 917.

¹⁶¹ Katrin Kinzelbach, ‘The EU’s Human Rights Dialogues – Talking to Persuade or Silencing the Debate?’ (KFG Conference, Free University of Berlin, 10-11 December 2009) 15.

¹⁶² Srinivasan (n 156) 32.

¹⁶³ Hartmut Mayer, ‘Is it Still Called “Chinese Whispers?” The EU’s Rhetoric and Action as a Responsible Global Institution’ (2008) 84 *Int Aff* 61, 77.

¹⁶⁴ Interview SMSO 1 (n 90).

¹⁶⁵ id.

(b) 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, violations to the rights of 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'.¹⁶⁶

India has criticised Brussels for its double standards. Indian stakeholders have often wondered how the EU's 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.¹⁶⁷

(c) Incoherence 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.¹⁶⁸ 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.¹⁶⁹

The EU has neither developed minority rights within the *acquis communautaire*, nor do the Member States subscribe to a single standard.¹⁷⁰ Moreover, not all EU MS accept minority rights: Belgium, Greece and Luxembourg have not ratified the convention, and France has not even signed it.¹⁷¹ Thus, demonstrable failure by the EU MS 'to meet the standards they urge on others naturally blunts the EU's international credibility'¹⁷² and lead many beyond Europe to wonder how effective the Union itself is in upholding human rights in its own backyard.

(d) Moral grandstanding

¹⁶⁶ 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 E Wetzel (ed), *The EU as a "Global Player" in Human Rights* (Routledge 2011) 78-79.

¹⁶⁷ Shashi Tharoor, 'Can India Afford an Ethical Foreign Policy?' (*Times of India*, 14 October 2007) <<http://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/SHASHI-ON-SUNDAY-Can-India-afford-an-ethical-foreign-policy/articleshow/2456205.cms>> accessed 4 May 2016.

¹⁶⁸ King (n 108) 96-97.

¹⁶⁹ Jurado (n 137) 127.

¹⁷⁰ Bruno De Witte, 'Politics Versus Law in the EU's Approach to Ethnic Minorities' (2000) EUI Working Paper No RSC 2000/4 <<http://cadmus.eui.eu/handle/1814/1644>> accessed 4 May 2016; Gaetano Pentasuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe' (2001) 12 EJIL 3.

¹⁷¹ Karen E Smith, *European Union Foreign Policy in a Changing World* (2nd edn, Polity Press 2008) 127.

¹⁷² King (n 108) 98.

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.¹⁷³ India, many diplomats recount, feel 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.¹⁷⁴

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 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’.¹⁷⁵

For instance, the National Human Rights Commission (NHRC) 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’.¹⁷⁶

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’.¹⁷⁷ In fact, although NGOs do not have participation in the EU-India Dialogue, 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.¹⁷⁸ Moreover, the Indian Supreme Court has been very active on some human rights issues, *e.g.* the right to food and the right to water –rights that are not among the priorities of the EU and its Member States. More recently, in February 2016 it gave a glimmer of hope to the LGBT community by referring Article 377 of the Indian Penal Code to a five-judge constitutional bench for an in-depth reading.

(e) *More understanding necessary*

¹⁷³ Shashi Tharoor, ‘New India, Old Europe’ (*Project Syndicate*, 15 November 2011); Shashi Tharoor, ‘Reconsider Relations with the European Union’ (*India Today*, 18 May 2012) <<http://indiatoday.intoday.in/story/european-union-india-ties-india-eu-joint-action-plan/1/189252.html>> accessed 11 May 2016.

¹⁷⁴ Srinivasan (n 156) 26.

¹⁷⁵ Mahendra Gaur, ‘Interview with Ambassador Amar Nath Ram’ (2013) 1 FRPC Journal 24, 31 <<http://www.fprc.in/pdf/J-13.pdf>> accessed 10 March 2016.

¹⁷⁶ Carolyn Evans, ‘Human Rights Commissions and Religious Conflict in the Asia-Pacific Region’ (2004) 53 ICLQ 713, 726-727.

¹⁷⁷ Hardeep S Puri, ‘Statement at 59th Session of the Commission on Human Rights (n 136).

¹⁷⁸ Tharoor, ‘Reconsider Relations with the European Union’ (n 173).

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 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."¹⁷⁹

Many of India's social problems are deep-rooted and will take time to be resolved. 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'. 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'.¹⁸⁰

Despite the European normative being increasingly contested and challenged by the emerging powers and the changing balance of power, the narrative of Europe and the discourse it has established about itself has not so far been significantly affected. Europe needs to be more open to learning from others; it needs to listen more and lecture less.¹⁸¹

b) Political dialogue and public policy: Peru

This case study seeks to analyse how concepts of democracy, rule of law, and human rights in Peru influence dialogues concerning human rights between the European Union and Peru. The research shows that even though the concepts may differ in some aspects, the dialogue has been good.

This report makes use of conceptualisations of democracy, rule of law, and human rights, that have been previously covered in FRAME Deliverable 3.3. The present report thus utilises the conceptual elements established in previous work. An innovative methodology was used to not only determine the current understanding of these concepts, but also to explore their social-political aspects and points of contention. Internal political differences generate a range of interpretations of democracy and human rights. It is important to state that this study relies mainly on primary sources. This is because there is a lack of investigation regarding the dialogue, indeed in general there is a lack of research regarding international cooperation and foreign affairs of Peru.

¹⁷⁹ Amar N 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) 7.

¹⁸⁰ Interview SIO 1 (n 81).

¹⁸¹ Rajendra K Jain, 'EU Global Strategy' (2016) ISS Expert Opinion No 42 <http://www.iss.europa.eu/publications/detail_eugs-opinions/article/rajendra-k-jain-director-europe-area-studies-programme-at-the-jawaharlal-nehru-university/> accessed 11 May 2016.

(1) Institutional setting and structure of the dialogue

Political dialogues between the European Union and Peru are framed within the ‘Memorandum of understanding for the establishment of a mechanism for bilateral consultations’ (MOU) signed by the European Union and the Peruvian government on 29 October 2009.¹⁸² This agreement creates a mechanism for bilateral consultations in which both parties are committed to a series of meetings termed *political dialogues*. The objective of these meetings involves promoting cooperation in matters central to the concerns of each party, as well as other matters of common interest.¹⁸³

The MOU states that senior officials from both parties come together once a year, alternating location between Lima and Brussels. The Vice Minister of Foreign Affairs of Peru and the Executive Director of the Americas of the EEAS are the representatives participating in these meetings. The MOU also indicates that according to the agenda of a given meeting, officials from other sectors may participate in political dialogues alongside the aforementioned representatives.¹⁸⁴ In such cases, the Peruvian committee calls upon the Ministry of Foreign Affairs, and invites other Ministries or the President of the Ministerial Council so that they may participate in the dialogue. Each political dialogue concludes by adopting an agenda in order to prioritise particular issues deemed important for relations between the EU and Peru, the outcomes of which are then discussed in the next meeting.

It should be noted that six meetings have taken place (one per year) since the establishment of the mechanism of consultation. The first political dialogue took place in Brussels on March 10th 2011, with a focus on issues involving climate change and the fight against drugs. The most recent meeting took place on October 29th 2015, in Brussels. In this case, matters of commercial interest, in particular the Trade Agreement between the European Union and Peru,¹⁸⁵ cooperation in development, foreign relations, the fight against drugs, and organised crime were discussed, among others.¹⁸⁶ As it can be seen, new topics have been raised with time. These themes appeared in dialogue and reflect the different interests that can develop over time. It is important to see how, for example, organised crime has appeared because of the necessity to develop new strategies against this issue and its impact on human rights, especially in the cases of human trafficking.

Furthermore, aside from these high-level political dialogues, *technical dialogues* take place annually to address specific topics. According to the EU delegation in Peru, technical dialogues have been held on matters such as the fight against drugs, decentralisation, and micro and small-scale enterprise. The function of these technical dialogues is to allow an exchange of information between both parties that

¹⁸² Memorandum of understanding between the European Commission and the Republic of Peru for the establishment of a mechanism for bilateral consultations [29 October 2009] <http://eeas.europa.eu/peru/docs/mou_peru_es.pdf> accessed 21 December 2015 (MOU).

¹⁸³ MOU art 1.

¹⁸⁴ MOU art 2.

¹⁸⁵ Trade Agreement between the European Union and its Member States on the one hand, and Colombia and Peru, on the other [2012] OJ L354/3.

¹⁸⁶ EEAS, ‘The European Union and Peru hold VIth High-Level Political Dialogue Meeting’ (Brussels, 29 October 2015) <http://eeas.europa.eu/delegations/peru/press_corner/all_news/news/2015/20151029_es.htm> accessed 21 December 2015.

can later be utilised in the political dialogues.¹⁸⁷ In such cases, the Minister of Foreign Affairs arranges meetings and sectors relating to the specific topics of discussion are invited to attend. In regards to the subject of human rights, two technical dialogues have been held in the last two years. These meetings addressed issues of violence against women, with participation from the Ministry of Women and Vulnerable Populations, and corruption and social unrest, in which the Ministry of Justice and Human Rights was also present.

It is important to point out that in bilateral consultations concerning the subject of human rights, civil society is also involved in dialogues. Although civil society does not necessarily belong to the mechanism of consultation established by the MOU, its participation provides an opportunity for the EU to understand the perspective of organisations like the *Coordinadora Nacional de Derechos Humanos* (National Coordinator of Human Rights), or state entities that deal with such issues, for example the Peruvian Ombudsman. The information gathered in these consultations is then used as material for formulating an agenda for the following technical dialogues with the State or the annual high-level political dialogues. There is no clear mechanism on how the NGOs are selected, however it is worth saying that the most relevant NGOs working on human rights are always there. They have the possibility to raise issues: as a matter of fact, they have done that in several occasions such as the situation in Bagua, regarding indigenous rights vis-à-vis economic activities. The situation in Bagua refers to a violent reaction towards indigenous people protesting against legislation that affected the forests and jungle. In the clashes, several indigenous and non-indigenous people, including police officers, were killed and wounded. These clashes generated a violent response from the Government. Civil Society Organisations (CSO), on the other hand, turned to different international organisations to end the violence and seek for accountability and reparations.

Finally, the MOU also allows for representatives of both parties to convene meetings in order to discuss specific or urgent matters.¹⁸⁸ The flexibility of this mechanism ensures that before certain events of importance to the national politics of Peru, or to its relations with the European Union, information can be shared between all parties. In this sense, these consultations can take place by means of unofficial or diplomatic meetings. As we have mentioned before, one of the cases in which an urgency meeting was appointed was when the Bagua situation took place.

(2) Conceptualisations of human rights, democracy and rule of law emerging in the dialogues.

(a) *The understanding of democracy*

As discussed in Deliverable 3.3, there are differences in how democracy is understood by the European Union and Peru.

In practice, European Union officials have stated that there has not been tension in the dialogues since the return to democracy.¹⁸⁹ They feel that there are problems, as in any democracy, but, all in all, the

¹⁸⁷ Interviews carried out with the EU Delegation in Peru (Lima, Peru, 5 October 2015).

¹⁸⁸ MOU art 2.

¹⁸⁹ Interview with Ximena Sierralta and Manin Ljunggren, Officials of the European Union Office in Peru (Lima, Peru, 13 October 2015).

situation in terms of respect for human rights, democracy and rule of law looks promising because, for example, for the first time in history, Peru will have four democratic governments in a row. In that sense, European Union officials are confident that, regardless of the Government, they will be able to develop strategies to foster human rights.

(b) *Human rights*

As indicated in Deliverable 3.3 one of the most controversial points regarding the implementation of civil and political rights is *the right to protest*.

Centre	Periphery
Human dignity	Full legal capacity
Universal rights	Collective rights
Universality of rights-holders	Groups at risk: people with disabilities, indigenous peoples. Also people linked to subversive organisations ¹⁹⁰
Indivisibility	Social rights
Civil and political rights	Right to protest
Principles and economic and social rights: relating to the right against poverty	Social rights

Table 2: Core and periphery elements of the Peruvian conceptualisation of human rights

It is impossible to say that understandings of civil and political rights can go undisputed. The right to protest is one of the most significant of these rights. It is protected in the Peruvian Constitution in accordance with Article 2.12 in which it is stated that:

Every person has the right to gather peacefully and without arms. Gatherings in private or in public places do not require prior notice. Those that take place in squares and public roadways must be announced to the authorities in advance, and may be prohibited only for reasons of security or public health.

The Constitutional Tribunal has stated that ‘in accordance with Article 2.12 of the constitution, in no circumstance should exercising the right to gather be subject to prior authorisation by the administrative authorities [...] this may only be limited or prohibited according to the particular circumstances of a given case, and only for sufficient, well-founded and objective reasons.’¹⁹¹ Nevertheless, certain legislative measures regarding the use of force by police officers are aimed towards criminalising the act of protest.¹⁹² In this case, many protests are carried out against mining investments in rural areas, usually on

¹⁹⁰ By subversive organisations we refer to those groups that used to belong to the Peruvian Communist Party (PCP), Sendero Luminoso (SL) and Movimiento Revolucionario Tupac Amaru (MRTA) (the subversive organisations that led to the armed conflict). Some of these groups are trying to exercise the right to political participation and they are having troubles in that matter.

¹⁹¹ *Confederación General de Trabajadores vs Municipalidad Metropolitana de Lima*. Exp. 4677-2004-PA/TC [2005] Tribunal Constitucional del Perú.

¹⁹² The hearing before the Inter-American Commission of Human Rights can be viewed online, see <https://www.youtube.com/watch?t=3552&v=1PqeBvT_jSk> accessed 11 May 2016.

traditional indigenous land. This right to protest is undeniably linked to environmental and collective rights. In this respect, it should be noted that in the case of environmental rights the degree to which the state should intervene is still a point of contention. This is primarily due to some sectors viewing the state's involvement in environmental regulations as a detriment to investment in mining. In fact, certain sectors point out that the term 'human rights' is used politically to favour particular ideologies.¹⁹³ That is, those who work in favour of human rights are seen to represent certain left-wing political agendas. In this sense, it is often indicated that those who defend human rights are opposed to development, or in other cases, human rights advocates are linked to subversive groups. However, during the dialogues, the EU has recognised the value of the defenders of environment as legitimate human rights advocates.

In debates about human rights the matter of indigenous land has become especially relevant of late, and thus cannot be omitted. In accordance with Convention 169 of the International Labour Organisation, indigenous peoples have the right to prior consultation. It should be noted here that following a close reading of Article 6.2 of the Convention, 'free, prior and informed consent' is not a requirement but the aim of such consultation. Similarly, Article 16.2 refers to the relocation of Indigenous Peoples as requiring consent, yet it provides for 'an exception' when this is not achieved. Consequently, a law¹⁹⁴ and a regulation¹⁹⁵ have been promulgated in Peru to implement prior 'consultation'.

However, not all levels of the state apparatus work in favour of this. Certain political groups believe that prior consent works to perpetuate the backwardness of the indigenous peoples' way of life.¹⁹⁶ Moreover, various media agencies suggest that complaints made by indigenous peoples have less to do with measures taken by the government and more to do with pressure applied by human rights organisations. In some government sectors, such as the Ministry of Energy and Mines, opposition prior consultation does exist.¹⁹⁷ In general, however, there is no clear position in this respect. This issue becomes apparent in dialogues wherein the European Union asks about particular cases¹⁹⁸, like those of Santiago Manuin¹⁹⁹ and Máxima Acuña.²⁰⁰

The subject of the rights of indigenous peoples can become contentious as it also remains on the periphery. While declaring a state of emergency in Bagua, the Peruvian state sought to clarify its position on this subject.²⁰¹ The Bagua state of emergency came before a horrendous situation that took the life of

¹⁹³ Interview with Alberto Beingolea, Congressman of the Republic (Lima, Peru).

¹⁹⁴ Law N° 29785 on the Right to Prior Consultation with Indigenous Peoples [2011], Recognised in Convention 169 of the International Organisation of Labour (ILO).

¹⁹⁵ id; Supreme Decree 001-2012-MC [2012].

¹⁹⁶ Interview with Alberto Beingolea (n 193).

¹⁹⁷ See Peruvian Ombudsman, Office N° 0249-2014-DP/AMASPP. <<https://es.scribd.com/doc/266640875/Oficio-0249-Ministerio-de-Energia-Minas-Utero-pe>> accessed 11 May 2016.

¹⁹⁸ Interview with Ximena Sierralta and Manin Ljunggren (n 189).

¹⁹⁹ Beatriz Jiménez, 'Santiago Manuin, un Guerrero por la Paz' (*La Republica*, 30 December 2014) <<http://larepublica.pe/30-12-2014/santiago-manuin-un-guerrero-por-la-paz>> accessed 11 May 2016.

²⁰⁰ Wilber Huacasi, 'Máxima Acuña Insiste en que Minera Yanacocha los Está Acorralando' (*La Republica*, 9 June 2015) <<http://larepublica.pe/impres/politica/6401-maxima-acuna-insiste-en-que-minera-yanacocha-los-esta-acorralando>> accessed 11 May 2016.

²⁰¹ Interview with Ximena Sierralta and Manin Ljunggren (n 189).

33 people.²⁰² The protest started when some laws were sanctioned with occasion of the FTA with United States. Even though these laws had to do with the use of forests, indigenous people were not consulted at all.²⁰³

Another noteworthy matter is that of the support for *Lugar de la Memoria* (The Place of Remembering). This place was the objective of several political attacks from different sectors, especially from Fujimori's party. However EU considered it important to support this initiative. *Lugar de la Memoria* is the first memory site supported by the Executive branch. Local governments, universities, the Ombudsman's Office or civil society organisations, have administered other previous remembrance places. *Lugar de la Memoria* is the clearest effort by the government to create a place for remembrance in Peru and here lies its importance, even though some political sectors are against it. It must be said that the current administration supports the initiative but this might be in danger if Keiko Fujimori, Fujimori's daughter, wins the elections.²⁰⁴ Though this matter is often a controversial element of the notion democracy in Peru, the European Union has decided to support it.

(c) *Concept of rule of law*

In the case of rule of law, it has not been possible to identify any specific issues that arise in the political dialogues. To date, Rule of Law issues have not arisen, apparently due to the importance and urgency of other topics. In that sense, some aspects of ROL are covered in the discussions of human rights issues. Nevertheless, there are no specific projects regarding ROL between Peru and the EU.

(3) *Conclusions*

A very important aspect to consider in relation to the HRD within the political dialogue of the EU and Peru is that human rights is only one of multiple issues on the agenda, next to economy and trade, the fight against drugs and organised crime, scientific cooperation, regional politics and cooperation for development. It is in this context that few human rights issues are highlighted. This has also led to a lack of interest on behalf of academics to focus on the EU-Peru human rights dialogues, who have nevertheless focused on other aspects of the bilateral relation, such as trade, and on the relation EU-Andean Community. The Peru-EU HRD does not appear to be high in the political nor academic agenda.

In conclusion, it is possible to say that Peru and the EU agree on most of the terms referring to human rights and democracy. However, it is worth pointing out that the agreement mostly concerns core aspects of human rights. When the dialogue is about the more contested issues, such as indigenous rights or the right to development, there may be differences, but these do not amount to a denial of the concepts. However, it is worth saying that this agreement is context-dependent, which may vary in the next election. As highlighted in previous reports, concepts are dynamic and their interpretations may change. This dynamic nature of the concepts of human rights, democracy and rule of law requires the EU to be

²⁰² Elizabeth Salmón, 'The Struggle for Laws of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples' (2013) 22 Pacific Rim L&Pol'y J 353.

²⁰³ OHCHR, 'Report of the situation of human rights and fundamental freedoms of indigenous people (Mission to Peru): Observations on the situation of the indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces' (18 August 2009) UN Doc A/HRC/12/34/add.8, para 21.

²⁰⁴ Currently, Keiko Fujimori holds a 30% of popularity in the latest polls. According to Peruvian legislation, if no candidate gets more than 50%, there is a ballotage.

attentive to changes in the political and social context of third countries, even when these countries show a positive stance towards human rights and appear as a consolidated democracy.

2. European Neighbourhood Policy

The ENP concerns itself, as the name suggests, with EU relations to its neighbours with the aim to facilitate ‘political association and [achieve] economic integration’ to the largest degree possible.²⁰⁵ The EU considers cooperation a strategic priority and establishes Action Plans or Association Agendas with partner countries to achieve the aforementioned integration.²⁰⁶ Such bilateral agreements, in addition, evidence countries’ commitment to fundamental EU objectives, *e.g.* those relating to human rights, democracy and the rule of law, and set an agenda for the achievement thereof.

Next to economic integration, the EU ‘offers [partner countries] improved circulation of people across borders, financial assistance and technical cooperation toward approximation with EU standards’ in return for reform that supports the alignment of both parties’ interests.²⁰⁷ Depending on the partner with whom it is established, the ENP takes the form of a Partnership and Cooperation Agreement (PCA) or Association Agreement (AA).²⁰⁸ Notwithstanding its legal form, agreements follow the so-called ‘more-for-more principle’ and provide for greater (financial) support to those partners that show most progress.²⁰⁹

The ENP with Morocco, being the recipient of the largest amount of EU financial support, is outlined in detail below. Here, as has been done for the strategic partnership and political dialogue earlier, both the institutional setting and conceptualisation of human rights, democracy and rule of law are addressed.

a) Introduction to the EU-Moroccan HRD

(1) Chronology of main EU-Moroccan interactions

The five-year agreement signed between Morocco and the EEC in July 1969 marks the start of the EC-Morocco cooperation.²¹⁰ Essentially commercial in nature, this cooperation agreement called for the exemption of duties on certain manufactured goods (to allow Morocco to develop its textile industry) and the establishment of preferential rates on certain agricultural products, such as citrus fruits and olives.

Within the framework of the Global Mediterranean Policy, a new bilateral agreement was signed in 1976 (and came into force two years later). The new agreement expanded the initial commercial cooperation framework to include economic and financial assistance (in the form of financial protocols). The EEC earmarked this aid for the development, modernisation and diversification of agribusiness and industry.

Indeed, Morocco’s desire to move closer to Europe is by no means new. In 1984, Hassan II submitted an

²⁰⁵ EEAS, ‘European Neighbourhood Policy’ <http://eeas.europa.eu/enp/about-us/index_en.htm> accessed 14 April 2016.

²⁰⁶ Council, ‘Council Conclusions on the Review of the European Neighbourhood Policy’ (Brussels, 14 December 2015) Press Release No 926/15 <<http://www.consilium.europa.eu/en/press/press-releases/2015/12/14-conclusions-european-neighbourhood/>> accessed 14 April 2016.

²⁰⁷ EEAS, ‘ENP – How it Works’ <http://eeas.europa.eu/enp/how-it-works/index_en.htm> accessed 14 April 2016.

²⁰⁸ *id.*

²⁰⁹ Johannes Hahn, ‘Stronger Neighbourhood, Stronger Partnerships: A Revised European Neighbourhood Policy’ (2016) 21 *Europ Foreign Aff Rev* 1; see also Commission, ‘European Neighbourhood Policy – Factsheet’ (19 March 2013) MEMO/13/236 <http://europa.eu/rapid/press-release_MEMO-13-236_en.htm> accessed 14 April 2016.

²¹⁰ See ANNEX I for a detailed account on Moroccan domestic conceptualisations.

EEC membership application during a European Council meeting.²¹¹ Surprising and unexpected, this request had underlying prospective objectives. In an interview with *Le Matin du Sahara et du Maghreb*, Hassan II explains his decision: 'I was thinking long term and I would not restrain myself from envisioning a future for the whole Maghreb.'²¹² The monarch evoked economic reasons, but emphasised political considerations as the main rationale behind the move: 'Before it was of a commercial or economic nature, the membership application to the European Common Market is a political one [...]'.²¹³

The initiative was vigorously defended by Morocco, particularly by Azzedine Guessous, then-Minister in charge of Relations with the European Economic Community. Like Spain, whose membership process lasted nearly two decades, Morocco adopted a prospective approach in anticipation of an eventual partnership or a comprehensive union. It is with the utmost attentiveness that Morocco entered this negotiation, which it deemed a step forward on the long path toward Europe.²¹⁴

Morocco and the EU are tied by an Association Agreement, which was signed in 1996 and came into force in 2000. This agreement covers all fields of economic activity. On a commercial level, the agreement aims at establishing an industrial free trade area and at deepening the liberalisation of trade in agriculture and fisheries.

In the area of human rights, Article 2 of the AA states: 'Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and an essential element shall constitute of this Agreement.'²¹⁵ This clause determines the promotion of human rights to be an 'essential element' in the EU's external relation, constituting the so-called 'human rights clause', and is a major point of disagreement.

The EU- Morocco Action Plan (2005-2010) foresees a more focused implementation of the tools made available by the Association Agreement and supports Moroccan goals of deeper integration of economic and social structures with those of the Union. The action plan for 2005-2010 also marks the start of annual monitoring and evaluation reports on the implementation of the ENP (ENP Progress Reports).

Another highlight of Morocco-EU relations was the Association Council of 23 July 2007, in which Morocco and the European Union decided to launch a process that aimed at formulating what would become the 'advanced status' to which Morocco aspired. Originating from the Association Council, the joint EU-Morocco document on strengthening bilateral relations aims at the establishment of new institutions (a Higher Institute for Combatting Crime, and a joint Parliamentary Committee). The attached document also explicitly lists political conditions, such as Morocco's gradual membership to certain conventions (particularly those of the Council of Europe), or undergoing legislative reforms (political, legislative and

²¹¹ Maurice Flory, 'Note sur la Demande d'Adhesion du Maroc à la Communauté Économique Européenne' (1986) 23 *Annuaire de l'Afrique du Nord* 705.

²¹² *ibid* 706.

²¹³ *ibid* 707.

²¹⁴ *ibid* 709.

²¹⁵ Euro-Mediterranean Agreement Establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2, art 2.

administrative). However, this condition is relative due to the legal nature of the document.

As Nicolas Delort notes: '[T]he advanced status is, above all, a statement; a proclamation by two voices for better cooperation in the future.'²¹⁶ In other words, the EU-Morocco joint document has no binding provision. It aims at emphasising the strengthened cooperation between both parties and the EU's support of reforms pioneered in Morocco. In particular, it offers a legitimate framework for Morocco to integrate the EU internal market.

The EU Summit held on 7 March 2010 in Granada between the EU and Morocco was an unprecedented event for both parties. It was the first EU summit with a Mediterranean Third Party since the entry into force of the Treaty of Lisbon. The statement prepared jointly by the two parties at the conclusion of the Summit states that 'the EU and Morocco have the same desire to construct their partnership in the field of foreign relations on the basis of their adherence to the shared values of democracy, the rule of law and human rights.'²¹⁷ This sentence that appears at the top of the first part of the statement refers to the human rights clause.

Their common desire and ambition are evidence of their shared vision in responding to the many regional and global challenges.

Soon after, negotiations on a deep and comprehensive free trade agreement (DCFTA) were launched in March 2013. Four rounds of negotiations have been held so far. This agreement should be an effective framework for securing investment and developing trade relations.

A new ENP plan of action for 2013-2017 was adopted during the eleventh Association Council meeting of EU-Morocco held on 16 December 2013. This new plan is a combination of the old plan (2005-2010) and the joint document on advanced status; and offers an operational roadmap for the implementation of the advanced status, paving the way for a gradual, regulatory, and consensual rapprochement. Morocco has wanted more than the EU was prepared to offer.²¹⁸

(2) ENP progress reports

It is on the basis of the ENP 2005-2010 Action Plan that annual monitoring and evaluation reports on ENP implementation began. While these reports were initially prepared in Brussels, the EU Delegation has drafted them in the last three years. The latter bases its reports on civil society contributions and the work of the Commission. The approval process of these assessment reports is conducted internally within the Commission, after which a short report on the overall assessment of the country is issued, and subsequently presented to the ambassadors of member countries in Brussels.

²¹⁶ Nicolas Delors, 'Statut Avancé: Passer du Symbolique au Pratique' (2010) Centre d'Analyse et de Publication de l'Institut Amadeus <<http://www.amadeusonline.org/images/stories/PDF/Statut-avance-MarocUE-juillet2010.pdf?phpMyAdmin=2daacd6fce4759898390589077e6bc49>> accessed 20 December 2015.

²¹⁷ Council, 'Joint Statement European Union-Morocco Summit' (Brussels, 7 March 2010) Press Release No 7220/10, 2 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/113247.pdf> accessed 26 April 2016.

²¹⁸ 'Morocco has demonstrated on more than one occasion that it has no patience with the stagnating, simple free trade area relations imposed by the EMP in 1995'. See eg Alfred Tovias, 'The European Union and the Mediterranean Member States' in Federiga Bindi and Irina Angelescu (eds), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (2nd edn, Brookings Institution Press 2012).

ENP Monitoring reports have often drawn criticism from partner countries. Morocco has also informally expressed its dissatisfaction on many occasions, especially when the reports moved away from the factual reporting of events and included subjective assessments or criticism.

During the review of the ENP, the idea to replace these monitoring and evaluation reports developed unilaterally by joint reports was proposed. This idea was quickly dropped, as it seemed this proposal would present little use given that the European side would be more or less forced to censor itself. In the end, a compromise was reached. The last two ENP progress reports were also based on contributions from various Moroccan ministries. It appears that this new approach suits both partners.

Civil society groups, who believe that they remain superficial, also question the usefulness of the monitoring and evaluation reports. For these actors who really understand the situation in Morocco, the monitoring reports are inconclusive despite the improved format. In fact, the monitoring reports are less detailed than before; are shorter; and, for the previous two years, contain recommendations. Despite these improvements, the question of the usefulness of these reports remains. Therefore, the evaluation of the ENP implementation in the current format of a monitoring report has been annulled. There will be no follow-up report for 2015, but a new reporting form will emerge.

(3) Current/ongoing EU-Morocco HRDs

The Human Rights dialogue between Morocco and the EU is held on several levels, including ministerial, senior and expert levels. The structure of the dialogues is based on discussions ranging from the general to the more specific.

(a) *The Association Council*

The Morocco-EU Association Agreement signed in 1996 led to the creation of two institutions for the monitoring and implementation of the agreements. These institutions are the structures for political dialogue on Human Rights in particular. The first institution is the Association Council, which consists of members of the Council of the EU and the European Commission, on the one hand, and members of the Moroccan government, on the other. The Association Council is co-chaired by the Moroccan Minister of Foreign Affairs and the High Representative for the Foreign Affairs and Security Policy (HR). The Association Council meets once a year and prepares the annual report on progress and accomplishments. This council, which has decision-making power, is a platform for political exchange within the frameworks of both EU-Morocco partnership and strategic matters of common interest. The time devoted to human rights issues is restricted due to the limited duration of the council itself. Therefore, human rights are discussed from a general standpoint.

(b) *The Association Committee*

The Association Committee is the second institution established by the Morocco-EU Association Agreement. This committee meets annually, for one day a year in Rabat, and reunites senior officials from both parties. All Moroccan ministries are represented. The Association Committee, which brings together no less than 100 senior officials, is responsible for the on-going management of agreements and conducts a comprehensive review of reforms in different sectors. Even if the committee goes into more detail than the Association Council, discussions remain general and lack depth. The issues of human rights are raised

briefly at committee level.

(c) *The Sub-Committee for Human Rights, Democratisation and Governance*

Since 2005, around ten technical committees comprising experts of the European institutions and the Moroccan administration hold meetings each year.²¹⁹ The Subcommittee for Human Rights, Democratisation and Governance is the entity that deals with human rights matters. This subcommittee holds annual day-and-a-half meetings alternating between Brussels and Rabat, and is an opportunity to discuss the human rights situation. A tacit agreement between the two parties agrees not to raise individual cases of violation of human rights. The mention of certain cases is 'tolerated'²²⁰ from the Moroccan side.

(d) *A monitoring mechanism of individual cases*

A monitoring mechanism for individual cases has recently been established. This mechanism is an alternative to Morocco's rejection of raising individual cases in the Subcommittee for Human Rights, Democratisation and Governance meetings. This new entity offers a platform for regular meetings (approximately every week) between the European Union Delegation accompanied by two Member States, and the National Council for Human Rights (CNDH) or the Inter-Ministerial Delegation for Human Rights (DIDH) alternately. The main mission of the monitoring mechanism for individual cases is the observation and monitoring of trials of Moroccan activists. One meeting was held to date. It is therefore too early to assess this new entity.

(e) *Permanent political dialogue*

Permanent political dialogue is not an institution in its own right. During side meetings at bilateral or large international summits, the European side may address its concerns or acknowledge positive developments informally.

(4) *The contribution of the Council of Europe in the Morocco-EU dialogue*

Beyond the dialogue established with European institutions, Morocco maintains deep relations with the CoE. The Council is a separate intergovernmental organisation that brings together the 47 European states, whose main areas of concern are human rights, democracy and the rule of law. The expertise gained by the CoE is often made available to the EU, which sponsors the council. EU action in the field of human rights is often linked to that of the Council of Europe.

Relations between Morocco and CoE date back to the 1990s, when Hassan II gradually started to

²¹⁹ The existing Subcommittees are: Enhanced political dialogue; Economic dialogue; the Justice and Security subcommittee; the Subcommittee on Human Rights; the Industry Subcommittee, Trade and Services; the Internal Market Subcommittee; the Subcommittee on Research and Innovation, the Transport subcommittee, Environment and Energy; the Agriculture and Fisheries Subcommittee; the Working Group on Social Affairs and Migration; the Customs Cooperation Committee.

²²⁰ Interview with Philip Holpzefel, Head of the Political Affairs, Media, Culture and Information Section at the EU Delegation in Rabat (Rabat, Morocco, 22 December 2015).

implement reforms, adhering in particular to the mechanisms of the Council of Europe that were open to non-member states. It was only after the adoption of the joint document on advanced status that relations entered a new strengthened phase. This rapprochement resulted in the signing of the Headquarters Agreements in 2014.²²¹ The joint document on advanced status 'conditions' advanced status to the ratification of certain conventions of the Council of Europe. Today, Morocco is a member of the European Commission for Democracy through Law (commonly known as the Venice Commission), the European Centre for Global Interdependence and Solidarity (commonly known as the North / South Centre) and the Pompidou Group. Morocco's involvement lies, in particular, in the participation of experts, lawyers or elected officials in these mechanisms. Furthermore, Morocco was the first ever state to obtain 'Partner for Democracy' status in June 2011. This status allows Moroccan parliamentarians to sit in on plenary sessions of the Parliamentary Assembly of the Council of Europe (PACE), as well as committee meetings, without holding any voting rights.

The neighbourhood partnership between Morocco and the Council of Europe for the period 2015-2017 stipulates that the purpose of the partnership is to 'assist Morocco in the on-going process of democratic reforms, which started several years ago, by helping the country to tackle challenges related to human rights, the rule of law and democracy'.²²² This assistance manifests itself through monitoring, shared expertise in drafting laws, organisation of awareness seminars, or even symbolically through the translation of conventions.

It is worthy of note that a significant amount of the Council of Europe's activities are funded and outsourced by the EU. The Head of the CoE Office in Rabat, Jean Mehdi Remili, disagrees: 'It is not outsourcing, but rather complementarity. The EU calls upon us when it lacks the necessary expertise to fully carry out some aspects of its projects.'²²³

(5) Accomplishments to-date of EU-Morocco HRD: ENP progress reports

The monitoring and evaluation reports on ENP implementation issued between 2006 and 2014 offer a comprehensive view of the situation in Morocco. These reveal that, in general, Morocco seems more attentive to Human Rights issues and is on the right path towards the strengthening of democratic institutions. The monitoring reports still show the close relations between the two parties and welcome the good performance of the dialogue. If Morocco is on the right path, the remaining path is still long and winding, and it is not uncommon to find that the reports experience 'delays', are 'difficult to apply on the ground' or contain 'inequalities'.

b) Actors involved in EU-Morocco HRD

(1) EU institutions involved in the EU-Morocco HRD

The European External Action Service is an institutional body of the European Union. Founded in 2011, the EEAS operates under the authority of the High Representative of the Union for Foreign Affairs and

²²¹ Interview with Halima Benhanni, Responsible for the «Council of Europe» portfolio at the Ministry of Foreign Affairs and Cooperation (Rabat, Morocco, 9 January 2015).

²²² Council, *Neighbourhood Partnership with Morocco 2015-2017* (CoE 2015).

²²³ Interview with Jean Mehdi Remili, Head of the Council of Europe in Rabat, (Rabat, Morocco, 20 March 2015).

Security Policy, and is the EU's diplomatic service both in Brussels and abroad. The EEAS focus on human rights and the rule of law further nourishes the EU's politicisation of its external relations. This approach renders EEAS a leader for member states in the formulation of policies related to the promotion of the rule of law, democratic governance and crisis management.

(a) EU delegation in Rabat

The EEAS is present in Morocco through the Delegation of the European Union in Rabat. It operates under the authority of the HR/VP Federica Mogherini.

The Delegation's main task is to work towards the implementation of the EU-Morocco partnership within the framework of the European Neighbourhood Policy, including offering financial support for Morocco's political reforms, and economic and social development; boosting trade relations within the framework of the agreements and negotiations of the DCFTA; strengthening cooperation in the security field; ensuring the implementation of the Mobility Partnership; and finally, following up on the new Fisheries Protocol.

In terms of Human Rights, the 'Political, Press, Culture and Information' and 'governance' sections are the most involved in the Morocco-EU Dialogue. They closely follow human rights developments in Morocco and are the main interlocutors with the Kingdom on the matter.

(b) EEAS Brussels

In Brussels, the ENP Sub-Directorate is in charge of monitoring the implementation of the ENP, coordinating with the geographic divisions and 'country desks', and suggesting recommendations for the HR /VP and Member States.

Also, the 'Morocco desk' is in charge of centralising and passing on the work of the Delegation of the European Union in Rabat to COHOM. The 'Morocco Desk' functions as a country-advisor for the EEAS.

EEAS representatives sit on COHOM, which is in charge of preparations for high-level discussions and decisions on human rights. COHOM also brings together national experts in Human Rights and representatives of the Commission.

(2) Moroccan institutions involved in EU-Morocco dialogue

(a) Moroccan institutions that engage in direct discussions with EU

A number of Moroccan institutions take part in the Morocco-EU dialogue. Relations with the EU are of such importance that a single ministry, the Ministry of Foreign Affairs (MFA), was responsible for relations with the European Communities in the 1980s. Today, the Ministry of Foreign Affairs and Cooperation (MAEC) contains an important directorate for 'EU and Mediterranean Processes' in charge of coordinating between Morocco's various ministries and the EU. It is at the MFA that Association Committees and thematic sub-committees are hosted.

Established in 2011, the Inter-ministerial Delegation for Human Rights (DIDH) is a government body within the Office of the Head of Government. In coordination with ministerial departments and organisations, DIDH is tasked with developing public policy on matters of defence, respect, the protection and promotion

of human rights and the implementation of these policies in accordance with international conventions on human rights to which Morocco is a signatory, as well as international law. DIDH participates in the work of the Subcommittee for Human Rights, Democratisation and Governance and is called on to take part in the monitoring mechanism of individual cases.

In addition to the MFA, several other ministries are regularly invited to take part in the Morocco-EU dialogue on human rights through respective ministries' international cooperation divisions.²²⁴ The contribution of these ministries in the dialogue focuses on very specific themes, like child labour or gender wage equality.

At the parliamentary level, political dialogue is conducted between the European Parliament and the Moroccan House of Representatives. It is within this framework that an EU-Morocco friendship group was created in the European Parliament on 22 June 2011. This group brings together members of the European Parliament from different nationalities and acts as a forum to discuss the challenges of political and democratic transition in Morocco after the 2011 reforms. Regular contact is maintained between both European and Moroccan elected officials at the European Parliament, but also during official visits Morocco.

The National Council for Human Rights (CNDH) is the national institution in charge of the promotion and protection of human rights in Morocco. In 2011, CNDH replaced the Advisory Council on Human Rights (CCDH), formerly established in 1990. The CNDH actively participates in Morocco-EU dialogue. The council's expertise and independence (the CNDH is an autonomous non-governmental institution) render it a well-regarded institution for European partners. The CNDH is involved in the work of the Association Committee, the Subcommittee for Human Rights, Democratisation and Governance and responds favourably to the monitoring procedure of individual cases.

(b) *Moroccan institutions with indirect involvement in EU-Moroccan dialogue: The role of the palace*

Officially absent from the dialogue, the Palace is indirectly involved. In this respect, it is necessary to keep in mind that the King of Morocco plays a central role in shaping not only internal policy, but also foreign policy: 'He sets the tone and extent of the language, which are then carried out by the actors of Moroccan foreign policy.'²²⁵

The involvement of the Palace on the matter often manifests itself in royal speeches or through 'royal arbitration.' To this end, one recalls that royal arbitration was called upon in favour of the new *Moudawana* (Family Code) in 2004. The *Moudawana* was a major event which, for example, freed adult women from parental tutelage in marriage, raised the legal age for marriage to 18 for both sexes, dropped the man's right to unilateral divorce initiative, and called for the supervision of the Family Court in matters of polygamy. Following a public debate on abortion, King Mohammed VI summoned the Minister of Justice and Freedoms, the Minister of Endowments and Islamic Affairs, and later received the President of the CNDH. The King gave his instructions for the three parties to work in consultation with the Ulama

²²⁴ These include: the Ministry of the Interior, the Ministry of Justice and Liberties, the Ministry of Employment and Social Affairs, and the Ministry of Solidarity, Women, Family and Social Development.

²²⁵ Ismaïl Regragui, *La Diplomatie Publique Marocaine: Une Stratégie de Marque Religieuse?* (L'Harmattan 2013).

on new legislation in this regard.

c) Conceptualisations of human rights, democracy and rule of law in the Moroccan-EU HRD

The Progress Report relative to the implementation of the ENP is an annual report on the Morocco-EU dialogue. It seems that Morocco has made significant progress in the implementation of the ENP Action Plan and is in the process of consolidating human rights and fundamental freedoms, especially through the adoption of regulatory texts. For further details on the conceptualisation of human rights by Morocco, please consult the appendix.

(1) Issues raised in the HRD

(a) Democracy / transparency / rule of law

In the areas of democracy, transparency and the rule of law, dialogues focus on advanced regionalisation – the King initiated a territorial reform project.²²⁶ Following the January 3, 2010 speech, a Consultative Committee on Regionalisation (CCR) was established to prepare a democratic model for advanced regionalisation as ‘the beginning of a new dynamic towards a thorough institutional reform’.²²⁷ The Commission report contained important recommendations, including the need to revise the Constitution to set in motion the implementation of advanced regionalisation. The latter is based on the democratic management of the affairs of the region, which will be strengthened in the process. Morocco presents advanced regionalisation as a very ambitious project. While the EU supports the proposed model, the fact remains that Europeans remain sceptical of its advanced nature.²²⁸ Compared to the federal system European states adopt, Morocco still appears as a centralised state.

The dialogue also contains an election-monitoring component. The recent local elections (municipal and regional), held in September 2015, were the first local elections organised under the new 2011 Constitution. During these elections, regional councils were elected by direct universal suffrage, thereby, marking the start of the implementation of the proposed advanced regionalisation project. A team of European experts on elections made the trip at the request of the Moroccan authorities²²⁹ to monitor the election process.

(b) Speech / association / torture / HR defenders

As long as individual cases of violations of Human Rights are not raised, the Moroccan side seems very open to dialogue on freedom of association and expression, human rights activists, political prisoners, or even torture. While some areas of human rights show improvement, the fact remains that several reforms have yet to be completed and implemented. The 2014 progress report recommends Morocco to

²²⁶ King Mohammed VI of Morocco, ‘Excerpt from Royal Speech’ (Rabat, 3 January 2010) (‘Our national ambition is to move from fledgling regionalisation to advanced, democratic, development-oriented regionalisation’).

²²⁷ id.

²²⁸ Interview with Philip Holpzefel (n 220).

²²⁹ Catherine Ray, ‘Statement by the EU Spokesperson on Foreign Affairs (Brussels, 3 September 2015) <<http://www.mapnews.ma/fr/dossier/les-elections-communales-premier-pas-vers-la-mise-en-oeuvre-de-la-regionalisation-avancee-ue>> accessed 27 April 2016.

‘accelerate’²³⁰ its efforts in implementing democratic principles and human rights, in particular, through ‘the promotion of dialogue with civil society, gender equality and the strengthening of freedoms of association, assembly and expression’.²³¹ The progress report also calls on Morocco to focus its efforts on ‘guaranteeing the respect for exercising freedoms of association, assembly and expression for all citizens, abolishing any sentence of imprisonment for journalists [...] and, with regards to the press code, strengthening the consultation of stakeholders.’²³²

As to prisons, the situation remains ‘worrying’,²³³ especially due to overcrowding and the high number of people in custody.

Although the 2014 progress report states that manifestations were organised peacefully overall, the report adds that some social movements and human rights protests were repressed. Several other manifestations were, for their part, banned without official notification. As mentioned above, progress reports are very generic and only give an overall picture. Individual cases of human rights violations are raised reactively.

(c) Women

In recent years, the Morocco-EU dialogue on gender issues has focused on the institutional and legal mechanisms for guaranteeing women's rights. Thus, the dialogue focused on the draft law relative to the Authority for Parity and the Fight against all Forms of Discrimination (APALD). This institution, which will be established by virtue of Articles 19 and 164 of the 2011 Constitution, should guarantee easier access to parity and be given the means to conduct inquiries and independent investigations.

Furthermore, in 2003, EU ambassador to Morocco, Rupert Joy, expressed his support for the draft law on combating all forms of violence against women in a Moroccan daily newspaper.²³⁴ The draft law, submitted to the Secretary General of the Government (SGG) in September 2013 and submitted to the Council of Government was returned to the Ministry of Solidarity, Women, Family and Social Development. The Minister in charge of this portfolio is not willing to include issues related to domestic violence in the draft law.²³⁵ The law will be resubmitted to the SGG in January, 2016.

In 2014, the Moroccan parliament passed an amendment to the penal code abolishing a provision that allowed adults to escape a conviction after committing rape against a minor if they spoused the child. This amendment was undertaken after a public debate following the suicide of Amina Filali, a young 15-year-old girl raped and forced to marry her rapist.

²³⁰ Commission, ‘Implementation of the European Neighbourhood Policy in Morocco – Progress in 2014 and Actions to be Implemented’ (Joint Working Document Services) SWD(2015) 70 final, 2.

²³¹ *id.*

²³² *ibid* 3.

²³³ *ibid* 9.

²³⁴ Rupert Joy, ‘Lutte Contre la Violence à l'Egard des Femmes l'Affaire de Tous’ (*L’Economiste*, 26 November 2013) <<http://www.leconomiste.com/article/913305-lutte-contre-la-violence-l-gard-des-femmes-l-affaire-de-touspar-rupert-joy#sthash.DAMvDrhd.dpuf>> accessed 14 February 2016.

²³⁵ Interview with Khalid Hammoumi, Head of the International Cooperation Section at the Ministry of Solidarity, Women, Family and Social Development (Rabat, Morocco, 10 December 2015).

Also, in the area of women's rights, an observatory for equality between women and men in the work place was created. Its mission is to collect data, research and analysis on women's situation in the work place, and formulate proposals and recommendations for legislative reforms, regulations and programmes to ensure gender equality. .

It is worth noting that the EU did not react during the ongoing debate on gender equality following the publication of the CNDH report. The issue of inheritance is extremely sensitive given that the Qur'an determines the detailed shares for inheritors. Any statement by the EU on the issue might have a counterproductive on Moroccan sentiments.²³⁶

(d) Migrants

The issue of migration was introduced to the Morocco-EU dialogue in 2006. The 2006 progress report on the implementation of the ENP emphasises the EU's support for Morocco's approach towards illegal immigration. The report also welcomed the organisation of the Rabat Conference on Migration in July 2006, which brought together countries of origin, transit, and destination, to reflect on a coordinated management of migration. A few years later Morocco adopted and implemented a migration policy described as 'ambitious',²³⁷ setting in place a process of regularisation and integration of illegal migrants and refugees.

The regularisation operation for undocumented migrants was conducted throughout 2014. Following a mid-term review, a national commission was established to monitor and remedy the process. This seems to have had a positive effect since the number of positive decisions increased significantly. According to a report issued jointly between the International Federation for Human Rights (FIDH) and the Antiracist Group for Support and Defence of Foreigners and Migrants (GADEM) on 2 December 2014 (on the last day of the regularisation operation), 22,917 applications were filed by nationals from 112 countries; 10,603 applications were accepted (46%); and 6701 residence permits were issued.²³⁸

Despite the encouraging results of its migration policy, Morocco still faces many challenges. For example, reception facilities are not enough to cater to all the needs of immigrants. Also, as most migrants are situated in the north of the country (in order to reach Europe via the Strait of Gibraltar), illegal immigrants are sometimes subject to violent arrests and relocations to cities in the centre of the country.

(e) Avoided issues: The three red lines

The Morocco-EU dialogue on human rights covers a wide range of areas. The dialogue is approached with a high degree of seriousness from the Moroccan side; whereas, the EU claims that it encounters some difficulties in conducting frank conversations due to certain sensitivities.²³⁹ That is to say, the European side does not address three untouchable subjects: Islam, territorial integrity and the monarchy, as expressed in the country's slogan: 'God, The Motherland, and The King'.

²³⁶ Interview with Philip Holpzefel (n 220).

²³⁷ Commission, 'Implementation ENP in Morocco' (n 230) 3.

²³⁸ FIDH and GADEM, *Maroc entre Rafles et Régularisations Bilan d'une Politique Migratoire Indécise* (FIDH 2012) 19.

²³⁹ Interview with Philip Holpzefel (n 220).

If the current Moroccan constitutional text no longer considers the King ‘sacred,’ Article 46 states that ‘the King’s person is inviolable and respect is due to Him’.²⁴⁰ In addition to the political prerogatives expressly granted by the Constitution in his capacity as head of state, the function of ‘Amir al Mu’minin’ (Commander of the Faithful) entrusts the monarchy with ensuring ‘the respect for Islam’.²⁴¹ Thus, the red lines ‘Religion’ and ‘Monarchy’ are mutually reinforced.

Religious matters are particularly sensitive in Moroccan society, which still bears the stamp of conservatism. Dialogue on religion is usually heated. From abortion to gender equality, the EU takes a cautious approach, recognising that heightened Moroccan sensitivities to human rights issues related to religion and sexuality may provoke a backlash. One of the most obvious topics that brings to the fore the challenge of universality and indivisibility are LGBTI issues. On the one hand, the Council of Europe, which risks less than the EU, has taken a somewhat bolder approach to dealing with Morocco’s wish to ignore the topic. For example, the CoE Parliamentary Assembly issued a resolution (Res. 2061) revising the CoE-Morocco Partnership for Democracy with the Parliament of Morocco, where developments and issues to tackle are outlined. Article 5.11 ‘calls on the Moroccan authorities to take the necessary steps to remove the criminalisation of adultery and homosexuality from the Criminal Code’.²⁴² This may be contrasted with the last available Progress Report (2015) of the ENP with regards to Morocco, no mention is found with regards to LGBTI rights.²⁴³

Finally, on the issue of Moroccan control over the Western Sahara, which Moroccans widely consider to be an issue of national integrity and national right, constitutes one of the foundations of the legitimacy of the monarchy. For Moroccans, great pride is associated with the Green March (1975) wherein Moroccans believe that they reacquired the southern provinces that historically were part of the kingdom.²⁴⁴ Expressions, like ‘national cause’ and ‘territorial integrity’ are frequently used in Moroccan discourse to refer to the Sahara issue. In Morocco, territorial integrity and sovereignty are interconnected. Any criticism or hostility towards territorial integrity is interpreted as an attack on the King’s sovereignty. The official EU position is to support UN mechanisms in the resolution of this conflict. According to Véronique Janssen, ‘the EU position on the Sahara is clear. In the absence of consensus of the 28 [EU countries], our position is to follow the efforts of the UN, its special mission (MINURSO) and its Special Envoy (Christopher Ross) to find a just and lasting political solution. There is, therefore, no interference on our part.’²⁴⁵ In connection with the Western Sahara issue, the adoption of the fisheries protocol between Morocco and the EU has been at the centre of a prolonged crisis between the two parties. A Moroccan diplomat says that these agreements were negotiated at prices well below the prices commonly applied internationally

²⁴⁰ Moroccan Constitution of 2011, art 46.

²⁴¹ *ibid* art 41 (reading: ‘The King, Commander of the Faithful, sees to the respect for Islam’).

²⁴² CoE Res 2061 ‘Evaluation of the Partnership for Democracy in Respect of the Parliament of Morocco’ (23 June 2015).

²⁴³ Commission, ‘Implementation ENP in Morocco’ (n 230).

²⁴⁴ See eg Khadija Mohsen-Finan, *Sahara Occidental: Les Enjeux d’un Conflit Régional* (CNRS Editions 1997); Marguerite Rollinde, ‘La Marche Verte: Un Nationalisme Royal aux Couleurs de l’Islam’ (2003) 202 *Le Mouvement Social* 133; and Mohamed Cherkaoui, *Morocco and the Sahara: Social Bonds and Geopolitical Issues* (Bardwell Press 2007).

²⁴⁵ Interview with Karima Kabbaj, Head of the EU Directorate for EU and Mediterranean Processes at the Ministry for Foreign Affairs and Cooperation (Rabat, Morocco, 19 March 2015).

and for several reasons. One explanation could be that the economic value of such agreements, although considerable (about 30 million Euros), is still relatively low compared to the budget dedicated to support Morocco. But the main reason according to him lies in the fact that these agreements are viewed by Morocco as an implicit recognition of its sovereignty over the Western Sahara.

The crisis dates back to 14 December 2011, when the European Parliament rejected the adoption of the fisheries protocol. Although the Political Counsellor to the delegation of the European Union ensured that the reason behind the rejection was strictly related to technical elements (particularly in connection with respect for the environment, wildlife and natural resources), many observers think that it was, in reality, due to issues raised by many MEPs about the 'socio-economic impact on the affected populations'. This was interpreted on the Moroccan side as an accusation of exploitation of resources without benefitting the local people. Véronique Janssen, however, stated that the issue does not only concern the people of the Western Sahara, but those in all fishing zones. Yet, it is the Saharan waters that are rich in resources, and where these agreements apply.

The process, which eventually led to the entry into force of the protocol, lasted over two and a half years. The political Counsellor adds:

"[...] there was a lot of lobbying on both sides, on the one side Ambassador Alem [Ambassador of Morocco to the EU], [...], and on the other, the Delegation of the European Union (DUE), EEAS, and The Directorate-General for Maritime Affairs and Fisheries. We were shunned until ratification by the King, they [Moroccans] were very angry. We were left out in the cold until they realised that we were actively campaigning on their side. The Spanish lobby also played an important role because they benefit most from these agreements. In fact, the ratification of the protocol was King Mohammed VI's gift to the new King of Spain during his first visit to Morocco."

Worthy of noting that a period of eight months had elapsed between the adoption of the Protocol by European and Moroccan parliaments on the one hand, and the ratification by King Mohammed VI, on the other.

The exploitation of natural resources is viewed as a more general criticism with a particular focus on human rights. Different parties denounce the fact that human rights in the Sahara are used as an instrument against Morocco, and insist on reminding them that the issue arose in 2008, after Morocco had presented its autonomy plan, deemed credible by the United Nations. In his 6 November 2014 speech, King Mohamed VI states:

"Enough of these outbidding tactics against Morocco! Stop exploiting the rights and freedoms offered by the homeland to conspire against it! [...] My country rejects the policy of belittling its initiatives and of amplifying events occurring in the southern provinces, while saying nothing and acting in collusion with regards to events in Tindouf and the neighbouring countries. [...] At a time when they [the Secretary-General of the United Nations and the major international powers] reaffirm that Morocco is a model for democratic development, an influential state in ensuring security and stability in the region and a partner in the fight against terrorism, there is some

ambiguity in the way they deal with the question of its territorial integrity.”²⁴⁶

This short passage of the royal speech reveals a number of elements. First, the King points out the double standard of using human rights issues for wrong reasons. Then, it is a reminder of the crucial role played by Morocco in regional security and, in particular, its role in the fight against terrorism. Finally, the King focuses on the ambiguity with which the Sahara case is handled. This suggests a relationship in which one partner feels prejudiced against.

The evolution of the Morocco-EU crisis reveals the resort of both parties to power games in order to seize the political opportunity in a structurally asymmetrical context. The voices of MEPs hostile to the Moroccan position are followed by a critical public discourse towards Europe, accompanied by a subtle game that mixes delays and threats. Although both parties understand the importance of their cooperation and their mutual interests, a recent episode developed to, once again, taint EU-Morocco relations, which are currently suspended. The reason is a verdict issued by the EU Court of Justice which overturned on 10 December 2015, the agricultural agreement concluded between Morocco and the EU on 8 March 2012. The Court argued that the Council of the EU ‘had not addressed the question of whether the exploitation of natural resources [in the region] benefited the population of this territory.’²⁴⁷ This court decision angered Rabat. The Morocco-EU Association Council scheduled four days later was eventually held and offered Morocco with an opportunity to express its intransigence on the issue. The meeting concluded with Federica Mogheini stating in a press conference that the Council has decided to appeal the court decision. As of 1 January 2016, Morocco has suspended its relations with the EU and cancelled all visits and meetings of the subcommittees scheduled in January.²⁴⁸ This was denied by the government spokesman, who said after a Council of Government meeting: ‘No decision has been made on the suspension of Relations with the EU, but we are moving towards a normalisation of our relations with the EU and its preservation within a context of mutual respect, taking into account the interests of our country.’²⁴⁹ During the early months of 2016, Morocco suspended contacts with the European Union, though they have more recently been restored. Morocco’s intransigence has a good chance of paying off. The prolonged suspension of judicial cooperation between Morocco and France forced the latter to yield. In the same way, partnerships on migration and security are of utmost importance for the EU and could eventually tip the balance in favour of Morocco.

Morocco-EU crises raise the issue of *realpolitik* in human rights diplomacy.²⁵⁰ The *realpolitik* question is made all the more relevant when one sheds light on the systematic introduction of the human rights clause in EU agreements, with the goal of reaffirming its commitment to build trade relations exclusively with States who are respectful of universal values. If the approach is commendable, it rapidly becomes

²⁴⁶ *id.*

²⁴⁷ Case T-512/12 *Front Polisario v Council of the European Union* [2015] ECLI:EU:T:2015:953.

²⁴⁸ Interview with Véronique Janssen, Political Counsellor at the Delegation of the European Union in Rabat (Rabat, Morocco, 5 January 2016).

²⁴⁹ Mustapha El Khalfi, ‘Statement by Spokesperson of the Government’ (Rabat, 7 January 2016).

²⁵⁰ Bertrand Badie and Jean-Marie Fardeau, ‘La Diplomatie des Droits de l’Homme’ (2003) 50 *Revue Internationale et Stratégique* 13, 15; Gérard Fellous, *Les Droits de l’Homme une Universalité Menacée* (La Documentation Française 2010).

misleading when one considers that the EU maintains close commercial ties with states like China and does not pay much heed to human rights and democracy.

Statements by Eneko Lanbaduru seem to confirm some restraint on the European part. ‘We do not negotiate human rights [...] but we are present as guardians, observers and facilitators, at times, in a certain number of advances.’²⁵¹ European diplomacy on human rights in Morocco is thus limited to a role of observation, advice and criticism. To be heard, the EU puts a bet on its importance for Morocco ‘this does not mean that we are always followed [...]’.²⁵²

(2) Morocco’s perceptions of the HRD with EU

(a) *Interference in internal Moroccan affairs*

It is commonly understood that interference refers to unwanted intervention at the expense of a country’s sovereignty. We tend to understand the concept in its intangible sense, as defined by Moncef Khdir.²⁵³ According to the latter, interference may be by way of a material intervention when it takes the form of a physical operation on the territory of a foreign state, but it can also be immaterial when it involves e.g. the political assessment of the system by a foreign entity. Karima Kabbaj states: ‘It is true that some reports in which European institutions mentioned a delay in the implementation of reforms can be interpreted by some as a form of interference [This situation only depends on us]’.²⁵⁴

To express its dissatisfaction with a report or measure taken by a European entity, Morocco would resort to the practice of receiving foreign delegations by officials of lower rank. Official speeches are also a platform for Morocco to express its displeasure. Morocco’s speech at the opening ceremony of the 69th session of the General Assembly of the United Nations, held under the theme of Post-2015 Development, was different from previous speeches, and a critique of the western human rights model, which seeks universality. Through the Head of Government, Abdelilah Benkirane, King Mohammed VI called for an approach that respects countries’ identity and exemplifies widely shared Moroccan attitudes:

“Accordingly, the first call I would like to make from this rostrum regards the need to respect the characteristic values and principles of each country as it builds its own development model. This is particularly true for developing countries which are still suffering from the consequences of colonialism. [...] Today, and given the adverse consequences suffered, former colonial powers have no right to ask the countries of the South to introduce radical change rapidly, on the basis of a frame of reference with which they are unfamiliar, be it in terms of their culture, their principles or their values. It is as if no development were possible other than through a single model: that of the West. [...] Instead of providing the assistance needed for the peoples concerned, some Western countries, who asked nobody’s permission to colonize countries of the South, continue to impose harsh

²⁵¹ Georgi Gotev and Eneko Landaburu, ‘L’Aide de l’UE au Maroc n’est pas Conditionnelle aux Droits de l’Homme’ (*EurActiv*, 17 October 2013) <<http://www.euractiv.fr/development-policy/aide-de-ue-au-maroc-est-pas-cond-interview-531135>> accessed 11 March 2016.

²⁵² id.

²⁵³ Moncef Khdir, ‘Pour le Respect des Droits de l’Homme sans Droit d’Ingérence’ (2002) 52 *Revue Trimestrielle des Droits de l’Homme* 901, 913.

²⁵⁴ Interview with Karima Kabbaj (n 245).

conditions on them and hinder these countries' normal course towards progress. In fact, all what Western countries and their affiliated institutions do is give lessons, and, at best, a few pieces of advice. As for support, it is very limited and is always conditional."²⁵⁵

This perception also seems anchored in European discourse, as evidenced Karima Kabbaj 'The EU tends to see Morocco as a good student; but this is not what we want! We do not fall into this logic! Morocco abides by the high standards, which are in line with its identity and commits to respecting them of its own will.'²⁵⁶

The issue of interference is a paradox. From a legal standpoint, it is difficult to prove its existence. Yet, since conditionality is defined by *the norm maker*, there is, from the start, an asymmetry which is internalised by the actors with the aim of attaining goals and interests.²⁵⁷ Yet, even when it is accepted, it is also criticised and deemed 'untenable' and 'drastic'.²⁵⁸

Former EU Ambassador to Morocco, Eneko Landaburu denies any European inclination to interfere in the internal affairs of the Kingdom. In an interview with EurActiv, he said that the issue of human rights is 'a sovereign issue for the Moroccan government. We do not need to co-manage any policy.'²⁵⁹ Criticism of interference is always accompanied by a strong reaffirmation of the sovereignty of the state and its own will to align itself in accordance with the highest standards of Human Rights and democracy.

According to those interviewed, interference is not criticised as much when it comes to supporting civil society. There is allusion to the matter, for example, in the discourse of former EU Ambassador to Morocco: 'In the field of human rights, we have no conditionality, because we fund or assist in the work of a number of associations. We are, therefore, not in negotiation with the government.'²⁶⁰ The main argument is that donors will fund associations only after they have presented their projects. The choice is made according to criteria specified in advance in the call for proposals.²⁶¹ Also, a brief overview of the proposals reveals that they are very oriented and shaped by the terms of reference in the calls for proposal, exactly like a job seeker who engineers his application to meet the requirements of the job offer. This is how the debate on implicit interference appeared in the 2000s because of the substantial funding of the European Union Delegation devoted to this issue.²⁶² The DUE Political Counsellor objects to this, but recognises that the criteria adopted by the EEAS is often very precise and regrets that the bureaucracy

²⁵⁵ UNGA, 'General Debate of the 69th Session: Morocco' (25 September 2014) <http://www.un.org/en/ga/69/meetings/gadebate/pdf/MA_en.pdf> accessed 28 April 2016.

²⁵⁶ Interview with Karima Kabbaj (n 245).

²⁵⁷ Zaki Laïdi, *La Norme sans la Force: L'Énigme de la Puissance Européenne* (2nd edn, PFNSP 2008).

²⁵⁸ UNGA 'General Debate Morocco' (n 255).

²⁵⁹ Gotev and Landaburu (n 251).

²⁶⁰ id.

²⁶¹ Interview with Chadi Sidhoum, Project Manager at European Endowment for Democracy – Southern Neighbourhood (Brussels, Belgium, 20 January 2015); Interview with Fadoua Maroub, Founder President of the Association des Rencontres Méditerranéennes du Cinéma et des Droits de l'Homme (Rabat, Morocco, 13 January 2015); and interview with Véronique Janssen (n 248).

²⁶² Interview with Youssef Raissouni, Coordinating Director of the Moroccan Association for Human Rights (Rabat, Morocco, 18 March 2015).

often dictated by Brussels takes over.²⁶³

(b) *EU's human rights double standards:*

(i) *Inconsistent EU positions on human rights*

In his book, *La Norme Sans Force*, Zaki Laïdi notes: 'Although it would deny it, Europe actually practises a classic case of the double standard.'²⁶⁴ The double standard is a common practice in international relations, which explains the differences in European assessments of third-country behaviour. Laïdi continues: 'In terms of human rights, it [Europe] shows more interference with European countries which are destined, to join the EU, than with Arab countries. And among the latter, between those who are of a strategic interest, and those who are less of one.'²⁶⁵ We will try to see to what extent this applies to Morocco.

Criticism of the double standard seems to be very strong on the Moroccan side. While Morocco appears to be the most advanced country in terms of democracy and human rights in the region, there is a feeling that Europe is stricter towards Morocco than it is with its neighbours. In this regard, a Moroccan diplomat states that 'there are double standards. It is a sense of injustice that we feel. If one wants to evaluate an experience, one should do so by comparing it with a similar case, in the region. It should not be compared with Great Britain!'²⁶⁶ For her part, Karima Kabbaj described the perception of the double standards as follows: 'You feel some sort of double-talk/double-speech: there are countries where there are no complaints, including our adjacent neighbour.'²⁶⁷ These testimonies express some frustration on the part of the actors of Morocco's diplomacy, which insist that the kingdom's policy of opening-up stems from a genuine desire for internal democratic reinforcement.

On the reasons why Europe practises this double standard, Abderrazak Rouwane states that 'one should not be naive and think that all is perfect and well. The EU does not interfere in the affairs of gas and oil-supplying countries and has no interest in doing so. Moreover, given the revenue generated by these countries from their natural resources, they can ignore the EU's remarks.'²⁶⁸ This response seems to be shared by everyone. Even the Political Counsellor of the DEUE, in the end, admitted that 'it is clear that a blind eye is turned when there are real economic interests.'²⁶⁹ By practising this double standard, the proposed democratic model certainly loses its credibility. Turning a blind eye to democracy and human rights when interest is at stake equates to accepting 'the existence of regimes which are quite odious/detestable.'²⁷⁰

Veronique Janssen objects to this criticism, explaining that the EU's role is not to 'push' states to engage where they do not want to, but to accompany them, in the sense that it is the countries themselves who

²⁶³ See interview with Véronique Janssen (n 248).

²⁶⁴ Laïdi (n 257) 182.

²⁶⁵ id.

²⁶⁶ Diplomat requested anonymity.

²⁶⁷ Interview with Karima Kabbaj (n 245).

²⁶⁸ Interview with Abderrazak Rouwane, Secretary General of the Joint Ministerial Delegation for Human Rights (Rabat, Morocco, 20 March 2015).

²⁶⁹ Interview with Véronique Janssen (n 248).

²⁷⁰ See Badie and Fardeau (n 250).

define their strategy and pace. Financial aid and technical assistance are always processed based on the application of the Moroccan state. Viewed from this angle, EU action cannot be equated to any form of interference or double standard. According to Véronique Janssen, it is simply based on the application of the principle of *more for more*, in reference to the fact that the EU develops more significant partnerships and offers more advantages to countries which progress more towards democratic reforms. However, criticism of the double standard accusation by the European side could pay off. Indeed, it may be an additional argument for Morocco to negotiate further with donors and to express its dissatisfaction when it feels the EU has been too intrusive.

(ii) *Failure to respect human rights inside the EU*

A sense of lack of respect for human rights within the EU is prevalent on the Moroccan side. Images of how fleeing refugees from Iraq and Syria were recently treated on European soil further fuels the Moroccan argument. Recent events, like the construction of a wall in Hungary, police violence, or even a journalist kicking a migrant holding his child in his arms all bear great significance.

Even Moroccan institutions are getting involved. For the first time, CNDH has tried to invoke shortcomings of respect for human rights in Morocco-EU dialogue. Indeed, the Commission opened an investigation into discrimination against Moroccans in the EU. According to Driss El Yazami, this investigation was a surprise for the DEU, which requested its withdrawal from the agenda of the Subcommittee on Human Rights, Democratisation and Governance and its postponement.²⁷¹ Always willing to discuss human rights issues in Morocco, the EU is less so when it comes to human rights on its own soil. Questioned on the subject, Phillip Holpzafel explains that the DEU decision was motivated by the conviction that the issue would be more relevant if it was discussed in the subcommittee dedicated to social affairs and migration.

(iii) *Linking of human rights to economic incentives*

The strategy of associating human rights issues to economic incentives, also called democratic conditionality, is clearly stated in the principle of *more for more*: 'Increased EU support to its neighbours is conditional. It depends on progress in building and consolidating democracy and respect for the rule of law. The more and the faster a country progresses in its internal reforms, the more support it will get from the EU.'²⁷² The same could be said in the *less for less* principle: 'The EU will uphold its policy of curtailing relations with governments engaged in violations of human rights and democracy standards, including by making use of targeted sanctions and other policy measures.'²⁷³ The implementation of this approach is specified in the EU support framework for Morocco. The European Union has dedicated a budget of over €728 million to Morocco for the period 2014-2017. In this respect, Morocco is the second recipient of EU financial aid within the ENP framework, behind Palestine.²⁷⁴ The amount allocated to Morocco by the EU

²⁷¹ Driss El Yazami, 'Statement by the President of the CNDH' (Rabat, Morocco, 16 December 2015).

²⁷² Commission and EEAS, 'A New Response to a Changing Neighbourhood' (Joint Communication) COM(2011) 303.

²⁷³ id.

²⁷⁴ Antony Drugeon, 'Pourquoi l'UE Accorde 800 Millions d'Euros au Maroc' (*Telquel*, 10 September 2014) <http://telquel.ma/2014/09/10/pourquoi-ue-accorde-800-millions-euros-maroc_1415663> accessed 20 December 2015.

for this period ²⁷⁵ actually ranges from €728 to 890 million. The EU is committed to unlock €728 million over three years and €62 million more if it deems that Morocco has made progress in fields where funds were allocated. Obtaining the full amount is subject to conditions. This approach precisely illustrates the principle of *more for more*. It is explicitly mentioned in the framework for the EU's support to Morocco that 'these additional funds will be determined on the basis of progress achieved towards the establishment of a solid and sustainable democracy and the implementation of reforms which contribute to achieving this goal'.²⁷⁶

In essence, the rationale behind the principle of *more for more* can only be commendable. It is also important for it to be applied. On the Moroccan side, 'We do not complain, we receive the highest amount and fully understand that the logic of the *more for more* is applied.'²⁷⁷

(3) EU's perceptions of the Moroccan approach to human rights

Interviews conducted with members of the DEU suggest the belief that while the Palace genuinely wishes to introduce reforms, it nevertheless wants to maintain firm control over the country. The inherent contradiction, however, still allows room to implement reform, especially if the goals converge. Morocco's image is that of a Muslim state, with a conservative society; one where its active civil society has to play an increasing role in the reform process, while making sure not to cross the three red lines.

d) Analysis and reflections

(1) Different conceptualisations of HR

Differences in views originate from two Moroccan characteristics. First off, Morocco is a Muslim state. Islam in Morocco is often described as accommodating, open, or moderate. The 'Sharia' is not applied rigorously and great efforts are undertaken in interpreting religious texts (ijtihad) by the Council of Ulemas with the aim of rendering religious precepts more in tune with contemporary times. It is within this framework that royal instructions were given to the Secretary General of the Rabita Mohammadia of Ulemas to discuss inheritance laws.

To a lesser extent, the second element that may explain the difference in conceptualisation is the monarchy's will to maintain a firm grip on the country - one of the main reasons behind setting red lines.

(2) Diverging interests and priorities

Besides the European desire to posit itself as an influential promoter of values on the international scene,²⁷⁸ EU action continues to pursue realist interests.

The two main EU initiatives targeting its Mediterranean neighbours (EMP and ENP) are viewed as

²⁷⁵ Commission and EEAS, 'Programmation de l'Instrument Européen de Voisinage (IEV): Cadre Unique d'Appui pour l'appui de l'UE au Maroc (2014-2017)' <http://eeas.europa.eu/enp/pdf/financing-the-enp/morocco_2014_2017_programming_document_en.pdf> accessed 6 January 2016.

²⁷⁶ Missing.

²⁷⁷ Interview with Karima Kabbaj (n 245).

²⁷⁸ Diez (n 145).

partnerships which aim to export stability in order to avoid importing insecurity.²⁷⁹ Thus, the best way for the EU to gain in influence is to secure its environment by exporting its standards beyond its borders.²⁸⁰ Deeming Morocco as 'key era of security for Europe',²⁸¹ the EU's goal is to create a buffer zone between sub-Saharan countries and Europe through the ENP.²⁸² Europe's biggest fears lie in irregular migration flows, and terrorist acts of jihadi nature: two ongoing and sad realities.

The perception of illegal immigration as a threat to European security is rooted in concerns over the management of uncontrolled flows. The second reason lies in the fact that illegal immigration is seen as a potential breeding ground for terrorism. The development in perception of the threat is owing to amalgams which often associate illegal immigration with jihadi terrorism and trafficking of all kinds (drugs, human beings, etc).²⁸³ Although in an asymmetrical relationship with the EU, Morocco has adopted a strategy which appears to be paying off by positing itself as a good student, and negotiating increasingly important rewards by linking migration stakes with economic ones.²⁸⁴ The *issue linkage* approach is a bargaining tactic based on the simultaneous discussion of two or more issues for joint settlement. The migration issue is, therefore, a political resource for Morocco to negotiate under what Ali Bensaâd labels as 'geographic renteering'.²⁸⁵

Furthermore, following the events of September 11, a security obsession emerged in Europe.²⁸⁶ Since the attacks on the offices of French weekly Charlie Hebdo, the fight against terrorism appears to be, more than ever, the priority for European governments. For some European Union countries, Morocco has become a key country in the realisation of this goal.²⁸⁷ Indeed, several states have expressed their desire to strengthen security cooperation with the Kingdom, which is distinguishing itself thanks to its expertise in the matter.

Security issues are therefore a means to a political end. In the case of EU-Morocco relations, security is a mutual goal. The management of migration issues and transnational terrorism by Morocco, in turn, corresponds with financial security.²⁸⁸ The EU seeks to outsource as much of its migration policies to exert remote control. For its part, Morocco uses its 'resources' to best benefit from Europe's obsession with security. Addressing its human rights issues with the EU also represents an opportunity for Morocco to

²⁷⁹ Laïdi (n 257) 169.

²⁸⁰ Laure Delcour and Elsa Tulmets (eds), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Nomos 2008).

²⁸¹ id.

²⁸² Raffaella Del Sarto and Tobias Schumacher, 'From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?' 10 *Europ Foreign Aff Rev* 17.

²⁸³ Houria A M'Chichi, 'La Migration dans la Coopération UE-Maroc entre Tentative de Gestion Institutionnelle et Pragmatisme' in Houria A M'Chichi, Bachir Hamdouch and Mehdi Lahlou (eds), *Le Maroc et Les Migrations* (Fondation Friedrich Ebert 2005).

²⁸⁴ Nora El Qadim, 'La Politique Migratoire Européenne vue du Maroc: Contraintes et Opportunités' (2010) 31 *Politique Européenne* 91.

²⁸⁵ Ali Bensaad, 'Le Maghreb Pris entre Deux Feux' (*Le Monde*, 28 October 2005).

²⁸⁶ Azzedine Rakkah, 'La Politique Européenne en Méditerranée' (2009) 14 *Oasis* 105.

²⁸⁷ Interview with Mourad Errarhib, Director of Cooperation and International Relations at the CNDH (Rabat, Morocco, 13 January 2015).

²⁸⁸ Pierre Buhler, *La Puissance au XXIe Siècle: Les Nouvelles Définitions du Monde* (CNRS Editions 2011) 84.

affirm its international respectability. This was especially true during the reign of Hassan II. If priorities and interests of both parties vary, each seeks to benefit in its own way.

(3) Overcoming differences

As we have seen repeatedly, the Western Sahara issue is an extremely sensitive issue in Morocco. The latter does not accept the instrumentalisation of human rights issues when it comes to the Sahara and insists that the issue only arose in 2008, after it presented its autonomy plan, which the UN deemed credible. It is clear that since the Moroccan proposal of the enhanced autonomy plan for the Western Sahara, reports incriminating Morocco on its management of rights and liberties of the people of this area is increasing. A case in point is the report prepared by British politician, Charles Tannok, on the human rights situation in the Sahel region, which was adopted by the European Parliament 22 October 2013. Although its title suggests that it addresses the Sahel region, the report has been viewed as an indictment against Morocco.²⁸⁹ Indeed, Tannok ‘condemns violations of human rights’ and does not hesitate to qualify the Western Sahara as ‘territories occupied by Morocco’, despite the fact that the UN position, which is modelled on the official position of the EU, considers the Western Sahara as a territory under Moroccan administration. Gilles Pargneaux, President of the EU-Morocco friendship group²⁹⁰ draws attention to the fact that the ‘Tannock’ report is an initiative report and, therefore, ‘it is a parliamentary position and does not have any legislative value. Bearing this in mind should allow us to temper the political consequences of this text.’²⁹¹

Also, the ‘Parliamentary contribution to resolving the Western Sahara conflict’ adopted on 25 June 2014 by the Parliamentary Assembly of the Council of Europe (PACE), reflects a position that seems a bit more balanced. It seems that the instrumentalisation of human rights in European international organisations is done in the institutions where members were directly elected: the European Parliament and PACE. According to Véronique Janssen:

“Moroccan criticism is not directed at the position of the EU, but rather at those taken by a certain number of European parliamentarians, whose role has grown lately and, therefore, bears more legitimacy. The criticism is not intended for the institutions, but for parliamentarians. This is the cost of democracy. We must fight against this instrumentalisation of human rights.”²⁹²

²⁸⁹ A diplomat requesting to remain anonymous.

²⁹⁰ Created in June 2011, the EU-Morocco ‘Friendship Group’ of the European Parliament brings together MEPs from different nationalities. They maintain regular contacts with Moroccan officials. The group has acquired Morocco’s position regarding the Sahara, as evidenced by an open letter to the UN Secretary General on the renewal of the mandate of MINURSO to April 2015. An informal group of parliamentarians called ‘L’intergroupe Sahara occidental’ is opposed to the EU- Morocco Friendship Group. See eg the interview with Gilles Pargneaux, ‘Le Rôle du Groupe d’Amitié UE-Maroc’ (*Magazine* 360, 8 April 2014) <<https://groupedamitieuemaroc.wordpress.com/2014/04/08/interview-par-le-magazine-360-le-role-du-groupe-damitie-ue-maroc/>> accessed 5 January 2016, for more information.

²⁹¹ id.

²⁹² Interview with Véronique Janssen (n 248).

B. Formal Human Rights Dialogues

Institutionalised human rights dialogues with third countries or regional organisations have become common practice. Through these consultations, the EU is able to ‘[...] implement its policy on human rights [...]’ abroad.²⁹³ In line with the Union’s objective to ensure the integration of human rights and democratic principles throughout its external policy, it may ‘initiate a human rights-specific dialogue’ to confer extra attention to the topic.²⁹⁴ HRDs’ objectives, notwithstanding this goal of general policy integration, are adjusted on a case-by-case basis according to the partner with whom the dialogue is held.²⁹⁵ There is, furthermore, some variety in the level at which these dialogues take place, both within formal HRDs as in comparison with strategic partnerships or political dialogues.²⁹⁶

Prior to the initiation of formal HRDs, exploratory talks are held with the country in question. These discussions allow for an assessment of the objectives the third country wishes to pursue and permit the EU to provide an explanation of the ‘principles underlying the EU’s action’.²⁹⁷ The idea thereof being that it allows for an alignment of expectations and fundamental values. The decision to formally commence HRDs is subject to discussion in COHOM and ultimately dependent on Council of EU approval.²⁹⁸ COHOM is, in addition, tasked with the follow-up of ‘the dialogue and for setting the agenda in all scenarios’.²⁹⁹

Below one will find an elaboration on the EU’s HRDs with the African Union and China respectively, providing the institutional setting in which these dialogues take place and commenting on the conceptualisation of human rights, democracy, and the rule of law within them.

²⁹³ EEAS Guidelines (n 5) 2.

²⁹⁴ *ibid* 5.

²⁹⁵ However, there are some topics that are given priority and are included on the agenda of all dialogues, eg:

“[...] signing, ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms, combating the death penalty, combating torture, combating all forms of discrimination, children's rights, and in particular those of children in armed conflicts, women's rights, freedom of expression, the role of civil society and the protection of human rights defenders, international cooperation in the field of justice, in particular with the International Criminal Court, promotion of the processes of democratisation and good governance, the rule of law and the prevention of conflict.”

ibid 6; see also EEAS, ‘Human Rights and Democracy’ <http://eeas.europa.eu/human_rights/about/index_en.htm> accessed 14 April 2016.

²⁹⁶ EEAS Guidelines (n 5) 2-3. See also EEAS, ‘11th AU-EU Human Rights Dialogue – Joint Communiqué’ (Kigali, Rwanda, 24 November 2015) <http://eeas.europa.eu/rwanda/151124_au-eu_hr_dialogue-communiqué.pdf> accessed 14 April 2016 (indicating that the AU delegation was led by AU Commissioner for Political Affairs, H.E. Aisha L Abdullahi, with participants including the President of the African Court on Human and Peoples’ Rights, the Commissioner of the African Commission on Human and Peoples’ Rights, among others) (AU-EU Joint Communiqué); EEAS, ‘34th EU-China Dialogue on Human Rights’ (2 December 2015) Press Release No 151202/03 <http://eeas.europa.eu/statements-eeas/2015/151202_03_en.htm> accessed 14 April 2016 (Mr. Li Junhua, the Director-General for International Organisations and Conferences, served as the ministerial representative of the Chinese delegation).

²⁹⁷ EEAS Guidelines (n 5) 8.

²⁹⁸ *id.*

²⁹⁹ *ibid* 9; see also EEAS, ‘Mandate of the Working Party on Human Rights’ (Brussels, 10 December 2014) <http://eeas.europa.eu/human_rights/workgroup/docs/cohom_mandate_en.pdf> accessed 14 April 2016.

1. African Union

a) Institutional setting of the dialogue

The AU-EU HRDs has its origin in the 2007 Joint Africa-EU Strategy (JAES),³⁰⁰ which set out that ‘based on a Euro-African consensus on values, common interests and common strategic objectives’ the partnership should set out to ‘bridge the development divide between Africa and Europe through the strengthening of economic cooperation and the promotion of sustainable development in both continents, living side by side in peace, security, prosperity, solidarity and human dignity.’³⁰¹ The JAES underlined that the partnership between the EU and Africa has to build on equal partnership, which should replace the former ‘donor-recipient relationship’.³⁰² However, it is not easy to achieve the aim of equal partnership, because the EU and its Member States are the main donors of the AU,³⁰³ which creates economic dependence. According to some scholars this donor-recipient relationship has its roots in the colonial past of Africa, and what is more, some human rights violating laws and institutions of African countries stem from the colonial periods.³⁰⁴

The AU-EU HRDs³⁰⁵ is a platform jointly agreed on by the AU and the EU and it is the only formal human rights dialogue between the EU and an intergovernmental organisation (dialogue among institutions),³⁰⁶ and one of several dialogues between the EU and the AU.³⁰⁷ The AU-EU HRDs focuses on general human rights issues (e.g. the death penalty, women’s rights, the rights of migrants and the right to development) and not on concrete cases.³⁰⁸

The impact of this human rights dialogue is inherently limited because the AU as an intergovernmental system ‘can only complement but not replace national systems’.³⁰⁹ The EU as a supranational organisation has more normative power regarding its Member States: as an EU official involved in the AU-EU HRDs pointed out, ‘the AU is accountable for their Member States in a different way’.³¹⁰ Furthermore, the AU

³⁰⁰ EEAS, ‘The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy’ <http://www.africa-eu-partnership.org/sites/default/files/documents/eas2007_joint_strategy_en.pdf> accessed 20 October 2015.

³⁰¹ Council, ‘The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy’ (Lisbon, 9 December 2007) Press Release No 16344/07, para 4 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf> accessed 10 May 2016.

³⁰² Karen del Biondo, ‘Moving beyond a Donor-Recipient Relationship? Assessing Partnership in the Joint Africa- EU Strategy’ (2015) KFG Working Paper Series No 63 <http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_63.pdf> accessed 11 May 2016.

³⁰³ The Africa-EU Partnership, ‘Financing the Partnership’ <<http://www.africa-eu-partnership.org/en/about-us/financing-partnership>> accessed 23 March 2016.

³⁰⁴ Chidi A Odinkalu, ‘Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa’ (2003) 47 JAL 1, 8–9.

³⁰⁵ They are part of the Africa-EU Strategic Partnership, the formal channel through which the European Union and the African continent work together. It is based on the JAES adopted by Heads of State and Government at the second EU-Africa Summit in 2007. See Council, ‘The Africa-EU Strategic Partnership’ (n 301).

³⁰⁶ Interview with an EU official, participant of AU-EU HRDs (March 2016) (Interview EU HRD Participant).

³⁰⁷ See also FRAME Deliverable 5.4 on the EU-AU dialogues.

³⁰⁸ Del Biondo (n 302) 25.

³⁰⁹ Odinkalu (n 304) 25.

³¹⁰ Interview EU HRD Participant (n 306).

regional human rights system is often described as an underfunded and ineffective one,³¹¹ consisting of 54 countries, which includes not only elected but also military regimes.³¹² The limited effectiveness of the African regional human rights system limits the possible human rights records of the HRD.

The HRD between the AU and the EU has been held, usually once a year, since 2008. While there was a feeling from the AU side that the agenda setting in the early years was dominated by the EU, this has improved over the years and there is also more engagement with civil society and participation by relevant stakeholders.³¹³

The dialogues are part of the Africa EU Partnership on Democratic Governance and Human Rights which 'aims at developing a common understanding of democratic governance and at promoting and consolidating a shared human rights agenda'.³¹⁴ The outcome of the dialogue is expressed in recommendations that feed into the political processes.

(1) Actors involved in the dialogue

The participants in the dialogue are high-level civil servants – the most recent dialogue in November 2015 was *e.g.* led by the AU Commissioner for Political Affairs and the EU Special Representative for Human Rights. African participants included the President of the African Court on Human and Peoples' Rights, the chairperson of the African Commission on Human and Peoples' Rights and the AU Commission's Director for Political Affairs. The EU delegation included the head of the EU delegation to the AU, the head of the EU delegation to Rwanda and the head of division, Pan-African Affairs, EEAS. The only civil society representative present was the chairperson of the political affairs cluster of the AU's Economic, Social and Cultural Council (ECOSOCC).³¹⁵

Civil society can have input in the process. Sometimes their input is acted upon. Thus at the November 2015 Dialogue the AU and the EU 'decided to jointly support a Continental Conference on Freedom of Expression in 2016 based on the recommendations made by the civil society seminar'.³¹⁶

(2) Structure of the dialogue

The dialogue is a one-day event. Thus the agenda for the 2012 dialogue set out a meeting lasting from 9 AM to 6 PM, starting with brief opening statements by the leaders of each delegation, after which members of each delegation introduced human rights developments in each of the continents. At the 2012 dialogue the African side presented on the human rights strategy for Africa, recent developments in African countries and the work of the AU organs with a human rights mandate. The EU side presented on the strategy for the implementation of the EU Charter of Fundamental Rights and developments in the EU external human rights policy. The death penalty and the right to development were discussed under the heading specific human rights issues before the report of the 3rd CSO seminar. After lunch the

³¹¹ Odinkalu (n 304) 26.

³¹² *ibid* 11.

³¹³ Interview with an AU official, participant of AU-EU HRDs, (May 2015) (Interview AU HRD Participant).

³¹⁴ Commission, 'One Year after Lisbon: The Africa-EU Partnership at Work' (Communication) COM(2008) 617 final.

³¹⁵ AU-EU Joint Communiqué (n 296).

³¹⁶ *ibid* para 10; AU-EU Civil Society, 'Seminar on the AU-EU Human Rights Dialogue' (Kigali, Rwanda, 20-21 November 2015).

participants discussed AU-EU cooperation at the UN level before turning to AU-EU cooperation ‘on matters of mutual interest’, listed as actions relating to the fight against racism, racial discrimination, xenophobia and related intolerance and the implementation of the UN Guiding Principles on Business and Human Rights. The meeting further discussed follow up in relation to recommendations by previous dialogues on a workshop on the human rights of migrants, refugees and asylum seekers; a seminar on UNSC Resolution 1325 on women, peace and security; support to human rights and gender training programmes for peace-keeping missions in Africa; and a study on freedom of association. The final discussion point at the 2012 dialogue was on the relationship between the human rights dialogue and the Africa-EU partnership on democratic governance and human rights.

b) Conceptualisations of human rights, democracy and rule of law emerging in the dialogues.

Human rights, the rule of law and democracy are listed among the fundamental principles in the Constitutive Act of the AU.³¹⁷ This document emphasises the promotion of peace and security, the promotion of democratic principles and institutions, popular participation, and good governance. It also emphasises the promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.

As explained in Chapter III, the EU’s areas of engagement are defined in the HRDGs and its thematic human rights guidelines. However, as was mentioned above, a dialogue with an intergovernmental organisation is clearly different from a dialogue with a state. It must also be noted that there are clearly divergent views among the participants on either side of the dialogues and perhaps in particular in relation to the Member States. It is noticeable that Member States’ representatives on either side do not participate in the formal human rights dialogue, but sometimes participate in thematic seminars that are organised as an outcome of the dialogue.

The discussions tend to focus on issues of mutual interest in multinational fora such as the UN³¹⁸ and practical assistance to the AU institutions,³¹⁹ but also include discussion on various thematic issues as further discussed below. The AU is insistent that its programmes should be home-grown but accepts support for such programmes when donors, such as the EU, take an interest in them, for example in relation to elections and peace and security.³²⁰ As was discussed earlier, the EU is a major financial contributor to the AU human rights institutions, such as the African Commission and Court, even though dependence on donors is controversial. The Rules of Procedure of the African Commission permits the Commission to accept funds from donors such as the EU.³²¹ However, some scholars argue that such external interventions may expose Commissioners (and the Court’s judges) to outside pressures which

³¹⁷ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15, art 4.

³¹⁸ Interview AU HRD Participant (n 313).

³¹⁹ *id.*

³²⁰ *id.*

³²¹ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010 (adopted 18 August 2010) rule 66(2).

might compromise their independence.³²² These concerns have also been highlighted by the AU political bodies and in 2014 the AU Executive Council decided to ‘increase the budgetary allocation’ of the African Commission ‘to prevent the dependency of such a sensitive and important AU organ on partner funds for the performance of its functions’.³²³ The 2015 dialogue discussed the following topics: business and human rights, abolition of the death penalty, migration, election observation, impunity, human rights in conflict situations and freedom of expression. The topic of social rights was not on the agenda of the AU-EU HRDs, which is problematic from the aspect of the principle of the indivisibility of human rights. The EU further pledged support for the Africa 2016 Human Rights Year.

There is clearly a difference of opinion on many of these issues between various states but it is less clear that there is a divergence of opinion between the AU and the EU as organisations. Evidently the AU cannot take the same clear-cut stance as the EU on the death penalty as it is still practiced in many of its Member States. However, there is clearly a movement towards abolition in many Member States as endorsed by the Cotonou Declaration of the Continental Conference on abolition of the Death Penalty in Africa, adopted in 2015.

It was perceived as a sign of true partnership in the HRDs that the African partner could influence the agenda of the HRDs, when the issue of migration was put on the agenda of the dialogue:

“Some of the other partnership like migration and mobility for example only attracts the attention of the African side because the Europeans do not want to have direct discussion with the continent on this issue of migration. They want to have it as a bilateral issue between countries in Europe and specific countries in Africa.”³²⁴

To raise the issue of migration and mobility in HRDs was an African interest, because the current system privileges the ‘free’ movement of European nationals³²⁵ over African nationals *e.g.* through visa systems.³²⁶

Migration is an issue high on the agenda of the EU in light of the current influx of refugees into the EU. Clearly the AU is an important partner of the EU in stemming in particular the flow of refugees making their way to North Africa to cross the Mediterranean by boat to the EU, with many perishing at sea as a result. At the 2015 dialogue ‘[b]oth parties stressed the rights, safety and security of migrants’ and it was agreed to ‘expedite the implementation of the agreed action plan of the Valetta Summit of 2015’ and to

³²² See Julia Harrington, ‘The African Court on Human and Peoples’ Rights’ in Malcolm D Evans and Rachel Murray (eds), *The African Charter on Human and Peoples’ Rights: The System in Practice 1986–2006* (CUP 2002) 315; Michelo Hansungule, ‘African Courts and the African Commission on Human and Peoples’ Rights’ in Anton Bösl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (KAS 2009) 251.

³²³ AU Decision 856(XXV) ‘Decision on the Thirty-Sixth Activity Report of the African Commission on Human and Peoples’ Rights’ EX.CL/Dec.856(XXV) para 10.

³²⁴ Interview AU HRD Participant (n 313).

³²⁵ Boldizsár Nagy, ‘Nationality as a Stigma: The Drawbacks of Nationality (What do I have to do with Book-Burners?)’ (2014) 5 *Corvinus J Sociol & Soc Pol’y* 31, 49-55.

³²⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1.

continue the dialogue.³²⁷ While the 1969 AU Convention Governing Specific Aspects of Refugee Problems in Africa,³²⁸ ratified by 45 Member States, includes a broader definition of refugees than the 1951 UN Refugee Convention, the focus of EU-AU discussion around migration is on how to stop the migrant flow through addressing 'root causes of irregular migration and displaced persons in Africa'.³²⁹

Since the dialogue cannot discuss all issues in detail, joint seminars are sometimes arranged by the AU and EU to take the discussion further. Thus a one-day dialogue on 'Fostering the implementation of UN Guiding principles on Business and Human Rights through regional cooperation' was held in Addis Ababa on 16 September 2014 as 'a direct follow-up to decisions made at the AU-EU Human Rights Dialogue in November 2013'.³³⁰ While both sides expressed their commitment to the implementation of the Ruggie Principles, the 'AU stated their endeavour to develop an African owned framework to implement the UN Guiding Principles so as to accommodate the uniqueness of the continent'.³³¹ At the November 2015 dialogue the 'EU committed to support the AU with the development of an African Policy Framework on the Implementation of the UNGP Business and Human Rights.' Controversial issues between the two sides such as the desirability of developing a binding UN treaty on business and human rights (pushed among others by South Africa) has seemingly not been discussed in the context of the human rights dialogue.

Issues of democratisation do not feature much on the agendas of the human rights dialogue. At the 2015 dialogue the parties simply 'welcomed the progress achieved in improving the AU capacity and methodology through EU support in the areas of training, staff exchange and capacity building in 2015' and agreed to further strengthen the cooperation.³³²

The fighting of impunity for mass atrocities is high on the agenda of both the AU and the EU. The communiqué of the 2015 dialogue reiterates the commitment of the two unions 'to fighting impunity of all sorts' and highlighting cooperation in relation to addressing impunity in South Sudan. It is important to emphasise that the functioning of the International Criminal Court to investigate, prosecute and try individuals accused of committing genocide, crimes against humanity, and war crimes has been a bone of contention between the two parties since the Court first sat in 2002. With 9 out of its 10 investigations located in Africa, the AU side has been critical of the role of the ICC and 'suspects the Court is politically

³²⁷ AU-EU Joint Communiqué (n 296) para 6.

³²⁸ AU Refugee Convention art 1(2) (stating that the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality).

³²⁹ See Council, 'Valletta Summit – Action Plan' (Valletta, Malta, 11-12 November 2015).

³³⁰ The Africa-EU Partnership, 'Africa and EU Join Efforts to Promote Human Rights in Business' (21 October 2014) <<http://www.africa-eu-partnership.org/en/newsroom/all-news/africa-and-eu-join-efforts-promote-human-rights-business>> accessed 23 March 2016.

³³¹ EEAS, 'Fostering the Implementation of the UN Guiding Principles on Business and Human Rights through Regional Cooperation' (Addis Ababa, Ethiopia, 16 September 2014) <http://www.africa-eu-partnership.org/sites/default/files/userfiles/final_report_-_au-eu_hrb_seminar_held_on_16_sept_2014.pdf> accessed 11 May 2016.

³³² AU-EU Joint Communiqué (n 296) para 7.

influenced by its, mainly European, funding countries'.³³³ It was in this light that the then AU Chairperson, Jean Ping decried that:

“International law should not be wielded as the big stick by strong nations used to pummel the weak ones. We are against selective justice. If we have to be fair, the Georgian president, who is being accused by Russia of genocide, must face similar justice.”³³⁴

There is however no mention of the deep divide between the AU and the EU in relation to the ICC (in particular its indictments of African heads of state) and the exercise of universal jurisdiction by some EU MS. That the ICC does not feature prominently in the human rights dialogue does not mean that discussions around it do not feature in other AU-EU engagements.³³⁵

There is a clear commitment to freedom of expression in the legal frameworks of both the AU and the EU. The 2015 dialogue decided ‘to jointly support a Continental Conference on Freedom of Expression in 2016 based on the recommendations made by the civil society seminar, as well as a Seminar on Freedom of Association’ and to ‘develop national action plans on safety and security of journalists and freedom of expression advocates in conflict zones in Africa’ and to support access to information.³³⁶ It remains to be seen how this is implemented in practice. While the AU human rights organs from time to time criticise Member States for lack of freedom of expression and association, such criticism is unlikely to be directed to Member States from the AU policy organs.

Some controversial issues such as LGBTI rights are not found on the agenda of the dialogues despite featuring heavily in the EU and its Member States’ engagement with many AU Member States both bilaterally and for example in the UN’s Universal Periodic Review process.

c) Conclusions

The human rights dialogues present a platform where the EU and Africa can discuss the issues that are impeding the realisation of human rights, democracy and rule of law. As one of our interviewees underlined, the AU-EU HRDs are ‘very important’ and are a ‘useful occasion of talk’ on human rights issues at the continental level.³³⁷ Civil society can clearly influence the process even though their direct involvement is limited, especially as they do not directly participate in the HRD.³³⁸ The dialogue is clearly seen as a way to promote issues of common concern, with detailed discussion often being deferred to thematic workshops where other stakeholders with relevant expertise can also participate and make substantive inputs on specific issues. There is seemingly little conceptual contestation at the dialogues as

³³³ The 9 African States are: The Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Côte d’Ivoire, Libya, Sudan, Uganda, Kenya, Libya, and Mali. Nigeria and Guinea are also under preliminary examinations. See Anne Vernet and Eric Pichon, ‘The African Union and the International Criminal Court: What is at Stake?’ (*EP Think Thank*, 1 April 2016) <<https://epthinktank.eu/2016/04/05/au-icc/>> accessed 29 April 2016.

³³⁴ ‘AU Chief Accuses ICC of Selective Justice (CORRECTED)’ (*Panapress*, 27 January 2009) <[http://www.panapress.com/AU-chief-accuses-icc-of-selective-justice-\(CORRECTED\)--12-522092-43-lang2-index.html](http://www.panapress.com/AU-chief-accuses-icc-of-selective-justice-(CORRECTED)--12-522092-43-lang2-index.html)> accessed 29 April 2016.

³³⁵ See eg EEAS, *EU Annual Report on Human Rights and Democracy in the World* (EEAS 2010) 60.

³³⁶ AU-EU Joint Communiqué (n 296) para 10.

³³⁷ Interview EU HRD Participant (n 306).

³³⁸ The only civil society presence in the dialogue is the chairperson of the political affairs cluster of the AU’s ECOSOC.

the focus is on establishing cooperation. However, although sides seem to agree on common issues confronting human rights in both regions during the dialogue, their approach to these issues differ greatly.

First, on the issue of migration, while the AU side sees internal instability and armed conflict as a reason for which people may seek for asylum, the EU arguably differs on this conception and is investing a great amount of resources to deter such individuals from reaching its borders. Second, both recognise the need to forestall impunity and mass atrocities, yet the African side perceives the EU as being the political force influencing the ICC to launch a deliberate and targeted indictment against AU Member States for committing some of these crimes. Third, while the AU seeks binding instruments as a means of averting and addressing the human rights violations often triggered by the operations of EU MS' corporate entities, the latter has arguably impeded such a treaty from seeing the light of day. In light of this uneasy calm looming over the AU-EU relations, it would be important for both parties to use the HRD's flexible and deliberative platform to address these differences and adopt a common approach towards safeguarding the rights of individuals within their respective jurisdictions.

2. China

As was mentioned in the introduction to this report, the HRD with China is the most studied one in the secondary literature. What follows here is just a brief case study.

a) Institutional setting of the dialogue

(1) Goal of the dialogue

Improving the human rights situation in China is one of the significant aims of the EU-China HRD. The Dialogue is an instrument adopted by the EU to channel all issues of concern (such as the death penalty, re-education through labour, ethnic minorities' rights, civil and political freedoms *etc.*) in a forum where China is committed to responding.³³⁹ Meanwhile, promoting mutual understanding and cooperation in terms of human rights is an essential goal of the Dialogue as well.

In 2001, the EU issued a document describing the HRD as an essential part of the EU's methods to promote sustainable development, peace and stability.³⁴⁰ One of the main goals of the EU is to emphasise the promotion of civil and political rights in China.³⁴¹ However, from the viewpoint of China, the Dialogue must be a platform for discussing both China and EU countries' human rights situations. There is no doubt that the Dialogue is an opportunity for both China and the EU to identify and implement cooperation programmes in the human rights and legal spheres,³⁴² however, some scholars have pointed out recently that the Dialogue is policy centred and China is just using the dialogue as a way of fending off criticism.³⁴³ Kinzelbach's diagnosis of the HRD is hard: 'the attitude of the Chinese MFA in the Dialogue turned from purposely hypocritical in 1995 to openly uninterested in 2010. The EU's engagement in the Human Rights Dialogue, on the other hand, turned from fairly optimistic in 1995 to entirely ceremonial in 2010.'³⁴⁴

(2) Structure of the dialogue

The Dialogue is held in the form of a one-day meeting, which is hosted by a Chinese senior officer and an EU senior officer. There are a number of departments that are responsible for human rights affairs taking part in the Dialogue, such as the representatives of the Supreme People's Court, the Commission of Legislative Affairs of Standing Committee of the National People's Congress, the Ministry of Public Security, and the State Bureau of Religious Affairs. From the EU, authorities such as the European External Action Service Director of Asia-Pacific Affairs and the EU presidency will also attend the Dialogue.

In addition to the one-day meeting, the EU and China also host some topic-related seminars, which could

³³⁹ See EEAS, 'EU-China Human Rights Dialogue' <http://eeas.europa.eu/delegations/china/eu_china/political_relations/humain_rights_dialogue/index_en.htm> accessed 20 April 2016.

³⁴⁰ EEAS Guidelines (n 5) 2.

³⁴¹ Katrin Kinzelbach and Hatla Thelle, 'Taking Human Rights to China: An Assessment of the EU's Approach' (2011) 205 *China Qrt* 60, 63.

³⁴² *ibid* 66.

³⁴³ Baker (n 6) 60.

³⁴⁴ Kinzelbach, 'Quiet Diplomacy' (n 6) 195.

be considered as a follow-up of the Dialogue. For example, between 2006-2007, EU and China did not only engage in HRDs four times, but also launched EU-China Human Rights Seminar for four times as well. The topics of these seminars related, among others, to death penalty, prevention and prohibition of torture, the right of education, transparency and regulation of media, establishment of national human rights institution, the implementation mechanism of economic, social and cultural rights.

The European Commission is one of the main bodies interested in the Dialogue because some of the programmes proposed in the Dialogue are usually enforced by the Commission. The EC provides China with assistance for promoting human rights in specific issues, for example, support to Chinese civil society organisations in protecting children or the victims of torture.³⁴⁵

(3) Context in which the dialogue takes place

The EU-China HRD was set up in 1995, and since then there are two rounds of the dialogue each year. The topics of the Dialogue vary per year, and all of these topics are raised according to important human rights events taking place in China or the EU.

The Tiananmen Square event in 1989 brought international attention to China's human rights issues. European countries then tried to point out human rights issues in China and wanted to give suggestions for the Chinese Government on the basis of values perceived as western. Meanwhile, China did not want to be criticised by international community for its human rights record. After several years of diplomatic manoeuvring in the Human Rights Commission, a new strategy was pursued and the EU-China HRD began to take place regularly in the autumn of 1997.³⁴⁶

However, between 1995 to 1997, as the EU attempted to co-sponsor a resolution criticising the human rights situation in China, China suspended the HRD unilaterally. It seems that the HRD was taken by China as a way to deterring the EU MS from co-sponsoring a resolution at the UN level.³⁴⁷ It was not until the Chinese Minister of Foreign Affairs announced in the UNGA that China would like to restart the dialogue with EU that the it started to take place again twice a year. A thorough account of how the HRD developed over time is set out in Kinzelbach's book *'The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits'*.

b) Conceptualisations of human rights, democracy and rule of law emerging in the dialogues.

(1) Human rights

Examining early encounters, Kinzelbach has found that the EU clearly prioritised civil and political rights in China, whereas the Chinese government emphasized the 'citizens' social and cultural rights and the rights of the disadvantaged'.³⁴⁸ This divergence in emphasis still occurs today.

In terms of the conception of human rights, some Chinese scholars pointed out that the EU attaches great

³⁴⁵ See EEAS, 'EU-China Human Rights Dialogue' (n 339).

³⁴⁶ Kinzelbach and Thelle (n 341) 61.

³⁴⁷ Baker (n 6) 58.

³⁴⁸ Kinzelbach, 'Quiet Diplomacy' (n 6) 22-23.

importance to the universalism of human rights and advocates that it is reasonable and workable to establish an universal mechanism and model of human rights promotion and protection.³⁴⁹ However, according to these scholars, the EU ignored the different circumstances such as social mechanisms, historical backgrounds, cultural traditions, etc., that means different countries should establish their own human rights promotion and protection policies on the basis of domestic circumstances.³⁵⁰

Although the EU criticises the human rights situation in China, it does not deal with all the human rights issues arising within the EU.³⁵¹ The 2014 human rights report in Europe published by the Council of Europe, declared that democracy, rule of law and human rights situation in Europe have been experiencing a crisis as never before. The refugee problem, racial discrimination, corruption, hate speech, etc., affect many European countries. The financial crisis and increasing social inequality have negatively affected human rights. In many European countries, poverty and high unemployment rates intensified this situation and breed extremism.³⁵² Therefore, the Chinese point out, even though the EU has established a relatively well-developed human rights protection system, it still faces human rights violations.

Contrary to regarding the EU's conception of human rights as the default one to follow, establishing human rights policies based on the domestic situation could lead to a self-reliable, self-sufficient and self-confident conception of human rights.³⁵³ The HRDs are a good platform for communication, beneficial to both the EU countries and China to learn from each other. Discussing the level of human rights protection in a State is beneficial in order to find out gaps in human rights promotion, however, if there is some disagreement on basic principles of human rights, such as different understandings of the universalism and particularism of human rights or the right to development, China will reject the suggestions proposed by the EU countries, weakening the effects of the HRDs.

(2) Democracy

Even though both the EU countries and China use the concept of democracy, they have different interpretations of this concept.³⁵⁴ China established a democratic system with Chinese characteristics, which includes the National People's Congress System, the System of Mutual-Party Cooperation and Political Consultations led by the Communist Party of China, etc.³⁵⁵ This domestic system differs from Western views of democracy where free elections, multi-party systems and parliamentary systems are the main elements of democracy. Due to the differences between these systems, there are some different

³⁴⁹ Li-yu Zhu and Xiao Jin Zhang, 'The Similarities and Difference of the Chinese and European Union's Viewpoint of Human Rights and the Impacts on the Relations between China and European Union' (2002) 4 Journal of China National School of Administration 87.

³⁵⁰ *ibid.*

³⁵¹ At the 34th HRD, China suggested that the EU should explore possibilities to deal with human rights problems such as refugee protection, religious discrimination, etc.

³⁵² Wang Fang, 'Europe has Fallen into the Worst Human Rights Situation since the Cold War' (*People's Daily*, 18 April 2014) <<http://world.people.com.cn/n/2014/0418/c1002-24911132.html>> accessed 2 December 2015.

³⁵³ Zhuying, 'The Flood of Refugees Challenges European Human Rights Conception' (2015) 847 Chinese Social Science Weekly.

³⁵⁴ This is further explored in FRAME Deliverable 3.3.

³⁵⁵ See China Society for Human Rights Studies, 'Nature and Characteristics of Chinese Democracy' <<http://theory.people.com.cn/GB/49150/49152/3588173.html>> accessed 1 February 2016.

policies and methods for democratic promotion within them.³⁵⁶ The EU and China view these democratic policies according to their own democratic system. However, they will emphasise their own success in democratic promotion instead of directly criticising other countries' democracy.³⁵⁷

There are several explanations for this: one of the most obvious characteristics of HRDs is that the contents of these dialogues are too general, especially in the field of democracy. Both the EU countries and China would make friendly suggestions for democracy promotion to each other, but there are no specific guidelines to deal normatively with substantive issues of democracy. Even though the term 'democracy' has been put forward in many Chinese official documents, social media and academic papers, it is just a generalised term and there is no specific and concrete definition of democracy. For instance, some government officials use the term 'democracy' as a way of appealing to citizens and promoting their own political career.³⁵⁸

In addition, reviewing the contents of the EU-China HRDs for the past ten years, most of them do not refer to democracy directly, except concerning the events which took place in Tibet on 14 March 2008. The EU accused China of being a non-democratic regime, failing to protect the freedom of religion, expression and association and violating the civil and political rights of the minorities in Tibet and Xinjiang. This criticism is unacceptable for China.³⁵⁹ Democratic affairs are considered as domestic affairs and States are not willing to accept other countries' criticisms or suggestions easily, especially when the criticisms relate to issues connected to national sovereignty. As a result, democratic matters are hardly discussed in the HRDs.

Chen and Kinzelbach are very critical of the Chinese role in democracy promotion. They argue that 'the Chinese party-state has sought to countervail external and domestic democracy promotion by using a wide range of tactics, ranging from domestic repression, counter-discourse at home and abroad, to sticks and carrots at the international level.'³⁶⁰

(3) Rule of law

Rule of law is one of the most significant topics in HRDs.³⁶¹ The main topics of rule of law include, among others, the evolution of the criminal judicial system, anti-corruption measures, and ratification of the ICCPR. As Chinese leaders increasingly realise the significance of the rule of law, most of the suggestions which were given by the EU countries in the HRDs have been put into action, for example, China has established the basic State policy for the development of rule of law, requires that the staff in judicial

³⁵⁶ See Shupin Zhang, 'The Western Democracy Should Accept Criticisms' (*People's Daily*, 24 July 2014).

³⁵⁷ For example, during the 30th HRD in 2011, the representatives of China introduced the improvements of rule of law, people's livelihood, democracy, etc. and emphasised that only on the basis of mutual respect and mutual equality could the HRDs have a positive effect in the future.

³⁵⁸ See 'The Democratisation of China and Its Limits' (*Xinhua International*, 23 March 2011) <http://news.xinhuanet.com/world/2011-03/23/c_121219525.htm> accessed 26 April 2016.

³⁵⁹ Hui Chen, 'The Influence of International Norms of Human Rights on Chinese Foreign Policy' (Master Thesis, Zhejiang University 2009) 56.

³⁶⁰ Dingding Chen and Katrin Kinzelbach, 'Democracy Promotion and China: Blocker or Bystander?' (2015) 22 *Democratization* 400, 403.

³⁶¹ See eg the content of the 4th, 20th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th, 30th, and 31st HRD.

administration must be ruled by law, enforce the law strictly and bring perpetrators to justice.³⁶²

In recent years, the European Commission has initiated several programmes such as the EU-China Legal and Judicial Co-operation Programme, for the purpose of promoting the judicial system in China. Another example is the EU-China Village Governance for Equitable Development with the UNDP, which aims to strengthening the rule of law and the participation of civil society in China.³⁶³

However, because most of the topics related to the rule of law in the HRDs are focused on individual cases, and most of the suggestions for the promotion of rule of law are not so specific, it is difficult to extract all-around and practical suggestions. The HRDs are considered to be a platform for exchanging experience in promotions of the rule of law, but not a binding agreement between the EU and China. Meanwhile, there are different models for the development of rule of law, which means some suggestions proposed by the EU countries may appear suitable for the EU countries but not for China. China would like to use a model that could be accepted by Chinese people and should consider the historical legal background of China.

c) Conclusion

Human rights is a sensitive topic in China because it is related to politics and national sovereignty. As a result, China is cautious about the suggestions made by other countries, which is also an obstacle for fostering mutual trust between the EU countries and China. Nevertheless, the EU-China HRDs are officially considered to be a platform for communication and mutual-understandings in the human rights field.³⁶⁴

Some scholars are suspicious of the effect of the dialogue because it is political and empty. The HRD has also changed over the years. According to Chen and Kinzelbach, China's increasing international power, and at the same time the financial crisis in Europe, 'changed the dynamics of international politics, and significantly decreased the party-state's vulnerability to international pressure. Accordingly, high-ranking leaders in Beijing now dismiss Western criticism of China's governance model rather confidently. For example, according to confidential accounts of EU officials, Wu Hailong (since 2014 China's Representative at the UN in Geneva) noted repeatedly in closed-door meetings that China was no longer willing to be lectured on human rights and democracy because "times have changed".'³⁶⁵

Others maintain however that, as China has gradually accepted the conceptions of human rights, democracy and rule of law promoted by the United Nations and has agreed to more cooperation in international community, the dialogue has proved to be a useful tool for promoting mutual understandings in practice, allowing China and EU to find more common sense in terms of human rights, democracy and rule of law.

³⁶² See the 'Sixteen Words' Policy for rule of law that was put forward in the Report of the 18th National Congress of the Communist party of China.

³⁶³ See EEAS, 'EU-China Human Rights Dialogue' (n 339).

³⁶⁴ See People's Republic of China Ministry of Foreign Affairs, '34th EU-China Human Rights Dialogue' <http://www.fmprc.gov.cn/web/wjbxw_673019/t1319776.shtml> accessed 2 February 2016.

³⁶⁵ Chen and Kinzelbach (n 360) 403.

V. Conclusions

A. Institutional setting of the dialogues

The previous reports in this work package were primarily theoretical, focusing on formal elements of the concepts of human rights, democracy and rule of law. Limited attention was paid to the operationalisation of these concepts. Unlike those reports, the present report focuses more on operationalisation: the enquiry is focused on conceptions that are deeply embedded, almost buried, in the practice of international relations. It is a challenging report since theoretical conceptions need to be disentangled from politics. Considering the institutional setting of the HRDs is the first step towards such end.

This report has explored how domestic and organisation-based conceptions of human rights, democracy and rule of law emerge in EU HRDs, and what consequences they bring for the general HRD' goals. We have focused our attention on two main types of dialogues: general HRDs, including those established in bilateral relationships and the European neighbourhood policy, and formal HRDs with third countries and international organisations.

Before discussing the main findings of each type of dialogue and reflecting on these findings from a theoretical and conceptual perspective, the differences found among the institutional settings of the dialogues need to be addressed. The scope and the importance of the discussions taking place in the HRDs seem to be strongly connected to their purpose and institutional setting.

The HRD with India, taking place within the strategic partnership mechanism, has revealed the different expectations of each side. Based on the present case study, it appears that the discussion of human rights issues is a compulsory topic in a much longed-for relationship 'among peers', in which the desire for the recognition of India as sovereign state and emerging power seems to underlie the Indian agreement to participate. Although rooted in the colonial past, the perceived asymmetry of the dialogue bears little reality in current times, particularly from an economic perspective. Even if the 'bilateral relationship' is formally seen as 'strategic' for both parties, and thereby, horizontal, it nevertheless appears to be perceived in the Indian view as a vertical one, with the EU on top.

The case study on the AU underlines that, since the partner in this HRD is an intergovernmental organisation and not a state or supranational organisation, the impact of the dialogues can be limited on the national level. In this dialogue there are real points of contention between the two partners, such as the views on the International Criminal Court and the issue of migration. The case study raises the asymmetry of the bilateral relation rooted in the colonial past through examples such as the economic dependence of the AU.

The list of human rights issues discussed in the context of the political dialogue with Peru significantly varies both in substance and in number from issues discussed in formal HRDs, like those held with China and the African Union. In a historical perspective, the general purpose of the political dialogue with Peru is not to enter into an assessment of the human rights situation in Peru, but rather to establish a trade and commercial relationship. In this context, attention to human rights is not prevalent over discussions about innovation and technology or economic development. Interestingly, among the different types of dialogues here examined, however, the Peruvian-EU dialogue is perhaps the one in which the EU has

potentially more (economic) leverage. This might lead to an enhanced HRD in the future.

Among the general HRDs discussed in this report, the case study of Morocco is probably the most successful and shows less friction, even though from a conceptual point of view, many differences were found. The genuine efforts of Morocco to improve its human rights record and democratic deficit shows a political commitment towards human rights, but may also be encouraged by the desire to operate more closely with the EU. Morocco is, after all, a 'neighbour', with long standing connections with the EU and its Member States. This geographical and historical closeness may balance other 'conceptual' distances. That said, it is possible that the more informal nature of the dialogues taking place in the context of the ENP strengthen this positive attitude. The ENP brings positive consequences for Morocco, ranging from free movement of people and goods to financial support and other forms of collaboration, and this seems to yield fertile grounds for HRDs.

It appears, thus, that HRDs taking place in the context of broader and more general foreign relation mechanisms of the EU, such as bilateral relationships and the ENP, are inherently connected to other types of dialogues carried out within those mechanisms. Considering that multiple types of dialogues are also held with states with which the EU holds formal HRDs suggests that it is not the existence of more dialogues that is positive, but the interconnectedness or embeddedness of them. This 'embeddedness' of the general HRDs appear as a positive dynamic, enhancing the possibilities to continue the debate about certain issues that might have been halted by moving it to other fora, presenting it from a different yet complementary angle. The challenge for formal HRDs lies in how those multiple types of dialogues can be more fruitfully interrelated. Such dynamics calls for a coherent and consistent approach.

The 'formal' HRDs examined in this report, however, suggest some advantages over non-formal ones. Firstly, the preparation process towards the dialogue, including the consultation of civil society, seems beneficial beyond the discussions taking place in the context of the dialogues themselves since they provide an opportunity for engaging and mobilising civil society. Even when not formally taking part in the HRD, NGOs and civil society representatives keep the attention to human rights on the political agenda. Secondly, the promotion of other theme-based dialogues in addition to or as a follow-up to human rights dialogues, often with the participation of experts, ensures a more nuanced and detailed discussion than formal HRD allow for. One EU diplomat participating in the most recent informal COHOM meeting emphasised that often, non-diplomats, particularly experts of specialised officials are more open and offer less resistance to criticism and human rights debates. Thirdly, formal human rights dialogues are in practice more transparent than general HRDs taking place within other mechanisms, even when NGO's and civil society representatives are not allowed to participate. This is the result of the regulated proceeding, with agreed upon agendas, which are made public and detail press releases. In the case of the EU-AU dialogue in particular, the nature and structure of the organisations also encourage transparency, or at the very least, publicity.

Bearing in mind these aspects of the dialogues that are induced by the different type of mechanisms, the question arises as to the possibility to properly tailor the dialogues to make the most of each mechanism. Below, we discuss some crosscutting issues found in the case studies.

B. Reflections on cross-cutting issues

1. State sovereignty

Beyond the specific human rights issues arising in each of the dialogues discussed in this report, questioning the human rights situation within the third countries is generally regarded as an issue challenging the principle of State sovereignty and non-interference in the private affairs of States. The Moroccan case study highlights that such interference can be a material or immaterial one. This dissatisfaction with the EU's involvement is expressed, albeit in different forms, in the case of China, India and Morocco.

According to the official viewpoint of Morocco, human right issues in the Western Sahara are used as an instrument against the country's territorial integrity. In the EU-Morocco relationship any criticism towards territorial integrity is interpreted as an attack on the King's sovereignty. In this dialogue, according to the Moroccan viewpoint, the European partner cannot address the territorial integrity of Morocco, as this constitutes one of the 'red lines' of the EU-Morocco HRDs.

In a similar way, institutional dialogues refrain from mentioning delicate issues that might infringe upon the sovereignty of Member States. The 2015 AU-EU HRD avoids discussion of the deep divide between the AU and the EU in relation to the International Criminal Court (in particular its indictments of African heads of state) and the exercise of universal jurisdiction by some EU MS.

2. Double standards

The discourse of sovereignty is often mixed with a critique of the 'double standards' used by the EU. These double standards appear at two levels. Firstly, there is an inconsistency between the position of the EU regarding human rights in third countries and within the Union. For instance, third countries question the European track of human rights regarding migrant and refugees and the protection of (religious) minorities. The moral, rather than the legal, standing of the EU for questioning the domestic situation in the third countries becomes the focus of criticism. Secondly, the EU appears to take a stricter or more flexible stand towards specific countries, without clearly establishing parameters for comparison. The assessment of the human rights situation is perceived as disconnected from the realities of the region, with countries being 'unfairly' compared to European standards. Similarly, the different yardstick used to assess countries in similar situations, 'turning a blind eye', is perceived as resulting from economic interests of the Union.

It would considerably enhance the consistency of the HRDs if issues in which the human rights output of the EU is problematic were included on the agenda and explicitly mentioned in the HRDGs, too. It would demonstrate the EU's openness for constructive dialogues and it could have a positive impact on the human rights system of the European Union itself. Openness for genuine dialogue instead of one-way lecturing would fend off partners' complaints, like 'we do not want to be lectured; you have got your problems too.'³⁶⁶ Consistency would also be promoted if the EU departed from the practice of treating third countries differently 'even though their human rights (and democratic) records are similar'.³⁶⁷

3. Universality and cultural diversity

³⁶⁶ Interview SMSO 1 (n 90).

³⁶⁷ Smith (n 171) 116.

Another aspect emerging as closely connected to claims of sovereignty is the universality of human rights, which is questioned and perceived as a ‘western model of human rights’, imposed on non-western states. This criticism, prevalent in the Chinese position, is also found in human rights dialogues that are more fluent and positive, like the Morocco-EU dialogue.

The case studies show that given the colonial and post-colonial experiences of the EU partners in HRDs, the EU and its Member States should be very sensitive by respecting the mutuality of dialogues and showing their willingness to respect the equality and sovereignty of the partners. In the frame of such sensitising, the EU should put on the agenda of HRD meetings its own human rights problems too (like racism, xenophobia, discrimination, racial and ethnic profiling, violations of the rights of migrant workers and members of the Roma and Muslim minorities) and report to the partners its steps taken in these areas.

The lack of mutuality in HRDs can strengthen the arguments of cultural relativism, according to which the European partners are leaving no room for cultural diversity in the frame of HRDs. The case studies show that the non-European partners of the HRDs, especially China and India, often make strong criticisms of the HRs situation within the EU and some of its Member States in the framework of the Dialogues. The Indian case study explicitly mentions that Europe needs to be more open to learning from others and emphasises that recently the European partner in HRD has not been reflective enough.

4. Indivisibility

Another aspect creating friction appears to be the indivisibility of human rights, which although formally accepted, is highly contested in practice. Such contestation becomes apparent in relation to the right to development, which reveals the tensions between theory and practice. For instance, India emphasises the right to development, similarly to Peru, and incorporates the notion of international collaboration in relation to economic, social and cultural rights, while the EU seems to link international cooperation to development, which is moreover not formally recognised as a human right.

5. (When) Conceptions matter

The case studies in this report suggest that conceptualisations matter, even if different conceptions are only part of the causes of friction in the dialogues. This was also emphasised during the most recent informal COHOM meeting, taking place in Amsterdam in April 2016. There are three main moments in which conceptualisations of human rights, democracy and the rule of law are relevant. For the EU, a first relevant moment to deal with conceptualisations relate to the analysis of the domestic system for the elaboration of *strategic papers*. Secondly, conceptions matter for the selection of topics for the *agenda* of the dialogues. A broader understanding of the different conceptions can contribute to incorporate themes that are normally excluded from the discussions. Here it should be noted that the EU does not always see eye-to-eye with its partners about what constitutes a human rights issue and what not. The case studies show that the human rights nature of some issues is contested. For instance, the denial of visas for family reunification is regarded as a human rights issue by India, but as a consular matter by the EU. This ‘difference in conception’ has very concrete human rights consequences for Indian citizens who are migrants in the EU. Thirdly, proper awareness and knowledge of the differences in conceptions can have a direct impact on improving the *communication* between the parties.

The findings of FRAME Deliverables 3.2, 3.3 and 3.4, focusing on domestic and institutional conceptions of human rights, democracy and rule of law, can be directly applicable to the three mentioned aspects. They can contribute to improve the quality of strategic papers, providing insight on domestic understandings and also highlighting often overlooked themes that constitute part of domestic conceptions. A richer understanding of different conceptions can also facilitate communication, establishing a common language. Similar reports covering other states and organisations would also contribute to these ends.

6. Role of politics: politicisation of conceptual difference

Conceptions must nevertheless also include a political reading. The ‘politicisation’ of difference, often termed ‘identity politics’ in social sciences, cannot be overlooked, certainly in the context of HRDs. The questions of who use the narrative of ‘difference’ and ‘universalism/relativism’, and for what purpose, need to be considered.³⁶⁸ The politicisation of recalling differences in conceptions appears, firstly, as a defence mechanism, fending off external criticism. This defence mechanism is often complemented with a practice of emphasising certain elements of human rights, democracy or rule of law in order to make a point. For instance, in bilateral relations one party may choose to discuss specific topics that will allow them to criticise the other party. In such a selection of elements of human rights, a political choice is perceived.

The politicisation of conceptual difference also emerges when conceptions are manipulated in order to suit political ends. States or organisations changing their position regarding the universality and relativism of human rights are one example of the political manipulation of conceptions. The change in position towards concepts that appeared to be ‘established’ and agreed upon confirm the contested and on-going nature of the concepts of human rights, democracy and rule of law, which we have emphasise repeatedly in our reports.

Those changes in position also point out that differences among the parties cannot be overlooked. Even when States and organisations may have similar interests and founding principles as the EU, their identities are also shaped by their differences. Universal, regional and local perspectives on human rights, democracy and rule of law intersect and coexist within each State and organisation. Their position, and also their alliances, may then fluctuate among them. An intersectional understanding of their national and institutional identities may contribute to predict the changes in their political positioning.

C. Final suggestions

One last reflection derived from the case studies in this report, and confirmed in the discussions held during the last informal COHOM meeting, relates to the usefulness of the HRD as a mechanism to revisit (contested) conceptions. In this regard, two aspects seem to be of relevance. Firstly, the capacity to identify when disagreements relate to differences in conceptions, and secondly, the capacity to take the dialogues as a two-way avenue, where both parties can learn from each other. The case studies reveal strong criticism towards the EU’s participation in the dialogue as a hierarchical rather than vertical one. The openness towards different conceptions is crucial if elaborating new conceptions and revisiting old

³⁶⁸ This point is regularly emphasised by the EU Special Representative for Human Rights, Stavros Lambrinidis.

ones is desired. Debates are, after all, central to the promotion of human rights. Identifying the core and indisputable elements of human rights, while debating contested ones, can only enhance their scope. In doing so, reference to universally agreed conceptual points, such as those accepted in relation to the UPR mechanism or the work of the Treaty Bodies, can be a great contribution.

There are a few basic suggestions for facilitating HRDs that can be derived from the brief discussion of the relevance of conceptions in human rights dialogues as included in this report. The first overarching suggestion is to ensure that diplomats rely on quality background information that includes an analysis of domestic conceptions of human rights, democracy and rule of law, with attention to the different conceptions that might be held by the State and those by civil society. This latter aspect suggests the need for further research.

Regarding the agenda of the dialogues, two suggestions can be made. Firstly, tailor the dialogue to the reality of the State or Organisation, rather than focusing on general topics of discussion. Secondly, build a strong agenda on common interests. Finally, share experiences regarding common problems. This could help to 'demystify' the paternalistic positioning of the EU vis-à-vis the other party.

Finally, a few strategies for facilitating the dialogues, mentioned during the last COHOM meeting could also contribute to improve communication between the parties. Changing the discourse, parting from 'the narrative of preaching', acknowledging the differences and recognising own failures and the other partners' achievements can strengthen the mutuality of HRDs.

Secrecy is not the ideal way for HRDs as it goes against accountability, but sometimes it is the only accepted way by the partners. Agreement on behalf of the EU to take effective minutes and audio records of HRD meetings would help to achieve transparency.

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FRAME Documents

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Annex I

A. Moroccan conceptualisations of HR standards

1. General official Moroccan positions on HR

a) *The constitution*

Drafted in the wake of the Arab Spring, the 2011 constitution is often described as a real ‘Constitution for human rights’.³⁶⁹ There are no less than 60 references to rights in the Constitution. The latter proclaims a long list of rights and freedoms and also requires the State to guarantee them. The 2011 constitutional text uses new terminology, including the ‘individual’, the ‘citizen’, ‘civil society associations’ and ‘non-governmental organisation’. Also, Article 175 of the constitution stipulates that no subsequent revision ‘may infringe the provisions [...] acquired in matters of freedoms and of fundamental rights inscribed in this Constitution.’

The fundamental freedoms proclaimed by the Constitution primarily originate from the preamble of the Constitution which recognises, on the one hand, Morocco's commitment to human rights as they are universally recognised and, on the other, emphasises Morocco's commitment to ‘protect and to promote mechanisms of human rights’ and ‘to ban and combat all types of discrimination against anyone.’ The preamble calls on the State

“[...] to comply with the international [...] conventions which [the State] has ratified, within the framework of the provisions of the Constitution and the laws of the Kingdom, while respecting its immutable national identity; and, upon the publication of these conventions, acknowledges their primacy over the internal laws of the country, and, as a result, harmonises the relative provisions of its national legislation.”³⁷⁰

Thus, international law takes precedence over domestic law.

If the preamble makes reference to human rights within its legal universal framework, Title II of the Constitution lists the various individual rights and freedoms, enacted by conventions ratified by Morocco, like the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These include the right to security, the legality of sentences and violations, the right to a fair trial, the inviolability of the home, the prohibition of torture and inhuman and degrading treatment, freedom of mobility, freedom of thought, opinion and expression, the right to health, work, housing, education, *etc.* Equality between men and women is also asserted in the different economic, social, civil and political fields.³⁷¹

The constitutional reform also offered Morocco with an opportunity to reconcile with its past. Following the recommendations of the Equity and Reconciliation Commission (IER), numerous cultural rights have

³⁶⁹ An expression used by Nadia Bernoussi (Conference on Constitutional Dynamics in Morocco and Tunisia, Institute of the Arab World, Paris, 16 October 2014).

³⁷⁰ Moroccan Constitution of 2011 prmb1.

³⁷¹ Omar Bendourou, ‘Les Droits de l’Homme dans la Constitution Marocaine de 2011: Débats autour de Certains Droits et Libertés’ (2014) 6 La Revue des Droits de l’Homme 1.

been incorporated in the preamble; notably, the recognition of the Amazigh language as an official language of the Kingdom, or the recognition of Morocco's plural identity.³⁷²

The constitution also makes reference to collective freedoms, such as the freedoms of assembly, peaceful demonstration, association and trade union, and political affiliation. The right of access to information is also proclaimed; while, the press freedom right is asserted by prohibiting any form of prior censorship. The same can be said of the right to express and disseminate information, ideas, and opinions.

Furthermore, it is worthy of noting that the constitution includes 18 references to Islam, which serves to support the nation 'in its collective life'³⁷³ and is the religion of the State.³⁷⁴ The constitution points out that 'the pre-eminence accorded to the Muslim religion in the national reference is consistent with the attachment of the Moroccan people to the values of openness, moderation, tolerance and dialogue for mutual understanding between all the cultures and the civilizations of the world.'

b) Other Moroccan laws

As the Constitution constitutes the supreme legal framework of the State, all other Moroccan laws originate from the text. In addition to the 19 organic laws mandated by the Constitution,³⁷⁵ no less than

³⁷² Moroccan Constitution of 2011 prmb1 (reading: 'Son unité, forgée par la convergence de ses composantes arabo-islamique, amazighe et saharo-hassanie, s'est nourrie et enrichie de ses affluents africain, andalou, hébraïque et méditerranéen').

³⁷³ *ibid* Ch I, art 1 (which states that 'La nation s'appuie dans sa vie collective sur des constantes fédératrices, en l'occurrence la religion musulmane modérée, l'unité nationale aux affluents multiples, la monarchie constitutionnelle et le choix démocratique').

³⁷⁴ *ibid* Ch I, art 3 ('L'Islam est la religion de l'Etat, qui garantit à tous le libre exercice des cultes').

³⁷⁵ The 19 organic laws included in the new Constitution include :

- 1- Loi organique sur la langue amazighe (article 5)
- 2- Loi organique sur le Conseil national des langues et de la culture marocaine (article 5)
- 3- Loi organique sur les partis politiques (article 7)
- 4- Loi organique réglementant le droit des citoyens de présenter des propositions en matière législative (article 14)
- 5- Loi organique réglementant le droit des citoyens de présenter des pétitions aux pouvoirs publics (article 15)
- 6- Loi organique sur le droit de grève (article 29)
- 7- Loi organique relative au Conseil de Régence (article 44)
- 8- Loi organique précisant la liste des établissements et entreprises stratégiques concernés par les nominations aux emplois civils (article 49)
- 9- Loi organique sur la Chambre des représentants (article 62)
- 10- Loi organique sur la Chambre des conseillers (article 63)
- 11- Loi organique sur le fonctionnement des commissions d'enquête (article 67)
- 12- Loi organique des Finances (article 75)
- 13- Loi organique définissant les règles relatives à la conduite des travaux du gouvernement (article 87)
- 14- Loi organique réglementant le statut des magistrats (article 112)
- 15- Loi organique sur le Conseil supérieur du pouvoir judiciaire (article 116)
- 16- Loi organique sur la Cour constitutionnelle (article 131)
- 17- Loi organique sur le recours pour non constitutionnalité des lois (article 133)
- 18- Loi organique sur la régionalisation (article 146)
- 19- Loi organique sur le Conseil économique, social et environnemental (article 153)

203 laws should also be prepared for the implementation of the new constitution. More than four years after the adoption of the constitutional reform, it is clear today that the process has fallen short of its initial goals. Indeed, a large number of organic laws and other laws are yet to be adopted. One of the recommendations of the 2014 monitoring/follow-up report (published in March 2015) was to ‘accelerate the implementation of the new Constitution, by reinforcing the pace of adoption of all the mandated organic laws and establishing the structures and mechanisms pertaining to them’. Of the 19 anticipated organic laws, only eight have been adopted as of 1 January 2015.

If the preamble makes reference to human rights as they are universally recognised, the fact remains that certain rights are not mentioned in the Constitution, as this would be incompatible with Muslim precepts. This affects, in particular, freedom of conscience or freedom of sexual orientation. However, this will not escape the attention of lawyers who could raise a Priority Preliminary Ruling on the issue of Constitutionality (QPC) with the Constitutional Court. The latter could rule in favour of these laws by virtue of the Preamble to the Constitution, which prohibits all forms of discrimination.³⁷⁶

Also, while the right to life is mentioned in the Constitution,³⁷⁷ its interpretation remains unclear. Does it refer to the right to life of a foetus/ or to that of notorious criminals? In this regard, Morocco continues to apply a *de facto* moratorium on the death penalty (since the 90s), which is still effective within Morocco’s legislative framework. However, the proposal to abolish the death penalty has been widely supported for some time, particularly by the Parliamentary Network for the Abolition of the death penalty (which includes about 240 members, representing almost all political parties), the network of lawyers, several political parties and the CNDH.

c) *Royal discourses/Dahirs*

Royal speeches can also allude to Morocco’s approach on human rights. In his message to participants in the Second World Forum on Human Rights, held in Marrakech in November 2014, the King of Morocco expressed his commitment to the universality of human rights and his satisfaction with the positive overall development in this area since the Vienna Conference. However, Mohamed VI warned against the two deviations that confront this universality. The first is reclusiveness, which would lead to the rejection of the other (a subtle reference to religious extremism) and the denial of human rights. The second deviation is the transformation of human rights to a one-size-fits-all approach, because ‘universality should, in its very essence, be the result of a progressive, dynamic process whereby values are embraced at individual and collective levels. In this process, national and cultural traditions should be allowed to find their rightful place around a set of immutable values, not in opposition to it or next to it’. Thus, the universally recognised human rights constitute the foundations for any State, but modifications may be made in accordance with national characteristics. The King adds: ‘Indeed, universal values acquire greater legitimacy when they represent and protect human diversity, and when all peoples and cultures contribute to shaping them, ultimately considering them as their own.’ To illustrate his point, the King

³⁷⁶ El Yazami (n 271).

³⁷⁷ Moroccan Constitution of 2011 Ch II, art 20 (reads ‘Libertés et Droits Fondamentaux « Le droit à la vie est le droit premier de tout être humain. La loi protège ce droit’).

referred to the fact that Africa has contributed very little to the determination of universally recognised human rights and should not remain a mere consumer, but be able to contribute to the creation and even determination of these rights.³⁷⁸

d) *Agreement with HR treaties and documents*

A brief overview of the status of ratification of UN conventions by Morocco allows us to formulate the following conclusions: the reservations made by Morocco relate to the non-jurisdiction of the International Court of Justice (ICJ) in examining serious human rights violations perpetrated on Moroccan soil. Only Moroccan courts have the jurisdiction to prosecute persons suspected of infringing human rights. Also, it is not uncommon for Morocco to issue statements at the UN in order to support its own interpretation of texts.

³⁷⁸ Extract of the discourse in English:

“As you know, since the Vienna Conference, human rights have gained in importance, becoming a key variable not only in the life of nations but also in international relations. However, there have been some deviations in connection with this growing universality, which must also rise to unprecedented challenges. In many parts of the world, reclusiveness, intolerance, rejection of others -because of ethnic considerations or a distorted understanding of the lofty message of religion – are leading to blatant violations of fundamental rights, including the sacred right to life. I wish to express my solidarity with and compassion for the victims of these pathologies and would like to call on the international community to be more actively supportive of victims. The universal character of human rights must not be questioned. Rather than being the product of a single school of thought or doctrine, universality should, in its very essence, be the result of a progressive, dynamic process whereby values are embraced at individual and collective levels. In this process, national and cultural traditions should be allowed to find their rightful place around a set of immutable values, not in opposition to it or next to it. Indeed, universal values acquire greater legitimacy when they represent and protect human diversity, and when all peoples and cultures contribute to shaping them, ultimately considering them as their own. Your Excellencies, Ladies and Gentlemen, Countries in the developing world – particularly in Africa – want to play a part in determining human rights standards. They no longer want to remain a subject for debate and assessment, or to be a field of experimentation. It is a historical fact that international human rights instruments were developed in the absence of Africa. When the Universal Declaration of Human Rights was adopted in 1948, there were only four independent African countries. When the 1966 International Covenants were adopted, there were only about 30 African countries which had freed themselves from the colonial yoke. Since it did not have the opportunity to contribute to developing the international human rights law, Africa should be given the opportunity to enrich it with its own culture, history and genius, thus increasing the continent’s chances to fully embrace it. Africa cannot remain a mere ‘consumer’ of international standards devised in its absence. Africa can no longer be the invariable object of international reports and external evaluations. Our continent has become mature enough to claim its rightful place in the global human rights architecture and to fully play its role in it. Universal values are common to us all, but the pathways we take are not. This is the motto of a responsible Africa which is fully committed to human rights; a continent that can no longer remain the eternal subject for human rights debates. Africa wants to be heard; it wants to make a contribution to devising standards that are truly universal. Our continent does not want to be kept on the sidelines when it comes to human rights, which concern Africa too.”

See ‘King Mohammed VI’s Message to 2nd World Forum on Human Rights’ (*Morocco World News*, 27 November 2014) <<http://www.morocoworldnews.com/2014/11/145357/king-mohammed-vis-message-to-2nd-world-forum-on-human-rights/>> accessed 11 May 2016.

Furthermore, Morocco fully endorses the Council of Europe agreements open to non-Member States. Today, Morocco is involved in 7 partial agreements: Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (Pompidou Group); the Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters; European Centre for Global Interdependence and Solidarity (North-South Centre); European Commission for Democracy through Law; the European Audio-visual Observatory; Enlarged Partial Agreement on Sport (EPAS), and European Pharmacopoeia. The gradual accession of Morocco to the various conventions of the Council of Europe was stated in the EU-Morocco Joint Communication on the Advanced Status.³⁷⁹

In 1990, all member countries of the Organisation of the Islamic Conference, which later became the OIC, including Morocco, approved the Cairo Declaration of Human Rights in Islam. This declaration is often criticised because of its non-conformity with the Universal Declaration of Human Rights, and its subordination of universally recognised human rights to norms of Islamic Sharia. It is worth mentioning that this declaration, though symbolically significant, is not binding and has no legal effect, which may explain its unanimous adoption without opposition.

Morocco signed the Arab Charter on Human Rights a few months after its adoption by the League in 2004. However, Morocco has not ratified the Convention to date. Although the ACHR calls for the universal and indivisible adoption of human rights, some articles of the Charter remain inconsistent with international treaties.

Finally, as previously mentioned, the EU systematically introduces the ‘human rights clause’ in agreements it forges in order to reaffirm the European commitment of conducting business relationships exclusively with states that respect these values. Thus, all EU-Morocco agreements contain a clause devoted to human rights.

e) Moroccan statements to international community

(1) ICCPR reports to UN HR Committee

The reports submitted by Morocco to the Human Rights Committee, within the framework of the ICCPR, are drafted to highlight the achievements of the country, as well as its strong adherence to the covenant. However, it is important to note that the reports tend to interpret the Covenant as being in conformity with the Moroccan position on the Western Sahara. The most recurring example is Article 1 of the Covenant on the right to self-determination. The report submitted by Morocco in June 2015 emphasises that

“The Charter of the United Nations and the relevant resolutions of the General Assembly (1514 and 1541 of 1960 and 2625 of 1970) leave the United Nations a margin of discretion in regard to the

³⁷⁹ Commission, ‘Joint Proposal for a Council Decision on the Union position within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, with regard to the adoption of a recommendation on the implementation of the EU-Morocco Action Plan implementing the advanced status (2013-2017)’ (Brussels, 17 April 2013) JOIN(2013) 6 final.

forms and procedures by which the right to self-determination is to be implemented. According to this criterion of the United Nations, self-determination is not at all the same as independence).”³⁸⁰

Morocco supports its argument by adding that ‘the Sahara has been an integral part of the Kingdom of Morocco since time immemorial’, before concluding that the Moroccan autonomy plan and the advanced regionalisation project are the best possible solution.

Article 3 of the periodic report focuses on gender equality. This section of the report repeatedly refers to Morocco’s advances, particularly with regards to the family law. Morocco’s responses to the observations and recommendations of the Committee on the Kingdom’s shortcomings on matters of inheritance, polygamy, divorce and freedom of marriage usually contain factual elements.

(2) Other statements to the international community

Moroccan statements to the international community often include reference to human rights purposes. In fact, Morocco gives considerable importance to its image in the West and aims to appear as an exemplary MENA country in matters of democracy and human rights. However, the tone of these statements varies depending on the relations between Morocco and the West, especially regarding the Western Sahara issue.

In the Moroccan statements to the United Nations General Assembly (UNGA), the King of Morocco often insists on his commitment to promoting and preserving human rights in their universal dimension. However, the King’s speech, read out by the Prime Minister, at the 69th United Nations General Assembly has defended the respect of specificities by criticising the Western-centred conception of the universal human rights. The following quoted parts of the discourse illustrate this change of rhetoric.

“Each country follows a path of its own, having taken into consideration its historical development, cultural heritage, human and natural resources, specific political circumstances, as well as its economic choices and the obstacles and challenges facing it. What applies to the West should not be used as the sole criterion for determining the efficiency of other development models; nor should one make comparisons between countries – however similar their circumstances may be – even when these countries belong to the same geographical area. Accordingly, the first call I should like to make from this rostrum regards the need to respect the characteristic values and principles of each country as it builds its own development model. This is particularly true for developing countries which are still suffering from the consequences of colonialism.”

Thus, the King pointed out the damages caused to the developing countries by their former Western colonisers to make these latter feel guilty in order to delegitimise Europe’s attitude of taking the moral high ground on behalf of the entire world. Also, the speech states that:

“[...] given the adverse consequences suffered, former colonial powers have no right to ask the countries of the South to introduce radical change rapidly, on the basis of a frame of reference with

³⁸⁰ Article 1 du Rapport périodique du Maroc adressé au Comité des Droits de l’Homme, juin 2015 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/195/52/PDF/G1519552.pdf?OpenElement>

which they are unfamiliar, be it in terms of their culture, their principles or their values. It is as if no development were possible other than through a single model: that of the West [...] In fact, all that Western countries and their affiliated institutions do is giving lessons, and, at best, a few pieces of advice. As for support, it is very limited and is always conditional.”

f) Moroccan statements about HR issues outside Morocco

(1) Palestinians

Morocco reiterates its formal commitment to human rights in the occupied Palestinian territories at every opportunity, and regularly requests the international community and human rights bodies to denounce Israeli violations. In fact, its status as President of the Al Quds Committee, established by the OIC, increases its sense of responsibility, and that of its sovereign, toward the Palestinian cause. If Morocco appeals to the international community on the Palestinian-Israeli conflict and calls to hold Israel responsible for many abuses against Palestinians, the statements are not accompanied by political action. For example, when examining the situation in Palestine and other occupied Arab territories at the Council of Human Rights on 23 March 2015:

“Morocco welcomed the report of the Special Rapporteur, adding that Israel’s refusal to cooperate with him did not prevent him from showing the suffering of the Palestinian people. Palestinian children continued to be deprived of their human rights, and Morocco called on the international community to follow up on that situation and to hold Israel accountable. It called on Israel to end the blockade of Gaza so that humanitarian aid could be brought in [...] Morocco said that the reports submitted confirmed the deteriorating situation in the Occupied Palestinian Territories due to continued human rights violations. The siege of the Gaza Strip had had a devastating effect on the lives of the Palestinian people. The illegal expansion of Israeli settlements was one of the main causes for the suffering of the Palestinian people. Morocco objected to the annexation of land and said attempts to change the demographic structure of Jerusalem undermined the Palestinian rights.”³⁸¹

(2) Blasphemy, defamation of religion, Danish cartoons

With regards to defamation of religions, the Moroccan position is clearly in favour of its criminalisation. Like other Muslim States, the Kingdom criminalises blasphemy and advocates for its international recognition as a crime that breaches the universal principles of respect for man and his beliefs. While condemning the violent reactions to the 2005 Danish cartoons, Morocco has strongly condemned the publication of the cartoons through both its diplomacy and its religious institutions, and prohibited the sale of any blasphemous publications. Morocco was even absent from the solidarity march with Charlie Hebdo, which took place in Paris in January 2015. At a UN General Assembly meeting on anti-Semitism, Ambassador of Morocco to the UN, Omar Hilal; said that

³⁸¹ OHCHR, ‘Human Rights Council Discusses Human Rights Situation in the Occupied Palestinian and Arab Territories’ (23 March 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15743&LangID=E>> accessed 11 May 2016.

“[...] to oppose all violence emanating from anti-Semitism, Islamophobia, Christianophobia, or against religious minorities is a universal obligation. However, this fight will remain sterile as long as the notion that the human being and faith are inseparable is not recognised. Otherwise, how else can one explain the duty to defend man against these despicable aggressions, when we allow disrespect for their religion? How can we claim to promote the right to freedom of religion and tolerate the blasphemy of prophets? Man and his faith are but one.”³⁸²

2. Moroccan institutional reports on specific HR issues inside Morocco

The Council's mission is to prepare annual reports on the situation of human rights and present them to both houses of parliament. It also develops thematic reports on specific human rights issues and carries out visits to detention centres (especially prisons, psychiatric hospitals, police stations).

The last thematic report to date, entitled ‘Gender Equality and Parity in Morocco Preserving and implementing the aims and objectives of the Constitution’ was presented on 20 October 2015. This report, which was intended to be an analytical assessment, 10 years after the reform of the family code, 4 years after the promulgation of the Constitution, and 20 years after the adoption of the Beijing Platform; did not fail to stir up controversy, especially with regards to gender inequality in inheritance. The report notes that ‘[t]he law on inheritance establishes inequality between men and women [...]’.³⁸³ The fact that the Qur'an meticulously details gender inheritance shares renders the topic extremely sensitive. Furthermore, the report recommends the ‘[amendment] of the Family Code in order to give women equal rights in [...] inheritance, in accordance with Article 19 of the Constitution and Article 16 of CEDAW’.³⁸⁴ This recommendation raises a dichotomy in Morocco’s conventional legal practice, as it seems like, for CNDH, the Family Code, the Constitution and CEDAW are at odds on this matter.

3. Conclusions/analysis of Moroccan conceptions of HR

The conception of human rights differs from one institution to another. But in general, it seems that all institutions agree on the fact that Morocco must comply with the universally recognised human rights. A part of civil society, which is mostly rooted in the left, adheres to these universal values. The Constitution, the monarchy, religious institutions and a large part of the population like to emphasise that the universally recognised human rights must be consistent with Islam. The CNDH, for its part, seems to be a progressive institution that is not afraid to open the debate on conservative issues. Many believe that CNDH is driven by political will to establish a prospective institution and a source of recommendations.

³⁸² Kingdom of Morocco, ‘Ambassador of Morocco to the UN: “We cannot promote religious freedom and tolerate blasphemy of the Prophet”’ (22 January 2015) <<http://www.maroc.ma/fr/actualites/ambassadeur-du-maroc-lonune-peut-promouvoir-la-liberte-de-religion-et-tolerer-le>> accessed 11 May 2016.

³⁸³ ÉTAT DE L’ÉGALITÉ ET DE LA PARITÉ AU MAROC Préserver et rendre effectifs les finalités et objectifs constitutionnels, Rapport thématique du CNDH, Elaboré par Rabéa Naciri, présenté le 20 octobre 2015.

³⁸⁴ ÉTAT DE L’ÉGALITÉ ET DE LA PARITÉ AU MAROC Préserver et rendre effectifs les finalités et objectifs constitutionnels, Rapport thématique du CNDH, Elaboré par Rabéa Naciri, présenté le 20 octobre 2015.