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Constructive Engagement and Human Rights:

The Case of EU Policy on China

Doctoral thesis submitted by: Annabel Egan B.A. M.Litt
Supervisor: Professor William A. Schabas

College of Business, Public Policy and Law
School of Law
Irish Centre for Human Rights
National University of Ireland, Galway

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I, Annabel Egan, certify that the Thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of any of this work.

Signed: ____________________________ Date: ____________
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Firstly, I would like to acknowledge the learned advice of my supervisor, Prof. William Schabas. Without his encouragement I would, no doubt, have given up too early on my efforts to obtain a doctorate whilst working and raising a young family.

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Summary of the Contents

Since the European Commission released its first communication on relations with China in 1995, together, human rights diplomacy and human rights assistance, in the form of EU funding for rights-related technical cooperation projects, have defined the EU approach to ‘constructive engagement’ with China on human rights. This study provides an analysis of the arguments put forward by the institutions of the EU in defence of the choices that have been made in constructing this policy approach. It is guided by the following research question: how has the EU justified its human rights policy on China and are the arguments put forward themselves coherent?

The promotion of human rights is but one of many competing and sometimes conflicting objectives of EU external relations policy. Given the need for prudential trade-offs between objectives, it is argued that the process of justification plays a key role in maintaining the legitimacy of any human rights policy. The following hypothesis proceeds from this argument and is developed in order to address the central research question.

The overarching justification for EU human rights policy on China is based on arguments of morality and values. The choice of particular policy instruments has, however, been repeatedly justified on the basis of their effectiveness. Any failure on the part of the EU to either demonstrate the results of these policy choices or justify their absence will result in a loss of legitimacy, undermining the credibility of the EU as a human rights actor.

On the basis of an analysis of public declarations from the EU over a period of more than two decades the following answer to the central research question is offered: the arguments put forward by the EU in defence of its human rights policy on China lack coherence and are not sufficient to justify the choices made in formulating and implementing it. The conclusion is also reached that, as proposed by the hypothesis, in the absence of demonstrable results, core policy choices justified by the EU on grounds of their effectiveness
have suffered a loss of legitimacy which threatens to undermined not only the credibility of the EU as an external human rights actor but also the entire ‘European construct’ which has identified the EU as a community based on human rights principles.¹

Introduction

Since the 1990s, much of the academic research concerning the nature of the European Union (EU) as a global human rights actor has focused on the issue of inconsistency and has sought to examine its impact on the credibility of the EU as a norms exporter.\(^2\) It has been argued that in treating countries with similar human rights records differently the EU has ‘raised doubts about the extent to which human rights are a genuine concern in foreign policy’.\(^3\) Moreover, it has been suggested that often glaring inconsistencies between the rhetoric and reality of EU human rights policy have not only diminished the impact of human rights demands in external relations, but also undermined the credibility of the EU as a human rights actor.\(^4\)

While the practical execution of human rights policy deserves scholarly attention, by focusing on the cleavage between the rhetoric and reality of EU human rights policy this approach has encouraged scholars either to ignore the

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official discourse on human rights policy entirely, or to examine it only in order
to compare verbal commitment to action on the ground, with the intention of
pointing out predictable and obvious inconsistencies.\textsuperscript{5} By focusing attention on
EU human rights policy at the level of official discourse, it is hoped that this
study can contribute something new to the debate on EU human rights policy,
much of which is by its very nature declaratory and aspirational.\textsuperscript{6}

This study will analyse the arguments put forward by the institutions
with primary responsibility for formulating and implementing the EU’s external
human rights policy as it applies to China in defence of the choices that they
have made. The study is thus guided by the following research question: how
has the EU justified its human rights policy on China and are the arguments
presented themselves coherent?

Within the varied disciplines which comprise the study of human rights,
the particular subject of EU human rights policy on China has received notably
scant scholarly attention. Given China’s notoriously poor human rights record
and its position as an emerging superpower, this \textit{prima facie} appears to be a
major gap in our understanding of the EU as human rights actor. In spite of the
paucity of focused research however, scholars have been quick to accuse the
EU of deliberately sidelining human rights within the overall EU-China
bilateral relationship in order to focus on other priorities, in particular, trade.\textsuperscript{7}

\footnotesize
\textsuperscript{6} The ‘European Union’ was formally established under its current name by the Maastricht Treaty, which came into force on 1 November 1993. For ease of expression, rather than referring variously to the European Economic Community, the European Communities and the European Union, the term EU will be used throughout this study.
While such statements may possess a certain intuitive appeal arising from a naturally occurring skepticism, they are not grounded in scholarly research.

The only monograph to address the issue of EU human rights policy on China to date provides a chronological reconstruction of the EU-China Human Rights Dialogue since its inception in 1995.\(^8\) Although Kinzelbach’s work is impressive in its meticulous detail, it does not present a complete picture of the development of EU human rights policy in China. The EU-China Human Rights Dialogue is not the only form of EU human rights diplomacy to target China, nor is human rights diplomacy per se the only instrument employed by the EU in its human rights policy on China.

Since the European Commission released its first communication on relations with China in 1995, together, human rights diplomacy and human rights assistance in the form of EU funding for rights-related technical cooperation projects have defined the EU approach to ‘constructive engagement’ with China on human rights.\(^9\) But while recognising elsewhere that human rights assistance programming is in fact a constituent part of the EU policy approach, Kinzelbach does not include an analysis of human rights assistance in her study.\(^10\) In the absence of such analysis, conclusions are nevertheless drawn as to the efficacy of the policy of constructive engagement as a whole and the argument is made that ‘engagement strategies are ineffective as long as a norm-violating government still adopts a strategic, instrumental


mode of response’. Moreover, by maintaining a narrow focus on the policy instrument of bilateral human rights dialogue, Kinzelbach does not give adequate consideration to the manner in which the EU acts on the issue of human rights practices in China in other diplomatic fora, in particular the UN. Once again, however, even in the absence of such analysis, the argument is made that the existence of the Dialogue is responsible for the ‘containment and downgrading’ of the human rights issue within the EU’s China policy.

Recommendations which proceed from these conclusions are based on the assumption that abandoning the Dialogue will necessarily result in more, rather than less, attention being paid by the EU and its member states to human rights in China, and the reverse is not countenanced.

Repeated demonstration of the fact that human rights concerns are not always the top external relations priority for the EU cannot enhance our understanding of the choices made by the EU as a human rights actor. The promotion of human rights is but one of many competing and sometimes conflicting objectives of EU external relations policy. Differences in the application of EU human rights policy, from one region to another, from one country to another, and from one set of circumstances to another, are to be expected. As stated by Donnelly ‘a blind demand that violation x produce response y is simplistic and silly’.

Sometimes a country can afford to act on its human rights concerns and other times it cannot. Politics involves compromise – a result of the multiple and not always compatible goals that are pursued and the resistance of a world that is not always responsive. Human rights, like other goals of policy, must at times be compromised.

Given the need for prudential trade-offs between competing priorities, the process of justification plays a key role in maintaining the credibility of any

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12 ibid 273
14 ibid 590
human rights actor and, by extension, the legitimacy of its policies.

If these different goals are justified and justifiable, they are merely differences, not inconsistencies. Differing conditions and capabilities, as well as competing values, must be taken into account in the formulation and implementation of a coherent policy.\(^{15}\)

To better understand the choices made by the EU as a human rights actor, rather than dismiss official EU discourse on human rights as empty rhetoric, it is necessary to analyse the content and coherence of the arguments presented by the EU institutions with competence for external human rights policy to explain and defend the choices they have made. The natural point of departure for such an analysis is an examination of the claims made by the EU for the place of human rights within the overall framework of its relations with China. The key issue at stake is not whether or not EU human rights policy is applied equally at all times across all circumstances but how the EU has justified its policy decisions and whether the arguments themselves are coherent.

Legitimacy is one of the oldest ideas in political philosophy but it is without a universally accepted definition. As understood in modern political science, legitimacy is a ‘\textit{social} property – not an attribute of an action’.\(^{16}\) In other words, legitimacy is a property signifying the approval or acceptance of a particular regime or its policies by society. It is a social property in the sense that the source from which it flows is society itself rather than the regime in question. But there is no agreement on how, in order to achieve legitimacy, a particular regime should behave. Nor is there agreement on how its behavior can be evaluated, against which criteria and by whom.

The present study is not concerned with the historical and philosophical development of ‘legitimacy’ as a concept in political science. It is not the intention here to enter this centuries-old debate but merely to defend the choices

\(^{15}\) ibid 591
that have been made in adhering to the concept of legitimacy identified below. These choices have primarily been motivated by the desire to approach the subject of the EU’s external human rights policy, in particular its policy on China, from a new perspective with the aim of enhancing our understanding of the EU as a human rights actor.

In an effort to develop a definition of legitimacy that would provide a useful framework for empirical research, Weber attempted to reduce legitimacy to a matter of fact by equating it with the belief of citizens that a particular regime is legitimate. Aside from its obvious circularity, the key dilemma of Weber’s definition is that it removes the possibility of normative evaluation as part of the legitimising process, whilst also discounting the opinion of those outside the jurisdiction of the regime itself as irrelevant. Thus, according to Weber’s definition, the legitimacy of, for example, the Nazi regime becomes possible.

Habermas’ concept of legitimacy as centering on the existence of ‘good arguments for a political order’s claim to be recognised as right and just’ was developed in answer to Webers’s approach, which had come to dominate empirical research despite its shortcomings. Drawing on discourse ethics, Habermas defined the process through which legitimacy is achieved as open and participatory discursive validation rooted in reason. According to Habermas, ‘the procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sluices for the discursive rationalisation of the decisions of an administration’. Habermas also conceives of legitimacy as a process, or, as later described by Franck a ‘matter of degree’, wherein the legitimacy of a regime can be enhanced or

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eroded by the strength or weakness of the arguments it puts forward to defend its actions.20

At its heart, Habermas’ definition is a simple one – it conceives of legitimacy as a social product and argues that a regime and its policies can only be considered legitimate if they can be justified through rational argument in the form of public discourse. As such, this definition succeeds in combining rationality with the concepts of righteousness and justice, thereby restoring what Graftstein refers to as the ‘essential meaning’ of legitimacy, which had been distorted by Weber:

The concept should properly signify a normative evaluation of a political regime: the correctness of its procedures, the justification for its decisions, and the fairness with which it treats subjects.21

For the purpose of this study, Habermas’ concept of legitimacy possesses a number of benefits. First, by emphasising the importance of the role played by official discourse, it suggests a new approach to the study of EU human rights policy. With Habermas in mind, the dangers involved in failing to engage in open discourse on policy choices become clear. Official rhetoric from the EU on human rights policy matters not just as a point of comparison with policy as implemented but in and of itself, since any failure by the EU to adequately justify its own choices and actions will have a negative impact on the legitimacy of both the policies pursued and the EU as a human rights actor. Secondly, while it conceives of legitimacy as a social property, at the same time it allows a rational evaluation of the legitimacy of particular policies through an examination of relevant official texts without the need to establish empirically how these policies are perceived by international society – a vast undertaking beyond the scope of this study.

Drzewicki describes a process of human rights evolution that takes place in four clearly defined stages: idealisation, conceptualisation, juridisation and realisation. 

With the adoption of the UN Charter the idealisation and conceptualisation of human rights within the international system was broadly achieved. This achievement was followed by a period of standard-setting, or juridisation, to face the current challenge of implementation. As an objective of foreign policy, this challenge is most acute in situations where human rights concerns come into conflict with other priorities. This conflict is most clearly apparent in the bilateral relations of the European Union and China.

The conflict between human rights principles and other interests, brought about by China’s position as a rapidly growing economy with the world’s largest population, is further exacerbated by China’s geo-strategic position as an emerging superpower, both in terms of its military capacity and political weight as a permanent member of the UN Security Council. Combined, these factors make China particularly resistant to external pressure on human rights issues. Despite decades of engagement on human rights with an array of actors, from individual states to multilateral organisations like the United Nations, China still considers human rights to be an internal issue, and refers frequently to the principles of sovereignty and non-interference in domestic affairs enshrined in Article 2(7) of the Charter of the United Nations. In short, China has yet to fully accept the idea that internal Chinese human rights practices are a legitimate topic for EU foreign policy. Although in many cases, China permits discussion of its human rights record through bilateral human rights dialogue, these dialogues are presented as a major concession on the part of the Chinese to their dialogue partners, all of which contributes to making the environment in which EU human rights policy on China is formulated uniquely challenging and by the same token uniquely positioned to


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highlight the problems involved in constructing a legitimate human rights policy.
Chapter 1 Theoretical Framework and Methodology

1.1 Introduction

Within the discipline of international relations, much of the study of the EU has been dominated by two separate issues: first, what is the nature of the EU; and second, what does the EU do? Theorists addressing the first question argue that we cannot understand what the EU does without a clear understanding of what the EU is. Others have come to accept that the EU is *sui generis* – a unique entity unlike any other. They have put aside the debate over the nature of the EU and have chosen instead to focus their attention on providing an analysis of what the EU does as a regime as opposed to what the EU is. Broadly speaking there are two different approaches to this research, institutionalist rationalist and social constructivist. The approach taken affects the nature of the research questions asked.

The institutionalist rationalist approach includes realism, neo-realism, liberalism and neo-liberal institutionalism. Each of these theories assumes the international system is composed of self-interested actors that act to maximise their utility, subject to constraints. In such models, the focus of analysis is on the ‘variation in the constraints faced’ with preferences and beliefs accepted as given.

Neo-realism and neo-liberalism share an inherent rationality. As an approach, rationalism contends that to understand the international system we must first and foremost understand the material conditions that shape it. This approach leads to ‘questions that focus upon why certain decisions, leading to

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certain courses of action were made’, the answers to which are sought principally through reference to material conditions.\textsuperscript{26} While ideational conditions, such as norms and identity, are accepted as relevant, they are seen as ‘exogenously given, that is, an opening set of conditions/parameters for which no explanation is provided and which – crucially – remain sealed off from external influence’.\textsuperscript{27}

Although within rationalism, some theorists have sought to highlight the importance of ideas in the international system – first and foremost amongst them Max Weber – the analytical distinction between ideas and interests has been rigidly maintained. The problem involved in maintaining this distinction is that such an approach cannot account for the adoption and implementation of human rights policies within the broader area of foreign policy. In the case of China for example, a rationalist approach cannot explain why the EU continues to incorporate human rights into its external relations with China when doing so may jeopardize, rather than advance, the material interests of its member states. On the contrary, rationalist theorists would ‘expect human rights to be used against traditional opponents and not to be used against allies’.\textsuperscript{28} Where this is not the case, rationalism proposes no alternative explanation for the adoption of human rights policies except to dismiss such policies as insignificant rhetoric since it does not allow a constitutive role for ideas in influencing and directing interests.

In addressing the topic of EU human rights policy on China, a rationalist approach would suggest questions which seek to establish why the EU acts the way it does in its human rights relationship with China. This has led numerous scholars to make bold statements about the ‘real’ reasons behind certain policy decisions that they simply have not demonstrated in their empirical research.

\begin{flushleft}
\textsuperscript{27} ibid 8
\end{flushleft}
The advantage of social constructivism is not that it can answer similarly framed *why* questions, but that it poses alternative questions that can be answered more readily.

1.2 Social constructivism

Social constructivism ‘resulted from the empirical failure of approaches emphasising material structures as the primary determinants of state identities, interests and preferences’. As a reflective, cognitive approach, social constructivism contends that the key structures in the international system are ‘intersubjective rather than material’ and that ‘identities and interests are in an important part constructed by these social structures’. In contrast to Weber, Wendt contends that ‘knowledgeable practices constitute subjects’ and that ‘identities and interests are endogenous to interaction’. According to this approach, the emergence of human rights as a legitimate area for international scrutiny and action is not a ‘simple victory of ideas over interest’ but rather demonstrates ‘the power of ideas to reshape understandings of national interest’.

In an effort to shift attention from how states pursue their interests to how they define those interests in the first place, rather than ask why a particular policy decision is made, social constructivists would ask: how? How did the ideational conditions develop to make a particular policy possible and ‘what are the bases (in dominant belief systems, conceptions of identity,

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31 ibid 392
symbols, myths and perceptions) upon which such choices are made?’. 34 This is not to say that material conditions have no role, ‘but that their impact is always mediated by the ideas that give them meaning’. 35

It is important however, not to overstate the differences between rationalism and constructivism or to over emphasise the potential impact on the research agenda of adhering to one approach over another. As argued by Fearon and Wendt, a ‘pragmatic interpretation of rationalism and constructivism as analytical tools or lenses with which to theorise about world politics’ is advisable and it is ‘perfectly legitimate to view the choice of one approach over another as merely a methodological convenience necessitated by the fact that one cannot study everything at once’. 36

Unlike realism and liberalism, rationalism and constructivism are not theories about how the international system operates but ‘methodologies for studying international politics, both of which emphasise different aspects of social life’. 37 Ultimately, the study of human rights policy is particularly suited to a social constructivist approach that emphasises the role of ideational conditions in shaping interests. Social constructivism draws on a wide range of disciplines, including psychology, sociology, and philosophy, and offers the researcher a rich toolbox of methodologies from which to choose. Organisational theory, role theory, discourse analysis, foreign policy analysis and theories of collective identity formation, communication and argumentation are among the many that have been employed by social constructivists in their research. In all cases, the choice of tools should be dictated by their ability to shed new light on the research questions under consideration rather than an abstract preference for one approach over another.

36 ibid 53
37 ibid
This study asks, how has the EU justified its human rights policy on China and are the arguments put forward themselves coherent? The most natural point of departure for such analysis is ‘the self-understandings of the actors involved’, which necessitates an examination of the discursive practice of EU human rights policy on China as it exists in official texts.38

1.3 Justification

Habermas’ theory of communicative action distinguishes between three different categories of justifying argument: pragmatic argument, ethical-political argument and moral argument.39 Following Habermas, three analytically distinct ways in which a given policy can achieve legitimacy have similarly been identified, with each grounded in a different logic for action: a logic of consequence, a logic of appropriateness and a logic of moral justification.40 Different criteria identify each of these logics: utility, values and rights.41

Policies that are justified on grounds of a logic of expected consequence are legitimised by their ‘utility’, where utility is defined as ‘the most efficient translation of a given set of interests or preferences’.42 As defined, the logic of consequence and the concept of utility are typically associated with

42 ibid
realism/neo-liberalism and often understood to mean the promotion of self interest and the maximisation of material benefit giving rise to concrete results. However this need not necessarily be the case.

First, norms, values and identity can play a powerful role in shaping the perceived interests and policy preferences of an actor, to the extent that they become predisposed to pursuing policies that promote or protect particular sets of norms. As stated by Sikkink:

Human rights policy emerged because policy makers began to questions the assumption that national interests are furthered by support of repressive regimes that violate the human rights of their citizens.43

While there is of course considerable debate within the discipline of international relations about the ways in which norms are adopted, suffice it to say here that ‘unless we are prepared to dismiss all talk as cheap’, we must be open at least to the possibility that repeated statements declaring commitment to a particular set of norms might give rise to policies that serve to protect and promote those norms.44

Secondly, not all policies produce ‘concrete’ results, and in areas such as human rights where a multiplicity of policies are carried out by a multiplicity of actors, directly attributing results is not often possible. This is not to say that such policies are not an efficient response to a particular set of circumstances and cannot be justified by reference to utility in addition to other, perhaps more powerful, arguments based on values and rights. Thus, it becomes evident that in order to take account of policy areas such as human rights, the criteria identifying the logic of consequence should be interpreted broadly to mean a

sound practical response to a given set of circumstances, and should be divorced from traditional realist/neo-liberal understandings.

Policies that are justified on the grounds of a logic of appropriateness are legitimised ‘through reference to what is considered appropriate given a particular group’s conception of itself and what it represents’. Policies that are justified on the grounds of a logic of moral justification are legitimised ‘with reference to principles that can be recognised as ‘just’ by all parties, irrespective of particular interests, perceptions of the ‘good life’ or cultural identity’.

Lerch and Schwellnus have made an important contribution to this analytical framework by highlighting the role of ‘complex argumentations’ that refer to more than one logic of justification, with coherence between the various arguments presented playing an important legitimising role, especially in relation to external human rights policy.

The decision to incorporate a human rights dimension into foreign policy calculations may be justified by national, regional, multilateral and nongovernmental actors on the basis of morality and values, by combining arguments based on the logic of moral justification and the logic of appropriateness, but morality and values alone cannot always justify specific decisions relating to the use or development of particular human rights policy tools. Such decisions must often be justified on the basis of their utility, or a logic of expected consequence, in so far as they should be seen as an efficient solution to given interests and preferences while at the same time upholding the values of the community they represent as well as principles that are recognised as morally acceptable by all parties.

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46 ibid
When applied to external human rights policy the question naturally arises as to which particular audience arguments put forward in defence of policy decisions should be directed. If legitimacy is to be conceived of as a social property, from which social group does it flow – the domestic audience in the EU on behalf of whom all EU external relations policy is implemented, the audience in the target state, in this case China, or international society more generally? It is argued here that a legitimate human rights policy must be justified at all three levels.

Arguments demonstrating that the policy choices made represent the most efficient means by which to promote the realisation of human rights as an external relations objective must be developed and delivered to the domestic audience in the EU. Where choices are defended on the basis of their utility, it therefore falls to the institutions of the EU to demonstrate that the desired results have either been produced or can be reasonable anticipated. Coherent arguments must also be constructed to justify to the audience in the target state the inclusion of human rights objectives in EU external relations policy. Finally, external human rights policy must be justified by reference to the universal and indivisible rights it seeks to promote and must be pursued by means which do not contravene these principles.

With this framework in mind, the official EU discourse justifying the choices made with regard to the promotion of human rights in China is analysed by combining the insights of argumentation theory with the concept of coherence, where coherence ‘demands not simply that a rule is applied equally to everyone, but that any distinction or exception can be justified in principled terms’. 48 As stated by Smith:

Trade-offs between objectives are to be expected – human rights promotion cannot possibly come first all the time. But when it does not come first, the reason must be explained,

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48 ibid 307
otherwise inconsistency will undermine the EU’s foreign policy with an ethical dimension.49

Based on the understanding of the role of justification in achieving legitimacy outlined above the following hypothesis is developed:

The overarching justification for EU human rights policy on China is based on arguments of morality and values. The choice of particular policy instruments has, however, been repeatedly justified on the basis of their effectiveness. Any failure on the part of the EU to either demonstrate the results of these policy choices or justify their absence will result in a loss of legitimacy, undermining the credibility of the EU as a human rights actor.

Analysis is carried out with reference to texts from: the Council of the European Union, in which each of the EU member states is represented;50 the European Commission, in particular the directorates general with responsibility for development and cooperation programming as well as those with responsibility for the role of the European Commission in EU Common Foreign and Security Policy and in conducting relations with Asia; the High Representative of the Union for Foreign Affairs and Security Policy;51 and the

50 Consideration of the national discourse from each of the 27 EU member states regarding the promotion of human rights in China is an enormous undertaking beyond the scope of this study. Discourse from the member states will therefore be considered only in so far as it is articulated collectively through the Council of the European Union. Composition of the Council of the European Union depends on the topic under consideration. Prior to the Lisbon Treaty, external relations issues were discussed by the foreign affairs ministers of the member states meeting in the General Affairs and External Relations Council which sat in two configurations, one addressing general policy questions and one addressing external relations where the member states addressed among other issues, the development of the EU’s Common Foreign and Security Policy. These two configurations have been permanently separated by the Lisbon Treaty into the General Affairs Council and the Foreign Affairs Council. For ease of expression, this study will not distinguish between the General Affairs and External Relations Council and its successor the Foreign Affairs Council but will refer instead to the Council of the European Union in all instances.
51 Lady Catherine Ashton was appointed by the Council of the European Union as the first High Representative of the Union for Foreign Affairs and Security Policy in November 2009. The High Representative presides over the Council in the area of foreign affairs, represents the EU on the international stage and is also Vice President of the European Commission. She is mandated to conduct the Union’s Common Foreign and Security Policy, to contribute to its
European External Action Service. While the impact of the European Parliament on the development of the EU’s external human rights policy instruments is not in question here, since the Parliament has no power ‘to directly take action in relation to the promotion of human rights in third countries’ discourse from the Parliament will not be the focus of this particular study.

Analysis of publicly available texts from these sources, over a period which extends from 1975, when the EU and China established diplomatic relations, to the end of 2011, is complimented by reference to numerous unpublished documents from various sources including internal EU documents obtained by the author following requests for access to information under Regulation (EC) 1049/01; diplomatic cables published on the Wikileaks website; unpublished documents relating to the EU-China Human Rights Seminars available at the Irish Centre for Human Rights, National University of Ireland Galway; and a small number of classified documents obtained from confidential sources in the course of conducting research for this study.

development and to ‘ensure the consistency of the Union’s external action’, a mandate which she is supported in fulfilling by the External Action Service. Consolidated Version of the Treaty on European Union (2010) Official Journal of the European Union C/ 83, 20 March 2010, Art. 18, Art. 27

The External Action Service was established by Council Decision 2010/427/EU of 26 July 2010 in accordance with Article 27(3) of the Treaty on European Union as amended by the Lisbon Treaty. It is composed of a central administration and each of EU’s approximately 140 delegations worldwide. In terms of personnel, it is dominated by former staff of the European Commission, some 1,000 plus of whom were transferred en bloc from the External Relations Directorate General of the European Commission to the new service when it was launched in January 2011. Around 90 staff from the former Directorate General for Development within the European Commission were also transferred. A further 440 personnel working in the areas of external relations and politico-military affairs were transferred from General Secretariat of the Council of the European Union to the new service and a small number of new posts were filled by staff working in the diplomatic services of the EU member States. European Union (2010) Press Release: New Step in the Setting Up of the EEAS - Transfer of Staff 1 January 2011 IP10/1769, Brussels, 21 December 2010

The analysis of these documentary sources is enriched by insights gained through five years living and working in China, first as a journalist with the ‘South China Morning Post’ and subsequently as spokesperson for the European Commission Delegation in Beijing. This experience, coupled with ongoing involvement in the EU-China Human Rights Seminars as a research associate at the Irish Centre for Human Rights, has provided the author with direct access to those responsible for implementing EU human rights policy in China and allowed the development of a nuanced understanding of the challenges involved. It is hoped that this understanding will ensure that the conclusions drawn by the study, and that the policy recommendations which proceed from them, are firmly grounded in reality.

1.4 Structure of the study

The study can be broadly broken down into two main parts: chapters 2 and 3 provide essential context for the development of EU human rights policy on China while chapters 4 and 5 focus on the primary tools employed by the EU in implementing its policy of constructive engagement with China on human rights.

Chapter 2 considers existing research applying the most comprehensive constructivist theory on human rights norms transfer developed to date – that of Risse, Ropp and Sikkink’s spiral model – to the case of China. A number of weaknesses of the model are highlighted and it is argued that it can only be applied to China with some difficult. This analysis is not only important in providing a context for the development of EU human rights policy on China throughout the period under scrutiny but also in providing a basis on which to formulate policy recommendations presented at the end of the study.

Chapter 3 examines the development of the EU as a human rights actor and locates its China policy in a broader global context. A clear distinction is made between the ‘hard’ and ‘soft’ policy instruments used by the institutions of the European Union in executing its external human rights policy and a brief outline of the instruments available for use by the EU in pursuing its human rights policy on China is presented. This is followed by an overview of EU human rights policy statements on China as presented in five key China policy communications issued by the European Commission since 1995 and endorsed by the Council of the European Union.

The objective of chapters 4 and 5 of the study is to consider the manner in which the EU has justified the human rights policy choices it has made regarding the tools of human rights diplomacy and human rights assistance programming respectively in relation to China. Official discourse from the European Commission/External Action Service and the Council of the European Union relating to each instrument is examined with a particular emphasis on the legitimacy of the justifying arguments provided therein.

The study ends by presenting a series of policy oriented conclusions and recommendations which it is hoped can contribute, in a practical way, to the existing academic literature.
Chapter 2 Human Rights in China

2.1 Introduction

The spiral model of human rights norms transfer was developed in the late 1990s by Risse, Ropp and Sikkink following five years of empirical research into the impact of international human rights norms on domestic human rights practices in 11 developing countries including Chile, Czechoslovakia, Guatemala, Indonesia, Kenya, Morocco, Poland, South Africa, the Philippines, Tunisia and Uganda.\(^{55}\) The five-phase model categorises the various stages a state may transition through as it reforms its domestic human rights practices in response to pressure from what Risse et al refer to as a ‘transnational advocacy network’, which includes international non-governmental organisations, international regimes and organisations as well as states promoting human rights norms working in conjunction with ‘domestic opposition groups, NGOs and social movements’.\(^{56}\) The five phases in the transition of norm-violating states to norm compliance identified by the spiral model of human rights norms transfer are: repression; denial; tactical concession; prescriptive status; and norm-consistent behaviour.\(^{57}\) Risse et al also distinguish between three ‘ideal types of social action’ necessary for the enduring internalisation of norms, which together can be understood as a process of norm socialisation: instrumental adaptation, argumentative discourse and institutionalisation.\(^{58}\)

Existing academic research explicitly applying the spiral model to China is in broad agreement that China entered the first phase of the model in the late

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\(^{56}\) ibid 18
\(^{57}\) ibid 234-278
\(^{58}\) ibid 17
1950s during the anti-rightist movement, the second phase following the Tiananmen Square massacre in June 1989, and the third phase in 1991 when the Chinese authorities began to make tactical human rights concessions to appease heightened international criticism of China’s record. However, there is some debate over China’s location within the model by the end of the 1990s and beyond.

2.2 China and the ‘spiral model’

According to the spiral model, the first phase begins where there is a significant increase in the human rights violations carried out by the target state. On the whole, this phase of the model is characterised by repression, from ‘extreme repression bordering on genocide…to much lower levels of repression’. The target state is not engaged in the international discourse on human rights norms, even at a tactical level, and repression is widespread and largely unchallenged at home and internationally.


This first phase of the model can be seen to come to an end when the ‘transnational advocacy network succeeds in gathering sufficient information to put the norm-violating target state on the international agenda’. While processes of argumentation take place during the first phase, this involves ‘networks persuading Western states to join network attempts to change human rights practices in target states’ rather than an attempt to engage in a process of moral persuasion with the target state itself.

Western European states were among the first from outside the communist bloc to engage with China following the end of the civil war and the foundation of the People’s Republic of China in 1949. Despite pressure from the United States to isolate China, the United Kingdom became the first western state to recognise the new Chinese government in January 1950 followed quickly by Holland in March 1950. In May, Sweden became the first western state to establish full diplomatic relations with China and by the late 1950s Germany had established itself as China’s largest non-communist trading partner and along with the United Kingdom and France enjoyed a ‘surprisingly large commerce and trade in non-strategic goods’.

Writing more than two decades ago, Cohen described China prior to the Tiananmen Square massacre as the ‘human rights exception’, due to the exemption of its human rights record from international scrutiny throughout this period and up until the late 1980s. Given the level of commercial engagement between China and the West, this exemption cannot easily be attributed to China’s isolation and Cohen has argued that in fact it resulted an information deficit caused by the absence of an organised lobby focusing on human rights violations in China, both of which are key features of the first

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63 ibid
64 ibid 23
phase of the spiral model. By contrast, in accounting for the special treatment of China, Kent, Yahuda and Wan place greater emphasis on the political realities of the ‘period of tripolarity’, during which China was seen as a counterweight to the Soviet Union.

That China was largely exempt from external criticism of its domestic human rights record during this period is beyond debate. The People’s Republic of China was recognised as the sole legitimate government of China by UN General Assembly resolution 2758 in 1971, at the height of the violence of the Cultural Revolution. Yet, the abuses perpetrated within the context of the Cultural Revolution were not considered during any of the debates on human rights which took place at the UN throughout the 1970s. China began to attend the sessions of the UN Commission on Human Rights as an observer in 1979 before acceding to full membership in 1982. But despite the inclusion of a section on China in Amnesty International’s annual reports since 1972 and its publication of the first NGO report focused exclusively on China in 1978, China’s ‘peculiar immunity’ continued to protect it from broader international criticism, particularly at the UN throughout the late 1970s and much of the 1980s.

The single exception to this rule was the situation in Tibet, which since the Chinese occupation in the 1950s has commanded the attention of Western governments, NGOs and international organisations at various intervals. During the 1950s and 60s, human rights abuses perpetrated in Tibet were debated in the

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68 ibid
UN General Assembly leading to a total of three resolutions,\textsuperscript{72} reports of violent governmental repression of demonstrations in Tibet, between late 1987 and March 1988, appeared in some Western media and,\textsuperscript{73} in October 1987, the issue was highlighted by a resolution from the European Parliament.\textsuperscript{74} The resolution expressed the ‘grave concern’ of the Parliament over the ‘disturbances’ in Lhasa ‘which are reported to have caused many deaths’.\textsuperscript{75} This resolution was followed in April 1988 with the publication of a report from the parliamentary Sub-Committee on Human Rights entitled ‘The Chinese and Human Rights in Tibet’, the release of which was timed to coincide with the Dalai Lama’s visit to London in April 1988 and set the tone for his June 1988 address to the Parliament.\textsuperscript{76}

These initiatives were followed in March 1989 by a second, more strongly worded resolution from the European Parliament, unreservedly condemning ‘the violent repressive measures and in particular the use of arms, which have taken place in the Tibetan capital’, calling for the lifting of martial law, deploring the ‘loss of life resulting from these disturbances’ and expressing ‘deepest sympathies with the families affected’.\textsuperscript{77} However, despite the attention they received, these events were not sufficient to place human rights violations in China more generally on the international agenda and as

\textsuperscript{72} UN General Assembly Resolution 1353 (XIV) of 21 October 1959; UN General Assembly Resolution 1723 (XVI) of 20 December 1961; UN General Assembly Resolution 2079 (XX) of 18 December 1965
\textsuperscript{75} \textit{ibid}
concluded by Foot, ‘China still received…sympathetic treatment…based on the scale of the economic reform taking place and the problems it faced’.78

The second phase of the spiral model – that of denial – ‘often results from a particularly awesome violation of human rights such as a massacre’.79

The reaction of the target state almost invariably involves both denial of the validity of international human rights norms and rejection of the suggestion that its human rights practices are subject to international jurisdiction by reference to ‘an allegedly more valid international norm, in this case national sovereignty’.80

In the case of China, it has been argued that the ‘particularly awesome’ violation that propelled the country into the second phase of the spiral model was the officially sanctioned violence that led to unknown numbers of deaths on Tiananmen Square and surrounding areas of Beijing, commencing on 4 June 1989. As stated by Foot:

The Chinese government’s authorisation of the use of deadly force on 4 June 1989 against peaceful demonstrators accomplished in one stroke what unrest in Tibet, earlier student demonstrations, the arrest of political activists, and reports of torture had failed to achieve: global attention became sharply focused on human rights violations in China.81

The events leading up to 4 June have been well documented elsewhere and it is not necessary to revisit them here.82 Suffice it to say that scholars reviewing

80 ibid 24
82 The official death toll was 241 persons, including soldiers, with a further 7,000 wounded. Amnesty International and other advocacy groups put the number of dead in Beijing at around 1,000. Neither figure includes a tally of those detained, imprisoned or executed. Neither figure includes those who died in protests that took place in other Chinese cities immediately prior to and following 4 June 1989. For a full account see: Zhao, Z. (2009) Prisoner of the State: The
human rights practices in China in light of the spiral model are in agreement that intense suppression of political activism continued throughout 1989 and 1990, despite the early release of a number of political prisoners and the lifting of martial law in Beijing in January 1990 and the Tibetan capital Lhasa in May of that year. Transition to the third phase of the spiral model is according to Risser et al, ‘the biggest challenge for the transnational human rights network’. The socialisation process of instrumental adaptation in the form of ‘shaming’ is particularly relevant in bringing about change in the target state during the second phase and early in the third phase of the model. This depends largely on the ‘strength and mobilisation of the transnational human rights network in conjunction with the vulnerability of the norm violating government to international pressure’. The presence of the international media in Beijing from April 1989 to cover the Gorbachev state visit guaranteed that the ‘initial dissemination of information about the demonstrations and subsequent abuses of the massacre was immediate and widespread’. This presence allowed the transnational human rights network, with international NGOs to the fore, to ensure that human rights violations in China were forced onto the agenda of democratic states and international bodies such as the UN, bringing an end, at least

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ibid

temporarily, to the ‘peculiar immunity’ enjoyed by China in the preceding years.

Throughout the 1990s, the Chinese authorities reacted to this criticism by engaging in instrumental adaptation, making cosmetic changes to its human rights practices while at the same time developing its own competing human rights discourse, thereby, placing it firmly within the third phase of the spiral model. Scholars explicitly applying the spiral model to the case of China are in agreement that although some tactical concessions were made as early as January 1990, when as mentioned above martial law was lifted in Beijing, more significant concessions were not forthcoming until 1991. These included reduced sentences for some of those tried in 1991 for their role in the demonstrations as well as China’s willingness to receive human rights delegations from Australia and France, culminating in the publication of China’s first White Paper on human rights in October of that year.87 China also responded instrumentally to other more obvious manifestations of the new international focus on its human rights practices, in particular, the attempts made within the context of the UN to publicly scrutinise China’s human rights record.

The importance of international pressure in the form of public shaming in bringing about change in the target state during the second phase and early in the third phase of the model is highlighted by Risse et al.88 The vulnerability of the target state to such criticism plays a key role in determining the effectiveness of shaming as a policy approach. While Risse et al predict that ‘countries receiving large military and economic aid flows will be more vulnerable to human rights pressures than those not receiving such flows’, crucially, in the case of China, vulnerability is defined not only in material

88 Several members of the UN Commission on Human Rights, including most notably the United States, continued to lobby for a resolution critical of China’s human rights record long after consensus among democratic states over the efficacy of such a move had dissolved as will be detailed in chapter 4.
terms but also as ‘a desire to maintain good standing in valued international groupings’.  

That China valued its reputation within the United Nations and ‘cared deeply’ about the criticism of its human rights record contained in reports produced by various Special Rapporteurs from the early 1990s, and, in particular, attempts made by Western governments including the EU member states to table draft resolutions critical of human rights practices in China for consideration at the UN Commission on Human Rights, is clear from the lengths to which China went to both stifle and counteract it. Intense lobbying by Chinese officials at the UN Commission on Human Rights ensured that draft resolutions critical of its record were defeated on procedural grounds every year with the exception of 1995 when the draft was itself defeated by a narrow majority. At the same time China also attempted to question the legitimacy of UN working groups and to weaken the ability of the UN human rights system to tackle country-specific situations while stepping up efforts to develop an alternative human rights discourse with periodic publication of white papers on human rights from 1991 onwards. Within this context, China’s promotion from the early 1990s of its preferred mechanism of ‘non-confrontational’ bilateral human rights dialogue can also be seen as a form of instrumental adaptation and a continuation of its efforts to undermine the UN route, once again placing it firmly in the early third phase of the spiral model.

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91 Publication of white papers on various human rights issues became a regular feature of China’s efforts to direct the global discourse on human rights and defend its own record from the early 1990s. According to Fleay, between 1991 and 2003 China was to publish some 21 such papers. In 2009, China published its first Human Rights Action Plan covering the period 2009-2010. In June 2012, a second action plan was published covering the period 2012-2015.

Foot and Fleay point to a short lived period of greater openness in China from September 1997 to October 1998, during which China received the United States’ President Bill Clinton and the UN High Commissioner for Human Rights and signed the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. However, both authors also agree that this was followed by a significant backlash, commencing with the arrest of key China Democracy Party members in November 1998. This backlash has led the two authors to conclude that despite the brief ‘Beijing Spring’ of 1997 to 1998, at the end of the 1990s China remained embedded in the third tactical concessions phase of the spiral model.93 Thereafter, consensus on China’s location within the spiral model among scholars explicitly applying the model to China evaporates somewhat.

Risse et al highlight four key indicators for location of a target state within the prescriptive status phase of the model: ratification of respective international human rights covenants and their protocols; institutionalisation of norms in the constitution or domestic law; the development of institutionalised mechanisms for citizens to raise complaints about human rights violations; and engagement in discursive practices that ‘acknowledge the validity of human rights norms irrespective of audience…[and] no longer denounce criticism as interference in internal affairs’ thereby enabling an open dialogue with critics.94 Writing in 2000, Foot concludes that in spite of the repressive measures used by the Chinese authorities to contain perceived threats to the security of the regime in the late 1990s, with particular reference to the China Democracy Party and the Falun Gong movement, there is ‘considerable space’ between stages three

and four of the model and that, by the year 2000, China is best located ‘in-between’ the two phases.95

By the year 2000, China had ratified or acceded to four of the then seven core international human rights instruments and had signed, although not yet ratified, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.96 Although in every case China had made reservations reflecting ‘its concern with state sovereignty and non-interference’ or denying the right to submit individual complaints, ratification of core human rights treaties is often regarded as an important benchmark in assessing the degree to which a target state is willing to accept the validity of international standards.97

Of equal note was the enactment of the Organic Law on Villagers’ Committees in 1998, which made the holding of free and competitive elections for village level committees and assemblies compulsory practice nationwide.98 In its 1997 White Paper on Human Rights, China was also at pains to present reforms introduced by the revised Criminal Law and Criminal Procedures Law, which included ‘some movement towards the presumption of innocence, elimination of certain forms of arbitrary detention, and the expansion of the role of defense counsel’, as an effort to strengthen judicial guarantees of human rights and a landmark in the development of the legal system.99 However, significant as these developments were, they are not sufficient to fulfill the criteria necessary for classification as a state in phase four of the model,

particularly when seen in the light of China’s continued reference to the norm of state sovereignty in an attempt to delegitimise external criticism of its human rights record and the absence of a viable mechanism through which citizens could raise complaints about violations of their human rights.

Writing in 2005, Fleay states that the continued dominance of the socialisation process of instrumental adaptation combined with the ability of the Chinese authorities to ‘repress organised attempts at establishing opposition groups’ suggest that, by 2003, China was not ‘nearing the end’ of the third phase of the model and should not be considered as a state in transition from phase three to phase four. The same conclusion is also reached once again by Fleay in 2008, who notes that ‘[d]espite some constitutional and legislative changes consistent with international human rights norms, the judicial system in China is far from independent and reports continue of the use of torture, arbitrary arrest and extrajudicial killings’. Likewise, in 2010 Kinzelbach locates China at the early stages of the spiral model. Moreover, other scholars who have evaluated China’s interaction with the international human rights system during the same period without direct reference to the spiral model have also concluded that China has not internalised human rights norms and continues to react to external criticism with a mixture of denial and tactical concessions.

According to Risse et al, in order to ensure the selection of appropriate policy instruments and maximise the potential impact of human rights policy,

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policy decisions taken by states and organisations seeking to encourage human rights reform in a third country should be informed by comprehensive target state analysis. While this position is not unique to the creators of the spiral model, the policy recommendations which flow from it go far beyond those put forward by other authors.

Building on the five phases of the spiral model, Rise et al maintain that the selection of human rights instruments appropriate to the phase of the model in which the target state is located at any given time is crucial to the overall chance of success of any human rights policy. They assert that policies characterised by ‘shaming and moral consciousness-raising’ are judged to be most effective during the earlier stages of the model while policies characterised by ‘constructive engagement’ can be effective only in the later stages of the model:

Our data suggests that constructive engagement might indeed work, but only at the later stages of the spiral model when communicative and argumentative processes constitute the main dynamic. To use constructive engagement at the early stages of the process when a norm-violating government is working in a purely strategic and instrumental mode will almost always be taken for weakness and indecisiveness.104

Given the dominant analysis of China as a state firmly rooted in phase three of the spiral model, the implications of this assertion for the formulation of external human rights policy are far reaching. These implications are most clearly demonstrated in Kinzelbach’s chronological reconstruction of the EU-China Human Rights Dialogue.

On the basis of her analysis of China’s interaction with the EU in the context of the Human Rights Dialogue, Kinzelbach concludes first, that ‘China has so far not progressed far enough along the spiral model’s phases for persuasion strategies to be successful’ and, second, that engagement strategies

are indeed ineffective ‘as long as a norm-violating government still adopts a strategic, instrumental mode of response’ as suggested by Risse and Ropp. Furthermore, the argument is also made that:

[T]he EU’s continued engagement with China in a structured human rights dialogue at the level of officials is merely perceived in Beijing as a sign of the EU’s weakness and indecisiveness. Stated more pointedly, it could be said that the dialogue is an encouragement rather than a discouragement to continue with oppressive policies because it has helped to significantly reduce the reputational risks Chinese leaders face in the international arena.

It is not the intention here to argue that in fact China has progressed beyond stage three of the spiral model to phase four, prescriptive status. Rather, the analysis presented below will highlight various weaknesses of the spiral model and will suggest an alternative understanding of human rights developments in China, which will allow for a more accurate identification of issues and areas where external actors may be in a position to make a valuable contribution.

2.3 Weaknesses of the model

That the spiral model could not adequately capture the domestic human rights situation in China was pointed out by Foot shortly after the work produced by Risse, Ropp and Sikkink introducing the model was published. While Foot’s conclusion can and has been interpreted to suggest that, in her view, by 2000, China was in transition from phase three of the model to phase four, it might just as easily be understood as a reflection on the shortcomings of the spiral model itself, which can accommodate the case of China only with some difficulty. Such an interpretation finds support in subsequent statements

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106 ibid 267
made by Foot to the effect that, while China had ‘almost’ reached prescriptive status, further progress was not inevitable due to the existence of a deliberate government policy to override the human rights provisions contained in new laws ‘in the event of any threat to the [Communist Party of China]’s monopoly on political power’. 108 Clearly, in the view of Foot, in the year 2000 China fulfilled neither the criteria established for categorisation in stage three nor in stage four of the model, but occupied a space outside the model, somewhere in between these two.

In her work on the spiral model, Fleay demonstrates a number of core differences between the case of China and the eleven case studies presented by Risse, Ropp and Sikkink. According to Fleay, China experienced a comparatively short denial phase during which, unlike the spiral model case studies, it engaged in argumentative discourse, normally evident only in phase three, and also succeeded in ‘exerting some influence over its external critics’. 109 In Fleay’s view, China’s behavior in phase three of the model also stands apart from the other case studies presented by Risse et al since ‘in contrast to the spiral model the Chinese government was not engaging increasingly more in argumentative discourses than practicing instrumental adaptation’. 110 Fleay attributes this fact to the ‘government’s dominant identity continuing to be that of a great power’, which she states has enabled China to take actions ‘to influence understandings of international human rights norms and their enforcement mechanisms’ and to enjoy a level of success in doing so. 111 This ability, combined with China’s great power status, is, according to Fleay, a significant factor in ‘contributing to the Chinese government’s stalled progress to phase four’. 112

108 ibid 258
110 ibid 318
111 ibid
112 ibid 318-319
and Latin America than the ‘previously dominant “Washington consensus” of market economics with democratic government’.  

Given China’s recognised skill and assertiveness as an emerging superpower on the world stage, it should perhaps not come as any surprise that a model developed exclusively with reference to economically vulnerable developing countries cannot accurately chart the trajectory of the changes underway in the world’s most populous country with the world’s fastest growing economy. In the face of external criticism, China’s desire to protect its own image internationally has in the past drawn tactical concessions from the authorities. However, China’s primary response to such pressure has been to exert its influence as an emerging superpower to diminish its own vulnerability. As stated by Fox and Godment in their 2009 ‘Power Audit of EU-China Relations’:

Europe’s approach to China is stuck in the past. China is now a global power: decisions taken in Beijing are central to virtually all the EU’s pressing global concerns, whether climate change, nuclear proliferation, or rebuilding economic stability. China’s tightly controlled economic and industrial policies strongly affect the EU’s economic wellbeing. China’s policies in Africa are transforming parts of a neighboring continent whose development is important to Europe. Yet the EU continues to treat China as the emerging power it used to be, rather than the global force it has become...The EU’s heroic ambition to act as a catalyst for change in China completely ignores the country’s

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economic and political strength and disregards its determination to resist foreign influence.\textsuperscript{120} While in the post-Tiananmen years, as China defended itself against almost annual attempts to secure a resolution at the UN Commission on Human Rights critical of its human rights record, it perhaps fit the description of a state in the third phase of the spiral model motivated to offer concessions by the desire to ‘lessen international isolation’, clearly it cannot be described in such terms today. But nor does it fit the description of a state either in or transitioning to the forth phase of the model, confirming that indeed, as indicated by Foot more than a decade ago, the model cannot accommodate the case of China.

A second weakness of the model as it relates to China has been identified by Fleay in its failure to conceptualise the influence which states may have on international human right norms. Instead, the spiral model ‘only allows one conclusion – that target states progressing to the later phases of the model themselves reinforce the validity of existing norms’.\textsuperscript{121} Thus, the model is one of convergence, in so far as it aims to understand the processes involved in ‘development towards a globally unified system of institutional practices and values’.\textsuperscript{122} That states, such as China, could influence international standards through a process of selective adaptation involving a combination of ‘resistance’ and ‘pro-active norm setting’ is not countenanced.\textsuperscript{123}

Finally, the spiral model which, during the third phase of tactical concession conceives of states as making ‘minor cosmetic changes’ in response to international pressure, cannot account for the breadth of the domestic human rights reform that has taken place in China over the past decade. As described

\textsuperscript{123} ibid 713
above, China’s ability as an emerging superpower to influence the international discourse on human rights norms has allowed it to minimise the reputational risks associated with external criticism. Yet, at the same time, it has continued on a path of change even in the absence of significant ‘pressure from above’ which, according to the model, is a ‘necessary condition’ for such change.\(^{124}\)

This is not to say that as an emerging superpower China is immune to external criticism, or that its response should not be understood as a mixture of instrumental adaptation and argumentative rationality. What is suggested however is that China’s reaction to pressure for change from the transnational human rights network does not correspond to the stages of the spiral model and that the model itself is, therefore, of little relevance in formulating policy recommendations for external actors such as the EU. Rather than evaluating China’s human rights practices primarily at the international level, focusing on the processes by which it has been enmeshed into the global human rights regime as well as its responses to that regime, it is argued that our understanding of how external actors can contribute to the great ferment of change underway in China would be better enhanced by reference to domestic conditions as both a catalyst for reform as well as a significant inhibiting factor.

### 2.4 Domestic reform

Deng Xiaoping became paramount leader of the Communist Party of China in December 1978, signaling an end to the upheavals of the Cultural Revolution and the Mao era. Under new leadership, China was to embark on a programme of sweeping economic reform which would see it transformed from a centrally planned command economy to a socialist market economy. As part of this transition process, the Communist Party of China has gradually surrendered its monopoly over the domestic social and political space and

allowed the progressive development of ‘realms of freedom’ that would have been unthinkable in China only decades ago.\textsuperscript{125}

The remarkably rapid evolution of the domestic legal environment has led to an upsurge in rights consciousness. For the first time in China’s history, citizens can sue the state for unjust administrative actions and Chinese workers are increasingly looking to domestic laws on labour dispute resolution to protect their interests.\textsuperscript{126} In addition to the courts, citizens also claim their rights through non-judicial popular action including the collective submission of written complaints through the letters and visits system (xinfang), group appeals to Party authorities or people’s congresses and through street protest, strikes, demonstrations and riots.\textsuperscript{127}

At the same time, China’s associational landscape has changed completely since the total prohibition on the activities of non-governmental organisations was lifted in the mid-1970s, leading to an explosion of registered and unregistered social and grassroots organisations through which millions of Chinese articulate and pursue their interests while exercising their right to associate and organise.\textsuperscript{128} As a key indicator of a mobilising domestic opposition, the spread of rights consciousness beyond a small group of disestablished and marginalised intellectuals to other social groups in China by the start of the twenty-first century is clearly demonstrated by the determination of both workers and peasants to use both the law and the streets to defend their rights.\textsuperscript{129}

\begin{thebibliography}{9}
\end{thebibliography}
On 10 April 1989, the People’s Daily Newspaper hailed the promulgation of the country’s Administrative Litigation Law as a ‘milestone of democratic and legal construction’. The Administrative Litigation Law gave citizens the right to sue the state for unlawful administrative action such as detention or land confiscation. The number of cases taken against the state grew steadily to an annual average of about 100,000 in 2005. At the same time, the loss ratio for plaintiffs declined from 35.9 percent in 1992 to 28.6 percent in 2001. While, more often than not, cases are taken by individuals against individuals, collective action involving more than tens of thousands of plaintiffs is not unheard of, signaling the increasing propensity of China’s citizens to organise to defend their rights.

Similarly, since the introduction in 1995 of the National Labour Law, which for the first time enshrined the basic rights of all Chinese workers and granted all enterprises significant autonomy in taking personnel and labour related decisions, Chinese workers have been turning to the law to air their grievances and press for redress in increasing numbers. On 10 March 2009, Wang Shengjun, president of the Supreme People’s Court, delivered the annual Work Report of the court to the National People’s Congress. The report stated that labour disputes had increased by 94 percent on the previous year, reflecting the determination of workers to exercise their rights under the new Labor

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Contract Law in harder economic times as well as an ‘increasing willingness’ on the part of the courts to accept such cases.  

The adoption of rights laws, and the greater willingness of China’s citizenry to use those laws to defend their rights, has also given Chinese lawyers an ‘increasing role to play in Chinese politics’ and has led to the ‘creation of a legal profession interested in promotion of the rule of law’.  

Starting almost from nothing in the late 1970s, by 2000 China came to have over 9,500 law offices and 110,000 lawyers rising to 140,000 practicing lawyers working in 14,000 law firms by 2008. Moreover, the proportion of firms established with state investment as opposed to those established as ‘western style partnerships’ has been reversed over the past decade. Whereas, in 1997, almost 66 percent of the law firms in existence were established with state investment, by 2008, some 70 percent were partnerships.

In addition to the expression of rights consciousness through court action, non-judicial action has been gaining steady momentum in China over the past decade as a means by which Chinese citizens can air their grievances and seek redress. The national system of letters and visits, which allows groups and individuals to directly petition the Chinese Communist Party through the letters and visits offices established throughout all government organs including the courts, has been in existence since the 1950s but was formalised in 1995 and substantially revised in 2005.

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138 ibid
The 1995 national regulations compelled the organs of the state to accept not only petitions reporting official malfeasance but also expressing comments, suggestions and principled criticisms relating to official decisions. The opportunity to address the Party in this manner is taken up by a large number of China’s citizens every year. Even prior to the 2005 introduction of new national regulations, the aim of which was to regularise the system, diminish some of its more coercive aspects and enhance its role as a mechanism for dispute resolution, figures from the director of the national xinfang bureau show that the total number of petitions received by the State Bureau for Letters and Calls, in addition to those received by both Party and government xinfang bureaus at the county level and higher, exceeded 8.64 million in the first nine months of 2002. This corresponds to an annual rate of 11.5 million per year, almost twice the total yearly caseload of the entire Chinese judiciary.

With increasing frequency, petitions received represent the views of many hundreds or even thousands of citizens who have come together in an effort to address a collective grievance. More worryingly for the authorities, the organisation of mass petitions is often accompanied by, sometimes violent, protests, demonstrations and strikes. In one such incident in December 2011, inhabitants of the southern Chinese village of Wukan (population 13,000), located in Guangdong province, seized control of the village, expelling local officials, Communist Party leadership and public security personnel, when anti-corruption protests which began in September turned violent following the death in police custody of Xue Jinbo, one of 13 village representatives elected

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to engage with officials over an alleged land grab.\textsuperscript{142} The incident, which
became known as the ‘Siege of Wukan’, saw the village placed under a
blockade by the People’s Armed Police for a period of six days prior to the
negotiation of a resolution with the provincial authorities. This resolution
included agreement to release without charge four village representatives held
by the police for 12 days, to release the body of Xue Jinbo to relatives, to
publish the financial accounts for the village, to investigate the villagers’
allegations of corruption and to permit the election of a new village
committee.\textsuperscript{143}

In post-Mao China, the ‘public airing of both peasant and worker
grievances has become ‘an accepted part of local politics’.\textsuperscript{144} In a much quoted
2005 statement, Minister of Public Security, Zhou Youkang, reported that the
number of ‘mass incidents’ in China had expanded dramatically over the ten
year period, from 10,000 in 1994 to more than 58,000 in 2003, rising to more
than 74,000 in 2004.\textsuperscript{145} During the same period, the number of participants in
such incidents had increased from 730,000 persons to 3,760,000 persons.\textsuperscript{146}
Zhou Yongkang went on to report that mass incidents had occurred ‘in all
provinces, autonomous regions and municipalities’; that they were more
‘diversified’ in terms of participation involving ‘dismissed workers, farmers,
urban dwellers, enterprise owners, teachers and people from various social
strata’; that they incorporated ‘extreme’ methods including ‘laying siege and
attacking party and government offices, blockading public roads, stopping

\begin{itemize}
\item \textsuperscript{142} Mattis, P. (2011) ‘Wukan Uprising Highlights Dilemmas of Preserving Stability’ \textit{Jamestown Foundation: China Brief} 11(23). Retrieved 21 June 2012 from:
\url{http://www.jamestown.org/uploads/media/cb_11_71.pdf}
\item \textsuperscript{143} ibid
\item \textsuperscript{145} Congressional Executive Commission on China (2006) Annual Report 2006, Washington DC, p. 45
\item \textsuperscript{146} ibid
\end{itemize}
trains and other situations’; and that they displayed a ‘tendency towards greater organisation’, including the ‘appointment of leaders from within the group’.  

In reaction to these statistics, the still relatively new Party leadership under Hu Jintao and Wen Jiabao called on provincial Party and security officials to affect major decreases in the level of protest over the two subsequent years. Provincial governments came under increasing pressure to contain local protest and were ranked according to the number of local petitions that were brought to the capital, while punitive action was taken against officials when local grievances escalated into more widespread protest. The media were instructed not to report on protests without permission, internet petitioners were targeted by the public security bureau and a number of campaigns were launched in an attempt to address the familiar causes of discontent: the negative impact of economic reform and widespread corruption. Not surprisingly, by 2006, many provinces were able to report a drop in the number of ‘mass incidents’ of more than 20 percent, with some reporting as much as a 90 percent drop.  

Due to the absence of an agreed official definition of what constitutes a ‘mass incident’, the politically sensitive nature of the statistics and the pressure put on provincial authorities to secure lower rates, it is of course difficult, if not impossible, to know the real number of such incidents or how many citizens have participated in them. However, even at the lower rates reported, the degree of public protest and the resilience of the protesters themselves to police repression stands in marked contrast to the ‘years of public passivity’ that followed the events of 1989. More surprising still is that, in many cases, the regime is ‘allowing these expressions of discontent’ to take place.  

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149 Ibid  
China’s associational landscape has also changed completely since the end of the Mao era. NGOs in China ‘lost their independent nature and became vehicles for the Party to implement its control over the general public’ in the 1950s.\textsuperscript{151} During the turbulent years of the 1960s and 1970s, all but a handful of the existing social organisations were disbanded following claims of counterrevolutionary activity and no new groups were established until the early 1980s.\textsuperscript{152} The sector enjoyed a period of rapid and largely uncontrolled growth in the 1980s which, according to Gold, provided the real dynamic behind the grassroots movement calling for political and economic reform, culminating in the Tiananmen Square protests of 1989.\textsuperscript{153}

In the aftermath of Tiananmen, the authorities determined to bring the sector back under the control of the Party, with the publication of administrative regulations reintroducing the ‘dual-registration system’ which enabled only civil society organisations with a government agency as their sponsor to register with the Ministry of Civil Affairs.\textsuperscript{154} A second campaign to “rectify” and “regularise” existing organisations was launched in the late 1990s as part of a general crack down on dissenting voices, including the Falun Gong, and which required re-registration with the Ministry of Civil Affairs, forcing tens of thousands of groups to close or go underground.\textsuperscript{155}

Official statistics from the Ministry of Civil Affairs, analysed by Ma in her monograph on NGOs in China, show that in 1993, when records began, there were approximately 153,000 registered civil society organisations in China.\textsuperscript{156} This number peaked in 1996 at approximately 200,000 before

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{152} ibid 9
  \item \textsuperscript{153} Gold, T. (1990) ‘Tiananmen and Beyond: The Resurgence of Civil Society in China’ Journal of Democracy 1, pp. 18-31
  \item \textsuperscript{155} ibid
  \item \textsuperscript{156} The 1998 regulations use the term ‘social organisations’ to describe civil society organisations in China. ‘Social organisations’ are defined in the regulations as non-profit organisations that are voluntarily founded by Chinese citizens for their common will and operated according to their charters’. The figures relating to such groups supplied by the
\end{itemize}
\end{footnotesize}
beginning to decline steadily for a period to reach approximately 129,000 in 2002.\textsuperscript{157} Ma then reports a slight increase in the numbers registering from 2002 to 2003, with the final tally for 2003 reaching approximately 133,000.\textsuperscript{158}

Figures released since this time demonstrate that this increase has not only continued but has gathered pace, bringing the number of civil society organisations registered with the Ministry of Civil Affairs in 2005 to a total of 315,000, rising to 420,000 in 2009.\textsuperscript{159} The rapid growth in these numbers has been attributed to ‘new opportunities for the development of charitable undertakings in China’ created by the concept of ‘harmonious society’ which was promoted by the new Party leadership under Hu Jintao and Wen Jiabao from 2003.\textsuperscript{160} In a ‘harmonious society’, citizens were to be encouraged to take on social service functions, traditionally carried out by the government, by forming their own local organisations.\textsuperscript{161}

That these organisations have the potential, not only to deliver basic services, but also to impact on government policy, particularly in the area of environmental protection, is becoming evident.\textsuperscript{162} In July 2009, a decision taken by the courts in Guizhou province to accept the country’s first environmental

\textsuperscript{159} Liu, P. (2011) ‘Development of Charities in China since the Reform and Opening Up’ in Li, Y. ed. NGOs in China and Europe: Comparisons and Contrasts (Farnham; Burlington: Ashgate), p. 88; Tsinghua University NGO Research Centre (2006) A Nascent Civil Society within a Transforming Environment: CIVICUS Civil Society Index Report China (Mainland) (Beijing: Tsinghua University), p. 20
\textsuperscript{161} Liu, P. (2011) ‘Development of Charities in China since the Reform and Opening Up’ in Li, Y. ed. NGOs in China and Europe: Comparisons and Contrasts (Farnham; Burlington: Ashgate), p. 79
lawsuit filed by a government backed environmental group, the All-China Environmental Federation, against a government agency, was greeted as a breakthrough by green activists who had been pushing for many years for the courts to allow NGO-led environmental public interest litigation in China. In October 2011, the question of whether or not similar suits would also be accepted from independent grass-roots organisations was answered positively for the first time when the courts, in Yunnan Province, accepted a case filed by Friends of Nature and the Chongqing Green Volunteer Association, with the support of the Quijing City Environmental Protection Bureau. While environmental activism of this kind cannot for the most part be described as having an explicit human rights mandate it has been argued that, ‘civic self-empowerment through environmental movements creates a major impetus for broader, systemic reform’, perhaps sowing the seeds for further action on other more sensitive issues down the line.

The increasing independence of Chinese civil society organisations is also demonstrated by the submission of written materials critical of China’s human rights record for inclusion in the stakeholder report, compiled by the Office of the High Commissioner for Human Rights, in advance of China’s Universal Periodic Review in February 2009. The submission of, for example, a written contribution from the highly controversial Beijing Aizhixing Institute – the executive director of which, Sakharov prize winner Hu Jia, was jailed for three and a half years in 2008 for inciting subversion of state power – is a clear indication that not only were the ‘party’s efforts to rein in increasingly independent intellectuals and ideologues’ beginning to have a ‘diminishing impact’ but also of the tacit acceptance of their new role by the ruling elites.

166 Goldman, M. (2005) From Comrade to Citizen: The Struggle for Political Rights in China
2.5 Domestic control

In spite of these developments, China remains a single-party state in which all forms of political participation remain ‘strictly state-defined’, and there can be no doubt that the state still retains ‘the coercive power to quell social unrest and disband unapproved organisations’. The full extent of this power was demonstrated in the run up the 2008 Olympic Games in Beijing. During this period, while issuing public statements which claimed the Games would ‘benefit the further development’ of the ‘human rights cause’ in China, a campaign was launched to silence dissenting voices, most notably in Tibet following the outbreak of political unrest in May 2008. The Party’s strident reaction to the release of the Charter ’08 manifesto is further evidence not only of its continuing iron grip on power but its willingness to wield that power even in the face of sustained public criticism at an international level. As stated by

Charter ’08 is a political manifesto calling for democratic reform in China. It was published in December 2008 to mark the 60th Anniversary of the Universal Declaration of Human Rights. At the time of its release, the Charter had been signed by some 303 Chinese activists from all walks of life. This number has continued to rise since the Charter was released to reach over 10,000 currently. In addition to imposing a ban on domestic reporting of its release, the authorities reacted by subjecting many of its original signatories to harassment and intimidation in the weeks and months that followed. One of its principal authors, Liu Xiaobo, was arrested and charged with subversion of state power in June 2009. His trial, in December 2009, led to an 11 year sentence. Liu Xiaobo was awarded a Nobel Peace Prize in October 2010. The authorities in China dismissed the award as an ‘obscenity’ and prohibited media reporting of the matter. In the weeks leading up to the award, Liu Xiaobo’s wife, Liu Xia, was placed under house arrest, many of his supporters were detained and harassed and all were prevented from travelling to Oslo to attend the ceremony and collect the prize on his behalf. China also reacted to the Nobel Peace Prize award by suspending ongoing negotiation of a Free Trade Agreement with Norway and by launching, what was described in an Aljazeera news report by an unnamed member of the Nobel Committee as, an ‘unprecedented’ campaign to persuade foreign governments to boycott the ceremony. See: Aljazeera, Staff Reporter (2010) ‘Chinese Nobel Boycott Gains Support’, Aljazeera, 7 December 2010. Retrieved 1 January 2011 from: http://english.aljazeera.net/news/europe/2010/12/201012717240690770.html; For further detail
Yahuda, ‘the bottom line is that the Party in general and its leaders in particular…will be resolute and merciless in striking down those whom they perceive as a challenge to their hold on power.’

Bueno de Mesquita and Downes have demonstrated that it has been possible for authoritarian regimes to achieve economic growth while at the same time limiting the realisation of human rights, in particular, those related to civil and political rights, by restricting access to what they term ‘coordination goods’ which are necessary for political organisation, with the effect that domestic efforts to improve access to human rights can be effectively suppressed. This conclusion is supported by Kampfner’s recent study of democracy in Singapore, which demonstrates that it is possible, and even sustainable in political terms, to achieve economic success in a restricted democracy which does not fully respect human rights.

In the case of China, the restriction of coordination goods is a key objective of official policy, articulated in the efforts of the Party under Hu Jintao to extend its control over all forms of mass communication from traditional media to new technologies, in particular the internet. As stated by Bandurski, contrary to ‘the Western liberal ideal of independent and even adversarial state-press relations’, the relationship between state and press in China is best described as ‘interdependent’ with the media seen as ‘cooperating and collaborating with the party state toward shared goals such as opposition to local corruption and abuse of power’. As demonstrated by Pils, this relationship has ensured that the state retains the power to ‘successfully repress not only protest but also information about its repression’ with censorship


affecting not only the ‘the most important repression of a political movement to occur [in China] in recent decades – June Forth’ but also ‘individual, usually case related, protestation and appeals’. 175

Rather than indicating a desire to expand consultation and transparency, in many instances the central government policy of strengthening the rule of law, allowing certain forms of non-judicial public criticism and encouraging the development of social organisations should be understood as ‘directly related to the party’s interest in holding onto power’ by channeling conflict into areas that are both officially sanctioned and controlled. 176 According to O’Brien and Li, the Administrative Litigation Law, for example, has ‘less to do with liberal ideology or any newfound affection for citizens’ rights and more to do with ‘cadre monitoring’. 177 By encouraging China’s citizenry to act as watchdog, the Beijing-based Central Committee of the Communist Party can extend its reach far beyond the capital and gain support for the essential task of uncovering the corruption which has delegitimise the Party and threatened to challenge its authority in recent years. But while the Party and the government are often difficult to distinguish, the Party itself is not subject to the Administrative Litigation Law and cannot be held responsible for unlawful administrative acts. 178 Nevertheless, the Party’s immunity from prosecution does not prevent it from frequently interfering in cases, with Party committees often issuing internal orders prohibiting the courts from accepting sensitive suits. 179

Similarly, in the case of labour disputes, the government frequently takes over the handling of ‘large collective disputes’ in order to mitigate their

178 ibid 35
179 ibid
‘social and political consequences’. \( ^{180} \) Crucially in this regard, the Labour Contract Law, which came into effect on 1 January 2008, falls short of recognising the workers right to organise, thereby negating the possibility of the formation of independent workers unions with the potential to organise outside the control of the Party.

Despite the emergence of what might be described as an embryonic civil society in China, advocacy and political organisations are still ‘strikingly underdeveloped’. \( ^{181} \) Most registered NGOs choose advocacy roles in non-sensitive areas, such as women’s issues, the environment, health care, education and consumer rights, preferring to work in line with the goals of the central government rather than in opposition to them. \( ^{182} \) The maintenance of the controversial ‘dual-registration’ system has played a crucial role in curtailing the growth of critical voices within the sector, since no government agencies or mass organisations dependent on the government for their financial security ‘want to take on such a political liability’. \( ^{183} \) Although numerous local level experiments allowing less rigid processes for the registration of civil society organisations have been underway for a number of years in various provinces and cities, particularly in the south of China, the announcement, in November 2011, of new provincial level regulations allowing registration without a government sponsor in Guangdong province has given rise to renewed hopes that the dual-registration system may eventually be abandoned. \( ^{184} \) At the time of writing, however, there is little reason to believe that this decision will be taken swiftly or that indeed it will be the inevitable outcome of ongoing experimentation. Moreover, it is by no means assured that such revisions would

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\( ^{184} \) Zhuang, P. (2011) ‘Guangdong to Allow Some NGOs off the Leash’ South China Morning Post, 25 November 2011
in practice make it easier for groups operating in sensitive areas to register, given that the entire process remains within the purview of government agencies.

While the compulsory expansion of the xinfang system under the 2005 national regulations has been presented by the authorities as an effort at enhancing accountability and a sign of greater willingness to accept and listen to criticism, the promotion of the system can also be seen as a successful attempt to extend the rule of the Party as opposed to the rule of law. As is the case regarding the Administrative Litigation Law, the 2005 regulations represent an attempt to use the general populace to monitor the behaviour of local agents and provide the central government with information about potential sources of social instability. In contrast to China’s formal legal institutions, the authority of the xinfang system is not ‘grounded on formal law and legal norms’ but ‘derived solely from the political power of the Communist Party and individual officials’, reflecting the continued ability of Party members ‘to personally intervene in and resolve particular disputes, regardless of legal norms’.  

The xinfang system is predicated on the assumption ‘that rulers and ruled share the same understanding of right and wrong, of just and unjust’. All petitions received through the system are addressed to agents of the state ‘requesting their intervention’ and cannot, therefore, be ‘construed as overly confrontational’. Where confrontation occurs, the officials concerned are quick to defend themselves as demonstrated by the results of a survey conducted by the Chinese Academy of Social Sciences in 2004 which showed that over half of the petitioners surveyed were beaten or subjected to other

\[187\] ibid
reprisals by government officials as a result of their petitioning activities.\textsuperscript{188} The \textit{xinfang} system has, over time, adopted a number of legal norms, such as procedural time limits and the requirement that decisions take the form of a written opinion issued to the petitioner, but, as a whole, it remains arbitrary in its decision making and opaque in its processes. Although undoubtedly representing ‘an important practical alternative to formal legal channels’, the fact that Chinese citizens resort to the \textit{xinfang} system to express their grievances far more often than formal legal channels says more about the weaknesses of the formal system than the strength of the alternative.\textsuperscript{189}

With respect to the thousands of street protests and rural demonstrations that take place throughout China each year, once again there is no evidence to suggest that central government policies or the political system are the target of the demonstrators’ grievances. On the contrary, demonstrators generally lay the blame for their hardships at the door of local figures, including state owned enterprises and corrupt local officials, while appealing to the central government ‘as a kind of ombudsman that could be persuaded to intervene locally on their behalf’.\textsuperscript{190} This was the situation in the case of Wukan, cited above, where villagers prominently displayed banners and placards proclaiming their loyalty to the Communist Party and appealing to the central government for support.\textsuperscript{191} The reaction of the central government to public demonstrations which are perceived to target the state, including for example those that occurred in Tibet in May 2008 and Xinjiang in July 2009, confirm that the party continues to regard the public sphere as ‘a sphere for the exercise of state

\begin{itemize}
  \item \textsuperscript{189} ibid
\end{itemize}
power’: thus, it will allow public expression of discontent only within certain boundaries.192

As stated by Oi, at present there exists ‘little if any network in place capable of coordinating either the workers or the peasants’ into a broader movement:

The protestors seldom expand their activities outside their local area…So far there are no signs that other groups who have grievances against the regime are attempting to coordinate larger-scale collective resistance. Political dissidents and intellectuals do not appear to be involved in these disturbances.193

The determination of the Party to ensure that the gulf between the significant numbers of disaffected workers and peasants, on the one hand, and China’s limited clutch of political dissidents and public intellectuals, on the other, is not crossed is clearly demonstrated by its treatment of legal professionals, in particular lawyers. While the number of lawyers in China has grown over the past decade it remains low for a country of its size. According to research conducted by Cabestan, Li, Sun and Dolais, in France for example, the number of lawyers per head of population is approximately six times that in China.194 This shortfall is most acutely felt in the area of criminal law.

It is estimated that only about one third of the total number of lawyers in China practice criminal law and defendants are represented by a lawyer in only about 30 percent of criminal cases.195 By some estimations, the number of lawyers who are willing to work on sensitive “rights defence” cases is thought

195 ibid
to be as low as just 20 nationwide. This small group face the deliberate obstruction and persistent harassment of the authorities. In response to a 2002 poll, conducted by the All China Lawyers Association, abuses including detention, illegal arrest and degrading treatment in court were reported in some 53 percent of criminal cases.

The revised Law on Lawyers, which came into effect on 1 June 2008, made it a criminal offence for a lawyer to deliver a speech in court ‘compromising the national security, maliciously defaming others or seriously disrupting the court order’. Taken in conjunction with Article 306 of the 1997 Criminal Law, which provides a fixed term penalty of up to seven years imprisonment for defense lawyers found to have enticed a witness to change his/her testimony or to have destroyed or forged evidence, these provisions place defense lawyers in a uniquely vulnerable position. The vulnerability of this position is exacerbated by the dual role of the Chinese procuratorate, which is both the highest agency at the national level responsible for prosecution and investigation as well as the state organ responsible for legal supervision. Equally important is the absence of an independent lawyers association in China, calls for the creation of which have been vigorously resisted by the state. Finally, the maintenance of the annual license renewal process for all law firms in China has also provided the state with a convenient way of

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preventing lawyers who insist on taking sensitive cases from practicing, by refusing to renew their licenses.\(^{202}\)

In an effort to ensure that rights consciousness does not give rise to pressure for liberalisation from a diverse and unified demographic, the Party has also been active in attempting to ‘recruit or co-opt’ members of the emerging middle class in China.\(^{203}\) According to Breslin, a crucial part of this strategy has been the official encouragement of middle class ‘apoliticism’. Breslin states that ‘[w]hereas the Maoist state wanted every citizen to be politically active, the contemporary state encourages apoliticism and rewards citizens with a private sphere if they keep their side of the bargain’.\(^{204}\)

While numerous scholars have concluded that the majority view in China supports state policy, which places economic development and social stability ahead of human rights reform, it must be remembered that discontent is difficult to gauge and, as a result, is often underestimated by external observers.\(^{205}\) In this context, the Arab Spring serves as a vivid reminder that autocratic regimes are notoriously unstable and that they often collapse unpredictably. In fact, it could be argued that the harsh reaction of the Chinese authorities to certain events, such as publication of the Charter ’08 manifesto or the subsequent award of a Nobel Peace Prize to Liu Xiaobo, is not that of a regime that feels secure in its position but rather one which sees potential threats to its survival in the expression of any competing view. However, it is

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not the intention here to evaluate the stability of Communist Party rule in China, but to illuminate the duality of the policy approach pursued by the Party, which can be described as the deliberate combination of measures which would seek to encourage reform in certain areas while at the same time bolstering the ability of the regime to stamp out all forms of dissent. According to Li:

The Party must simultaneously lead the economic and political reforms necessary to legitimise its own leadership position; and at the same time control these reforms to ensure that they do not go so far as to undermine and even ultimately challenge the Party’s absolute and unchallengeable leadership in the political, economic and social spheres. This dual posture of leading and limiting has resulted in an erratic and uneven economic, political and social transition in China. While in some aspects China is moving forwards, backwards steps have been taken.\textsuperscript{206}

This duality has been clearly demonstrated in the amendments to China’s Criminal Procedure Law, adopted in March 2012.\textsuperscript{207} The revised Criminal Procedure Law simultaneously incorporates measures which would seem at once to both extend and undermine the rule of law. Major positive developments include those relating to the introduction of judicial oversight of all orders regarding compulsory psychiatric treatment for criminal suspects;\textsuperscript{208} measures to improve the juvenile justice system and bring it into line with international standards;\textsuperscript{209} the decision to initiate pre-trial hearings at the discretion of the trial judge;\textsuperscript{210} the incorporation of mediated plea bargaining;\textsuperscript{211} the extension of existing exclusionary rules to all criminal cases and their incorporation into the Criminal Procedure Law;\textsuperscript{212} as well as the incorporation

\textsuperscript{207} Criminal Procedure Law of the People’s Republic of China [Revised 2012] 中华人民共和国刑事诉讼法[2012修订]
\textsuperscript{208} ibid 284-289
\textsuperscript{209} ibid 266-276
\textsuperscript{210} ibid 39, 40, 182(2)
\textsuperscript{211} ibid 208-215, 277
\textsuperscript{212} ibid 54-58
of existing rules aimed at reducing capital punishment.\textsuperscript{213} These positive measures exist alongside notable negative developments regarding the detention of criminal suspects. Not only do the amendments fail to bring the Criminal Procedure Law into line with international standards by outlawing the use of covert detention prior to arrest provided for under the 1996 legislation, they also propose to significantly extend the power of the police to detain criminal suspects in isolation at secret locations without access to family members or lawyers by amending the provisions relating to ‘residential surveillance’.

Residential surveillance, as provided for in the 1996 legislation is a form of house arrest intended as a more lenient alternative to detention under arrest. It is used to restrict the liberty of criminal suspects who do not pose a threat to the community, for up to six months during investigation. As such, the regulations and legislation which pre-date the most recent amendments to the Criminal Procedure Law provide that, unless the suspect is of no fixed abode, residential surveillance should be executed at the suspect’s home, that the suspect should be permitted to live with his family throughout the period of residential surveillance and that the suspect does not need permission to meet with his lawyer.\textsuperscript{215} In recent years, however, a more draconian form of ‘residential surveillance’ has seen dissidents and critics of Communist Party rule including Nobel Laureate Liu Xiaobo and artist Ai Wei Wei illegally detained for long periods at undisclosed locations without access to the outside world.

The draft amendments to the Criminal Procedure Law, released for public comment in August 2011, proposed to legalise this practice by specifically allowing for residential surveillance to take place at a location other than the suspect’s home and without the need to inform the suspect’s family of

\begin{itemize}
\item \textsuperscript{213} ibid 235-240
\item \textsuperscript{214} ibid 83, 73
\item \textsuperscript{215} Criminal Procedure Law of the People’s Republic of China [Revised 1996] 中华人民共和国刑事诉讼法[1996 修订], Art. 57
\end{itemize}
the deprivation of liberty in cases involving terrorist activities, corruption, the crime of endangering national security and where it is judged that to do so may hinder the investigation. Following a public outcry, the provisions on residential surveillance were further amended in March 2012 to require notification of the suspects’ family within 24 hours in all cases, save when it is not possible to furnish such notification. However, the law as adopted does not specify that the whereabouts of the suspect or the reason why he has been placed under residential surveillance must be disclosed. Moreover, since the appointment of legal council, in cases involving the crimes of endangering national security, terrorism and corruption, remains subject to approval by investigators, access to legal representation is by no means assured.216 Despite the draconian power which the legislation on residential surveillance confers on the public/state security organs, the authorisation process is far from stringent and requires only the approval of the police at the next highest level or the procuratorate in cases of corruption.

This reformulation of the legislation regarding residential surveillance fulfils one of China’s judicial reform targets – that of strengthening so-called ‘special procedures’ in order to support the investigation of crimes against state security, terrorism, organised crime and corruption. It is best understood as part of an overall effort to continue to rebuild the Chinese legal system, rationalise measures existing in departmental legislation, and provide them with a more adequate legal basis, while at the same time protecting the ultimate power of the state. As argued by Sapio, this objective has been realised through a culture of ‘legal exceptionalism’ which allows the state to ‘step inside and outside of the law as it sees fit, determining who can, in practice, enjoy abstract rights and who cannot’.217 This reality has led Sapio to conclude that the unequal

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216 Criminal Procedure Law of the People’s Republic of China [Revised 2012] 中华人民共和国刑事诉讼法[2012 修订], Art. 37(3)
treatment of certain categories of citizens in China does not stem from a ‘deficit in rule of law’ but from the law itself:

[Legal reform has increased the law’s potential to suspend rights, turning the law not into an entity that constrains power, but into an entity that allows sovereign power to break free from self-imposed constraints. The transition toward a form of rule of law began displaying this sinister potential as the party undertook a systematic attempt to avoid the fate of other Leninist regimes.]

2.6 Conclusion

Over the course of the last two decades, China has emerged as a major global economic and political power. A significant catalyst in China’s rapid resurgence has been its pursuit of sophisticated foreign policy initiatives which aim to reflect its increasingly open, global standing. An important consequence of this shift in foreign policy has been China’s ever increasing engagement with the international human rights system.

China has ratified over 20 international treaties relating to human rights, including the International Covenant on Economic, Social and Cultural Rights - notably with a reservation to Article 8 - and has signed, although not yet ratified, the International Covenant on Civil and Political Rights. China was elected as a member of the United Nations Human Rights Council in 2006 and again in 2009. In February 2009, China submitted to Universal Peer Review at the UN Human Rights Council, and will undergo a second review in October 2013.

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218 Ibid
219 In accordance with paragraph 7 of General Assembly resolution 60/251 on the Human Rights Council, members of the Council serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms. Thus, at the end of its current term on 31 December 2012, China will not be eligible to serve again until 2016.
220 The Universal Peer Review is a state-driven process which provides for a review of the human rights record of each of the 192 UN Member States by the UN Human Rights Council once every four years. The UPR was created by the UN General Assembly on 15 March 2006 by Resolution 60/251 establishing the UN Human Rights Council.
But while China may reiterate its commitment to the rule of law on the international stage, evidence of reform is often not visible on the ground. Severe restrictions continue to be placed on a number of fundamental rights including freedom of assembly, association and religion. The period in the run up to the Beijing Olympics was characterised by the denial of basic human rights including freedom of expression, fair trial and freedom from arbitrary detention and China has been judged to have failed to live up to its commitment to use the occasion as a platform for further reform by critics both internally and externally.221

More, recently, China has also failed to ensure that the long-awaited amendment of its Criminal Procedure Law brings the country closer to the goal of ratification of the International Covenant on Civil and Political Rights. On the contrary, by failing to significantly limit the power of the state to carry out covert detentions and to address persistent systematic problems – including the extensive use of administrative detention, the dual role of the procuratorate, unequal access to legal representation for criminal suspects as well as the restricted role of defence lawyers – the 2012 amendments ensure that ratification of the Covenant, without the need for multiple reservations to fundamental provisions, remains impossible.

The disconnect which exist between China’s human rights rhetoric and human rights practices has led numerous scholars applying the spiral model to conclude that China is firmly rooted in the third phase of the model which is characterised by the socialisation process of instrumental adaptation and defined by the response of tactical concession to human rights criticism. In line with the spiral model, this conclusion has led to the formulation of policy

recommendations based on the argument that engagement strategies, such as that pursued by the EU through its human rights dialogue and related human rights assistance programming, cannot succeed in China and is ‘perceived in Beijing merely as a sign of weakness and indecisiveness’. 222

The analysis set out above, however, allows a different understanding of the nature of China’s engagement with the international human rights system as well as its approach to the promotion of human rights. While the Party will act to protect the image of China on the international stage, this reaction is defined not by China’s vulnerability but by its status as an emerging superpower. Although, in the past, concessions have been obtained from China in response to international criticism, China’s approach to the domestic promotion of human rights is motivated not by the objective of silencing external criticism but by that of securing the continuity of the single-party state. This understanding would caution against strategies which emphasise the contribution to be made by ‘blaming and shaming’ and focus instead on building policy recommendations that take China’s status as an emerging superpower into account and recognise the bifurcation of the Chinese approach to the domestic promotion of human rights. 223

Chapter 3 Policy Options

3.1 Introduction

The European Union traces its origins back to the aftermath of World War II, when the 1951 Treaty of Paris established the European Coal and Steel Community, creating a common market for steel and coal among the six European states that were party to it: Belgium, France; Germany, Italy, Luxembourg and the Netherlands. As originally conceived, the EU was thus resolutely economic in character and neither the Treaty of Paris nor the subsequent Treaty of Rome made explicit reference to respect for human rights as either a foundational doctrine or a guiding principle for Community action.224

Since the 1950s, successive treaties have overseen the enlargement of this economic entity, both in terms of its membership and activities, requiring, in parallel, the deliberate cultivation of an EU identity which could justify the assumption of additional powers beyond the mere provision of ‘legal arguments concerning its competence to act in certain fields’.225 By enabling the development of an identity ‘based primarily upon understandings of the EU as a value-based community’ the commitment of the EU to the protection and promotion of human rights has played a key role in legitimising the ‘European construct’.226

The first clear statement referring to respect for human rights as a general principle underlying the establishment of the European Communities

was issued jointly by the European Parliament, the Council of the European Union and the European Commission in 1977. The joint declaration argues that the treaties establishing the European Communities are ‘based on the principle of respect for the law’ and that the law itself is comprised of ‘general principles’ including in particular ‘the fundamental rights, principles and rights on which the constitutional law of the Member States is based’. The declaration goes on to emphasise the ‘prime importance’ attached to the ‘protection of human rights’ by the EU institutions and to affirm their commitment to ‘respect these rights’ in the ‘exercise of their powers and in pursuance of the aims of the European Communities’. The purpose of this declaration was to ‘fuse the forces of law and rights into the very core of the Community’ by demonstrating its human rights pedigree. This purpose is also reflected in the progressive constitutionalisation of human rights within the EU system over the past two decades.

The Preamble to the 1986 Single European Act referred to the determination of the member states to ‘work together to promote democracy on the basis of the fundamental rights’ as recognised in their constitutions and laws. However, fundamental rights were not formally recognised in an EU treaty until Maastricht, when Article F(2) of the new Treaty on European Union committed the member states in its common provisions to ‘respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms’.

The Treaty of Amsterdam, which followed in 1997, amends the Treaty on European Union to declare for the first time in Article 6(1) (ex Article F(1)) that the EU is ‘founded on the principles of liberty, democracy, respect for

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228 European Community (1977) Joint Declaration by the European Parliament, the Council and the Commission Official Journal of the European Communities C 103/1, 27 April 1977
229 ibid
230 ibid
human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. Moreover, Article 49 states that respect for these principles is a prerequisite for EU membership and Article 7 establishes a mechanism to sanction serious and persistent breaches of human rights by EU member states.\textsuperscript{232} This mechanism was strengthened by the Nice Treaty in 2001.\textsuperscript{233}

The centrality of respect for human rights as a core EU value was further underlined by the Lisbon Treaty, which entered into force in December 2009. Article 6(1) of the Treaty on European Union as amended by Lisbon provides the Charter of Fundamental Rights – proclaimed by the European Parliament, the Council of the European Union and the European Commission in 2000 – with the same legal value as the Treaties.\textsuperscript{234} In addition, Article 6(2) of the Treaty on European Union as amended by the Lisbon Treaty provides that the EU will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The competence of the EU as an external human rights actor evolved alongside the development of its foundational doctrine. Human rights were not mentioned in the 1970 Luxembourg report, which established the European Political Cooperation mechanism as a precursor to the Common Foreign and Security Policy and enabled the member states to consult regularly on national policy and, where possible, to formulate common positions.\textsuperscript{235} However, despite this omission, the promotion of human rights quickly became a focal point for the coordination of member state negotiating positions in the Conference on Security and Cooperation in Europe, which resulted in the 1975

\textsuperscript{233} ibid

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Helsinki Final Act. But this focus was not maintained thereafter and beyond the need to react to ‘cases of atrocities’, the EU did not begin to incorporate the protection human rights as an objective of external relations policy in its own right until the end of the Cold War provided the impetus to do so.

Article J(1) of the Treaty on European Union signed at Maastricht in 1992, establishes the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms as core objectives of the newly created Common Foreign and Security Policy. At the same time Article 130u of the Treaty Establishing the European Community also confirms the promotion of democracy, the rule of law and respect for human rights and fundamental freedoms as central objectives of development cooperation policy.

Article 181(a) of the Treaty Establishing the European Community as amended by the Nice Treaty, establishes the promotion of human rights as an objective not only of development cooperation but all forms of cooperation with third countries. The primacy of human rights in the EU’s external relations was reaffirmed by Article 21(1) of Treaty on European Union as amended by the Lisbon Treaty, which 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 UN Charter and international law.

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236 The Helsinki Final Act was signed following two years of negotiation in the context of the Conference on Security and Cooperation in Europe by the 33 participating European states, Canada and the United States. The Helsinki Final Act lists ‘Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief’ as among a total of 10 core ‘Principles Guiding Relations between Participating States’.


As a result of a number of institutional innovations, including in particular the creation of the post of High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission as provided for in Article 18 and Article 27 of the Treaty on European Union, the Lisbon Treaty also furnishes the EU with the means to formulate and implement the full range of its external relations policy more coherently, including in the area of human rights.239

In order to pursue the external human rights policy objectives set out in successive EU treaties, the EU has over time developed and used a range of instruments. These include: bilateral and multilateral human rights diplomacy, human rights assistance programming, the standard human rights clause, the Generalised System of Trade Preferences as well as other trade related human rights instruments and, in extreme cases of human rights violations, the imposition of restrictive measures in the form of embargos and sanctions of various kinds. Notwithstanding the broad range of available tools, since the early 1990s, when the EU first began to elaborate the external dimension of its human rights policy, a clear preference for the use of what the EU terms ‘positive’ measures has been repeatedly expressed.240

In its 1991 communication to the Council of the European Union and the European Parliament on human rights and development cooperation, the European Commission expresses this preference as follows:

Depending on the case, the Community can choose active promotion of human rights or a negative response to serious and systematic violations. The various means of encouragement and dissuasion may be combined, depending on the situation or needs.

The Community will wherever possible give preference to the positive approach of support and encouragement.241

239 See footnote 52
241 ibid
That this preference was to extend to all areas of the EU’s external human rights policy was confirmed in a 1995 communication issued by the European Commission which states that in pursuing its human rights objectives ‘the Commission has gradually identified the areas of activity that correspond to a positive, practical and constructive approach based on the concepts of exchange, sharing and encouragement’. Together, these communications highlight two instruments as of particular importance in pursuing a positive human rights policy: human rights dialogue and human rights assistance programming. These instruments have been used extensively by the EU in promoting human rights as an objective of external relations policy not only in China but worldwide.

Within the broad category of human rights policy instruments, it is also possible to differentiate not only between positive measures, such as dialogue and human rights assistance programming on the one hand, and negative measures, such as sanctions on the other, as the EU has done itself, but also between instruments which incorporate human rights concerns into the external relations calculus in a manner which can impact on behavior in other areas such as trade and aid, and those instruments which exist in isolation from the rest of bilateral relationship. In order to allow a more nuanced understanding of the external dimension of EU human rights policy, it is therefore necessary to distinguish between ‘hard’ and ‘soft’ policy instruments before proceeding to identify the principal instruments selected for use in China.

At the outset, a distinction will also be made between instruments created for use in crisis situations, including humanitarian aid and civilian and military missions, and those created with the aim of promoting and protecting human rights as a general objective of EU external relations policy. The

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analysis presented below will focus on this latter category since the role of the EU in conflict prevention and crisis management worldwide is of little relevance to its human rights policy in China.244 Likewise, while the activities of the EU as a humanitarian aid donor undoubtedly have a part to play in the protection of human rights in crisis situations, the ‘sole objective’ of such aid is to ‘provide an emergency response that specifically aims to save and preserve life and to prevent and relieve human suffering wherever the need arises if local actors are overwhelmed, unable or unwilling to act’.245 As such, the provision of humanitarian aid is not tied to human rights performance and is not used by the EU as an instrument for the long-term promotion of human rights in any state, but rather as a means to address the basic needs of victims of natural disasters and armed conflict and is therefore not relevant to the present study.246

3.2 Soft policy instruments

Soft human rights policy instruments can be defined as instruments that do not explicitly link human rights performance to behaviour in other areas of external relations, and can thus be said to exist in isolation from the rest of the bilateral relationship. Soft human rights policy instruments used by the EU in its external relations include both multilateral and bilateral human rights diplomacy as well as certain categories of EU funded human rights assistance programmes.

In a briefing paper produced for the European Parliament Sub-Committee on Human Rights, Sara Guillet identified four types of bilateral EU dialogue focused specifically on human rights:

244 For an overview of ongoing EU civilian and military missions see: http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en
- dialogues based on association or cooperation agreements (including for example the 78 states party to the Cotonou Agreement and the 17 states involved in the Union for the Mediterranean)
- ad hoc dialogues (Russia and India)
- dialogues with like-minded states (United States, Canada, New Zealand and Japan)
- and structured dialogues on human rights (China and Iran)²⁴⁷

In contrast to dialogues based on association or cooperation agreements, ad hoc dialogues, dialogues with like-minded states and structured human rights dialogue are not based on any legally binding agreement and exist in isolation from the rest of the EU’s bilateral relationship with the target state. This is not to say that human rights cannot be, and have not been, raised by the EU in other bilateral fora, or that human rights developments cannot have an impact in other areas of the bilateral relationship. Rather, the point being made is that specific mechanisms explicitly linking the functioning of these dialogues to other policy areas have not been put in place.

The EU has stated unequivocally that the existence of a human rights dialogue in any form with any state should not preclude the EU from raising its human rights concerns in other bilateral diplomatic contacts with the state in question. In 2001, the first set of ‘Guidelines on Human Rights Dialogues’ issued by the Council of the European Union specifically committed the EU to ensuring that human rights would be ‘included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the presidency of the Council, the Troika, heads of mission or the Commission’.²⁴⁸ Political leaders from the European member states interfacing with their counterparts at national level are

also expected to raise the human rights concerns of the EU during bilateral meetings, particularly when holding the presidency of the EU.

Human rights are also frequently addressed by the EU through additional channels for declaratory diplomacy in the form of conclusions of the Council of the European Union as well as declarations and both public and private démarches. Prior to the Lisbon Treaty, declarations and démarches were issued by the member state holding the rotating presidency, or collectively by the EU member states in the Council of the European Union. Post-Lisbon, this responsibility has fallen to the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service.

In addition to bilateral human rights diplomacy, the EU also uses multilateral human rights diplomacy to pursue its external human rights policy. While human rights related issues can be, and in many cases have been, touched on in a variety of multilateral fora, the United Nations conducts the ‘longest, and arguably the most important, survey of the situation of human rights in the world’. As such, the United Nations is alone in providing a dedicated forum for examination of human rights practices in individual states giving rise to direct criticism, specific recommendations, voluntary commitments and legal obligations – all of which is a matter of public record.

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250 Further diplomatic instruments are also available to the European Parliament including, for example, urgency debates in plenary, parliamentary resolutions, delegation visits to target countries and the annual Sakharov Prize for Freedom of Thought which has on two occasions been awarded to human rights activists in China: in 1996 to Wei Jingsheng and in 2008 to Hu Jia.
252 For analysis of EU representation in multilateral fora Post-Lisbon see: Emerson, M., Balgour, R., Corthaut, T., Wouters, J., Kaczynski, P. & Renard, T. eds. (2011) *Upgrading the*
Human rights violations in specific countries can be, and have been, addressed by the EU in various UN fora including, in particular, the UN General Assembly, through the Social, Humanitarian and Cultural Affairs Committee (Third Committee), and the Commission on Human Rights/Human Rights Council. Each of these venues also offers opportunities for the EU and/or the rotating EU presidency to make statements expressing the concern of the EU regarding human rights violations in specific countries and indeed welcoming positive developments. Each venue also offers the opportunity to table or co-sponsor draft resolutions highlighting country-specific situations as well as to support drafts sponsored by other UN members. In addition, the EU can take the initiative to call for a special session of the UN Commission on Human Rights/Human Rights Council on urgent human rights situations. Finally, the EU member states also participate in Universal Peer Review at the Human Rights Council, by both contributing to third country reviews and by being themselves subject to review on the same terms.

The European Commission, in a 2003 communication setting out the attachment of the EU to ‘effective multilateralism’ through the UN as the

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EU’s Role as a Global Actor: Institutions, Law and the Restructuring of European Diplomacy (Brussels: Centre for European Policy Studies)


254 The convening of frequent special sessions has been a prominent feature of the work of the UN Human Rights Council. A total of 19 special sessions were convened between June 2006 and August 2012. Of these, four were called at the initiative of the EU through its ambassador in Geneva (8th special session on the situation of human rights in the Democratic Republic of Congo; 17th special session on the Situation in the Syrian Arab Republic; 18th special session on the situation in the Syrian Arab Republic; 19th special session on the ‘deteriorating human rights situation in the Syrian Arab Republic and the recent killings in El-Houleh’). Two sessions were called at the initiative of the EU member state holding the rotating EU presidency with the full support of the other EU members (4th special session on the human rights situation in Darfur; 15th special session on the human rights situation in the Libyan Arab Jamahiriya). A further two sessions were called by individual member states other than the state holding the EU presidency and with the full support of all EU members (5th special session on the human rights situation in Myanmar; 11th special session on the human rights situation in Sri Lanka).

bedrock of the international system, states that the commitment of the EU to act as a ‘front-runner’ at the UN is ‘reflected in the large number of country and thematic initiatives it pursues’ at the Commission on Human Rights.\textsuperscript{256} Furthermore, the European Commission has explicitly stated that the likelihood of a particular draft resolution being adopted should have no bearing on the EU decision to sponsor it.\textsuperscript{257} However, apart from an insistence that every situation should be considered on its own merits with due attention paid to positive developments, no guidance has been provided as to the precise role to be played by critical statements and draft resolutions at the UN in a global EU policy which favours a positive approach. This ambiguity has persisted to the present day, with the result that the basis on which the EU member states will agree to raise certain situations and not others remains unclear, leaving the EU open to accusations of selectivity motivated by self-interest.\textsuperscript{258}

As well as bilateral and multilateral human rights diplomacy, the EU has developed a range of human rights assistance programmes which aim at supporting democratisation and promoting human rights in third countries.\textsuperscript{259} Although the EU launched its global development policy over 50 years ago in 1958, aside from a number of \textit{ad hoc} initiatives in the 1970s, it was not until the 1990s that ‘serious efforts’ were made to ‘include human rights considerations in its general development policy’ when the end of the ‘Communist threat discourse’ provided the impetus for the development of human rights assistance

\textsuperscript{257} European Commission, External Relations Commissioner Benita Ferrero Waldner (2005) Declaration on the 61\textsuperscript{st} Session of the UN Commission on Human Rights SPEECH05/111, European Parliament, Strasbourg, 23 February 2005
programming in the area of civil and political rights.\textsuperscript{260}

This process of development culminated in a groundbreaking resolution from the Council of the European Union on 28 November 1991.\textsuperscript{261} The resolution explicitly included the promotion and observance of civil and political rights as a policy objective of equal importance to those in the area of economic, social and cultural rights, which had been the traditional focus of development cooperation.\textsuperscript{262} This move reflected a general shift in the overall strategy of many major donors. As stated by Simma, Aschenbrenner and Schulte:

Throughout the world, lessons taken from previous failures of development action have shown that growth does not come about by economic assistance alone, but is also closely linked to the organisational structure of society. In the overall context, the international community was discovering that there could be no development without a certain degree of democracy, no democracy with out respect for human rights, and, finally, no democracy without development.\textsuperscript{263}

These principles were codified in Maastricht in 1992 and the EU started to develop its human rights assistance programming on the basis of the November 1991 Council of the European Union resolution and the provisions on development policy set out in the Treaties.\textsuperscript{264}


\textsuperscript{263} ibid

As originally conceived, the provision of EU funding in support of human rights initiatives in third countries was not made conditional on the human rights performance of the target state.\textsuperscript{265} Quite to the contrary in fact, for example the European Initiative for Democracy and Human Rights has sought, since its creation in 1994 as a separate funding stream for EU human rights projects in third countries, to focus a substantial portion of its activities on countries and regions where human rights and fundamental freedoms are most at risk. However, following the development of the ‘standard human rights clause’ in the mid-1990s, the provision of bilateral development aid to third countries party to agreements containing the clause has been linked to the observance of basic human rights standards as will be discussed in further detail below under ‘hard policy’.

In addition to the provision of funding for external action through bilateral and thematic development instruments, the EU also provides loans for a range of actions in third countries, through the European Investment Bank. While the European Investment Bank is required to ensure that its activities do not have a negative human rights impact, it does not invest directly in human rights initiatives and has not made human rights performance in target states a condition for investment.\textsuperscript{266} Rather, its external mission is to support the ‘development of the private sector, the development of infrastructure, security of the energy supply and environmental sustainability’ in line with the priorities of EU development cooperation.\textsuperscript{267} Thus, although the provision of European Investment Bank financing for actions in third countries represents a significant, and often overlooked, instrument for the pursuit of certain EU

\begin{footnotesize}
\textsuperscript{267} The European Investment Bank has been mandated to lend in Asia since 1993, where it supports initiatives contributing to environmental sustainability. The first loan to China was made in 1999. Since that time, China has become the major beneficiary of loans in Asia, accounting for some 43 percent of the €4.1 billion invested in the region by 2011. European Investment Bank (2011) EIB Factsheet: EIB Financing in Asia, May 2011, p. 1. Retrieved 23 August 2012 from: http://www.eib.europa.eu/attachments/country/eib_factsheet_asia_en.pdf
\end{footnotesize}
external relations objectives, the potential relevance of its activities for the promotion of human rights is limited and as a result will not be the focus of this particular study.

3.3 **Hard policy instruments**

Hard human rights policy instruments can be defined as those that explicitly link human rights performance to other areas of external relations, in a manner that can modify behaviour in these other areas. Both positive and negative conditionality are clear examples of hard human rights policy instruments. Conditionality entails the linking of ‘perceived benefits to another state (such as trade and aid), to the fulfilment of conditions relating to the protection of human rights and the advancement of democratic principles’. 268 Positive conditionality offers benefits where the target state fulfils certain conditions. Negative conditionality requires the reduction, suspension or termination of perceived benefits in response to breaches of those conditions. 269

The most widely used form of negative conditionality within EU human rights policy is the ‘standard human rights clause’, which has been included in all cooperation and association agreements concluded by the EU with third countries since 1995. 270 The development and use of the standard clause has been well documented elsewhere. 271 Suffice it to say here that the clause

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269 Ibid
270 A database of all EU agreements containing the human rights clause is available at: http://ec.europa.eu/world/agreements/default.home.do
includes two elements. First, it incorporates respect for democratic principles and human rights as an essential element of the agreement. Second, it incorporates a non-execution clause, ultimately allowing for the suspension or termination of an agreement where violation of an essential element represents a material breach of its terms.

As demonstrated by Bartels, while the official EU discourse on the development of the standard clause deliberately cultivates the view that the non-execution clause was created with the express purpose of protecting human rights by explicitly enabling suspension or termination of agreements where violations occur, in fact the clause allows either party to take ‘appropriate action’ where it is considered that the other has failed to fulfil its obligations in any area under agreements containing the clause. Moreover, respect for democratic principles and human rights are not the only elements deemed essential to the functioning of cooperation and association agreements negotiated by the EU. For example, the agreement concluded with Indonesia in 2009 also specifies the objective of ‘Countering the Proliferation of Weapons of Mass Destruction’ and that of ‘Combating Organised Crime and Corruption’ as essential elements of the agreement. The primary difference between treatment of cases involving alleged violations of essential elements of an agreement and treatment of breaches relating to other obligations is that violation by either party of essential elements of an agreement may constitute a

273 ibid
In practice, however, consultation procedures have been initiated frequently in relation to suspected violations of essential elements of agreements, particularly under the Cotonou Agreement with African, Caribbean and Pacific states. In this regard however, the EU has demonstrated a strong preference for keeping agreements operational and suspension or termination is to be understood only as a measure of last resort. As a result, the standard clause has not, as yet, led to termination of an agreement, although as of January 2011, it had led to the partial suspension of bilateral agreements in 20 instances.²⁷⁷ Notably, on only one occasion to date has partial suspension been the result of human rights violations as opposed to a breach of democratic principles.²⁷⁸

In relation to the standard human rights clause, it is also important to note that since the Single European Act came into force in 1987, the assent of the European Parliament has been required to ratify a number of external agreements concluded between the EU and third countries. In the 1990s, the European Parliament used this power to delay ratification of agreements with Algeria, Croatia, Morocco, Pakistan, Russia, Syria and Turkey on the basis of their lack of respect for human rights.²⁷⁹ In February 2006, the European Parliament resolved to make inclusion of a human rights clause in all bilateral partnership and cooperation agreements a precondition for assent, codifying

²⁷⁶ ibid 44(4)
²⁷⁸ In October 2005, the Council of the European Union partially suspend the EU’s partnership and cooperation agreement with Uzbekistan, following the refusal of the Uzbek government to allow an independent inquiry into the May 2005 Andijan massacre, which saw hundreds of demonstrators killed by security forces.
established practice.\textsuperscript{280} Thus, although parliamentary assent was not created as a human rights instrument, it has been used as such by the European Parliament.

In addition to the standard clause, the EU has in recent years developed a ‘model human rights clause’ which was included in an EU partnership and cooperation agreement for the first time in October 2009 with Indonesia.\textsuperscript{281} The standard text of the model clause, which it is intended will be included in all such future agreements, states that:

1. The Parties agree to cooperate in the promotion and protection of human rights.
2. Such cooperation may include, \textit{inter alia}:
   a) supporting the development and implementation of a national action plan on human rights;
   b) human rights promotion and education;
   c) strengthening human rights-related institutions;
   d) the establishment of a meaningful, broad-based human rights dialogue.\textsuperscript{282}

The introduction of the model human rights clause is an attempt to ensure that, in addition to allowing for punitive action to be taken against states that are seen to violate human rights by means of the standard clause, the need for positive engagement is also explicitly recognised by both sides. Although, the undertaking to cooperate in the promotion of human rights is not an essential element of agreements containing the model clause, it is conceivable that, should either party fail to facilitate implementation of the envisaged cooperation, the use of consultation procedures provided under the non-execution clause could be triggered, leading to the negotiation of an agreed resolution at the ‘highest possible level’ or the imposition of ‘appropriate

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\textsuperscript{282} Email from Geoffrey Harris, Head of Human Rights Unit, Directorate General for External Policies of the Union, European Parliament, to the author (5 May 2008) Subject: HR Clause (on file with the author)
\end{flushright}
action’ to remedy the situation. Moreover, by establishing human rights as an issue of common concern, the model clause also specifies human rights as an appropriate topic for discussion within the context of bilateral political dialogue more generally, regardless of whether or not the envisaged programme of cooperation is successfully established. In line with the ‘Guidelines on Human Rights Dialogues’ issued by the Council of the European Union, the model clause thus also represents an effort to mitigate the potential ‘ghettoising’ effect of dedicated human rights dialogue, which risks restricting the discussion of EU concerns to a single channel.

While the standard human rights clause has been referred to as ‘the most significant example of the EU’s adoption of conditionality’, the Generalised System of Preferences (GSP) is a second, equally significant and constantly evolving, tool for human rights conditionality. The GSP is a ‘system of preferential trading arrangements through which the EU extends preferential access to its markets to developing countries’ by offering unilateral and non-reciprocal trade preferences. Since 1995, the GSP has included a negative conditionality clause, which has long been available to the EU as a tool to press for progress on implementing the core labour standards of the International Labour Organisation.

The EU became the first to apply the GSP to developing countries belonging to the ‘Group of 77’ within the United Nations Conference on Trade

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and Development and to the overseas countries and territories of the member states in 1971.\textsuperscript{288} The original and sole aim of GSP was to support developing countries in expanding sales of their products in the EU and to promote their industrialisation. Despite resolutions from the European Parliament’s Economic and Social Committee and a communication from the European Commission in favour of the inclusion of a ‘social clause’, linking trade relations to labour standards as early as 1978, it was not until the mid-1990s that this was finally achieved.\textsuperscript{289}

The negative conditionality clause included in the general GSP scheme from 1995 provides for the temporary withdrawal of GSP preferences in whole or in part for products originating in a country that practises any form of slavery or forced labour, or a country that exports goods made by prison labour. For example, following a detailed review procedure initiated on the basis of a joint complaint submitted to the European Commission by two trade union confederations in 1995, all GSP benefits were temporarily withdrawn from Burma in 1997 on grounds that the use of forced labour in the country was ‘routine and widespread’.\textsuperscript{290}

Prior to 2005, the EU also operated a total of four ‘special incentive schemes’ alongside the general GSP scheme, one of which has a specific human rights dimension and ties additional preferences to recognition of labour rights.\textsuperscript{291} The special incentive arrangement for core labour standards rewards compliance with International Labour Organisation Convention No 87 on

\begin{footnotes}
\footnotetext{291}{Special incentive arrangements included in the GSP scheme prior to 2005 provided additional benefits for: least developed countries; for states that effectively apply international standards for the sustainable management of tropical forests; and for particular states the development of which is judged to be seriously hampered by drug production, including those of the Andean Community, the Central American Common Market and Panama.}
\end{footnotes}
freedom of association, Convention No 98 on the right to organise and to bargain collectively and Convention No 138 on child labour, and can thus be considered a form of positive conditionality. States receiving additional benefits under the special incentive scheme can also have these benefits withdrawn if they are found to have violated the rights protected by the conventions at any stage following their acceptance onto the scheme. For example, in 2004 the EU launched an investigative procedure into freedom of association violations in Belarus following complaints from the International Confederation of Free Trade Unions, the European Trade Union Confederation and the World Confederation of Labour. The investigations substantiated the complaints made and ultimately lead to the withdrawal of additional benefits to Belarus in 2007.\footnote{European Commission (2007) Press Release: EU will withdraw GSP Trade Preferences from Belarus over Workers' Rights Violations IP/07/844, Brussels 18 June 2007, p. 1}

The entire GSP was reformed and simplified in 2005, replacing the five existing schemes (the general scheme and four special incentive arrangements) with three new ones: a general scheme; GSP Plus; and Everything But Arms, which provides duty-free, quota-free access for all non-military products for the 50 least developed countries.\footnote{Council of the European Union (2005) Council Regulation (EC) 980/2005 of 27 June 2005 Applying a Scheme of Generalised Tariff Preferences \textit{Official Journal of the European Union} L 169/1, 30 June 2005, Art. 8, Art. 12} The 2005 GSP reform marks an important point in the development of EU human rights policy in a number of respects. Firstly, it expands the human rights grounds on which the general benefits provided under GSP can be temporarily withdrawn far beyond issues related to labour standards. These grounds now include ‘serious and systematic violation’ of the principles laid down in a total of 16 international conventions listed in Annex III A of Regulation (EC) 980/2005 applying the scheme.\footnote{These are: the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Convention concerning Minimum Age for Admission to Employment (No 138); Convention concerning the Prohibition and Immediate}
the conventions listed is not a necessary condition for states to receive the benefits provided by the general scheme, violation of the rights they recognise is grounds for their withdrawal.295 This is a remarkable expansion of the criteria for the temporary withdrawal of general benefits envisaged in 1995, which, as stated above, were limited to two specific human rights violations: the practice of slavery and forced labour.

The clearest example of the use of positive conditionality in the EU’s external human rights policy is GSP Plus, launched on 1 July 2005.296 GSP Plus provides benefits in the form of duty free access to EU markets for imported goods from countries with ‘poorly diversified’ economies that are ‘therefore dependent and vulnerable’ and that accept the main international conventions relating to social rights, environmental protection and good governance, including human rights. Countries benefiting from preferential treatment under the GSP scheme can also have these benefits withdrawn if they fail to fulfill their obligations under the scheme.

The willingness of the EU to consider withdrawal of GSP Plus benefits has been demonstrated in the cases of Sri Lanka and El Salvador. Both states were admitted to the GSP Plus scheme in 2006, with a renewal date at the end of 2008. The European Commission opened investigations in May 2008 following a judgment reached by the Supreme Court in El Salvador which concluded that ratification of International Labour Organisation Convention No. 87 concerning Freedom of Association and Protection of the Right to

Action for the Elimination of the Worst Labour Practices (No 182); Convention concerning the Abolition of Forced Labour (No 105); Convention concerning Forced or Compulsory Labour (No 29); Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100); Convention concerning Discrimination in Respect of Employment and Occupation (No 111); Convention concerning Freedom of Association and Protection of the Right to Organise (No 87); Convention concerning the Application of the Principles of the Right to Organise and to Bargain (No 98); International Convention on the Suppression and Punishment of the Crime of Apartheid


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Organise was unconstitutional.\textsuperscript{297} In October of the same year, investigations were launched in respect of Sri Lanka to establish whether national legislation ‘incorporating the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child is effectively implemented’. \textsuperscript{298} In the case of El Salvador, GSP Plus benefits were retained following the conclusion of the investigation, which lead to a constitutional amendment to allow trade unionism in the public sector.\textsuperscript{299} In the case of Sri Lanka, the threatened withdrawal of GSP Plus benefits was not sufficient to persuade the authorities to address the violations identified in the investigation and benefits were finally withdrawn in August 2010.\textsuperscript{300}

In addition to the GSP, the EU has also introduced a number of specific trade related human rights measures to regulate, in particular, the trade in arms and the trade in goods which could be used for capital punishment, torture, cruel inhuman and degrading treatment. Since 1998 for example, the EU’s voluntary ‘Code of Conduct on Arms Exports’ has linked the approval of licences for the export of arms on the regularly updated EU ‘Common Military List’ to respect for human rights.\textsuperscript{301} This voluntary code was replaced in 2008 with a legally binding Council common position, which codifies the EU rules governing the export of military technology and equipment largely set out in

\textsuperscript{298} ibid
1998. In 2000, the Council of the European Union issued its first regulation governing the export of ‘dual-use’ products and technologies of both civilian and military application. This regulation has been updated on several occasions and was substantially recast in 2009 by Council Regulation (EC) 428/2009. In addition, the Council of the European Union adopted a common position on the control of arms brokering in 2003. As part of its commitment to abolition of the death penalty and the prohibition of torture, cruel inhuman and degrading treatment, since 2005 the EU has also regulated the export of goods which could be used for capital punishment or torture. The relevant list of restricted goods was updated most recently updated in 2011.

The importation of certain categories of goods, the production of which is connected to human rights abuses, is also regulated in some instances. Precious gems including, in particular, ‘conflict diamonds’ represent a prominent example of the kind of goods targeted. The trade in rough diamonds has been subject to the Kimberly Process certification scheme since 2002, which prohibits the importation of uncertified rough diamonds in line with the provisions of a Council common position implementing the multilateral scheme.

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The imposition of ‘restrictive measures’ in direct response to human rights violations can also be classified as clear examples of hard human rights policy. Restrictive measures can be applied on foot of a UN Security Council Resolution, which is binding on all UN members, or unilaterally by the EU on the basis of a common position agreed unanimously by the EU member states. Prior to creation of the Common Foreign and Security Policy under the 1992 Maastricht Treaty, the application of unilateral measures was a matter for discussion within the context of the European Political Cooperation mechanism, established in 1970 by the Luxembourg Report and subsequently codified in the 1986 Single European Act. The primary difference between the provisions of European Political Cooperation and those of the Common Foreign and Security Policy is that the former defines EU common positions only as a ‘point of reference for the policies of the member states’ whereas positions agreed under the Common Foreign and Security Policy are binding.

A range of options exist in relation to the application of restrictive measures including economic and financial sanctions, such as prohibition of loans and credit to state owned enterprises, political sanctions, such as withdrawal of EU diplomatic representation and suspension of high level political contacts, and military sanctions, such as the suspension of military cooperation and the imposition of arms embargoes. In each case, the measures applied must respect the international obligations of the EU, in particular, those that apply to import and export restrictions against third countries set out under the General Agreement on Trade and Tariffs (GATT) and those that apply to

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restriction on the trade in services set out in the General Agreement on Trade in Services (GATS). Article XXI of GATT allows for import and export restrictions which are either applicable to arms and military equipment, or imposed in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security. Restrictive measures which do not fall under these categories must meet the conditions laid down in Article XX of GATT on general exceptions, or its GATS equivalent Article XIV.313

As a result of these limitations, which severely curtail the ability of the EU to act outside the scope of UN Security Council Resolutions in imposing restrictive measures, a clear preference has developed for the use of ‘smart sanctions’ targeting particular individuals.314 This approach allows the EU to apply restrictive measures without stepping outside the boundaries of permissible action under the terms of the General Agreement on Trade and Tariffs and the General Agreement on Trade in Services, while at the same time reducing ‘to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries’.315 Smart sanctions imposed by the EU most often combine freezing the assets of targeted individuals, denying access to the EU though visa bans and the imposition of arms embargoes.316

313 Article XX GATT sets out the bases on which members can derogate from their obligations under the agreement provided the measures adopted ‘are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. Exceptions which could allow derogations on grounds related to human rights include those contained in Article XX(a) regarding measures ‘necessary to protect public morals’, Article XX(b) regarding measures necessary to protect human, animal or plant life or health, and Article XX(e) regarding measures ‘relating to the products of prison labour’.
315 ibid
316 ibid
3.4 China and the soft policy preference

Prior to the Tiananmen Square massacre of 1989, the limited EU-China relationship was driven entirely by economic interests. Diplomatic relations between the EU and China were established in 1975. In 1979, just one year after China began its programme of ‘Reform and Opening’ under the leadership of Deng Xiaoping, the EU and China signed their first trade agreement. The 1979 agreement was replaced in 1985 by a trade and economic cooperation agreement, which provides the principal legal basis for EU-China relations today.\footnote{Van der Borght, K. & Zhang, L. (2010) ‘The Current Legal Foundation and Prospective Legal Framework of the PCA’ in Jing, M. & Balducci, G. eds. Prospects and Challenges for EU-China Relations in the 21st Century (Brussels: Peter Lang), pp. 54-56}

When news of the massacre on Tiananmen Square broke on 4 June 1989, the heads of state and government of the twelve EU member states were meeting in Madrid.\footnote{The Heads of State and Government of the EU member States convene in the European Council. The European Council differs in composition from the Council of the European Union in which the member states are represented at ministerial level. The European Council defines the general political direction and priorities of the EU. It does not exercise legislative functions.} In quick succession the foreign ministers of the EU member states, the European Commission and the heads of state and government condemned the actions of the Chinese authorities as ‘violent’, ‘bloody’ and ‘brutal’ repression.\footnote{European Commission (1989) Bulletin of the European Communities Bull. 6/1989: section 2.3.2, section 2.4.1, section 1.124} Although only briefly, the argument was made that the actions of the Chinese authorities in response to protests which had ‘legitimately’ claimed the ‘democratic right’ of the population were ‘in violation of universally recognised human rights principles’ and were ‘condemned by public opinion everywhere in the world’. In this manner, it was argued that there was a moral obligation on the member states of the European Union to act. In response, on 27 June 1989 the European Council issued a declaration setting out the EU response as a combination of the following measures:
- raising the issue of human rights in China in the appropriate international fora; asking for the admittance of independent observers to attend the trials and to visit the prisons;
- interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China;
- suspension of bilateral ministerial and high-level contacts;
- postponement by the Community and its Member States of new cooperation projects;
- reduction of programmes of cultural, scientific and technical cooperation to only those activities that might maintain a meaning in the present circumstances;
- prolongation by the Member States of visas to the Chinese students who wish it.

Taking into account the climate of uncertainty created in the economic field by the present policy of the Chinese authorities, the European Council advocates the postponement of the examination of new requests for credit insurance and the postponement of the examination of new credits of the World Bank.320

That the most appropriate response to Tiananmen should first and foremost take the form of condemnation in the appropriate international fora accompanied by restrictive measures, including both economic and political sanctions as well as an arms embargo, was simply not judged to be a matter for public debate among the EU member states at the time. As a result, questions regarding the precise circumstances under which the restrictive measures imposed could or should be removed and the practice of sponsoring a critical resolution on China’s human rights record at the UN Commission on Human Rights should cease went unanswered in the official EU discourse which emerged following 4 June 1989. At the same time, other equally important issues, including whether or not the two strands of this policy could or should be separated at any point, were also met with silence. This has lead to a number of anomalies in the EU’s human rights policy on China, including, in particular, the longevity of the arms embargo which remains in place more than two decades after the events which led to its imposition and long after the EU has

removed all other restrictive measures put in place and ceased to sponsor a draft resolution on China at the UN Commission on Human Rights.

At the outset, the European Commission made it abundantly clear that the disruption to bilateral relations caused by the events on Tiananmen Square was intended to be short-lived. In a statement justifying cancelation of the planned 5 June 1989 EU-China Joint Committee Meeting the European Commission warned that:

"[T]he cooperation between China and the Community can only suffer as a result [of recent events in China] and would risk being permanently affected if the policy of the Chinese Government were to start on a course which would put at risk the policy of openness and reform followed until now. The Commission therefore asks to be informed very precisely of the course of events and expresses the wish that peaceful conditions will very quickly return in China. It appeals to the Chinese authorities to take the necessary measures to ensure the security of European citizens."

This statement infers that in fact the Tiananmen Square massacre was not of itself sufficient to ‘permanently affect’ bilateral relations nor was it viewed as the dramatic and bloody end to the policy of ‘openness and reform’ to which it refers. It tacitly invites the Chinese authorities to take remedial measures to address the situation and stresses the importance of being kept fully informed of developments. On 10 January 1990 martial law was lifted in Beijing. One week later, on 17 January the 12 EU member states issued an official statement noting the move and expressing the hope that it would lead to ‘an improvement of the human rights situation in China’.

The statement, which makes no reference to ongoing human rights concerns, set the scene for the announcement in October 1990 of the European Council decision to begin to normalise official relations.

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Notably, between January 1990 and October 1990, none of the European Council, the Council of the European Union or the European Commission had made any public statement as to the conditions which would allow for this to happen. Nevertheless, on 23 October 1990, China’s brief period of isolation was officially brought to an end as follows by the Council of the European Union:

Suite au recommandations du comité politique, les ministres ont convenu de la normalisation de relations de la communauté et de ses membres avec l’Iran et approuve les mesures suivantes au sujet de la Chine:
- possibilité de contacts ministériels bilatéraux et haut niveau,
- reprise graduelle des programmes de coopération culturelle, scientifique et technique,
- reprise graduelle des projets de coopération par la communauté et ses états membres,
- accord sur la possibilité d’octroi de financements de projets de développement par les institutions financiers internationals.323

These conclusions effectively lifted all EU sanctions imposed against China save the arms embargo.324 They are notable both in their brevity and in the total absence of any reference to human rights developments in China.

At the time, the desire to normalise relations with China was closely connected to the need to secure Chinese support in the UN Security Council during the Gulf War, the outbreak of which ‘posed a new and potentially more devastating challenge to global norms concerning use of force, territorial integrity, as well as human rights’ and which ultimately ‘prompted governments to weigh their concerns about rights violations in China against

324 As early as February 1990 some EU member states had in fact already begun to offer new loans to China in spite of ongoing economic sanctions. However, the October 1990 decision reached by the Council of the European Union nevertheless represented the official end to the sanctions imposed.
other major foreign policy objectives’. However, this complex reality was not reflected in the scant official discourse justifying the normalisation of bilateral EU-China relations which, in an attempt to portray the decision as one taken solely in response to improvements on the ground in China, referred only to the ‘hope’ that conditions would continue to improve following the January 1990 decision to lift martial law in Beijing.

That following normalisation of EU-China relations after Tiananmen, the main priority for EU policy in relation to China and the rest of the Asian region would continue to be the development of bilateral trade was made clear in the first communication on Asia issued by the European Commission in 1994. The communication states that in light of the growth in spending power of the Asian population ‘[t]he Union needs as a matter of urgency to strengthen its economic presence in Asia in order to maintain its leading role in the world economy’.

While, placing the commercial interests of the EU at the top of its list of priorities in Asia, the communication also displays an understanding of economic engagement as a significant engine for broader political change, itself informed by the member states’ experience of regional integration in Europe since the 1950s. It is expressed in the communication as follows:

The concept of the interrelationship between human rights, democracy and development, should be inspired by the assumption that economic development could bring about the progressive construction of civil society and thus

328 ibid, p. 1
improve the exercise of human rights, which in their turn could also be an important factor for development. This expectation of what has been described by neo-functionalist theorists as a ‘positive spillover effect’, coupled with the stated preference of the EU for the use of positive measures in implementing its external human rights policy, provides the foundations for the EU’s policy of ‘constructive engagement’ with China announced the following year.

The first European Commission communication on relations with China, entitled ‘A Long-Term Policy for China-Europe Relations’, outlines the policy of ‘constructive engagement’ with China, initiated in June 1994 when ‘an ambitious new framework for bilateral political dialogue’ was established to allow regular contact between the two sides ‘on all issues of common interest and global significance’ with the aim of encouraging ‘full Chinese participation in global affairs’. The communication states that:

These new arrangements have already made possible a sustained exchange of views, not only on respective internal developments, but also on global and regional security interests, as well as human rights. All such matters can be examined in depth whilst continuing to respect the sovereignty of both parties. China and the EU can now discuss mutual interests and find common ground on the full range of political and security issues.

In this manner, ‘constructive engagement’ can be understood as an approach not only to EU policy in the area of human rights, but one which was to inform the full spectrum of EU relations with China.

The 1995 communication states that human rights are ‘at the heart of EU policy worldwide’. However, while affirming that violations are a ‘cause for concern in their own right’, the claim is also made that ‘the espousal of

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331 European Commission (1995) Communication of the Commission: A Long Term Policy for Europe China Relations COM(95) 279, section B.1, para. 5
332 ibid 6
333 ibid 1
international standards of human rights and acceptance of political liberalisation is vital for long-term social and political stability’. 334 This argument, which must be understood as an attempt to convince the Chinese audience that the promotion of human rights is also in the interests of China, is developed in subsequent EU communications and reduced to the simple proposition that ‘full respect’ for human rights is ‘inextricably linked to economic development and prosperity’. 335

The contention that enhancing respect for human rights must lie at the heart of development policy is not exclusive to the EU and in fact pervades much of the global discourse on rights-based approaches to development that has evolved since the mid-1990s. 336 However, there is a fundamental difference between the claim that human rights must be integrated into development policy and that made by the EU, which is that the realisation of human rights is necessary for economic development.

Over the past two decades, China has demonstrated that even in the absence of democracy and full respect for fundamental civil and political rights, economic development has not only been possible but has been rapid and sustained. Moreover, this achievement has been expressly recognised by the EU. According to the mid-term review of the EU’s 2007-2013 development cooperation policy for China published by the European Commission in 2010:

Across China, there were over 400 million fewer people living in extreme poverty in 2001 than 20 years previously. By 2001, China has met the foremost of the Millennium Development Goals – to reduce by half the 1990 incidence of poverty – and had done so 14 years ahead of the 2015 target set for the developing world as a whole. 337

334 ibid
The review also contends that this ‘new China’ is characterised in the document as a system ‘underpinned by political stability’. 338

In the face of such achievements, the claim that the promotion of human rights is a necessary condition for sustainable economic development in China is unconvincing. Despite the weakness of this argument however, an alternative discourse focusing on the equal claim of Chinese citizens to the enjoyment of universal and indivisible human rights that have been recognised internationally, including by China, has not been cultivated and delivered systematically by the EU.

The practical parameters of the EU approach to the promotion of human rights in China is set down for the first time in the 1995 European Commission communication as a combination of ‘carefully timed public statements, formal private discussions and practical cooperation’. 339 According to the communication:

The EU will pursue the issue of human rights through action on three levels. First it will support potential efforts in China to open up and liberalise all areas of Chinese life, in different sections of society as well as different parts of the economy. These trends inevitably reinforce moves towards the development of a civil society based on the rule of law. Second it will systematically and regularly continue to raise human rights issues in bilateral dialogue with China. Third, it will engage the international community in the dialogue through multilateral fora such as the United Nations. 340

The policy instruments identified for use in the case of China by the communication can thus be summarised as a combination of human rights diplomacy and human rights assistance programming. This general approach to the promotion of human rights in China as an objective of EU external relations policy has been confirmed in each of the subsequent strategy papers on China published by the European Commission in 1998, 2001, 2003 and 2006, and

338 ibid 3
340 ibid 2
endorsed on each occasion by the Council of the European Union.\textsuperscript{341} However, as will be discussed in chapters 4 and 5, despite agreement on the identification of soft policy instruments as the key to constructive engagement, the EU view of the manner in which these instruments should interact and the relative weight to be applied to the various channels for human rights diplomacy has not been clearly established, leading to ongoing controversy about the way in which the EU conducts itself on the issue of human rights in China. This controversy has also been fed by the reluctance of the EU to use the available hard policy instruments to pursue its human rights objectives in China.

The embargo on the sale of arms to China, agreed by the EU member states in June 1989, is explicitly referred to in the 1995 communication from the European Commission as evidence that the ‘importance attached to human rights has been a consistent feature of the EU’s policy towards China’.\textsuperscript{342} However, it is mentioned only as a reactionary measure and is not presented as tool available for use in implementing the EU’s human rights policy on China on an ongoing basis.\textsuperscript{343}


\textsuperscript{343} At the time of writing, the EU applies embargoes on the export of arms to a total of 12 other states in addition to China. These are: Burma; the Democratic Republic of Congo; Iran; Iraq;
In the wake of the EU’s declaration of a ‘strategic partnership’ with China in its 2003 communication on bilateral relations, the embargo was to become the focus of much diplomatic activity as the Chinese authorities intensified their efforts to ensure that the only remaining measure put in place by the EU post-Tiananmen was dismantled. The change of leadership which took place in China in 2003 was greeted with great optimism in the Western world. After an initial period of denial, the openness with which the SARS crisis was tackled by the new government under President Hu Jintao and Premier Wen Jiabao, gave rise to an expectation of deeper political reform which seemed more realistic than at any time since the end of the Beijing Spring in 1998.  

Against this background, the release of the European Commission’s October 2003 communication ‘A Maturing Partnership: Shared Interests and Challenges in EU-China relations’ was carefully timed to set the scene for the first occasion on which Hu Jintao and European Commission

Ivory Coast; North Korea; Lebanon; Liberia; Sierra Leone; Somalia; Sudan; and Zimbabwe. However, the embargo against China differs from these others in so far as it predates the Maastricht Treaty and the creation of the Common Foreign and Security Policy. As such, it is based only on a political declaration from the European Council issued on 27 June 1989, which is not legally binding. Moreover, while the brief declaration establishing the embargo applies the measure to the ‘trade in arms’, it does not specify the types of products covered. Since the embargo is implemented through national level legislation put in place by member states in response to the 1989 declaration, this omission has enabled major arms exporting member states to interpret the declaration narrowly as covering only lethal arms. This narrow interpretation has in turn enabled the export of dual-use technology and support systems from the EU to China to grow since 1989 in spite of embargo.

The first reported case of Severe Acute Respiratory Syndrome occurred in the southern Chinese city of Foshan in November 2002, as the carefully orchestrated change of leadership, from the fourth generation of the Chinese Communist Party under President Jiang Zemin to the fifth generation under Hu Jintao, took place. Despite the rapid spread of the virus inside China and ultimately beyond its borders, the authorities denied the severity of the outbreak until April 2003, when news of its extent was leaked to Western media in Beijing by a retired doctor. The new leadership under Hu Jintao, in place for just one month at the time, responded decisively. On 20 April 2003, accurate figures for the outbreak were released, China’s health Minister, the mayor of Beijing and approximately 120 provincial officials were dismissed and containment policy was rapidly deployed. This reversal of the official policy of denial was also accompanied by recognition of the important role to be played by a free-press in monitoring official policy and protecting and promoting the interests of the people under such circumstances. However, hopes that the decision to lift restrictions on reporting the progress of the disease would last beyond the crisis period and extend to other areas of public life have proved unfounded. See Chan, K. & Ignatieff, M. (2004) SARS and the Implications for Human Rights. Case study for the Carr Centre for Human Rights, John F. Kennedy School of Government (Harvard University)
President Jose Manuel Barroso would meet during the annual EU-China Summit, which took place just over one month later. It was also timed to precede the release of China’s first White Paper on bilateral relations with the EU, which was keenly anticipated by the EU and referred to at several points in the European Commission communication.345

The 2003 Chinese white paper states that the EU ‘should lift its ban on arms sales to China at an early date so as to remove barriers to greater bilateral cooperation on defence industry and technologies’.346 Within two months of its release, the EU heads of state and government mandated the Council of the European Union to begin to re-examine the question of the embargo.347

The explicit request that the EU lift the embargo presented the member states with an unprecedented opportunity to use it as a tool with which to press for positive human rights developments, by linking the decision to lift to the need for specific human rights concessions from China. As documented elsewhere however, this opportunity was not exploited.348

By early 2005, despite previous indications that the unanimity required to lift the embargo would be reached among the EU’s then 25 member states, in the face of severe pressure to the contrary from the United States, this outcome had begun to appear increasingly unlikely.349 Multiple classified diplomatic

347 European Council (2003) Presidency Conclusions DOC/03/5, 12 December 2003
cables published on the Wikileaks website demonstrate not only the early engagement of the United States on this issue, but also the extent of the pressure placed on the EU to ensure the status quo. While it would appear that China’s adoption in March 2005 of the Anti-Secession Law, which legalised the use of force against Taiwan in the event of any move to declare independence, influenced the outcome of the internal EU deliberations on the embargo, the leaked cables support the view expressed in China at the time, that the deciding factor was in fact successful lobbying by the United States.

By the time the issue was addressed publicly by the EU in its 2006 communication on relations with China, earlier expectations that the EU would lift the embargo had long evaporated. Consistent with the 1995 document, the 2006 communication states that the embargo is a reactionary measure put in place following the ‘events in Tiananmen Square in 1989’. The communication goes on to deliver the, by then, established line on the embargo which commits the EU to continuing to ‘work towards embargo lift’, and calls for progress on a variety of issues, including ‘China’s human rights situation’, in order to improve the ‘atmosphere for lift’ although no specific demands are

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made in this regard.\textsuperscript{353} It is notable also that the 2006 communication does not address the embargo issue under title 3.1 ‘Supporting China’s Transition Towards a More Open and Plural Society’, which deals with all other human rights instruments including the dialogue, but separately under title 3.5 ‘International and Regional Cooperation’.\textsuperscript{354} This differentiation between the embargo and other instruments is indicative of the continued ambivalence of the EU regarding the role to be played by human rights considerations in its decision making on the embargo issue.

This same vacillation is also evident with regard to the treatment of other trade related hard policy instruments in the EU’s communications on relations with China. The 1998 communication from the European Commission entitled ‘Building a Comprehensive Partnership with China’ devotes considerable attention to ongoing and intense negotiations on China’s accession to the World Trade Organisation.\textsuperscript{355} While the document states that as part of its overall approach to the accession negotiations the EU should ‘encourage China to anticipate accession’ by prioritising the amendment of certain domestic laws and regulations, it refers only to those laws and regulations ‘that affect foreign investment’ and no role is envisaged for human rights reform.\textsuperscript{356} However a clear link between trade and human rights, specifically labour rights, is drawn in a subsequent passage dealing with the Generalised System of Preferences.\textsuperscript{357}

As stated above, prior to 2005, in addition to the general GSP scheme, the EU operated a total of four ‘special incentive schemes’, one of which had a specific human rights dimension and tied additional preferences to recognition of labour rights. In this regard, the 1998 strategy document states that while the advantages enjoyed by China under the general scheme may be reduced due to

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\textsuperscript{353} ibid  \\
\textsuperscript{354} ibid  \\
\textsuperscript{356} ibid  \\
\textsuperscript{357} For analysis of the reasons underlying the omission of human rights considerations in the EU position during these negotiations see: Zimmerman, H. (2007) ‘Realist Power Europe? The EU in the Negotiations about China’s and Russia’s WTO Accession’ \textit{Journal of Common Market Studies} 45(4), pp. 813-832
\end{flushleft}
the exclusion, or ‘graduation’, from the scheme of a range of products judged to have reached a certain level of competitiveness, ‘the new GSP special incentive arrangements (social and environmental clauses), will allow beneficiary countries to obtain an additional preferential margin provided they meet international standards of labour rights’, including standards on child labour, freedom of association and the right to collective bargaining.358 The objective of urging China to ‘sign, ratify and fully implement’ International Labour Organisation conventions on core labour standards is mentioned twice in section B on ‘Supporting China’s Transition to an Open Society Based on the Rule of Law and Respect for Human Rights’ and is placed first on a list of ‘proposed initiatives’ which concludes the section.359 However, no clear connection is drawn between the objective stated in section B and the availability of the new GSP special incentive arrangement described in section C ‘Integrating China into the World Economy’.

The language used in the communication would in fact suggest that the new special incentive arrangements are referred to only in order to refute criticism from China following the graduation of numerous competitive products from the general scheme. The fact that in 1998 the EU can have had little real expectation that China would indeed sign, ratify and implement the International Labour Organisation conventions in order to obtain benefits under the GSP special incentive arrangements, and the fact that core labour standards are not mentioned in any further EU strategy documents on China in the context of the Generalised System of Preferences would seem to support this analysis.360

359 ibid, pp. 10-11
360 China ratified ILO Convention 138 on the minimum age for admission to employment in 1999. However, it is unlikely that the GSP special incentive scheme influenced this decision since China did not ratify ILO Convention 87, on freedom of association and protection of the right to organise or ILO Convention 98, on the right to organise and bargain collectively, and therefore remained excluded from the benefits outlined by the scheme until its expiry in 2005.
Prior to 2005, temporary withdrawal of general benefits under the GSP scheme was possible for products originating in a country that operates any form of forced labour or that exports goods made by prison labour. Given the extensive and well documented use of prison labour in China in the form of the Re-education Through Labour system – a reform process that ‘takes place through collective labour and by which the planned penal economy makes a significant contribution to the state economy’ – these provisions would seem to have provided the EU with a valuable tool with which to pressure China to improve its labour standards.\footnote{Hualing, F. (2005) ‘Re-education through Labour in Historical Perspective’ China Quarterly 184, p. 811; Hualing, F. (2005) ‘Punishing for Profit: Profitability and Rehabilitation in a ‘Laogia’ Institution’ in Diamant, N., Lubman, J. and O’Brien, K., eds. Engaging the Law in China: State, Society and Possibilities for Justice (California: Stanford University Press)} The potential of the general GSP scheme as a hard human rights instrument would seem to be enhanced by the fact that by 2003 the EU had become China’s largest export market, as well as the fact that, before the reform of the GSP system led to the graduation of the majority of Chinese products from the scheme in January 2006, China was the greatest net beneficiary of the scheme accounting for more than 30 percent of GSP imports into the EU. However, despite the potential of the GSP as a human rights instrument and the acceptance of the European Commission that ‘goods produced in Laogai, under those very conditions which we condemned, may well be imported into the European Union’ to date no formal investigation into the issue has been opened.\footnote{European Commission (2010) Statement by Member of the Commission Stefan Fule, European Parliament Plenary Debate on the Import of Laogai made goods into the EU, Strasbourg, 23 September 2010}

This lack of action can in part be explained by the complexity of the investigative procedure itself. As argued by the European Commission in response to a written question from Member of the European Parliament Olivier Dupuis in 1997, a formal GSP investigation cannot be launched by the European Commission acting on its own initiative:
The Commission may act only if it has received a duly substantiated complaint from a natural or legal person, or association not endowed with legal personality, which can show an interest in such temporary withdrawal. This complaint must be accompanied by all the documentary evidence needed by the Commission to examine its admissibility and determine the relevance of the allegations made. By way of example, the Commission would refer the Honourable Member to the cogently argued complaint that it received with a view to the temporary withdrawal of preferences from Myanmar (Burma) on the grounds of forced labour. Some 1400 pages of information and testimony backed up this complaint. 363

However the procedural complexities of the investigation process cannot explain the absence of any mention of the availability of negative conditionality as a human rights instrument alongside numerous references to the GSP special incentive arrangements in the EU’s communications on China. This can only be understood as stemming from a deep-set reluctance to apply negative measures to China.

As outlined above, in 2005 the regulations governing GSP underwent a major process of reform which included expansion of the criteria for temporary withdrawal of general GSP benefits and the creation of GSP Plus. At the same time, the decision was taken to graduate 80 percent of Chinese exports from the general scheme with effect from 1 January 2006. While in theory, as a developing country, China remains eligible for benefits under the general scheme, the progressive realisation of the graduation process has meant that the percentage of imports from China to benefit from preferential treatment under GSP has continued to decline since that time. In 2011, the European Commission estimated that by 2014, just 1.24% of imports from China would remain eligible under the general benefits scheme, rendering it virtually meaningless as a hard human rights policy instrument in the Chinese context. 364

In addition, since China does not meet the baseline criteria for economic vulnerability in relation to GSP Plus, this scheme is also placed beyond the reach of the EU as a human rights policy instrument in China. As a result, since 2006, groups advocating the application of EU trade related human rights instruments to China have focused their efforts instead on lobbying the European Commission to introduce EU wide legislation prohibiting the importation of goods produced through prison labour, as permitted under Article XX(e) of the General Agreement on Tariffs and Trade.

In response to rigorous questioning during a 2010 debate in the European Parliament on the importation of ‘Laogai-made goods’, a spokesperson for the European Commission signalled for the first time the willingness of the Commission to begin to consider the matter, by establishing an interdepartmental taskforce to study the effectiveness of existing United States legislation. However, the European Commission was at pains to stress the ‘extreme difficulty’ of establishing ‘whether – and which – goods imported from China into the European Union have been produced in laogai’, the ‘delicate’ nature of the issue ‘in our relations with China’, and the necessity to focus any response not only on China but all countries where ‘the use of prison labour is a matter of concern’. While recognising that there are limits to the EU approach, which is defined as one of ‘positive engagement’ and accepting that ‘so far’ it has ‘not produced any notable change in Chinese policy as regards Laogai’, the statement continues as follows:

Even in these challenging times, China and Europe are natural partners. A policy of engagement and dialogue with China is the best way to move forward to resolve these issues, notably in the context of our Human Rights Dialogue

or the EU-China High-Level Economic and Trade Dialogue.\textsuperscript{367}

More than one year later, the establishment of the promised interdepartmental taskforce was confirmed by the European Commission. However, it was also confirmed that forced labour in China was not to be the focus of the investigations undertaken by the taskforce in spite of the acceptance on the part of the European Commission that ‘forced labour for export production’ takes place in China:

From a trade perspective, the interservice group is working together with the European External Action Service to obtain as full a picture as possible of where – other than known cases in China and Myanmar – forced prison labour for export production may take place. This work also involves Member State Embassies, international organisations and non-governmental organisations. The Commission does not rule out the possibility of introducing an import prohibition for goods produced using forced labour, but this must be both feasible and effective. In the meantime, the Commission will continue to denounce the Laogai system and other forms of forced labour which are incompatible with fundamental human rights within the framework of any appropriate forum.\textsuperscript{368}

The possibility that, in years to come, the EU may be in a stronger position to address such issues bilaterally, within the framework of consultation procedures triggered as a result of the inclusion of a standard human rights clause in any new bilateral Partnership and Cooperation Agreement, is intriguing. The launch of formal negotiation of a comprehensive agreement to replace the outdated arrangements put in place in 1985 was announced in 2006, with the negotiations themselves commencing in 2007. From the outset, the EU has made it clear that ‘driving a fair bargain with China’ in realigning the framework within which the two sides conduct their trade relationship would be

\textsuperscript{367} ibid
\textsuperscript{368} European Commission (2011) Joint Answer given by Mr. De Gucht on Behalf of the Commission to Written Questions E-010606/11, E-010839/11, 19 December 2011
its principal concern. As a reflection of the priority placed on trade relations, this aspect of the EU’s engagement with China is the exclusive focus of an extensive working paper released alongside the 2006 European Commission communication ‘EU-China: Closer Partners, Growing Responsibilities’, which sets out the negotiating priorities of the EU for the years ahead.

Following the line taken in previous communications on China, the 2006 document confirms that the EU’s ‘fundamental approach to China must remain one of engagement and partnership’. The communication highlights the need for continued support for ‘a strong and stable China, which fully respects fundamental rights and freedoms, protects minorities and guarantees the rule of law’ as the first of five key EU priorities which together represent ‘the way forward’ for EU policy on China. Although the communication is critical of the dialogue approach, noting the need for this instrument to become ‘more focused, results oriented, and flexible’ as well as ‘better coordinated with member state initiatives’, no definite course of action is proposed to address its shortcomings and no new policy initiatives are proposed.

Consistent with the decision taken in 1995 regarding the inclusion of a standard human rights clause in all EU partnership agreements with third countries, the EU negotiators have stated their intention to see that the clause is included in the new agreement with China. Given the absence of the clause from the existing 1985 Agreement on Trade and Economic Co-operation between the EU and China, such an outcome would represent a significant step

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372 ibid 4-5
373 ibid 4
forward. However, achieving it will not be a simple matter. By comparison to many of the other states that have accepted the insertion of the clause in recent years, China is in a much stronger negotiating position vis-à-vis the EU, given its global economic and strategic importance. Until such a time as the outcome desired by the EU is secured and negotiation of the entire agreement is concluded, the standard human rights clause as a classic instrument of negative conditionality will remain beyond the reach of the EU in its human rights policy on China.

3.5 Conclusion

The inclusion of a human rights dimension in the external relations objectives of the EU has been justified on moral grounds by reference to the universality and indivisibility of human rights and the duties this imposes on states to uphold and promote them both internally and externally. Further justification has also been provided on grounds of appropriateness, by reference to the values on which the EU claims to have been founded. However, while such arguments may provide an underlying justification for the inclusion of human rights objectives in external relations policy per se, they are insufficient to justify particular policy decisions with respect to a preference for the use of one approach and its related instruments over another.

In order to pursue its external human rights objectives, the EU has developed five principal global instruments: human rights diplomacy, human rights assistance, the standard human rights clause, the generalised system of preferences as well as other trade related instruments, and restrictive measures. There is of course considerable debate and uncertainty among policy makers

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376 Treaty on European Union Official Journal of the European Communities C 340, 10 November 1997, Article 6(1) (ex Article F(1))
and scholars as to how best to promote human rights as a foreign policy objective. However, the purpose here has not been to discuss the relative merits or demerits of the available soft and hard policy instruments, but rather to demonstrate that the EU pursues a human rights policy on China which has since the early 1990s been characterised by a reliance on positive soft policy instruments. This preference been articulated by the EU in relation to China, not on the basis of target state analysis but on the basis of the assumptions which underpin the EU’s global approach as a human rights actor.\textsuperscript{377}

The question of how, and when, to employ negative measures in a policy which favours a positive approach has not been comprehensively addressed in the official discourse. As a result, EU decisions regarding the role of, in particular, trade related human rights instruments appear in the case of China to be unprincipled, weak and self-serving.

The arms embargo, the only hard instrument currently in use in China, exists in isolation from the rest of the EU’s human rights policy. No attempt has been made, in any of the five key EU communications on relations with China published since 1995, to present the embargo as necessary to protect human rights in China and the EU has not taken advantage of the opportunities presented to use the embargo to press for positive concessions from China. Instead, the embargo has been exclusively represented in these documents as a reactionary measure imposed following the Tiananmen Square massacre.\textsuperscript{378}

Until such a time as the Council of the European Union announces a common position clearly setting out the specific criteria which must be fulfilled by China in order for the embargo to be lifted, and committing the member states to doing so should these criteria be met, it should continue to be understood as a


post-Tiananmen sanction which remains in place, not because the EU member states have agreed unanimously that it should, but because they have been unable to agree unanimously that it should not. This has been the case for a variety of reasons many of which have little to do human rights concerns and much to do with the prioritisation of the trans-Atlantic relationship.
Chapter 4 Human Rights Diplomacy

4.1 Introduction

EU diplomats and officials interact with their Chinese counterparts on the issue of human rights through a variety of multilateral channels. The most prominent include: the Regional Forum of the Association of South East Asian Nations (ASEAN), which brings together representatives of the ten ASEAN member states, the European Union and 16 states from the Asia-Pacific region to discuss political and security issues of common concern including human rights; to the Asia Europe Meeting (ASEM), accompanied since 1997 by an informal seminar on human rights involving government officials, academics and civil society representatives from the 48 ASEM partners; and the UN Commission on Human Rights/Human Rights Council.

EU diplomats and officials also interact with their Chinese counterparts on the issue of human rights through a variety of bilateral channels. Since the mid-1990s, the EU has committed to addressing the issue of human rights practices in China bilaterally through the structured ‘political dialogue’ which established a network of regular engagements from summit meetings at the level of heads of state/government to working group meetings between senior officials covering all areas of common interest. The EU-China Human Rights Dialogue was established in 1995 as part of this network and provides a

379 The ten members of ASEAN are: Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam. In addition to the ASEAN members, the following participate in the Regional Forum: Australia, Bangladesh, Canada, China, Democratic People’s Republic of Korea, the European Union, India, Japan, Mongolia, New Zealand, Pakistan, Papua New Guinea, the Republic of Korea, the Russian Federation, Sri Lanka, East Timor and the United States.

380 Participants in the ASEM informal seminar on human rights include: Australia, Austria, the ASEAN Secretariat, Belgium, Brunei Darussalam, Bulgaria, Burma, Cambodia, China, Cyprus, Czech Republic, Denmark, Estonia, the European Commission, Finland, France, Germany, Greece, Hungary, Indonesia, India, Ireland, Italy, Japan, Korea, Laos, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mongolia, Netherlands, New Zealand, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sweden, Thailand, United Kingdom, Vietnam.

dedicated closed forum for the bilateral discussion of human rights issues dominated by foreign affairs officials on both sides. Human rights are also raised bilaterally by the EU by means of public statements and declarations as well as both public and private démarches on particular cases and issues of concern.

Within this matrix, the UN Commission on Human Rights/Human Rights Council and the EU-China Human Rights Dialogue represent the principal channels through which the EU seeks to have an impact on the human rights situation in China by means of multilateral and bilateral human rights diplomacy. As such, analysis of official discourse justifying key choices relating to the use of human rights diplomacy as a policy tool will focus on these two distinct arenas. This focus is not intended to suggest that the EU does not also interact with China on human rights in variety of other multilateral and bilateral fora. On the contrary, it merely represents a practical choice since it is simply not possible to cover all aspects of the EU’s diplomatic engagement with China on the issue of human rights within the scope of the current study.

The UN Commission on Human Rights was established as a permanent subsidiary body of the UN Social and Economic Council (ECOSOC) in 1946. Members of the Commission on Human Rights are elected to serve by ECOSOC, with approximately one third of the seats in the Commission coming up for election each year. At the time of its dissolution, a total of 53 states were serving as members of the Commission on Human Rights, including seven EU members and one candidate country. The ‘European Community’ was granted observer status in ECOSOC and its functional bodies including the Commission on Human Rights in 1979.

The UN Human Rights Council was created by the UN General Assembly in March 2006 by resolution 60/251. The Human Rights Council, like its predecessor, is an intergovernmental body to which states are elected to serve as members. Members of the Human Rights Council, of which there are a total of 47, are elected by a simple majority of the UN General Assembly on the basis of equitable geographic distribution. Since its establishment, there have been seven to eight EU member states serving on the Human Rights Council at any one time. The EU is not a member of the Human Rights Council but, following ratification of the Lisbon Treaty, has been recognised as an observer in accordance with Article 47 of the Treaty on the Functioning of the European Union which gives full legal personality to the EU.

Harmonisation of European Union activity at the United Nations falls under the EU’s Common Foreign and Security Policy and is pursued intergovernmentally. In order to present EU positions, the unanimous agreement of all 27 EU member states is required. This was the case prior to the reforms introduced by the Lisbon Treaty and remains the case after its implementation.

Preparatory work is carried out in Brussels through the Council Working Party on Human Rights, which convenes the heads of each of the human rights units within the foreign affairs ministries of the EU member states. The precise content of EU positions and statements is then negotiated on the ground in Geneva with all parties also often receiving instruction from capital, thus resulting in a uniquely complex policy process.

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384 UN General Assembly Resolution 60/251 of 15 March 2006
Until the entry into force of the Lisbon Treaty on 1 December 2009, both the European Commission and the Council of the European Union maintained separate representative offices at the UN in Geneva. Post-Lisbon, these offices have been merged into a single European Union Delegation. Although the precise role of the new EU Delegation in coordinating and representing the Union at the United Nations is slowly evolving, the 27 member states of the European Union have continued to be the principal decision makers on all strategic policy matters.

Before the entry into force of the Lisbon Treaty, common EU positions and statements were presented at the UN Commission on Human Rights/Human Rights Council by both the rotating EU presidency and members of the EU representative offices in Geneva. In keeping with the ‘one message many voices’ approach adopted by the EU in 2005, individual member states have also used their speaking time to support agreed positions.388 This arrangement has continued largely unchanged following Lisbon and the merger of the representative offices of the European Commission and the Council of the European Union, although now it is the European Union as opposed to the European Community which has legal personality at the UN and it is the EU Delegation rather than the European Commission which on occasion speaks on behalf of the EU at the Human Rights Council, particularly during interactive dialogue with the UN Human Rights Special Procedures.389

Innovations introduced by the Lisbon Treaty may address some of the issues affecting the coherence of EU external human rights policy at the UN by progressively transferring the burden of coordinating EU positions from the rotating presidency to the EU Delegation, by creating a permanent chair for each of the Brussels-based Council working parties and by placing the Foreign

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Affairs Council under the permanent chairmanship of the High Representative of the Union for Foreign Affairs and Security Policy. However, they will not significantly reduce the estimated 2,300 meetings which take place between New York and Geneva every year in order to reach the internal consensus necessary to formulate unified EU policy positions at the UN.\textsuperscript{390}

With regard to the internal competencies of the European Union, the EU-China Human Rights Dialogue, like collective action at the UN, is also a Common Foreign and Security Policy instrument. Unusually however, since the inauguration of the dialogue, the European Commission, and subsequently the External Action Service, has played a key role in both the preparations for and organisation of the dialogue.\textsuperscript{391} However, all strategic policy decisions relating to the Human Rights Dialogue are taken inter-governmentally by the member states requiring unanimity. This was the case prior to the Lisbon Treaty and remains the case following its implementation.

While the member states remain the principal strategic decision makers in relation to the dialogue, the Lisbon Treaty has brought about a change in the personnel involved in both preparing the dialogue and representing the Union during it, which, in addition to the appointment of permanent chairpersons to all Council working parties, is intended to enhance the coherence of the EU approach. Thus, primary responsibility for preparing the dialogue has been shifted from the human rights unit within the foreign affairs ministry of the rotating EU presidency to the European External Action Service, in particular the division responsible for human rights policy instruments. These responsibilities include preparation of the extensive briefing book for the EU delegation on the dialogue, compilation of which is now the exclusive responsibility of personnel within the human rights policy instruments division and one which must be carried out in the absence of any additional resources.


Prior to Lisbon, in addition to leading the coordination of preparations for the dialogue, the rotating presidency at the level of Ambassador/Director General was also the lead representative in the EU delegation to the dialogue meeting. Following Lisbon, and the abandonment of the rotating presidency in the area of foreign policy, this role has fallen to the EU Director for North-East Asia and the Pacific within the External Action Service. Although member states are invited to send representatives to attend the dialogue as observers, this invitation has not been taken up with any great enthusiasm and the numbers choosing to do so have reportedly been very low. From 2005 to 2009, the EU delegation to the dialogue also included the Personal Representative for Human Rights of the High Representative for Common Foreign and Security Policy. This position was abolished in 2009. In 2012 it was replaced by that of the EU Special Representative for Human Rights.\(^3\) At the time of writing, the responsibilities of this new role have not yet been finalised. However, initial information received from the External Action Service would indicate that, as currently conceived, the Special Representative will not take part in the EU-China Human Rights Dialogue.\(^3\)

On the Chinese side, the delegation is led by the Department of International Organisations and Conferences within the Ministry of Foreign Affairs. The head of the Chinese delegation is generally at the level of director but at times at the level of deputy director and occasionally below. From within the Ministry of Foreign Affairs, the Chinese delegation also includes representatives from the Department of European Affairs and the Special Representative on Human Rights, who since 2004 has come to play an increasingly important role in both the Dialogue and the accompanying EU-

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\(^3\) Email from Jolita Pons, European External Action Service to the author (26 September 2012) Subject: China (on file with the author)
China Human Rights Seminars. Since 1998, the Chinese delegation has also included representatives of other ministries with direct responsibilities in areas addressed by the agenda, including the Ministry for Public Security and the Ministry of Justice, as well as other relevant institutions, such as the State Council Information Office, the Supreme People’s Court and the Supreme People’s Procuratorate. However, these Ministries have no responsibility for preparing the dialogue and play a secondary role in the official delegation. The current composition of the EU delegation to the dialogue does not allow for the involvement of direct counterparts from EU member state ministries.

Detailed information on the agenda and the nature of the discussions that take place during each round of dialogue are not made public. However, according to a classified 2009 assessment of the dialogue commissioned by the Council Working Group on Human Rights and obtained through confidential sources, the agenda broadly speaking consists of four headings: opening remarks; recent human rights developments in China and the EU; issues of common concern including key themes for each particular dialogue; and cooperation with international fora/UN human rights systems. The assessment states that during the 2005 to 2009 period covered by the report, the following topics were raised ‘almost systematically’:

- Developments with regard to ICCPR ratification
- Situation in Tibet
- Situation in Xinjiang
- Torture
- Death penalty
- Human rights defenders
- The individual cases list
- Administrative detention/Reform Through Labour
- Rule of law
- Freedom of expression, association
- Freedom of religion and belief
- Role of civil society
- EU-China legal seminar

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395 ibid
The assessment also highlights the exchange of information regarding the EU’s list of individual cases of concern as an ‘essential part’ of each round of dialogue since the first such list was handed over in 1997.  

In addition, each round of dialogue includes a ‘field trip’ and ‘side meetings with line Ministries, State Authorities and sometimes NGOs’. Field trips are generally organised by the inviting party and side meetings generally organised on the initiative of the visiting party. During the period covered by the 2009 report, field trips in China included: a re-education through labour centre in western Beijing’s Daxing District; Shanxi province and Tianjin; and the Xinjiang Autonomous Region. Field trips organised on the margins of the dialogue in Europe included: Bela Pod Bezdezem detention centre for illegal migrants in the Czech Republic, Italian minority institutions in Kopur and Piran, Slovenia; the Berlin Care Centre for the Victims of Torture; the European Monitoring Centre on Racism and Xenophobia; and the Austrian Human Rights Advisory Board.

Since 1998, the dialogue has been mirrored by an expert level process through the EU-China Human Rights Seminars. The primary participants in the EU funded seminars are European and Chinese human rights academics, NGO representatives in Europe and civil society representatives in China. The seminars are also attended by officials on both sides, some of whom also participate in the dialogue. Despite the stated ambition of the EU to strengthen the link between the two events in order to ensure that the seminars can ‘feed into’ and ‘enrich’ the dialogue, there is no working agreement among the EU member states as to whether and how such a connection should be forged let alone between the EU and its interlocutors in China. As a result the ambition to

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396 ibid, section 2.1.2  
397 ibid, section 2.1.3  
398 ibid  
399 See: chapter 5 of this study ‘Human Rights Assistance Programming’
create a substantive link between the two meetings remains largely unfulfilled.\textsuperscript{400}

The progress of the dialogue is monitored by Council Working Party on Human Rights in Brussels. In addition to conducting twice yearly discussion of the dialogue as part of its general overview of all current EU human rights dialogues, a total of three more in-depth reviews have been concluded, one in 2000, one in 2004 and, as mentioned above, most recently in 2009. Since 2001 representatives of the EU have also taken part in the ‘Berne Process’, a multilateral coordination effort initiated by the Swiss Ministry of Foreign Affairs in order to enable officials from like-minded states conducting human rights dialogues with China to share relevant information. Participating states include Australia, Canada, the United Kingdom, Hungary, Japan, Norway, Switzerland, Germany and the United States.\textsuperscript{401}

\textbf{4.2 Emergence of the dialogue approach}

The events that unfolded on Tiananmen Square in June 1989 were considered for the first time by a UN human rights body in August of that year, when the Sub-Commission on Prevention of Discrimination and Protection of Minorities met in Geneva. The meeting resulted in a resolution on the ‘Situation in China’ which: expressed the ‘concern’ of the Sub-Commission in respect to ‘the events which had taken place recently in China and their consequences in the field of human rights’; which requested that the Secretary General ‘transmit to the Commission on Human Rights information provided by the Government of China and by other reliable sources’; and which made an ‘appeal for clemency’ for those involved.\textsuperscript{402} The effect of this cautious resolution, which

\textsuperscript{400} European Commission (2007) EU-China Human Rights Network Open Call for Proposals, EuropeAid/126960/C/ACT/Multi, p. 3, p. 8
\textsuperscript{402} UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1989/5 of 31 August 1989
carefully avoided the use of condemnatory language, was to place responsibility for further consideration of the matter firmly on the shoulders of the UN Commission on Human Rights.

By 1990, two decades has passed since the establishment of the European Political Cooperation mechanism committed the member states of the EU to the presentation of coordinated positions in international organisations where possible. Yet, when the UN Commission on Human Rights met in March to discuss the situation in China, the EU member states had jointly submitted a draft resolution to the Commission on Human Rights on only one previous occasion and the Commission had never been addressed by the rotating EU presidency on behalf of the member states. The fact that the EU member states were willing to support a draft resolution critical of China’s human rights record in 1990 and went on themselves to be among the principal architects of several subsequent drafts was thus in itself something of a breakthrough, not just for the EU’s approach to the promotion of human rights in China, but for EU external human rights policy more generally.

Without exception, political leaders in the Western world accepted that the events on Tiananmen Square required a reaction. Thus, the decision to support a draft resolution at the UN Commission on Human Rights and, as discussed in chapter 3.4, to impose accompanying restrictive measures was one that was taken not only by the EU member states but also other states including Australia, Canada, Japan, Norway and the United States.

A draft resolution on the situation in China expressing concern about ‘events which took place recently’, appealing for clemency for those involved and requesting the transmission of further information to the UN Commission on Human Rights was submitted in March 1990 at the Commission’s 46th session by a total of 18 Western governments including the 12 members of the

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European Union, eight of whom were members of the UN Commission on Human Rights with voting rights. In comparison to the resolution passed by the Sub-Commission which it closely resembled in most respects, the draft resolution presented to the Commission on Human Rights is notable for its inclusion of positive language welcoming ‘as steps in the right direction’ the decision to lift martial law in Beijing and release 573 persons detained during the protests and urging the authorities to ‘continue to take measures along the same lines’. However, despite its neutral tone, it was clear that ‘no matter what the initiative would contain it would meet firm resistance’ from China and its supporters. As a result, none of the 18 states that jointly submitted the draft was prepared to come forward to introduce it and Germany was the only EU member state to make a statement arguing against the no-action motion moved by Pakistan in response to it. Ultimately, the no-action motion was carried by 17 votes to 15 with 11 abstentions and the Commission on Human Rights dismissed the draft without further consideration.

In the absence of a coherent discourse setting out the precise objectives of its approach to the protection and promotion of human rights in China in the immediate aftermath of the Tiananmen Square massacre and justifying the policy choices it had made to pursue them, the EU member states placed themselves in an ambiguous position wherein they were to argue for a resolution on the human rights situation in China for years to come, while at the same time pursuing the development of relations with China in other areas unhindered by human rights concerns following normalisation of the bilateral

\[407\] A no-action motion is a procedural motion provided by Rule 65, Article 2 of the Rules of Procedure of the Functional Commissions of the Economic and Social Council of the United Nations. The text of Article 2 reads that ‘[a] motion requiring that no decision be taken on a proposal shall have priority over that proposal’. The no-action motion was used for the first time in March 1990 to block consideration of a draft resolution on a country-specific human rights situation in relation China.
relationship in October 1990.\textsuperscript{409} Under such circumstances, it is perhaps not surprising that, year after year, EU attempts to secure a resolution on China at the Commission on Human Rights were met with scepticism and derision by China and its supporters.

No draft resolution on China was tabled at the next session of the Commission on Human Rights which took place in March 1991, reportedly in return for Chinese support in the UN Security Council during the Gulf War.\textsuperscript{410} In August 1991 however, a second resolution from the Sub-Commission focused the attention of the Commission on Human Rights on human rights practices in China once more.\textsuperscript{411} Resolution 1991/10 expressed its concern at ‘the continuing reports of violations of fundamental human rights and freedoms which threaten the distinct cultural, religious and national identity of the Tibetan people’ and called directly upon the Chinese Government to ‘fully respect the fundamental human rights and freedoms of the Tibetan people’.\textsuperscript{412} Like its predecessor, the resolution also requested the Secretary-General to transmit information on the issue to the Commission on Human Rights.

When the Commission on Human Rights met on 10 March 1992 to consider a draft resolution on the human rights situation in China/Tibet tabled for the first time by the rotating EU presidency, most Western states including the EU members, the United States and Japan, had largely normalised their relations with China despite the serious ongoing concerns expressed in draft itself and the numerous UN reports to which it referred, including those on torture, summary or arbitrary execution, and religious tolerance, as well as the report from the Working Group on Enforced or Involuntary Disappearance.\textsuperscript{413}

\textsuperscript{409} European Commission (1990) \textit{Bulletin of the European Communities} Bull-2/1990, section 1.3.1
\textsuperscript{411} UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1991/10 of 23 August 1991
\textsuperscript{412} ibid
In what was to become a familiar pattern, following the conclusion of the introductory remarks arguing in favour of the draft, China defended its human rights record and criticized the draft on grounds that it ‘ran counter to the basic principles of respect for the sovereignty and territorial integrity of states’. 414 This intervention was followed by a statement from Pakistan which moved a motion of no-action on the same grounds. A debate followed and the motion was adopted 27 votes to 15 with 10 abstentions. 415

In 1993 and 1994, draft resolutions introduced by The Netherlands and Greece were also set aside following the adoption of no-action motions moved by China, although in response to increased lobbying on the part of the EU and its co-sponsors the margin in favour of the no-action motion decreased from a high of 12 votes in 1992 to just 4 votes in 1994.416 As has been well documented elsewhere, the Chinese no-action motion was finally defeated at the 1995 session of the UN Commission on Human Rights with 22 votes in favour, 22 votes against and nine abstentions, enabling the Commission to debate the draft itself for the first time. 417

Lempinen, who has written the most comprehensive study to date of China’s treatment at the UN Commission on Human Rights, has argued that

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415 ibid paras. 1-39
while the UN Commission on Human Rights may have repeatedly taken the
decision not to formally debate the draft resolutions submitted on the situation
in China, in fact the procedural debates which took place over the no-action
motion ‘have not been on anything but the situation of human rights in China’.
To support this argument he points out that a total of 15 statements were made
during the debate over the no-action motion in 1995, the only year in which the
motion was rejected, while by comparison just two statements were made in
connection with the draft, one explanation of the vote before the vote and one
explanation of the vote after the vote.418 However, as will be demonstrated
below, a mere headcount of the statements made is not a reliable indicator of
the quality of the debate generated.

Despite the inclusion of positive language noting ‘the successful efforts
of China to better the economic situation of the country…thus improving the
enjoyment of economic rights’, the 1995 draft resolution was more strongly
worded than its predecessors, naming for the first time the ‘local, provincial and
national authorities’ in China as the perpetrators of human rights violations.419
However, the summary records of the 7 March UN Commission on Human
Rights meeting reveal that while the member states of the European
Community sponsored the draft and lobbied against the no-action motion, they
did not take advantage of the opportunity provided by the debate to express
their concerns about the human rights situation in China.

Of the 14 states that took the floor during the debate on the no-action
motion, eight spoke in favour of the motion while five spoke against, including
France – which then held the presidency of the EU – and the United Kingdom.
Without elaborating their concerns in relation to China’s human rights
practices, those states which spoke against the no-action motion made their
arguments on the basis that no country should be exempted from scrutiny at the

UN Commission on Human Rights and that any refusal on the part of the
Commission to consider the draft resolution would seriously undermine its
credibility. At the same time, states speaking in favour of the motion expressed
their belief that the draft was a politically motivated attack against all
developing countries. Numerous as they may be, such statements do not address
the substance of the draft resolution or EU concerns about human rights
practices in China since rather than argue that the draft should be considered by
reference to the serious allegations made within it, a principled argument is
constructed against the use of no-action motions to prevent consideration of
country-specific situations per se.420

Likewise, the official summary records of the 8 March meeting, during
which the draft resolution was ultimately rejected by 21 votes to 20 with 12
abstentions, reveal that no EU member state contributed to the brief debate on
the draft. The explanation of the vote provided by France stated only that the
‘human rights violations taking place in China were of legitimate concern to the
international community, and the fact that the draft resolution had been
submitted would be bound to strengthen the credibility of the Commission on
Human Rights and encourage all those who were endeavouring to tackle human
rights problems objectively in countries throughout the world’.421

Notwithstanding the disappointing outcome of the meeting in March,
the apparent commitment of the EU to UN human rights mechanisms as the
most appropriate channel through which to address country-specific human
rights violations was confirmed in July 1995, when the European Commission
issued its first communication on relations with China. The communication
states that:

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420 UN Commission on Human Rights (1995) Summary Record (7 March 1995) UN Doc:
E/CN.4/1995/SR.59/Add.1, paras. 57-72
421 UN Commission on Human Rights (1995) Summary Record (8 March 1995) UN Doc:
Effective concertation in the human rights debate at international level is a prerequisite for a successful policy. The EU puts particular stress on the involvement of the international community through the UN Commission on Human Rights. The level of international support attracted for the resolution criticising the situation in China in February 1995 suggests that this approach is bearing fruit.\footnote{European Commission (1995) Communication of the Commission: A Long Term Policy for Europe China Relations COM(95) 279, section B.2. para. 7}

This statement is unambiguous not just in the priority it affords to multilateral monitoring as a vital component of external human rights policy but also specifically in ascribing a key role to the tabling of country-specific draft resolutions at the UN Commission on Human Rights.

While underlining the commitment of the EU to multilateral monitoring through the UN, the 1995 European Commission communication on China also warns of the danger that ‘relying on frequent and strident declarations’ would ‘dilute the message or lead to knee-jerk reactions from the Chinese government’.\footnote{ibid B.2. para. 1} Arguing that the ‘key criterion for pursuing human rights initiatives must be effectiveness, the impact that an initiative would have on the ground’ the communication goes on to announce the establishment of a ‘dialogue specifically devoted to human rights’ as the most prominent innovation in its new policy of ‘constructive engagement’ with China on human rights.\footnote{ibid B.2. para. 8}

From the outset, it was made clear that the Human Rights Dialogue was not to be seen as a replacement for the discussion of EU concerns within the context of the broader political dialogue but as an addition to it. In this regard, the communication states that:

The EU must pursue a detailed dialogue on all aspects of human rights at every opportunity. The new and more systematic arrangements for Political Dialogue provide regular fora for exchanging views and deepening understanding on human rights issues.\footnote{ibid B.2. para. 7}
This commitment is repeated in the communication from the European Commission on relations with China issued in 1998 and reinforced by those issued in 2001 and 2003 which describe human rights as a ‘priority focus’ for political dialogue. But in spite of the prominent role ascribed to the incorporation of a human rights dimension into the broader political relationship, no mechanism has been put in place to monitor and report on the extent to which human rights have indeed been raised by the EU in its regular contacts with China.

As a demonstration of the EU’s commitment to the discussion of human rights in its contacts with China at the highest political level, commencing in 2002, the inclusion of a reference to human rights has been negotiated in most, if not all, of the joint statements issued by the two sides following successive EU-China Summits. However, these statements do not provide an account of the nature of the discussions which took place but merely serve to confirm the mutual importance attached by both sides to the promotion and protection of human rights as well as to the bilateral human rights dialogue as an appropriate venue for the discussion of the issue. Even less space has been given to the issue of human rights in statements made by the EU following other high-level bilateral contacts. For example, following the second EU-China Strategic Dialogue between the High Representative for Foreign Affairs and Security Policy, Catherine Ashton, and China’s State Councillor Dai Bingguo in 2011,

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427 Council of the European Union (2012) Joint Press Communiqué of the 14th EU-China Summit 6474/12 Presse 50, Beijing, 14 February 2012, para 6
Ashton states merely that the meeting provided ‘an opportunity to set out the EU’s views’. 428

As stated in chapter 3.1, the EU Guidelines on Human Rights Dialogue issued by the Council of the European Union in 2001 also committed the EU to ‘mainstreaming’ human rights concerns in all its contacts with dialogue partners, not just those that fall within the rubric of structured political dialogue. 429 In reality however, it is not difficult to find evidence of occasions on which human rights have been deliberately excluded from the agenda for such encounters. For example, in an answer from the European Commission to a written parliamentary question from MEP Philip Claeys enquiring as to whether or not human rights issues were discussed during the June 2003 visit of EU Trade Commissioner Pascal Lamy to China the following statement is made:

The sole objective of the visit to China on 13 and 14 June by the Member of the Commission responsible for Trade was to discuss trade issues with the new Chinese government...The human rights issue was therefore not broached on this visit. However, it is at the very core of the EU’s relations with China. The EU’s concerns on this matter are regularly raised, notably at meetings forming part of the political dialogue with China. In addition, the Union has been conducting a structured dialogue since 1997 on human rights with China. Every six months this provides the opportunity to reiterate these concerns and encourage China to make improvements in terms of respect and promotion of human rights in that country. 430

However, it must be recalled that such omissions are also evident in statements that predate the inauguration of the dialogue, which would caution against the conclusion that the ‘public speechlessness’ of the EU on the issue has been a

428 European Union (2011) Speech of High Representative Catherine Ashton at the EU Strategic Dialogue with China, Gödöllő A181/11, Brussels, 12 May 2011
direct result of the human rights dialogue. For example, according to Wan, as early as 1994, the French Prime Minister Edouard Balladur refused to raise specific human rights concerns during an April 1994 visit to China on the basis that the exclusive purpose of the visit was to boost bilateral economic ties.

In addition to confirming that the EU-China Human Rights Dialogue was to exist as a third channel for bilateral human rights diplomacy vis-à-vis China, ‘on top of’ the UN Commission on Human Rights and the political dialogue, the 1995 communication from the European Commission on relations with China also stated that the dialogue – the first round of which took place in Brussels on 25 and 26 January 1995 – was launched at the suggestion of China. This statement, and the fact that the dialogue was inaugurated in the same year China’s human rights record became the subject of every Working Group and Special Rapporteur’s report produced by the UN, has led to the development of a foundational myth which insists that the policy preference for dedicated human rights dialogue was exclusively Chinese, that it was motivated by a desire on the part of the authorities to sideline public criticism of its human rights record at the UN Commission on Human Rights, and that the eventual agreement of the EU to launch the dialogue represented a significant diplomatic defeat for the member states which were successfully divided and outmaneuvered by their Chinese counterparts. However, the EU’s global preference for soft policy characterised by positive measures including dialogue

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in fact predates the inauguration of the EU-China Human Rights Dialogue by several years, as demonstrated in chapter 3.

In December 1995, this first communication on relations with China was reviewed by the Council of the European Union which ‘endorsed the broad lines of the analysis and recommendations’ proposed therein. However, in contrast to the endorsements of key European Commission communications on China offered by the Council of the European Union on subsequent occasions, in 1995, the ‘guidelines for a European Union strategy towards China’, set out by the Council differed from those proposed by the European Commission on one key issue. In relation to human rights, having highlighted the importance attached to the issue in the EU’s bilateral relationship with China and the ‘constant attention’ afforded to it, the Council of the European Union proceeded to welcome the EU-China Human Rights Dialogue which was described, not as complementing action at the UN Commission on Human Rights but, as complementing the ‘political dialogue with the EU and its member states’ established in the previous year. The Council of the European Union then states that ‘[b]oth the bilateral political dialogue and the ad hoc dialogue on human rights provide suitable frameworks

438 ibid 3-4
for shaping with rigor and pragmatism an effective EU human rights policy vis-à-vis China’. 439

No mention is made in the conclusions of the Council of the European Union of a role for multilateral monitoring in the EU’s human rights strategy. This absence demonstrates that, even as the efforts of the EU to secure a resolution at the UN Commission on Human Rights critical of China’s human rights record were beginning to ‘bear fruit’, the member states in the Council of the European Union did not all share the view of the European Commission on the EU approach to China at the UN. 440 Given that the member states, rather than the European Commission, were the decision makers with regard to EU positions at the Commission on Human Rights, this lack of agreement over core policy principles must be understood as a clear sign that the consensus, which had existed among the member states regarding EU sponsorship of a draft resolution on China for six years post-Tiananmen, had begun to crumble.

The second round of the EU-China Human Rights Dialogue took place in Beijing on 22 and 23 January 1996. In spite of this meeting and the direct request made during it by the Chinese side that the EU no longer sponsor a draft resolution on the human rights situation in China at the UN Commission on Human Rights, the EU member states maintained their existing position and a sixth draft was submitted at the Commission on Human Rights three months later. 441

German Foreign Minister Klaus Kinkel, in his statement to the Commission on Human Rights on 16 April 1996, made it apparent that the decision to support the draft was taken reluctantly by some member states as a result of the failure of attempts to secure concrete concessions from China in return for a change in the EU stance at the Commission on Human Rights:

439 ibid 4
Having failed to persuade the Government of China in an exhaustive dialogue to take further steps to improve its human rights record, the European Union had, together with the United States, submitted a draft resolution on the human rights situation there which derived entirely from concern for the international respect of human rights.  

In line with the December 1995 conclusions of the Council of the European Union on EU-China relations, this statement indicates that, given the right moves on the Chinese side, certain member states would be prepared to alter their position at the UN Commission on Human Rights, bringing an end to the consensus that had existed among them since 1990.

Ultimately, the 1996 Chinese no-action motion was adopted by 27 votes in favor to 20 against with six abstentions, and the draft resolution was set aside without consideration once more. Regardless of this outcome, the third EU-China Human Rights Dialogue scheduled to take place in the second half of 1996 was subsequently cancelled by the Chinese side in protest at the member states’ continued sponsorship of a draft resolution, clearly demonstrating that in the eyes of China, the biannual dialogue and the annual draft resolution could not coexist.

In 1997, the EU member states acting in the Council of the European Union did not reach a decision addressing sponsorship of a draft resolution at the Commission on Human Rights in advance of its 53rd session. Instead, the Council of the European Union ‘reaffirmed its willingness to continue’ the stalled human rights dialogue, directed the Dutch Presidency to ‘intensify, in close co-operation with other interested parties, the consultations and preparations already underway for the possible tabling of a Resolution on human rights in China’ and concluded that a final decision on the matter would

be taken ‘in the light of developments’. As documented elsewhere, the member states ultimately split over the issue, with France, Germany, Italy, Spain and Greece deciding not to cosponsor the draft resolution introduced by Denmark and supported by the remaining nine members of the European Community. In spite of having refused to cosponsor a draft resolution, Germany, France and Italy spoke and voted against China’s no-action motion on grounds that it threatened the credibility of the Commission on Human Rights, as did Denmark, Ireland, Austria, the Netherlands and the United Kingdom.

Notwithstanding the careful avoidance of the use of condemnatory language and a concerted effort to paint the draft resolution as an invitation to dialogue with the High Commissioner for Human Rights, the ‘rising tension and increasing acrimony’ remarked on at the meeting by the delegate from Bangladesh is glaringly apparent in the summary record, in particular in the statements made in favour of the no-action motion. The delegate from Algeria for example, remarked on the lack of consensus on the substance of the draft resolution even among its sponsors ‘the states of the Western world’. The delegate from Malaysia argued that the draft had been ‘rejected for the past six years’ because ‘the Commission saw no need to consider it’ while the delegates from Cuba and Sri Lanka insisted that the no-action motion would be

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446 Spain and Greece were not members of the Commission in 1996 and as a result could not vote on the motion.
448 ibid paras. 72-73
adopted once more ‘because the majority of the members of the Commission considered that a draft resolution was not the best way of addressing a problem’. 449

According to the summary record, the delegate from Pakistan closed the debate by stating that:

> There were other, far more serious, situations of persistent violations of human rights which the sponsors of the draft resolution, and the Commission as a whole, chose to ignore year after year...The representative of the Netherlands had expressed the hope that China had proposed a no-action motion for the last time. He, in turn, hoped that the sponsors of the doomed draft resolution had placed it before the Commission for the last time.450

The Chinese no-action motion was adopted by a decisive margin when 27 members voted in its favour with 17 against and nine abstentions.451 It was the last occasion on which any EU member state sponsored or tabled a draft resolution on the situation of human rights in China at the UN Commission on Human Rights.

Following China’s lead, the tactical use of the no-action motion has since been employed by numerous other states in an attempt to block consideration of country-specific draft resolutions on Burma, Cuba, Iran, North Korea, Sri Lanka, Sudan, Turkmenistan, Uzbekistan and Zimbabwe.452 Moreover, its use has extended beyond the UN Commission on Human Rights and has become a feature of the debate in a variety of UN fora, including the Third Committee of the UN General Assembly and the UN Human Rights Council, where it was used for the first time in 2009.453

449 ibid, para. 65, paras. 76-77, paras. 60-61
450 ibid 88
451 ibid 91

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4.3 Policy shift

It has been argued that frustration over the failure of repeated efforts to pass a resolution on China’s human rights record at the UN Commission on Human Rights was a major contributing factor leading to the February 1998 decision taken by the Council of the European Union not to table or co-sponsor a draft resolution on China at the upcoming session of the UN Commission on Human Rights. While such considerations may have featured in the private deliberations of the actors involved, this issue was not advanced publicly by the EU as an argument in defence of the 1998 decision. Rather, in their public declarations at the time, both the European Commission and the Council of the European Union maintained the line that the decision was taken on the basis that dialogue was an effective policy tool and that it had produced results and would continue to do so.

On 23 February 1998, the Council of the European Union announced its first formal position regarding the stand that would be taken by the EU member states on a country-specific draft resolution at the UN. The decision not to table or co-sponsor a draft resolution on China was justified as follows on the basis of the first ‘encouraging results’ produced by the dialogue.

In view of the initial encouraging results of the EU-China Human Rights Dialogue, the Council agreed that neither the Presidency nor Member States should table or cosponsor a draft resolution at the next UN Commission on Human Rights. The EU’s opening statement at the fifty-fourth session of the Commission on Human Rights will refer to


the human rights situation in China. If the situation arose, the Council agreed that EU delegations should vote against a no-action motion.456

The precise nature of these first encouraging results was set down by Brittan just over a fortnight later during a meeting in Brussels with prominent Chinese dissident Wei Jingsheng who had been released from prison in China on medical parole to the United States in November 1997.457 A written account of the meeting transmitted to the European Parliament Sub Committee on Human Rights set out an extensive list of recent positive developments including: agreement on a ‘substantial’ package of EU funded human rights cooperation programmes; signature of the International Covenant on Economic Social and Cultural Rights; an undertaking to sign the International Covenant on Civil and Political Rights; agreement to establish a network of experts to facilitate signature and ratification of the two covenants; confirmation of an invitation to the UN High Commissioner on Human Rights to visit China in ‘the first half’ of 1998 as well as agreement to allow visit of ‘various’ UN Rapporteurs including the 1997 visit of the Working Group on Arbitrary Detention; an agreement on an ‘early visit’ of the EU to Tibet; an agreement regarding a follow-up seminar to the Beijing Conference on Women; an agreement to incorporate NGOs ‘more fully’ into the bilateral human rights Dialogue; and an undertaking to report on the implementation of the UN Covenants in Hong Kong and not to introduce the death penalty in Hong Kong.458

458 The ‘EU Troika’ refers to a triumvirate usually composed of representatives of the former, current and incoming EU presidency, plus a representative of the European Commission and the Council of the European Union. From 1999, the former presidency was replaced by a representative of the Council Secretariat.
As outlined in chapter 2 above, the so-called Beijing Spring from September 1997 to October 1998, during which the Council of the European Union took its decision with respect to the position of the EU at the 54th session of the UN Commission on Human Rights, was a period characterised by greater openness in China reflected in a marked optimism in the West regarding the potential for positive human rights reform. It was also a period of intense activity in the bilateral EU-China human rights relationship during which took place: four rounds of the formal EU-China Human Rights Dialogue; one informal dialogue round; the first and second EU-China Human Rights Seminar; an EU troika field visit to Tibet; and a dedicated China-EU seminar on women’s rights. That such intense levels of activity in an atmosphere of positive change may be expected to yield tangible results was not unreasonable and in fact in 1998 the EU was not alone in making the decision not to table or co-sponsor a draft resolution on China’s human rights record on grounds of the ‘positive steps’ being taken.459 The same decision was for example reached by the United States and justified on the basis that China had made a commitment to sign the International Covenant on Civil and Political Rights.460 However, the arguments put forward by the EU to justify its decision not to table or co-sponsor a draft resolution differed significantly from those advanced by the United States in attempting to tie the progress achieved exclusively to the dialogue approach.

Brittan maintained that ‘many of the specific actions called for in the last draft UN Resolution which the EU supported…have now been agreed upon within the context of the dialogue’.461 On this basis he argued that it was ‘difficult to claim that the support for tabling of a UN Resolution…was a more

effective way to pursue the objectives set out in the draft resolution'. In this regard, he highlighted three areas in particular where progress had been made on issues raised in the 1997 draft resolution: signature of the two UN Covenants; EU visits to Tibet; and strengthening of UN Cooperation.

Firstly, it is notable that Brittan includes ‘EU visits to Tibet’ as a ‘specific action’ called for in the 1997 draft when in fact the draft made no mention of the need for an EU visit to the region but called instead on the Government of China to ‘preserve and protect the distinct cultural, ethnic, linguistic and religious identity of Tibetans and others’. To suggest that somehow this would be the automatic outcome of the EU visit grossly overinflates its potential impact. In fact, Kinzelbach has argued convincingly that not only did the visit, which took place in May 1998, fail to have any discernable positive impact on the ground but that, by accepting tight Government supervision of the entire programme, it ‘solidified the inability of external actors to negotiate meaningful conditions for human rights assessment missions to China’. Brittan’s statement also claims progress in relation to ‘strengthening human rights cooperation’. This rather broad term is not in fact used in the 1997 draft resolution which calls on China to ‘continue to strengthen its bilateral dialogues’ and separately for it to ‘cooperate fully with all thematic special rapporteurs and working groups of the Commission on Human Rights’.

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462 ibid
In August 1997, Chinese officials indicated their willingness to reinstate the EU-China Human Rights Dialogue ‘without preconditions’. Correspondingly, the dialogue, which had failed to take place in either the second half of 1996 or the first half of 1997 due to China’s objection to continued EU sponsorship of a critical draft resolution at the UN Commission on Human Rights, resumed in the autumn of 1997 with a preparatory meeting taking place in October in advance of the dialogue which took place in December. By the time Brittan made his statement, another round of dialogue had taken place in January 1998 and one was planned for the autumn. However, to claim that the resumption of the dialogue was somehow a result of the dialogue is circuitous in the extreme and is more demonstrative of Brittan’s determination to present an impressive list of results for the dialogue approach than of its actual effectiveness.

Undoubtedly, progress had been made in relation to China’s cooperation with UN mechanisms, including a visit of the Working Group on Arbitrary Detention in 1997 and agreement in principle to a visit from the UN High Commissioner on Human Rights which took place in September 1998. Progress had also been made in relation to the two UN Covenants, with the International Covenant on Economic Social and Cultural Rights signed in 1997 and an undertaking to sign the International Covenant on Civil and Political Rights secured. However, these advancements, while significant, do not in themselves amount to ‘agreement of the specific actions’ contained in the draft resolution as stated by Brittan since the progress called for in the draft was much more far reaching, including: ratification of both covenants; ‘observance of all human rights’ in accordance with China’s obligations; and ‘full cooperation’ with all UN human rights mechanisms. Moreover, to ascribe the progress achieved during the period March 1997 to 1998 to any one particular policy instrument

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468 ibid
or actor, at a time when a multitude of actors used a range of instruments to elicit concessions from China, is highly questionable. Thus, the arguments put forward by the EU lacked rigor and were not sufficient to justify what transpired to be a permanent policy choice.

The 1998 common position of the Council of the European Union ‘represented a major policy shift’ and as such was highly controversial. The delicate internal consensus that enabled this policy shift was predicated on the basis that the human rights reforms initiated during the Beijing Spring of 1997 to 1998 would gather pace and that China would continue to demonstrate ‘increased willingness to be integrated into the international human rights system and to discuss problems openly and act co-operatively’. This consensus collapsed following the backlash against the China Democracy Party and pro-democracy human rights activism beginning in October 1998 and the suppression of the Falun Gong movement beginning in 1999 as evidenced in the March 1999 European Parliament Resolution on the EU’s priorities for the 55th Session of the United Nations Commission on Human Rights.

This resolution, while describing the human rights dialogue as a ‘welcome establishment’, called unequivocally for the EU member states to revert to previous policy and table a draft resolution on human rights in China in response to the ‘recent crackdown on dissidents’, signaling the establishment of a strong dissenting discourse on the promotion of human rights in China from within the institutions of the European Union. However, in spite of the deteriorating situation in China and Brittan’s earlier assertion that ‘the EU attitude towards a UN Resolution in the future would be entirely conditional on continued and demonstrable progress being made in China’, in March 1999

470 ibid
472 European Commission, Vice President of the European Commission Sir Leon Brittan (1998) Bilateral EU-China Dialogue on Human Rights: Meeting with Wei Jingsheng (Subcommittee
the Council of the European Union merely ‘confirmed its position concerning the EU’s approach to China’ for the upcoming session of the UN Commission on Human Rights, without offering any justification for doing so, while at the same time expressing its dismay at ‘the December crackdown on peaceful political activists and by the continuation of arrests and sentencing’.  

As stated previously, positions reached by the EU under the Common Foreign and Security Policy mechanism require unanimity. In spite of the undertaking to define and implement a unified foreign policy enshrined in Article J.1 Title V of the Maastricht Treaty, in 1997 each of France, Germany, Italy, Spain and Greece broke with the established EU approach to China at the UN Commission on Human Rights, publicly splitting the member states over sponsorship of the draft resolution. In the absence of a unanimous decision to revert to previous policy in recognition of the deteriorating human rights situation in China and sponsor a draft resolution in March 1999, the member states faced two options: to allow a second public split over the issue, or to attempt to reach a compromise position.

While the prospect of a second public split over the issue of human rights in China was in itself a serious matter for the EU, it must also be remembered that these negotiations took place against a backdrop of renewed conflict in the former Yugoslavia, leading on 24 March to the launch of a second NATO intervention in the region in less than four years. At the 21 to 22 March meeting of the Council of the European Union in Brussels, all minds were therefore turned to Kosovo and ‘the last chance for a peaceful solution’ presented in the form of the Rambouillet accords. Under such circumstances, the question of how to avoid a repeat of the weak and divided EU response to  

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the Bosnian war loomed large. Thus, not only was the EU position on China at the UN Commission on Human Rights not the most pressing foreign policy issue on the agenda of the meeting, but the situation in Kosovo also served to highlight the urgent need for the member states to make good on the promise of a common EU foreign and security policy as set out in the Maastricht Treaty.

Ultimately, the compromise position negotiated in relation to China prevented the EU from tabling or co-sponsoring a draft resolution at the UN Commission on Human Rights in 1999. Instead the EU member states were to vote against the Chinese no-action motion and to deliver a total of three statements setting out, in some detail, their collective concerns about human rights violations in China. These were delivered within the context of the debate on the no-action motion, during the opening remarks of the EU presidency and under the agenda item addressing violations of human rights and fundamental freedoms in any part of the world.

4.4 Policy discourse

In order to maintain the legitimacy of a highly controversial policy choice, justified explicitly on the basis of its potential impact, it fell to the European Commission and the Council of the European Union to demonstrate that it had produce significant results and would continue to do so. This responsibility has been recognised by the European Commission. In a strong statement made during a debate in the European Parliament on the EU strategy for the year 2000 session of the UN Commission on Human Rights, External Relations Commissioner Chris Patten asserted that ‘[i]f we are to rest our position on the human rights dialogue, then we need to be able to convince you, the NGO community and the public at large that it is actually getting

somewhere’. But in spite of the fact that the dialogue policy was justified on
grounds of its effectiveness and the fact that the Council of the European Union
and the European Commission accepted the responsibility this incurred on them
to monitor and communicate its progress, some ten rounds of dialogue took
place over a six year period before a stable set of objectives for the new policy
approach was agreed and made public in 2001.

Following the first internal evaluation of the dialogue conducted under
the French Presidency in the second half of 2000, the Council of the European
Union publicly released a set of eight benchmarks for the dialogue in 2001.
These benchmarks remain current and are referred to in all internal evaluation
processes. They are:

- ratification and implementation of the Covenants on Civil
  and Political Rights and on Economic, Social and Cultural
  Rights;
- cooperation with human rights mechanisms (visit by the
  Rapporteur on Torture, invitation to other Rapporteurs,
  follow-up to recommendations from conventional
  mechanisms and recommendations by Rapporteurs,
  implementation of the agreement with the Office of the
  High Commissioner for Human Rights);
- compliance with ECOSOC guarantees for the protection of
  those sentenced to death and restriction of the cases in
  which the death penalty can be imposed, in keeping with
  Article 6 of the Covenant on Civil and Political Rights;
  provision of statistics on use of the death penalty;
- reform of administrative detention; introduction of judicial
  supervision of procedures; respect for the right to a fair and
  impartial trial and for the rights of the defence;
- respect for the fundamental rights of all prisoners,
  including those arrested for membership of the political
  opposition, unofficial religious movements or other
  movements, such as the Falun Gong; progress on access to
  prisoners in Chinese prisons, including in the autonomous
  regions; constructive response to individual cases raised by
  the EU;
- untrammeled exercise of freedom of religion and belief,
  both public and private;

478 European Commission, External Relations Commissioner Chris Patten (2000) Next Session
Engagement or Failure? (PhD thesis presented at the Ludwig Boltzmann Institute), p. 96
479 Council of the European Union (2001) 2327th Council Meeting: General Affairs 5279/01
- respect for the right to organise;
- respect for cultural rights and religious freedoms in Tibet and Xinjiang, taking account of the recommendations of the committees of the United Nations Covenants, halt to the "patriotic education" campaign in Tibet, access for an independent delegation to the young Panchen Lama, Gedhun Choekyi Nyima, who has been recognised by the Dalai Lama.

The internal evaluation which gave rise to these benchmarks notes the existence of ‘deux extremes’ in the nature of China’s engagement on human rights issues over the course of the eight rounds of dialogue held to date. These two extremes are expressed as, on the one hand, ‘l’ouverture initiale de la Chine au dialogue et des avances dans domaines important’ and, on the other, as ‘l’extreme sensibilite a l’evocation de subject touchant a l’organisation politique du pays ou a sa politique en matiere de minorities’. In this regard, the evaluation notes that while there was a willingness on the part of the Chinese to engage on certain questions, including the judicial system, the death penalty, and administrative detention, attempts to engage on others, including dissidents, minorities, and freedom of expression, were viewed as ‘une menace pour le regime’. Remarkably however, the benchmarks agreed for the dialogue include issues not only from the list of areas where a willingness on the part of the Chinese to engage was identified in the 2000 but also in areas where all attempts to engage had been rejected. This reality suggests that the eight issues highlighted by the benchmarks represent a list of the EU’s priority concerns regarding human rights practices in China rather than a list of core objectives which it was agreed could most readily be progressed through the instrument of dialogue.

The stated aim of the Council of the European Union in making public the objectives of the dialogue was to enhance the transparency of the dialogue.
process by providing a stable set of benchmarks against which to ‘evaluate the results of the dialogue at regular intervals, to determine how far its expectations have been met’. However, the practical value of the benchmarks identified is severely limited by two significant factors. Firstly, the benchmarks were never discussed with the Chinese side. Therefore, they represent a unilateral statement of purpose rather than a mutually agreed set of objectives for what is, after all, a bilateral process. Secondly, the benchmarks announced in 2001 represented long-term objectives requiring systemic change in China, rendering them of little use as a yardstick against which to measure the results of the biannual meetings on an ongoing basis. This significant shortcoming has been recognised in the two internal reviews of the dialogue conducted since the benchmarks were made public in 2001.

The 2004 review, which was partially declassified following a freedom of information request by the author under Regulation EC 1049/2001, states as follows:

As regards the specific areas (‘benchmarks’) that the EU has established to measure progress in, it is acknowledged that the EU has set them at the highest level, namely the ideal situation of full and guaranteed respect for human rights and the rule of law.

The review goes on to state that:

The large number of objectives that the EU has stated for its Human Rights Dialogue with China inherently leads to a mixed picture of both optimism and continuing concern.

But in spite of the admission that the 2001 benchmarks are not fit for purpose, the 2004 review falls short of calling for the identification of additional short-

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486 ibid section 3.2.
term goals. This call is however included in the 2009 internal assessment of the dialogue obtained by the author from confidential sources. The assessment recommends the formulation of ‘realistic, short-term objectives’ in addition to the benchmarks and states that, ‘in the period under review, steps in this direction have been taken but not followed up’.

There exist two principal sources of regular public statements from the Council of the European Union addressing the objectives and results of the dialogue: the Common Foreign and Security Policy Annual report published each year since 1998; and the EU Annual Report on Human Rights published each year since 1999. From 2005 onwards, this information is supplemented by biannual press releases issued by the presidency of the day following the conclusion of each dialogue round. In addition, publicly available documents from each of the following sources also contain occasional references to the results of the dialogue: conclusions and declarations from the Council of the European Union; official responses from individual EU Commissioners and the rotating presidency to questions about the dialogue from members of the European Parliament; and China policy documents issued by the European Commission and endorsed by the Council of the European Union.

A review of these documentary sources demonstrates that on only one occasion since the end of the Beijing Spring in the autumn of 1998 was a specific outcome directly related to the EU benchmarks claimed for the dialogue in a public statement issued by the European Commission, the rotating presidency or the Council of the European Union. The 2003 Annual Report on Human Rights states that during the round of dialogue which took place in November 2002 the Danish Presidency ‘managed to extract from the Chinese a written invitation to the UN Special Rapporteur on education’. That such an invitation was in fact transmitted to the EU delegation during the November 

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Aside from this notable exception, other public statements on the dialogue issued by the same sources and reviewed by the author are assiduous in their avoidance of making similar declarations clearly linking the policy of dialogue to concrete results in the priority areas identified, while at the same time employing a number of discursive strategies in order to create the impression of acceptable levels of progress without making any direct claims. The 2003 European Commission communication on relations with China provides a clear example of several such strategies. The opaque and cautiously worded communication states that:

The dialogue has led to \textbf{some positive developments}. China has stated its engagement to enhance co-operation with UN Human Rights mechanisms, in particular with the UN High Commissioner for Human Rights, the Special Rapporteurs on torture and on education, and the Chairman of the Working Group on Arbitrary Detention, although these commitments have yet to be fully realised. The dialogue has allowed for extensive exchanges of views on individual cases of human rights violations, and China’s offer to provide information on individual cases between dialogue rounds is a welcome further step. Moreover, \textbf{EC human rights-related assistance programmes} have been implemented in a largely satisfactory manner, and China has shown readiness to envisage further projects, including on sensitive issues such as torture prevention in police and prison administration.\footnote{European Commission (2003) Commission Policy Paper for Transmission to the Council and the European Parliament: A Maturing Partnership - Shared Interests and Challenges in EU-China Relations (Updating the European Commission’s Communications on EU-China Relations of 1998 and 2001) COM(2003) 533 final, Brussels, 10 September, p. 13 [bold text in original]}

In an effort to present an overall picture of gradual progress the communication publically welcomes a commitment from the Chinese side to enhance cooperation with UN Human Rights mechanisms while at the same time acknowledging that this commitment has not been ‘fully realised’ and
without stating clearly whether in fact the dialogue is judged to have contributed to it. The communication also highlights the ‘largely satisfactory’ implementation of EC human rights related assistance projects as an area in which the dialogue is judged to have brought about ‘positive developments’. While the negotiation of human rights related assistance projects has been a feature of the dialogue since its inception, this is not in fact among the stated objectives of the dialogue and is not one of the benchmarks against which the impact of the dialogue is measured. Furthermore, despite the insistence of the European Commission that the dialogue has ‘allowed for the implementation of a number of cooperation projects in the field of the rule of law’, other states with no bilateral human rights dialogue have managed to find alternative channels through which to successfully negotiate projects in the same field with their Chinese counterparts; including Austria, Belgium, Denmark, France, Italy, the Netherlands and Sweden.\(^\text{491}\)

The timing of the statement welcoming certain developments in relation to individual cases is particularly curious, coming as it does shortly after a major disagreement between the two sides over the execution of Buddhist Lama Lobsang Dhondup, who was found guilty of bomb attacks in Sichuan Province.\(^\text{492}\) Lobsang Dhondup was on the EU list of individual cases of concern and had been the subject of two démarches directly prior to his execution, the first known execution of a Tibetan for political crimes in over two decades.\(^\text{493}\) It is striking however, that while referring to individual cases as one of the areas in which positive developments were noted, the statement does


\(^{493}\) Council of the European Union (2003) Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of CFSP Including the Financial Implications for the General Budget of the European Communities 7038/03, Brussels, p. 82
not claim that the dialogue has led to a single release or sentence reduction but rather that it has provided a venue for an ‘exchange of views’ on the matter.

That the dialogue has not played an instrumental role in any of the high profile prisoner releases welcomed by the EU since the late 1990s would seem to be confirmed by the 2009 internal assessment which states that ‘the Chinese side do not respond to EU requests for sentence reduction or release of political prisoners’, and that while ‘the Chinese side has in most dialogue rounds responded to the lists, the response is seldom satisfactory to the EU side’. 494
This analysis is supported by existing research which has concluded that the vast majority of high profile releases have been brokered by the United States and that while some of those released may have been on the EU list, the EU did not play a decisive part in negotiating the desired outcome. 495

The negligible impact of EU interventions on individual cases has also been recognised in the public statements made by the Council of the European Union and the European Commission in the years following the execution of Lobsang Dhondup. The 2005 Annual Report on Human Rights for example states:

There has been little or no progress in a number of areas of concern during the period under review. These include freedom of expression; freedom of religion; and freedom of assembly…. Persistent repression in these areas leads to large numbers of prisoners of conscience and only very little response from the Chinese side to the EU’s list of cases of concern. 496

Similarly, the 2007 Annual Report states that ‘unfortunately the limited action of the

Chinese government meant that very few individuals were released early and new names were added to the list of individual cases of concern in the course of the year.  

Reflecting a general deterioration in the bilateral human rights relationship following the execution in 2008 of businessman Wo Weihan on the very day EU and Chinese officials discussed his case in the dialogue and on whose behalf the EU had lobbied for clemency, the 2008 Common Foreign and Security Policy annual report states that:

> In the light of the events surrounding its 26th round (execution of Mr Wo Weihan on the day of the dialogue), and of the increased pressure on Human Rights Defenders, as outlined by the award of the Sakharov prize by the EP to Hu Jia (December 2008), the EU has asked for tangible signs of Chinese reengagement in the dialogue and has constantly voiced its concerns, notably through a list of individual cases transmitted to the Chinese authorities.

The report however fails to mention that confrontation over the execution – and in particular a strong public statement from the EU presidency condemning the execution which ‘seriously undermined the spirit of trust and mutual respect’ required for the dialogue – led for the first time to an outright refusal from the Chinese side to provide answers to the list of individual cases of concern submitted by the EU at the dialogue meeting.

As part of a concerted effort to cultivate the impression that the dialogue is more than an exchange of views among foreign affairs officials and in fact provides an opportunity for in-depth engagement on sensitive issues, the conclusion of Troika field visits to various locations including Tibet and

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Xinjiang has also been emphasised in public statements from the Council of the European Union and the European Commission. As stated previously, the agreement to allow an EU Troika field mission to Tibet was highlighted by Brittan in 1998 as one of the achievements of the dialogue.\textsuperscript{500} A second Troika field visit to Tibet took place in September 2004 with similar visits to the provinces of Jiangxi and Xinjiang in November 2002 and October 2005 respectively.\textsuperscript{501}

In relation to the 2002 visit to Xinjiang, the EU’s Annual Report on Human Rights for that year states:

\begin{quote}
At the initiative of the EU, the dialogue was followed by a field visit to Jiangxi province, where the EU is supporting the EU-China Village Governance Project, which provided an opportunity to reaffirm the commitment of the EU to promote democracy at the grassroots level in China.\textsuperscript{502}
\end{quote}

That EU officials should be permitted to visit the site of a project sponsored by the EU can hardly be considered an achievement in itself. Moreover, while perhaps the exact site of the visit was specified by the EU side as being of particular interest to the delegation, following established practice the itinerary was organised and dictated by the Chinese side.\textsuperscript{503} This was also the case regarding the visit to Tibet in 2004 and Xinjiang in 2005, leading the EU annual report on human rights to remark that these visits ‘largely confirmed EU


The careful construction of irrefutable circular arguments is also a prominent feature of public statements on the impact of the dialogue issued by the European Commission and the Council of the European Union. While insisting that the ‘human rights dialogue is an acceptable option only if enough progress is achieved on the ground’ and that the progress of the dialogue should therefore be monitored continuously, both the European Commission and the Council of the European Union have argued that in fact clearly visible results cannot be expected in the short to medium term. As stated in the March 2001 conclusions of the Council of the European Union:

\begin{quote}
[The dialogue] which includes in-depth discussions on issues of concern and is complemented by technical cooperation and seminars, in a long-term perspective contributes to the reform process and the promotion of rule of law in China as well as to further enhanced co-operation with the UN Human Rights mechanisms.\footnote{Council of the European Union (2001) 2338\textsuperscript{th} Council Meeting, General Affairs: Human Rights/China - Conclusions 6933/01, Brussels, 19 March 2001}
\end{quote}

Thus, while arguing on the one hand that the dialogue should be judged on its impact alone on the other hand it is argued that it is too early to expect the dialogue to have produced clearly visible results \textit{sic} the impact of the dialogue cannot be judged. The same line is presented in the 2005 Annual Report on Human Rights published by the Council of the European Union which states that although they ‘cannot yet realistically lay claim to major changes, either in attitude or actions, they do permit a frank exchange of views and are an important means of supporting reformers in the countries concerned’.\footnote{Council of the European Union (2005) EU Annual Report on Human Rights 2005 12416/05, Brussels, p. 53} That the Council of the European Union would state, a decade after the inauguration
of the dialogue, that it has not ‘yet’ rendered either a change in ‘attitude or actions’ gives a clear indication of just how long-term the objectives of the dialogue are in eyes of the EU member states.\textsuperscript{507}

In fact, rather than point to specific results as required to maintain the legitimacy of a controversial policy choice justified explicitly on the basis of its effectiveness, statements made by the European Commission and the Council of the European Union more often regret the lack of progress on many of the EU’s priority concerns and reiterate their resolve to make the dialogue more focused on producing results. The inaugural EU Annual Report on Human Rights complied by the Council of the European Union was published in 1999 and covers the period 1 June 1998 to 30 June 1999, which saw a marked deterioration in human rights practices in China. The report remarks that in spite of the ‘positive steps’ taken by China in the period under review, including signature of the two UN covenants ‘the severe crackdown on dissidents in December 1998, which the Union condemned on several occasions and addressed with the Chinese authorities, showed that the positive steps in the international arena were not matched by concrete progress in the human rights situation in the country’.\textsuperscript{508} The statement regretting the lack of progress on the ground is followed by the assertion that the Union ‘intends to make the human rights dialogue with China more focused and more orientated towards concrete improvement in the human rights situation’.\textsuperscript{509} This discursive pattern is closely echoed in the March 2000 conclusions of the Council of the European Union and frequently reproduced by both the Council and the European Commission thereafter, most notably in the 2001 and 2006 communications on relations with China issued by the European Commission and endorsed by the Council of the European Union.\textsuperscript{510}

\textsuperscript{507} ibid
\textsuperscript{509} ibid
The 2001 communication was released following a marked deteriorated in the human rights situation in China, with criminalisation of Falun Gong membership in July 1999 and a sustained crack down on political activism. The sense of frustration felt within the EU at the lack of progress achieved on key human rights concerns is palpable in the communication which states that:

China’s opening and joining the international community has always been fraught with difficulties and is likely to be so for many years. Nothing can be taken for granted. The reform process is not on permanent autopilot.511

In a significant hardening of the line taken in 1998, the 2001 communication states that while the EU-China human rights dialogue ‘is the European Union's preferred channel for working to improve the situation in the various areas of concern it is clear that dialogue is an acceptable option only if progress is achieved on the ground’.512 In spite of this warning however, no new initiatives are suggested in response to the changed policy environment.

The total absence of new thinking on the EU’s approach to the promotion of human rights in China is also clearly demonstrated in the 2006 communication from the European Commission. The communication states that the EU’s expectations ‘are increasingly not being met’ by the twice-yearly dialogue which is described as having been ‘conceived at an earlier stage in EU-China relations’.513 However, the communication does not propose a


512 ibid 11

definite course of action to remedy this situation and concludes, in spite of it, that the dialogue ‘remains fit for purpose’. 514

Following the most recent 2009 internal assessment of the dialogue, the Common Foreign and Security Policy report for that year reaffirms the aspiration of the Council of the European Union that the dialogue will become ‘more results oriented’. 515 This aspiration is repeated in the 2009 EU Annual Report on Human Rights which states that the recommendations contained in the review will be ‘discussed with China’. 516 These discussions are referred to once again in the 2010 Annual report, published in September 2011, which states that the EU ‘completed in consultation with the European Parliament and civil society, an evaluation of the dialogue and opened discussions with China on the implementation of the recommendations of this evaluation’. 517 However, the report does not provide any information about the recommendations which flowed from the evaluation and fails to mention that by the end of 2010 China had not agreed to implement a single one of them as evidenced by the fact that, save for the personnel changes on the EU side brought about by the Lisbon Treaty, the June 2011 dialogue, and the seminar which followed it in September 2011, rigidly adhered to established practice.

In relation to the dialogue itself, the 2010 report states that a single round of dialogue took place in that year ‘as China unilaterally cancelled the round which should have taken place in Beijing in the second semester’. 518 The 2010 report then concludes by providing, for the first time since the publication of the inaugural human rights report in 1999, an entirely negative analysis of developments in China during the previous 12 months.

514 ibid
518 ibid 146-148
The report for 2011 confirms that China once again refused to hold a second round of dialogue in the winter of that year.\textsuperscript{519} In addition, the report also states that the June 2011 round was not accompanied by a field visit since it ‘was not possible to reach agreement on a location for such a visit’.\textsuperscript{520} Given the enthusiasm on the EU side for such visits, described in the 2009 dialogue assessment as ‘of great value’ in contributing to ‘the knowledge of and insight into the situation on the ground in China’ and in the 2009 annual report on human rights as ‘an integral part of the programme on each occasion’, this failure can only be interpreted as a further attempt on the part of China to unilaterally scale back the dialogue and its associated activities.\textsuperscript{521} The brief statement on the EU-China Human Rights Seminars included in the 2011 annual report, states only that a single seminar took place in Beijing on the themes of human rights and drug policy and human rights and new technology.\textsuperscript{522} The report does not refer to China’s refusal at the eleventh hour to grant a visa to a representative from New York-based NGO Human Rights in China to participate in the event, which was alluded to in the press statement released by the EU following the seminar and which cast a deep shadow over the proceedings.\textsuperscript{523} Like its 2010 predecessor, the 2011 report concludes by providing a wholly negative assessment of human rights developments in China during the reporting period.\textsuperscript{524}

\textsuperscript{519} European Union (2012) EU Annual Report on Human Rights 2011 11518/12, p. 242
\textsuperscript{520} ibid
4.5 Effective multilateralism

The EU member states jointly sponsored a country-specific draft resolution at the UN Commission on Human Rights for the first time in 1989, when the then 12 members of the Union addressed the issue of human rights in Iran.\(^{525}\) In the years which followed, the official discourse on the role of the UN in the EU’s global human rights policy has been substantially developed, culminating in the publication of the 2003 European Commission communication setting out the commitment of the EU to ‘effective multilateralism’ as a ‘defining principle of its external policy’ the success of which ‘rests with the determination of states to obey the rules they have set themselves, and their commitment to persuade others to obey them when they are most tempted to do otherwise’.\(^{526}\) The communication also stated that to fulfil its role as a ‘front-runner’ the EU must be willing to ‘take the lead with an ambitious approach’ including in particular ‘country and thematic initiatives’.\(^{527}\)

In the case of China however, in contrast to the 1990s when a draft resolution on the human rights situation in China was tabled collectively by the EU or one of its member states on seven separate occasions, a draft resolution on China has been tabled at the UN on just three occasions since 2000 none of them at the initiative of the EU. Ironically, the EU member states were thus more active in attempting to raise the issue of China’s human rights record at the principal UN human rights body before such action was established as the mainstay of the EU’s global approach to the protection and promotion of human rights. In addition, as the discourse on ‘effective multilateralism’ was being developed, the EU, ‘by not pushing for the condemnation of glaring


\(^{527}\) ibid 8
examples of human rights abuses in the face of opposition’ was itself ‘complicit in ‘dysfunctional multilateralism’ in the area of human rights’.\textsuperscript{528}

In 2001, the common position agreed by the Council of the European Union in advance of the 57\textsuperscript{th} session of the Commission on Human Rights revealed the hypocrisy of the EU stance by committing the member states for the first time to supporting the draft resolution on China which the United States had signaled its intention to sponsor, thereby clearly signaling acceptance of the fact that a resolution was warranted, while also agreeing that the EU would not act as ‘front runner’ by coming forward as a co-sponsor.\textsuperscript{529} This hypocrisy was compounded in 2002 when, following the loss of United States membership of the Commission on Human Rights, no EU member state came forward to sponsor a draft resolution in its stead. This was the case despite the fact that the EU member states had recognised the ongoing ‘strike hard campaign’ against violent crime, corruption and terrorism in China as a ‘grave setback’ which had resulted in ‘an extremely high number of death sentences and executions’ and had undertaken to ‘consider favourably’ voting for the adoption of a draft resolution should one be introduced.\textsuperscript{530}

With the possibility of EU sponsorship of a draft resolution on China effectively removed in 1998, the EU’s approach to China at the UN Commission on Human Rights in the years which followed has centred around opposition to China’s no-action motions, moved in response to the tabling of draft resolutions on the human rights situation in China by the United States, as well as the delivery of oral statements which have included comments critical of China’s human rights record. In 1999, 2000 and 2001 statements delivered by the EU presidency in opposition to the Chinese no-action motion incorporated a clear focus on specific human rights violations in China.

including severe restrictions on freedom of expression, religion and association, the treatment of pro-democracy activists and Falun Gong practitioners, the human rights situation in Tibet and Xinjiang, administrative detention and the frequent use of the death penalty. The willingness of the EU to raise specific issues in oral statements delivered by the presidency during these years is in stark contrast to the period during which the EU was itself the principal sponsor of the draft resolution when, with few exceptions, statements delivered by both the presidency and the member states centred around the EU’s principled objection to the no-action motion. In 2004 however, the EU statement made by the Irish Presidency during the debate on the motion made no mention of any specific human rights concerns in China for the first time since the EU had ceased sponsorship of a draft resolution on China. Instead, the motion was once again opposed only on grounds of principle and it was argued that no-action motions per se undermine the ‘transparency and non-selectivity’ of the Commission on Human Rights.

With regard to its opening statement, in line with the 1998 common position committing the EU to referring to the human rights situation in China in its opening remarks at the 54th session of the UN Commission on Human Rights, the British Presidency presented a positive assessment of developments in China and reaffirmed the EU position on China for the session. This practice was upheld in 1999 and 2000. However, given the changed human rights environment in China following the end of the Beijing Spring in October 1998, for the first time the EU presidency highlighted numerous specific concerns over human rights violations in China in its opening statement at the

Commission on Human Rights in 1999. The statement, which as a mark of the importance attached to it was reproduced in the annual report on human rights from the Council of the European Union, includes administrative detention, the use of the death penalty and restrictions on freedom of expression, opinion, assembly and association among its list of concerns before going on to conclude that:

The action taken against political dissidents in China has placed a great strain on the European-Chinese dialogue on human rights. We regard the very severe prison sentences imposed upon civil rights activists as unacceptable…

A statement highlighting the same concerns was also delivered in 2000. However, the strong language addressing the tension caused in the bilateral dialogue by the crackdown on human rights activism in China that was included in the 1999 statement was notably absent from its successor.

In 2001, the EU’s opening statement addressed its human rights concerns thematically without reference to specific country situations. In the years since, while the EU has raised country-specific situations in several of its opening statements, China has not been among those singled out for comment, and its regular statements addressing the human rights situation in China have with few exceptions been concentrated under one agenda item, that allowing for general debate on the violation of human rights and fundamental freedoms in any part of the world. This is in marked contrast to the approach of some member states, including Sweden in particular, which have continued to raise specific concerns regarding China not only during general debate on human

rights violations around the world but also under other agenda items, including opening statements, long after the EU had ceased to do so.\textsuperscript{538}

The UN Commission on Human Rights concluded its 62\textsuperscript{nd} and final session in March 2006 and was replaced by the newly created 47 member UN Human Rights Council later that year. The decision to reform the principal UN human rights monitoring body was taken as a result of the increasing dissatisfaction of the members of the UN General Assembly with the Commission on Human Rights, which was seen as highly politicised and selective in both its composition and performance.\textsuperscript{539} The new body, which held its inaugural meeting on 19 June 2006, is a subsidiary organ of the General Assembly as opposed to the Economic and Social Council as was the case regarding the Commission on Human Rights. Unlike its predecessor, which met for a single session every spring, the Human Rights Council is mandated to meet no less than three times a year for no less than a total of ten weeks per annum. In reality however, since its inception it has convened more often than this due to the scheduling of frequent special sessions.

The only substantive change to the mandate of the Human Rights Council as compared to that of the Commission on Human Rights is the establishment of the Universal Periodic Review Mechanism, the purpose of which is to examine in public the human rights record of every UN member state on a rotating basis, with each state coming up for review every four years.\textsuperscript{540} However, the composition of the Human Rights Council differs somewhat from that of its predecessor in so far as membership has been agreed on the basis of equitable geographic distribution, thereby ensuring the

\textsuperscript{538} See for example the statement made by State Secretary for Foreign Affairs of Sweden, Frank Belfrage, during the High-Level Segment of the Human Rights Council on 1 March 2011. The statement identifies China as the country which is believed to carry out the highest number of death sentences worldwide and expresses regret at the refusal of the authorities to publish its death penalty statistics. State Secretary for Foreign Affairs of Sweden, Frank Belfrage (2011) Statement at the High-Level Segment of the Human Rights Council, 1 March 2011


numerical domination of Asian and African states.\textsuperscript{541} Whereas African and Asian states combined had about the same number of votes as the combined Latin American and Western European and Others Group (WEGOG) in the Commission on Human Rights, African and Asian states now dominate the Human Rights Council accounting for 26 of its 47 members. It has been argued by some commentators that these states have used their numerical dominance to ‘set the agenda’, which is notable particularly in the ‘reluctance of many African and Asian members to act on country situations apart from Israel’.\textsuperscript{542} The EU in its 2007 Annual Report on Human Rights also put forward a similar view of the challenges posed by the composition of the new body:

Ensuring efficient EU participation and the integration of EU positions in the work of the [Human Rights Council] remained a serious challenge in view of the numerically decreased representation of the EU in this body as compared to the former UN Commission on Human Rights.\textsuperscript{543}

Without a doubt, the composition of the new Human Rights Council has done little to alleviate the significant challenges facing the EU in rallying support for its positions. However, it must be remembered that as demonstrated above, the EU member states had lost their appetite for sponsorship of a draft resolution on human rights practices in China long before the Human Rights Council was established.\textsuperscript{544}

In March 2003, the Council of the European Union issued what transpired to be its last comprehensive set of conclusions on the EU approach to China at the UN Commission on Human Rights, confirming its by now established position: should a draft resolution be tabled, the EU would vote and lobby against any no-action motion and would ‘consider favourably voting for

\textsuperscript{542} ibid
the adoption of the draft’. The following year, the conclusions issued in advance of the annual session of the UN Commission on Human Rights referred only to the importance the EU attached to its dialogue with China and Iran and stated rather obliquely that ‘such dialogues do not preclude appropriate consideration by the CHR of the human rights situation in those countries’. The same line was repeated without elaboration in 2005. Since that time, human rights practices in China have occasionally become the subject of conclusions issued by the Council of the European Union. However the Council of the European Union has issued no further conclusions on the EU approach to China at the UN, the absence of which signals the tacit acceptance of the member states that this issue no longer requires consideration and that the EU policy on the matter is set in stone. Thus, while the composition of the Human Rights Council may provide some small degree of shelter for the EU from criticism of its reluctance to table a draft resolution on certain issues, it has not played a significant role in placing consideration of the human rights situation in China by means of a draft resolution tabled by the EU at the Human Rights Council beyond the realms of possibility.

As has been the case at the Commission on Human Rights, EU action on China at the UN Human Rights Council has tended to cluster around the agenda item allowing for general discussion of human rights situations that require the Council’s attention, namely Item 4. While the EU has ‘issued language’ on China under this agenda item at the Human Rights Council, these statements have for the most part been brief and cautiously worded, often avoiding overt suggestion of any wrongdoing on the part of the authorities. In addition, contrary to the ‘single message many voices’ approach agreed under

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the British Presidency in 2005, few member states have been willing to use their speaking time to support EU statements on China, even during times of crisis.\textsuperscript{548}

From June 2006 to December 2011, in addition to public statements about individual cases the EU has published numerous statements and declarations expressing its concern regarding human rights abuses in China, most prominent among them are those relating to: political unrest in Tibet in March 2008; the December 2008 detention of human rights activists involved in the Charter 08 manifesto calling for political reform including Liu Xiaobo; the execution of nine persons following political unrest in Urumqi in July 2009; and the increasing incidents of arrest, harassment and disappearance of Chinese human rights defenders, lawyers and activists in early 2011.\textsuperscript{549} Notwithstanding the public nature of these declarations and the grave concerns expressed therein, the EU has not used Item 4 of the agenda to follow up on these concerns at the UN Human Rights Council in a timely and robust manner.

The case of Tibet will be dealt with in more detail below, however suffice it to say here that on 6 June 2008, when the opportunity arose for the EU to address the matter of the March 2008 unrest at the UN Human Rights Council under Item 4 of the agenda for the first time, in its oral statement the EU referred to the situation only in passing by stating that it would welcome a visit to the region of the UN High Commissioner for Human Rights, which the Chinese authorities were called upon to accept and facilitate. That the EU would issue such a statement, in spite of the fact that the authorities had already explicitly rejected the High Commissioner’s request for such a visit while also neglecting to include critical comments regarding China’s human rights record in Tibet at a time when an estimated 1,000 persons detained during the unrest


remained unaccounted for, reveals the weakness of the EU position.\textsuperscript{550} This weakness is further exposed by comparison to the statement issued by Sweden under the same agenda item moments later, which criticised agents of the Chinese government for committing ‘acts of violence’ in Tibet, placing restrictions on religious institutions, subjecting individuals to arbitrary arrest and detention and reportedly denying them the right to equal protection before the law.\textsuperscript{551} The delivery of this statement by the Swedish delegate made it clear that the EU text did not reflect the views of member states pushing for a more vigorous approach to China and signaled continued division within the ranks of the EU over the issue.

The EU response under Item 4 at the Human Rights Council to other concerns raised by the EU in numerous press releases and public declarations on China has been equally muted. For example, following the detention of Liu Xiaobo and other activists involved in the Charter 08 initiative, on 16 December 2008 the French Presidency issued the first in a series of press statements and declarations from the EU that were to be released over the course of Liu’s detention, arrest, trial, sentencing and finally his December 2010 award of a Nobel Peace Prize.\textsuperscript{552} However, the oral statement made by the

\begin{footnotesize}
\textsuperscript{550} While it is clear that serious violations of human rights were committed, their full extent is difficult to assess since at the time Tibet was effectively sealed off. The reported number of dead, wounded and detained varies widely and there is continuing concern about maltreatment and torture of detainees, the absence of internationally guaranteed fair trial rights and an intensified patriotic re-education campaign. CNN World, Staff Reporter (2008) ‘Tibet Protesters Missing, Amnesty Says’ CNN World, 19 June 2008. Retrieved 29 September 2008 from: http://articles.cnn.com/2008-06-19/world/oly.tibet.torch_1_vehicles-and-shops-lhasa-olympic-torch?_s=PM:WORLD

\textsuperscript{551} Archived video of the 6 June 2008 meeting including the statements delivered under ‘Item 4: General Debate’ by Slovenia on behalf of the EU and that delivered by Sweden can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=080606

\end{footnotesize}
EU under Item 4 of the agenda at the next meeting of the Human Rights Council in March 2009, referred only to concern regarding ‘measures taken against those who wish to express their views peacefully’ and made no specific reference to the Charter 08 initiative or the well publicised harassment and detention of Liu Xiaobo and other activists involved.553

Research conducted for this study has shown that in spite of issuing a total of seven public statements on the Charter 08 initiative and more particularly the case of Liu Xiaobo during the period December 2008 to December 2010, the EU did not raise its concerns regarding either issue in any of its oral statements under Item 4 of the agenda at the UN Human Rights Council. In March 2010, the Spanish Presidency failed to deliver within the speaking time allotted to the EU a statement critical of human rights practices in China ‘including harassment and detention of Charter ‘08 signatories, in particular Liu Xiaobo’ that was contained in the text circulated by the EU in the debating chamber.554 No attempt was made to correct this omission by referring to the matter under another agenda item during the March 2010 session or indeed any subsequent session of the Human Rights Council with the effect that, whether by accident or design, the issue has not been raised by the EU in its oral statements at the UN Human Rights Council. Nor has the EU taken advantage of numerous opportunities provided during interactive dialogue with various Special Rapporteurs to highlight material related to Liu Xiaobo’s case.

553 Archived video of the 17 March meeting including the statement delivered under Item 4 General Debate by the Czech Republic on behalf of the EU can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=090317
routinely included in their reports. In the same period, both the Czech Republic and Germany explicitly raised the case of Liu Xiaobo and Charter 08 in their statements, revealing once again that statements issued collectively by the EU member states do not reflect the views of members prepared to be more proactive on particular issues.

On 9 July 2009 the Czech Presidency issued a press statement on behalf of the EU member states expressing concern over the violent unrest which had broken out in Xinjiang several days previously. In careful language the statement avoided any suggestion of wrongdoing on the part of the authorities, in spite of reports of the use of excessive force by the People’s Armed Police, and instead expressed sympathy with the families of those who had lost their lives and called for restraint on all sides. At the subsequent meeting of the Human Rights Council in September 2009, an almost identical statement was issued by the EU during the general debate under Item 4 of the agenda. This was followed by another press release in November 2009. Unlike its predecessors however, the November 2009 press statement was unambiguous in condemning the execution of nine persons sentenced to death in connection


556 Archived video of the 15 March 2010 meeting including the statement delivered under ‘Item 4: General Debate’ by the Spain on behalf of the EU and those of the Czech Republic and Germany can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=100315

557 Council of the European Union (2009) Declaration by the Presidency on Behalf of the EU Following Developments in Xinjiang, China 11855/1/09 REV 1 Presse 213, Brussels, 9 July 2009

558 Archived video of the 22 September 2009 meeting including the statement delivered under ‘Item 4: General Debate’ by Sweden on behalf of the EU can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=090922

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with the unrest while at the same time expressing the concern of the EU
member states regarding the ‘conditions under which the trials were
conducted’.\textsuperscript{559} Despite the evolving situation however, this press statement was
not followed up at the Human Rights Council in a timely manner in March
2010, by which stage a further 18 persons had been condemned to death.\textsuperscript{560}
Instead, a brief oral statement was delivered by the Spanish Presidency under
Item 4 on 8 June 2010, reiterating the concern of the member states regarding
conditions of trial but falling short of condemning the executions already
carried out.\textsuperscript{561}

Not only has Item 4 of the agenda proved to be a weak tool in the hands
of the EU for addressing human rights violations in China, as was the case at
the UN Commission on Human Rights, but by continuing to concentrate its
statements on China almost exclusively under a single agenda item the EU has
passed up the opportunity to draw attention to material relating to China
included in UN documents before the Commission on Human Rights/Human
Rights Council, in particular those of the UN Special Procedures. On numerous
occasions the UN Commission on Human Rights/Human Rights Council has
had before it reports from various UN Special Procedures detailing serious
concerns about human rights practices in China following missions to the
country. Despite this, by the end of the period covered by this study the EU had
made specific comments on the content of only one of these reports. On 8
March 2011, the Hungarian Presidency on behalf of the European Union
‘underlined’ the recommendations contained in the preliminary observations of
the Special Rapporteur on the Right to Food in relation to the resettlement of
Tibetan herding communities and, quoting from the document, called on the

\textsuperscript{559} Council of the European Union (2009) Declaration by the Presidency on Behalf of the Union
Regarding the Recent Execution of Nine Persons in Xinjiang 15843/09 Presse 326, Brussels, 12
November 2009
Media}, Beijing, 26 January 2010. Retrieved 26 July 2011 from:
http://uk.reuters.com/article/2010/01/26/uk-china-xinjiang-idUKTRE60P3HM20100126
\textsuperscript{561} Archived video of the 8 June 2010 meeting including the statement delivered under ‘Item 4:
General Debate’ by Spain on behalf of the EU can be viewed at:
Chinese authorities to ‘engage in meaningful consultations’ with the herders. However, the concerns raised in the 1997 and 2004 China mission reports of the Working Group on Arbitrary Detention, the 2003 China mission report of the Special Rapporteur on the Right to Education and the 2005 China mission report of the Special Rapporteur on Torture and Other Cruel, Inhumane and Degrading Treatment passed before the UN Commission on Human Rights and the Human Rights Council without specific comment from the EU on practices in China.\(^{562}\)

Likewise, the EU has proved reluctant to draw attention to extensive material relating to China routinely included in general reports from the UN Special Procedures. At the 2\(^{nd}\) session of the Human Rights Council in September 2006 for example, the Council had before it a Compilation of Developments in the Area of Human Rights Defenders drawn up by the Special Rapporteur on Human Rights Defenders.\(^{563}\) During the interactive dialogue with the Special Rapporteur however, the EU made no comment on China’s record in this regard while at the same time raising in some detail its concerns in relation to other country situations, in particular Uzbekistan.\(^{564}\) Although the issues raised in relation to Uzbekistan warranted attention, the bleak situation facing human rights defenders in China was surely also deserving of discussion, particularly given the emphasis placed on individual cases by the EU and more


564 Archived video of the 22 September 2006 meeting including the statement delivered by Finland on behalf of the EU can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=060922
specifically the extent of the concerns expressed in the compilation.\textsuperscript{565} Likewise, although the summary of cases annexed to the annual report of the Special Rapporteur on Extrajudicial and Summary Execution before the 11\textsuperscript{th} session of the Human Rights Council in June 2009 contained numerous allegations in relation to the March 2008 unrest in Tibet, during its statement on the matter the EU chose to refer directly only to alleged incidents of juvenile execution in Iran.\textsuperscript{566} Similarly, at the 14\textsuperscript{th} session of the Human Rights Council in June 2010, the summary of cases annexed to the report of the Special Rapporteur on Freedom of Expression contained allegations of serious human rights violations in relation to the July 2009 unrest in Xinjiang and in Tibet as a result of the ‘patriotic education’ campaign which had followed the March 2008 unrest.\textsuperscript{567} During the interactive dialogue which followed, the EU asked the Rapporteur concerned for her opinion on the situation in Sri Lanka, Venezuela, Turkmenistan and Iran and enquired as to whether she would seek an invitation to any of these countries. China, which had yet to respond to a 2002 request for a visit from the Rapporteur and which featured more in the report than any of the countries highlighted was not mentioned.\textsuperscript{568} The same meeting of the Human Rights Council also had before it information relating to: five death sentences carried out in Tibet following the March 2008 unrest; the deaths in Xinjiang of 156 people during the July 2009 unrest and the 12 death sentences carried out following it; as well as the imposition of a death sentence on British citizen Akmal Shaikh following his conviction on charges of drug
trafficking.\textsuperscript{569} However, this information, which was annexed to the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, was not highlighted by the EU despite the fact that each of the issues raised had also been the subject of critical EU press statements.\textsuperscript{570}

In addition to statements delivered under Item 4 and during interactive dialogue with UN Special Rapporteurs, the Human Rights Council, like the Commission on Human Rights before it, also provides for the discussion of country-specific situations during general debate under a number of other agenda items, including Item 3 on the promotion and protection of all human rights and Item 8 on the follow-up and implementation of the Vienna Declaration and Programme of Action. While statements delivered under these agenda items should not focus exclusively on any one state, it is permissible to raise specific issues of concern in particular counties in order to illustrate the general points being made. However, while the EU has addressed numerous country situations under these agenda items, during the period covered by this study it has chosen to do so in the case of China on only one occasion – in March 2008 following the outbreak of unrest in Tibet.

On 17 March 2008, the EU presidency issued a declaration expressing deep concern about 'ongoing reports of unrest in Tibet' following the 14 March crackdown on protests and demonstrations which started in Lhasa and spread to other areas of the province and surrounding areas.\textsuperscript{571} Having already delivered its statement at the Human Rights Council during the general debate under Item 4 of the agenda on 13 March, the EU was faced with a choice: it could coordinate with other actors and attempt to schedule a special session of the

\textsuperscript{569} UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (2010) Addendum to the Report Submitted by the Special Rapporteur (18 June 2010) UN doc A/HRC/14/24/Add.1, pp. 35-57

\textsuperscript{570} Akmal Shaikh was executed on 29 December 2009. He was the first EU citizen to be executed in China in over fifty years and was widely suspected to have suffered from a psychiatric pathology. Council of the European Union (2009) Declaration by the Presidency on Behalf of the Union on the Execution of Akmal Shaikh 112082, Brussels, 29 December 2009

Human Rights Council as it was urged to do by various NGO actors including Forum-Asia, an alliance of some 40 Asian non-governmental organisations, or it could attempt to address the unfolding events under another agenda item. At the time, the EU had had some success in calling for two of the, by then, six special sessions convened by the Human Rights Council since its establishment, including most recently the session on Burma in October 2007. However, in relation to Tibet, the decision was taken instead to coordinate with other actors, including Australia, Canada and the United States along with some seven international NGOs, and to raise the issue at the Human Rights Council just over a week later during the general debate under Item 8 of the agenda.

On the basis of confidential interviews, Kinzelbach has concluded that the option of calling a special session was ‘discussed in some member states but quickly dismissed because the EU did not expect to win the necessary support from other Council members’. In the absence of documentation setting out the deliberations which led to this decision it is not possible to confirm this

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573 Although Item 4 of the agenda was still under discussion on 17 March, the debate had shifted to consideration of the report of the Special Rapporteur on Sudan and the mandate of the Special Rapporteur on Myanmar. Thus, it was not a lack of preparedness that prevented the EU from acting on 17 March, as suggested by Kinzelbach so much as a pragmatic understanding of the procedural rules of the Human Rights Council. See: Kinzelbach, K. (2010) The EU’s Human Rights Dialogue with China: Constructive Engagement or Failure? (PhD thesis presented at the Ludwig Boltzmann Institute), p. 211
analysis unreservedly. However, it would seem that the likelihood of success in obtaining the support of more than one third of the Council’s 47 members required to call a special session on Tibet was indeed limited.

If the support is assumed of the seven members of the Western Europe and Other States Group, the three EU members of the Eastern European States Group and Japan, which had previously co-sponsored a number of draft resolutions on China and had consistently voted against the Chinese no-action motion, it is possible to count 11 potential votes in favour of a special session on Tibet in March 2008.\(^{577}\) Taking the previous voting record of the 2008 members of the Human Rights Council on draft resolutions addressing human rights in China as one indication of their willingness, or otherwise, to directly address specific violations in China within the UN system, it would seem highly unlikely that support for a special session on Tibet could have been secured from states which had consistently opposed any action on China on the eleven occasions on which the issue had come before the Commission on Human Rights from 1990 to 2004.\(^{578}\) It is also unlikely that the support of either Brazil or Russia could have been secured. Although both states had previously voted against the Chinese no-action motion, with Brazil also voting in favour of the 1995 draft resolution, by the time the last draft resolution on China was proposed in 2004 this position had been reversed and both states had voted in favour of no-action instead.\(^{579}\)

Following this logic, it is conceivable that the support of Guatemala could have been secured in light of the fact that it had opposed the Chinese no-

\(^{577}\) In 2008 the Western European and Other States Group was composed of the following members: Canada, Finland, France, Germany, Netherlands, Switzerland, and the United Kingdom. The three EU members of the Eastern European States Group were: the Czech Republic, Poland, and Romania. For a full list of the 2008 members of the UN Human Rights Council see: http://www2.ohchr.org/english/bodies/hrcouncil/groups.htm


\(^{579}\) For a record of votes on the 1995 draft resolution see UN Doc: E/CN.4/1995/SR.60, para. 5
action motion in 2001 and 2004. It is also conceivable that the support of Ecuador could have been secured in light of the fact Ecuador had voted consistently against the Chinese no-action motion from 1990 to 1996, and in favour of the draft resolution in 1995. That said, it must be borne in mind that, in 1997, the position of Ecuador appeared to have softened somewhat and it has abstained from voting on the issue since that time.

If indeed the support of Guatemala and Ecuador could have been recruited, it is judged that the best hope of securing the remaining three votes necessary to call a special session on China would then have rested on the ability of the EU and its allies to recruit the support of the Philippines, which had consistently voted against the no-action motion up to and including 1995 but then abstained in the vote on the draft resolution and all subsequent votes on the issue, as well as two of the three states which had abstained in all voting on the matter since the early 1990s, namely Mauritius, Mexico and the Republic of Korea.

Given the enormous blow to China which the successful convening of a special session on its human rights record in Tibet would have represented, particularly as it prepared to open the Beijing Olympics in August 2008, it is very unlikely that states that had proved unwilling to support the consideration of a draft resolution on China even in the years immediately following the Tiananmen Square massacre, could have been persuaded to support a special session in 2008. Furthermore, even if it were possible to secure the support of 16 or more members in calling for a special session on Tibet, without cross-regional backing there can be no guarantee that the session itself would have allowed for a critical review of developments in Tibet. The inability of the EU, during the May 2009 special session on Sri Lanka which was convened at the initiative of Germany with the support of all EU member states, to secure amendments to a draft resolution sponsored by the Sri Lankan government
commending its own efforts to ‘ensure the safety and security of all Sri
Lankans’ serves as a vivid reminder of this fact. 580

During the meeting of the Human Rights Council on 25 March,
statements referring to the situation in Tibet delivered by successive speakers
were interrupted on points of order by the Chinese delegation, members of
which argued that the matter at hand was a general thematic debate on the
Vienna Declaration and that contributions should focus on this area. 581 As was
the case in the UN Commission on Human Rights during the 1990s, China’s
procedural arguments were supported by a coalition of mostly African and
Asian states including Algeria, Morocco, Pakistan, Sri Lanka and Zimbabwe as
well as long-term ally Cuba. 582 These statements were countered by Slovenia
and Switzerland which argued that country situations ‘can and should’ be raised
during discussion of Item 8 and that failure to do so would render the Human
Rights Council a ‘toothless organisation with no credibility and no real
relevance’. 583 In response to these arguments, the President of the Human
Rights Council, Doru Costea, stated that reference to ‘country-specific
situations plural’ was permissible under Item 8, but he also emphasised the
point that such references should be used to illustrate issues raised in the
general debate and should not be the focus of any one statement. 584 Nonetheless,
Costea permitted speakers delivering statements exclusively on Tibet to
conclude their remarks in all but one case. The tumultuous session ended with a

the Human Rights Council’ in Wouters, J., Bruyninckx, H., Basu, S. & Schunz, S. eds. The
European Union and Multilateral Governance: Assessing EU Participation in United Nations
Human Rights and Environmental Fora (Basingstoke; New York: Palgrave Macmillan), pp. 94-
95
581 Archived video footage of the 25 March 2008 meeting including the statements made by
582 Archived video footage of the 25 March 2008 meeting including the statements made by
Algeria, Cuba Morocco, Pakistan, Sri Lanka and Zimbabwe is available at:
583 Archived video footage of the 25 March 2008 meeting including the statements made by
Slovenia and Switzerland is available at:
584 Archived video footage of the 25 March 2008 meeting including the statements made by
President of the Council Doru Costea is available at:
statement issued by China describing the Tibetan unrest as a series of ‘violent, criminal acts’ which ‘threatened the lives and property of the people’ and was inspired by the separatist ‘Dalai clique’.\textsuperscript{585} It was argued that China had exercised ‘extreme restraint’ in bringing the situation under control through the use of ‘necessary and lawful measures’ and that in particular ‘no lethal weapons were carried or used’ in the process. In language strongly reminiscent of similar debates which took place at the UN Commission on Human Rights during the 1990s, China’s critics at the UN Human Rights Council were variously accused of ‘distorting the facts’, ‘politicising the debate’ and applying ‘undisguised double standards’.\textsuperscript{586}

In spite of its procedural irregularities, the 25 March session was something of a breakthrough, in so far as it allowed for human rights violations in China to be raised at the Human Rights Council by numerous speakers in a coordinated manner for the first time. In fact, despite the best efforts of the Chinese delegation, it would not be an exaggeration to describe the afternoon session as dominated by the matter of human rights violations in Tibet. However, the contribution of the EU to the overall debate was muted by comparison to that of other speakers.

The statement delivered by Slovenia on behalf of the EU was not focused on Tibet, as were those of other speakers including the United States and Australia (speaking also on behalf of Canada), but covered a range of issues related to the agenda item on the Vienna Declaration before addressing Tibet briefly using language that was careful not to suggest any wrongdoing on the part of the Chinese authorities.\textsuperscript{587} Thus, while the EU expressed only ‘concern about ongoing reports of unrest in Tibet and other regions of China’ the statement delivered by the United States, by comparison, spoke to the

\textsuperscript{585} Archived video footage of the 25 March 2008 meeting including the closing statement made by China can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=080325
\textsuperscript{586} ibid
\textsuperscript{587} Archived video footage of the 25 March 2008 meeting including statement made Slovenia on behalf of the EU can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=080325
'deeply troubling reports of violence, arrests and loss of life stemming from what began as peaceful protests in Lhasa'. 588 Furthermore, while the six EU member states that spoke during the session aligned themselves with the statement delivered by the Slovenian Presidency, none of them actually went on to address the situation in Tibet, demonstrating that even in times of crisis the member states of the European Union are, for the most part, not prepared to use their speaking time to support EU statements on China delivered on their behalf.

The debate on 25 March was also significant in defining the parameters of how far it was possible to go in addressing country-specific situations during regular sessions of the Human Rights Council under agenda items other than Item 4. This issue was highlighted in the 2008 EU Annual Report on Human Rights which stated that during the March 2008 session of the UN Human Rights Council, the EU had ‘made it clear that country-specific situations could be raised under other relevant agenda items and not only under item 4’. 589 However, in spite of the latitude for such action demonstrated in 2008, the EU has continued almost without exception to restrict its comments on China during regular sessions of the Human Rights Council to Item 4 while at the same time referring on a regular basis to other pressing country situations, including in particular those of Burma, Iran, Sri Lanka and Zimbabwe, under a variety of agenda items.

Outside the regular sessions of the UN Human Rights Council, the Universal Peer Review mechanism provides the best opportunity for the EU to engage with China on its human rights record at the Council. Mainland China is not a state party to the International Covenant on Civil and Political Rights and as such does not report to the Human Rights Committee. The Universal Peer

588 Archived video footage of the 25 March 2008 meeting including the statement made by the United States can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=080325
Review process is thus ‘one of the only avenues’ for exploring China’s compliance with the rights set out in the Covenant.  

While the EU member states participate in the Universal Peer Review process, they do not issue common positions on states under review, and neither the EU Delegation nor the presidency speaks on behalf of the Union. The reason most often advanced for this decision is that it represents an effort on the part of the EU to discourage the ‘bloc politics’, which dogged the effectiveness of the former Commission on Human Rights. While this ‘self-denying’ logic may have influenced the decision not present common positions during Universal Peer Review, it is also likely that recognition of the burden of coordination that the need to formulate an EU position on each of the 192 states under review would have created, as well as the difficult question of how to act during the review of individual EU member states, was just as significant. Instead, the member states are encouraged towards ‘soft coordination’, sharing briefing materials and keeping each other informed of their positions while at the same time speaking only in their national capacity.

A total of 21 EU member states were among the 115 states to request speaking time during the working group on China’s Universal Periodic Review.

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on 9 February 2009. Due to the great number of states that wished to contribute, some 55 states were unable to deliver their statements during the session as a result of time constraints, including nine EU members. In the absence of a coordinated approach, it is indeed remarkable that, as demonstrated by Kinzelbach, no one single issue was raised by each of the 12 EU member states that spoke during the meeting and there was no coherence to the recommendations issued by them. The purpose of this observation is not to suggested that the EU member states should speak and act in unison during the Universal Peer Review process, but to demonstrate that two decades after they began to formulate a human rights policy on China post-Tiananmen, there is still no agreement among them on either their priority concerns or the most pressing actions which should be undertaken by China to improve its human rights record. However, more significant still is the fact that, despite the clamour for speaking time during the 9 February 2009 meeting, not one EU member state spoke in the subsequent plenary session on 11 June 2009, during which the outcome of the review, including China’s responses to the recommendations made, was discussed and adopted. This is all the more remarkable when one considers that each of the 12 EU member states that spoke on 9 February made recommendations which were subsequently rejected by China.

This poor EU performance is not limited to the case of China. At the same 11 June plenary session for example, the Human Rights Council adopted reports on the outcome of the Universal Peer Review process for a total of 15 other states including Azerbaijan, Bangladesh, Cameroon, Canada, Cuba, Djibouti, Germany, Jordan, Malaysia, Mauritius, Mexico, Nigeria, the Russian

596 Archived video of the Universal Periodic Review of China on 9 February 2009 including the statements made by the EU member states can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=090209
Federation, Saudi Arabia, and Senegal. Sweden contributed its view during the review of the outcome on Germany and Canada. Likewise, Belgium and Ireland contributed their views during the review of the outcomes on Mexico and Senegal respectively. No other EU member state made any contribution. This pronounced lack of initiative casts doubt on not only the ability of the EU member states to systematically address country-specific human rights practices in the absence of EU coordination but also their commitment to the Universal Peer Review process itself.

### 4.6 Post Lisbon

The hope remains that, following ratification of the Lisbon Treaty, the EU will re-examine its external relations policy with a view to establishing a clearer focus on the promotion of human rights as an EU priority. The creation of a human rights division under the directorate for global and multilateral issues has largely answered concerns expressed by human rights NGOs regarding the initial resistance of the High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton, to the inclusion of a specialised human rights directorate within the new External Action Service. In December 2011, frustration, at the length of time taken for the 2010 review of all human rights processes within the EU’s foreign affairs machinery to produce results, gave way to optimism following publication of a communication from the High Representative setting out her vision, and that of the European Commission, on the future direction of external EU human rights policy. This optimism was

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598 ibid 186, 256  
599 ibid 499  
601 European Union, High Representative of the Union for Foreign Affairs and Security Policy Catherine Ashton (2011) Joint Communication to the European Parliament and the Council:

The Action plan lists a total of 96 actions which the EU is committed to implementing by the end of December 2014 and which it is intended will enhance the coherence and effectiveness of the EU as a human rights actor on the world stage. Key amongst these recommendations is recognition of: the need for human rights strategies to be precisely tailored to individual country situations; the need to publicly monitor the performance of the EU in meeting its human rights objectives; and the need to appoint a European Union High Representative for Human Rights to enhance the effectiveness and visibility of the EU as a global human rights actor.

But despite the renewal of official rhetoric reinforcing the commitment of the EU to the promotion of ‘human rights in all areas of its external action without exception’, the continued mixed performance of the EU on the issue of human rights in China at the UN Human Rights Council throughout 2011 would caution against the assumption that radical change can be expected in relation to EU policy on China, particularly in the area of human rights diplomacy.

From the outset, Ashton and her cabinet have displayed what has been described as a ‘pragmatic approach’ to human rights in China. This approach was revealed in media reports of a confidential 19 page document setting out Ashton’s vision for EU relations with China, Russia and the United States in

ibid
December 2010. Without reference to human rights conditionality, the document was reported to recommend the lifting of the embargo on the sale of arms to China, which was portrayed as a ‘major impediment’ to the development of ‘stronger EU-China cooperation on foreign policy and security matters’. The document also proposed the cultivation of a human rights policy approach which leaves little room for the raising of difficult political issues apart from individual cases and suggests instead that the EU ‘manage expectations’ and focus on matters of ‘consensus’ and ‘common-ground’. 607 The suggestion that in order to make progress the EU should take a more strategic approach to the promotion of human rights in China is not of course an unreasonable one. However, when translated into practice, it appears, as yet, not to have resulted in a renewed focus on a defined set of priority issues but in the continuation of a pronounced disinclination to issue critical statements addressing ongoing developments in China at a high diplomatic level.

On 28 February 2011, in a marked departure from established practice it fell to the EU Delegation in Beijing, rather than the High Representative of the Union for Foreign Affairs and Security Policy in Brussels, to issue a statement regarding ‘troubling accounts’ of foreign journalists in the city being ‘detained without explanation and being physically intimidated or assaulted’. 608 The statement was to be the first in a series expressing concern about the crackdown on freedom of expression in China launched in response to attempts by human rights activists to use the internet to provoke a pro-reform ‘Jasmine Revolution’ inspired by the Arab Spring.

On the same day the statement was issued by the Delegation in Beijing, Ashton delivered her first address to the UN Human Rights Council in Geneva at its 16th session. 609 Her speech referred to numerous country-specific

607 ibid
situations, challenges and priorities. China was not amongst them: this in spite of the fact that the Human Rights Council was meeting for the first time since the events in China surrounding the Nobel Peace Prize ceremony on 10 December 2010 had placed its human rights record under sustained international scrutiny; in spite of the level of interest in the case of Nobel Laureate Liu Xiaobo professed by the EU in multiple statements on the matter; and in spite of reports of ongoing state-led repression reflected in the statement from the EU Delegation released that day.\textsuperscript{610} Similarly, a subsequent statement delivered by the speaker for the EU Delegation during interactive dialogue with the Special Rapporteur on Human Rights Defenders on 10 March 2011 did not highlight any of the cases referred to in an exceptionally long list relating to China and attached to the annual report, including that of Liu Xiaobo’s and his wife Liu Xia.\textsuperscript{611} Instead, the EU speaker made only general comments on the role of women human rights defenders in society.\textsuperscript{612} Finally, during the general debate under Item 4 of the agenda on 14 March, the Hungarian Presidency on behalf of the European Union referred only to positive developments in China.


\textsuperscript{612} Archive video of the 10 March 2011 meeting including the statement by the EU Delegation can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=110310
including the visit of the UN Special Rapporteur on the Right to Food and the reduction in the number of crimes carrying the death penalty.\footnote{Archive video of the 14 March 2011 session including the statement of the Hungarian Presidency on behalf of the European Union can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=110314}

On 5 April 2011, a second declaration was issued locally by the EU Delegation in Beijing, this time expressing wider concerns including ‘the increasing use of arbitrary detention against human rights defenders, lawyers and activists in China’ and in particular the detention of artist Ai Wei Wei.\footnote{European Union, Head of the European Union Delegation to China, Ambassador Serge Abou (2011) Statement by the Head of the European Union Delegation to China on the Increasing use of Arbitrary Detention in China, Beijing, 5 April 2011} Two days later on 7 April, the same issues were taken up in a resolution from the European Parliament specifically calling on the High Representative of the Union for Foreign Affairs and Security Policy to take action.\footnote{European Parliament (2011) Resolution on the Case of Ai Wei Wei in China P7_TA-PROV(2011)0157, Strasbourg, 7 April 2011} On 13 April, these concerns were raised publicly in a long overdue statement from Ashton:

\begin{quote}
In recent weeks, a large number of lawyers, writers, journalists, petitioners, artists and bloggers have been subject to arbitrary arrest and other forms of harassment or have simply disappeared. In this context, I am alarmed at the arrest of Ai Wei Wei. In other cases, long prison sentences have been imposed on dissidents. New restrictions have been introduced on the work of foreign journalists.\footnote{European Union, High Representative for Foreign Affairs and Security Policy Catherine Ashton (2011) Statement by the High Representative on the Human Rights Situation in China, Brussels, 13 April 2011.}

The statement went on to urge the Chinese authorities to: clarify the whereabouts of all persons who had disappeared; ensure that their treatment was fully in accordance with international human rights standards and the rule of law; and to release all of those who had been detained for exercising the universally recognised right to freedom of expression.

The timing of this statement would suggest that it was issued reluctantly in response to pressure created by the European Parliament resolution and the public declarations released by the Beijing Delegation as well as lobbying from
human rights NGOs, all of which threw the silence of the High Representative of the Union for Foreign Affairs and Security Policy on the matter into stark relief and combined to force a public reaction despite Ashton’s apparent preference for quiet diplomacy when addressing human rights concerns in China. This suggestion is supported by the fact that less than one month later, Ashton chose not to refer to human rights as an issue in her statement setting out EU priorities ahead of her 12 May Strategic Dialogue meeting with China’s State Councilor Dai Bingguo. Moreover, despite the continued detention of Ai Wei Wei and other human rights activists in China, in a speech made following the conclusion of the Strategic Dialogue, Ashton did not highlight a single specific issue but referred only to the opportunity the dialogue afforded to present the ‘views’ of the EU regarding the human rights situation in China rather than the EU’s concerns. Following a second meeting with Dai Bingguo in October 2011, Ashton confirmed once again that she had taken the opportunity to ‘repeat the EU’s consistent position on human rights’ however she chose once again not to outline this position in her public statement.

That Ashton’s perceived reluctance to speak out on human rights issues, particularly in relation to Asia, had long been the cause of some frustration among EU officials working in the area of external relations is reflected in a diplomatic cable published online by Wikileaks. The cable sent from the United States’ mission in Brussels on 4 Feb 2010 following a meeting with European Commission officials from the Asia unit of the European External Action Service, quotes one EU official as stating during discussions regarding the EU’s human rights policy for China that Ashton had failed to show ‘clear leadership’


618 European Union, High Representative for Foreign Affairs and Security Policy Catherine Ashton (2011) Speech of High Representative Catherine Ashton at the EU Strategic Dialogue with China, Gödöllő A181/11, Brussels, 12 May 2011

while at the same time ‘lamenting the lengthy delays before Ashton’s office will release EU statements on current events’. 620

The 13 April 2011 statement released by Ashton was delivered verbatim by the Hungarian Presidency on behalf of the EU at the UN Human Rights Council on 15 June, just one day before the EU-China Human Rights Dialogue took place in Beijing with the addition of a line calling for the authorities to refrain from the use of force in dealing with the evolving situation in the Kirti monastery. 621 In a marked improvement on the performance of the EU on the issue of human rights in China in the preceding months, a total of four EU members states also referred to similar concerns in China during their own speaking time under Item 4, namely Sweden, France, Belgium and the Czech Republic. 622

Despite the continuation throughout 2011 of what is widely recognised to be one of the most severe and sustained attacks on human rights activism in China for decades, Ashton made no further public comment critical of China’s human rights record in 2011 and no statement on China was made by the EU at the 18th Session of the UN Human Rights Council in September 2011. 623

620 Wikileaks (2011) ‘EU has No Instructions to Discuss Lifting China Arms Embargo’ Wikileaks reference no. 10Brussels133. Created 4 Feb 2010. Released 30 August 2011

621 Reports of the forcible removal and detention of large numbers of monks from Kirti Monastery following disturbances which broke out in the aftermath of the self-immolation of a 24 year old monk on 11 March 2011 had begun to emerge in the weeks preceding the UN Human Rights Council meeting.

622 Archived video of the 15 June 2006 meeting including the statement delivered by the Hungarian Presidency on behalf of the European Union can be viewed at: http://www.un.org/webcast/unhrc/archive.asp?go=110615

4.7 Conclusion

Like other actors in the Western world, after decades of inactivity on human rights violations in China, including during the bloodiest years of the Cultural Revolution, the EU was forced to focus its attention on the matter by the Tiananmen Square massacre of 4 June 1989. For a six year period following the massacre, there was unified agreement among the EU member states that an appropriate response to Tiananmen must include the tabling or co-sponsorship of a draft resolution on China at the UN Commission on Human Rights. However, sponsorship of an annual draft resolution was never intended, nor presented, as a permanent feature of EU human rights policy on China, but rather as a reaction to a particular and unprecedented event. As early as 1990, moves were already underway to normalise the bilateral relationship and it was made clear that Tiananmen was not to have a permanent affect. It was to be expected that ultimately this would also lead to a softening of the member states’ resolve in the Commission on Human Rights.

The cancellation of the third round of the EU-China Human Rights Dialogue due to take place in the autumn of 1996 demonstrated without doubt that China would not allow the dialogue and EU sponsorship of an annual draft resolution to coexist and that a choice must therefore be made between the two instruments. China’s agreement to resume the dialogue in December 1997 played a significant role in encouraging the EU member states not to sponsor a draft resolution at the forthcoming session of the UN Commission on Human Rights. However, while the dialogue approach was indeed presented by the EU as a more effective policy tool than EU sponsorship of an annual draft, the deciding factor in enabling the landmark 1998 EU common position on the matter was the improved human rights situation in China, rather than the resumption of the dialogue itself.

A critical juncture was arrived at in March 1999, when the EU member states, in the Council of the European Union, faced the decision of whether to table or sponsor a draft resolution on China at the forthcoming session of the
UN Commission on Human Rights or to continue to implement the approach set out in 1998, which had placed the dialogue at the heart of EU human rights policy on China. By confirming the stance established in 1998 without advancing any additional arguments in its defence, the 1999 common position tied the legitimacy of the EU approach to its ability to have a demonstrable impact, notwithstanding the radically changed political environment and the absence of the threat of a critical resolution which had played a key role in provoking previous concessions.624 Once again, however the deciding factor in enabling the 1999 common position appears not to have been the existence of the dialogue, but the desire to present a unified policy stance at the UN Commission on Human Rights.

Since its inauguration, the dialogue has been consistently portrayed by the EU as an additional instrument for engagement with China on the issue of human rights and the EU has confirmed repeatedly that it would not be permitted to replace ‘appropriate consideration’ of the situation in China at the UN.625 Indeed, the decision not to sponsor a draft resolution on China at the UN Commission on Human Rights, while controversial, did not in fact render the EU powerless to raise its concerns regarding serious human rights violations perpetrated in China in its oral statements at the UN. To this day, the EU has the opportunity to voice its concerns in a timely and robust manner under a

variety of agenda items, in particular by drawing attention to materials relating to human rights violations in China routinely brought before the Council by UN working groups and Special Rapporteurs. However, in spite of the EU’s self-professed commitment to multilateral monitoring, when it comes to China this opportunity has rarely been taken up.

While it may be tempting to attribute this silence to the dialogue and to argue that it has sheltered the EU member states from the necessity of speaking out on China, in fact the EU’s reluctance to publicly criticise human rights practices in China was plainly evident long before the dialogue was established. As analysis of statements made by the EU member states in the Commission on Human Rights reveals, even during the period 1990 to 1996 when they were most active on the issue, the EU member states proved reluctant to criticise China’s human rights record in their public statements at the UN.

Although coordination of EU positions at the UN indeed remains cumbersome, the relevant mechanisms have improved over time and are more streamlined now than in the past. Yet, it seems that when it comes to China, as demonstrated by the muted EU response to the outbreak of violent unrest in Tibet in March 2008, even in times of crisis it is rare that the EU member states can agree a strong statement at the UN’s principal human rights body. Analysis of the EU performance on the issue of human rights in China would also suggest that the EU policy preference for quiet diplomacy in the form of discrete bilateral engagement has endured under the stewardship of the EU’s first High Representative for Foreign Affairs and Security Policy with the result that, to a large degree, China continues to enjoy a ‘peculiar immunity’ from criticism first identified by Cohen in the 1980s.626

Chapter 5 Human Rights Assistance Programming

5.1 Introduction

Alongside human rights diplomacy, the offer of ‘practical’ support for human rights in China, through the provision of EU funding for human rights related projects, has been a key feature of the Union’s policy discourse since the European Commission released its first communication on relations with China in 1995. The communication describes human rights diplomacy and EU funded human rights assistance programming, as mutually reinforcing elements of a single policy approach which would ‘pursue human rights issues though a combination of carefully timed public statements, formal private discussions and practical cooperation’ However, the communication provides no detail as to the precise role and objectives to be pursued by the envisaged programme of practical cooperation and little progress was made in developing it until the changes, brought about by the controversial February 1998 common position of the Council of the European Union, provided the impetus to act on existing policy commitments.

The March 1998 communication on China released by the European Commission elevates the position of human rights assistance programming to that of one of just two core human rights policy instruments selected for use in China as follows:

The resumption of the EU-China human rights dialogue without any preconditions gives the EU a real opportunity to pursue intense discussions which, coupled with specific cooperation projects, remains at present the most appropriate means of contributing to human rights in China.

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627 European Commission (1995) Communication of the Commission: A Long Term Policy for Europe China Relations COM(95) 279, section B.2, para. 1
628 ibid
In order to advance the objective of supporting China’s ‘transition to an open society based on the rule of law and respect for human rights’, the communication proposes to ‘[b]ack up dialogue with concrete cooperation programmes’. The 1999 Annual Report on Human Rights published by the Council of the European Union continues in a similar vein and refers to the commitment of the EU to develop a cooperation programme ‘in support of the human rights dialogue with China’. In the years immediately following the announcement of the February 1998 common position of the Council of the European Union on China, documents detailing the EU’s human rights policy routinely described specific projects as fulfilling this role, including those aimed at improving the rights of women and the disabled, promoting local democracy, strengthening the rule of law, supporting small projects on the ground and sharing experience regarding ratification of the International Covenant on Civil and Political Rights.

Despite the passage of more than a decade since the EU began to fund human rights related projects in China in the late 1990s, little scholarly attention has been paid to the development of the EU’s human rights assistance policy in China. Moreover, that which exists does not present an in-depth consideration of the shifting and often conflicting priorities which inform this policy. To a certain extent, this can be explained by the complexity of the

630 ibid 11
EU’s external financial instruments which, coupled with the paucity of publicly available information on specific projects, make analysis of these initiatives and their stated objectives challenging work. However, even in the absence of such analysis, conclusions have been drawn and recommendations made regarding the impact of EU human rights programming and the future direction it should take, which would seem ill advised given the lack of research to back up such statements.

Only in the case of the EU-China Human Rights Seminars, has the manner in which an EU funded project should support the dialogue process been elaborated in the official discourse beyond the vaguely worded policy pronouncements detailed above. The question of how to realise the commitment to implement a human rights assistance programme that would ‘support’ and ‘complement’ the dialogue is not addressed in the official discourse relating to any other EU funded project in China. Nor is it tackled at the level of the EU’s global discourse on human rights dialogue. In fact, the EU Guidelines on Human Rights Dialogues, agreed by the Council of the European Union in 2001 and updated in 2008, make no mention of a role for human rights assistance programming in realising the objectives of human rights-specific dialogue with third countries generally, or of any need to establish a connection between these two instruments. As a result, the manner and degree to which human rights

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dialogue and human rights assistance programming should be linked together in the case of China has become a matter of some debate.

At one end of the spectrum, Morten Kjaerum, then director of the Danish Centre for Human Rights, has advocated the establishment of a mechanism, which would place the EU-China Human Rights Seminars in a pivotal role as an engine for the generation of ideas for the development of new human rights assistance initiatives, which could be reviewed by the political dialogue and then returned to the seminars for further elaboration and detailed planning.\footnote{Kjaerum, M. (2000) ‘EU, China and Human Rights: Main Themes and Challenges’ in Pentikäinen, M. ed. EU-China Dialogue. Perspectives on Human Rights with a Special Reference to Women Juridica Lapponica 23. (Rovaniemi: Lapland University), p. 9} This view is echoed by the confidential 2009 assessment of the EU-China Human Rights Dialogue which, in a section outlining ‘Best practices of other dialogues’, asserts that ‘the most successful dialogues are those that are closely linked with practical/technical programmes’.\footnote{Council of the European Union (2009) Assessment of the EU-China Human Rights Dialogue 2005-2009 CFSP/SEC/1906/09. Classified document obtained through confidential sources (on file with the author), Section 4.10, pp. 29-30} The assessment states that:

The countries that directly link their dialogues with extensive cooperation programmes indicate that the process of linking is difficult and time-consuming but that the resulting technical cooperation is often very useful. In general it is the dialogue that informs the projects, not the other way around.\footnote{ibid}

Following on from this, it is suggested that ‘complementing and linking the dialogue with practical cooperation projects in China produces positive results’ and that the EU ‘should explore possibilities to adopt a similar comprehensive approach and expand the scope of its current cooperation accordingly’.\footnote{ibid}

By contrast, Kinzelbach and Thelle have warned against formalising the interaction between the policy instruments of human rights assistance programming and human rights dialogue in China. While levelling a rather
clichéd criticism at the EU for displaying a ‘lack of political will’ in failing to realise the benefits which could ‘in theory’ accrue were ‘concrete proposals for improving linkages’ between the two instruments implemented, Kinzelbach and Thelle go on to argue that:

> Politicians and government officials can learn from academics and practitioners and often do in less sensitive settings, but the issue of human rights protection in China is such a high-profile point of contestation between China and the democratic part of the world that it would be better to separate the political negotiations and the academic and practical co-operation at the level of civil society.  

Apart from being obviously inconsistent, this analysis does not allow for the possibility that, in fact, the EU is well aware of the politicising effect which closer association with the dialogue may have on EU funded human rights assistance programming in China and that the decision not to cultivate a closer link between the two instruments is the result of a conscious decision rather than unwillingness to act on stated objectives. This view would seem to be supported by the fact that similar warnings have long been voiced by donors and agencies implementing human rights assistance programmes in China. In her 2007 study of legal projects in China aimed at improving human rights, Woodman refers to interviewees from the United Kingdom Foreign Office, the Norwegian Centre for Human Rights, the International Centre for Criminal Law Reform and Criminal Justice Policy based in Canada and the Danish Institute for Human Rights, as making precisely this point.  

Since the early 1990s, the global EU discourse on development aid has described human rights as part of a good governance ‘triptych’, consisting of human rights, democracy and the rule of law, with good governance regarded as

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the ‘all embracing principle’. In the absence of clarity from the EU on the precise nature of the intended link between the dialogue and human rights assistance programming in China, rather than evaluate current practice against a theoretical ideal, the analysis presented below will establish the extent to which human rights objectives have been incorporated into EU funded good governance programming in China. With regard to projects conceived after January 2001, the degree to which the human rights priorities set for the dialogue in the 2001 benchmarks are reflected in the objectives of EU funded human rights initiatives will also be examined. For the purpose of this study, good governance projects will be considered human rights initiatives if they explicitly pursue a human rights-based approach as defined by the Office of the

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Benchmark 1 Ratification and implementation of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights

Benchmark 2 Cooperation with human rights mechanisms (visit by the Rapporteur on Torture, invitation to other Rapporteurs, follow-up to recommendations from conventional mechanisms and recommendations by Rapporteurs, implementation of the agreement with the Office of the High Commissioner for Human Rights)

Benchmark 3 Compliance with ECOSOC guarantees for the protection of those sentenced to death and restriction of the cases in which the death penalty can be imposed, in keeping with Article 6 of the Covenant on Civil and Political Rights; provision of statistics on use of the death penalty

Benchmark 4 Reform of administrative detention; introduction of judicial supervision of procedures; respect for the right to a fair and impartial trial and for the rights of the defence

Benchmark 5 Respect for the fundamental rights of all prisoners, including those arrested for membership of the political opposition, unofficial religious movements or other movements, such as the Falun Gong; progress on access to prisoners in Chinese prisons, including in the autonomous regions; constructive response to individual cases raised by the EU

Benchmark 6 Untrammeled exercise of freedom of religion and belief, both public and private

Benchmark 7 Respect for the right to organise

Benchmark 8 Respect for cultural rights and religious freedoms in Tibet and Xinjiang, taking account of the recommendations of the committees of the United Nations Covenants, halt to the ‘patriotic education’ campaign in Tibet, access for an independent delegation to the young Panchen Lama, Gedhun Chohekyi Nyima, who has been recognised by the Dalai Lama.
High Commissioner for Human Rights.\textsuperscript{644} Crucially, this definition implies the identification of ‘rights holders and their entitlements and correspondingly duty-bearers and their obligations’ and which would work towards ‘strengthening the capacities of rights-holders to make their claims and of duty bearers to meeting their obligations’.\textsuperscript{645} In addition, good governance programmes, which specify human rights as a cross-cutting issue, will also be considered human rights initiatives.

Uniquely, in the case of the EU-China Human Rights Seminars, the nature of the link envisaged with the political dialogue process is elaborated in calls for proposals relating to the seminars launched in 2001 and 2008, as well as the resulting contractual agreements reached with the organisers of the seminars themselves, in particular the Irish Centre for Human Rights, National University of Ireland, Galway. Thus, it is possible to compare public statements setting out the EU view of the way in which the seminars should support the dialogue process with actual practice in this regard.

As discussed in chapter 4.4, achievement of the dialogue benchmarks requires far reaching political and legal reform in China. As such, translation of the benchmarks into realistic short-term objectives which can be advanced by EU funded projects, typically lasting no more than four years, is a challenge in itself. For the purpose of this study, human rights projects in support of benchmarks two through eight will include those which address any of the following issues: cooperation with human rights mechanisms, use of the death penalty, reform of administrative detention, rights of prisoners, freedom of religion and belief, the right to organise, and respect for cultural rights and religious freedoms in Tibet and Xinjiang. Human rights projects in support of benchmark one will include legal reform initiatives conceived with the explicit

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objective of ratification of the International Covenant on Civil and Political Rights signed by China in 1998. Projects in support of the broader objective of implementation of the International Covenant on Economic, Social and Cultural Rights also contained in benchmark one, will include only human rights initiatives which address, in particular, the right to organise and respect for cultural rights in Tibet and Xinjiang. This narrow definition of benchmark one is justified on the basis that, following China’s March 2001 ratification of the International Covenant on Economic Social and Cultural Rights, the focus of EU human rights policy in this area has converged on these two issues.

By the time the dialogue benchmarks were published in January 2001, respect for the rights of China’s ethnic minorities had long been highlighted as a concern by western governments, NGOs and international organisations, including, in particular, the European Parliament which had focused its attention on developments in Tibet since the late 1980s. The treatment of minorities in Xinjiang, while receiving less attention, was added to the EU’s list of concerns in the early 1990s. In 1993 for example, without referring explicitly to the Xinjiang Autonomous Region, the EU presidency highlighted as an EU concern, restrictions on the practice of religion in areas ‘with important minority populations’ including those where the population was ‘predominantly muslin’. Xinjiang was specifically mentioned for the first time by the EU at the UN Commission on Human Rights in 1999, during the statement delivered by the EU presidency under agenda Item 9, on violations of human rights and fundamental freedoms in any part of the world. In March 2000, the Council of the European Union referred for the first time to Xinjiang in its conclusions on China. The issue was subsequently included in the dialogue benchmarks finalised towards the end of 2000 and approved by the Council of the European

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By contrast, the right to organise was added to the list of EU priorities in the late 1990s, as China prepared to sign and ratify the International Covenant on Economic Social and Cultural Rights, in anticipation of reservations to article 8(1) regarding the right to form and join independent trade unions, which indeed materialised some months later. The right to organise and cultural rights in Tibet and Xinjiang have been clearly established as the priority issues for the EU in relation to the implementation of the International Covenant on Economic, Social and Cultural Rights in China. That this is so is further demonstrated by the fact that these two issues are also highlighted separately in dialogue benchmarks seven and eight.

With this understanding of human rights assistance programming and the policy priorities set down in the dialogue benchmarks in mind, it will be possible to ascertain whether or not the projects in China, funded by the EU, underpin the EU-China Human Rights Dialogue as proposed by the EU itself, and whether the various human rights initiatives implemented by the EU constitute a coherent strategy for human rights assistance in China. Such an approach also makes it possible to circumvent the obstacles created by the level of secrecy surrounding the dialogue itself, which would prevent closer analysis of potential operational and substantive links between the two instruments.

There are two principal streams of funding for human rights assistance programming in China. The first is comprised of geographic instruments, including those created by the 1992 ALA regulation targeting Asia and Latin America, and its 2006 successor establishing a financing instrument for development cooperation in Latin America, Asia, Central Asia, the Middle East and South Africa. The second funding stream is comprised of thematic


instruments, including, first and foremost, the European Instrument for Democracy and Human Rights, and its predecessor the European Initiative for Democracy and Human Rights (EIDHR), which remains the only external EU funding stream with a dedicated human rights focus.

The major purpose of aid delivered through ALA and the Development Cooperation Instrument is the eradication of poverty. However, respect for human rights and the promotion of democracy, the rule of law and good governance have been ‘key elements’ of EU development ‘discourse, policy and activities’ since the November 1991 resolution of the Council of the European Union recognised human rights and democracy as ‘part of a larger set of requirements’ judged necessary ‘to achieve balanced and sustainable development’. All initiatives funded under these geographic instruments, including those in the areas of good governance, democracy, and human rights, require the explicit approval of the authorities in China and are negotiated bilaterally between the EU and China, with the Ministry of Commerce generally taking the lead on the Chinese side. Thus, while agreed projects benefit from substantial levels of funding with EU grants of up to €20 million being earmarked for single initiatives, the scope of activity is limited to those which meet with Chinese approval.

By contrast, the European Initiative for Democracy and Human rights and its 2006 successor the European Instrument for Democracy and Human Rights, allow the EU to fund smaller scale initiatives in China and elsewhere, working directly with civil society actors. In theory, this form of funding does not require the explicit approval of the Chinese authorities and, consequently, the details of such projects are not negotiated bilaterally prior to the launch of relevant calls for proposals or the agreement of grant contracts with successful applicants.

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applicants. To date, the largest publically acknowledged grant awarded under this funding stream for initiatives targeting China has been the current €1.5 million EU-China Human Rights Seminars project led by the Irish Centre for Human Rights, National University of Ireland Galway since 2009. In addition to the European Instrument for Democracy and Human Rights, there is also scope to fund human rights related projects under a number of other thematic programmes, including those aimed at supporting civil society, in particular the programme for Non-State Actors and Local Authorities for Development launched in 2007, and its predecessor the NGO Co-financing programme, as well as the programme entitled Investing in People also created in 2007. As is the case with the European Instrument for Democracy and Human Rights, funding can be allocated through these thematic programmes without the need for official government approval.

5.2 First generation bilateral projects

In order to establish the degree to which the broad portfolio of EU funded assistance in China underpins the objectives of the official dialogue, it is

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necessary to consider the full spectrum of EU assistance in the area of good governance and identify the resources dedicated to human rights initiatives including, in particular, those which also aim to progress the issues highlighted as priorities for the dialogue in the 2001 benchmarks. The objectives of the EU’s programme of bilateral development aid for China are set out in the following publically available documentary sources: China country strategy papers, which guide the general direction of EU development cooperation in the light of target state analysis; and multiannual indicative programmes, which provide guidelines on programming and project identification. These are complemented by the information contained in: country-specific annual action programmes, which detail the financing decisions taken by the European Commission on a yearly basis including ‘action fiches’ setting out the objectives and expected results of the initiatives for which funds have been reserved; annual work programmes, which detail the grants to be awarded during the year following calls for proposals; and, where applicable, guidelines for grant applicants.

Analysis of these documents demonstrates that from the late 1990s, when the EU began to incorporate good governance into its bilateral development cooperation strategy for China, until the end of the period covered by the 2002 to 2006 China Country Strategy Paper, financing decisions were made in favour of a total of nine programmes classified by the EU as good governance/rule of law initiatives. Of these nine projects, seven proceeded to implementation,

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654 These include: Intellectual Property Co-operation Programme (1999-2004: EU contribution €5.6 million); Legal and Judicial Cooperation Programme (2000-2005: EU contribution €13.2 million); Village Governance Training Programme (2001-2006: EU contribution €10.6 million); EU-China Programme on Illegal Migration and Trafficking in Humans (proposed for 2003-2005: EU contribution €10 million); China-Europe Public Administration Programme (2003-2007: EU contribution €5.7 million); EU-China Civil Society Co-operation Programme (proposed for 2004-2006: EU contribution €20 million) EU-China Project for the Protection of Intellectual Property Rights IPR2 (2007-2011: EU contribution 10.9 million); Governance for
two of which were explicitly framed as human rights initiatives: the Village Governance Training Programme and Governance for Equitable Development. A further two specify human rights as a cross-cutting issue: the Legal and Judicial Cooperation Programme and the EU-China Law School. The remaining initiatives, including the China-Europe Public Administration Project, which aims to enhance the efficiency and transparency of the system of public administration in China and those relating to intellectual property, cannot be considered human rights initiatives since they were neither explicitly framed as such, nor do they specify human rights as a cross-cutting issue.

Negotiation of bilateral agreements leading to the establishment of the EU-China Legal and Judicial Training Programme and the Village Governance Co-operation Programme took place in the months and weeks leading up to the announcement of the controversial decision taken by the Council of the European Union not to table or co-sponsor a draft resolution critical of China’s human rights record at the March 1998 session of the UN Commission on Human Rights. Not only did the timing of the negotiations afford these programmes a uniquely high political profile, the agreement of a package of human rights related development cooperation also played a significant role in justifying the February 1998 common position of the Council of the European Union, with the result that implementation of the agreed projects was pursued with greater urgency thereafter.

The 1998 communication on China, released by the European Commission days after the conclusion of the March session of the UN Commission on Human Rights, summarises the EU approach to the promotion of human rights in China as one which combines ‘open debate’ with cooperation. The communication argues that:

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Equitable Development (2007-2011: EU contribution €6.8 million); EU-China Law School (2007-2013: EU contribution €18.2 million)
The resumption of the EU-China dialogue on human rights has placed renewed emphasis on the constructive resolution of differences. This gives the European Union a chance to put its good intentions into practice and deliver tangible assistance.\textsuperscript{655}

The view that the February 1998 common position of the Council of the European Union and resumption of the dialogue represented an opportunity rather than a setback for EU human rights policy in China was also cultivated in other arenas. For example, in defending the February 1998 common position during a meeting with Chinese activist Wei Jingsheng, Vice President of the European Commission, Sir Leon Brittan, listed China’s agreement to a ‘substantial EU funded cooperation programme in the field of human rights’ among the recent achievements of the dialogue.\textsuperscript{656} In doing so he referred, in particular, to the Legal and Judicial Cooperation Programme and the Village Governance Training Programme. The purpose of this statement was twofold: first, to demonstrate the importance of the dialogue as a venue for the negotiation of projects intended to advance the EU’s human rights agenda; and secondly, to demonstrate that, notwithstanding the position of the Council of the European Union on sponsorship of a draft resolution at the UN Commission on Human Rights, the bilateral human rights dialogue was not the only instrument available to the EU in pursuing the objectives of its human rights policy in China.

With negotiations regarding the EU’s flagship Legal and Judicial Training Programme at an advanced stage, the 1998 communication on China published by the European Commission clearly established the promotion of human rights as both an explicit and a primary objective for the programme:

The EU should help China’s efforts to develop a society based on the rule of law. Developing a sound and transparent legal framework, both in the civil and criminal sphere, providing rights to Chinese citizens – including the right to a fair trial – making them aware of those rights, and training lawyers and judges, would help achieve this goal as a first step. The EU is currently devising an ambitious programme of legal and judicial cooperation with these objectives in mind…

Agreement on the EU-China Legal and Judicial Training Programme was reached in November 1998 and the programme was officially launched in May 2000. With an EU investment of €13.2 million, it was at the time the largest externally funded rule of law initiative approved by the Chinese government and presented the EU with a significant opportunity to put its human rights policy into practice. This view was supported by the year 2000 report from the European Commission on implementation of its China policy, which states that the programme would ‘underpin moves towards creating a society more firmly based on the rule of law and respect for human rights, by disseminating a better understanding of this concept among those professionals most closely involved in the Chinese legal system’.  

In spite of these statements and the high profile afforded to the programme as a key component of the EU’s new constructive approach to the promotion of human rights in China, the final project evaluation states that human rights were not ‘consistently, strongly’ or ‘uniformly supported’ by the initiative. In fact, even at the early stages of project design, human rights were conceived as playing only a discrete and marginal role, as evidenced by the absence of legal professionals working in the area of criminal law from an initial list of intended programme beneficiaries, which included civil servants,

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legislators, judges and others ‘working in the areas of administrative, civil, commercial and international law’. Thus, in line with the final evaluation, it is possible to conclude that – aside from ‘a few’ grants of less than €100,000 each allocated through the so-called Directors Facility created under the programme to support rule of law initiatives carried out by Chinese organisations – the Legal and Judicial Cooperation Programme ‘did not overtly address human rights issues’. While the programme was conceived and negotiated prior to the release of the dialogue benchmarks, it is also notable that none of the issues which were to be agreed as the priorities for the EU in its human rights dialogue with China, provided the focus for training delivered by the programme.

Agreement to establish the Village Governance Co-operation Programme was signed by the two sides in mid-February 1998, just weeks before the Council of the European Union announced its common position on China. Within days of signature, the particulars of the programme – the aim of which was to ‘promote the development of village self-governance and democratisation in China’ – were to be the subject of discussion at the dialogue. Also, the EU delegation to the November 2002 dialogue visited the project at its site in Jiangxi.

In 1987, the National People's Congress of China approved the draft Organic Law of Village Committees (Organic Law), which provides for the organisation, functioning and election of village committees in China. Following a decade-long trial period, during which the draft was implemented on a pilot basis, the Organic Law was revised and passed by the National

660 ibid 12
661 ibid 11
People’s Congress in November 1998, just months after the EU and China reached formal agreement on the establishment of the Village Governance Co-operation Project. At the time, the Organic Law was greeted internationally as the major positive development in China’s reform, with the hope expressed that the experiment would progress from village level to township and beyond.⁶⁶⁵

Although history has proved these hopes illfounded, the launch of the Village Governance Cooperation Programme in 2001 enabled the EU to actively pursue a ‘key objective’ of its China policy, that of providing ‘support for the continued reform and transition process, in a visible manner allowing an exceptionally positive evaluation for the programme in 2006.⁶⁶⁶

Notwithstanding the synergy that the programme achieved between the priorities of the EU and the Chinese authorities, it seems that no effort was made to ensure the sustainability of the initiative beyond the funding period. Apart from the 2002 site visit and infrequent mention of the programme within the context of the dialogue, there is no documentary evidence of any attempt to establish a substantive link between the two, which would allow the discussion of issues highlighted in the course of its implementation to be followed up at political level. In spite of the inclusion of specific recommendations in the final evaluation report for the project, which proposed that the European Commission should continue to monitor the impact of the programme as well as link the ‘programme outputs’ to new initiatives, no such action has been undertaken.⁶⁶⁷

The 2005-2006 ‘Indicative Programme’ for China sets out the ambition of the EU to establish a major programme to ‘consolidate and expand’ on the achievements of its existing good governance initiatives, in particular the Legal

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and Judicial Cooperation Programme which at the time was in the process of being wound up.\textsuperscript{668} The document proposes an allocation of €22 to €28 million for a single programme entitled Governance Capacity Building, the objective of which was ‘to support the Chinese Government in its efforts to develop a society based on the rule of law’.\textsuperscript{669} That the programme envisaged was to have an explicit human rights focus is made clear in the document which includes ‘better human rights protection through strengthening of the rule of law and enhanced transparency in legal procedure and practice’ among the key results expected.\textsuperscript{670} Without specifying any need for a direct link with the dialogue, the document refers to the dialogue as one of two ‘channels for working to improve the human rights situation in areas of concern’.\textsuperscript{671} Human rights assistance is presented as the second channel, with the argument being made that the proposed programme would further strengthen EU support for human rights.

Ultimately, it proved impossible to reach agreement on a single human rights initiative of the scale proposed in the indicative programme and the decision was taken instead to create two separate initiatives. In January 2007, a financing agreement, which would see the creation of the first Sino-foreign law school approved by the Ministry of Education, was signed by the two sides. Under the agreement, the Chinese side undertook to provide in-kind contributions to the value of €10 million and the EU agreed to invest approximately €18.2 million.\textsuperscript{672} This was followed within months by the conclusion of an agreement to establish a joint EU-UNDP initiative entitled Governance for Equitable Development. The EU contribution to this latter initiative was approximately €6 million, bringing the total committed by the EU to the two programmes to €22.2 million from a maximum allocation of €28 million.

\textsuperscript{669} ibid 20
\textsuperscript{670} ibid
\textsuperscript{671} ibid
The call for proposals for the EU-China Law School was launched in April 2007. The overall objective of the programme, as set out in the call, is to ‘support the Chinese Government in its efforts to develop a society based on the rule of law’. The specific purpose of the programme is to:

[I]ncrease capacity for realising China’s governance priorities by establishing a Europe-China School of Law aiming at improving the knowledge, skills and performance of the Chinese legal profession in relation to European and international law and legal systems as a key factor in supporting the transition process and the sustainability of legal, social and economic reforms.673

While the promotion of human rights is not among the core objectives of the school, it is referred to as a cross-cutting issue which is to be mainstreamed into the programme activities. Thus, it is suggested in the call that a module on international human rights law might be inserted into the masters programme.674 It is also suggested that targeted training for Chinese legal professionals on European Law might cover the European Convention on Human Rights.675 However, the issue of human rights is not mentioned in the call as a focus area within the third area of proposed activity, that of research and consultancy.

The contract to establish the EU-China Law School was awarded to a consortium of 17 partners led by the University of Hamburg. On the Chinese side, the consortium included the Chinese University of Political Law Science where the school is based, the National Prosecutors College and the National Judges College. Following the recommendations contained in the call for proposals, ‘Rule of Law and Human Rights’ is included as one of 25 compulsory modules taken as part of the three year masters degree programme in Chinese and European law and one of nine compulsory modules taken as part of the one year masters degree programme in European and international law.

673 European Commission (2007) Europe-China School of Law: Guidelines for Applicants Responding to the Call for Proposals for 2007 EuropeAid/125527/L/ACT/CN, p. 4
674 ibid 10
675 ibid 11
In addition, human rights issues have been addressed in at least three of the twelve training courses for prosecutors, which were delivered under the programme up to the end of 2011 and for Chinese lawyers in at least two of the twelve training courses. Human rights topics addressed within the professional training programmes for prosecutors include evidentiary standards, the rights of suspects, pre-trial detention and the right to a legal remedy. Topics addressed within the programmes for lawyers include fundamental rights, the role of defence lawyers, the independence of lawyers, procedural rights and the independence of the judiciary.676

In a short section dealing with cross-cutting issues, the 2011 mid-term evaluation for the EU-China Law School confirms only that human rights are ‘important within the curriculum’, however no further information is provided and no attempt is made to evaluate the human rights impact of the project to date.677 Without access to information about the precise content of the masters degree programmes and professional training it is not possible to ascertain whether or not the teaching delivered has thus far required a self-critical analysis of current human rights practices in China. The fact that, for example, China’s human rights obligations are not the focus of any of the 16 compulsory courses delivered as part of the masters programme in Chinese law would seem to suggest that this may not be the case. Rather, it seems likely that teaching is focussed on the theoretical and historical development of human rights as opposed to the challenges presented by domestic practices, thereby perpetuating the commonly held view that human rights are a ‘foreign concept’ of little practical relevance to China. In this regard it is notable that in the case of professional training for prosecutors, human rights are most frequently addressed in courses which present the ‘European system’. Moreover, it is also clear that, although the masters degree programmes and professional training

676 For an outline of the professional training programmes delivered by the EU-China Law School including an archive of agendas see: http://www.cesl.edu.cn/eng/prgcareer.asp
modules have at times addressed issues highlighted as priorities for the EU by the dialogue benchmarks, the Law School programme as a whole has not consciously sought to focus on these priorities.

The overall aim of the Governance for Equitable Development programme, negotiated alongside the Law School, is to ‘support the Chinese Government in its efforts to develop an open and equitable society based on the rule of law’. 678 In contrast to the Law School, this programme includes among its core objectives ‘the promotion of good governance, increased access to justice, enhanced public participation in decision making and civil society involvement in equitable development’. 679 The project is divided into three core components. The first component, implemented in partnership with the Supreme People’s Court, aims at ‘increasing the access to justice by improving the capacities of the Chinese judiciary to deliver a fair and transparent justice and upgrading the transparency in court decision making and judicial personnel appointment’. 680 The second component, implemented in partnership with the National People’s Congress, China’s legislature, aims at ‘at improving China's law and policy-making systems’ by enhancing the role and capacity of the National People’s Congress in law making. 681 The third component, implemented in partnership with the Chinese Ministry of Civil Affairs, aims to develop the role of civil society in China. 682

The final evaluation report for the programme highlights a number of possibilities under component one which, if extended beyond the pilot project phase, have the potential to bring about a systemic improvement in the delivery

680 ibid 2
681 ibid
682 ibid
of transparent court decision making in China. This includes for example, pilot projects promoting the use of open trials. However, there clearly is no deliberate attempt to focus on the access to justice issues highlighted as priorities for the EU in the dialogue benchmarks. These include compliance with the ECOSOC safeguards for the protection of those facing the death penalty, reform of the system of administrative detention and respect for the fundamental rights of prisoners.

The objective of enhancing the role of the National People’s Congress in legislating, highlighted as the focal point for activity under the second core project component, is not included among the dialogue benchmarks as an EU priority and will not therefore be discussed here in further detail. In relation to the third component regarding civil society organisations in China, which accounts for almost half of the entire project budget, it is evident from the final project evaluation that independent human rights organisations were not the target beneficiaries of activities and also that there was no attempt made to focus on issues or organisations active in areas set down as priorities for the EU in the dialogue benchmarks. While highlighting progress towards eventual national level legislation abolishing the cumbersome dual-registration process which would, if adopted, benefit all civil society organisations, the final evaluation report also concludes that:

The GED project has been weak in supporting the involvement of independent CSOs in policy dialogue and law-making initiatives in the field of CSO registration and tax deductions and exemptions. Few such CSOs, especially rights protection CSOs, were invited to participate in research projects, workshops and study tours. It is still difficult for independent CSOs, especially those which work

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684 ibid 48
Neither the EU-China Civil Society Cooperation Programme, nor the programme envisaged in the area of human trafficking, proceeded to implementation. In the case of the former, ‘concerns over the absorption capacity in the Chinese context’ resulted first in a decision to cut by half the funding allocated from €20 million to €10 million, before the proposal was finally shelved in 2005. Since the programme was never implemented, it is not possible to establish with any certainty whether or not the intention was to focus activities on human rights NGOs, or more particularly organisations active in areas highlighted as EU priorities by the 2001 dialogue benchmarks. However, this seems unlikely given the sensitivity of the issues in question and the absence of any reference to the dialogue, or its objectives, in early descriptions of the programme.

Likewise, due to a ‘lack of agreement between the EU and China on the scope and content’ of the proposed project in the area of human trafficking, financing was reduced from €10 million to €1 million and the proposal was finally dropped in 2005. As conceived by the EU, the programme on human trafficking can be considered a human rights initiative in so far as it relates to the rights of the person, however it does not reflect the priorities set out in the dialogue benchmarks and no link to the official process was envisaged in early descriptions of the project.

5.3 Second generation bilateral projects

In contrast to the earlier Country Strategy Paper covering the period 2002 to 2006 and the corresponding indicative programmes, projects in the area of

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‘good governance’ are not grouped together and addressed under a single heading in the 2007 to 2013 paper. Rather, ‘good governance’ is addressed as a cross-cutting issue incorporated into programmes across the three areas identified as priorities for EU development cooperation in China. These are to:

(1) provide support for China’s reform programme in areas covered by sectoral dialogues, where EU experience can provide added value;
(2) to assist China in her efforts to address global concerns over the environment, energy, and climate change;
(3) to provide support for China’s human resources development.

This approach is in line with the official discourse on the role of good governance in development, which since 2003 had emphasised the need for ‘an increased use of sector-wide approaches’. This approach is also consistent with the recommendations put forward by a 2006 thematic evaluation of EU support to good governance as an external relations objective, and the European Commission communication on the same subject that followed some months later. More particularly to China, it also reflects one of three core recommendations made in the 2007 country level evaluation of EU funded cooperation programmes, which was released in the months preceding the 2007 to 2013 Country Strategy Paper.

The evaluation summarised the evolution of the official discourse on good governance as follows:

Increasingly, EC policy documents explicitly recognize the linkages between promoting governance and achieving broader development objectives (e.g. poverty reduction; conflict prevention; stability and security). As a result, there is a gradual shift in (mental) approaches from governance

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Accordingly, the conclusion was drawn that ‘poor governance’ had ‘limited’ the results of China’s reform programme ‘at the level of policy administration, implementation and enforcement’ and in response the recommendation was made that the theme of governance ‘should be broadly defined’ and ‘mainstreamed into all sectors’.  

From 2007, when the current Country Strategy Paper was published, until the end of period covered by this study in December 2011, financing decisions were taken by the EU in favour of 14 separate programmes in China funded through the package of bilateral development aid made available to China by the Development Cooperation Instrument. Of these, a total of three specify the promotion of good governance as a primary objective. Good governance is also incorporated into a further eight programmes as a cross-cutting initiative. Of these 11 good governance programmes, three can be described as human rights initiatives in so far they are explicitly framed as such, or refer to human rights as a cross-cutting issue. These are the EU-China Environmental Governance Programme, the Civil Society Dialogue and the EU-China Police Training Project. In addition, although not categorised as a good-governance initiative, the China-EU Access to Justice Programme, the

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692 ibid
693 These include: China-Europe Public Administration Programme II (2010-2014: EU contribution €4.5 million); EU-China Environmental Governance Programme (2011-2015: EU contribution €15 million); EU-China Police Training Project (2012-2016: EU contribution €6 million).
aim of which is to support the provision of free legal aid in China, should also be considered a human rights project since it is specifically framed as such.

The EU-China Environmental Governance Programme outlined in the 2008 annual action programme marks a new departure for the EU’s environmental protection strategy in China.\textsuperscript{695} For the first time, the programme sees the EU adopt a human rights based approach to the promotion of environmental protection in China in a major bilateral initiative. As such, the need to tackle issues relating to freedom of information, public participation in decision making and access to justice, is explicitly recognised and provide the underlying logic for the entire programme. According to the annual action plan for 2008, the programme is divided into two core components. A total of €11.25 million of the €15 million in available funding has been allocated to the first component targeting the ‘local level’, where the ‘main stress’ is laid on ‘public rights and access to information, encouraging modification to implementing rules and regulations’. A more modest €3.5 million has been allocated to the second component targeting, the ‘national level’, where the focus is on working ‘with the national government agencies to improve the policy and legal framework, particularly in the area of public participation, access to environmental information and the right to appeal and redress’.\textsuperscript{696}

The programme was officially launched in December 2011, following the award of a contract to German based consultants GOPA to provide technical assistance under component two. A call for proposals under component one was launched in November 2010. The call invites proposals from a range of non-state actors for actions relating to four ‘core themes’ of the programme: public access to environmental information; public participation in environmental consultation and decision making; access to justice in environmental matters; and proactive engagement of the private sector in


\textsuperscript{696} ibid p. 3
sustainable practices. Several actions under themes two and three are specifically framed as human rights initiatives, with reference made to the rights of citizens and the duties of the authorities in relation to a broad range of issues including in particular access to information, the provision of legal assistance, the development of evidentiary standards and the provision of effective remedies.

According to the official EU discourse, along with accountability, effectiveness, coherence and participation, ‘openness’ is one of the five ‘principles of good governance’. However, be this as it may, the right of access to information, which is understood as a corollary of the right to freedom of expression, is not among the issues highlighted as priorities for the EU by the dialogue benchmarks. Thus, the suggested actions listed under theme two are not directly relevant to the objectives of the dialogue. Similarly, access to justice is referred to as a priority for the EU, but only in so far as it relates to the ECOSOC safeguards for the protection of those sentenced to death, reform of the system of administrative detention and respect for the rights of prisoners. By contrast, the intended outcome of actions funded under theme three of the Environmental Governance Programme is to enhance public access to justice in environmental matters. Thus, it also seems highly unlikely that actions funded under theme three will be of direct relevance to the issues set out as priorities for the EU in the dialogue benchmarks, in particular benchmarks three, four and five.

The EU-China Civil Society Dialogue Project was created as a ‘Support Measure’ under the EU’s Development Cooperation Instrument in response to a 2006 proposal from the European Parliament calling for the establishment of a €1 million programme to enable a ‘structured dialogue between Chinese and

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697 European Commission (2011) EU-China Environmental Governance Programme: Guideline for Grant Applicants EuropeAid/132-005/L/ACT/CN, pp. 9-11
699 UN Human Rights Committee (2011) General Comment No. 34 Article 19: Freedoms of Opinion and Expression (12 September 2011) UN Doc: CCPR/C/G/34, paras. 18-19
European civil society’. As provided for in the 2006 regulation establishing the Development Cooperation Instrument, the project falls outside the areas of cooperation set out in the relevant country strategy paper for China and accompanying multiannual indicative programme and was negotiated separately with the Chinese Ministry of Commerce.

The overall objective and specific purpose of the project, as described in the 2009 annual action programme, is ‘to support the consolidation of a structured ongoing dialogue between European and Chinese civil society’ and to ‘formulate common recommendations on public as well as private governance for the benefit of sustainable development and of poverty eradication’. A clear emphasis is to be maintained on ‘themes related to major common challenges’ in working with civil society institutions in various fields, including ‘law, journalism, religion, culture, minorities, gender, health, environment, trade unions, and policy think-tanks’. This list of ‘relevant fields’, which is non-exhaustive, allows for the possibility of action on several issues highlighted as priorities by the dialogue benchmarks, including respect for cultural rights and religious freedoms in Tibet and Xinjiang (benchmark eight) and respect for the right to organise (benchmark seven). In addition, the promotion of human rights is specified as a cross-cutting issue which should be mainstreamed in all project activities in both the 2009 action fiche and the 2010 call for proposals which followed.

The contract to implement the project was awarded to a consortium led by Nottingham University in November 2010. By December 2011, the project had facilitated a total of three ‘participatory dialogues’ addressing the following

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703 ibid 4-5
704 ibid 5; European Commission (2010) EU-China Civil Society Dialogue: Guidelines for Grant Applicants EuropeAid/129551/L/ACT/CN, p. 8
issues: climate change, sustainable consumption and production (July 2011); industrial pollution and environmental health (August 2011); and informal work and migration (November 2011). While it is possible that in each case the subject matter was considered from a human rights perspective, this is not stated in the materials published following the events themselves.\(^{705}\)

Notwithstanding this possibility, it is clear that thus far, the themes selected for discussion have been of no direct relevance to the dialogue benchmarks.

The EU-China Police Training Project foreseen in the annual action programme for 2010 is explicitly framed as a human rights initiative. The programme states that ‘reform of police training has a fundamental role to play’ in ensuring the ‘responsiveness of the Chinese police to the needs of the Chinese people and society and in a manner which respects the rule of law, human rights and fundamental freedoms’.\(^{706}\) EU support in implementing the reform agenda of the Chinese Ministry for Public Security in relation to policing, is described as instrumental to the Ministry’s approach, particularly in the ‘priority areas’ of: management of the police force; law- and rights-based maintenance of public security; standardisation of law enforcement; modern criminal investigation methods; and the fight against specific forms of organised crime.\(^{707}\)

According to 2010 the annual action programme, the €6 million project shall be comprised of two main activities: police training on four distinct themes, including specifically ‘the quality and requirements of criminal investigations’; and the establishment of a ‘senior level’ dialogue between the Chinese Ministry of Public Security and counterparts in a number of EU member states.\(^{708}\) The integration of ‘human rights aspects…into all project activities’ is clearly stated to be the EU approach, one which the Ministry for

\(^{705}\) For information regarding events convened by the EU-China Civil Society Dialogue project including press releases and newsletters see the project website at: http://www.eu-china.net
\(^{707}\) ibid
\(^{708}\) ibid 3
Public Security is said to both ‘understand and support’. As such, not only is the proposed project undoubtedly a human rights initiative, it is also of high potential relevance to dialogue benchmark five, regarding respect for the fundamental rights of all prisoners.

The incorporation of a focused high level dialogue into the project design marks a new and promising departure for EU human rights assistance in China. While in the past the activities of certain EU funded projects have targeted personnel within the Chinese legislature, executive and judiciary, including for example the National People’s Congress, the Supreme People’s Court and the Ministry of Civil Affairs, to date the involvement of equivalent member state organs in EU funded projects has been limited. This asymmetry has been remarked on with some dissatisfaction by Chinese participants. For example, according to the mid-term evaluation of the EU-China Law School, representatives of the National School of Judges and the National Prosecutors College in receipt of professional training delivered through the project have ‘expressed a strong interest in having among lecturers also persons with practical experience in the judiciary rather than academics’. To mitigate such shortcomings, the approach proposed for the Police Training Project requires the direct involvement of the competent EU member state organs and other relevant bodies such as Europol.

A financing agreement for the project was signed in 2011 and the project office was established in Beijing in mid-2012. In the absence of a public statement from the EU on the matter, it is not possible to ascertain whether the delays experienced in implementing the project have been a result of ‘policy changes’ in China, an altered security and political situation, or difficulties in establishing an appropriate consortium of EU law enforcement agencies to implement the project, all of which are highlighted as potential risks in the

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709 ibid
710 ibid 5
annual action programme.\textsuperscript{712} It is also impossible to judge at this point the extent to which project activities will focus on issues highlighted by the dialogue benchmarks, in particular the fundamental rights of prisoners.

The overall objective of the EU-China Access to Justice Programme outlined in the EU’s 2011 action programme is ‘to support China’s effort in strengthening access to justice to disadvantaged groups in regions with less developed infrastructure and in less economically developed areas’ by improving the quality of legal aid in China.\textsuperscript{713} The suggested approach, which would combine training activities targeting legal aid workers in pilot provinces with a high level policy dialogue between the Ministry of Justice and its EU member state counterparts, is reflective of that proposed for the EU-China Police Training Project.\textsuperscript{714} Although the activities undertaken are expected to have ‘a systemic effect throughout the field of legal aid in China’, the annual action programme states that the project should be implemented in three provinces including either Tibet or Xinjiang.\textsuperscript{715}

As such, the objectives of the project described in the action programme reflect the priorities set out in dialogue benchmark five, regarding respect for the fundamental rights of prisoners, in so far as it may enable prisoners to access their rights through the provision of legal aid. Furthermore, although the need to enhance the quality of legal aid in capital cases is not mentioned as a particular focus for the project, to the extent that a systemic improvement is achieved, the project may also contribute to the realisation of benchmark three, on compliance with the ECOSOC safeguards for the protection of those sentenced to death.\textsuperscript{716} Finally, the objectives of the project described in the annual action programme also reflect the priorities set out in benchmark eight.

\textsuperscript{714} ibid 4
\textsuperscript{715} ibid
\textsuperscript{716} UN Human Rights Committee (2007) General Comment No. 32, Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial (24 July 2007) UN Doc: CCPR/C/G/32, para. 21
of the dialogue, regarding respect for cultural rights and religious freedoms in Tibet and Xinjiang, in so far as improvements in the provision of legal aid may enable citizens in these provinces to more easily assert their rights.

Following lengthy negotiations, a financing agreement was signed between the two sides in September 2012 and a call for proposals launched in the same month.\textsuperscript{717} In contrast to the description of the proposed project contained in the 2011 action plan, the guidelines for applicants, published alongside the call for proposals, make no mention of either Tibet or Xinjiang as potential locations for project activities. Rather, it is stated that the project will take place in the following three provinces/autonomous regions: Henan, Inner Mongolia and Shanxi.\textsuperscript{718} Thus, while the project as described in the call for proposals is of potential relevance to benchmarks three and five, relating to the fundamental rights of prisoners and the ECOSOC safeguards, it is of no relevance to benchmark eight, regarding cultural rights and religious freedoms in Tibet and Xinjiang.

A direct link to the EU-China Human Rights Dialogue is not discussed in the annual action programme. However, it is suggested that in order to mitigate the potential negative impact that any deterioration in the overall EU-China relationship might have on the implementation of the project, it is necessary to ‘keep dialogue channels open and be associated with EU-China political dialogues’ of which the Human Rights Dialogue is a constituent part.\textsuperscript{719} This description of the connection between the project and the Human Rights Dialogue is expressed rather differently in the final call for proposals, which states explicitly that the project should ‘contribute to deepening the existing EU-China policy dialogue in the domain of Rule of Law, access to justice and human rights’.\textsuperscript{720} Thus, the project is to improve the quality of the

\textsuperscript{717} European Commission (2012) China-EU Access to Justice Programme: Guidelines for Grant Applicants EuropeAid/133-422/L/ACT/CN, Beijing, January 2012
\textsuperscript{718} ibid p. 4
\textsuperscript{720} ibid 10
dialogue rather than the dialogue support the smooth implementation of the project as originally envisaged.

5.4 Human rights seminars and micro projects

In 2007, the European Commission published for the first, and indeed only, time an independent evaluation of the EU’s overall cooperation and partnership with China. The report, which covers not only projects in the area of human rights but the full range of EU funded initiatives from 1998 to 2006, concludes that during the period under review it is possible to identify a total of two EU funded initiatives created with the express objective of supporting the progress of the Human Rights Dialogue. These are the EU-China Human Rights Seminars and the Human Rights Small Projects Facility, or the Micro Project Programme as it is generally called in the official discourse, funded through the European Initiative for Democracy and Human Rights and its 2006 successor, the European Instrument for Democracy and Human Rights.

The EU-China Human Rights Seminar process was conceived in the late 1990s as an integral part of the EU-China Human Rights Dialogue. In the view of the European Commission, the ‘principal’ objective of the seminars since their inception has been to:

- open up the official human rights dialogue to the European and Chinese academic and NGO communities and create a space for non-confrontational discussions at experts’ level;
- follow up on some of the discussions of the official dialogue in a more in-depth manner and encourage experts to feed the agenda of the dialogue with new topics, approaches and emerging issues;
- expose Chinese academics and civil society representatives to international human rights standards and EU practices.

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722 ibid Volume 2, pp. 14-15

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Since the first seminar took place in Beijing in January 1998, all costs associated with the events have been covered exclusively by the EU from the budget of the European Initiative on Democracy and Human Rights and its successor, the European Instrument on Democracy and Human Rights. Responsibility for logistical organisation on the Chinese side has continuously resided with the Law Institute of the Chinese Academy for Social Science, China’s leading academic institute in the area of the social sciences. On the EU side however, this responsibility has frequently changed hands.

From 1998-2001, responsibility for organisation of the seminars mirrored the rotating presidency and was generally allocated to the leading human rights institution in the country concerned. In order to enable greater continuity and allow participants to engage on a deeper level between seminars, the decision was taken in 2001 to provide funding which would transfer responsibility for organisation to a single academic institution. Following a call for proposals from the European Commission, this responsibility was contracted to the Irish Centre for Human Rights, National University of Ireland Galway, as the lead organisation in a newly created network of academic institutions across Europe and China.

Following the expiry of the contract with the Irish Centre for Human Rights, the task of organisation was outsourced to CECOFORMA, a professional consultancy based in Belgium, from 2005 to 2008. The reason for this change in ‘methodology’ has never been made clear by the funder. While Kinzelbach has suggested that it was due to dissatisfaction with the leadership of the Irish Centre for Human Rights, in fact this criticism has never been made by the European Commission either publically or privately in its contacts with the Irish Centre for Human Rights. Moreover, the fact that a second contract was awarded to the Irish Centre for Human Rights to lead the seminar process

724 ibid
for a three year period from 2009 would seem to suggest that while this view may have been expressed by individual members of the Council Working Party on Human Rights in the course of interviews with Kinzelbach as reported, it was not generally held within the Council Working Party on Human Rights or the European Commission.

While responsibility for the logistical organisation of the seminars on the EU side has changed over the years, negotiation of dates, topics and participants for each event has been handled throughout by the Chinese Ministry of Foreign Affairs and the European Commission, or since 2010 by the European External Action Service. The events themselves have also adhered to a format established in the 1990s with few significant alterations. Each two-day seminar convenes academic experts, civil society actors and government officials to consider various human rights topics. While multiple topics were considered at each of the first three seminars taking place in February 1998, October 1998 and February 1999, all subsequent events have focused on just two: one proposed by the European Commission/External Action Service and the other by the Ministry of Foreign Affairs. Generally speaking, two seminars have taken place each year from 1998 to 2009, one in the first half of the year and one in the second, alternating between Beijing and the seat of the EU presidency. In 2010, the frequency of the seminars was reduced to one a year on the basis of a unilateral decision taken by the Chinese Ministry of Foreign Affairs, following the conclusion of an internal review of all of China’s bilateral human rights dialogues. However, the events themselves, although less frequent, continue to adhere to their original format.

Uniquely in the case of the seminars, the intended nature of the link to the dialogue process has been elaborated in the official discourse beyond the general policy commitments contained in the various communications on relations with China released by the European Commission. In particular, the contract negotiated between the European Commission and the Irish Centre for Human Rights in 2002, as well as the 2008 call for proposals launched by the
Commission, further outline the EU view of the manner in which the two processes should interact.

The 2002 contract negotiated with the Irish Centre for Human Rights states that the project will ‘complement and indeed interact with the ongoing human rights dialogue’ as follows:

It is envisaged that the participants in the dialogue, including the Chinese Ministry of Foreign Affairs, the EU Presidency and the Commission, will review the activities of the network and make recommendations to the Steering Committee. It is further proposed that an agenda item on future EU-China dialogues should include a Review of the activities of the Network so that both the dialogue and the network maintain a line of communication and cooperation.\textsuperscript{726}

That the ‘EU-China legal seminars’ are in fact included among thirteen ‘topics’ covered ‘almost systematically’ at the dialogue is confirmed in the 2009 internal assessment of the dialogue process.\textsuperscript{727} In addition, since its inception it has been the case that a number of officials participating in the dialogue on both sides also participate in the corresponding seminars. However, it would appear from the content of both the Interim Narrative Report and the Final Narrative Report produced by the Irish Centre for Human Rights in 2002 and 2003, that while the seminars may be regularly included on the agenda for the dialogue, the two way flow of information envisaged in the statement above had not materialised.

In a written addendum to the 2002 Interim Narrative Report, numerous suggestions are made with a view to linking the two events ‘more closely together’ including the suggestion that ‘the Political Dialogue could refer an issue to the Dialogue Seminar for discussion and advice’, thereby enabling the

seminars to ‘act as an expert group available for consultation in a tangible way to the Political Dialogue’. The inclusion of this suggestion would seem to indicate that recommendations had not been received from the political level and that little thought had been given by the actors involved in the official process as to how, in reality, the Network could best support the dialogue. Moreover, it is apparent from the following suggestion contained in the addendum that not only did the political actors fail to make recommendations to the Network, which could ensure that it maintained a strategic focus on issues of relevance to the dialogue, but that in fact the Network was kept entirely in the dark about the proceedings of the dialogue:

At a most basic level, participants in the Dialogue Seminar should be informed about the Political Dialogue. An information session at the beginning of the Dialogue Seminars to lay out the main discussion and findings of the previous Political Dialogue could be a first step in this direction. This is not something that the Network can do under the present circumstances – we do not receive any information on the Political Dialogue.

That this situation was to persist until the end of the Network project is made clear in the Final Narrative Report, which states that ‘the Network did not have any links to the EU-China Political Dialogue’. The relevant passage, which is worth quoting in full, continues as follows:

An input of information [from the Dialogue to the Network] would allow for better coordination and strategising in connection with the related Dialogue Seminars. Bearing in mind the fact that these events are part of the same process working towards the same objectives, providing for some links between them could assist to ensure there are no contradictions or conflicts as between the message and outputs of these events. They could in this way become more mutually reinforcing.

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729 ibid pp. 3-4
The report concludes its analysis of the problems, related to the lack of a discernable link to the dialogue, by repeating the suggestions made in the earlier Interim Narrative Report.

While operational issues relating to the seminars have been discussed in the dialogue and side meetings associated with it, including in recent years, for example, issues relating to both the frequency of and setting for the events, the issues actually debated at the seminars are not followed up at the dialogue, principally because there is no agreement between the two sides that they should be. Although the Ministry of Foreign Affairs is willing to allow the seminars to continue, there is no inclination to agree to any measure which would enable the EU to use either verbal or written materials produced within the context of the seminars to bolster their own arguments in the dialogue. This, it would seem, is precisely what the European Commission had in mind when stating in its 2008 call for proposals that the ‘purpose’ of the seminars was the production of joint conclusions and recommendations, ‘which feed into the discussions at the official political dialogue’.731

In line with previous practice, participants in the seminars organised by the Irish Centre for Human Rights since 2009 are split into two separate working groups, each with a focus on one of the two topics selected for discussion at the event. Two rapporteurs, one European and one Chinese, are nominated from each working group and entrusted with reporting on the discussions that have taken place at the final plenary session of the seminar. In the past, this format has very occasionally resulted in the presentation of joint conclusions and recommendations by seminar rapporteurs at the closing

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However, since 2009, all attempts made by the Irish Centre for Human Rights and its interlocutors in the EU to institutionalise this practice have been rebuffed by the Chinese Ministry of Foreign Affairs, with the result that none of the four seminars organised under the current contract have led to the production of such materials. Instead, in each case, the seminar rapporteurs have presented their own view of the discussions, with particular care being taken on the Chinese side to avoid reference to any call for specific reforms in China that may have been made during the course of the event.

Despite the passage of more than a decade since the seminars were conceived as an integral part of the EU-China political relationship, no agreement exists between the two sides as to the purpose of the events and the entire process exists only on the basis of established practice. As a result, controversial issues such as the involvement of civil society, the role of the seminar rapporteurs and the production of joint conclusions and recommendations remain unresolved. Crucially, given the stated intention of the EU that the seminars should ‘feed into’ and ‘enrich’ the dialogue, no mechanism has been put in place to allow materials and discussions from the seminars to reach the dialogue, the absence of which has had a profound and negative impact on the ability of the events to achieve their primary objective.\(^733\)

The successful establishment of a substantive link between the official dialogue and the seminars requires detailed discussion and agreement at political level as to the precise objectives and modalities of such a mechanism, as well as the objectives of the seminars more generally. However, as a matter of principle, the EU is reluctant to enter such discussions with the Chinese

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Ministry of Foreign Affairs about a project funded under the European Instrument for Democracy and Human Rights.

Since its establishment in 1994, one of the defining characteristics of the European Initiative for Democracy and Human Rights and its successor, the European Instrument for Democracy and Human Rights, has been that the funds allocated through it are granted directly to civil society organisations, enabling projects to proceed without the need for 'prior approval from national authorities or government'. In the view of the European Commission, this means that:

[A]t least at the conception stage, the beneficiaries do not have to make concessions that would perhaps weaken the content and hence the impact of the projects. Likewise, since governments are not involved in project elaboration, they cannot resort to delaying tactics that would forever postpone the beginning of activities. Projects financed under the instrument put governments in front of a fait accompli that they perhaps dislike but cannot openly torpedo...

The significance of this approach, and the perceived benefits it entails in terms of flexibility and independence of action, have been consistently highlighted in the official discourse relating to the European Initiative for Democracy and Human Rights since its creation and have been transposed into the European Instrument for Democracy and Human Rights. As a result, it is an approach

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\[735\] ibid


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which the EU is understandably reluctant to abandon under pressure, whether or not the logic for pursuing it appeals to the Chinese side.

Kinzelbach has suggested that the failure of the European Commission to ‘reach prior agreement’ with the Ministry of Foreign Affairs, when launching the first call for proposals in 2001 to establish an academic network which would undertake organisation of the seminars, indicates that ‘the European actors involved lacked adequate understanding of the institutional dynamics in China, not only with regard to the position of CASS vis-à-vis the MFA but more broadly regarding the sensitivities involved in any interaction between Chinese and foreign human rights experts’. However, it would seem more likely that the decision not to engage with the Ministry on the particulars of the call was motivated not by a lack of understanding but by adherence to the principle of independent action underlying the European Initiative for Democracy and Human Rights. The fact that, in spite of the objections raised by the MFA in relation to the first call, the same position was maintained in 2008 when a second call for proposals was launched, would also support this interpretation of events. Nevertheless, in the case of the seminars, this position would appear to be entirely self-defeating.

In China, there is a direct link between politics and academia which cannot be entirely broken. It is precisely the existence of this link which has led the EU and other actors to seek to influence policy by encouraging engagement through funding expert exchange initiatives. What sets the seminars apart from other such initiatives is that they were conceived of, and are seen as part of, the EU-China political relationship. As academic events intrinsically linked to the political process, the details of each seminar must be negotiated and agreed with the Ministry of Foreign Affairs. Under such circumstances, it would

appear misguided not to engage with the Ministry of Foreign Affairs on issues of substance which gravely affect the quality of the seminars themselves.

The profound impact, which this decision has had on the ability of the seminars to achieve stated objectives, was highlighted in a December 2011 statement delivered by the Irish Centre for Human Rights at a public hearing on human rights in China convened by the European Parliament Subcommittee on Human Rights. The statement asserts that following the award of a second contract to the Irish Centre for Human Rights to lead the seminar process for a three year period from 2009, ‘it transpired that the project proposal, submitted in partnership with the Chinese Academy of Social Sciences, had not received the approval of the Chinese Ministry of Foreign Affairs’ as a result of the ‘displeasure of the Chinese side at not having been consulted when the original terms of reference for the open call were being drawn up’.

The statement continues as follows:

> [W]ithout an agreed basis for the entire project the Irish Centre for Human Rights and the Chinese Academy of Social Sciences are prohibited from engaging directly on the negotiation of topics and subtopics for the event. As a result, the subtopics identified often lack coherence which prevents participants from focusing on any one particular area and ensures that discussions remain broad and theoretical.

> All attempts to engage with our academic counterparts in China in order to introduce minor innovations with a view to streamlining the preparations for and improving the quality of the seminars…have ended ultimately in rejection and a refusal to deviate in any way from ‘established practice’.

The statement further asserts that despite the development of the bilateral relationship between China and the EU, the seminar process ‘has failed to evolve’ and takes place on ‘exactly the same basis as it did in 1998’. Finally,

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739 Archived video footage of the meeting including the full statement delivered on behalf of the Irish Centre for Human Rights can be found at: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20111205-1500-COMMITTEE-DROI
740 ibid
741 ibid
the conclusion is drawn that ‘while the seminars have served their purpose well’ it is time ‘for the process to be reoriented’. 742

The second EU funded initiative identified by the 2007 evaluation as being explicitly linked to the official dialogue is the Micro Projects Programme. The Micro Projects Programme was a global facility created in 1994 under the European Initiative for Democracy and Human Rights. Through the Programme the EU offers small grants (maximum €100,000) to ‘grassroots NGOs in third countries that implement projects supporting and promoting human rights, democracy and the rule of law, conflict prevention and easing conflict consequences’ and which do not exceed two years in duration. 743 Calls for proposals under the programme, which are managed locally by the relevant overseas delegation of the European Commission/European Union, aim to advance the priorities set out for the European Initiative for Democracy and Human Rights in various strategy papers and are tailored to the needs of the target country. In the case of China, the precise objective of the Micro Projects Programme has been defined as that of ‘maximising the impact of the EU-China Human Rights Dialogue’. 744

Since the programme was opened to China, the European Commission Delegation in Beijing has launched five calls for proposals, one in each of the years 2001, 2004 and 2005 as well as two in the year 2006. During the lifetime of the programme, 25 grants worth a total of approximately €1.3 million have been awarded to provide funding for actions lasting between nine months and two years.

In spite of the key role of maximising the impact of the dialogue ascribed to the programme, publicly available information relating to it is exceptionally

742 ibid
limited. Moreover, due to poor record keeping and frequent personnel changes during the lifetime of the programme in China, the institutional memory of the initiative and the actions funded under it can only be described as, at best, incomplete.

The first call for proposals under the programme was launched in December 2001 following publication of the benchmarks set for the EU-China Human Rights Dialogue in January 2001. A 2004 résumé of the actions funded in response to the call and a 2005 summary of the results achieved in each case demonstrate that, in terms of objectives, five of the 18 actions funded following the 2001 call reflect the specific priorities set out for the dialogue in the 2001 benchmarks. This includes a total of three actions relating to benchmark five, on the rights of prisoners, one action relating to benchmark four, on reform of the system of administrative detention, and one action relating to benchmark eight, on the rights of ethnic minorities in Tibet and Xinjiang.

A total of seven other actions relate to rights guaranteed under the International Covenant on Economic, Social and Cultural Rights which China ratified in February 2001. However, none of these actions reflect the

745 A request by the author under Regulation (EC) 1049/01 for access to the 2001 Guidelines for Grant Applicants setting out the priorities of the first call for proposals could not be met since no record of the guidelines has been kept.


747 Actions relating to benchmark five include: Justice for Children - on the rights and interests of children during police interrogation (2002-2003: EU contribution €60,000); Training about Police Law Enforcement - on human rights training for law enforcement personnel (2002: EU contribution €40,000); and Human Rights Training of Police in Hunan Province - on the prevention of torture (2002-2003: EU contribution €90,000).

748 Actions relating to benchmarks four and eight respectively include: Study on the Judicability of the Labour Re-education System (2002-2003: EU contribution €60,000); and The Xiao Jing Scripts among Chinese Northwest Muslim Ethnic Minorities (2003: EU contribution €80,000)

749 These include: Status of Chinese Women’s Rights and Interests (2002-2003: EU contribution €50,000); Equal Right to Receive Education (2002-2006: EU contribution €15,000); Amendatory Intervention of Public Opinion on Women’s Employment (2002-2003: EU contribution €39,000); Training Course on the Skills of Protection of the Rights of All Floating Workers in Wuhan (2002-2003: EU contribution €40,000); Protection of Workers’
priorities set out in the dialogue benchmarks which clearly establish the right to organise and the right to participate in cultural life as the priority issues for the EU in the area of economic, social and cultural rights. Likewise, while action 13 entitled In-Depth Analysis of Village Democracy in Anhui Province (2002 to 2003 EU contribution €30,000) relates to rights guaranteed under the International Covenant on Civil and Political Rights, it does not reflect the specific priorities in the area of civil and political rights set out in the benchmarks nor does it aim at legislative reform ratifying the Covenant as envisaged in benchmark one. The remaining five actions funded under the call relate to matters other than rights guaranteed by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and are of no relevance to the dialogue benchmarks.\textsuperscript{750}

The second call for proposals under the Micro Projects Programme was launched in 2004 with four thematic priorities:

1. Promoting and protecting the rights of workers, including migrant workers;
2. Promoting the rights of people living with HIV/AIDS and combating discrimination against people directly or indirectly affected by HIV/AIDS;
3. Promoting access to education for disadvantaged groups;
4. Promoting the human rights of detainees and raising the awareness of police and law enforcement officials on human rights.\textsuperscript{751}

\textsuperscript{750} These include: Human Rights Law Training Programme for University Teachers (2003: EU contribution €67,000); Research and Prevention: Current Situation of Discrimination against Street Children and Migrant Children in Kunming (2002-2003: EU contribution €56,000); Prevention of Family Violence (2002-2003: EU contribution €14,000), Equal Rights and Opportunities for Disabled Children and Their Families in the Less Developed Areas of Western China (2003-2004: EU contribution €33,000); and Child Abuse and Neglect - Assessment, Management, Prevention (2002-2003: €60,000)

\textsuperscript{751} European Commission (2004) Micro Projects China: Guidelines for Grant Applicants Ref 119-918, p. 3
Thus, while explicitly stating that the Micro Projects Programme was established to ‘maximise the impact’ of the dialogue, the call goes on to invite actions in several areas unrelated to its key objectives.

An outline of grants awarded since 2004 reveals that by comparison to the first call, which resulted in grants for 18 actions totaling €840,000, the second call was much more modest, both in terms of the number of grants awarded and the total amount of funding contracted. Three actions received funding totaling €168,000 under the programme, none relating to the specific objectives of the dialogue as set out in the 2001 benchmarks.

A third call for proposals was launched in April 2005. The call identifies three new thematic priorities including:

1. Strengthening local civil society organisations, in particular organisations focusing on human rights;
2. Raising police and law enforcement officials’ awareness of human rights and promoting the rights of detainees;
3. Protecting the rights of national minorities.

Following the call, a total of seven actions were selected for funding of approximately €433,000 in total. A total of four of these were selected under priority two, in line with the specific objectives of the dialogue, as set out in benchmark four on the rights of prisoners. Three actions were selected for

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753 These include: To Ensure Female Client’s Rights - on the reproductive rights of people living with HIV/Aids (2004-2005: EU contribution €54,000); Rights Protection Action for Migrant Workers (2004-2005: EU contribution €60,000); and Public Interest Legal Aid on Women’s Labour Rights (2004-2005: EU contribution €55,000).
756 These include: Raising Awareness of Human Rights Among the Students of Selected Police Colleges in China (proposed EU contribution €45,000); Containment of Illegal Interrogation (proposed EU contribution €45,000); Human Rights of Detainees in Criminal Proceedings (proposed EU contribution €90,000) and A Legislation Petition for Lawyers’ Intervention to Prevent the Extortion of Confessions by Torture (proposed EU contribution €55,000).
funding under priority one, including two in the area of workers rights. However the limited material available does not indicate any focus on the right to organise which is highlighted by benchmark seven as the focal issue for the dialogue in relation to worker’s rights. The final action selected for funding under priority one relates to rights of sexual minorities and is of no direct relevance to the dialogue benchmarks.

A written communication dated 16 December 2005, from the head of development at the EU Delegation in Beijing to the EU Ambassador to China, reveals that due to objections raised by the Chinese Ministry of Foreign Affairs to four of the seven actions selected for funding in 2005, the Micro Projects Programme was suspended with the effect that no contracts were awarded in that year. A further attempt was made to implement the programme in 2006 with two calls for proposals launched simultaneously in June under two separate campaign headings: ‘Fostering a culture of human rights’; and ‘Promoting the democratic process’. In contrast to the earlier calls, however, the 2006 ‘Guidelines for Grant Applicants’ make no mention of the EU-China Human Rights Dialogue.

The 2006 calls for proposals resulted in funding for four separate actions. It is clear from the final narrative report for the action entitled Promoting the Civil Society Process, implemented by the China Foundation for

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757 These include: Haikou Longhua Migrant Worker Rights Protection (proposed EU contribution €100,000), and Protecting Basic Rights of Peasant-Workers in Cities (proposed EU contribution €20,000)
758 Sexual Minorities and Human Rights (proposed EU contribution €62,000)
759 Note to Serge Abou, Head of EU Delegation to China and Mongolia, from Micha Ramakers, Acting Head of Development Cooperation Section, EU Delegation to China and Mongolia (16 December 2005) Subject: Cancellation of third Call for Proposals, Human Rights Micro Projects Programme Reference 121 332. Access granted following a request by the author under Regulation (EC) 1049/01 (on file with the author)
761 ibid
Poverty Alleviation, that NGOs working on thematic issues of direct relevance to the dialogue benchmarks were not the strategic focus of the project.\textsuperscript{763} From the limited material available, it also appears that the three remaining actions do not relate directly to any of the issues highlighted as priorities for the dialogue by the 2001 benchmarks.\textsuperscript{764}

There is no evidence to suggest that knowledge or material generated by actions funded under the Micro Project Programme were utilised by either side within the context of the EU-China Human Rights Dialogue, at any stage. However, the implementation of the Micro Projects Programme in China was placed on the agenda of the dialogue by the Ministry of Foreign Affairs on at least two occasions: in March 2002 following the first call for proposals and again in October 2006 following what transpired to be the final call.\textsuperscript{765}

As a programme created under the European Initiative for Democracy and Human Rights, one of the defining characteristics of the Micro Projects Programme is that it enables the EU to channel funds directly to civil society organisations without the need for approval from the Chinese authorities. Thus, just as the European Commission did not consult with the Ministry of Foreign Affairs prior to issuing calls for proposals in relation to the EU-China Human Rights Seminars, so the Chinese authorities were not informed in advance of the calls launched under the Micro Projects Programme, nor were they consulted on the pre-selection of actions for funding.

That the Chinese authorities would react strongly against this failure to consult was indeed ‘predictable’ as suggested by Kinzelbach, particularly as the global Micro Projects Programme had been in existence since 1994 and similar


\textsuperscript{764} These include: Training of Policymakers and Law-executors on CEDAW and Women’s Law (2007: EU contribution €60,000); Enhancing Villagers’ Political and Social Participation in the Rural Area of China’s Less Populated Ethnic Group Regions (2007-2009: EU contribution €75,000); and Promotion of Awareness and Protection of Rights of the Disadvantaged Children in China (2007-2008: EU contribution €75,000).

objections had frequently been encountered elsewhere.\textsuperscript{766} Given the longevity
of the programme and the operating environment in China, it seems highly
unlikely therefore that the reaction of the authorities would have come as a
surprise to the EU. Hence, it is not unreasonable to conclude that the EU
decision not to consult with the Chinese authorities prior to the launch of the
first call for proposals in 2001 and to negotiate a solution once objections had
been raised instead, was informed by adherence to long-established principles,
rather than a failure to anticipate an inevitable clash as proposed by Kinzelbach.
In reality, any attempt to engage with China before this point would only have
served to weaken the negotiating position of the EU by signaling a willingness
to surrender on matters of principle, without first securing anything in return.
Moreover, should such an attempt have failed, the EU would have been
confronted with the choice of having to proceed with the call in the face of
objections from the Chinese, or to abandon it because of them, thereby
accepting the need for Chinese approval before launching future initiatives.

It seems probable that the insurmountable problems encountered in
implementing the Micro Projects Programme played a significant role in
ensuring that China was not among those states for which a specific Country
Based Support Scheme was created to replace the Micro Projects Programme
when the new European Instrument for Democracy and Human Rights became
operational in 2007. Instead, civil society organisations are invited to apply for
funding to support actions targeting China in response to calls for proposals
launched under Objective 1 of the European Instrument for Democracy and
Human Rights, which was established with the aim of ‘[e]nhancing respect for
human rights and fundamental freedoms in countries and regions where they

\textsuperscript{766} ibid 117; Nordic Consulting Group (2001) Evaluation of the Micro Projects Facility
Operating Under the European Initiative for Democracy and Human Rights: Final Report,
October 2001. Access granted following a request by the author under EC Regulation (EC)
1049/01 (on file with the author), p. 15; European Parliament (2005) No Lasting Peace and
Prosperity without Democracy and Human Rights: Harnessing Debates on the EU’s Future
Financial Instruments PE N°381.358, Directorate-General for External Policies of the Union,

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are most at risk’; and under Objective 3, which is aimed at ‘[s]upporting actions on human rights and democracy issues in areas covered by EU Guidelines, including on human rights dialogues, on human rights defenders, on the death penalty, on torture, and on children and armed conflict’. 767

Due to the difficult operating environment in countries targeted under Objective 1, information regarding the actions financed is treated in the strictest confidence. The promotion of ‘the right to freedom of thought, conscience and religion or belief’ and ‘the right to freedom of peaceful assembly and association’, including in particular ‘the right to form and join a trade union’, were established as two of the four ‘main issues’ which the programme aims to address in the second call for proposals launched under Objective 1 in 2008.768 Thus, it is conceivable that, at the very least, actions of particular relevance to benchmarks seven and eight may have been funded in China. However, no list of projects awarded grants under Objective 1 has been made public at any stage. Thus, it is not possible to ascertain which actions, if any, were indeed supported in China or to what extent they reflect the EU priorities set out in the dialogue benchmarks.

The same is true of actions relating to the guidelines on human rights defenders financed under Objective 3. The first call for proposals launched under Objective 3 in relation to human rights defenders was broadly framed with the overall objective of ‘strengthening the status of human rights defenders and their fundamental rights’. 769 As such, it does not call for a thematic focus on defenders working on particular rights but aims to support the work of defenders in general. Following the call, a list of eleven organisations that were

to benefit from funding was published by the European Commission. While no detailed information regarding the nature of the activities supported is provided, it is clear from the list that four of the eleven grants relate to actions that were to take place in other countries and regions. The remaining seven grants relate to ‘global actions’. However, without access to additional information it is impossible to judge from the list whether any of the actions funded were to take place in China and if so, whether or not their objectives were of direct relevance to the dialogue benchmarks.

By contrast, the 2011 call establishes a clear focus on defenders ‘who are most at risk’ and lists numerous examples including amongst them trade unionists, defenders’ lawyers and defenders of the rights of indigenous peoples. The relevance of these groups to the realisation of the dialogue benchmarks is obvious. However, it is also clear from the call that the list provided is indicative and there is no reason to assume that proposals relating to defenders working in these areas were received, or indeed funded, in the case of China. The public release of detailed information regarding the actions funded is not anticipated.

5.5 Other projects funded through thematic instruments

In addition to the EU-China Human Rights Seminars and the Micro-Projects Programme detailed above, the available compendia of activities funded under the European Initiative for Democracy and Human Rights and the European Instrument for Democracy and Human Rights list a total of 10 projects financed in China from 2000-2010.

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As one would expect in the case of projects funded under the European Initiative for Democracy and Human Rights and its successor the European Instrument for Democracy and Human Rights, the promotion of human rights is placed at the centre of each of these initiatives. However, closer examination of their objectives reveals that of the 10 projects funded since 2000, a total of three pursue objectives of no direct relevance to the EU priorities established by the dialogue benchmarks.772

The overall objective of the EU/China Education and Vocational Training Programme is to assist the China Disabled Persons’ Federation ‘in providing vocational education for disabled people of working age in China’.773 As such the project clearly falls outside the issues set as priorities for the EU by the dialogue benchmarks. The core objective of the project entitled Cooperation in the Field of Economic, Social and Cultural Rights is to ‘strengthen the economic, social and cultural rights of women in the counties of Jinping and Malipo (Yunnan province)’ by enhancing the legal knowledge of the beneficiaries, improving their literacy levels, providing training on issues related to health and hygiene and strengthening the capacity of local authorities.774 As such, the objective of the project also falls outside the EU priorities set out in the dialogue benchmarks since, in relation to economic, social and cultural rights, it does not focus on issues or groups highlighted as of particular importance to the EU, these include respect for cultural rights and religious freedoms in Tibet and Xinjiang and the right to organise.775 The objective of the project entitled Strengthening the Democratic Process in China: Public Participation in Decision Making is ‘to stimulate academic debate’ on

772 These are: EU-China Education and Vocational Training Programme for the Disabled (2001-2003: EU contribution €980,000); Cooperation in the Field of Economic, Social and Cultural Rights (2002-2004: EU contribution €700,000); and Strengthening the Democratic Process in China: Public Participation in Decision Making (2006-2009: EU contribution €316,000)
the role of the public in decision making, ‘by piloting and promoting public participation in urban planning decisions’. While it is intended that by ‘researching, designing, and modeling effective and appropriate consultative processes for public policy making in China’, the project would have a systemic impact beyond the urban planning process, the right to take part in the conduct of public affairs, which is guaranteed by Article 25 of the International Covenant on Civil and Political Rights, is not in fact highlighted as a priority for the EU by the dialogue benchmarks.

Of the remaining seven projects, a total of three relate to benchmark three regarding the death penalty. A further two relate to benchmark five relating to respect for the fundamental rights of all prisoners. These five projects hold much in common. Each was conceived by the Great Britain China Centre, a London-based not for profit organisation with expertise in the design and implementation of projects ‘aimed at sharing UK and EU legal, social and good governance best practice models with China’. As such, the project proposals adhere to a common methodology, which seeks to support reform by conducting academic research and/or developing materials for use in pilot training projects targeting the legal profession, the legislature and law enforcement officers.

Abolition of the death penalty and the prohibition of torture are not only objectives of EU policy in relation to China, but global objectives pursued by the EU, since the mid 1990s, through various means, including the European Initiative on Human Rights and Democracy and its successor the European Instrument on Democracy and Human Rights. The 1998 EU guidelines on the death penalty, the first guidelines in the area of external human rights policy issued by the member states at ministerial level, state that the objectives of the EU are:

- to work towards universal abolition of the death penalty as a strongly held policy view agreed by all member states
- where the death penalty still exists, to call for its use to be progressively restricted and that it be carried out according to minimum standards.\(^{781}\)

These objectives were updated in 2008 with the addition of a sentence calling for ‘the immediate establishment of a moratorium on the use of the death penalty’ as well as a line calling for ‘accurate information about the exact number of persons sentenced to death, awaiting execution and executed’.\(^{782}\)

The EU guidelines on the death penalty were followed in 2001 with a second set of guidelines, this time addressing external policy on the issue of torture, cruel, inhuman and degrading treatment.\(^{783}\) These guidelines, which were also updated in 2008, state that ‘[t]o work towards the prevention and the eradication of all forms of torture and ill-treatment within the EU and worldwide is a strongly held policy view of all EU member states’.\(^{784}\)

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\(^{783}\) Since 1998, the EU has published eight separate human rights guidelines as follows: death penalty (1998 updated 2008); torture and other cruel, inhuman and degrading treatment (2001 updated 2008); human rights dialogues with third countries (2001 updated 2008); children and armed conflict (2003 updated 2008); human rights defenders (2004 updated 2008); promoting compliance with international humanitarian law (2005 updated 2009); promotion and protection of the rights of the child (2007 updated 2008); violence against women and girls and combating all forms of discrimination against them (2008)

\(^{784}\) Council of the European Union (2001) Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 10010/01, p. 2;
bilateral and multilateral cooperation in achieving this goal is emphasised in both the 2001 and 2008 versions, in particular with reference to European Initiative for Democracy and Human Rights, as is the necessity to ‘provide effective training’ for target groups including law enforcement officials, the judiciary, prosecutors and lawyers’.  

There is an obvious synergy between the objectives expressed in the dialogue benchmarks, regarding in particular the use of the death penalty, but also the eradication of torture as it relates to the rights of prisoners, and those of the EU’s global policy on the same issues. Thus, although neither the dialogue nor its benchmarks were referred to in the project proposals submitted for any of the five projects under discussion, the projects themselves pursued aims in keeping with the priorities of the dialogue. Moreover, not only do these particular projects pursue objectives of direct relevance to the dialogue, but EU officials in both Beijing and Brussels have been kept informed of their progress in a structured and systematic way by, among other initiatives, attending key project events. However, given the secretive nature of the dialogue itself, it is not possible to ascertain whether or not the findings of research, conducted under the auspices of these projects, have been discussed within the dialogue.

The two remaining projects funded in China under the European Initiative for Democracy and Human Rights both speak to issues related to the treatment of ethnic minorities. By training teachers in the delivery of

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Council of the European Union (2008) Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: An Update of the Guidelines 8590/08, p. 2

785 Council of the European Union (2001) Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 10010/01, p. 5, p. 9; Council of the European Union (2008) Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: An Update of the Guidelines 8590/08, p. 5, p. 9;

786 Access to the relevant project proposals, mid term evaluations and, where applicable, final evaluations was kindly provided by the Great Britain China Centre in relation to each of the five projects under discussion (unpublished documents on file with the author).

787 These include: Power of the Documentary: A Series of Workshops to Improve Production Standards and TV coverage of Women, Disabled People and Ethnic Minorities in China (2006-2008: EU contribution €679,000); and Xinjiang Basic Education Project (2006-2009: EU contribution €316,000)
bilingual education and developing teaching resources in the mother-tongue, the Xinjiang Basic Education Project aims ‘to ensure the rights of minority children to a relevant, high quality basic education’. Since 2002, existing education policy in Xinjiang has seen the progressive eradication of mother-tongue education from primary level upwards. However, the final narrative report for the project would indicate that the project does not include among its objectives the development of research and recommendations which could be used to generate debate on the cultural rights of ethnic minorities in Xinjiang in relation to existing policy. Furthermore, unusually for a project funded under the European Initiative for Democracy and Human Rights, the project as a whole does not overtly pursue a rights-based approach to the issue but aims to tackle, at a local level, some of the practical impediments to mother-tongue education in Xinjiang. Thus, while the relevance to benchmark eight of the dialogue, regarding respect for cultural rights and religious freedoms in Tibet and Xinjiang, is clear, the project itself does not easily fit the criteria developed in this study for consideration as a human rights initiative. The project has however played an important role in establishing a solid working relationship between the lead implementing organisation, Save the Children, and the relevant authorities in Xinjiang. This in turn has enabled Save the Children to implement a number of related projects with funding from the EU, in particular under the thematic programme, Non-State Actors and Local Authorities for Development, as discussed in further detail below.

The BBC World Trust project ‘Power of the Documentary’ is also of relevance to benchmark eight, albeit less directly. The stated aim of the project is to ‘build capacity and commitment from television documentary makers, television professionals, and TV stations in the 12 provinces of Western China to reflect and respond to the needs of specific disadvantaged or marginalised.

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789 Save the Children UK (2009) Xinjiang Basic Education Project: Final Narrative Report. Access granted following a request by the author under Regulation (EC) 1049/01 (on file with the author)
790 ibid
social groups and to improve TV coverage of human rights issues’. While the original project proposal had envisaged the involvement of media professionals and NGO personnel in Tibet, the final narrative report reveals that ‘Tibet could not be included as a project activity site’ due to the restrictions placed on foreign journalists and media personnel wishing to enter the province in addition to ‘other well known sensitivities and restrictions’.

The final narrative report specifies the target audience for the project as a total of 110 media professionals and 96 NGO personnel working in a total of 11 Western provinces including Xinjiang. The report however, refers specifically to just one activity in Xinjiang – a three day media skills workshop delivered to 11 media professionals and NGO personnel. While it is not clear from the report whether or not media professionals and NGO personnel from Xinjiang province participated in project activities elsewhere, it is made apparent that, from the outset, implementation of the project was hampered by frequent and unforeseen restrictions. In addition to the exclusion of Tibet as a site for project activities, it was also necessary to cancel documentary training workshops planned for a total of five of the eleven provinces targeted including Xinjiang; to restrict NGO participation in the four final symposia to just one representative from the All China Women’s Federation or the China Disabled Persons’ Federation in each case; and to exclude NGO personnel entirely from two core week-long ‘train-the-trainers’ workshops.

As a result of these restrictions, the project could not achieve one of its primary objectives: breaking down barriers to cooperation between media professionals and NGO personnel in the early stages of documentary making. Moreover, it is also clear from the final narrative report that due to the tight

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791 European Commission (2008) EIDHR Updated Report by Location 2000-2006, p. 120
793 ibid
794 ibid 7
795 ibid 6, p. 10, p. 3
796 ibid 4
controls placed on project activities, contrary to the description of the action contained in the 2008 EIDHR compendium, it was in fact not possible to focus on human rights issues, including in particular the rights of ethnic minorities in Xinjiang. Rather, much of the training delivered through the project appears instead to focus on production values more generally, including story structure, picture editing and sound editing. Correspondingly, instead of improving ‘coverage of human rights issues’, as stated in the EIDHR compendium, the final narrative report describes the project outcome as improving the ‘capacity and commitment’ of participants to produce ‘quality social documentaries’. The ‘hope’ is also expressed that ‘the project will have made a lasting impact on the way that film makers look at social issues and how they present rural women and children, ethnic groups and disabled people in their future productions’. 797

In addition to the European Instrument for Democracy and Human Rights, funding in support of human rights related projects in China is also available under a number of other thematic programmes. These include in particular the NGO Co-financing budget line, the legal basis for which is provided by Council Regulation EC 1658/98, and the thematic instrument Non-State Actors and Local Authorities in Development, which was created in 2006 under the Development Cooperation Instrument to replace NGO Co-financing. 798 In addition, the thematic programme Investing in People, also created under the Development and Cooperation Instrument, also allows funding for projects which incorporate human rights actions in China. 799

797 ibid 15-16
The NGO Co-financing budget line enabled the European Commission to provide up to 85% of the total cost of actions in developing countries on foot of proposals received from European NGOs. In contrast to the European Instrument for Democracy and Human Rights, the primary objective of NGO Co-financing is ‘poverty alleviation’. However, the ‘promotion and defence of human rights’ is highlighted as an area to which ‘particular attention’ should be paid alongside strengthening civil society, the role of women in development and sustainable development. Similarly, programmes created under the Development and Cooperation Instrument, the primary objective of both Investing in People and Non-State Actors and Local Authorities in Development is the ‘eradication of poverty’. However, the programme Investing in People includes objectives relating to the rights of women, children and minorities. Without highlighting particular rights or groups, the objective of the programme Non-State Actors and Local Authorities in Development is broadly defined as ‘strengthening the capacity of non-state actors and local authorities in the policy making process’ in order to ‘promote an inclusive and empowered society’, with an emphasis on ‘vulnerable and marginalised groups’. The promotion of human rights is also specified as a cross-cutting issue which should be mainstreamed in all project activities. To date, projects in China have not received a significant level of funding under the programme

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801 ibid 1
802 ibid 2(1)
804 ibid 13(2)
805 ibid 14

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Investing in People. Therefore the brief analysis below will focus on the Non-State Actors programme and its precursor entitled NGO Co-financing.807

In spite of the inclusion, in Regulation (EC) 1658/98 on NGO Co-financing, of a specific reference to human rights as an area to which particular attention should be paid, the promotion of human rights is not highlighted as an objective of the programme in the calls for proposals which followed. Rather, it is stated in successive calls that operations must cover one of two priority areas including ‘support to sustainable social, human and economic development processes’ and ‘institutional support and capacity building for local development structures, including partner organisations in developing countries’.808 No mention is made of the promotion of human rights in this context, with the result that the projects supported in China are not framed as human rights initiatives and neither incorporate the promotion of human rights

807 The EuropeAid online database contains information relating to just two projects that include actions in China funded in response to global calls for proposals under the thematic stream Investing in People. These are: EnCompass – aimed at identifying best practice in relation to the preservation of cultural heritage with actions taking place in Hainan Province, China; Mombasa, Kenya; and Georgetown, Guyana (2009-2012: EU contribution €850,000); and Protecting Migrant Children from Trafficking and Exploitation in the Mekong Delta Region (2009-2011: EU contribution €585,000). A further two projects funded under Investing in People are listed on the website of the European Union Delegation to China. These are: Decent Work and Social Protection for Persons with Disabilities – with actions taking place in China’s Guangxi Province and Tibet as well Laos and Vietnam (2010-2013: EU Contribution €1.75 million); and Community Based Psychiatry: Promoting the Integration of Mental Health Care into Primary Health Care Services in Beijing, Jilin Province and Anhui Province, PR China (2011-2013: €728,000).

among their primary objectives, nor address human rights as a cross-cutting issue. By contrast, the promotion of human rights including, in particular, the rights of women, children and the disabled, is highlighted as a cross-cutting issue in successive calls for proposals launched under the programme entitled Non-State Actors and Local Authorities in Development, the primary objective of which is to ‘benefit populations out of reach of mainstream services and resources and excluded from policy making processes’. This broad definition of programme objectives and the inclusion of human rights as a cross-cutting issue allows for the possibility of actions of direct relevance to the dialogue benchmarks through reference to marginalised groups including, in particular, ethnic minorities in Tibet and Xinjiang.

Of 14 projects funded through the programme in China between 2007 and December 2011 and known to the author, five include actions in Tibet and/or Xinjiang. Examination of the limited material relating to these projects that has been made publicly available to date would suggest that the project entitled Improving Participation and Capacity of Disabled Children is


specifically framed as a human rights initiative. However, without access to further information regarding the remaining four projects, it is not possible to state conclusively whether or not these were also conceived as human rights initiatives. Nevertheless, it is clear in each case that the objective of enhancing respect for cultural rights and religious freedoms in Tibet and Xinjiang is not the intended focus of any of these initiatives. Hence, their relevance to dialogue benchmark eight can only be described as, at best, peripheral.

In addition to projects carried out in Tibet and Xinjiang, a further nine initiatives known to the author have been implemented in other parts of China with funding under the Non-State Actors programme since 2007.\(^{811}\) As is the case for actions in Tibet and Xinjiang funded through the programme, on the basis of the limited information made publically available it is not possible in most cases to state conclusively whether or not these projects were conceived as human rights initiatives. However, it is clear that the issues highlighted as priorities for the EU by the dialogue benchmarks – including ratification of the International Covenant on Civil and Political Rights, cooperation with human rights mechanisms, the death penalty, administrative detention, the rights of prisoners, freedom of religion and belief, the right to organise and cultural rights and religious freedoms in Tibet and Xinjiang – have not been the focus of activities. It is also notable that, in spite of the establishment of ‘empowerment’

and ‘local ownership’ as funding principles for the Non-State Actors programme, none of the lead organisations to have received grant aid in support of projects in China thus far are, in fact, Chinese.\textsuperscript{812} There can be no doubt that the inclusion of China on a list of nine countries where there was ‘no possibility of publishing a local call’ was a significant contributing factor in this regard.\textsuperscript{813} Although there has been no official statement outlining the basis on which this decision was taken, a review of the other eight countries on the list would indicate that it was necessitated by the exceptionally difficult operating environment in the countries concerned which, in addition to China, include: Afghanistan, Azerbaijan, East Timor, Iran, Liberia, Mongolia, North Korea and Swaziland.

5.6 Conclusion

Since 1995, key communications on relations with China issued by the European Commission have described the EU human rights policy approach as comprised of two mutually reinforcing elements: human rights diplomacy and human right assistance programming.\textsuperscript{814} However, despite the EU undertaking to develop a package of human rights assistance programmes to support the dialogue which these statements entail, this has not been achieved. Only in the case of benchmark three, regarding the death penalty, and benchmark five, regarding the fundamental rights of prisoners, is it possible to state that the EU has succeeded in establishing a visible programme of activities directly related to the objectives of the dialogue. Moreover, it seems that this was made possible by a fortuitous coincidence of priorities expressed by the European Commission (2007) Thematic Programme – Non-State Actors and Local Authorities in Development: Strategy Paper 2007-2010, p. 3, p. 5, p. 8, p. 13


\textsuperscript{813} European Commission (1995) Communication of the Commission: A Long Term Policy for Europe China Relations COM(95) 279, section B.2, para.1
Instrument for Democracy and Human Rights and the dialogue benchmarks, as opposed to a strategic decision taken within the EU.

To date, none of the publically acknowledged human rights projects in China, funded by the EU, have focused on the issues set out in benchmark two, regarding cooperation with human rights mechanisms, benchmark six, regarding freedom of religion and belief, or benchmark seven, regarding the right to organise. Notwithstanding funding, publically acknowledged human rights initiatives in Tibet and Xinjiang have not overtly addressed the issue of cultural rights and religious freedoms and are of peripheral relevance to the objectives of the dialogue. Publically acknowledged funding for initiatives related to benchmark four, regarding reform of the system of administrative detention, has been limited to a single micro project which received a grant of €60,000 for actions taking place over a 12 month period from 2002 to 2003.

Of the 12 publically acknowledged human rights projects funded under the European Instrument for Democracy and Human Rights in China since the late 1990s, a total of seven pursue objectives directly in line with the EU priorities expressed in the dialogue benchmarks. Two of these have been deliberately portrayed in the official discourse as explicitly linked to the dialogue. However, closer examination of the objectives of the actions funded under the Micro Projects Programme reveals that of the 32 selected for grant aid between 2001 and 2006, just nine were in line with the EU priorities established by the dialogue benchmarks of which four did not proceed to implementation. In relation to the EU-China Human Rights Seminars, a link undoubtedly exists between the expert level process and the political process, with political actors responsible for negotiation of the dates, topics and participants for the seminar event. However, the decision taken by the EU not to enter into negotiations with the Ministry of Foreign Affairs, on the objectives and methodology of the process prior to the launch of calls for proposals, has ensured that this link continues to exist only at an operational rather than substantive level.
In relation to grant aid delivered through thematic instruments other than the European Instrument for Democracy and Human Rights, since 2007, none of the 14 actions supported by the programme entitled Non-State Actors and Local Authorities in Development has pursued objectives of direct relevance to the dialogue benchmarks. Similarly, the small number of projects supported through the programme, Investing in People, is of no direct relevance to the dialogue benchmarks.

Finally, with regard to bilateral development aid, delivered under the 1992 ALA regulation and its successor the Development Cooperation Instrument, of the 20 proposed projects classified by the EU as good governance initiatives and considered in section 5.1 above, a total of seven projects, which specify the promotion of human rights either as a core objective or a cross-cutting issue, have proceeded to implementation. Of these, only one, the EU-China Police Training Project, pursues primary objectives of direct relevance to the dialogue. Each of the other six projects aim to advance objectives of no direct relevance to the priorities set for the dialogue in the 2001 benchmarks. This includes the flagship Legal and Judicial Cooperation Programme and the Village Governance Training Programme, which were not only conceived and negotiated, within the context of the decision taken by the Council of the European Union to cease sponsorship from 1998 onwards of any draft resolution critical of China’s human rights record at the UN Commission on Human Rights, but also played a significant role in justifying that decision.

Not only has the EU failed to fulfill its commitment to develop a human rights assistance package in support of the dialogue, but the incorporation of

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815 As discussed in section 5.3 above, the proposed China-EU Access to Justice Programme is also of potential relevance to the dialogue benchmarks. However, since at the time of writing the project has not yet proceeded to implementation, it has not been included in this tally.

816 In relation to human rights projects foreseen at the time of writing, it would appear that the objectives established for the EU-China Access to Justice Programme may contribute to the realisation of benchmark three on compliance with the ECOSOC safeguards for the protection of those facing the death penalty and benchmark eight on respect for cultural rights and religious freedoms in Tibet and Xinjiang. However, prior to implementation it is not possible to judge the extent to which these issues will indeed be the focus of activities.
human rights objectives into good governance projects funded under bilateral development aid also remains the exception rather than the rule, signaling a broader policy failure. The 2001 communication from the European Commission on the role of the EU in promoting human rights and democratisation in third countries and the conclusions of the Council of the European Union on the same subject, clearly establish the requirement to mainstream human rights across all policy areas as a core principle of the EU’s external relations.817 Since that time, the obligation on the EU and its member states to ensure the effective integration of human rights into external actions has been written into law and has been confirmed repeatedly in numerous policy statements.818 These include: the 2005 European Consensus on Development; the 2006 conclusions of the Council of the European Union on mainstreaming human rights into the Common Foreign and Security Policy; the December 2011 communication from the High Representative of the Union for Foreign Affairs and Security Policy entitled ‘Human Rights and Democracy at the Heart of EU External Action: Towards a more Effective Approach’; and the June 2012 ‘Strategic Framework and Action Plan on Human Rights and Democracy’ published by the Council of the European Union.819

However, despite such frequent proclamations and in stark contrast to the issue of good governance, which since 2007 has indeed been effectively mainstreamed into the EU development cooperation agenda for China, the promotion of human rights remains a marginal issue. While it may be tempting

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to argue that more open and accountable governance will result quite naturally in improved domestic human rights practices, this argument cannot be made so easily in relation to the issues highlighted as priorities for the EU by the dialogue benchmarks. It is not poor governance, for example, that prevents China from ratifying the International Covenant on Civil and Political Rights or from responding positively to requests for visits from UN Rapporteurs. Nor is it poor governance that dictates the broad definition of capital crimes or motivates China’s reservation to Article 8(1) of the International Covenant on Economic, Social and Cultural Rights. These are policy decisions taken at the highest level and it is only at this level that they can be reversed.

To a certain degree, the failure of the EU to mainstream human rights objectives, throughout its development cooperation programme for China can be explained by the exceptionally difficult operating environment in that country, which has prevent the implementation of proposed projects, led to the cancellation of others and resulted in the curtailment of activities already underway. However, it also points to a deeper problem that affects EU programming not only in China but worldwide.

The first independent assessment of its human rights work in third countries, commissioned by the EU, identified ‘limited Commission leadership at political and managerial level to push for the mainstreaming of human rights in all aspects of cooperation’ as one of six ‘systemic constraints’, which had ‘structurally hampered’ the impact of EU action.\(^{820}\) The global evaluation, which spans a 10 year period starting in 2000 and takes account of all EU financing instruments for external action, also specifies the need to develop an ‘integrated approach’ to the promotion of human rights as one of seven main recommendations.\(^{821}\) The report states that:

\(^{821}\) ibid 17
There is not yet an explicit strategy to facilitate the combined use of the instruments. The EC agenda on human rights is generally not integrated into bilateral programming and there is a limited coordination between the relevant units and sections at HQ and in the EU Delegations dealing with the various instruments that could potentially be used to promote human rights. The key question for the EC is not whether to use a thematic instrument or to use a geographic instrument, but rather how to effectively combine the two instruments.\textsuperscript{822}

The absence of such a strategy is reflected in the lack of a coherent discourse setting out the overall EU approach to human rights assistance programming in China as well as its progress in meeting stated objectives.

Each of the funding streams, under which human rights assistance initiatives in China are eligible for support, pursues its own objectives and priorities. The clear focus of the European Instrument for Democracy and Human Rights is to support actions that promote rights contained in the core international treaties including, in particular, the International Covenant on Civil and Political Rights. While the thematic budget lines on Non-State Actors and Investing in People are also rights-based, they ‘focus less on sensitive human rights issues but rather target vulnerable sectors’ including women, children and migrant workers as well as ‘key sectors to the enjoyment of social and economic rights’ such as health and education.\textsuperscript{823} By contrast initiatives, funded under the EU’s programme of bilateral development aid, must be negotiated in agreement with the Chinese authorities and focus on supporting government-led reforms already underway.

The lack of a strategic approach to EU human rights assistance programming is demonstrated even more clearly by the absence of systematic programme evaluation. While some of the higher profile EU funded human rights projects in China were referred to in annual reports on human rights, published by the Council of the European Union prior to 2008, these reports make no attempt to determine the progress of EU human rights assistance

\textsuperscript{822} ibid 42 (italics in original)
\textsuperscript{823} ibid 44
programming, nor indeed EU human rights policy more generally, in achieving stated objectives. No mention has been made of EU funded human rights assistance programming in China in annual reports on human rights published since that time. Although individual assessment of each EU funded initiative is standard practice upon completion, EU projects are conceived, implemented and evaluated as stand alone initiatives and the overall impact of EU human rights programming in China is yet to be the subject of a comprehensive review. Moreover, individual project evaluations are not made publically available.

In order to overcome the challenges posed by policy compartmentalisation, the 2011 thematic evaluation of global EU human rights programming highlights the need for rigorous target state analysis.

What matters is to properly assess the human rights situation in a country in coordination with all relevant actors and partners; to analyse what is needed; and then to match it with what is feasible in terms of support strategies (through various instruments). This implies a well-defined ‘localised’ human rights strategy based on a deep knowledge of contextual conditions and linked to the overall country programming.

This recommendation would seem to endorse an initiative already underway, whereby EU Delegations worldwide have been tasked with developing a ‘human rights country strategy’ to guide EU policy on a country-by-country basis. According to the 2010 EU Annual Report on Human Rights published in September 2011, it was expected that over 140 such strategies would be

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developed by the end of 2011. The annual report states that these strategies ‘will look not just at civil and political rights but also at social, economic and cultural rights’ and they ‘will see us acting not only in our more traditional areas such as women's and children's rights, but also in newer areas, such as human rights in the business context’. 826

The December 2011 communication from the High Representative of the Union for Foreign Affairs and Security Policy on the role of human rights in EU external action is also critical of what is described as the traditional ‘top down’ approach to human rights policy making, which sees the agreement of ‘worldwide priorities in Brussels’ which the EU institutions then seek to apply ‘through political dialogues and meetings with third countries’. 827 The communication argues that ‘even if the principles and objectives’ of this policy are universal, ‘the immediate priorities, and therefore the route and timetables, can and must vary from country to country’. As a result, it advocates instead the development of a tailor-made human rights strategy for each country, the merits of which are described as follows:

The country strategies aim to bring together the resources of EU Delegations and the diplomatic missions of EU Member States in the field. They establish country-specific priorities and objectives, which can be integrated in all relevant EU external policies such as development, trade or security, and so fit into the EU’s overall political and economic relations with any given country. They are drafted taking into account the views of civil society.

The EU should ensure that the human rights country strategies are taken into account in human rights dialogues, in policy-making and when programming and implementing financial assistance with third countries, including in the post-2013 Country Strategy Papers. 828

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828 ibid 7-8
These proposals are further endorsed in the June 2012 human rights framework and action plan published by the Council of the European Union. In the human rights framework and action plan, the undertaking to complete preparation of the EU’s human rights country strategies by the end of 2013 and to ensure that they are mainstreamed into all policy is announced. At the same time, an undertaking to issue ‘annual progress reports and reviews’ is also declared. However, the action plan does not state whether or not these strategies and the associated reports and reviews will be made public in full, in part or not at all. Until this process is concluded and the completed country strategy paper for China is made public, if indeed this is the intention, it will not be possible to make a judgment as to whether or not the suggestions presented therein will ensure greater policy coherence in the area of human rights. However, it is not inconceivable that human rights concerns in China will play a lesser, rather than greater, role in EU development policy in the years ahead.

Major changes, to the way in which EU funding will be channeled to China were announced in the European Commission’s 2011 proposal for a regulation establishing a new partnership instrument for cooperation with third countries. That China would graduate from bilateral development aid programming has been widely anticipated since the 2006 European Commission communication on relations with China warned that as China ‘moves further away from the status of a typical recipient of overseas development aid, the EU must calibrate its cooperation programme carefully and keep it under review. This was followed in 2007 by the inclusion of specific recommendations on ‘phasing out’ bilateral development cooperation

830 ibid
831 ibid
for China, which resulted in successive cuts to the bilateral development cooperation budget over the subsequent five years. However, the intended nature of the instrument that would fund continued EU engagement with China beyond development cooperation was not made clear until publication of the December 2011 European Commission proposal for a new Partnership Instrument.

The European Commission proposal has major implications for China and eighteen other middle income countries, all of which are set to ‘graduate to new partnerships’ at the end of the current funding cycle in December 2013. This means that, if the European Commission proposal is adopted unaltered, the countries listed will no longer be eligible for bilateral development assistance, through which the lions’ share of EU funding for China is currently channeled and through which all major human rights initiatives, with budgets in excess of €1.5 million, have been supported since the late 1990s.

Instead it is proposed that, following graduation, these nineteen countries will be eligible for support for regional cooperation initiatives under the Development and Cooperation Instrument as well as two new thematic instruments: Global Public Goods and Challenges; and Civil Society Organisations and Local Authorities. While these proposals confirm the promotion of democracy, human rights and the rule of law as an overarching goal for all EU development cooperation, neither the regional cooperation priorities specified for Asia, nor those set out for the two new thematic instruments, incorporate specific human rights objectives. Moreover, funding delivered through these channels does not allow for a continuation of the ‘top-down’ approach to human rights programming, favoured by the EU in China.

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837 ibid Art. 4, Art. 5, Art. 6
for over a decade, which has seen the EU cooperate directly with official partners in the design and implementation of major initiatives intended to have a systemic impact, including for example the new EU-China Police Training Project and the proposed EU-China Access to Justice Programme.\(^{838}\) Although funding will continue to be made available through the European Instrument for Democracy and Human Rights, it is envisaged that this instrument will maintain its current focus on projects delivered directly by civil society organisations, which to date has prohibited the involvement of official partners at the stage of project conception and design.\(^{839}\)

In order to enable engagement on a range of issues with graduating states, it is proposed that a new ‘Partnership Instrument’ be created.\(^{840}\) The specific objectives of the proposed new instrument are as follows:

(a) implementing the international dimension of the “Europe 2020” strategy by supporting EU bilateral, regional and inter-regional cooperation partnership strategies, by promoting policy dialogues and by developing collective approaches and responses to challenges of global concern such as energy security, climate change and environment;
(b) improving market access and developing trade, investment and business opportunities for European companies, in particular SMEs, by means of economic partnerships and business and regulatory cooperation;
(c) enhancing widespread understanding and visibility of the Union and its role on the world scene by means of public diplomacy, education/academic cooperation and outreach activities to promote Union’s values and interests.\(^{841}\)

The international dimension of the *Europe 2020 Strategy* referred to in objective (a) above is set out in a European Commission communication by that name under the title ‘Deploying our external policy instruments’. The communication states that ‘growth will open up new opportunities for Europe’s

\(^{840}\) ibid p. 2
\(^{841}\) ibid 3
exporters and competitive access to vital imports’. The communication also states that ‘part of the growth that Europe needs to generate over the next decade will need to come from emerging economies as their middle classes develop and import goods and services in which the European Union has a comparative advantage’. The focus of this strategy, and the proposed Partnership Instrument that seeks to implement it, can therefore be summarised as the promotion of the EU’s economic interests. While human rights are referred to in Article 3 of the proposed regulation under general principles, it is clear that funding for specific human rights initiatives is not foreseen.

It is not possible at this stage to predict with any certainty the outcome of current inter-institutional negotiation on the final content of these regulations, all of which it is anticipated will ready for adoption towards the end of 2013. It is likely that, in the course of these negotiations, individual member states with a strong ethical foreign policy tradition or the European Parliament - which, since the 1980s, has advocated a central role for the promotion of human rights in EU external relations - may address the risk to bilateral human rights assistance programming presented by the current proposals. Major revisions to geographic instruments or a more flexible approach to the identification of project partners under thematic instruments, in particular the European Instrument for Democracy and Human Rights, cannot therefore be ruled out. Until such a time as this outcome is secured however, the ability of the EU to fund bilateral human rights initiatives in China beyond December 2013 will remain in doubt.

843 ibid
845 By August 2012, the European Parliament had tabled a total of 487 amendments to the proposed Development Cooperation Instrument alone. However, at the time of writing the nature of the amendments tabled had not been made public. Email from Malgorzata Jankowska, European External Action Service to the author (21 August 2012) Subject: HR Issues (on file with the author)
Conclusions

On the basis of an analysis of public declarations from the EU institutions with primary responsibility for external human rights policy on China over a period of more than two decades the following answer is offered to the central research question which has guided this study: the arguments put forward by the EU in defence of its human rights policy on China lack coherence and are not sufficient to justify the choices made in formulating and implementing it. Given the central role played by the process of justification in maintaining the legitimacy of human rights policy, the conclusion is also reached that, as proposed by the hypothesis, in the absence of demonstrable results, core policy choices justified by the EU on the basis of their effectiveness have suffered a loss of legitimacy which has, in turn, undermined the credibility of the EU as an external human rights actor.

The implications of this erosion of legitimacy are not, however, limited to area of external relations policy. In the absence of a common cultural identity, human rights represent an issue around which the member states of the Union can converge and one which has come to play an increasingly important role in the integration of the European Union. According to Williams:

\[\text{The language of respect for human rights has developed into an essential precondition promoted by the Community for its claim to be an authentic and legitimate institution of governance. Whatever the audience, internal or external, human rights have been deployed to acquire authenticity.}\^{846}

As the EU continues to experience a profound existential crisis, caused by ongoing financial and economic turmoil, renewed emphasis has been placed on the promotion of human rights as a core EU value in an effort to construct a

unified identity and purpose for its member states. This led, in December 2011, to the publication of Ashton’s communication ‘Human Rights and Democracy at the Heart of EU Action – Towards a More Effective Approach’ and was followed in June 2012 by the announcement of a human rights strategic framework by the Council of the European Union. These documents state unreservedly that the protection and promotion of human rights is a ‘silver thread running through all EU action’ both ‘internal and external’. 847 With regard to external relations policy, this commitment to human rights as a guiding principle is expressed in the human rights strategic framework as follows:

The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy. In the area of development cooperation, a human rights based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations. 848

In the face of such claims, any continued failure on the part of the EU to present coherent arguments in defence of the choices it has made in formulating and implementing its human right policy vis-à-vis China threatens to undermine not only the credibility of the EU as an external human rights actor as proposed in


That the absence of a discourse clearly setting out the results of EU human rights policy in China represents more than simply a failure to communicate known achievements is demonstrated by fact that it is not merely restricted to the EU’s public statements. The same omission is also evident in each of the most recent internal evaluations of the EU-China Human Rights Dialogue.

The internal evaluation of the dialogue, conducted under the French Presidency in 2000, the primary aim of which is to identify a stable set of objectives for the process, points to a familiar list of issues on which progress was made in the years since it was inaugurated up until 2000.\footnote{Council of the European Union (2000) Dialogue UE-Chine sur les Droit de L’Homme PESC/PRES/PAR/0924/00, 5 September 2000. Access granted following a request by the author under Regulation (EC) 1049/01 (on file with the author), p. 1} This includes China’s signature of the two UN covenants, the visit of the UN High Commissioner for Human Rights to China and the visit of the Working Group on Arbitrary Detention.\footnote{ibid} However no attempt is made to conduct an in-depth analysis of human rights developments in China or to establish what influence if any the dialogue may have had in bringing about the progress highlighted.

An effort to correct this omission was made in the evaluations conducted in 2004 and 2009. Having noted the inadequacy of the eight benchmarks published in 2001 as a tool with which to measure the progress of the dialogue on an ongoing basis, both documents go on to assess human rights developments in China against them. The 2004 review concludes a ‘mixed picture’ of progress and continuing concern in four of the areas specified by the benchmarks: cooperation with UN mechanisms, the signing and ratification of
international covenants, the death penalty and administrative detention. Only ‘limited progress’ is noted in a further three areas: the treatment of prisoners including the EU’s list of individual cases, freedom of religion and belief and the right to organise. ‘No progress’ is noted in relation to respect for the religious and cultural rights of minorities in Tibet and Xinjiang. By contrast, the 2009 review shows ‘mixed results often consisting of progress in a number of areas and lack of progress or deterioration in many other areas’ on all of the eight benchmarks with the exception of the last relating to the situation in Tibet and Xinjiang which is said to have deteriorated.

The executive summary contained in the 2004 review states that the assessment it presents of human rights practices in China is to be followed by ‘[a]n appraisal of the dialogue, focussing both on its intrinsic value and on the contribution of the dialogue to developments on the ground’. Likewise, the 2009 assessment states that in addition to an, ‘overall assessment of human rights progress’ measured against the 2001 benchmarks, ‘the possible impact of the dialogue’ will also be assessed.

This second element of the 2004 review assessing the ‘contribution of the dialogue to developments on the ground’ was not declassified and made available to the author in response to a request for access to information made under Regulation EC 1049/01. Hence, it is not possible to comment on its content. However, analysis of the entire 2009 document obtained through confidential sources reveals no serious attempt to assess what role, if any, the dialogue may have had in bringing about the limited progress identified in areas specified as EU priorities by the dialogue benchmarks. In fact, while the 2009

853 ibid
854 ibid
855 ibid
856 ibid 1.1
review finds that the ‘EU is an important contributor to the combined international efforts to improve Human Rights in China and as such contributes directly to progress on HR in China’, it also concludes that the ‘the impact of the EU’s HR Dialogue in itself cannot be determined’.858 This finding is in direct contradiction to the stated objectives of the review quoted above and the EU’s own ‘Guidelines on Human Rights Dialogues’, which clearly state that in reviewing human rights dialogue ‘[i]f progress has indeed been made, the assessment should, if possible, analyse how far the European Union’s activities have contributed to that progress’.859

The absence of a discernable link to target state analysis is in fact a prominent feature of much of the EU discourse on the promotion of human rights policy in China, suggesting that the choices made are more responsive to internal conditions and preferences in the EU than to particular human rights developments in China. From 1990 to 2011 the EU made a series of important policy decisions in relation to the promotion of human rights in China. Remarkably, in only a handful of instances have these decisions have been publicly justified by reference to developments in China. The decision to impose economic and political sanctions on China in 1989 was justified on the basis of morality and values by reference to the Tiananmen Square massacre which, it was argued, was brutally repressive and in ‘violation of universally recognised principles’.860 The ‘events in June 1989’ also provided justification for the decision to sponsor a draft resolution at the UN Commission on Human Rights critical of China’s human rights record in 1990 and for several years thereafter.861 In neither case was the argument made that sponsorship of a draft resolution would produce results and at no point was the EU called upon to demonstrate that it had. Finally, the decision taken in 1998 not to sponsor a

858 ibid
draft resolution in that year was justified by reference to a logic of utility by reference to improvements on the ground in China which had taken place during the period known as the Beijing Spring. While one might question the rigor of these arguments as a basis on which to justify the entrenchment of a long-term preference for ‘dialogue’ over ‘confrontation’, the legitimacy of the decision as it relates to action in 1998 alone was argued convincingly on the basis of target state analysis and indeed similar arguments were put forward by a multitude of other actors at the time.

By contrast, no justification was provided for the October 1990 decision to dismantle most of the sanctions put in place against China following Tiananmen or indeed to maintain the embargo against the sale of arms. Likewise, no attempt was made in 2003 to justify the decision to re-examine the embargo issue by reference to human rights developments in China. Rather it was later argued that this decision was prompted by the development of ‘all aspects’ of bilateral relations and based on the understanding that it would benefit the comprehensive strategic partnership agreed between the two sides.862 In 1995 the decision to introduce bilateral human rights dialogue and human rights assistance programming alongside multilateral monitoring through the UN Commission on Human Rights was justified by the EU on the basis that this new policy formulation would be more effective that that of ‘relying solely on frequent and strident declarations’, reflecting the EU’s global preference for positive measures rather than any sophisticated understanding of human rights practices in China’ or, correspondingly, the potential catalysts for domestic reform.863 Crucially, no justification was advanced in 1999 for the decision taken by the member states to maintain their 1998 position on China at

the Commission on Human Rights in spite of a severe deterioration in the policy environment which had enabled the original decision.\textsuperscript{864}

In 2001, the EU published for the first time a stable set of objectives for its human rights dialogue with China.\textsuperscript{865} The identification of objectives was justified on grounds that it would enhance the effectiveness of the dialogue process.\textsuperscript{866} However, no attempt was made to highlight the areas which could most readily be progressed through the instrument of dialogue or to justify the selection of the benchmarks identified by reference to target state analysis. At the same time, contrary to explicit commitments made by the EU as it shifted the focus of its human rights policy from multilateral to bilateral venues, the EU has failed to develop a package of human rights assistance programmes which would support the objectives of the dialogue while also allowing its criticism of practices in China to become confined, almost without exception, to just one agenda item at the principal UN human rights body.\textsuperscript{867} Again, no justification has been provided for these failures.

The central importance of target state analysis in informing key policy decisions is recognised in the ‘Guidelines on Human Rights Dialogue’ published by the Council of the European Union in 2001 and updated in 2008.\textsuperscript{868} The guidelines, which post-date the establishment of the dialogue with China, state that:

\begin{quote}
Any decision to initiate a human rights dialogue will first require an assessment of the human rights situation in the
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item[866] ibid IV
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country concerned. Amongst other things the assessment will look at developments in the human rights situation, the extent to which the government is willing to improve the situation, the degree of commitment shown by the government in respect of international human rights conventions, the government’s readiness to cooperate with United Nations human rights procedures and mechanisms as well as the government’s attitude towards civil society. ⁸⁶⁹

This statement is followed by a review of the procedures which should be undertaken in order to initiate any new human rights dialogue, including ‘the defining of practical aims…as well as an assessment of the added value to be gained from such a dialogue’ and the holding of ‘exploratory talks’ with the target state. ⁸⁷⁰

As stated by Wurth and Seidensticker, in order to construct a human rights policy which can better respond to, and indeed influence, developments in China it is ‘indispensable both for human rights dialogues and for measures aimed at the promotion of human rights’ to be based on a clear assessment of the human rights situation ‘including an appraisal of one’s own position and the political context’ as well as ‘the approach to human rights norms’ in the target state. ⁸⁷¹ Similarly, Woodman identifies a lack of ‘sufficient information about conditions on the ground’ as one of three key dilemmas faced by donors implementing legal reform human rights projects in China and has called for greater support for ‘empirical work’ and for an insistence ‘on serious needs assessments that allow for a clearer picture of where intervention can be most useful’. ⁸⁷² Moreover, such analysis could also play a vital role in legitimising core EU policies justified on the basis of their effectiveness by ensuring that policies which aim to influence developments on the ground are based on an accurate understanding of current conditions.

⁸⁶⁹ ibid p. 5; p. 7
⁸⁷⁰ ibid p 5; p. 8
As discussed in chapter 2, China’s interaction with the international human rights system is defined by its status as an emerging great power. This status has minimised China’s vulnerability to reputational damage by enabling it to recruit a significant level of support for an alternative view of the role of human rights in international relations. This view centres on the primacy of the norm of state sovereignty and supports bilateral diplomacy behind closed doors as the only acceptable means of engagement with China’s critics. At the same time, China’s approach to the domestic promotion of human rights is characterised by its duality, with the aim of ensuring the continuity of the single-party state acting as both an important engine for reform as well as its most significant inhibiting factor.

This understanding of China’s approach to human rights norms would suggest that in formulating policies targeting China, external actors should clearly distinguish between human rights violations which stem from issues related to capacity and human rights violations which stem from deliberate policy. A policy which allows for these categories to be addressed separately should then be constructed.

In some ways, this bifurcation has already been recognised by the EU in its relations with China. China is a strategic partner against which the EU maintains an arms embargo. China is classified as an Objective 1 country eligible for funding through the European Instrument for Democracy and Human Rights for activities in countries and regions where human rights and fundamental freedoms are most at risk. At the same time, it has been proposed that, as of 2014, China should graduate from bilateral development aid programming to new forms of partnership alongside developed countries including Australia, Canada, New Zealand and the United States. However, the duality of China’s approach to the domestic promotion of human rights has not been recognised by EU human rights policy on China, with the result that the EU has attempted to address all violations by means of the same policy instruments without regard for whether or not the instruments selected are the most appropriate to the job at hand.
The first task for the EU therefore, must be to identify its own priorities and distinguish between those that relate to violations which stem from capacity issues and those that relate to violations which stem from deliberate policy. It is recommended that this exercise is undertaken as an integral part of the promised development of a country-specific human rights strategy for China.

**Deliberate policy**

Attempts to engage with China on human rights violations which result from deliberate policy are likely to prove fruitless. These issues should rather be addressed publicly through appropriate multilateral and bilateral venues including, in particular, the UN Human Rights Council. In the absence of awesome violations on the scale of those witnessed in 1989, which would necessitate a more robust reaction at the UN including a special session on China and sponsorship of a draft resolution, it is suggested that, at a minimum, the EU response should include a commitment to address ongoing violations under all appropriate agenda items rather than exclusively under Item 4. Opportunities to highlight material relating to China during interactive dialogue with UN special rapporteurs and working groups must also be taken advantage of, particularly when they relate to issues raised separately by the EU in démarches, press statements and declarations. Finally, it is also suggested that given the need for unanimity on all EU positions, in order to avoid lowest common denominator outputs, when it is not possible to agree a position which reflects the views of member states advocating a strong statement on China, no EU statement should be issued. Rather, member states should be encouraged to speak on their own behalf thereby ensuring that the goal of presenting a unanimous Common Foreign and Security Policy is not permitted to undermine the commitment of the EU to effective multilateralism.

A role in addressing violations that stem from political choice may also be identified for EU funding to civil society organisations working with human rights defenders in China. However, it is suggested that the provision of direct support for unregistered organisations active on the ground in China should be
avoided. This suggestion is made due to the risks posed to the individuals concerned and the lack of EU expertise in both identifying and protecting them. More particularly, this suggestion is also made since, should the support of the EU for unregistered organisations become known, it would seriously, and perhaps permanently, undermine efforts to engage with China on issues related to capacity where higher levels of EU funding and significant experience have the potential to play a more transformative role.

While it may be tempting to argue that in the current economic climate it is no longer practical for the West to tackle China – its ‘banker’ – on human rights, it must be remembered that the reluctance of the EU to publicly address human rights violations in China stems from a long-standing policy preference and is as such completely unrelated to the economic crisis. Therefore, any attempt to use the crisis to suggest that an ethical foreign policy is something the EU can unfortunately no longer ‘afford’ vis-à-vis China would be extremely disingenuous. Moreover, despite its sabre rattling, it is also important to recall that China has shown itself to be pragmatic about the role of human rights in its broader relations with third countries and is unlikely to allow the human rights issue to influence policy decisions of major strategic importance with respect to its own potential role in resolving the economic crisis in the EU. As a clear indication of this pragmatism, thus far China has reportedly hinted at only one precondition which would assist it reaching a positive decision regarding investment in a bailout fund for the EU economy and it is entirely unrelated to human rights: that of granting China market economy status. In short, China continues to support the EU economy by maintaining its Euro asset holdings and is considering investment in Europe’s bailout fund not because Europe is soft on human rights but because the EU is China’s largest export

market and, as such, economic growth in China benefits from economic stability in Europe.\(^{876}\)

**Capacity**

In 1997, China made it clear that EU sponsorship of a draft resolution at the UN Commission on Human Rights on its human rights record was incompatible with ongoing bilateral human rights dialogue when it moved to suspend the EU-China process initiated in 1995. By reserving the right to table a draft resolution or to call for a special session on China for only the most serious of circumstances, the approach set out above would enable the EU to take a stronger stance on China at the UN while at the same time allowing the simultaneous continuation of engagement strategies, including dialogue and human rights assistance programming, to address violations stemming from issues related to capacity.

In the view of the author, it is possible to identify two key weaknesses in the structure and format of the existing human rights dialogue which continue to hamper its ability to have a positive impact on developments on the ground. First, contrary to the EU ‘Guidelines on Human Rights Dialogue’, as an interaction led by foreign affairs officials on both sides, the involvement of officials from ministries and institutions with a direct responsibility for human rights policy in China is limited, thereby greatly diminishing the relevance of the process as a human rights instrument.\(^{877}\) This weakness is not unique to China’s dialogue with the EU. Moreover, it has also been recognised as a significant limiting factor by Chinese participants from outside the Ministry of Foreign Affairs. A 2006 assessment of the Canadian dialogue with China for example, attributed this same concern to interviewees from the National

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People’s Congress, the Ministry of Justice, the Ministry of Public Security, the Supreme People’s Procuratorate, the All China Women’s Federation and the All China Lawyers’ Association. The assessment summarises the views expressed as follows:

- The Chinese MFA does not consult with them about what agenda items would be most useful to them in their ongoing work. The Chinese MFA simply advises them of the topics and asks that they research the Canadian situation in these areas and prepare questions and observations about Canadian human rights shortcomings.
- The Chinese MFA’s mandate is to defend China’s interests abroad. It has no institutional interest in promoting respect for China’s human rights domestically.  

Secondly, in creating the dialogue, the EU failed to differentiate between issues which lend themselves to progression by means of strategies focusing on engagement and those which do not, thereby robbing the dialogue of its potential as a venue for the non-confrontational elaboration ‘of new cognitive frames’ which may result in a change of policy preferences by the government. 

Despite repeated statements from the EU to the effect that, following the 2009 internal assessment of the dialogue, negotiations would be entered into with China with a view to implementing the recommendations made in the report, the only significant development to have taken place since is that, contrary to the wishes of the EU, the frequency of the dialogue has been reduced to a single meeting each year. That China has categorically rejected all attempts to negotiate changes to the structure and format of the dialogue is confirmed in a diplomatically worded statement from the EU following the

May 2012 dialogue round. The statement reiterates the desire of the EU to hold two rounds of dialogue each year and expresses regret at ‘China’s stance concerning the frequency and modalities of the dialogue’.  

In the absence of agreement from the Chinese side to alter the existing format in any significant way, the options currently available to the EU would seem to be to either continue the dialogue as is, or to abandon it. In spite of its significant shortcomings, as the only dedicated channel for the bilateral discussion of human rights issues, the EU-China Human Rights Dialogue has, since its establishment in 1995, provided the EU with an opportunity to interface directly with Chinese officials on its concerns. Without the dialogue, there is no guarantee that human rights concerns in China will continue to force their way onto the EU agenda with such regularity, albeit at a relatively low working level, or that the EU will continue to devote not inconsiderable resources to preparing policy positions on China and ensuring that the relevant personnel are briefed on major developments. Therefore, it is suggested that if the dialogue is to be dismantled, this should be done with great caution and only in the knowledge that an alternative mechanism can be put in place which will improve on the existing process. Recommendations as to potential structure of such a mechanism are set out below.

**Policy alternatives**

Strategies of engagement require a sustained focus on areas where there is commonality between the objectives of the EU and the reform priorities of the Chinese authorities. This has been described by human rights experts working in the field as the ‘windows of opportunity’ approach which would see donors focus their activities on areas where ‘a sign of commitment is evident on the part of authorities’ in target countries. In the case of China, such signs may be identified in official documents, including for example national human rights action plans, China’s white papers on human rights, the relevant five year plan
from the Supreme People’s Court and annual work reports from key ministries such as the Ministry of Justice and Ministry of Public Security as well as materials and commentaries published in academic journals, newspapers and current affairs magazines. While there is evidence that closer attention is being paid to some of these sources by the EU in planning its interventions in China, with both the action fiche for the EU-China Police Training Project and the EU-China Access to Justice Programme referring directly to official documents from China, it is suggested that the capacity of the EU to identify opportunities to build initiatives which resonate with the current reform discourse in China must be further developed. It is also suggested that in order to allow the development of ‘mutual trust, common goals’ and ‘agreed on methods of implementation’ the EU should generate a limited list of priority issues and concentrate its efforts in these areas. In line with the recommendations set out in the October 2011 communication from the European Commission on aid effectiveness and endorsed by the Council of the European Union in May 2012, it is further suggested that these priorities should not only be identified in consultation with China but also jointly agreed with the EU member states and pursued simultaneously through member state human rights assistance programming.

Once such opportunities have been identified, it is suggested that as an alternative to the existing human rights dialogue, a small number of focused exchanges are put in place to enable high level engagement on issues of core

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882 Key publications include: theoretical journals such as Orient (东方) and Open Times (开放时代); the current affairs magazine Caijing (财经); a number of newspapers published in southern China including Southern Weekend (南方周末) and Southern Metropolitan Daily (南方都市报); as well as numerous legal journals, in particular, those published by the Chinese Academy of Social Sciences and People’s University Beijing.


concern to both the EU and China. That China is indeed open to the initiation of such exchanges with the EU has been signaled in particular by the commencement of the EU-China Police Training Project highlighted in chapter 5.  

In order to maximise the potential impact of the envisaged exchanges, it is vital that they are owned and led on the Chinese side by state organs and institutions with an explicit role in either the formulation or implementation of domestic human rights policy and on the European side by direct counterparts at member state and EU level. It is also vital that these exchanges are established as long-term initiatives and are not limited to the duration of any one project or programme.

In order to ensure that they are impact oriented, a key objective of each exchange must be the identification and negotiation of related opportunities for cooperation on the delivery of practical assistance through EU funded pilot projects. It is suggested that using focused high level dialogue to identify project opportunities in related areas would enable the EU to maximise the potential impact of its human rights assistance funding by focusing on a small number of strategic priorities. This would represent a significant improvement on existing practice which lacks focus and has seen the EU support initiatives on a vast range of issues with little opportunity to follow up on progress made. In order to ensure the availability of ongoing financial support for initiatives in each sector, as an absolute priority, the EU must be prepared to commit to funding human rights activities in China beyond 2014.

To secure legitimacy, a full and public justification outlining the choices made by the EU in the light of target state analysis must be provided. The detailed objectives and instruments identified to pursue this new policy must be set out and a coherent discourse tracking its development and benchmarking its achievements must be set forth at regular intervals. In addition, a coherent discourse pressing home the universality of human rights, rather than their

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status as an EU-value, the equal right of Chinese citizens to the enjoyment of these rights, and the obligation this imposes on the Chinese authorities to protect and promote them must be developed and delivered systematically. Any failure to do so not only undermines the credibility of the EU as a human rights actor in China but also allows further space for the development of the Chinese counter-discourse, which has gained considerable traction, particularly among developing countries, with arguments that emphasise the primacy of economic social and cultural rights and the norm of state sovereignty.

Finally, it is suggested that given the potential weight which the standard human rights clause would lend to ongoing EU efforts to monitor human rights developments in China, its inclusion in any new partnership and cooperation agreement with China is of great importance. In the absence of public declarations from either side, setting out the particular issues on which agreement has been reached and those where further negotiation is necessary, it is not possible to state with any certainty whether or not resistance to the inclusion of the standard human rights clause has been encountered from China. Should this be the case, it is suggested that consideration be given to the possibility of linking Chinese agreement to the inclusion of both the standard clause and the model clause to the agreement of the EU to lift the arms embargo. In order to maximise the potential of the clause as a human rights instrument, it is also suggested that agreement must be reached in advance as to the precise modalities of the consultation procedures to be put in place should it prove necessary at any point to investigate suspected human rights violations. This must include agreement as to the role to be played by both parties, the sources of information to be relied upon and the means by which it should be gathered.
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