What Constitutes a Breach of the EC's Conditionality Clause?

Andreas Moberg

Published in Forskning om Europafrågor vid Göteborgs Universitet

(ISBN: 978-91-89608-26-7), 2009, nr 22

(Article starts on next page)

What Constitutes a Breach of the EC's Conditionality Clause?

Andreas Moberg[*]

Abstract

This article explores the EC's use of a legal construction, a contractual clause, as one among several available instruments at hand in its efforts to spread human rights, democratic principles and the rule of law to countries outside the EU. The clause is generally referred to as a conditionality clause. This article sets out to investigate how this clause has been put to use in practice. Focus is put on what events the EC has deemed to be severe enough violations of human rights, democratic principles and the rule of law to invoke the so called conditionality clause against another state. The results show that undemocratic regime changes stand out among the different events that lead the EC to invoke the clause.

Introduction

Idi Amin (1925-2003) was the president of Uganda between 1971 and 1979. The testimonials about his notorious cruelty are numerous and widely spread throughout the world. In June 1977, the EEC adopted the "Uganda Guidelines"[1] as a reaction to the political situation in Uganda, following debates in the European Parliament[2] that arose when MEP Van der Hek posed a question to the Council in February 1977.[3] According to information submitted by Mr. Van der Hek, which was mainly based on an Amnesty International Report, torture was committed on a daily basis and more than 50000 people had been murdered in Uganda since 1971. The Council's reply assured Mr. Van der Hek that it had agreed to take steps to ensure that Community assistance did not "in any way have as its

[*] Andreas Moberg is currently working as a lecturer and researcher at the Department of Law, School of Business, Economics and Law at the University of Gothenburg.

[1] "Council Declaration on the Situation in Uganda" adopted 21 June 1977, 10 Bulletin EC 6-1977, pp. 92-93.

[2] The European Parliament was not so named until the entry into force of the Single European Act 1987. In the Rome Treaty (1957) the institution we know as the European Parliament is actually called the Assembly.

[3] Written Question No. 941/76 (28 February 1977) by Mr. Van der Hek to the Council of the European Communities "on the human rights situation in Uganda", OJ C 214, 7/09/1977, p. 1.

effect a reinforcement or prolongation of the denial of basic human rights to its [Uganda's, *author's note*] people."[4]

The "Uganda Guidelines" meant that the Council applied economic sanctions against a third state as a response to human rights violations. The sanctions consisted in a suspension of payments already granted to Uganda through the Lomé (I) Convention. The decision to suspend Uganda's rights under the agreement was not based on the Lomé Convention itself, as there was no clause in the treaty granting such a right to the parties.

This lack of a contractual possibility to suspend or terminate the Lomé (I) Convention in case of the other party's breach of fundamental rights triggered a discussion both between the parties to the convention and between the member states of the EEC. Within the EEC, internal public opinion demanded that European funding of Amin's regime was terminated. As things turned out, the EEC's relations with Uganda were suspended, but this suspension was not primarily supported by legal argument. As Uganda neglected to raise a formal complaint about the EEC's unilateral suspension of benefits arising under the Lomé (I) Convention, there was never any reason to present the legal argumentation in this specific case.

Now, that said, most international lawyers would have little trouble arguing the EEC's case should it come to that, but that is not really the point I want to make here. What is important here is the fact that the EEC found itself wanting a contractual possibility to deal with this type of situation. This desire sparked a chain of events eventually leading up to the drafting of a model conditionality clause. Through the following rounds of re-negotiation of the Lomé Convention,[5] the discussion about the inclusion of a conditionality clause into the agreement was an ever-present feature until, finally, it was included in the revised fourth Lomé Convention in 1995.

The Conditionality Clause as an Instrument to Spread the Respect for Human Rights

What then, is a conditionality clause? The basic rationale behind a conditionality clause is to make certain values fundamental elements upon which the cooperation envisaged under the agreement in question rests. As such, said values are considered to be of such importance that

[4] Answer by the Council (20 July 1977) to Written Question No. 941/76 by Mr. Van der Hek to the Council of the European Communities "on the human rights situation in Uganda", OJ C 214, 7/09/1977, p. 1.

[5] Lomé II Convention entered into force 1979, Lomé III in 1985, Lomé IV 1989 and the revised Lomé IV in 1995.

the parties agree that an infringement of either of these values would, in fact, be such a serious attack on the whole purpose of the parties' endeavour as to merit and call for the suspension or termination of the agreement.

The idea of stipulating that certain elements of an agreement are of this magnitude is not at all unusual in international treaty law, but the special thing about conditionality clauses is that they refer to values that have no direct link with the actual topic the treaty covers. In fact, one argument often raised against the inclusion of a conditionality clause in, for instance an agreement on trade in textiles, is that provisions on adherence to respect for human rights and democratic principles have very little to do with conditions under which trade in textiles should take place. It is this specific fact that makes conditionality clauses special.

In May 1995 the Commission presented a proposal of a model conditionality clause.[6] The Commission had been using different varieties of conditionality clauses for a few years, and now, the argument went, they wanted to standardize the wording of the clause. The conditionality clause was created as an instrument at the Commission's disposal in its work with spreading respect for human rights in the world. Until 1995, the Community had made use of several different versions, for instance in the cooperation agreements with the Baltic states, with Brazil and with India. The differences between the versions were not significant, but there were gains to be made from harmonizing the practice.

The conditionality clause is inspired by the Vienna Convention's provision on "material breach" of an agreement as grounds for suspension or termination of international treaties.[7] The Commission's proposed conditionality clause, which the Council approved on May 29 1995, is a design made up of two parts. The first part is an "essential elements clause" and the second is a "non-execution clause". Its first part, the "essential elements clause", indicates the values the parties consider to be fundamental for the regulated cooperation. These values make up what I suggest calling the valuebase of the agreement. The second part of the conditionality clause, the "complementary clause", governs what course of action the parties have the right to take when the other party commits a "material breach" of the agreement. A "material breach", in turn, is explained as a breach of the obligation to protect the valuebase, that is, of one of the essential elements.

---

[6] Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95) 216 final, 23/5/1995.

[7] Article 60, Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

This means that when the parties to the treaty agree that human rights, democratic principles and the rule of law constitute essential elements of the agreement, either party will have the right to suspend or terminate the agreement in case of the other party's breach of these values.

The conditionality clause is normally included in a treaty in the following manner: the "essential elements clause" is inserted in the first section of the treaty stipulating that human rights, democratic principles and the rule of law constitute essential elements of the agreement in question.[8] The "essential elements clause" will be accompanied by a "non execution clause" among the final provisions of the treaty where the parties to the treaty give each other the right to suspend or terminate the agreement in case of any other party's "material breach" of the treaty. A "material breach" is defined as a breach of one of the "essential elements" of the agreement, that is, a violation of the stipulated valuebase.[9] Invoking the conditionality clause normally means that the faulting state is called to consultations with the invoking state. The aim of these consultations is to present the "material breach" to the delinquent, who will present a defence justifying the actions taken. Countermeasures, normally the suspension of relevant obligations towards the state in question, aiming to force the state to cease the unlawful practices, will be discussed and finally agreed upon. Under special circumstances, normally referred to as "cases of special urgency", countermeasures can be taken without prior consultation.

Aim and purpose of the Article – What Constitutes a Violation of the Conditionality Clause's Valuebase?

Among the many interesting questions surrounding the use of conditionality clauses as an instrument to spread the respect for fundamental values, I have, for the purpose of this article, chosen to focus on one specific question: *In response to which violations has the EC decided to call another state to consultations under a conditionality clause?*

---

[8] Cf. article 9(2) of the Cotonou Agreement: "Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.".

[9] Cf. article 96(2)a of the Cotonou Agreement: "If, despite the political dialogue on the essential elements as provided for under Article 8 and paragraph 1a of this Article, a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annexe VII.".

This is just one aspect, though admittedly important, of the combined academic effort required to analyze the phenomenon of conditionality clauses in international treaties governed by public international law. There are several other aspects of significant interest, such as questions concerning the effects a proposed conditionality clause will produce during treaty *negotiations* and questions regarding *decisions not to invoke* the conditionality clause in a specific case. And, fascinatingly enough, these examples do not even touch on all the important work required to analyze and *evaluate the effects* of using conditionality clauses.[10]

The knowledge gained from studying the cases where the EC has decided to call a state to consultations, or, as in a few exceptional cases, to invoke the clause relying on the exception granted for cases of special urgency, is very useful. Mainly because of the general usefulness of empirical data to support any given argument, but especially when discussing the normative reach of the clause in a perspective of legal certainty or when evaluating how useful the clause is as an instrument to spread respect for fundamental values. I have considered the knowledge of when, how and why the EC has used its conditionality clause as an excellent starting point for any type of analysis of the EC's use of political conditionality clauses. In this article, I will present an examination of the 17 cases where the EC has invoked the conditionality clause against another state since the Commission's decision to harmonize the clause in May 1995.

What Constitutes a Breach of the Conditionality Clause?

Now, before I present the data representing the cases where the conditionality clause has been invoked, I wish to stress the fact that the EC's decision to invoke the clause is taken by the Council, normally acting on a proposition from the Commission. Naturally, there are many cases where it could be well argued that the Council should have decided to invoke the clause but refrained from doing so. Likewise, the EC lacks

[10] Some of these issues have been covered and some of them need more work still. I would like to refer the interested reader to the following authors for a good overview of the use of conditionality clauses in EC external relations: Arts, Karin, Integrating Human Rights into Development Cooperation: the Case of the Lomé Convention, Kluwer Law International, 2000; Bartels, Lorand, Human Rights Conditionality in the EU's External Agreements, Oxford University Press, 2005; Fierro, Elena, The EU's Approach to Human Rights Conditionality in Practice, Kluwer Law International, 2003; Moberg, Andreas, Villkorsklausuler, Iustus Förlag, 2009; Smith, Karen E., The Use of political Conditionality in the EU's Relations with Third Countries: How Effective?, European Foreign Affairs Review, 3:253-274, 1998; Tomaševski, Katarina, Responding to Human Rights Violations 1946-1999, Kluwer Law International, 2000; Youngs, Richard, The European Union and the Promotion of Democracy, Oxford University Press, 2001.

the contractual ability to call a number of states to consultations in case of their violations of the model clause's valuebase simply because no agreement binding upon these countries contains a conditionality clause.[11]

The most important feature of this article is that it presents the cases where the Council has used the conditionality clause. On the other hand, it does not cover other cases. As such, it is not an attempt to explain, or even to describe, the EC's use of conditionality clauses generally. Rather, it aims to contribute to that very discussion with one important piece of the puzzle, namely a systematic analysis of the cases where the conditionality clause has been invoked by the EC.

In Theory?

Having said that, it is necessary to elaborate on which values the Commission considers included in the valuebase, as a feature distinct from the actual empirical evidence collected from the cases when the conditionality clause has been invoked. This means: what actions or omissions attributable to a third state bound by a conditionality clause state are, according to the Commission, *meant to render the invocation*, by the EU, of the conditionality clause?

The purpose of the clause is to stipulate what the acceptable position *vis à vis* fundamental rights *is*, from a normative standpoint. The "essential elements clause" serves to fulfil this purpose. However, any and all claims as to how a certain legal provision is to be interpreted will contribute to the re-construction of that legal provision, simply because all legal provisions are socially constructed, and as such, we cannot describe them without taking part in the re-construction of them as legal provisions. In other words, all descriptions are, to some degree, normative.

[11] It is important to remember that the Communication from the Commission, laying down the policy of using conditionality clauses as an instrument to spread these fundamental values to third countries, clearly states that all new draft negotiating directives for Community agreements with third parties should include the model conditionality clause, COM(95) 216, 23/5/1995, p. 12. However, the amount of states with which the EC lacks ratified agreements containing conditionality clauses is not very high, and it is decreasing. The UN has 192 member states. 27 of these are members of the EU. That leaves 165 states. Today (April 2009) the EC is bound to agreements containing a standard conditionality clause with approximately 140 states. The clause has been inserted into negotiating directives for upcoming negotiations with 16 more states. That leaves about 10 states with which the EC lacks a conditionality clause, or is not in negotiations about concluding an agreement containing one. Among theses states we find the USA, China, Japan and Australia.

Does this matter? Well, opinions will differ on how to answer this question, and the discussion is not the topic of this article.[12] However, there is one important point to be made for the purposes of this very article; we are all likely to agree that the EC's opinion, the EC's motivation, for deciding to invoke the conditionality clause is of great importance as a reoccurring updated statement of how the legal provisions forming the essential elements of the relevant treaty are to be interpreted. As we are able to let the Commission's statements on the interpretation of the fundamental values mirror the Council's motivation for invoking the clause we are able to see how the legal provisions forming the essential elements of the treaties are reconstructed.

Therefore, before we look at what the Council has deemed as serious enough violations of the "essential elements clause" to render a call for consultations, we will analyse the Commission's position as to what values the "essential elements clause" serves to protect.

A textual analysis of the actual model clause does not take us very far in this endeavour. The clause is drafted in very general terms and it is simply stating that:

> "Respect for the democratic principles and human rights established by [the Helsinki Final Act and the Charter of Paris for a New Europe] [as well as the principles of market economy] [as defined at the Bonn CSCE conference] inspires the domestic and external policies of the Community and of [third country] and constitute an essential element of this agreement"[13]

As the clause is a model clause, the wordings within brackets are meant to be "electives", selected and inserted depending on the context. What is striking is the lack of references to the specific values that constitute "essential elements". In this context, it serves well to remember that the EC has never been a party to any treaty on human rights. The EC unilaterally adheres to the principles common to the member states as manifested in their respective constitutions as well as in international treaties on human rights ratified by the member states, but on its own, as

[12] A discussion on how legal rules as socially constructed phenomena are reconstructed when described, mainly inspired by Searle's theory (in Searle, The Construction of Social Reality, Free Press, 1995), can be found in: Glavå & Petrusson, Illusionen om rätten, *Erkjennelse og engasjement*, Fagbokforlaget, 2002; Schollin, Digital Rights Management, Jure 2008; Moberg, Villkorsklausuler, Iustus förlag, 2009.

[13] Annex 1, Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries, COM(95) 216, 23/5/1995.

a subject of international law, neither the EC, nor the EU, has committed itself to a multilateral treaty for the protection of human rights.[14]

Why is that, one may ask? The simple explanation is that the member states never transferred such a competence to the Community. But how, then, is the EC competent to commit to making human rights "essential elements" of a treaty? This question may be answered in many different ways. One way would be to state that it is, in fact, a non-question, as there are several international agreements concluded by the EC containing an "essential elements clause".[15] This argument suggests that the Council would have decided to accept such a lack of competence. It should be added that many of the agreements are concluded as "mixed agreements", meaning that the EC and the member states conclude it on the one side, and the third country on the other, in order to make up for the EC's insufficient powers.

There is also authority from the European Court of Justice, supporting the interpretation that the EC is competent to include conditionality clauses in cooperation agreements. In a famous case, Portugal challenged the Council's decision to conclude an agreement between the EC and India based on article 181 EC (present numbering, then 130y EC).[16] The Court explained that human rights was an integral part of development cooperation and that article 181 EC would be ridded of its purpose should the EC need another legal basis, or as had been argued, the member states' support under a "mixed agreement".

All in all, when drafting the model conditionality clause the Commission spent very little ink explaining what the fundamental rights the "essential elements clause" was supposed to safeguard. The few references in the preparatory acts are worded in remarkably general language. The fact that the EC's competence in the field of human rights was, to say the least, meagre, is likely to be part of the explanation for this.

---

[14] In 1994, the Council of the European Union requested an Opinion from the European Court of Justice on whether the EC's accession to the European Convention for the Protection of Human Rights would be compatible with the EC-treaty, Opinion 2/94, 28 March 1994, ECR [1996] I-1759. The Court declared that the accession was incompatible with the treaty "as Community Law now stands", (Opinion 2/94, para. 36). This position has been defended ever since the Opinion was delivered, but the proposed Lisbon treaty will mean a complete change of scenery since it stipulates that the EC shall accede to the European Convention, article 6.2, Treaty on European Union, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Council Document No. 6655/1/08 available on http://europa.eu/lisbon_treaty/index_en.htm (2009-04-07).

[15] In 2005, the EC was bound by agreements containing a conditionality clause with ca 150 countries, Bartels, Human Rights and Democracy Clauses in the EU's International Agreements, European Parliament, 2005.

[16] Case 268/94, Portuguese Republic v Council of the European Union, 3/12/1996, ECR [1996] page I-6177.

Now, since there is one treaty relation only, amongst all the treaties the EC has concluded with third countries, that has been suspended because of an invocation of the conditionality clause, we need to shed some more light on what values, and how the Commission has declared these be interpreted, the "essential elements clause" has been linked to within the framework of this agreement. After all, this agreement is a manifestation of the EC's idea to use the conditionality clause as an instrument to spread the respect for human rights, democratic principles and the rule of law throughout the world. Therefore, in order to analyse what values the model "essential elements clause" was designed to protect, we are well advised to analyse what values the "essential elements clause" was meant to protect within this context. I am talking about the EU-ACP – context, that is the Lomé Conventions and the Cotonou Agreement.[17]

In order to examine what values the EC included in the value base linked to these agreements we must study the text of the agreements, both the actual conditionality clauses and the preambles. The clauses are extremely generally formulated, and references are made simply to "human rights, democratic principles and the rule of law". In the preamble of the Lomé (IV)bis Convention and the Cotonou Agreement quite a number of conventions on human rights are mentioned, in an attempt to clarify the normative range of the value base. The preamble of the Cotonou Agreement refers to 14 different conventions as well as "other instruments of humanitarian law".

It is clear that the EC intended to keep the value base as open as possible. The ability to specify the value base has been there all the time, but the choice has fallen on a strategy making it difficult to argue that a certain, fairly qualified, action would *not* fall under any of the provisions. It is also interesting to note that the EC is not a party to any of the conventions mentioned in the preambles.[18]

---

[17] Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, OJ L 156, 29/05/1998, p. 3; Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 65, 08/03/2003, p. 27. The Cotonou agreement was revised during 2004-05 and the revised agreement entered into force 1 July 2008, Council Decision of 28 April 2008 concerning the conclusion of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 129, 17/5/2008, p. 44.

[18] This point is made mainly because this specific fact is remarkably absent in the EC's text on the subject. From a pragmatic point of view, its significance is somewhat moderated by the fact that both agreements in question have been concluded as "mixed agreements". Therefore, it may well be argued that the references are made to treaties binding on the EU member states.

The Commission's preparatory work gives a more precise picture of the Commission's view concerning which values are included in the value base. The communication from the Commission introducing the conditionality clause[19] is, as has been shown above, hardly much more precise than the preamble of the agreements, but as the cooperation between the EC and the ACP evolved, the Commission worked on specifying what the EC recognized as the provisions of the value base. In March 1998 the Commission published a more extensive and detailed communication.[20] The purpose of the communication was to clarify for the ACP-states how "human rights", "democratic principles" and "rule of law" were interpreted by the EC, but the most remarkable thing about the communication is what the Commission writes in the concluding section, after having taken the trouble to clarify its interpretation of the concepts. The Commission indicates that the decision to invoke the clause is made following an *in casu* assessment that should be taken with regard to the political situation in the country.[21] It is not difficult to contrast such a statement against other statements concerning, for example, the universality and indivisibility of human rights.

Considering the fact that the Commission has had every opportunity to elaborate on what fundamental values the "essential elements clause" refers to, it is striking that the material provided by the Commission as an interpretative background for the invocation of the conditionality clause still gives only the most general guidance as to how the clause is intended to be applied.

Having arrived this far, it is time to look at how the "essential elements clause" has been used in practice.

In Practice?

Between 1995 and 2006, the EC invoked the conditionality clause against 12 different states. This occurred 17 times all in all. 17 cases of application over a period of 11 years does not seem very much, especially when considering the fact that the valuebase of the conditionality clause

[19] Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries, COM(95) 216, 23/5/1995.

[20] Commission Communication to the Council and the Parliament, Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(98) 146, 12 March 1998.

[21] "Implementing such a procedure requires the capacity to assess the failure to fulfill an obligation in respect of human rights, democratic principles and the rule of law. The decision to initiate consultations with a country will depend on a political assessment of each given case but that assessment should take account of a detailed analysis of the country's situation.", COM(98) 146, p. 16.

is drafted in such general terms. There is a significant amount of normative margin for interpretation suggesting that the number of cases is not low due to the criteria for invocation being narrowly constructed. Moreover, one should bear in mind that the conditionality clause was in force between the EC and about 120 states in the mid-nineties and about 140 states in 2005. Considering most annual reports on the status of worldwide protection for human rights, one would perhaps expect more cases.[22]

Furthermore, as has already been noted, all the 17 cases have appeared in the context of the EC's cooperation with African, Caribbean and Pacific countries, governed by the Lomé Convention and the Cotonou Agreement.

These general reflections on the EC's practice tell us that the conditionality clause has been used with restriction against a limited number of third states. This raises the question: *What types of violations of the valuebase have caused the EC to take action, relying on the conditionality clause?*

I have allocated the 17 cases of EC invocation of the clause between 1995 and 2006 into six categories. The largest category, by far, is "undemocratic regime change". It contains situations where a government has been replaced through a non-democratic process. The Council has used a variety of concepts[23] in its descriptions of the events that have led to the invocation of the conditionality clause within this category, but it is clear that all the events have one thing in common: the EC claims that the other party violated democratic principles.

The second category, "Procedural deficiencies at the general elections", is related to the first category in that we are dealing with democratic principles. Moreover, all events in categories 1 and 2 are related to isolated historical events, unlike the other four categories which tend to focus on development over a longer period of time.

The third category consists of the cases that were the most difficult to categorize. Though there are four cases, these have taken place in only two states; Liberia and Zimbabwe. Moreover, two of the cases are follow-ups on the first decision to call Liberia to consultations. The cases are more difficult to categorize because they are more complex than the

[22] There were 70 communications placed before the Human Rights Committee during the period covered by the Committee's 1997 annual covering the period July 1995 – July 1996, Report of the Human Rights Committee, Volume I, General Assembly Official Records, Fifty-first Session, Supplement No. 40 (A/51/40) and the numbers for the following reports were 49 for 1996/1997, 58 for 1997/1998, 50 for 1998/1999, 63 for 1999/2000, 68 for 2000/2001, 103 for 2001/2002, 92 for 2002/2003, 103 for 2003/2004, 112 for 2004/2005 and 71 for 2005/2006 adding up to a total of 839 communications between July 1995 and July 2006.

[23] "Military coup" and "Coup d'état" being the most common ones.

others. They concern long, very serious conflicts with several international players involved.

I have named the fourth category ”gradual deterioration of democratic conditions in the country.” The state behind this categorization is Guinea. When the EC invoked Article 96 Cotonou, the decision was taken after a long period of dialogue between the EC and Guinea on the conditions for democracy in Guinea. There were several occasions during the previous years when the EC arguably could have chosen to invoke the conditionality clause but refrained from doing so. Guinea was eventually called to consultations but when the decision to end the procedure was taken, the EC opted to focus on political dialogue, according to the provisions set up for dialogue in the Cotonou agreement, rather then suspension.

The fifth category consists of one unique case of consultations. Togo initiated the consultations by writing to the Commission. At that moment, cooperation with Togo had been suspended since 1992 except for a period between 1995 and 1998.

The sixth category consists of one of the consultations with Liberia. I mention the case to illustrate that it is the only case in which consultations were initiated due to the other party’s violation of article 97 Cotonou, which deals with serious cases of corruption.

---

1. Undemocratic regime change (9 cases)
2. Procedural deficiencies at the general elections (2 cases)
3. Generally described violations of human rights (4 cases)
4. Gradual deterioration of democratic conditions in the country (1 case)
5. Consultations at the request of the ACP States (1 case)
6. Article 96 & 97 Cotonou in combination (1 case)

Table 1
The 6 categories of cases of EC invocation of the conditionality clause

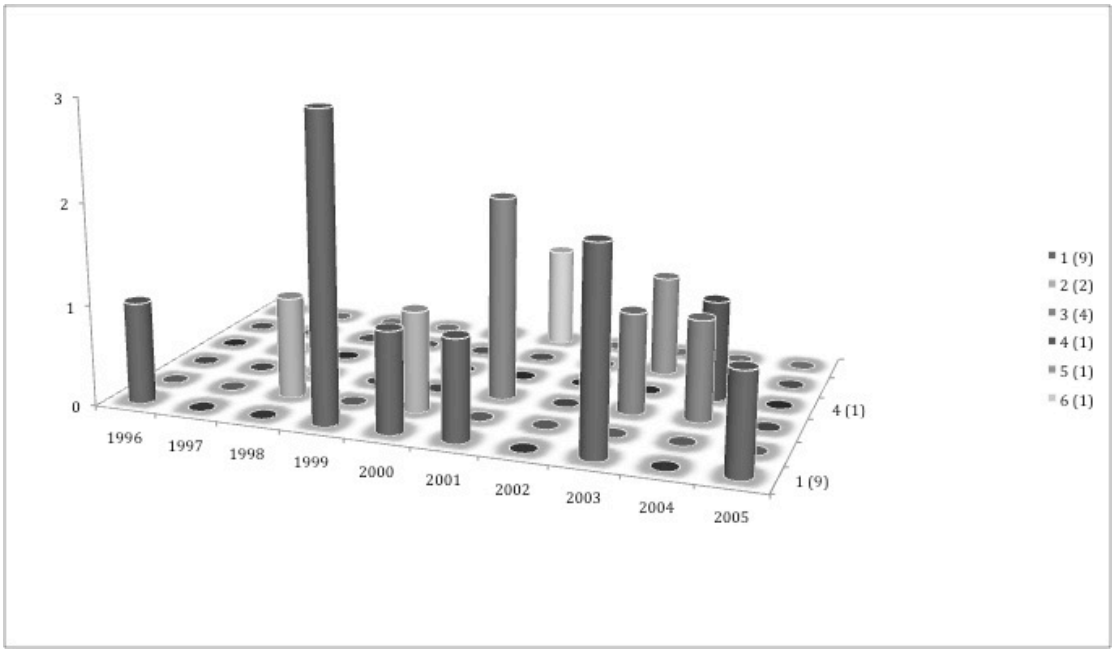

Table 2
The picture shows the 17 cases of invocation of the conditionality clause distributed per category and year. The x-axis shows time, the y-axis shows frequency of cases and the z-axis shows the six different categories listed above (Table 1)

Undemocratic Regime Change

The pattern that emerges from studying the EC's invocation of the conditionality clauses is very clear. Although there are six differing types of causes to invoke the conditionality clause, one single category represents a majority of cases of invocation.

The 9 cases of undemocratic regime change occurred in 7 different states. All the 17 cases of invocation of the conditionality clause concerned 12 states. The remaining 8 cases occurred in 5 other states.[24]

The second category mentioned above (procedural deficiencies at the general elections) is closely related to the category undemocratic regime change in that both concern the procedure of how governments legitimately govern the population. The 2 cases in that category are Togo (1998) and Haiti (2000).

[24] Guinea (2004), Haiti (2000), Liberia (2001, 2003, 2004), Togo (1998, 2004), Zimbabwe (2001).

	State	Date of regime change	Council Decision to Call to Consultations
1	Niger	27 January 1996	29 January 1996
2	Niger	9 April 1999	29 April 1999
3	Comoro Islands	29 April 1999	12 July 1999
4	Guinea Bissau	May 1999	19 July 1999
5	Ivory Coast	24 December 1999	14 January 2000
6	Fiji	19 May 2000	2 August 2000
7	Central African Republic	15 March 2003	22 May 2003
8	Guinea Bissau	14 September 2003	19 December 2003
9	Mauritania	3 August 2005	29 November 2005

Table 3
The 9 cases of undemocratic regime change

How does the EC know that it is time to invoke the clauses?

According to the formal institutional order the Council will decide on invocation on a proposition from the Commission. The information about a potential breach of the valuebase constituting the essential elements of the agreements is often collected by one of the "EU-embassies" in the country in question. This could mean one of the member states' embassies or representations, or, the Commission's delegation in the state in question.[25] There is no institution within the Commission with the express task of monitoring compliance with the conditionality clauses. As a consequence, the clause is used in a typical *ad hoc*-manner on a case-by-case basis.[26]

Concerning the 9 cases of undemocratic regime change, all of them are cases where the attempts to overthrow the government in control were successful. During the same period of time (1995-2006) there were 12 attempts at undemocratic regime change in the same group of countries that did not warrant any reaction from the EC. Only 3 of these were successful. The governments in power resisted 9 out of these 12 attempts respectively, and said governments also avoided a call for consultations under article 366a Lomé/96 Cotonou. It is thought provoking to consider

[25] The Commission has more than 130 delegations and offices all over the world, http://ec.europa.eu/external_relations/delegations/web_en.htm (2009-04-09).
[26] NB the Commission's position on how to determine when the clause should be invoked, footnote 20 above.

whether the state in question would have avoided such a call to consultations if the government had been overthrown.

On the one hand, it may seem odd to call those responsible for overthrowing a previous government to consultations, since such an act declares that those called are representing the state in question, and thus, in-directly, acknowledges them as the legitimate representation of that state. On the other hand, there is no use calling those overthrown to consultations, as they are no longer in any position to change the situation on the ground. The EC has adapted a pragmatic approach to this dilemma. As the consultation procedure always focuses ahead, on how those in power will improve the situation regarding fundamental rights, democratic principles and the rule of law, rather than focusing on past events (although it is a reaction per se) the question of responsibility for overthrowing a government is normally not on the agenda of the consultation procedure. In fact, it should be kept in mind that it would be presumptuous to assume that the overthrown governments were elected via democratically legitimate procedures. As often as not, the overthrown were themselves revolutionaries before their claim for the power to rule.

How can the EC's inclination towards reacting to undemocratic regime changes be explained?

There are two main separate strands of explanation available, if we count out the possibility that the EC acts on all the cases that are brought to its intention. The first explanation is that democratic principles are more important to the EU than issues regarding (other?) human rights and the rule of law.[27] The other explanation is that these cases are singled out for pragmatic reasons combined with the limited resources made available to enforce the conditionality clauses.[28] In short: since it is easier to prove, according to the facts on the ground, that an undemocratic regime change has taken place compared to proving that a certain government violates human rights and/or the rule of law.

Are democratic principles more important to the EC than fundamental rights and the rule of law? There are no explicit references or statements either from the Council or the Commission that this would be the case. Even though the practice disclosed in this article suggests

[27] It may well be argued that these concepts are intended to be regarded as examples rather than categories, but as this article is built on the interest to investigate what type of actions, if any specific, renders an invocation of the clause, such an argument is irreconcilable with the idea that it may be useful to discern a pattern (such as the one that this article actually identifies) in the EC's invocation of the conditionality clauses.

[28] Please note that this analysis does not take into account the interests concerning the decision to invoke the clause or not, as the only cases that are analysed here are cases where the clause has been invoked.

that there may be a hidden agenda, stating that democratic principles are more important, it seems highly unlikely that this would be the explanation to why this category is so much larger compared to the others. There seem to be very little to gain from such a policy, and even less from hiding such a policy were it there in the first place.

Are the undemocratic regime changes singled out for pragmatic reasons? My second suggested explanation seems more plausible than the first one. The conditionality clause is a legal instrument. When invoking a conditionality clause, the onus of proof lies with the party that invokes the clause. Proving that a regime change has taken place and that this regime change was contrary to democratic principles will be significantly less difficult compared to proving that a state is violating its population's human rights. In fact, the parties will share a common interest in the EC calling the state to consultations in many of the cases where a revolution has occurred, simply because the new rulers need to establish liaisons with the EC in order to secure development cooperation and humanitarian aid. Adding the layer of limited resources and the lack of an institutionalized supervising mechanism only enforces the theory that the category of undemocratic regime change would top the list of cases.

Conclusions

In this article, I have shown what the most common reason for the EC to invoke its conditionality clause in a contractual relation with a third state has been between 1995 and 2006. The conditionality clauses were constructed as an instrument to spread the respect for human rights, democratic principles and the rule of law throughout the world. They will soon have been used for 20 years, although the use was harmonized in 1995. So far, they have only been invoked within the context of the ACP-EU cooperation, that is, under the Lomé Conventions and the Cotonou Agreement.

The EC has acted more often against undemocratic regime changes in a partner country than against any other violation of the valuebase of the agreements containing a conditionality clause. As there is no official policy explaining why this is so, I have looked to the actual cases trying to understand how this clear trend has come about. The 17 cases of invocation of a conditionality clause between 1995 and 2006 show 9 cases where the reason has been the occurrence of an undemocratic regime change in the third state.

The most plausible explanation seems to be a combination of international treaty law and the EC's limited resources in this field. As

the onus of proof lies with the party claiming that there has occurred a violation, it is easier isolate, and thereby prove, that an undemocratic regime change has taken place, compared to proving human rights violations orchestrated by the state.

This article has focused on one aspect of the very big picture that is the EC's use of conditionality clauses. There are many, many more such aspects and hopefully more pieces of the puzzle will be added to this one in the near future.

List of References

Literature

Arts, Karin, Integrating Human Rights into Development Cooperation: the Case of the Lomé Convention, Kluwer Law International, 2000

Bartels, Lorand, Human Rights Conditionality in the EU's External Agreements, Oxford University Press, 2005

Bartels, Human Rights and Democracy Clauses in the EU's International Agreements, European Parliament, 2005.

Fierro, Elena, The EU's Approach to Human Rights Conditionality in Practice, Kluwer Law International, 2003

Glavå & Petrusson, Illusionen om rätten, *Erkjennelse og engasjement*, Fagbokforlaget, 2002

Moberg, Andreas, Villkorsklausuler, Iustus Förlag, 2009

Schollin, Digital Rights Management, Jure 2008

Searle, The Construction of Social Reality, Free Press, 1995

Smith, Karen E., The Use of political Conditionality in the EU's Relations with Third Countries: How Effective? European Foreign Affairs Review, 3:253-274, 1998

Tomaševski, Katarina, Responding to Human Rights Violations 1946-1999, Kluwer Law International, 2000

Youngs, Richard, The European Union and the Promotion of Democracy, Oxford University Press, 2001.

International Treaties

The Treaty of Rome, 25/3/1957.

Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

United Nations

Report of the Human Rights Committee, Volume I, General Assembly Official Records, Fifty-first Session, Supplement No. 40 (A/51/40)

European Union

European Court of Justice

Opinion 2/94, 28 March 1994, ECR [1996] I-1759

Case 268/94, Portuguese Republic v Council of the European Union, 3/12/1996, ECR [1996] page I-6177.

Commission of the European Communities

Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95) 216 final, 23/5/1995.

Commission Communication to the Council and the Parliament, Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(98) 146, 12 March 1998.

Council of European Communities

"Lisbon Treaty" Treaty on European Union, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Council Document No. 6655/1/08 available on http://europa.eu/lisbon_treaty/index_en.htm (2009-04-07).

Bulletin EC

"Council Declaration on the Situation in Uganda" adopted 21 June 1977, 10 Bulletin EC 6-1977, pp. 92-93.

Official Journal

"Lomé I", ACP-EEC Convention signed in Lomé on 28 February 1975, OJ L 25, 30/1/1975, p. 2.

Written Question No. 941/76 (28 February 1977) by Mr. Van der Hek to the Council of the European Communities "on the human rights situation in Uganda", OJ C 214, 7/09/1977, p. 1.

Answer by the Council (20 July 1977) to Written Question No. 941/76 by Mr. Van der Hek to the Council of the European Communities "on the human rights situation in Uganda", OJ C 214, 7/09/1977, p. 1.

"Lomé II", Second ACP-EEC Convention signed at Lomé on 31 October 1979, OJ L 347, 22/12/1980, p. 1.

"Lomé III", Third ACP-EEC Convention signed at Lomé on 8 December 1984, OJ L 86, 31/03/1986, p. 3.

Single European Act, 1987, OJ L 169, 29/06/1987, p. 1.

"Lomé IV", Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ L 229, 17/08/1991.

"Lomé IV(bis)", Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, OJ L 156, 29/05/1998, p. 3

"Cotonou Agreement", Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 65, 08/03/2003, p. 27

Council Decision of 28 April 2008 concerning the conclusion of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 129, 17/5/2008, p. 44.