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Political Conditionality: An EU Strategy to Integrate Human Rights and Development

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> *"All of us have a responsibility to promote and protect the rights of our fellow members of the human family, be that at home or elsewhere in the world. The EU takes this obligation seriously."* [1] Dr. Benita Ferrero-Waldner (2007)

> *"A commitment to respect, promote and protect human rights and democratic principles is a key element of the European Community's relations with third countries ... To help it meet those commitments the Community has a broad range of instruments at its disposal ... Taking account of human rights in contractual relations with third countries is one of those instruments. It is on this latter instrument that the communication focuses."* [2] Commission of the European Communities (1995)

> *"One of the criticisms of applying conditionality in aid allocation is that donors do so in their own interests, rather than those of the people of the developing countries. As aid budgets decrease, conditionality could provide an excuse to cut off aid to strategically or commercially unimportant states."* [3] Karen E. Smith (1998)

1. The Janus-faced Concept of Political Conditionality

The quotes above show us the polarity that *is* political conditionality. There are many ways of structuring a discussion on this broad, and politically

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[1] *Benita Ferrero-Waldner,* Member of the European Commission responsible for External Relations and European Neighbourhood Policy, in European Commission, The European Union: Furthering Human Rights and Democracy Across the Globe (Belgium: European Communities 2007).

[2] 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, 5.

[3] *Karen E. Smith,* 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?', 3 European Foreign Affairs Review (1998), 253–274.

sensitive subject. The discussion spans over a huge spectrum. It contains aspects of high politics aimed at realizing good, sustainable living conditions for all of us. It also contains a dimension of efficient economics following a *quid pro quo* logic. On top of that, the discussion is also seasoned with a flavour of doubt over the true objectives and motives that drive the whole machinery.

In this article, I will attempt to keep focus on what could be called the legal perspective on political conditionality. Even as we limit the discussion to legal perspectives, the polarity is unavoidable – are we talking about contractual relations where obligations are created through the principle of *pacta sund servanda*, or are we talking about obligations that are owed *erga omnes*, to all other subjects no matter what treaties are concluded? Or are we talking about both?

1.1 Aim of the Article[4]

This article will examine what could be described as one instance of the EU's use of conditionality clauses in external agreements as a strategy to integrate human rights in development. The article focuses on establishing why the EC decided to invoke the conditionality clause in each given situation. These reasons will be contrasted to the reasons that the EC has given to explain why, and under what circumstances, it should invoke conditionality clauses.

This is not the only way of studying the impact of conditionality clauses on the EU's strategy to integrate human rights and development, but it is an essential 'piece of the puzzle'.[5] Since this article concerns human rights and

[4] As a general note on terminology, I would like to point out that I have used the concepts EU, EC and EEC as I have seen fit considering the circumstances. They are not interchangeable. Following the entry into force of the amendments brought about by the Lisbon Treaty, a remark such as this one may seem outdated. However, I have chosen to use the historically correct denominations. Since all the cases I deal with in this article are pre-Lisbon cases, I will refer to the EC as a party to the agreement although the EC no longer exists as a subject of international law.

[5] 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. 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: *Karin Arts*, Integrating Human Rights into Development Cooperati-

development cooperation, I have chosen to focus on the conditionality clause in the ACP-EU Partnership Agreement (the Lomé Conventions and the Cotonou Agreement).[6] It is true that the vast majority of cases where the EC has invoked a conditionality clause against a third country have been cases of invocation of the clause in the ACP-EU Partnership Agreement. However, as there are other cases of the EC invoking conditionality clauses, under other regimes, I wish to underline that this article does not deal with those cases.[7] Furthermore, the article does not present any extensive evaluation of the practice. This would be the next step and I hope that the work presented in this article may be of use for such an undertaking.

To begin with, I will provide an overview of the EU's strategy to use conditionality clauses as an instrument to promote human rights and democratic principles. Thereafter, an analysis of the cases where the conditionality clause has been invoked will be presented. Finally, there will be a discussion based on the results of the analysis of when and why the EC has decided to invoke the conditionality clause.

on: The Case of the Lomé Convention (The Hague: Kluwer Law International 2000), *Lorand Bartels*, Human Rights Conditionality in the EU's External Agreements (New York: Oxford University Press 2005), *Elena Fierro*, The EU's Approach to Human Rights Conditionality in Practice (The Hague: Kluwer Law International 2003), *Andreas Moberg*, Villkorsklausuler (Uppsala: Iustus Förlag 2009), *Smith* 1998, *Katarina Tomaševski*, Responding to Human Rights Violations 1946–1999 (The Hague: Kluwer Law International 2000), *Richard Youngs*, The European Union and the Promotion of Democracy (Oxford: Oxford University Press 2001).

[6] The Lomé Convention was renewed four times before a conditionality clause was introduced through the revision of the fourth Lomé Convention. Therefore, the references given here are limited to the three versions of the ACP-EU Partnership Agreement that contain a conditionality clause: Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, OJ L 156, 29/05/1998, 3 (Lomé(IV)bis); 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, 27 (Cotonou). The Cotonou agreement was revised during 2004–05 and the revised agreement, Cotonou(bis), 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, 44.

[7] The cases I am referring to are suspensions of aid to Belarus in 1996, Russia in 1999 and Uzbekistan in 2005, cf. *Lorand Bartels*, The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and other Trade Arrangements with Third Countries (European Parliament DG External Policies of the Union, November 2008), 11.

1.2 Presenting the EU's Strategy of Using Conditionality Clauses to Promote Human Rights

This section will serve as a backdrop for further analysis of the cases where the EC has decided to invoke a conditionality clause against a third country. An account of the EU's aims and purposes with development cooperation in general, and conditionality clauses in particular, will provide the possibility to compare what the EU has done with what the EU has set out to do.

1.2.1 Analyzing the Strategy

My analysis of the EU's strategy to use conditionality clauses to integrate human rights into development will not be aimed at measuring how well the strategy has succeeded. Such an investigation would require a method that enables the researcher to discern whether a certain policy choice is better than another policy choice. One way of doing this would be to compile a kind of 'thermometer' using some benchmarking-system. Although this kind of research may be helpful, it is not what this article sets out to accomplish.

In this article, the research focus lies on establishing the reasons given for the decision to invoke a conditionality clause. I will work with the following research question: *In response to which actions has the EC decided to call another state to consultations under a conditionality clause?*

The answers given in response to the research question are then systemized in order to find similarities and discrepancies. I will show how the empirical data compares to the EC's stated reasons both for including a conditionality clause in the ACP-EU Partnership Agreement, and for invoking it. Through such an analysis it is my ambition to be able to contribute to the research on how human rights have been integrated into EU development cooperation.

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 important. Mainly so, 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.

1.2.2 Discussing the Conditionality Clause as an Instrument to Integrate Human Rights and Development

Based on the analysis of the cases when the EC has invoked the conditionality clause there will be a discussion on the conditionality clause as an instrument to integrate human rights and development. Naturally, the invocation of the conditionality clause is only one facet of the EU's practice of integrating human rights and development, but that does not mean that it is not important. On the contrary; it is important, as the actual practice of invocation of the clause is the most obvious manifestation of the conditionality clause, and as such, simply put, is what 'people see'. Therefore, it is intrinsically linked to the legitimacy of the strategy and as such it makes for a very important object of study for those interested in evaluating the EU's strategy to integrate human rights and development.

1.3 Disposition

Following this introduction I will continue the article with an overview of how conditionality and development cooperation are integrated theoretically. Thereafter, I will give an account of the EU's history of using conditionality clauses in external agreements. This account will include the analysis of the cases where the EC has invoked the conditionality clause in the ACP-EU Partnership Agreement as a response to a third country's violations of human rights, democratic principles or the principle of the rule of law. The analysis will be followed by a conclusion centred on the question of how conditionality clauses have been used by the EU as an instrument to integrate human rights and development.

2. Conditionality and Development Cooperation

2.1 A Theoretical Framework: What Is Human Rights Conditionality?

The basic rationale behind human rights conditionality in general, and a conditionality clause in particular, is to ensure that certain values become fundamental elements upon which the cooperation envisaged under an agreement rests. Thereby, said values are considered to be of such importance that the parties agree that an infringement of any 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 essential to the agreement is a heritage from theories on contract law common to most of those nations who took upon themselves to lay the foundations of international treaty law. The special thing about conditionality clauses is that they refer to values that have no direct link to 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.[8] It is this very fact that makes conditionality clauses special.

Human rights conditionality has been a tool used by donor countries since the 1970s.[9] To understand the reasons behind the practice, sometimes also referred to as 'linkage', it may be useful to separate the kind of human rights conditionality this article will focus on, which is human rights conditionality through *conditionality clauses in international agreements*, from the kind of *human rights conditionality used during negotiations* – e.g., on an international agreement – between states. *Fierro* separates conditionality *ex ante* from conditionality *ex post*, in an attempt to distinguish between the two.[10] *Ex ante* conditionality signifies the practice that tries to influence the policy of the receiving country using an agreement as 'leverage'. *Ex post* conditionality means reactions to certain behaviour of a receiving country. Using her terminology, this article focuses on the use of conditionality *ex post*. Another set of concepts that is commonly used by theorists is the *positive conditionality / negative conditionality* pairing. *Positive conditionality* means that whatever it is that the receiving country covets is used as an incentive to provoke the receiving country to respect human rights and democratic principles. *Negative conditionality* means that the incentives are given up front, and taken away when the receiving country fails to respect fundamental rights and democratic principles. Although it must be acknowledged that *negative conditionality* measures will hardly be used in an *ex ante* situation, one could perceive of both negative and positive measures in an *ex post* setting.

[8] Another good example of why a proposed agreement may be turned down because of a conditionality clause is the EC-Australia Cooperation Agreement negotiations in 1996–97, which were not concluded because of Australia's refusal to accept the EU's conditionality clause.

[9] Some of the earliest practice in the field took place in the USA where the Foreign Assistance Act of 1961 was amended in 1973, 1974 and 1975 (see especially Section 116.66). The amendments made sure that no foreign aid would be given to countries that violated human rights. Cf. *Bartels* 2008, 10, *Moberg* 2009, 125.

[10] *Fierro* 2003, 98. See also *Bartels* 2005, 60.

2.2 Why Conditionality Clauses?

The following short discussion on the various reasons to use human rights conditionality will be centred on the reasons to use conditionality clauses in agreements between the EC and third countries, which most of the time will mean *negative conditionality ex post*.[11]

Some of these reasons are well illustrated by the example of the EEC's relations with Uganda in the 1970s. 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'[12] as a reaction to the political situation in Uganda, following debates in the European Parliament[13] that arose when MEP Van der Hek posed a question to the Council in February 1977.[14] 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 50,000 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 effect a reinforcement or prolongation of the denial of basic human rights to its [Uganda's, *author's note*] people".[15]

[11] The invocation of the conditionality clause means that the party concerned is called to consultations with the EU. Therefore, it does not, in itself, mean that negative measures are taken. There are cases where the consultation procedure has been closed without there being any measures decided, as in the cases of consultations with Guinea-Bissau 1999 and 2004.

[12] 'Council Declaration on the Situation in Uganda' adopted 21 June 1977, 10 Bulletin EC 6-1977, 92–93.

[13] 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.

[14] 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, 1.

[15] 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, 1.

The 'Uganda Guidelines' meant that the Council applied economic sanctions against a 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, public opinion demanded the termination of European funding of Amin's regime. As things turned out, the EEC's relations with Uganda were suspended, but this suspension was not 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,[16] 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 (Lomé (IV)bis) in 1995.

2.2.1 Leverage, Collateral and Control

The EEC's lack of both an equivalent to the Foreign Assistance Act and the conditionality clause became apparent in case of Uganda (as mentioned above) and the budding EEC policy on conditionality clauses can be traced back to the frustration caused by the difficult dilemma that emerged under Idi Amin's rule. There are three prominent examples of motivations for using conditionality clauses to be drawn from the history of EEC-Uganda relations in the 1970s.

The first motivation is concern for the people subjected to the atrocities committed by the Ugandan regime. By using a conditionality clause as

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

leverage, the regime's financial manoeuvring space could have been limited without the use of potentially illegal actions, such as breaking an international agreement without any valid, justifiable ground. By making development cooperation aid conditional depending on human rights performance, the attainment of higher human rights standards could have been achieved.[17]

The second motivation is concern for the security of funding of, in this case, development cooperation aid. Had the funds sent to Uganda not been stopped, it is plausible that the public opinion within the EEC would have forced the then nine member states to cut back on funding for the EEC development cooperation. External action always resonates internally. The previously mentioned American Foreign Assistance Act linked development aid to demands on respect for human rights already in the mid-seventies when legislation prohibiting American foreign assistance to governments that violated human rights was passed.[18] The effect of this piece of legislation was that there had to be a way to cut off aid payments already agreed upon to regimes that violated human rights, because otherwise, the administration providing such aid would be in violation of the Foreign Assistance Act. In such a context, the conditionality clause works as a mechanism to ensure that the respect of human rights is taken as *collateral* for the granted aid.

The third motivation is an aspect of the first two but it deserves to be mentioned on its own merit: the question of legitimacy of EEC external action. The financing of regimes that notoriously violate human rights severely erodes the legitimacy of external policies to promote development, human rights and democratic principles. The early stages of the development of conditionality clauses focused on creating a possibility to react rather than creating an instrument to *control* future actions. *Sørensen* framed the question in an attempt to summarize: "do they [demands on respect of human rights, *author's note*] stem from a sincere aspiration of promoting democracy in the world, or are they a new way of dominating and disciplining the developing countries in the context of a so-called New World Order?".[19]

[17] Naturally, one could argue that the conditionality clause was not needed to stop the payments to Idi Amin, but that would be to argue that the actual legal construction — the agreement — is not necessary and by consequence, neither would there be any need to discuss legal perspectives on the issue. This could, of course, be the case but the rationale behind concluding agreements on these matters must be given due merit.

[18] Section 116.66 of the Foreign Assistance Act, 20 December 1975.

[19] *Georg Sørensen*, 'Introduction', in Georg Sørensen (ed.), Political Conditionality (London: Frank Cass and Company Ltd 1993), 1.

Sørensen leaves out the possibility that conditionality clauses are used to secure that the transfer of funds to a donor country really ends up where they were meant to, which we can see from other context is a possible part of the motivation behind using the clauses – the best example being the redesign of the American Foreign Assistance Act in the 1970s as mentioned above.

Thus we can conclude that there are three, roughly drawn-up, workable theories on why conditionality clauses are included by donor countries in international agreements:

Conditionality Clauses as Leverage
- In need of an efficient instrument to promote values to third countries.

Conditionality Clauses as Collateral
-As aid budgets decrease, the donors need a way to suspend the payments.

Conditionality Clauses as Control Mechanisms
-Using the contractual clauses as instruments to push foreign governments into submission.

2.3 How Does a Conditionality Clause Work?

Conditionality clauses are inspired by the Vienna Convention's provision on 'material breach' of an agreement as grounds for suspension or termination of international treaties.[20] The Commission's proposed conditionality clause, which the Council approved on 29 May 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 agreement's *valuebase*. The second part of the conditionality clause, the 'non-execution 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, a violation of one of the essential elements.

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

[20] Article 60, Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969. Entered into force on 27 January 1980. 1155 UNTS 331.

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.[21] 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 grant 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.[22] 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.[23]

[21] 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".

[22] 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".

[23] Cf. Article 96(2) Cotonou.

3. The EU's Use of Conditionality Clauses

3.1 A Brief Background of the EU's Policy on Conditionality Clauses

The early stages of the EU's (by then the EEC's) use of conditionality clauses have been touched upon already. After the need became apparent during the Uganda conflict, the introduction of contractual conditionality clauses became a point of discussion during the negotiations on renewal of the ACP-EEC Cooperation Agreement which eventually gave us the Lomé II Convention. The discussion centred on the tension between the principle of sovereignty and respect for individual human rights. The arguments against were mainly raised by the ACP-countries, but there were also arguments in support of the conditionality clauses brought forward from that group. Negotiations were tough on the issue and no agreement could be reached until a decade, and then some years, had passed. In November 1991, the member states agreed on a Council resolution on human rights, democracy and development. The resolution stated that 'human rights clauses' (i.e., a type of conditionality clause) should be introduced in all agreements on development cooperation, future as well as present ones, and all future cooperation agreements, between the EEC and third countries.[24]

In May 1995, the Commission presented a proposal of a model conditionality clause.[25] The Commission had been using different varieties of conditionality clauses since the resolution of November 1991, and now, the argument went, the Commission wanted to standardize the wording of the clause. Until 1995 the Community had made use of several different versions, for instance in the cooperation agreements with Argentina, the Baltic states, with Brazil and with India. The differences between the versions were not significant, but there were gains, such as equal treatment of all partner countries, to be made from harmonizing the practice.

[24] Resolution of the Council and the Member States meeting in the Council on Human Rights, Democracy and Development, 28 November 1991, Bulletin EC 11-1991, 5, 10. For a more elaborate account of the history of the conditionality clause within the EEC, EC and EU, see *Moberg* 2009, 128–160.

[25] 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.

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.[26]

3.2 Legal Framework for Invoking the Conditionality Clause[27]

Under the EC Treaty, the EC's decision to invoke the conditionality clause was taken by the Council, acting on a proposal from the Commission. The decision was taken by a qualified majority of the Council, unless it was a decision that suspended the cooperation completely. Those cases were decided unanimously. The choice of the qualified majority procedure to call a state to consultations under the agreement was controversial when it was introduced in the revised fourth Lomé Convention, but the procedure has been kept ever since. Development cooperation was a shared competence in the EC Treaty, and it is not subject to the principle of *estoppel* once the Community has acted in the field, which means that the competence will remain shared between the Community and the member states. Thus the Community policy may, theoretically, include actions that a single member state opposes through its own development policy, which renders the procedure controversial.[28] All the same, the procedural requirement for a

[26] In the Communication from the Commission that introduced the standardized version of the conditionality clause to be inserted in all draft agreements between the EC and third countries it is stated in the introduction that "[a] commitment to respect, promote and protect human rights and democratic principles is a key element of the European Community's relations with third countries ... To help it meet those commitments the Community has a broad range of instruments at its disposal ... Taking account of human rights in contractual relations with third countries is one of those instruments. It is on this latter instrument that the communication focuses". COM(95) 216 final, 23/5/1995, 5.

[27] I would like to remind the reader that all the cases studied for this article took place in a pre-Lisbon Treaty context.

[28] The principle of *estoppel* means, in this context, that the member states are barred from acting in a field once the EU has taken action in that field. The rationale behind such a principle is that the EU shall act as one entity in external relations. On the division of powers between the EU and its member states in the field of external relations, see *Piet Eeckhout*, External Relations of the European Union (Oxford: Oxford University Press 2004), Case 22/70 *Commission* v *Council* (AETR) [1971] ECR 263. Regarding the division of powers between the EC and its member states in the field of development cooperation, cf. Article 181 EC which states: "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall

Council decision to invite a state to consultations under Article 96 Cotonou(bis) is the same as it was under Article 366a Lomé(IV)bis and Article 96 Cotonou.

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 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. 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.[29]

That said, 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. Twenty-seven of these are members of the EU. That leaves 165 states. Today (November 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 ten 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.

Now we will turn to look at how the Commission and the Council have interpreted the valuebase. We will start off by examining the intended normative function of the valuebase, as interpreted by the Commission and the Council. Then we will compare these results with the actual cases where the clause has been invoked as a result of the Council deciding that the valuebase has been violated.

be negotiated and concluded in accordance with Article 300. *The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements*" (emphasis added). The emphasized passage above meant that the member state's competence to act in the field of development cooperation would not be subjected to the primacy of the Community's policy in the field – the various policies should co-exist. The general state of affairs has not changed in the new EU Treaty structure consisting of the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), see Articles 4.4 TFEU and 209 TFEU.

[29] COM(95) 216, 23/5/1995, 12.

3.3 *What* Should *Trigger the Invocation of the Conditionality Clause?*

To understand how the strategy to integrate human rights and development is executed through conditionality clauses it is necessary to elaborate on which values the Commission considers included in the valuebase of the ACP-EU Partnership Agreement, 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 EC, 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.

Does this matter? Well, opinions will differ on how to answer this question, and the discussion is not the topic of this article.[30] 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 motivation of the decision 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. The practical consequence of this argument is that the legitimacy of the EU's strategy to integrate human rights into development is dependant on how the EU interprets human rights norms.

Therefore, before we look at what the Council has deemed as serious enough violations of the 'essential elements clause' to render a call for

[30] A discussion on how legal rules as socially constructed phenomena are reconstructed when described, mainly inspired by Searle's theory (in *John Searle*, The Construction of Social Reality (London: Free Press 1995)), can be found in *Mats Glavå* and *Ulf Petrusson*, 'Illusionen om rätten', in Erkjennelse og engasjement: Minnesseminar for David Roland Doublet (Bergen: Fagbokforlaget 2002), *Kristoffer Schollin*, Digital Rights Management (Stockholm: Jure 2008), and *Moberg* 2009.

consultations, we will analyze 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.[31]

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 human rights treaties ratified by the member states, but on its own, as a subject of international law, neither the EC, nor the EU, has committed itself to a multilateral treaty for the protection of human rights.[32]

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'. This argument suggests that the Council would have

[31] 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.

[32] 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, [1996] ECR 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 is now rendered moot following the insertion of Article 6.2 TEU which stipulates that the EU shall adhere to the European Convention for the Protection of Human Rights.

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 together on the one side, and the third country on the other, in order to make up for the EC's insufficient treaty making powers.

There is also case law from the European Court of Justice, supporting the interpretation that the EC is competent to include human rights based 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).[33] 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', and therefore the conditionality clause and its correlating valuebase could be included into the agreement.[34]

All in all, when drafting the model conditionality clause the Commission spent very little ink explaining what the fundamental rights were that 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.

Amongst all the treaties the EC has concluded with third countries, there is one that stands out when it comes to the number of times the included conditionality clause has been invoked. Therefore, we need to shed some more light on what values the 'essential elements clause' has been linked to within the framework of this relationship. After all, this treaty relation 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 analyze what values the model 'essential elements clause' was designed to protect, we are well advised to analyze what values the 'essential elements clause' was meant to protect within this context. I am talking about the EU-ACP Partnership Agreement.

In order to examine what values the EC included in the valuebase linked to these agreements we must study the text of the agreements — both

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

[34] For a critical reading of the Court's ruling in Case C-268/94 *Portugal* v *Council*, see *Moberg* 2009, 100–107.

the actual conditionality clauses and the preambles. The conditionality clauses are 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 valuebase. 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 valuebase as open as possible. The ability to specify the valuebase 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.[35]

The Commission's preparatory work gives a more precise picture of the Commission's view concerning which values are included in the valuebase. The communication from the Commission introducing the conditionality clause[36] is, as has been shown above, hardly much more precise than the preamble of the agreements. As the cooperation between the EC and the ACP evolved, the Commission worked on specifying what the EC recognized as the provisions of the valuebase. In March 1998, the Commission published a more extensive and detailed communication.[37] 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

[35] 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.

[36] 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.

[37] 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.

taken with regard to the political situation in the country.[38] 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.

3.4 What Does *Trigger the Invocation of the Conditionality Clause?*[39]

Between 1995 and November 2009, the EC has invoked the conditionality clause in the ACP-EU Partnership Agreement against 13 different states.[40] This has occurred 22 times all in all. Twenty-two cases of application over a period of almost 15 years does not seem very much, especially when considering the fact that the valuebase of the conditionality clause 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

[38] "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, 16.

[39] The data presented here is the result of an extensive analysis of the EC's use of the conditionality clause between 1995 and 2006 which is presented in *Moberg* 2009, 190–557. The cases of invocation of the conditionality clause within the ACP-EU Partnership Agreement that have occurred after 2006 have been added to the data.

[40] These states are Niger (1996, 1999, 2009), Togo (1998, 2004), Guinea-Bissau (1999, 2003), Comoro Islands (1999), Ivory Coast (2000, 2001), Haiti (2000), Fiji (2000, 2007), Liberia (2001, 2003), Zimbabwe (2001), Central African Republic (2003), Guinea (2004, 2009), Mauritania (2005, 2008) and Madagascar (2009). At the moment of writing, November 2009, the latest state to be called to consultations was Niger who were called to consultations 27 October 2009, Doc. 14658/09 2971st Council meeting General Affairs and External Relations, 27/10/2009.

would perhaps expect more cases.[41] 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 22 cases of EC invocation of the clause between 1995 and November 2009 into five categories. The first three categories are 'undemocratic regime change', 'disturbances at general elections' and 'violations of human rights'. These three correspond well with the three main elements of the valuebase: the principle of the rule of law, democratic principles and human rights.[42] The two remaining categories are two special cases that I have found worth mentioning. The fourth category concerns the only case when a request for consultations was addressed to the EC by an ACP state. In 2003, the President of Togo asked for the EC to agree to a round of consultations with the aim of lifting the appropriate measures already in force against Togo. The fifth category is the only case when Article 97 Cotonou (concerning serious cases of corruption) has been mentioned as a ground for the decision to call a state, in this case Liberia, to consultations. As Article 97 Cotonou was mentioned together with Article 96 Cotonou in the decision to call Liberia to consultations, I have not regarded it as a case on its own merit.

The Council decisions to call states to consultations under the ACP-EU Partnership Agreement are all vague and imprecise in nature. The method used when allocating the various cases has been a combination of textual analysis of the decisions to call a certain state to consultations, textual analysis of the Commission proposals to call states to consultations, as well as an analysis through reports in media and from NGOs (Human Rights Watch and Amnesty International) on the events that have led to the EC invoking the conditionality clause.

[41] There were 70 communications placed before the Human Rights Committee during the period covered by the Committee's 1997 annual report 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.

[42] Cf. Article 9(2), para. 4 Cotonou(bis): "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".

Case	Year
1. Undemocratic regime change (13 cases)	
1. Niger	1996
2. Niger	1999
3. Comoro Islands	1999
4. Guinea-Bissau	1999
5. Ivory Coast	2000
6. Fiji	2000
7. Central African Republic	2003
8. Guinea-Bissau	2003
9. Mauritania	2005
10. Fiji	2007
11. Mauritania	2008
12. Guinea	2009
13. Madagascar	2009
2. Procedural deficiencies at the general elections (5 cases)	
1. Togo	1998
2. Haiti	2000
3. Ivory Coast	2001
4. Guinea	2004
5. Niger	2009
3. Generally described violations of human rights (3 cases)	
1. Liberia	2001
2. Zimbabwe	2001
3. Liberia	2003
....	
4. *Consultations at the request of the ACP States* (1 case)	
1. Togo	2004
5. *Article 96 & 97 Cotonou in combination* (1 case)	
1. Liberia	2001

Table 1. The five categories of cases of EC invocation of the conditionality clause. The table shows 23 cases, although there have only been 22 consultations, since the fifth category contains a case that is also accounted for in category 3 (Liberia, 2001).

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[43] 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 the rule of law, through not respecting the democratic principles enshrined in the constitution or the election laws.

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

The second category, 'procedural deficiencies at the general elections', is related to the first category in that we are dealing with democratic principles. These cases normally concern troubles during elections.

All events in categories 1 and 2 are related to isolated historical events, unlike the other main category, 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 three cases, these have taken place in only two states; Liberia and Zimbabwe. The cases are more difficult to categorize because they are more complex than the others. They concern long, very serious conflicts with several international actors involved. The violations that have caused the EC to call the parties to consultations are described as serious and prolonged violations of human rights.

The fourth category consists of one unique case of consultations. Togo initiated the consultations, in a slightly unorthodox manner by having their ambassador to Belgium write a letter to the Commission expressing Togo's wish to renegotiate the suspension of the cooperation. At that moment, cooperation with Togo had been suspended since 1992 except for a period between 1995 and 1998. The fifth 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.

3.5 Is the Conditionality Clause Invoked When It Should *Be Invoked?*

Naturally, the question is phrased in a sharpened, provocative, manner. The answer I intend to give is based on a comparison of the *circumstances under which the EC claims that the conditionality clause should be used* with the *circumstances under which it has been used.*

According to the formal institutional order the Council will decide on invocation of the conditionality clause upon 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.[44] There is no institution within the Commission with the express task of monitoring compliance with the conditionality clauses. As a

[44] The Commission has more than 130 delegations and offices all over the world, <http://ec.europa.eu/external_relations/delegations/index_en.htm> (27.4.2010).

consequence, the clause is used in a typical *ad hoc*-manner on a case-by-case basis.

Concerning the 13 cases of undemocratic regime change, all of them are cases where the attempts to overthrow the government in control were successful. In this context, it is interesting to notice that during the period of 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 three of these were successful. The governments in power resisted nine out of these 12 attempts respectively, and those said governments also avoided a call for consultations under Article 366a Lomé/96 Cotonou. It is thought provoking to consider whether the state in question would have avoided such a call to consultations if the government had been overthrown.[45]

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, indirectly 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 governments were themselves revolutionaries before assuming power.

4. Conclusion: The Conditionality Clause as an Instrument to Integrate Human Rights and Development

In this article I have given one account of the practice of tying respect for human rights, democratic principles and the rule of law to the granting of financial and intellectual support manifested in development cooperation agreements. I have presented one account of the evolution of this practice; its theoretical foundation as well as the historic events that has led to its

[45] For a more extensive discussion of the importance of these cases on non-invocation of the conditionality clause, see *Moberg* 2009.

implementation. The idea has been to describe how this practice functions as an instrument to integrate human rights into development.

I have presented the reasons given by the Council for invoking the conditionality clause in the ACP-EU Partnership Agreement between 1995–2009. The purpose has been to present these reasons in a systemized manner, because this data is presumed useful when it comes to evaluating the use of conditionality clauses as an instrument to promote human rights and democracy – and thus as one of many instruments to integrate human rights and development.

The systemized data has also been compared to the Commission's and the Council's interpretation of the valuebase, which they have constructed for development cooperation, as the conditionality clause is the intended measure used to safeguard the valuebase. From the data we can see that there is one situation where the EC uses the conditionality clause to call states to consultations that is significantly more common than the others, and that is when there has been an undemocratic regime change in a state.

4.1 The Critique of the Conditionality Clauses in the ACP-EU Partnership Agreement

This article is not about the critique of the use of conditionality clauses. However, in order to inspire discussion on the results of the examination of the cases when the Council has decided to invoke the conditionality clause in the ACP-EU Partnership Agreement I will briefly relate some of the aspects that are usually raised to criticize the practice of conditionality clauses in development cooperation.

4.1.1 The Trade-off Situation: The Universality Principle Undressed

One fundamental cause for criticism lies in the almost axiomatic relation between human rights as universal norms of theological character and the context in international treaties between sovereign subjects of international law, which is governed by the principle of *pacta sund servanda*. Simply put: if human rights, democratic principles and the rule of law are truly regarded as universal essential elements to these agreements – how come there are unsuspended treaties with [*enter your preferred human rights violator's name here*]?

4.1.2 Selective Invocation

It is really not difficult to find cases where the EC could have called a contracting party to consultations. This goes for the ACP-EU Partnership Agreement as well as any other regime containing political conditionality clauses. There is obviously a practice of selective invocation, which is perfectly normal in a contractual relation – but problematic under a universal obligation.

The EU finds itself locked in a position where its interests need to be balanced on every occasion where the prerequisites of invoking the conditionality clause are met. This is, of course, hardly surprising but it is still a difficult position from which to conduct a legitimate policy on the protection of human rights.

I have already touched upon the cases where the conditionality clause could have been invoked in the ACP-EU Partnership Agreement because of 'undemocratic regime changes' in ACP states. There are, of course, other examples as well. I have previously worked on analyzing these situations,[46] and my conclusion is that the answer to the question on how to maintain a legitimate practice of conditionality clauses is transparency. The decision to invoke the clause is never taken without an operation where the EU's various interests are balanced against each other. This may be obvious to us all, but the ACP-EU Partnership Agreement simply does not see it that way.

Without delving on the subject, the EU's interests may be divided into 'member state interests' and shared 'EU interests'. A good example of such a 'member state interest' is historically explainable investments made by former colonial powers in the relations with individual ACP states. A good example of a shared 'EU interest' is the EU's fisheries policy.[47]

[46] *Moberg* 2009.

[47] It is interesting to note in this context that the Commission recently, for the first time ever, decided to withdraw a proposal for a renewal of an Agreement on fishing quotas because of the other party's violations of international human rights. The state I am referring to is Guinea. The Commission decided not to put forward the proposal for a renewal of the agreement following the negative opinion of the European Parliament's Committee on Fisheries on 1 October 2009, even though the European Parliament did not vote and, furthermore, its vote would only have been guiding, not binding, on the decision to conclude the treaty.

4.1.3 The Human Rights' Platform

It is, however, important to acknowledge that the use of conditionality clauses has contributed to a deepened, and significantly more nuanced discussion on human rights between the EU and the ACP countries. The discussion on the inclusion of conditionality clauses into the ACP-EU Partnership Agreement, on invocation of the conditionality clauses, on evaluation of the clauses and basically on anything regarding the clauses, has led to the creation of a platform where the question of respect for human rights, democratic principles and the rule of law can be discussed.

A clear example supporting this hypothesis is the work done to improve the political dialogue within the Cotonou Agreement. The revision led to changes in the article on political dialogue (Article 8 Cotonou). The changes meant that the dialogue as a tool for promotion of consistent and relevant cooperation between the EU and the ACP countries was enforced. It was also decided that dialogue had to be held before the consultation procedure under Article 96 Cotonou could be launched. There is also a new annexe to the Cotonou Agreement, Annexe VII (Annexe VII: Political Dialogue as Regards Human Rights, Democratic Principles and the Rule of Law) that draws up the lines on how the structured dialogue between the parties should proceed. The revised Cotonou Agreement (Cotonou(bis)) was approved by the Council on 29 April 2008 which meant that it entered into force according to Article 93 Cotonou(bis) on 1 July 2008. By then the agreement, except certain provisions on multiannual financial frameworks had already been applied provisionally since the date of its signature, 25 June 2005.[48] This is a clear move from unilateral action towards constructive cooperation. It is possible, even probable, that this move would have taken longer to achieve were it not for the use of conditionality clauses.

[48] Council Decision (2008/373/EC) of 29 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, 44. Decision 2005/750/EC: Decision No. 5/2005 of the ACP-EC Council of Ministers of 25 June 2005 on transitional measures applicable from the date of signing to the date of entry into force of the revised ACP-EC Partnership Agreement, OJ L 287, 28/10/2005, 1–40. Article 1(1) of Decision No. 5/2005 of the ACP-EC Council of Ministers reads: "All the revised provisions of the Agreement shall take early effect, from the date of signature, with the exception of the required amendments concerning the multiannual financial framework and relevant parts of the Cotonou Agreement which, pursuant to paragraph 3 of Annex Ia of the revised Agreement, will be decided by the ACP-EC Council of Ministers before the entry into force of the revised Agreement, by way of derogation from Article 95 of the Agreement".