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The Condition of Conditionality – Closing in on 20 Years of Conditionality
Clauses in ACP-EU Relations

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Published by Stockholm Institute for Scandinavian Law, in Law and
Development, Scandinavian Studies in Law (ISSN: 0085-5944), 2015,
Volume 60, <http://www.scandinavianlaw.se>

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1 Introduction to EU Conditionality Clauses

Ever since 1 January 1996, the EU has had the possibility to suspend cooperation with the African, Caribbean and Pacific states (ACP-States) based on the Cotonou Agreement¹ (back then the Lomé (IV) Convention) because of the other party's failure to respect democratic principles, human rights and the rule of law.² This possibility was granted by the mechanism in the revised Lomé (IV) Convention (hereinafter Lomé(IV)bis), which often is referred to as the "conditionality clause".³

Much has been written about the EU's use of conditionality clauses. Legal scholars⁴ and political scientists⁵ have all contributed to the academic debate by analysing the EU's use of this instrument.

The EU's selective use of the clauses has often been the focus of such critical analysis. The hypothesis is that the EU applies double standards when evaluating breaches of human rights and scholars have studied the EU's practice when it comes to invoking the conditionality clauses in search of hidden agendas and unexpressed motives. A common feature of such critical analysis is the interest in identifying the *non-cases*, that is the cases where the EU arguably could, or even should, have invoked the conditionality clauses but chose not to. In this chapter, I set out to add to previous work in the field by comparing and contrasting the EU's use of conditionality clauses with the UN Human Rights Committee's (HRC) evaluation of human rights violations in the states that are parties to the International Covenant of Civil and Political Rights (ICCPR).⁶ Establishing the extent to which the two international governmental organizations' evaluation of human rights breaches correspond

1 The Cooperation started with the Yaoundé Convention in 1964, (Convention d'association entre la Communauté européenne et les États africains et malgache associés à cette Communauté, OJ 093, 11/06/1964, p. 1431), and via the four Lomé conventions it is now governed by the 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 L317, 15/12/2000, p. 3), the second revision of which is not yet in force though through Decision No 2/2010 of the ACP-EU Council of Ministers of 21 June 2010, the amending provisions are applied as from 1 November 2010.

2 Decision No 6/95 of the ACP-EC Council of Ministers of 20 December 1995, on the transitional measures to be applied from 1 January 1996, OJ L 327, 30/12/1999.

3 Conditionality clauses are also known as "human rights clauses" or "democracy clauses". In this chapter, I refer to them as conditionality clauses. Their basic feature is that they identify certain aspects of an agreement as "essential elements" of the agreement, and then they enable the parties to suspend or terminate the agreement in case of the other party's breach of these elements.

4 Such as Brandtner & Rosas (1998), Riedel & Will (1999), Tomaševski (2000), Bulterman (2001), Fierro (2003), Bartels (2005), Moberg (2009).

5 Such as Arts (1995, 2000), Smith (1998), Youngs (2001), Døhlie Saltnes (2013).

6 *International Covenant on Civil and Political Rights*, New York, 16 December 1966, UNTS Vol. 999, p. 171.

adds to the critical analysis of the EU's use of conditionality clauses, and particularly to the analysis of the European Commission's (the Commission) decisions to propose that the Council invokes the clause.

However, in order to fully understand why the non-cases are important, one must first understand the legal and historical context of EU development cooperation. Therefore, I will start the chapter by explaining how the EU has created what I would like to call "the human rights – development nexus". In the following, I will attempt to demonstrate how the EU's foreign policy on human rights protection evolved in a symbiotic relationship with the EU's policy on development cooperation, and that the logic of using conditionality clauses in the development cooperation context was carelessly grafted onto the budding foreign policy on human rights protection. I say carelessly, because a consistent policy to protect universal values such as human rights and democratic principles only comes at the cost of significant restraints on the manoeuvring space in the foreign policy arena. One might even say that the EU has painted itself into a corner. The EU's clear standpoint on the *symbiosis* of human rights and development cooperation, where human rights protection is seen as a pre-requisite for development, combined with the proclaimed conviction that human rights are universal, has transformed what previously was an *option* to invoke the conditionality clauses in case of a violation of the essential elements, into something close to an obligation.

Even though the argument under public international law for an obligation to invoke the conditionality clause is unconvincing, it is significantly stronger under EU law and furthermore, notwithstanding such an obligation, the most pressing argument for the EU to invoke the clause is to make sure that there is no room for critique regarding selective invocation (based on the EU's decision to use the conditionality clause or not). In the interest of upholding legitimacy for its foreign policy, the EU cannot afford to let other foreign policy interests trump the interest to protect human rights and democratic principles, at least not while EU rhetoric places protection of human rights at the very top of the list of foreign policy priorities. If EU human rights policy too often succumbs to other foreign policy interest, the legitimacy of the policy will be completely undermined.

Following an analysis of all of the cases where the EU has invoked the conditionality clause, I will analyse two kinds of documents from the HRC in relation to ACP-states. The purpose of this analysis is to contrast its result to the records of the EU's use of the conditionality clause in the ACP-EU cooperation agreements, in order to find out whether or not the EU and the UN share the same view on what constitutes a breach of human rights. The results of the comparison will then be used as the basis for a discussion of the EU's use of conditionality clauses as an instrument to promote foreign policy objectives in the field of protection of human rights and democratic principles.

2 The Human Rights – Development Nexus

Part four of the Treaty of Rome (1957) concerned association of what was called the overseas countries and territories. This section of the Rome Treaty was a French initiative introduced late during the negotiations.⁷ In the final section of Article 131 EEC⁸, it is stated that the primary purpose of the association is development cooperation.

When article 130u TEC⁹ entered into force, the Treaties had no standalone article establishing the “general objective of developing and consolidating democracy and the rule of law” which the article refers to. Back in 1993, Article J.1 p.2 TEU laid down the objectives of the Common Foreign and Security Policy (CFSP), and the fifth, and last, objective mentioned was “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.¹⁰ However, it is important to keep in mind that between Maastricht and Lisbon (1/11/1993-1/12/2009) the TEU competences and the TEC competences were strictly separated in the structure of the European Union.¹¹

In this section I will discuss the relation of EU development policy and human rights protection, as I would argue that the EU, ever since the early 1990’s, has established a *symbiotic* relationship between these fields.

2.1 *Development Policy shaped Human Rights into a General Objective of the Community*

Let us consider the following statement: *EC development policy shaped respect for human rights and democracy into a general objective of both the EC and the EU*. Could it be so, that EU development policy paved the way for human rights protection becoming the *pièce de résistance* in EU foreign policy?¹²

7 See Zartman (1971) for an overview of EEC-African relations.

8 “In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.”, art. 131, Treaty of Rome, 25/3/1957.

9 “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.” (introduced in the TEU 1993).

10 Before Maastricht, the preamble to the Single European Act also contained, in section 5, references to the need for the member states of the, then, EEC, to act according to principles on human rights and democracy, OJ L 169, 29/06/87, p.1.

11 An interesting case concerning how to draw the line between a CFSP measure under TEU and a development cooperation measure under the TEC was put before the CJEU in February 2005, Case C-91/05, *Commission of the European Communities v Council of the European Union*, 20/5/2008. The case is often referred to as the *ECOWAS*-case. See also Hillion & Wessels (2009).

12 As High Representative for Foreign Affairs and Security Policy, Catherine Ashton, stated

Today, Article 21 TEU¹³ sets a distinct, ambitious task for the EU. The advancement of human rights in the world is presented as one of the EU's objectives. As noted above, when article 130u TEC was introduced in 1993, there was nothing like the current article 21 TEU in the Treaties. In fact, the Treaties' objectives of the EU and the EC in the international arena had been carefully formulated, in order to strike a balance between the intergovernmental approach under the CFSP, the supranational approach of the EC and the approach chosen by each individual Member State as a sovereign entity in the international community of states. The legality of external Community action to promote human rights has been a topic for debate ever since the EU's inception.¹⁴

This was not, however, due to the member states' governments ignoring the importance of human rights. The first Community text ever to refer specifically to human rights and democracy was a declaration on democracy in the conclusions of the Copenhagen Session of the European Council in April 1978.¹⁵ In the final paragraph of the declaration, the heads of state and government

“[...] solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities.”¹⁶

Although the declaration focuses on the internal affairs of the members of the Community, it constitutes a clear statement of the ambition of the heads of state and government, that must be seen in the context of what had recently been going on in some European non-member states, such as Greece and Spain

when introducing the new Strategic Framework on Human Rights and Democracy: “Human rights are one of my top priorities and a silver thread that runs through everything that we do in external relations”, *EU Adopts Strategic Framework on Human Rights and Democracy*, Presse 285, 11737/12, 25/6/2012.

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

14 The Treaty articles most commonly suggested as granting a basis for the overall foreign policy objective to promote human rights protection have been Articles F 2 TEU and Article J 1.2 p.4 TEU in the Maastricht Treaty (in force 1/11/1993); Articles 6 TEU and Article 11.1 p.4 TEU in the Amsterdam Treaty (in force 1/5/1999); Articles 6 TEU (unchanged) and Article 11.1 p.4 TEU (unchanged) in the Nice Treaty (in force 1/2/2003) and then Articles 3.5 TEU and Article 21 TEU in the Lisbon Treaty (in force 1/12/2009). There are, of course, also examples (such as Article 130u TEC) of articles granting the competence to promote human rights as a prerequisite of the actual objective of that specific article.

15 Cheysson, Claude, *Europe, The Third World and Human Rights*, Trialogue, no. 19, 1978, p. 2.

16 Bulletin EC 3-1978, p. 6.

as well as in some South American states such as Chile, and African states such as Uganda.

The decision to suspend aid to Uganda in 1977 was also a clear stand on the importance attached to human rights in Community foreign policy.¹⁷ The suspension of aid to Uganda set a precedent in Community foreign relations, and this case was very important for the development of the conditionality clauses that epitomise human rights conditionality.¹⁸

In 1986, the foreign ministers of the European Economic Community (EEC) member states, meeting in the framework of European Political Cooperation and of the Council, made a strong statement regarding their ambition to uphold protection of human rights on a global level.¹⁹ This statement is important, as it shows that an ambition to promote and protect human rights was there amongst the member states even before the creation of the European Union.²⁰ The 1986 statement was followed up by two important declarations in 1991, by the European Council²¹ and the Council²² respectively. All three statements linked “appropriate responses”, specifically mentioning suspension of cooperation, in case of human rights violations. The second resolution of 1991, on Human Rights, Democracy and Development, was taken by the Council of Development Ministers. Manuel Marín, European Commissioner with responsibility for Development Cooperation 1993-99, called the resolution “fundamental” when speaking about human rights as “the backbone of the EC’s development cooperation policy”.²³

Support for the statement that *EC development policy shaped respect for human rights and democracy into a general objective of both the EC and the EU* may also be found in the case law of the Court of Justice of the European Union (CJEU):

“By declaring that ‘Community policy (...) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms’, Article 130u(2)

17 Council declaration on the situation in Uganda, 21/6/1977, 10 Bulletin EC 6-1977, p. 92-93.

18 On the “*Uganda Guidelines*”, see Moberg (2009), p. 126-127.

19 *Statement on Human Rights, adopted on 21 July 1986 by the Foreign Ministers of the European Community, meeting in the framework of European Political Cooperation and of the Council*, 19 Bulletin EC 7/8-1986, p. 2.4.4, (page 100).

20 The statement also declared that condemnations of other states’ violations of human rights were not in themselves violations of the principle of public international law not to interfere in the domestic affairs of states. Such an interpretation is of course a necessary pre-requisite for a policy instrument such as the conditionality clauses.

21 Conclusion of the European Council, Declaration on Human Rights, 28-29 June, 1991.

22 Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, 28 November 1991.

23 Marín Manuel, *Human rights are the backbone of our policy*, The Courier, no. 137, January – February 1993, p. 5.

requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation.”²⁴

The CJEU’s ruling in *Portugal v. Council* concerned the EC’s competence to include a conditionality clause in an agreement with India. The clause made the protection of human rights, fundamental freedoms, democratic principles and the rule of law “essential elements” of the agreement.

In the case, Portugal contended that the Council lacked the required competence to conclude treaties with conditionality clauses referring to human rights, since the EC had no competence whereby commitment to human rights protection was possible. Portugal thus contested the validity of the Council’s decision to conclude an agreement with India containing such a clause. The Council’s decision was taken 18 July 1994²⁵, some nine months after the entry into force of the TEU, and Portugal lodged a complaint on 26 September that same year. The CJEU found, 3 December 1996, that Portugal’s contention was unfounded in law, and pointed to the wording of article 130u(2) TEU which, according to the CJEU, stated that the Community not only had the competence to conclude such a treaty, it was indeed “*required*” to take account of these values when adopting measures in the field of development cooperation (para. 23) and that “development cooperation policy must be adapted to the requirement of respect for those rights and principles.” (para. 24).²⁶

It is clear from the Court’s reasoning that the objective referred to in Article 130u (2) is a general objective of the Community, which extends beyond the policy field of development cooperation. But, as already mentioned, the Treaties in force at the time did not include such a general objective, so we are left on our own with the task of identifying the legal basis for this conclusion.²⁷

Considering the CJEU’s *Opinion 2/94* on accession to the European Convention, the judgement in *Portugal v. Council* becomes even more puzzling. Both cases were filed within 6 months of each other. On April 26, 1994, the CJEU received a request for an opinion on whether or not the EC had the competence to accede to the European Convention for the Protection of

24 C-268/94, *Portuguese Republic v. Council of the European Union*, 3/12/1996, para. 23.

25 Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development, OJ L 223, 27/8/1994, p. 23.

26 AG La Pergola went even further in his opinion, stating that “I might venture to add that it would be the failure to adopt a clause of that type that would compromise the legality of Community action, because compliance with the specific wording of Article 130u would no longer be guaranteed.”. According to La Pergola’s opinion, not including the conditionality clause would be a breach of EU law. Case C-268/94, *Portuguese Republic v Council of the European Union*, Opinion of Mr Advocate General La Pergola delivered on 23 May 1996, para 29.

27 Peers issues the following review of this part of the judgement: “In four paragraphs of legal alchemy, an objective to which Community policy was contributing has become a rule which that policy must obey”, Peers (1998), p. 550.

Human Rights and Fundamental Freedoms (ECHR).²⁸ When the CJEU delivered its opinion in March 1996, it was made clear that: “[...] as Community law now stands, the Community has no competence to accede to the Convention.”²⁹ The reason why there was no competence to accede was due to the Community’s lack of a general competence in the field of human rights, as well as the institutional implications of accession, which, according to the CJEU, would require a treaty change to accommodate.

Thus, it would seem that although Opinion 2/94 mentions Article J.1 p.2 TEU as well as Article 130u TEC, these provisions could not be utilized as the legal basis for the accession of the Community to the ECHR, even though the Community was required, by Article 130u TEC, to take account of human rights when adopting measures in the field of development cooperation because human rights was a “general objective” (of the Community?).

These two rulings from the CJEU tell us that in 1994, when both the Council’s request for an Opinion of the Court and Portugal’s application for annulment were lodged, Community law did not allow the Community to commit itself to respect human rights through accession to the ECHR but did allow the Community to commit to respect human rights, democratic principles and the rule of law, through an external agreement.

The main difference between the two cases lies in the somewhat ominous “general objectives” of the Community described in article 130u TEC, the portal to Title XVII on Development Cooperation. Seen in retrospect, this makes a compelling argument that human rights entered Community foreign policy *through* Article 130u TEC – or, to put it bluntly: *There could be no EU human rights protection without development cooperation.*

2.2 *There can be no Development without Protection of Human Rights*

The second statement I would like to make here at the start of the chapter is that already in the early 1990’s, the EC had adopted the position that *there can be no development without human rights*.³⁰ The statement entails a political, normative, aspect; meaning that the Community was of the opinion that protection of human rights was a necessary condition were there to be any development.

There is also a more legalistic aspect based on interpretation of the treaties. In the above-mentioned case *Portugal v. Council*, the CJEU explained that human rights and development cooperation policy are closely linked.

28 Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28/3/1996, ECR 1996 I-01759.

29 Opinion 2/94, para. 36.

30 See especially section 2.2.1 “Democracy, human rights and effectiveness of the state”, in European Commission, Development Cooperation Policy in the Run-up to 2000 (1996), p. 54.

“The mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles ‘constitutes an essential element’ of the Agreement does not justify the conclusion that that provision goes beyond the objective stated in Article 130u(2) of the Treaty. The very wording of the latter provision demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles.”³¹

As the CJEU states that development cooperation policy must be adapted to the requirement of respect for human rights, it may be argued that the Community cannot adopt development policy measures towards a state that violates human rights and democratic principles, without violating the treaties.

Now, obviously, such a statement requires a narrow interpretation of the CJEU’s case law, and it may be best seen as a theoretical construction. What constitutes a (serious enough) *violation* of human rights, as well as what constitutes a “development policy measure”, is of course a matter of interpretation – but, nevertheless, the reasoning of the CJEU in *Portugal v. Council* suggests that Community development measures are illegal under Community law in case they are taken towards a state that violates human rights.

As indicated above, there are other significant arguments not to cooperate with states that violate human rights. These arguments could be characterized as political; both foreign policy motivated (diplomatic pressure as an incentive for change) and internal Community policy motivated (appeasing public opinion amongst the citizens of the EU). There are also economic arguments, where perhaps the efficient use of EU funds stands out.

The constructivist analysis of the interplay between Community development cooperation policy, Community treaty law and the CJEU’s judgements undertaken in this chapter explains how the EU’s standpoint on protection of human rights and democratic principles as a *sine qua non* for development cooperation has been established in EU treaty law, case law and policy.

3 The Conditionality Clause in the ACP-EU Conventions

The essence of the conditionality clause is quite simply that one party to a proposed agreement makes use of a superior bargaining position, so that certain concessions may be obtained from the counterpart. This is important, because the party that introduces the conditionality clause will normally do so at a certain cost – since the bargaining chip used for the conditionality clause could have been used for some other concession. Likewise, in case the agreement in itself is of lesser importance to the other party, the insistence on a conditionality clause may well mean that there is no agreement concluded.³²

31 C-268/94, *Portuguese Republic v. Council of the European Union*, 3/12/1996, para. 24.

32 This is what happened when the EU and Australia negotiated a Partnership agreement in

Technically, the conditionality clause is in fact made up of two separate clauses of an agreement. One clause, typically in the first section of an agreement, establishing that certain values are “essential elements” of the agreement and then, a second clause, often situated in the final section of the agreement, which stipulates that a breach of one of the essential elements of the agreement gives the other party the right to suspend or terminate the agreement. The construction is inspired by Article 60 of the Vienna Convention on the Law of Treaties (VCLT), on “Material Breach” as a legal basis to suspend or terminate a treaty.³³

The first conditionality clause in the ACP-EU Conventions, was introduced in the mid-term revision of the fourth Lomé Convention and entered into force provisionally 1 January 1996. It follows the “model clause” proposed by the Commission in May 1995.³⁴ By then, the EU had concluded a handful of agreements containing conditionality clauses, but there were a few varieties as regards their wording and content. During the same period, the idea of using conditionality clauses as an instrument to promote democracy and human rights had gained ground. Previously, the main idea behind the clauses had been to introduce a contractual possibility to stop cooperation under an agreement when another state was not respecting the human rights of its population, as in the case of Uganda 1977. However, during the first half of the 1990’s, the idea to use the conditionality clause as an instrument to promote human rights and democracy grew increasingly popular, particularly within the Commission and the European Parliament.³⁵

Between Lomé (IV)bis signed in 1995 and the currently applicable ACP-EU Convention (the two times revised Cotonou Agreement, signed in 2010, *hereinafter* Cotonou 2010), the conditionality clause has basically remained unchanged. The relevant parts of Article 5 of Lomé (IV)bis and Article 9 of the Cotonou Agreement (in the original agreement as well as in the revised agreements signed in 2005 and 2010), identifying human rights, democratic principles and the rule of law as essential elements of the agreement, are almost identical in all four versions. However, the context in which it is applied

1996-97. Australia’s refusal to accept a conditionality clause eventually led to the Commission and Australia deciding not to conclude an agreement but only a political declaration. See *Recent Developments in the Inclusion of Human Rights Clauses in EU Cooperation Agreements with Third Countries: the Cases of Australia and Mexico*, *NQHR* 3 1997, p. 372, and Brandtner and Rosas (1998), p. 474.

33 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, p. 331. Obviously, the EU is not a party to the VCLT, which means that article 60 VCLT does not bind the EU. However, the article may well reflect customary international law and as such it would be binding on the EU, see the ruling of the International Court of Justice (ICJ) in the *Danube Dam-Case*, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, ICJ reports 1997, p. 7.

34 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.

35 See e.g. Commission Communication to the Council and Parliament, Human Rights, Democracy and Development Policy, SEC(91) 61 final, 25/3/1991.

has seen a gradual shift towards strengthened political dialogue between the parties. The introduction of Article 8 in the first Cotonou Agreement institutionalised this dialogue and it was further reinforced through the adoption of Annex VII (Political Dialogue as Regards Human Rights, Democratic Principles and the Rule of Law) during the first revision of the Cotonou Agreement.

Even though the procedure surrounding the conditionality clause has been gradually transformed from a *sanctions oriented procedure*, where the agreement allowed the parties to call each other to consultations if they considered that there had been a failure to fulfil obligations in respect of the essential elements, into a *dialogue oriented procedure* where the role of the dialogue has been reinforced during every revision of the agreement, the essential elements appear to remain the same.

In Lomé (IV)bis the essential elements were stipulated in Article 5:

“Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention.”³⁶

It is important to notice the lack of precision offered by the text of the agreement, regarding the required level of protection of the values identified as “essential elements”. The corresponding “suspension clause”, Article 366a p.2, is of no more assistance in this regard.³⁷

In fact, this lack of precision regarding the required level of protection is a typical feature of all of the EU’s conditionality clauses. On the one hand, this may well be seen as perfectly normal – given the fact that the clauses are contractual clauses, meaning that it is up to the parties to define them (which obviously includes the freedom not to do so if that is their wish). On the other hand, given the context where the EU uses these clauses as instruments to promote foreign policy, this lack of definition becomes problematic as it inspires speculation of hidden agendas, especially when the clauses are not invoked. Furthermore, as already noted above, there may well be a case for arguing that the EU is obliged to invoke the clauses in case human rights and democratic principles are not respected since EU law requires that EU development policy must be adapted to requirements of protection of human rights. Then the question arises: What constitutes a breach of the essential elements?

36 The corresponding section in Article 9 the currently applicable Cotonou Agreement reads: “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.”

37 “If one Party considers that another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.”

I will start with an analysis of the agreements and their annexes as well as other EU documentation describing the conditionality clause and its normative reach, and thereafter I will analyse all of the cases where the EU has invoked the conditionality clause in the ACP-EU Conventions.

3.1 Text Analysis

As has been established, the conditionality clause in itself gives very little guidance to what norms actually constitute the essential elements of the agreement. Is it really so, that the parties to these agreements have thought it unnecessary to qualify which specific human rights, what they consider to be “democratic principles” and what they actually mean by “the rule of law”? After all, the parties have declared that protection of these values is of fundamental importance, to the extent that violations constitute serious enough offenses to terminate the agreement in its entirety. There are several treaties with practically global coverage devoted to human rights only, and these treaties are in themselves the objects of extensive analysis as to their actual meaning. The concepts “democracy” and “the rule of law” are practically academic disciplines in themselves. Have the parties really not elaborated on the meaning of these clauses?

The truth is that the parties have been unwilling to define the extent of the normative sphere of these values. They have left the concepts as open to future interpretation as possible. But, given the fact that there have been attempts made to clarify the meaning of the concepts during the two decades since their incorporation in the ACP-EU Conventions, I will present those attempts in chronological order.

The Commission’s Communication COM(95) 216³⁸, predates the entry into force of Lomé (IV)bis. Although the Commission’s Communication is not limited to the ACP-EU Conventions, it presents the model “conditionality clause”. The Communication is remarkable in its silence regarding what the Commission actually means by human rights, democratic principles and the rule of law. This conclusion was also the conclusion of the Rapporteur to the Committee on Foreign Affairs, Security and Defence Policy of the European Parliament, Mr. Carlos Carnero González, who called for a list of references as well as a monitoring mechanism to be established.³⁹ The same type of critique, although even more poignant, was voiced by the Rapporteur to the Committee on Development and Cooperation, Mrs Magda Aelvoet, in her report on the Commission’s proposed procedural rules for the implementation of Article 366a Lomé (IV)bis.⁴⁰ Her report identified many weaknesses in the (then)

38 The Council approved the Commission’s initiative on the 29 May 1995, Bulletin EU 5-1995, p. 1.2.3.

39 Report on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries, A4-1996-212, 26/6/1996.

40 The procedural rules will be covered below.

current practice regarding Article 366a and she highlighted the need for definitions regarding the terms “human rights”, “democracy” and “the rule of law” and the need for assessment criteria.⁴¹ The European Parliament proposed that there should be a reference to several international conventions for the protection of human rights in the preamble, but none of these made it into the decision itself.⁴²

The lack of definitions regarding the essential elements was definitely an issue for the ACP-side during the negotiations of the new Cotonou Agreement.⁴³ There was strong opposition against the EU’s perceived right of authoritative interpretation of articles 5 and 366a.⁴⁴ This debate led to the Commission issuing an explanation to the ACP-states on how the Commission interprets the articles.⁴⁵ The Communication (COM(1998) 146) is the most elaborate document ever produced by the EU on this matter. It was well received by the European Parliament who previously had criticized the Commission for its lack of precision in this specific regard. In his report on the communication, the Rapporteur to the Committee on Development and Cooperation, Mr Fernando Fernández Martín, stated that:

“This clarification of ideas and objectives by the Commission is to be welcomed. At the next ACP-EU negotiations all ambiguities should be removed in order to achieve a full understanding and a joint definition of ideas and objectives together with the areas of action involved. This should be reflected in the text of the new Convention, which should contain more specifically worded articles together with a corresponding annex with detailed explanations of all the provisions.”⁴⁶

41 Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention, 21/5/1997, A4-1997-175.

42 The proposed text: “Having regard to the United Nations Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Declaration on the Elimination of Discrimination against Women (1967), the Declaration on the Right to Development (1986), the Convention on the Rights of the Child (1989), and the Declaration on the Rights of Persons belonging to National Ethnic, Religious or Linguistic Minorities (1992)”, Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention, 21/5/1997, A4-1997-175.

43 See Moberg (2009), pp. 170-177.

44 *Comparing the ACP and EU negotiating mandates*, *The Courier* 173, January-February 1999, p. 72.

45 Communication from the Commission to the Council and the European Parliament - Democratisation, 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(1998) 146, 12/3/1998.

46 Report on the Commission Communication entitled “Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States”, A4-1998-0411.

It is evident that Mr Fernández Martín had high hopes regarding the possibility for changes being made to the EU practice on conditionality clauses. However, the Commission's elaborate discussion on the interpretation of Article 5 must be read in the context of the Commission's view on how to interpret Article 366a, which emphasizes the need to sometimes take other interests than human rights, democratic principles and the rule of law into account when making the decision to invoke the conditionality clause.⁴⁷

As it would turn out, the European Parliament's hopes were nurtured in vain. There were no significant definitions made in the Cotonou agreement, and neither were any such definitions included in the text during the revision in 2005. Not even in the second revision were any significant changes made in this respect. The specific mentions of human rights treaties in the ACP-EU Conventions remain the same since reference to the Universal Declaration of Human Rights as well as the 1966 UN Conventions and the regional human rights conventions in Africa, Europe and North America were introduced into the preamble of Lomé (IV).

There may, however, be change on the way. In the Action Plan to the EU Strategic Framework on Human Rights and Democracy, adopted by the Council 25 June 2012⁴⁸, the EEAS, the Member States and the Commission have been given the task to develop criteria for application of the human rights clause. This task refers to the general human rights clause, but it would have to be assumed that the conditionality clause of the ACP-EU Convention would be affected.⁴⁹

So, the Commission's Communication COM(1998) 148 is by far the most elaborate interpretation of the essential elements, but as we shall see in the following section, it has never been used as a reference when invoking the conditionality clause. Neither by the Commission when proposing the Council to use the clause, nor by the Council when deciding to use the clause.

47 "Article 366a of the Lomé Convention sets out clearly the procedure to follow in such cases and specifies the timing and players involved in this procedure, providing for consultations between the parties before any action is taken, save in cases of special urgency. Implementing such a procedure requires the capacity to assess the failure to fulfil 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(1998) 148, Section III.C.12.

48 Council conclusions on Human Rights and Democracy, 3179th Foreign Affairs Council meeting, Luxembourg, 25 June 2012.

49 On the EU Strategic Framework on Human Rights and Democracy, see Moberg (2014) (forthcoming).

3.2 *Analysis of application of Article 366a Lomé (IV)bis and Article 96 Cotonou, 1996-2014*

In this section I will account for all of the cases where the EU has invoked a conditionality clause under the ACP-EU Conventions.⁵⁰ The main focus will be on analysis of the stated reasons for invocation of the clause. However, as I have found it important to acknowledge that the procedural rules governing how to invoke the conditionality clause may have influenced how often, and perhaps also why/(why not)/ the Community has made use of the clause, I will begin by a short recount of these rules.⁵¹

3.2.1 Procedure

The procedure for invoking the conditionality clause in the ACP-EU Conventions has undergone significant changes since the first version of the clause was incorporated into Lomé (IV)bis. The conditionality clause had already been in force for more than three years before the Council finally, in March 1999, agreed on a procedure for invoking the clause.⁵² One possible reason why it took such a long time to adopt the decision is that the voting procedure changed from unanimity to qualified majority. As Bartels notes, the new procedure may well have led to an increase of the use of Article 366a, and it may also help explain why there are only two cases before 1999 and three in that very year.⁵³

When the Cotonou Agreement replaced the Lomé (IV)bis, the recently adopted procedure became obsolete.⁵⁴ However, through a decision by the Member States meeting within the Council on September 18, 2000, there were new procedural rules on invocation of the conditionality clause adopted, and it was decided that these rules would be applied provisionally from 2 August, 2000.⁵⁵ The most significant change, compared to the procedure under Article

50 In fact, these are the only cases where the EU has made use of the possibility to call a state to consultations under the conditionality clause, although the EU retains such a contractual option with more than 140 states.

51 The way I use the concept procedural rules here encompasses both the rules on how to invoke the conditionality clause that stem from the relevant treaty, and the internal EU rules on how to reach the decision to invoke the clause.

52 1999/214/EC: Council Decision of 11 March 1999 on the procedure for implementing Article 366a of the fourth ACP-EC Convention, OJ L 75, 20/03/1999, p. 32–33.

53 Bartels (2005a), p. V.

54 In fact, it was only ever used in three cases; (Guinea-Bissau 1999, Comoros 1999 and Côte d'Ivoire 2000).

55 2000/771/EC: Decision of the representatives of the Governments of the Member States, meeting within the Council, of 18 September 2000 on the provisional application of the Internal Agreement between the Representatives of the Governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, OJ L 317, 15/12/2000, p. 375–375. The chosen date, 2 August 2000, is the same date as was chosen

366a, was an adaptation to the institutionalised political dialogue in Article 8 of the Cotonou Agreement. The article specifically lists one of its objectives as “preventing situations arising in which one Party might deem it necessary to have recourse to the non-execution clause.”⁵⁶ Thus, one specific prerequisite for invocation of the new non-execution clause, Article 96 Cotonou, that all possible options for political dialogue must be exhausted before the procedure in Article 96 can commence. The voting rules on whether or not to call a party to consultations remained unchanged (decision by qualified majority).

There were new adaptations to the procedure made following the 2005 revision of the Cotonou Agreement.⁵⁷ The two most noteworthy changes were, first of all, that the requirement on exhaustion of all possible options for dialogue, which had been introduced in Article 8, was now also replicated in Article 96 (as a new paragraph 1a), and secondly, that there was a new Annex (Annex VII) attached to the Agreement. Annex VII was titled “Political dialogue as regards human rights, democratic principles and the rule of law”, and it sought to establish a framework for the dialogue. The relevant update of the rules on internal procedure were made through Decision 2006/611/EC in April 2006, whereby the agreement on procedure made between the Member States was updated.⁵⁸ There were no significant changes made.

Finally, the second revision of the Cotonou Agreement was signed 22 June 2010. The changes to the revised Cotonou Agreement were provisionally applied from the same day.⁵⁹ When it comes to the anticipated changes in the procedure on Article 96, there have been no such corresponding changes to Decision 2006/611/EC, which suggests that the “Internal agreement amending the internal agreement of 18 September 2000 on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement” is still applied.

for provisional application of the entire Cotonou Agreement, Decision No 1/2000 of the ACP-EC Council of Ministers of 27 July 2000 regarding transitional measures valid from 2 August 2000 until the entry into force of the ACP-EC Partnership Agreement, OJ L 195, 01/08/2000, p. 46–48.

56 Article 8.2 Cotonou.

57 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, p. 1–40.

58 2006/611/EC: Decision of the Representatives of the Governments of the Member States, meeting within the Council of 10 April 2006 on the provisional application of the Internal Agreement amending the Internal Agreement of 18 September 2000 on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, OJ L 247, 09/09/2006, p. 46–47.

59 2010/650/EU: Decision No 2/2010 of the ACP-EU Council of Ministers of 21 June 2010 on transitional measures applicable from the date of signing to the date of entry into force of the Agreement amending for the second time 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, as first amended in Luxembourg on 25 June 2005, OJ L 287, 04/11/2010, p. 68–69.

To sum up; it took roughly three years from provisional application of Lomé (IV)bis to agree on voting rules. One of the reasons why that question was considered so important was of course the nature of the competence of development cooperation. Since this type of competence has been shared between the EU and the Member States, without there being any risk of EU pre-emption, ever since it was introduced in the Maastricht Treaty⁶⁰, the idea of switching from unanimity to qualified majority when it came to decisions potentially suspending EU development cooperation may well have felt like an infringement on individual Member State's right to conduct their own development cooperation.

Once that question was out of the way, and the transition to qualified majority voting was confirmed, the main changes to the internal procedure have been adaptations to the changes in the Cotonou Agreement. These changes have mainly been about ensuring the role of political dialogue as laid down by the articles in the agreement.

3.2.2 23 Cases between 1996 and 2014

There are 23 cases where the Council has decided to invoke the conditionality clause of the ACP-EU Convention (Article 366a Lomé (IV)bis/Article 96 Cotonou).⁶¹ These 23 cases covering a time period of 18 years concern 13 states. As is clear from the section above, it is the Council who decides on invocation of the clause, on proposal from the Commission. Only once has there been a proposal from the Commission that did not lead to the Council deciding to call a party to the relevant ACP-EU Convention to consultations, and this was in the case of Ivory Coast in 2004.⁶²

When analysing the Commission's reasons for proposing consultations, it becomes clear that the most common reason falls under a category I have decided to call "*Undemocratic regime change*". This category typically includes cases of *coup d'états*, where the military seizes power – often from a democratically elected government. The fact that these cases are singular events, which means that they are easily identified occurrences, is a feature common to this category, and this has been put forth by Smith as an explanation as to why this category is larger than the others.⁶³ I have referred 14 of the 23 cases to this category.

The second largest category holds cases where the Community has found severe procedural deficiencies in the process during democratic elections. This category, "*Insufficient democracy*", is different from the first category in that it

60 Cf. Article 4.4 TFEU.

61 Five of the 23 decisions were taken under Article 366a Lomé (IV)bis.

62 Communication from the Commission to the Council concerning the opening of consultations with Côte d'Ivoire under Article 96 of the Cotonou Agreement, COM(2004) 547 final, 10/8/2004.

63 Smith (2001).

is not exactly un-democratic but rather insufficiently democratic. Six of the 23 cases belong to this category. The events causing the invocation are normally referable to a short period of time. This category entails such events as a sitting president altering the constitution and dissolving the constitutional court in order to remain in power (Niger 2009) and what could be labelled a gradual deterioration of the democratic environment, such as in the case of Guinea (2004).⁶⁴

The third category, which is called “*Violations of human rights*”, includes three cases: Liberia 2001 and 2003 as well as Zimbabwe 2001. In these three cases the Commission focuses on violations of human rights on a more general, systematic, level compared to the other categories where the events leading to consultations are more easily pinpointed.

The case of Liberia 2001 is so far the only case where the Community has made reference to Article 97 Cotonou (consultation procedure and appropriate measures regarding corruption), as well as Article 96, when the decision to call a state to consultations has been made. At first, Liberia’s response to the EU’s invitation to consultations was that they did not consider consultations under article 97 Cotonou justified.⁶⁵ However, the Council was not convinced by this argument and decided to include Article 97 Cotonou.

The case of Liberia 2003 is also special. This is the only case where the Council has decided to adopt measures under Article 96 Cotonou in a case of special urgency within the meaning of Article 96(2)(b) Cotonou.⁶⁶ Interestingly enough, the special urgency rather consisted in a need to modify the previous decision on appropriate measures, following the consultations initiated in 2001, so that EU funds could be used to contribute to the peace process via financial support to ECOWAS, who were peace keeping on a UN mandate.⁶⁷ The case of Zimbabwe in 2001 is a unique example amongst the 23

64 “The Commission considers that the gradual deterioration in the democratic environment described above, notably the dubious referendum of November 2001, the undemocratic parliamentary elections in June 2002, and the lack of positive signs of imminent change in the situation amount to non-respect of the essential elements set out in Article 9 of the Cotonou Agreement.” COM(2003) 517, 26/8/2003, para. 9.

65 Council Document 12293/01, 1/10/2001, ”I” Item Note from the ACP Working Party to the COREPER.

66 2003/631/EC: Council Decision of 25 August 2003 adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency, OJ L 220, 03/09/2003, p. 3–4.

67 Døhlie Saltnes has also composed a list of all the cases of invocation of conditionality clauses in ACP-EU relations. She has not included the case of Liberia 2003 on her list. On the other hand, she has included a case of a *coup d’état* in Niger 2010. There was indeed a coup in February, and President Mamadou Tandja was relieved of power, but there was no decision by the Council to call Niger to consultations under Article 96 Cotonou made, most likely because consultations were already open following the decision in 2009. Those consultations were suspended following the 2010 coup d’état, but they were resumed in May 2010, Second consultation meeting with the Republic of Niger on the basis of Article 96 of the ACP-EU Partnership Agreement - European Union conclusions, Presse 130, 10243/10, 26/5/2010.

cases. The situation in Zimbabwe that led to the Community invoking the conditionality clause was a deeply complicated situation, and the fact that the measures are still in force to this day underlines the special case status that is evident already in the Commission's proposal to the Council.⁶⁸

Table 1: The 23 cases of applied EU conditionality 1996 – 2014

Counterpart	Year	Proposal from the Commission	Category		
Niger	1996	No proposal made	URC		
Togo	1998	COM(1998) [no number on file], 8/7/1998		ID	
Guinea-Bissau	1999	COM(1999) 361, 9/7/1999 (366a)	URC		
Niger	1999	No proposal on file	URC		
Comoros	1999	COM(1999) 295, [no date on file] (366a)	URC		
Fiji	2000	COM(2000) 460, 24/7/2000 (366a)	URC		
Haiti	2000	COM(2000) 486, 25/7/2000 (366a)		ID	
Ivory Coast*	2000	COM(1999) 899, 7/1/2000 (366a)	URC		
Ivory Coast	2001	No proposal on file		ID	
Liberia**	2001	No proposal on file			HR
Zimbabwe	2001	COM(2001) 623, 26/10/2001			HR
CAR	2003	COM(2003) 222, 28/4/2003	URC		
Guinea-Bissau	2003	COM(2003) 824, 17/12/2003	URC		
Liberia	2003	COM(2003) 513, 19/8/2003			HR
Guinea	2004	COM(2003) 517, 26/8/2003		ID	
Togo	2004	COM(2003) 850, 8/1/2004		ID	
Mauritania	2005	COM(2005) 546, 28/10/2005	URC		

68 The following section is a good example of the Commission's difference in tone in relation to Zimbabwe, compared to the other 22 cases of invocation: "Zimbabwe has in recent years not lived up to its previously good reputation regarding the essential elements. The human rights record has deteriorated with growing violence and insecurity. There are problems with respect for democratic principles, such as freedom of expression. Zimbabwe has enacted a law limiting the freedom of broadcasting, there have been arrests of journalists, and accreditation procedures for foreign journalists are becoming increasingly difficult. Violence and intimidation took place prior to recent by-elections. The rule of law has been undermined by illegal occupation of farm-land with tacit support from the Government, and by strong political pressure on the judiciary, including the forced resignation of the chief justice. There are reports of police inaction following court decisions.", COM(2001) 623, 26/10/2001, para. 2.

Fiji	2007	COM(2007) 467, 10/8/2007	URC		
Mauritania	2008	COM(2008) 537, 2/9/2008	URC		
Guinea	2009	COM(2009) 76, 16/2/2009	URC		
Madagascar	2009	COM(2009) 219, 11/5/2009	URC		
Niger	2009	COM(2009) 529, 7/10/2009		I	
Guinea-Bissau	2011	COM(2010) 766, 20/12/2010	URC	D	

*Ivory Coast 2004 is the only case when the Commission has put forth a proposition to call another state to consultations that has not resulted in a Council decision to do so.

**Liberia 2003 is a special case in that there were appropriate measures in force following the consultations held in 2001, but the Council decided to change those measures using the special urgency procedure whereby measures may be adopted without prior consultations.

It is clear that “Undemocratic regime change”, in most cases through a *coup d'état*, is the most common reason why the EU calls an ACP-state to consultations. However, the data presented here does not allow me to conclude that the EU always acts when “Undemocratic regime change” takes place. In fact, Døhlie Saltnes has identified six cases of *coup d'états* during the same period that did not trigger EU invocation of the conditionality clause. She has also identified eleven other *non-cases*, meaning cases where the EU could have used the clause but decided not to.⁶⁹

The *non-cases* are a good example of an important reason to continue analysing the EU's use of conditionality clauses, as they help identifying the interests behind not invoking the clause. In my previous work in this field, I have attempted a method based on archived news reports to find *non-cases*.⁷⁰ Døhlie Saltnes developed a method using existing datasets on electoral records and *coup d'états* and in this chapter I use the UN HRC as my “human rights and democracy-thermometer”, in order to identify potentially interesting *non-cases*.⁷¹

There are also several other compelling reasons that call for further analysis. First of all: the EU has proclaimed that there can be no development without human rights. That means that the conditionality clause in the development cooperation agreement is a useful tool to stop development cooperation funding where there is inadequate human rights protection. Secondly, there are

69 Døhlie Saltnes (2013), p. 9.

70 Moberg (2009).

71 However, in this chapter, I will not embark on explaining why the *non-cases* became *non-cases*. For such analysis I would point the reader towards Smith (1998), Moberg (2009), Del Biondo (2011), Døhlie Saltnes (2013).

compelling legal arguments, in particular CJEU case law,⁷² that suggest that it would be contrary to EU law to adopt development cooperation measures that do not further the general objective of promoting human rights. And thirdly, the legitimacy of EU foreign policy is jeopardized when arguments of double standards and hidden agendas overshadow the general goal of promoting human rights and democracy throughout the world.

In the next section, I will present the result of an analysis of the UN Human Rights Committee's considerations of States' reports, as well as the individual complaints lodged before the HRC, concerning the ACP-states between 1996 and 2014 as a way of contrasting the EU's evaluation of human rights violations with the UN's.

4 The ACP-States and the Human Rights Committee

The HRC is one of the UN's so called "Treaty Bodies".⁷³ It is established under the ICCPR. There are four main functions performed by the HRC. First of all, there is the states' reports procedure where the HRC is competent to deliver *Concluding Observations* on reports delivered by the parties to the ICCPR.⁷⁴ Secondly, during the individual complaints procedure the HRC issues *Communications* following petitions from individuals, in relation to those states that have ratified Optional Protocol I (OP I).⁷⁵ The third function concerns intra-state complaints. Following a declaration of consent on behalf of a State bound by the covenant, the HRC is competent to receive and consider claims brought by one or more of the parties concerning another party's failure to fulfil its obligations under the covenant.⁷⁶ This procedure has never been utilized. The fourth function is the adoption of General Comments (GC's), whereby the HRC, through elaborate interpretation of Article 40(4) ICCPR, has taken upon itself to issue statements on suggested interpretation of various legal issues connected to the covenant and its application.

It is important to acknowledge that not all ACP-states may be assessed by the HRC. Even though a large majority of the ACP-states are parties to the ICCPR, only a minority of them have signed OP I. Today (2014), there are 79 ACP-states (in 1996, there were 71). 10 of today's ACP-states have not signed the ICCPR.⁷⁷ Six of the 79 have signed but not ratified.⁷⁸ Consequently, 16 of

72 C-268/94, *Portuguese Republic v. Council of the European Union*, 3/12/1996.

73 For an introduction to the UN Treaty Bodies, I recommend Alston & Goodman (2013), especially ch. 8-9.

74 Article 40, ICCPR.

75 Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS Vol. 999, p. 171.

76 Article 41, ICCPR.

77 These are Antigua and Barbuda, Cook Islands, Fiji, Marshall Islands, Micronesia, Niue, St. Kitts and Nevis, Solomon Islands, Tonga and Tuvalu.

78 Comoros, Cuba, Nauru, Palau, St. Lucia and Sao Tomé and Príncipe.

today's ACP States are not bound by the ICCPR. It is also noteworthy, that 17 of those 63 ACP-states bound today, were not bound by the Covenant in 1996.⁷⁹ When it comes to the first Optional Protocol, 36 ACP-states are bound today.⁸⁰ 12 of the 36 were not bound in 1996.⁸¹

For the purpose of this chapter, I will focus on a specific document created in the states' report procedure; namely the "list of issues" prepared by the "country rapporteur". The "country rapporteur" is one of the (4-6) members of a designated "country report task force". The "list of issues" contains the topics that the HRC wishes the state party to specifically address in its state report. Generally, the raised issues are related to specific articles in the ICCPR. For the purpose of this chapter, the "list of issues" is considered a useful instrument to identify potential violations of human rights committed by a certain state.

The states' report procedure is currently undergoing changes as the suggested LOIPR procedure is being implemented.⁸² However, as only two of the ACP-states bound by the ICCPR have accepted the new procedure so far (Cameroon and Chad), the changes are of minor importance for the purposes of this chapter. Furthermore, the proposed changes only strengthen the motivation for using the "list of issues" in the way that is proposed in this chapter; i.e. as a *litmus test* for potential violations of the ICCPR.

I will complement the analysis of the lists of issues with an analysis of the Communications issued under the individual complaints procedure. The Communications are not, *a priori*, considered as interesting (as the lists of issues) as symptoms of systematic violations of human rights, but they may nevertheless serve as an indication.

4.1 The Consideration of States' Reports 1996-2014

The HRC sent lists of issues to 41 of the ACP-states during the relevant time period. Ten of those states received a list of issues on two separate occasions.⁸³

79 These are: Belize (10/6/1996), Bahamas (23/12/2008), Botswana (8/9/2000), Burkina Faso (4/1/1999), Djibouti (5/11/2002), Eritrea (22/1/2002), Ghana (7/9/2000), Guinea-Bissau (1/11/2000), Liberia (22/9/2004), Mauritania (17/11/2004), Papua New Guinea (21/7/2008), Samoa (15/2/2008), Sierra Leone (23/8/1996), South Africa (10/12/1998), Swaziland (26/3/2004), Timor-Leste (18/9/2003) and Vanatu (21/11/2008). The date from when they are bound in parenthesis.

80 41 have signed, three have not ratified, Jamaica denounced its signature on 23 October 1997 and Trinidad and Tobago's denunciation is in effect since 27 March 2000.

81 Burkina Faso (4/1/1999), Cape Verde (19/5/2000), Côte d'Ivoire (5/3/1997), Djibouti (5/11/2002), Ghana (7/9/2000), Guinea-Bissau (24/9/2013), Guyana (5/1/1999), Lesotho (6/9/2000), Malawi (11/6/1996), Mali (24/10/2001), Sierra Leone (23/8/1996), South Africa (28/8/2002). The date from when they are bound in parenthesis.

82 Human Rights Committee, 99th session, Geneva, 12-30 July, 2010, Focused reports based on replies to lists of issues prior to reporting (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure), CCPR/C/99/4, 29/11/2010.

83 Barbados, Cameroon, Central African Rep., Chad, Dominican Rep., Kenya, Malawi, Sudan, Suriname and Togo.

In seven cases, the HRC has published a Concluding observation although there was no list of issues published concerning that specific state, during the selected time period.⁸⁴ Considering that in 1996 only 45 of the ACP-states, then totalling 71, were bound by the covenant, (although this number increased to 62 over the period), 41 states covers a good proportion of those eligible. Table 2 (below) shows what ICCPR articles the HRC specifically brought attention to in their lists of issues.

Table 2: Lists of issues 1996 – 2013.

1. State	UN Doc. Reference	No. of issues	ICCPR arts.
2. Angola	CCPR/C/AGO/Q/1, 21 Aug 2012	11	2, 3, 6, 7, 8, 9, 10, 12, 14, 17, 19, 22, 24, 25, 26
3. Barbados	CCPR/C/83/L/BRB, 1 Dec 2004	8	2, 3, 6, 7, 8, 10, 14, 24, 26
	CCPR/C/BRB/Q/3, 22 Nov 2006	10	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 24, 25, 26
4. Belize	CCPR/C/BLZ/Q/1, 23 Nov 2012	11	2, 3, 4, 6, 7, 8, 9, 10, 14, 19, 22, 24, 25, 26, 27
5. Benin	CCPR/C/82/L/BEN, 13 Aug 2004	13	2, 3, 4, 6, 7, 9, 10, 14, 19, 21, 22, 24, 25
6. Botswana	CCPR/C/BWA/Q/1, 10 Aug 2007	10	2, 3, 6, 7, 9, 10, 14, 19, 23, 25, 26, 27
7. Burundi	CCPR/C/BDI/Q/2, 25 Nov 2013	13	2, 3, 4, 6, 7, 8, 9, 10, 12, 14, 19, 21, 22, 24, 25, 26, 27
8. Cameroon	CCPR/C/CMR/Q/4, 2 Nov 2009	13	2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 19, 22, 23, 24, 25, 26, 27
	CCPR/C/CMR/5, 29 Nov 2011 (LOIPR)	15	2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 22, 25, 26, 27
9. Cape Verde	CCPR/C/CPV/Q/1, 29 Nov 2011	14	2, 3, 4, 6, 7, 8, 9, 10, 14, 16, 19, 24, 25, 26, 27
10. Central African Rep.	CCPR/C/79/L/CAF, 3, Sept 2003	8	2, 3, 4, 6, 7, 8, 9, 10, 12, 14, 19, 22, 25, 26
	CCPR/C/CAF/q/2, 24 Apr 2006	8	2, 3, 6, 7, 9, 10, 14, 18, 19, 22, 26
11. Chad	CCPR/C/TCD/Q/1, 26 Nov 2008	13	1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 21, 22, 24, 25, 26
	CCPR/C/TCD/Q/2, 8-26 Jul 2013	12	2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 22, 23, 24, 26
12. Congo	CCPR/C/68/L/COG, 3 Dec 1999	8	2, 3, 6, 7, 8, 9, 10, 12, 14, 16, 19, 21, 24, 26, 27
13. Dem. Rep. of Congo	CCPR/C/COD/Q/3, 7 Dec 2005	13	2, 3, 6, 7, 8, 9, 11, 14, 16, 19, 21 22 23 24 26
14. Djibouti	CCPR/C/DJI/Q/1, 29 Apr 2013	11	2, 3, 6, 7, 8, 9, 10, 14, 19, 21, 22, 23, 24, 25, 26, 27

84 Burkina Faso, Lesotho, Nigeria, Senegal, South Africa, Tanzania and Zimbabwe.

15. Dominica	CCPR/C/DMA/Q/1, 1 Sept 2010	11	2, 3, 4, 6, 7, 8, 9, 10, 14, 19, 22, 23, 24, 26, 27
16. Dominican Rep.	CCPR/C/71/L/DOM, 15 Nov 2000	7	1, 2, 3, 6, 7, 9, 10, 12, 13, 14, 24, 26
	CCPR/C/DOM/Q/5, 3 May 2011	11	1, 2, 3, 6, 7, 8, 9, 10, 12, 16, 18, 19, 21, 22, 25, 26, 27
17. Equatorial Guinea	CCPR/C/78/L/GNQ, 25 Mar 2003	10	2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 21, 22, 25, 26, 27
18. Ethiopia	CCPR/C/ETH/1, 15 Sep 2010	11	2, 3, 6, 7, 8, 9, 10, 14, 19, 22, 23, 24, 25, 26, 27
19. Gabon	CCPR/C/70/L/GAB	Document not found	
20. Gambia	CCPR/C/74/L/GMB, 24 Oct 2001	12	2, 3, 7, 9, 13, 14, 19, 21, 23, 24, 25, 26
21. Grenada	CCPR/C/GRD/Q/1, 11 Jun 2007	12	2, 4, 6, 7, 8, 9, 10, 14, 22, 24, 27
22. Guyana	CCPR/C/68/L/GUY, 3 Dec 1999	10	2, 3, 6, 7, 9, 10, 14, 19, 23, 24, 25, 26, 27
23. Ivory Coast	CCPR/C/CIV/Q/1, 7 Dec 2010	10	2, 3, 6, 7, 8, 9, 10, 12, 14, 19, 21, 22, 23, 24, 25, 26
24. Jamaica	CCPR/C/JAM/Q/3, 3 Dec 2010	11	2, 3, 4, 6, 7, 8, 9, 10, 14, 19, 20, 26, 27
25. Kenya	CCPR/C/82/L/KEN, 13 Aug 2004	12	2, 3, 4, 5, 6, 7, 9, 14, 17, 19, 21, 22, 23, 24, 26
	CCPR/C/KEN/Q/3, 22 Nov 2011	13	2, 3, 4, 6, 7, 8, 9, 10, 14, 19, 21, 22, 24, 26, 27
26. Madagascar	CCPR/C/MDG/Q/3, 31 Jul 2006	14	2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 18, 19, 21, 22, 25, 26, 27
27. Malawi	CCPR/C/MWI/Q/1, 26 Apr 2011	14	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27
	CCPR/C/MWI/Q/1/Add.1, 30 Jul 2013	14	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27
28. Mali	CCPR/C/77/L/MLI, 27 Nov 2002	9	2, 3, 7, 8, 9, 13, 14, 26, 27
29. Mauritania	CCPR/C/MRT/Q/1, 29 Apr 2013	12	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27
30. Mauritius	CCPR/C/83/L/MUS, 1 Dec 2004	10	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 19, 21, 22, 24, 26
31. Mozambique	CCPR/C/MOZ/Q/1/add.1, 31 May 2013	10	2, 3, 6, 7, 8, 9, 10, 14, 20, 23, 24, 26
32. Namibia	CCPR/C/81/L/NAM, 7 May 2004	10	2, 3, 6, 7, 9, 10, 13, 14, 18, 19, 23, 24, 25, 26, 27
33. Rwanda	CCPR/C/EWA/Q/3/Rev.1, 27 Nov 2008	12	2, 3, 4, 6, 7, 8, 9, 10, 14, 19, 20, 24, 25, 26
34. St. Vincent and the Grenadines	CCPR/C/VCT/Q/3, 6 Dec 2005	9	2, 3, 6, 7, 9, 10, 14, 24, 26
35. Seychelles	CCPR/C/SYC/Q/1, 15 Apr 2010	12	3, 4, 7, 8, 9, 10, 14, 19, 23, 24, 25, 26, 27
36. Sierra Leone	CCPR/C/SLE/Q/1, 23 Aug 2013	9	2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 19, 21, 23, 24, 25, 26

37. Sudan	CCPR/C/SDN/Q/3, 9 May 2007	12	1, 2, 3, 6, 7, 8, 9, 10, 12, 14, 18, 19, 21, 22, 26, 27
	CCPR/C/SDN/Q/4, 22 Nov 2013	13	2, 3, 4, 6, 7, 8, 9, 10, 12, 14, 18, 19, 21, 22, 23, 24, 25, 26, 27
38. Suriname	CCPR/C/75/L/SUR, 14 May 2002	11	1, 2, 3, 4, 6, 7, 8, 9, 14, 19, 21, 22, 25, 26
	CCPR/C/80/L/SUR, 28 Nov 2003	8	2, 3, 6, 7, 8, 9, 10, 14, 24, 26, 27
39. Togo	CCPR/C/75/L/TGO, 14 May 2002	11	2, 3, 4, 6, 7, 8, 9, 10, 12, 13, 14, 18, 19, 21, 22, 24, 25, 26
	CCPR/C/TGO/Q/4, 22 Dec 2010	13	2, 3, 6, 7, 8, 9, 10, 11, 12, 14, 18, 19, 20, 21, 22, 24, 25, 26, 27
40. Trinidad and Tobago	CCPR/C/80/L/UGA, 28 Nov 2003	13	2, 3, 6, 7, 9, 10, 12, 13, 14, 17, 19, 21, 22, 23, 24, 26, 27
41. Uganda	CCPR/C/80/L/UGA, 28 Nov 2003	13	2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 17, 19, 21, 22, 23, 24, 26, 27
42. Zambia	CCPR/C/ZMB/Q/3, 27 Nov 2006	11	2, 3, 6, 7, 9, 11, 14, 19, 24, 25, 26

Tabel 3: Timetable over the Lists of issues.

1996	-
1997	-
1998	-
1999	Congo, Guyana
2000	Dominican Rep.
2001	Gambia
2002	Mali, Suriname, Togo
2003	CAR, Eq. Guinea, Suriname, Trinidad and Tobago, Uganda
2004	Barbados, Benin, Kenya, Mauritius, Namibia
2005	Dem. Rep. Congo, St. Vincent and the Grenadines
2006	Barbados, CAR, Madagascar, Zambia
2007	Botswana, Grenada, Sudan
2008	Chad, Rwanda
2009	Cameroon
2010	Dominica, Ethiopia, Ivory Coast, Jamaica, Togo
2011	Cameroon, Cape Verde, Dominican Rep., Kenya, Malawi, Seychelles

2012	Angola, Belize
2013	Burundi, Chad, Djibouti, Malawi, Mauritania, Mozambique, Sierra Leone, Sudan

The number of issues brought up by the HRC in the lists of issues ranges from seven to 15, and normally there will be about 12-13 issues in the list. All of the lists cover multiple articles of the ICCPR, and some of them mention close to all of the substantive rights in the covenant.

Obviously, the lists of issues are intended to initiate discussions between the HRC and the state concerned; they are not to be considered the HRC's conclusion on the state's respect for the obligations in the covenant. That evaluation is, of course, covered in the Concluding Observations. Admittedly, the HRC sends lists of issues to the vast majority of the states who are parties to the ICCPR. However, it is not the fact that the HRC has *sent* lists to the ACP-states during this period that is interesting, but rather that the HRC identifies a large number of issues they want addressed in each and every one of the ACP-states. This fact makes it relevant to pose the question why the Commission does not want these issues addressed, especially since the EU is required to ensure that development cooperation measures contribute to the general objective of human rights protection.⁸⁵

Only five of the 41 states that received lists of issues between 1996 and 2014, are among the 13 states against which the Commission proposed that the Council use the conditionality clause.⁸⁶ This lack of convergence is striking.

The most striking fact is that there are 36 states who have received lists of issues containing questions of violations of a significant number of the articles in the ICCPR which the Commission has not (even) proposed that the Council call to consultations. Another striking feature is the fact that the two organizations seem to focus on different states. Out of the eight states that the EU has called to consultations while the HRC has not sent lists of issues, two (the Comoros and Fiji) are not bound by the ICCPR and could of course not receive any list. Two ratified the Treaty during the period (Guinea-Bissau in 2010 and Liberia in 2004).⁸⁷ The remaining four states are Guinea, Haiti, Niger and Zimbabwe. The HRC sent Concluding Observations to Zimbabwe in April 1998 and Haiti received its first list of issues in April 2014⁸⁸, but otherwise these states have not received any communications from the HRC since 1996.

85 C-268/94, *Portuguese Republic v. Council of the European Union*, 3/12/1996, para. 23.

86 These are the Central African Rep., Ivory Coast, Madagascar, Mauritania and Togo.

87 Guinea-Bissau signed the ICCPR 12 September 2000 and ratified it on the 1 November 2010. Liberia signed the ICCPR 18 April 1967, but did not ratify until 22 September 2004.

88 CCPR/C/HTI/Q/1, 23 April 2014.

4.2 *Communications 1996-2014*

Communications from the HRC are the result of the Individual Complaints Procedure (ICP) established through Optional Protocol I to the ICCPR.⁸⁹ Today, 38 ACP-states are bound by OP I. In 1996, eleven of these were not parties, although back then Jamaica and Trinidad and Tobago were. These two states denounced their ratifications of the protocol in 1997 and 1998 respectively. Trinidad and Tobago instantly re-acceded, with a reservation to the protocol concerning non-application in cases regarding individuals sentenced to the death penalty. A significant number of states declared that they did not accept such reservations and subsequently Trinidad and Tobago withdrew their re-accession in 2000. Guyana also denounced and re-acceded the protocol (in 1999), for the same reasons as Trinidad and Tobago. However, Guyana remains a party to the protocol, although Finland and Poland have registered reservations to Guyana's reservation, and Sweden has expressed its grave concern.

Through March 2014, there have been a total of 2371 cases filed before the HRC under the protocol. 388 of these are pending and 1008 have resulted in a view from the HRC. The rest are either discontinued by one of the parties (355) or declared inadmissible (620).⁹⁰ Only one ACP-state (Jamaica) is amongst the top ten states with the highest number of complaints, although there are two EU members (Spain 6th and The Netherlands 7th, with France close behind in 11th) that do break into that list. However, when analysing the ratio between the number of violations and total number of cases the pattern looks different. With such an analysis the ACP-states all climb through the ranks. Furthermore, when looking at the quota of "violations/no violation" in those cases where the HRC has communicated a view on the case, many of the ACP-states have a 100 % record of violations, which is not the case when we look at Canada, who tops the list of total number of complaints. Canada has a ratio of 32 views from 191 complaints, and 20 of these 32 were violations.

Only five ACP-states have more than 10 complaints: Jamaica (177), Trinidad and Tobago (48), Democratic Republic of the Congo (DRC) (26), Zambia (18) and Guyana (12). Jamaica, Trinidad and Tobago and Guyana are somewhat different cases, compared to the others, and as has been noted above, they have all denounced their ratification (although Guyana has re-acceded). The absolute majority of these cases concern prisoners on death row, which means that they state a clear message as to the state of affairs concerning the conditions of human rights protection in that context – which make them very interesting for the purpose of this chapter – although the data must be analysed in light of these circumstances. The cases of DRC and Zambia are typical

89 Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS, Vol. 999, p. 171.

90 Date collected from "Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", "www2.ohchr.org/english/bodies/petitions/StatisticalInformation.htm" (last visited 21/5/2014).

ACP-cases in the sense that most of the complaints against these states that end up with a view from the HRC are found to be violations of the Covenant.⁹¹ In both of these cases, the ratio is 100%.

However, I argue that the number of complaints is still too low to draw any conclusions on the general state of affairs as regards violations of “essential elements” in these states, although I cannot help noticing that the EU has never used the conditionality clause against any of the five ACP-states that I have mentioned here.

Furthermore, when it comes to the cases of Jamaica, Trinidad and Tobago and Guyana, it is remarkable that the Commission has not proposed consultation under the conditionality clause. The data from the HRC individual complaints jurisprudence clearly shows that there are issues to discuss with these states regarding the protection of human rights for prisoners on death row.

5 Conclusion – What is the Condition of EU Conditionality?

The condition of EU conditionality is severe. Although the conditionality clause appears healthy enough, especially when flaunted as the EU’s most important instrument to promote human rights, the symptoms have been there for everyone to see, ever since its arrival on the scene in the early 1990’s.

In this chapter, I have shown how the EU has set high standards for its own promotion of human rights, democracy and the rule of law throughout the world. It is clear that the EU has willingly taken the role to lead by example. The EU must promote human rights throughout the world; it is one of the organization’s aims.

Furthermore, I have argued that the EU-aim “human rights promotion” is a consequence of the EU-aim “development”. Bearing in mind that the EU considers that human rights protection is a prerequisite for poverty reduction and development, the symbiotic relationship of EU-human rights policy and EU-development policy is a manifestation of how these policies are two sides of the same coin. Thus, when conditionality clauses were introduced in EU external relations, they were born into a context influenced by the logic of universal human rights grafted onto the logic of effective development cooperation aiming at the reduction of world poverty.

There is a strong imperative that the EU must use the conditionality clauses when there is evidence of violations of human rights, simply because non-use erodes the legitimacy of EU foreign policy and in the long run hinders the EU to achieve its aims. There is also a legal argument supporting the view that non-use may constitute a breach of EU law, since action in the sphere of development is obliged to further human rights protection.

At the same time, 23 cases over 18 years speak volumes to the restraint with which the Council deals with the instrument. The condition of conditionality

91 The ratio between cases ending up with a view from the HRC is 16/26 total cases in DRC with two cases pending and 10/18 in Zambia with one case pending

deteriorates each time the Council chooses not to use the conditionality clause, as long as there is no credible explanation as to why the violations in the case at hand fall short of the threshold required for invocation.

This chapter set out to investigate how the UN Human Rights Committee has treated human rights violations in relation to the same set of states as those the EU has had the possibility to use the conditionality clause against. The comparison adds to the critical academic discussion of the EU's use of conditionality clauses. It shows that the UN HRC is significantly more prone, compared to the EU, to address potential human rights violations in the ACP-states. Since the difference in practice is nothing less than striking, the same old questions concerning double standards and hidden agendas surface.

When adding the analysis of the current chapter to previous work in the same field, the diagnosis is serious. The EU conditionality clause suffers from being caught between two irreconcilable logics; on the one hand it is an effective marketing device used to portray the EU as a champion for human rights and democracy on the internal and global arenas alike. As an instrument of foreign policy, the conditionality clause is effective and persuasive. In this context, the commitment is manifested through the juridification of the policy, and EU policy is legitimized by some of the inherent qualities of law, such as the principle of equality whereby equal cases are treated equally, and the principle of foreseeability, which establishes that certain action will render the same reaction if repeated.

However, juridification also brings high expectations on consistent application, compared to what regular foreign policy instruments normally would. As time has passed, the inconsistencies have grown more and more apparent. Paradoxically enough, the conditionality clause beckons the EU to come clean on its rhetoric regarding the universality of human rights, since it is becoming more and more obvious that all violations of human rights are not equal. In fact, based on the evidence of invocation shown above, some are more equal than others.

So, although the EU's practice of conditionality sometimes carries the traits of dissociative identity disorder, there are reasonable and simple explanations as to why this might be the case. In this chapter, I have pointed to the impossibility of joining the idea of development cooperation measures being illegal lest they contribute to the general objective of promoting human rights, with the idea of considering many different political interests before deciding whether or not to invoke the conditionality clause in the ACP-EU Agreement.⁹² Likewise, I have argued that the EU's contention that human rights are universal and indivisible is impossible to reconcile with the very sparse practice of calling other states to consultations, especially so in the light of the HRC's estimation of the situation for human rights protection in those of the ACP-states that fall under its jurisdiction.

92 "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(1998) 148, Section III.C.12.

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