An Inquiry into the Compatibility of the Demo-Conditionality with State Sovereignty in International Law
An Inquiry into the Compatibility of Demo-Conditionality with State Sovereignty in International Law

Special Focus: The Relations between the European Union and the African, Caribbean and Pacific Countries

Richard Juma Nyabinda
This study examines the issue of compatibility of demo-conditionality with state sovereignty in international law. From a practical perspective, it examines the state of the science with respect to the enforcement of demo-conditionality, in the context of the unique relationship between the European Union and the African, Caribbean and Pacific countries.

The practicality of any argument declaring certain norms to be compatible with state sovereignty rests on an assumption that it is possible to distinguish which norms are compatible from those which are not. The validity of such an assumption depends on whether a universal workable test with which to draw this distinction, and its accompanying requirements, has been or can be developed. Therefore, the starting point of this study is to investigate whether such a universal test exists, and if so, what its requirements are. The author reaches a legally appropriate conclusion as to which norms are compatible with the principle of state sovereignty and which not in the international legal system.

Thereafter, an investigation is undertaken with regard to the legal premises invoked to justify the compatibility of the demo-conditionality with state sovereignty. To this end, two levels of analysis (also referred to here as two paths) are followed. The first level of investigation concerns the proposition for demo-conditionality’s being premised upon adherence to new treaty obligations governing the parties’ observance of democratic norms. In this context, the examination focuses on Article 25 of the International Covenant on Civil and Political Rights, 1966 as the relevant provision. Other single-issue human rights instruments are also examined to establish whether they compliment Article 25. The second level of investigation explores the possibility for demo-conditionality's compatibility being premised upon obligations of State parties, which arise from the various development co-operation instruments adopted over the years. Here, emphasis is placed upon the question of whether or not these instruments advocate the inclusion of demo-conditionality in development co-operation between donors and recipients of aid. This study ultimately reaches a legally appropriate conclusion, at both levels of analysis, concerning demo-conditionality's compatibility with the principle of state sovereignty. At this juncture, a recommendation is made as to which of the two paths is the legally safer one for the pursuit of the demo-conditionality in development co-operation.

On the question of what constitutes a more successful international approach to the establishment of democratic governments in the South, this study has undertaken a comparative analysis, making suggestions with respect to two models: the "Enforcement Model", based upon coercive enforcement measures, and the "Managerial Model", based upon an approach of co-operative dialogue.

Finally, the study examines the state of the science with respect to enforcement of demo-conditionality, with a focus on the special relationships between the European Union and the African, Caribbean and Pacific countries. This is designed to provide a degree of insight into the practical aspects associated with the enforcement of demo-conditionality.

Key words: International law, State Sovereignty, Donors and Recipients, Development assistance, Human Rights, Free and Fair Elections, Democracy-conditionality, and the European-the African, the Caribbean and the Pacific countries.
To my Father:
Nyabinda Kondigo
I have now reached the point where it is now time to thank all those who have assisted, supported or simply been available around me during my time as a doctoral candidate.

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Uppsala, 21 January 2011
Richard Juma-Nyabinda
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<td>AASM</td>
<td>Association of African States and Malagasy</td>
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<td>AC</td>
<td>Africa Confidential</td>
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<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<td>ACP</td>
<td>African, Caribbean and Pacific</td>
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<td>AJCIL</td>
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<td>IBRD</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>ODIHR</td>
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<td>Security Council Official Record</td>
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<td>Treaty on the European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNTS</td>
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<td>USTS</td>
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<td>Va JIL</td>
<td>Virginia Journal of International Law</td>
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<td>WLR</td>
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<td>Yearbook of World Affair</td>
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<td>YILC</td>
<td>Yearbook of the International Law Commission</td>
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PART I

THEORETICAL FRAMEWORK
1 The Subject Matter of the Inquiry and Framework of the Study

1.1 The Subject Matter of Study

The main aim of this study is to investigate the issue of the compatibility of demo-conditionality with state sovereignty in international law,¹ and with those findings, clarify the legitimacy of this conditionality in development co-operation. Since the demise of the Cold War, and into this new millennium, the demand for the holding of free and fair elections has often been a condition for international development co-operation. Thus, in partnership agreements between major donors and the recipient countries,² the former insist on the inclusion of a clause³ to the effect that the provision of foreign aid⁴ will be subject to the compliance of national governments, with the


² In this study, the terms “conditionality recipients” and “conditionality actors” are taken to mean recipient countries of development assistance and donors of development assistance, respectively.

³ In this study, for the sake of simplicity, where the expression “democracy conditionality clause” is normally used “demo-conditionality” is used instead. For a thorough study of political conditionality clauses (i.e. human rights, democracy and rule of law clauses), see Andreas Moberg, “Villkorsklausuler. Om avtalsklausuler som utrikespolitiskt instrument” Iusjus Förlag, 2009 (hereinafter cited with reference- http://hdl.handle.net/2077/18910. For the supervision of these election elements in these clauses, see, International IDEA Code of Conduct for the Ethical and Professional Observations of Elections, International IDEA Code of Conduct Series 1 (Stockholm, International IDEA, 1997).

⁴ The term “foreign aid” is used here to mean a tool of intervention. See Peter J. Shraeder, "Intervention in The 1980s: US Foreign Policy in The Third World"; pp.63-68. In the context of this study, the cutting of aid includes not only comprehensive restrictions targeting the
holding\textsuperscript{5} of parliamentary and presidential elections which conform to the requirements of free and fair elections. The stated objective of this conditionality\textsuperscript{6} is to promote the establishment of democracy\textsuperscript{7} as a form of governance in the South.

International law recognises the principle of state sovereignty as granting a state exclusive jurisdiction of its territory, resources and people. Inherent in the very nature of sovereignty is the ongoing prerogative of the sovereign entity to determine the shape of its governing institutions through internal processes, without interference in any form from outsiders.\textsuperscript{8}

On the part of some recipients of aid, the principle of state sovereignty is still valued as the cornerstone of "international relations, essential to protecting their recently gained political independence".\textsuperscript{9} Therefore, some recipient countries\textsuperscript{10} resist vehemently any developments within the international system such as demo-conditionality, which tends to undermine the principle of state sovereignty.

\begin{itemize}
\item Holding\textsuperscript{5} of parliamentary and presidential elections which conform to the requirements of free and fair elections. The stated objective of this conditionality\textsuperscript{6} is to promote the establishment of democracy\textsuperscript{7} as a form of governance in the South.
\end{itemize}


\textsuperscript{6} The democracy conditionality clause is hereinafter referred to in this study as "demo-conditionality", and is associated with one of two models for enforcement of treaty obligations: the "Enforcement Model" and the "Managerial Model". The former, which includes economic sanctions and military intervention, relies on coercion. For this distinction, see, Abraham Chayes and Antonia Hander Chayes, "The New Sovereignty Sovereignty:Compliance with International Instruments", Harvard University Press, Cambridge, Massachusetts London, England,1995, Chapter 1, 1-27. A shift in emphasis from coercive to cooperative strategies is also becoming more apparent in contemporary domestic law enforcement. See Malcolm Sparrow, "Imposing Duties: Government's Changing Approach to Compliance" (Westport, Conn.; Praeger,1994). See also Chapter 13 of this study for a discussion of these models in the context of ensuring compliance with respect to demo-conditionality.


\textsuperscript{8} See e.g. the UN General Assembly in the unanimous "1970 Declaration on The Principles of Law Concerning Friendly Relations and Co-operation among States in Accordance with The UN Charter", (hereinafter cited as "The Friendly Relations Declaration", GA Res. 2625(XXV)(1970).

\textsuperscript{9} For a detailed list of writings on state sovereignty, see infra note 132

To justify\textsuperscript{11} the enforcement of demo-conditionality, the donors predicate its adherence upon new treaty obligations regarding the parties’ observance of democratic norms,\textsuperscript{12} and also upon global development co-operation instruments adopted over the years.\textsuperscript{13}

From the donor's perspective, the doctrine of sovereignty has lost much ground in recent years in view of increasing international interdependence, and in this context, it is no longer possible to wall off a State's internal political affairs using state sovereignty as a defence. That could only be done, according to the donors, when the debate was about, for example, whether the criticism of a country’s human rights performance constituted an infringement upon sovereignty. Such a debate, in their view, is already settled.

Some recipient countries, however, resist vehemently any developments within the international system which tend to undermine the principle of state sovereignty. International law recognises the principle of state exclusive jurisdiction of its territory, resources and people. Inherent in the very nature of sovereignty is the ongoing prerogative of the sovereign entity to determine the shape of its governing institutions through internal processes, without in any interference in any form from outsiders.\textsuperscript{14}

On the part of some recipients of aid, the principle of state sovereignty is still valued as the cornerstone of international relations in order to protect their recently gained political independence.\textsuperscript{15} The demo-conditionality infringes upon the principle of state sovereignty.\textsuperscript{16} Hence, these countries question the legitimacy\textsuperscript{17} of the demo-conditionality in international law.

The practicality of any argument declaring that certain norms are compatible with state sovereignty rests on an assumption that it is possible to distinguish which norms are compatible from those that are not. The validity

\begin{itemize}
\item \textsuperscript{11} For the role of justification, see the discussion in Chapter 13 of this study. For the literature on the subject, see, Philip E. Tetlock, Linda Skitka, and Richard Boettger, “Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity and Bolstering”, \textit{Journal of Personality and Social Psychology}, 57, no.4 (1989); p.632. See also Paul Anderson, “Justifications and Precedents as Constraints in Foreign Policy Decision-Making”, \textit{American Journal of Political Science}, 25, no.4 (Nov.1981); 740: ”Politics” to a very large extent consists of making statements justifying past and future decisions, and critiquing justifying actions made by others”, citing Keel Goldmann, \textit{International Norms and the War between States} (Stockholm: Laromedelsforlagen, 1971), p.22.
\item \textsuperscript{13} For these instruments see, Chapter 7 and 8 of this study.
\item \textsuperscript{14} See, Friendly Relations Declarations”, GA Res.2625(XXV)(1970),supra note 8.
\item \textsuperscript{15} For a detailed list of some of the writings on state sovereignty, see infra note 132.
\item \textsuperscript{16} See, Robert Mugabe’s strong argument concerning the Zimbabwe Elections, 2008 Daily Nations(Kenyan Newspaper) ,May and June,2008.
\item \textsuperscript{17} For the legitimacy of norms, see Richard Juma-Nyabinda, “The Requirements of Democratic Elections in International Law”, supra note 7,p.48.
\end{itemize}
of such an assumption depends on whether a workable test has been or can be developed, with which to make this determination. With this in mind, the broad questions addressed by this study are as follows. How does one go about differentiating between the norms that are compatible with state sovereignty and the ones that are not? Does a universal test for drawing this distinction exist? If so, what are the requirements of this test? Does demo-conditionality meet these requirements of compatibility, or not?

1.2 Delimitation of the Study

The subject matter of this study is restricted in scope as follows. The first delimitation concerns the discussion of compatibility of demo-conditionality with state sovereignty. Here, the analysis will take two routes. The first will be restricted to Article 25 of the International Covenant on Civil and Political Rights, 1966, and therefore to the State Parties to it. This does not mean that other global treaties will not be examined, since they might potentially reinforce the content laid out in ICCPR, 1966. Indeed, the discussion will also include global development co-operation instruments adopted over the years.

The second delimitation concerns the definition of the term "democracy" in the context of the demo-conditionality. This is quite significant to this study for two main reasons. To begin with, there are problems surrounding that term’s definition, as indicated below. The reason for this is that conditionality in development co-operation always features a cocktail of requirements, such as good governance, fundamental human rights and a free market.

The definition of democracy adopted in the context of our discussion of demo-conditionality will be restricted to the requirements of free and fair elections, as defined below. In the context of the special focus on development co-operation between the European Union and the African, Caribbean and Pacific nations, the case studies to be examined are delimited to actions taken up to 2005 within the framework of two main agreements: the Lome Conventions, and the Cotonou Agreement.

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18 See Part II, Chapter 5 of this study.
19 See Chapters 7 and 8 of this study.
20 For the definition and scope of conditionality see infra Chapter 2, of this study.
21 See Chapter 2 of this study, concerning terminological clarifications.
22 See, the European Human Rights Clause discussed in Part VI, Chapter 15 and 16 of this study.
23 See also the definition of democracy in Chapter 2 of this study.
24 For these agreements see, Part IV, Chapters 14, 15 and 16 of this study. New negotiations on EU-ACP countries within the framework of the Cotonou Agreement have been taking place since 2006, but no new results have been witnessed; therefore, these do not form part of this study. See New African 42 Year*August/September 2008*No.476. The reason for this is
The third delimitation concerns the sources studied with regard to the requirements of the right to free and fair elections; or rather, the requirements of democratic elections. Donors, who are the owners of the “demo-conditionality” initiative, and recipient countries “as the targets”, have developed regional international laws concerning the requirements of free and fair elections. These regional instruments will not be dealt with in this study. Instead, attention is focused on universal treaty instruments, which are supposed to govern the relations between donors and the recipients as such.

Furthermore, the examination of any universal treaty on the right of people to self-determination as one of the sources of the electoral aspect of democracy will be excluded. This does not in any way mean, of course, that the legal value of the concept is in doubt. Rather, it is not included because of the controversy surrounding the term "people". This term is not defined in any of the instruments mentioning the right to self-determination. Nevertheless, I must avoid this particular controversy since it is not directly relevant to the objectives of this study.

Things should be called by their appropriate name. If one is interested in the source of this particular aspect of democracy, then one should seek those instruments and documents which explicitly embody it. Accordingly, a consideration of the global instruments and documents embodying the “right to political participation” under international law is most relevant. In this context, it is also significant to point out that the scope of this study is to investigate whether the right to free and fair elections – including its elements as defined – is embodied in any global treaty. In other words, this investigation will not include an additional debate on the merits of whether this right

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that what has already transpired between these two development partners within the Lome Conventions and Cotonou is adequate for addressing the central question of this study, i.e. whether or not the EU pursues demo-conditionality in its relations with ACP countries.

25 See Richard Juma-Nyabinda, "The Requirements of Democratic Elections in International Law", supra note 7. See also Part IV, Chapter 14 of this study, which refers to the regional instruments.


27 Self-determination appears in both Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, both of 1966. (Hereinafter referred to as ICCPR and ICESCR, respectively.


29 For the definition of treaties, Chapter 4 of this study. See also Vienna Convention on the Law of Treaties, supra note 161.
is part of customary international law or general principles of international law.

1.3 Method and Materials

This is a legal analysis which is undertaken within the confines of the sources of international law. There has always existed a controversy among international lawyers, however, as to what constitutes these sources of international law.

There are reasons to expand somewhat on this issue, namely: for the process whereby rule of international emerge. Here, in addressing such disagreement, Article 38(1) of the International Court of Justice is widely recognised as the most authoritative statement on the sources of international law. It reads:

“\textit{The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting parties; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nation; as subsidiary means for the determination of rules of law}.”

Although this formulation is technically limited to the sources of international law that the International Court must apply, in fact, the function of the Court is to decide disputes submitted to it “in accordance with international law”. Since all Member States of the United Nations are ipso facto parties to the Statute by virtue of Article 93 of the United Nations Charter, there is no serious disagreement that the provision expresses the universal perception as to the enumeration of sources of international law. The states that are non-

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33 See e.g. I. Brownlie, Principles of Public International Law, supra note 1, and Oppenheim’s International Law, supra note 31, p.24 and M. O. Hudson, The Permanent Court of Justice, p.1934, pp.601 et seq.

34 Ibid.
members of the UN, of which Switzerland\(^{35}\) has always traditionally pro-
vided the obvious example, can specifically become parties to the Statute of
the Court.

There is controversy over the sources listed above, concerning whether or
not they should be considered exclusive or not.\(^{36}\) Thus, there are some who
ascribe to the idea that there are other possible sources of international law.\(^{37}\)
From a methodological point of view, it is therefore appropriate to point out
what is specifically embraced by this study as sources of international law,
and discuss their value.

In deciding upon the sources of international law to be used in this study,
one is always confronted with the following question, namely: “What is in-
ternational law?” This is a global question\(^{38}\) from which a number of others
follow, including: what is the nature of international law? Is it a body of
rules only? What is the nature of these rules? What kinds of reasoning are
involved in their application? To whom do they apply? Who regulates the
application of international law? Why should anyone comply with it? Where
is international law to be found?

All of these questions are interrelated,\(^{39}\) and it is sometimes impossible to
attempt to answer one without touching upon the other. The reader might
add yet one more question, namely: why must all of these basic questions
reappear in this study? The reasons for this are the following: firstly, they
provide guidance as to what this study considers as sources of international
law; and secondly, they provide clues as to what it regards as this interna-
tional law. International lawyers, for instance, who argue that international
law is only hard law or a combination of soft and hard law, are already
adopting a certain theory and approach in making such judgements.

Occupying centre stage in the debate on the theory of and approaches to
international law are rival visions of international law, namely: the “Positiv-
ists”/ “Traditionalists” on the one hand, and the “Process goal- oriented”/
"Progressives" on the other hand.\(^{40}\) The former group holds that international
law only derives from traditional sources, while the latter group is comprised
of international lawyers adopting the holistic view whereby the law is both a

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\(^{35}\) Switzerland is today a member of the United Nations.

\(^{36}\) See, Maya Kirilova Eriksson,, "Utmärna mot den traditionella folkrätten, 13 Mennessker og
retheger (19959, pp.176-201.

\(^{37}\) See, amongst other writers, H.G. Schermers, International Organisations, Resolutions,
EPIL II 1995, 1333-36, and B.Sloan, United Nations General Assembly Resolutions in Our

\(^{38}\) See, Higgins, Nature And Function of International Law, supra note 1.

\(^{39}\) Higgins’ views on these matters are elaborated in Integration of Authority and Control:
Trends in the Literature of International Law and Relations, in B. Weston and M. Riesman

\(^{40}\) See, for example, Sloan, The Binding Force of a Recommendation of the General Assembly
of the United Nations, 1948, Brit.YB: Lint’l L, at 36 for the discussions held by the "Progressive"
and "Traditionalist" Schools of Thought concerning whether or not the UNGA resolu-
tions create international law.
set of rules and process goal-oriented, and law-making a dynamic process. Of course, few international lawyers would wish to deny the dynamic quality of those processes, even where strict compliance with those sources articulated in Article 38 of the Statute is required.\footnote{According to Georg Schwarzenberger, Article 38 sources provide "scope for the dynamics of international law". See infra note 45. See, also Cheng, B." On the Nature and Sources of International Law", in:Cheng, B (ed), \textit{International Law Teaching and Practice}. (London: Stevens and Sons, 1982), pp. 203-233.} Accordingly, the process-oriented approach must evaluate "non-traditional" sources.

As Ingrid de Lupus argues, international law is not very static and therefore, its sources will be "ever dynamic and changing".\footnote{Bin Cheng, Ibid. pp. 45 and 134. See also, B. Cheng, on Custom: \textit{The Future of General Practice in a Divided World in the Structure and Process of International Law} (eds.) R. St.J. Macdonald &. Johnston), Dordrecht, 1983.} It is this process of "constant evolution" that concerns international development lawyers.\footnote{See Ibid.} Their question is, does this approach mean injecting ideology into international law, and therefore potentially undermining it?

In brief, the answer is: probably not. By addressing the legal implications both present and contingent upon modern changes in international society, and by emphasising the dynamic qualities of the international legal system including its capacity for change and development, international lawyers concerned with development issues do not undermine international law, but contribute to its strength and vitality. Accepting soft law as "law" means allowing a new perspective on well-established rules of general international law, reflecting the transformation of international society and the presence of new subjects of international law, including a preponderance of developing countries. International law should be considered to have become a truly universal system, in the shaping of which new members of the international society can play a full part.

Analysing the transformation and development of law in modern international society does not necessitate an ideological straitjacket or the rejection of classical principles of international law, particularly where law-making processes are concerned. The primary concern is with the process whereby informal prescriptions, such as those embodied in General Assembly resolutions,\footnote{For the literature on the possible legal effect of UNGA resolutions on international law creation, see Sloan, supra note 37.} may crystallise into legal rules.\footnote{"The process of picking up those informal prescriptions makes law", Ian Brownlie, \textit{The Methodological Problems of International Law and Development}, (1982) \textit{Journal of African Law}, pp. 9-10.}

Whatever the debate over the current normative value of today’s "soft law", it should also be accepted that this could be tomorrow’s "hard law". The preservation of the distinction between \textit{lex ferenda} and \textit{lex lata} does not preclude analysis of statements and principles, which provide the basis for
future legal rules. This emphasis on the dynamic of international law–
making, in other words, does not imply a challenge to the system itself.

It does not seem sensible for any international lawyer to insist on ignoring
phenomena which may have legal significance, simply because they inhabit
what Alain Pellet has called the “twilight zone”, instead of full normative
daylight.46

Given these facts, the analysis in this thesis goes beyond the basis of the
primary sources, i.e., treaty and customary law. In addition, judicial deci-
sions, doctrinal writings and declaratory pronouncements (UN and regional
declarations and resolutions) relevant to certain parts of this study will be
consulted.

Concerning the hierarchy of these sources, a distinction is made by some
writers between conventions, international customs and principles of law as
the three exclusive law-creating processes, whereas judicial decisions and
academic writings are regarded as the law-determining agencies which deal
with the verification of alleged rules.47 While recognising that this distinction
might be problematic, I use it in my analysis of the compatibility of demo-
conditionality with the principle of state sovereignty, as will be evidenced
later in this study.48 One implication is that a greater emphasis is placed on
the primary materials, particularly treaties, than the subsidiary ones.49 In
practical terms, it signifies that the conclusions to be arrived at in this study
cannot be based entirely on, e.g., a limited number of judicial decisions or
writings by publicists; this is particularly true when an analysis based upon
the treaty points in another direction. It is quite clear, however, that reliance
on hard law alone is a rather formalistic approach to determining law, and
will not find support among all legal scholars.

Some international lawyers maintain that the distinction between primary
and subsidiary materials made in Article 38 is not an accurate description of
the real impact of the case law as a source of international law.50 Yet, in
light of the relatively unambiguous wording of Articles 38 and 59 of the
Statute, this distinction would seem to be the least controversial.

48 See, Chapters 10, 11 and 12 of this study.
49 See, Ibid.
1.4 The Significance of the Study

If this study had merely set out to examine the legal status of recognition of, respect for, and protection of fundamental human rights, e.g. against genocide, torture, and slavery, the scientific contributions of this thesis would be questionable. Most international lawyers today agree that respect for these rights is obligatory, and that they are legal norms and fundamental human rights.

This study makes the following significant scientific contributions. The main one, which is quite new, is that it clarifies the state of the science with regard to the relationship between state sovereignty and demo-conditionality in international law.

There are a number of other contributions made as well. For instance, it clarifies the relationship between state sovereignty and other international norms in contemporary international law. This is significant in light of globalisation and other recent global changes, which have the potential to greatly impact the way in which this principle should be viewed.

Another significant contribution lies in the idea concerning the legal status of the right to free and fair elections and its requirements under international law. The democracy discussion occupies a top position as one of the most important items currently on the international agenda, and prone to international disputes. There is controversy, for example, concerning whether or not outright dictators, who deny their citizens a government to which the people may in some manner be said to have manifestly consented (“popular sovereignty”), should face external pressure. From a North–South perspective, this is a central issue. Thus,

The other scientific contribution is the treatment of a practical approach to demo-conditionality; i.e., its enforcement. The case studies examined depart from studies that have generally been more theoretical in approach, instead examining contemporary practices in this context.

Finally, this study should be viewed in the context of its contribution to the new EU initiative, “An International Society based on the Rule of Law”. As a follow-up to the GAERC decision of May 17 on "An International Society Based on the Rule of Law", Sweden, amongst other European governments, has developed and submitted some ideas for the Council, Secretariat and Commission's consideration. At a general level, Sweden's shared vision of a rule-based international order has implications for its policy. One of the proposals, amongst others that follow, is that human rights – of course, in-

51 See, Part III Chapter 11, on “fundamental human rights”, a category to which slavery, torture, and genocide are supposed to belong.
53 See Regeringskanliet, Utrikesdepartment, Premoria, 2005-09-06.
cluding democracy – should continue to permeate the Union's policy in the areas of trade and development. The human rights provisions of the Cotonou agreement which have received detailed treatment in this research, and, of course other trade and co-operation agreements, are important tools that could be used more effectively and consistently. This study thus informs this relationship between the EU and ACP countries.

International lawyers, both domestic and international policymakers, diplomats, human rights academicians, and activists stand to benefit greatly from the results of this study.

1.5 Conclusion

In this chapter, the study’s subject matter and theoretical framework have been explained. It is now possible to proceed to a discussion of the specific terminologies to be used in the analysis of this Study.
2 Terminological Clarifications

2.1 Introduction

Certain key terms are worth defining at the very beginning of this study, given that such words or concepts form an integral foundation of the themes discussed in the study and appear quite frequently. Therefore, the following terminologies are defined: sovereignty, donors and recipients, development assistance, human rights, requirements of free and fair elections, good governance, sustainable development, and aid conditionality.

2.2 Sovereignty

The term "sovereignty" indicates supremacy and superiority. These qualities are associated with the legal capacity of the State to act in a supreme and competent manner in any field, such that no other authority can override its functions.\(^{54}\) In its modern context,\(^{55}\) the concept of sovereignty is traceable to the Peace of Westphalia in 1648. This marks the date on which the emerging nation-states of Europe, weary of war, agreed to live in peace with one another on the basis of sovereign equality and non-interference in the other’s national affairs.\(^{56}\)

This concept has since become the linchpin by which governments, even those lacking a moral basis of authority, continue to forestall intervention\(^{57}\) from other countries. It is a political principle, given recognition both in customary international law and treaties.\(^{58}\)

\(^{54}\) For the literature on State sovereignty, see infra note 132.

\(^{55}\) Ibid.


\(^{58}\) Article 2(4) of the UN Charter and Article III (2) of the OAU Charter, for example. See Belatchew Asrat, "Prohibition Of Use Under The UN Charter:A Study of Article 2(4),Doctoral Thesis,Uppsala,1991..See, also Chapter 4 of this Study.
2.3 Donors and Recipients of Aid

2.3.1 Introduction

The two major principals in development co-operation are donors and recipients of aid. To use a terminology adopted throughout this study, they are stake-holders in co-operation activities.

2.3.2 Donor Countries

This study covers only inter-state relations. There are two groups of states which provide development assistance to developing countries: capitalist developed states from the West, and Marxist/Socialist ones. In the context of this study, donor countries are also referred as conditionality actors.

The Developed Capitalist Countries. Developed countries as a term refers to the nations consisting primarily of the United States, Canada (North Americas), Japan, Australia, New Zealand, and the other Western European countries that have well-developed and mature industrialised economies.\textsuperscript{59} Included today in this category are also the former Central and Eastern European countries that have joined the European Union, bringing its number to a total of twenty-seven. Japan, being at the same level of economic development with the West despite having a completely different culture, is also a significant donor.

The developed countries contribute the greater portion of development assistance in their bilateral relations with developing countries. These developed countries are also the majority contributors to financial institutions used for these purposes such as the World Bank and IMF. Therefore, they have the majority number of votes, which gives them greater control over the policies of these institutions.

Marxist/Socialist countries. The total number in this group has diminished, and continues to do so in the aftermath of the Cold War. Today, such countries include North Korea, China, Cuba, etc.

In development co-operation – with the exception of the newly established Sino-African relations\textsuperscript{60} – the amount of development assistance made available by these countries is not very large in comparison with the West. They always provide development assistance to developing countries that are allied with them, e.g. China and Cuba. However, when it comes to devising the rules governing development co-operation, their influence cannot be understated.\textsuperscript{61} Thus, in the context of China, it insists on the principle of sov-

\textsuperscript{59} See J. Ingram, \textit{International Economic Problems} 73 (2d.ed.1970), Manfield, at p.513. With the admission of former Eastern European countries into the New Europe, the number of Member States must be deemed to have increased.

\textsuperscript{60} For China’s role as Africa’s new economic partner, Professor Ken Kamoche, "Sino-African cooperation at what price?" \textit{Daily Nation}, 11/6/2006.

\textsuperscript{61} See,infra note 62.
ereign equality as paramount. Given this, fears have been expressed concerning Sino-African Relations, with regard to respect for democracy and human rights. The former World Bank President, Paul Wolfowitz, "was quoted as saying China and its banks were ignoring human rights and environmental standards when lending to developing countries in Africa.”

2.3.3 Recipient countries

This term denotes developing countries that are the recipient of development assistance. “Developing countries”, in turn, refers to the diverse group of more than 120 politically diverse States, most of which achieved their independence after World War II. These countries share several characteristics:

(i) widespread poverty;
(ii) high rates of population growth;
(iii) low levels of capital and technology;
(iv) uneven income distribution;
(v) agricultural dependence;
(vi) and slow industrial growth.

Certain developing States have formed a pluralistic association designed to achieve a number of specific objectives relating to fundamental issues of international economics and politics. These States are variously labelled as the “Group of 77”, the “less developed countries” (LDCs), “The South” and the “Third World”.

However, the term has become somewhat ambiguous in recent years, since nations historically included like Mexico, Brazil, South Korea and Taiwan (Tigers) now have industrial sectors of considerable size. For purposes of this study these countries are referred to interchangeably as “conditionality recipients”, “the target”, or “aid-recipient countries”. These terms are used interchangeably.

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62 See, Gao Feng, *The Principle of Sovereign Equality in 21st Century*, where he quotes Qian Qichen, VC Premier and Foreign Minister of China, at the 50th session of UNGA, UN Doc.A/50/PV.8., where he said: that “the core f the UN Charter is the principle of equality between sovereign States and non-interference in each other’s internal affairs.”

63 See,”Wolfowitz criticises China over Africa lending” Story by REUTERS Publication Date: 10/25/2006, London. For comments on Sino-Africa relations in this context, see also an article in Swedish Daily Newspaper, *Aftonbladet, Fredag* 2 February 2007, p.16.

2.4 Development Assistance

Development assistance or aid is defined by donors in different ways. For instance, public assistance has been defined by the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC) as:

(i) that given “by government or government sponsored institutions”,
(ii) which is concessional in character containing a grant element of at least “25%”,
(iii) to “directly enhance economic welfare and development”.66

In an analytical study prepared for the UN Institute for Training and Research (UNITAR), the terms “assistance” and “aid” are also confined to the “official financial flows” taking place in bilateral arenas (government to government transfers) and multilateral arenas (transfers from the International Bank of Reconstruction and Development (World Bank), the International Monetary Fund (IMF), the regional development banks, etc.).67 Although these are the meanings most commonly used, the term also covers technical assistance and aid in kind, i.e., food supplies.

2.5 Sustainable Development

According to Wikipedia:

"Sustainable development is a pattern of resource use that aims to meet human needs while preserving the environment needs so that they can be met not only in the present but in indefinite future".

The term was first used by the World Commission on Environment and Development (WCED), also known as the Brundtland Commission. Its report coined what has been the most often-quoted definition:

65 The terms development assistance, aid, or simply Official Development Assistance (ODA) are used interchangeably in this study.
68 A further distinction is made between "financial" and "monetary" assistance. While the former consists of development projects, the latter is intended to meet international obligations, especially involving debt. The aid provided by the IMF is a typical illustration of "monetary" assistance. See G. Feuer and H. Cassan, Droit International de Development 385-86(1985).
"as the use of natural resources in a manner that meets the needs of the present without compromising the ability of future generation to their own needs".69

The report ends with a dramatic appeal based on the urgency of achieving sustainable development. What, then, are the pillars comprising it?

Pillars of Sustainability. Sustainable development is the generic term for a broad range of concerns which in turn can be classified into three overall concerns: social welfare, economy and the environment.70 This three-pillar model of sustainability is found in the statements of several international instruments. For instance, the World Commission on Environment and Development-Brundtland Report on "Our Common Future " in 1987 71 states:

"We are unanimous in our conviction that the security, the well-being and the very survival of the planet depend on such changes, now"72

One of the factors to be overcome is environmental degradation. But this must occur without foregoing the needs of economic development, social equality and justice. A truly sustainable development therefore must be characterised by a degree of solidarity between different generations and nations.

Following the WCED Report, a three-pillar concept has emerged and been formally agreed upon in official documents,73 such as the UN Conference on Environment and Development (UNCED) of 1992, which bridged the gap between developmental needs and environmental protection.74 The Rio documents have altered the original scope of the notion of sustainable development, requiring a kind of three-pronged model focused simultaneously on “sustainable use of the resource”, economic development for the poor, and economic growth for all. These documents also recognise the three pillars of sustainability.75

69 The World Commission Development on Environment and Development (WCED) Report, also known as "Brundtland Commission, 1987(Report 2.1). The first number refers to the relevant chapter, the second to the paragraph within that chapter. Further statements, see infra note 71.
70 See, Gerd Winter, "A Fundamental And Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report, Chapter 1.2 in, Hans Christian Bugge and Christian Voigt, "Sustainable Development in International and Nation Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where can we go From Here?", in http://w.w.w.europalawpublishing.com.
71 The Brundtland Commission, formally the World Commission on Environment and Development(WCED) but known by its name Gro Harlem Brundtland, was convened by the United Nations in response to the 1983 General Assembly Resolution A/38/161-"Process of preparation of the Environmental Perspective to the Year 200 and Beyond. Welcoming the Establishment of such a Commission".
72 See, supra note 69 for the Report.
73 For an account of the semantic development of the concept, see, supra note 69.
74 Conference on Environment and Development (UNCED) of 1992, see, infra note 75.
75 Rio Declaration is discussed extensively in Chapter of 8 of this study.
This concept, then, recognises that development and environmental concerns go hand in hand and should be examined simultaneously. The advocates of sustainable development maintain the need to examine the rights and responsibilities of States, both in a bilateral context and in relation to the international community.

Industrialised countries, not surprisingly, may be apprehensive about the conservationist bias of the Brundtland Report, which threatens to regulate access to natural resources and ultimately modify lifestyles, implying slower economic growth. For developing countries, on the other hand, the term holds a certain potential to re-affirm the responsibilities of industrialised countries with respect to assistance. These responsibilities were de-emphasised, if not lost altogether, with the demise[advent?] of the “new international economic order” and, of course, under pressure from expanding “market-oriented approaches”.

With the interpretation of “sustainable development” used in the Rio principles, the concerns of industrialised and poor countries alike are given equal textual weight. States now subscribe to a single and uniform concept from which to derive protective initiatives. This was primarily accomplished through their adoption of the 1992 Rio Declaration on Environment and Development, which endorsed the concept of sustainable development in the accompanying Agenda 21, presenting that concept in unprecedented practical detail.

There exist many additional international, and even national declarations that have propagated the concept. The WTO Ministerial Declaration at Doha of 2001, for instance, states the relationship between trade, development and environment:

"We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".

The Johannesburg Plan of Action of Implementation of 2002 also framed the principle as follows:

"These efforts will also promote the integration of the three components of sustainable development, social development and environmental protection as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protect-

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76 Supra note 69.
77 For the discussion on Rio Principles, see Chapter 8 of this Study.
78 Ibid.
80 For Johannesburg Declaration, see http://www.un.org/esa/sustdev/documents/WSSD_POI-PD/English/POIToc.htm
ing and managing the natural resources base of economic and social development are overarching objectives of, and essential requirements for sustainable development”.

Another attempt to balance the different interests is contained in Article 2 of the EC Treaty:

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Article 3 and to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high level of protection and improvement of the equality of the environment, the raising standard of living and equality of life, and economic and social cohesion and solidarity among Member States”.

These three pillars of sustainable development are recognised to apply even at the national level. Thus, in the definition by the "German Council for Sustainable Development", sustainability means:

"to equally consider environmental, social and economic aspects. Thus, future-oriented management means: We have to leave our Children and grand Children an intact ecological, social and economic system. The one cannot be achieved without the other”.

The topic of how to implement sustainable development will not form a part of this discussion.

2.6 Human Rights

The Concept of Rights. In searching for a proper definition of human rights, the best place to begin is "rights". Here, a useful consideration is the dichotomy between right and obligation. As Hohefeld’s definition shows, a right is a chameleon-like notion. According to the writer, the term is ambiguously used to describe a variety of legal relationships. He identifies four different, correlative pairs of such relationships, broadly speaking. A "right" is often used in its strict sense of the holder being entitled to something, along with a correlative duty on the part of another. Sometimes, it is used to indicate immunity from the alteration of one’s legal status. Alternatively, it can indicate

81 Infra note 82.
a privilege to do something. And sometimes, it refers to the power to create a legal relationship.\textsuperscript{83}

It is evident that, according to Hohefeld, duty is the “invariable correlative” of a right “in the strictest sense”. This means that a right ”stricto sensu” cannot exist without a correlative duty. A similar thought has been expressed in modern rights-theory by Joseph Raz.\textsuperscript{84} He states that:

"…by definition rights are nothing but grounds of duties…". \textsuperscript{85}

However, according to Neil McCormick\textsuperscript{86} this notion of rights is not useful outside the narrow legal point of view. He prefers a theory which will assert the primacy of rights as grounds for identifying duties.

In the field of international law, Henkin remarks that:

“According to the common view, one has a legal right only against some other, to say one has a legal right against another is to say that one has a valid legal claim upon him and that the addressee has a corresponding legal obligation.”\textsuperscript{87}

In all of these views, despite their differences, there seems to be sufficient agreement over the necessary relationship between rights and duties. Accordingly, this study adopts this same understanding of rights.

Human Rights Defined. Human rights are, literally speaking, the rights that one has simply as a human being. As such these are equal, since we are all human beings. They are also inalienable in the sense that, no matter how inhumanely we act or are treated, we cannot become anything other than human beings.

Where do such rights come from? How do we determine the particular human rights that we have? Such philosophically vital questions are extremely contentious. In any case, for the purposes of contemporary international law and relations; we can take them as having been authoritatively

\textsuperscript{83} The words are used here in the sense ascribed to them in Hohefeldian analysis. In international law, privileges and immunities are words of art applicable to special contexts and often used without differentiation.

\textsuperscript{84} Joseph Raz., infra note 85.


confirmed by the principle of international respect for human rights, as a matter of treaty law.\textsuperscript{88}

\section*{2.7 Democracy and Election Elements}

\subsection*{2.7.1 Introduction}

The promotion of democracy, while not new, is a relatively recent objective in the context of foreign aid. For instance, when Sweden first formulated a comprehensive aid policy in 1961, promoting democracy was among the four overall objectives that were set. It should be pointed out, however that this particular objective was not actively promoted during the years that followed.\textsuperscript{89}

\subsection*{2.7.2 Definition of Democracy}

In many respects, democracy is a traditional example of a concept which is fundamentally contested. This is in great part due to the fact that there is not, nor is there likely to be, any final consensus on its definition.\textsuperscript{90} Of all the concepts included in "good government", democracy is surrounded by the most ambiguity; this includes the core concept itself. The question often asked is the following one: should democracy be limited to the substantive aspects, or the formal, procedural aspects involving an open competition between two or more political parties and free and fair elections?\textsuperscript{91}

In the context of this study, due to the emphasis on free and fair elections, a specific version of democracy\textsuperscript{92} has been adopted. Whereas the principle of democracy includes several aspects,\textsuperscript{93} this study deals only with a particular one;\textsuperscript{94} namely, the electoral aspect.\textsuperscript{95} This can therefore be described as a

\textsuperscript{88} For discussion of these instruments, see Chapter 10 of this Study.
\textsuperscript{92} On democracy as a subject, see, supra note 6. In particular see, Todd Landmann, “Democracy Analysis”, in International Institute for Democracy and Electoral Assistance, supra note 6. In this document, that author provides a rather in-depth and interesting definition, measuring, analysis and lacunae, and further work on just democracy.
\textsuperscript{93} For these aspects, See Richard Juma-Nyabinda", supra note 7. One of these aspects is the rule of law. For the rule of law from Swedish perspective, see, Per Sevastik(edn.), Legal Assistance to Developing Countries: Swedish Perspectives of Rule of Law, Norstedts Juridik AB, Kluwer Law International",Stockholm,1997.
\textsuperscript{94} See for comments on democracy and its recognition in any major international human rights law texts, in Chapter 5 of this study.
“minimalist” approach to this discussion over the meaning of democracy. This minimalist understanding of democracy in such narrow and process-oriented terms constitutes the main approach of international law. It is a non-teleological definition, which lists institutional criteria without revealing the underlying logic of the ends generating the list. Perhaps recognising the limited ability of outsiders to promote broad political change within states, international actors have come to use the term “democracy” to mean the essential procedures by which a democratic society functions.

There is a second, more expansive approach to the concept of democracy, which is to treat it as including several different aspects, encompassing substantive criteria, and based upon the understanding of democracy as an overarching vision of a democratic society. This is democracy understood in consequentialist terms, as one or a set of comprehensive visions of “the good life”. In other words, democracy is not simply concerned with the process of government, but is fundamentally connected to substantive goals. On this understanding of democracy, the relevant sources of law would be potentially infinite. All matters relating to political, social, economic, environmental and other rights could potentially contribute to democracy so defined. For our purposes, this broader reading of democracy will be excluded from discussion in this study.

2.7.3 The Elements of Free and Fair Elections

Is it possible to identify these elements? If so, what are they? There are two different approaches to categorising these elements which are proposed, respectively, by two international lawyers in the field. Gregory Fox divides them into four elements:  

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95 The term “electoral aspect of democracy” involves several factors, but in this study, this expression is sometimes replaced by the term, “democratic entitlement”, or for the right to free and fair elections and to political participation, simply “democratic elections”.
96 See the requirements of this aspect of democracy, in this same chapter of this study.
97 Thus, for what the term democracy means in a European context, see infra note 903. The term “democratisation” is used here to denote a process by which an authoritarian society becomes participatory.
98 See, infra note 99.
99 Such a broad conception of democracy is described in Thomas Christian, The Rule of the Many (Boulder, Colum. Westview Press, 1996). According to the Canadian Supreme Court, “democracy is not simply concerned with the process of government…but is fundamentally connected with substantive goals”. In the matter of Section 53 of The Supreme Court Act, R.S.C., 1985, C.S.26; and In the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada’s Set Out in Order in Council P.C.1996-1497, Dated September 30, 1996.
101 See, G.H. Fox, The Right to Political Participation in International Law", in Democratic Governance and International Law, edited by Gregory H. Fox and Brad R.Roth, supra note
“(i) universal and equal suffrage;
(ii) a secret ballot;
(iii) elections at reasonable periodic intervals;
(iv) and, an absence of discrimination against voters, candidates, or parties.”

Note that a "rights-based" approach is not employed here. Markku Suski, on the other hand, divides them into eight different categories:

“period elections, genuine elections, stand for election, universal suffrage, right to vote, equal suffrage, secret vote, free expression of the will of the electors.”

These elements have already been adequately elaborated, and no more clarification is necessary. The more important question is: what are the sources of the election elements beyond the global treaties, if any, that are to be explored in this study?

At the universal level, there are five main UNGA resolutions/declarations embodying the requirements of free and fair elections. The first one is the Universal Declaration of Human Rights, 1948. Its Article 21 states:

"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public services in his country.
3. The will of the people shall be the basis of authority of government; this shall be expressed in periodic and genuine elections, which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

This Article provides a minimum level of participation in government. Thus, Article 2(3) then states that "the will of the people shall be the basis of the authority", going on to clearly indicate how the will of the people shall be expressed. This latter section enumerates a number of election elements which constitute criteria for how elections must be held. If these are not satisfied, then the government cannot ground its authority in the will of the people. The other necessary election elements are: periodic elections, genuine elections, universal suffrage, equal suffrage, and the secrecy of the

7. See also, Richard Juma-Nyabinda, supra note 7, where this same later division has been applied.
103 See, Chapters 5 and 6 of this study.
104 The legal status of this instrument is discussed in Chapter 10 of this study; therefore, I will not deal with it here. See further, John Humphrey, The Universal Declaration of Human Rights: Its History, Impact and Juridical Character in: Ramcharan, B.G.(ED.), Human Rights: Thirty Years after the Universal Declaration, Nijhoff 1979, pp.21-37.
vote. All of these have been quite well-elaborated, and donors—“the owners of the demo-conditionality project”—are quite aware of what to expect from the recipient countries. Nevertheless, some further clarification of each of these factors is made in this study. The discussion of the legal status of the UDHR will be undertaken later on in this study.

The second source for the elements of fair and free elections is the UN General Assembly Resolution 742/1953 containing Factors Indicative of the Attainment of Independence or of Other Separate Systems of Self-government. The UN adopted this Resolution for situations involving non-self-governing Trust Territories, and to a lesser extent, for the implementation of the UDHR, 1948. The resolution has a fairly limited application, but nonetheless contains ideas and texts familiar from the UDHR, 1948 and develops these concepts further.

Upon closer examination of this UNGA declaration, it is clear that there are certain similarities between the resolutions, but also certain differences. Thus, for instance, it is evident that letter (a) adopts the language of the UDHR in making a fairly open-ended statement, but significantly, makes reference to the democratic expression of the will of the people. This resolution is of undoubtedly great significance for the establishment of the required electoral elements. In content, it reflects Article 21 of the UDHR, in which democracy is not prescribed nor defined. That word is not mentioned in any human rights documents in relation to participation. Instead, participation directly or through freely chosen representatives is the norm used, to which a number of other substantive human rights are connected. In (a), however, it does mention the word democracy.

105 The last election element is supplemented with reference to the possibility of organising equivalent voting procedures to compensate for a loss of secrecy, a dimension with a historical explanation.
106 See, infra, Chapter 5 of this study. See, Richard Juma-Nyabinda, supra note 7.
109 Ibid.
110 Ibid. Such as the existence of a choice on the part of the individual elector between candidates of differing parties, and the freedom of each individual to express his political opinions, support or oppose any political party or cause, criticise the government of the day, etc.
111 This point is emphasised by Markku Suksi, supra note 102, p.10.
112 It is the earliest resolution to have used the term “democracy”.
The third source where these elements are defined is the UNGA resolution on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.\textsuperscript{113}

The fourth is the 1992 Declaration on the Rights of Persons Belonging to National, Religious and Linguistic Minorities.\textsuperscript{114} The purpose of this last Declaration should be viewed in the context of the first two single-issue human rights documents discussed in this study in the context of participation and election.\textsuperscript{115} Minorities, as a group, should have the same right as "everyone", as stated in UDHR, to take part in government or public affairs of his/her country.\textsuperscript{116}

The fifth and last source consists of United Nations Studies. Here, reference should also be made to other special studies relating to this subject, that were carried out within the UN framework. In 1961, for instance, Herman Santa Cruz, Special Rapporteur, presented a Study of Discrimination in the Matter of Political Rights to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.\textsuperscript{117} In 1962, the Sub-Commission adopted a set of 15 general principles relating to freedom and non-discrimination in the area of political rights. This fairly extensive document was transmitted to the Commission, which was not able to consider it until 1973. Ultimately the study led to the adoption of the Economic and Social Council (ECOSOC) Resolution 1786(LIV), which simply refers governments and a number of other bodies to the drafted general principles.\textsuperscript{118}

The reference to political rights made in the aforementioned discussion also implies the requirements of democratic elections. To exclude these requirements from a study addressing "participation" would be erroneous. Also of great relevance in this context is Boutros-Boutros Ghali’s “Agenda for Democracy”, which forms part of the movement to instil democracy as a legitimate form of governance. The direct reference made to democracy by the Ghali study explicitly points to the requirements of democratic elections, which the Report demonstrates in observing:

“On the normative level, resistance has arisen which in some cases seeks to cloak authoritarianism in claims of cultural differences and in others reflects the undeniable fact that there is no model of democratisation or democracy suitable to all societies”.\textsuperscript{119}


\textsuperscript{115} For the single-issue human rights documents, see Chapter 6 of this study.

\textsuperscript{116} See, ibid.

\textsuperscript{117} United Nations, United Nations Action in the Field of Human Rights, 1983. p.188f.

\textsuperscript{118} Ibid.

\textsuperscript{119} See Boutros-Boutros Ghali, Agenda for Action, UN 1996.
At the regional level, there are also documents recognising the requirements of participation through elections, but these will not be discussed at this juncture.\textsuperscript{120}

2.8 Good Governance

Suffice it to state here that while this is a broad concept, the primary concern of the definition of “good governance”\textsuperscript{121} is with aspects of public administration such as effective financial accounting and auditing systems, appropriate legal framework, and open competition for contracts. The emphasis here is on accountability, transparency and predictability on the part of politicians and civil servants, and the rule of law in general.\textsuperscript{122}

One question which shall not be addressed here, however, is the relationship between the definition of concept of good governance and the notions of democracy and human rights already defined above\textsuperscript{123}

2.9 Conditionality

Conditionality\textsuperscript{124} is a complex phenomenon, involving a multiplicity of factors, and to provide a comprehensive definition is not a simple task. Because of its allegedly essentially political nature, conditionality has seldom been analysed by legal scholars.\textsuperscript{125} Perhaps the major reason for this is the absence of international regulations and standards, as well as the fact that its application has been fragmentary and of an ad hoc nature. Not all states apply conditionality, nor are all of them recipients.

Conditionality must systematically interact with, and often be subordinate to, geo-political, strategic, commercial and economic interests. If one also

\textsuperscript{120} For these documents, see Richard Juma-Nyabinda, “Requirements of Democratic Elections in international Law”, supra note 7.

\textsuperscript{121} See Hans-Otto Sano and Gudmundur Alfredsson with collaboration of Robin Claap(edn.), Human Rights and Good Governance: Building Bridges, The Raoul Wallenberg Institute of Human Rights Library Martinus Nijhoff Publishers, 2002, for what the good governance agenda involves and what can be gauged from it in general. For a discussion of good governance, see chapter 8 of this study concerning the Rio Declaration on Sustainable Development.

\textsuperscript{122} See Ibid.

\textsuperscript{123} This question is answered in Chapter 8 of this study. See, also Alfredsson, Gudmundur (eds.), in “Human Rights and Good Governance : Building Bridges,(eds), Martinus Nijhoff Publishers, edited by Gudmundur Alfredsson and Hans-Oto Sano.The Hague Kluwer Law International 2002.


\textsuperscript{125} Perhaps the exception is Katharina Tomasevski, who has published several research books on conditionality. See infra note 127.
takes into account the usual absence of concrete guidelines governing the actor, conditionality becomes rather a diffuse concept. Nevertheless, what is referred to as conditionality is reality, and an attempt at its definition is in order.

According to one English dictionary, a condition is:

“Something needed before something else is possible”.\(^{126}\)

In the field of development co-operation, the term conditionality has been coined to denote the donors’ practice of tying aid to specified conditions, whereby recipients would remain eligible.\(^{127}\) As a general rule, it concerns the relationship between two equal or unequal partners: the donor and recipient. The latter is dependant to a greater or lesser extent on the aid awarded by the former.

Traditionally, this notion has been designated by the term “aid conditionality”.\(^{128}\) However, conditionality has also been defined in wider terms to imply “the use or non-use of primarily economic instruments to bring about a political and behavioural change, whether at the top or grass roots level in order to achieve specific goals”.\(^{129}\) This definition is more suitable for the present purposes. Conditionality does not only confine itself to aid but can also include the commercial sphere, both with regard to the wording[wording?] of trade preferences, and the conclusion of trade agreements. Increasingly, development co-operation is addressed through commercial instruments. In practice, this means that it is no longer defined by internal priorities but often subject to the rules of the market.\(^{130}\) In international relations, developed states insist on making the receipt of development assistance conditional upon democracy[the point of this sentence in context of entire paragraph is unclear; are you making a contrast between the commercial instruments and the condition of democracy?].

The full scope of aid conditionality\(^{131}\) is expounded upon in other sections of this study, and therefore need not be mentioned further here.

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\(^{128}\) There are other definitions of aid conditionality. Gilles defines “political conditionality” in the following terms: “It denotes legitimate intervention by aid donors in the domestic affairs of the borrowing countries to alter the political environment in ways that sustain economic and human development”. See Elena Fierro, “Human Rights, Governance and Democracy: The World Bank’s Problem Frontiers”, *NQHR, No.1, Vol.11*, 1993, p.4.


\(^{130}\) Clarence Dias, "Una revisio'n de la condicionalidad:+bajo que’ condiciones y que’ alternativas?" en la Condicionalidad en las relaciones internacionales:’sirve para la proteccio’n de los derechos humanos?" *ILSA documents*, Colombia, No.13, 1996, p.4.

\(^{131}\) See Chapter 9 of this study.
2.10 Conclusion

The concepts that have been clarified throughout the chapter are very fundamental to this study. However, these are not the only ones to be considered; there are also other concepts that are crucial to this study, and they will be defined as they appear in the discussion. An outline of the remaining parts of the study will now be provided in Chapter 3.
3 Outline of the Remaining Chapters

3.1 Introduction

The remaining 14 Chapters are covered in Parts II, III, IV and V of this study.

3.2 The Arrangement

Part II, under the rubric of State Sovereignty and Justification for Demo-Conditionality, is composed of Chapters 4, 5, 6, 7, 8, and 9. It has two main aims. The first is to clarify how state sovereignty is conceived in contemporary international law; i.e., with regard to its relationship to other international norms. The second is to examine the legal premises, if any, that can serve as a basis to justify the compatibility of demo-conditionality with the principle of state sovereignty.

Chapter 4, State Sovereignty, begins with a brief history and theoretical overview of state sovereignty in international legal theory. Then, it proceeds to examine the issue of its recognition under international law. Finally, the relationship between state sovereignty and various international norms is explored. Here, the discussion is concerned with how one goes about differentiating between those norms that are compatible with state sovereignty, and those that are not. Also explored is the issue of whether there exists a universal test for this distinction.

Chapter 4’s conclusions provide the legal basis for approaching the central theme of this study; namely, an analysis of demo-conditionality's compatibility with state sovereignty. At that juncture, the various justifications for such a compatibility with state sovereignty are systematically examined. This can take one of two routes: treaty law, or instruments of development cooperation.

Chapter 5, Demo-Conditionality and General Treaty Law, is an examination of whether a general treaty law exists that embodies the right to free and fair elections, upon which demo-conditionality could be premised. If there is such a treaty, then its formulation and various interpretations shall be examined extensively. The main aim is to demonstrate that this treaty does, in fact, recognise the eight different elements of free and fair elections enumerated in Chapter 2 of this study.
Chapter 6, *Demo-Conditionality and Single Human Rights Treaties*, examines the possible existence, if any, of other treaties of such a nature which provide support for the general treaty provisions studied in Chapter 5. If there are such treaties, then this would further enhance the legal status of demo-conditionality in terms of its relationship with the principle of respect for state sovereignty in international law.

From here we move to the second level of analysis, which is directed at determining whether or not development co-operation agreements might constitute a legal basis for demo-conditionality. In Chapter 7, *Development Co-operation Instruments from 1945-1970*, the instruments of that period are examined. Chapter 8, *Resolutions Sponsored Conferences*, covering 1990-2006, likewise examines development co-operation instruments from that period. Here, emphasis is placed upon exposing their true legal status, and demonstrating whether or not they contemplate demo-conditionality in development co-operation.

Chapter 9, *Contemporary Practices*, examines the practices, if any, of states (donors) in reducing or cutting off development assistance to recipient states that have defaulted in the holding of free and fair elections. As an illustration, the relationship of one European state with its development partners will be described. Another case study examines the joint agreement between the EU and US regarding one recipient state.

Part III is designated under the rubric, *Demo-Conditionality and State Sovereignty in International Law*; i.e., the main theme of this study. This part is composed of Chapters 10, 11, 12 and 13.

Chapter 10, *State Sovereignty and Human Rights Conditionality*, examines the compatibility of human rights with state sovereignty. As Chapter 11 will reveal, the discussion of this relationship can be deemed to be interrelated with the debate over the compatibility of demo-conditionality with state sovereignty.

Chapter 11, *Demo-Conditionality and State Sovereignty*, constituting the first route of analysis, assesses the possible relationship between demo-conditionality and state sovereignty; i.e., it inquires as to whether this conditionality is premised in Article 25 of the ICCPR, 1966. A number of possible positions on the subject are explored. Finally, it indicates the particular position taken by the present study with regard to that relationship.

Chapter 12, *Route 2: Demo-Conditionality and State*, examines the issue of whether compatibility of demo-conditionality with state sovereignty can be legally justified on the basis of the development co-operation agreements already studied. In the same chapter, under the rubric *Route 1 or Route 2?*, a comparative analysis is undertaken with regard to the pursuit of demo-conditionality under Article 25 of the ICCPR 1966, as opposed to pursuing it through development co-operation agreements.
Chapter 13, *The Enforcement Model or The Managerial Model*, discusses the two models advanced for the purpose of ensuring compliance of States Parties with a treaty stating their international obligations. Here, the relevant document is Article 25 of the ICCPR, 1966. There is a critical analysis made to determine which of these models is more effective in achieving the objective of ensuring the holding of free and fair elections.

In Part IV, described under the rubric *Special Focus: European Union and the African, Pacific and Caribbean Partnership and Demo-conditionality*, there is an examination of the development co-operation between these two groups of countries, which have a unique set of historical relationships. Emphasis is placed on both the theoretical and practical aspects of this relationship; in particular, whether or not the donor – the European Union –should reduce or cut off aid to the ACP countries that fail to hold *free* and *fair* elections. This topic embraces three chapters: 14, 15 and 16.

In Chapter 14, *The European Union and the African, Pacific and Caribbean Partnership*, certain features of EU-ACP relations are discussed; for example, where the European Union, as a major donor, derives its legal capacity to undertake development co-operation with development partners, especially the ACP countries. Also discussed are the types of agreements the EU relies upon in its external relations with its partners.

Chapter 15, *The European Union and Political Conditionality*, discusses whether or not the European Union has embraced political conditionality in its relations with ACP. This is approached by exploring the evolution of European development policies, and discussing how the EU manifests its political conditionality. There is also a discussion of the possible existence, if any, of procedures which the EU and ACP must follow before aid can be reduced or cut off.

Chapter 16, *The Case Studies* examines case studies of six ACP countries which were subject to demo-conditionality in practice in their partnership with the EU. The main purpose of this chapter is to demonstrate whether or not EU does in fact reduce or cut off its development assistance to certain countries which have defaulted in the holding of free and fair elections.

Finally, in Part V, Summary and Conclusions, there is a summary and conclusion regarding the results of the analysis in this study.

### 3.3 Conclusion

This chapter has provided the basic outline and design used for the remaining parts of this Study. Now, we proceed to Part II of this study, where the following issue shall be discussed: the relationship between state sovereignty and the legal premises of demo-conditionality.
PART II

STATE SOVEREIGNTY
AND JUSTIFICATION FOR
DEMO-CONDITIONALITY
4 State Sovereignty

4.1 Introduction

As implied by the title, Part II of this study has the following two objectives: first, to clarify the issue of compatibility of norms with state sovereignty; and second, to examine the possible legal premises upon which demo-conditionality might be based when being enforced by donors.

With respect to the first issue, Chapter 4 addresses the following broad questions. Is state sovereignty a familiar concept in international law? If so, how? What is entailed by issues relating to the compatibility of norms with state sovereignty? How does one go about differentiating between a norm which is compatible with state sovereignty, and one which is not? Does any universal test exist to draw this distinction? If so what are the requirements of this test? And, finally, in the event of a claim that the state sovereignty of a country has been violated, where does the burden of proof lie?

Before we delve into these questions, a brief commentary on the concept of sovereignty in international legal theory is in order.

4.2 Sovereignty: History and Theory

This brief discourse exposes the dogmas relating to sovereignty that have dominated the field of international legal theory throughout various periods in history. The relevance of these dogmas to the question of norms' compatibility with state sovereignty is also revealed. Finally, the discussion will indicate which of them is most dominant or acceptable from the perspective of contemporary international legal theory.

Sovereignty has long been recognized by international lawyers as a key concept in both political and legal philosophy.132 However, over the years it

has been difficult to find common agreement amongst them as to which particular interpretation of sovereignty should be the dominant one. This debate has centered around two competing dogmas. One is the theory whereby sovereignty is viewed as the "absolute and the perceptual power within a State". Sovereignty, in this sense, means "supreme power over citizens and subjects unrestrained by law". Put differently, it means that the existence of some international norm in the international legal system does not in any way impact sovereignty, and therefore, that even international acts which are based upon legal norms (treaties or international customs) do not compete with state sovereignty.

As has already been hinted at the beginning of this study, this particular reading of sovereignty is still embraced by some developing countries. These countries, or rather their political leaders, highly value the principle of state sovereignty as a "cornerstone of international relations to protect their recently gained political independence".

On the other hand, to some modern legal thinkers, this notion of sovereignty in the absolute sense is wholly rejected. Instead, according to them, the acceptable interpretation of sovereignty today is one in which the concept is treated as "delimited" or "relative"; i.e. sovereignty "within international law". This means, to quote Kelsen, that "the legal authority or competence of a state is limited and limitable by international law". In the context of the relationship between international norms and state sovereignty, this second dogma supports the proposition that international action premised upon legal norms (treaty or international custom) are, in fact, compatible with state sovereignty. It is this latter model which falls in line with contemporary international legal theory.

As indicated, this position is also reflective of the donor's position. Thus, donors and even some recipient countries emphasise, for example, that the doctrine of sovereignty has been losing a great deal of traction in recent

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135 See Ibid, especially Nico Schrijver, supra note 132.
136 Ibid.
137 For the existence of the international legal system see, Chapter 13 of this study.
138 See Part I, Chapter 1of this study.
140 For the donor position, see Chapter 1 of this study.
years, in view of increasing international interdependence. This new trend, they point out, has led States' to resort to a bewildering array of regulatory agreements to deal with problems as disparate as nuclear proliferation, international trade, species destruction, intellectual property, climate change, human rights, etc.

Now, we move to the issue of recognizing state sovereignty in international law.

4.3 State Sovereignty and International Law
4.3.1 Introduction
The principle of state sovereignty is quite familiar to international law. There are many rules of positive international law guaranteeing state independence, as well as other indicators of sovereignty. All these provisions, taken together, converge in what is called the principle of state sovereignty, which is recognised as one of the general principles of contemporary international law. The following basic sources serve to legitimise the principle of state sovereignty in contemporary international law:141 writers, the International Law Commission, international courts and international agreements, among others.

4.3.2 International Publicists
As a legal proposition, sovereignty has been heatedly contested since its inception. There are publicists “who do not consider sovereignty to be a basic criterion of the State as a subject of international law”.142 There are also those who prefer the term “autonomy” to “sovereignty”, and those using “sovereignty and autonomy”.143 However, the school of thought that sovereignty is the foundation of the whole system of international law clearly predominates. Oppenheim’s International Law (1905), which was perhaps the “most influential and certainly the most enduring English-language treatise of the 20th century”,144 defines “sovereignty of state governments” as consisting of independence and authority in the form of supremacy over territory and over persons”.145

Sovereignty is a supreme legal power, whose authority is applicable to the position of states within the international community. It therefore follows

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141 Ian Brownlie, "Principles of Public International Law", supra note 1.
142 Korowicz, Modern Doctrines of Sovereignty of States-II, as cited in B.Kingsbury, Sovereignty and Inequality, 9 EJIL (1998), n.35 therein, supra note 132.
143 See, e.g. O.Schachter, "The Decline of Nation State and its Implications for International Law, 36 Columbia JIL (1997), 7; J. Charney, Universal International Law, JIL (1993), 529.
144 Kingsbury, supra note 132, p. 599.
145 Oppenheim’s International Law, supra note 31.
that the relationship of states on the international plane is characterised by equality and independence; in fact interdependence.146

4.3.3 The International Law Commission

In its 1949 Draft Declaration on Rights and Duties of States,147 the Commission stated that the right of each State to exercise jurisdiction over its territory and all persons and things therein, subject to the immunities recognised by International Law, as well as the duty to “refrain from intervention in the internal or external affairs of any other state”, implies independence.

4.3.4 International Court of Justice

The International Court of Justice has likewise endorsed the principle of state sovereignty in its judgement and opinions. In the Wimbledon case, the PCIJ ruled that it did not find a state to have abandoned its own sovereignty from the conclusion of any treaty which it undertakes to perform or refrain from performing a particular act. Instead, the right of entering into international engagements is an attribute of state sovereignty.148 In the second instance, the Lotus Case, the Court emphasised that international law governs the relations between independent States, and that restrictions upon this independence cannot be presumed.149

In the Corfu Channel Case, the Court also emphasised the importance of respect for territorial sovereignty between independent States.150

In the Asylum case, the Court denied the existence of a general right to grant diplomatic Asylum, as this constitutes a derogation of State Sovereignty.151 and as such cannot be recognised unless its legal basis is established in each particular case.152

4.3.5 Treaties and Other Instruments

Many other international treaties, covenants and instruments reiterate the principle of state sovereignty; or, put differently, sovereign equality as a legal principle. It is well-known that the principle of sovereign equality is

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146 Ibid.
148 PICA Publication Series Article No.1 p.25.
149 PCIJ Article no.10 p.18.
150 PCIJ Reports 1949, p.35.
151 ICJ Reports 1955, pp.266-274.
152 Ibid.
derived from the perception that all men are naturally equal,\textsuperscript{153} which forms the very conceptual basis of modern Western democracy. This in turn has, over centuries, evolved into one of the fundamental principles of the UN Charter. Article 2(1) declares that “the Organisation is based on the principle of Sovereign equality of all its members”. The term “sovereign equality” was elaborated in further detail in the Declaration of Principles of International Law to include certain elements.\textsuperscript{154} Today, it is widely recognised that the Declaration can be taken to reflect the views of the United Nations membership as a whole regarding the legal meaning of the Charter principles, which it elaborates.\textsuperscript{155} The International Court of Justice took the Declaration as evidence of \textit{opinio juris} of all States to accept the Charter principles as rules of international customary law.\textsuperscript{156}

State sovereignty in its modern context\textsuperscript{157} is traceable to the Peace of Westphalia in 1648, when the emerging nation-States of Europe, weary of war, agreed to live in peace with one another on the basis of sovereign equality and non-interference in another's national affairs.\textsuperscript{158} This concept of sovereignty has since become the linchpin upon which governments, even those lacking a moral basis of authority, continue to forestall intervention from other countries. It is a political principle given recognition both in customary international law and treaties.\textsuperscript{159}

Therefore, it seems quite clear that state sovereignty is already inherently established in the most solemn and universal treaty, the Charter of the United Nations, in a way which leaves no further doubt that it is part of general international law. Article 2 Paragraph 1 lays down ”sovereign equality”, and Paragraph 4 stipulates the duty to refrain from breaches against territorial integrity and political independence of another State.

The next issue to be discussed is the relationship of state sovereignty with international norms.

\textsuperscript{154} GA Res.2625 (XXV), Oct.24, 1970. The resolution was adopted without a no vote. Some of the elements included:(a) States are juridically equal, (b) Each State enjoys the rights inherent in full sovereignty, (c) Each State has the duty to respect the personality of other States, (d) the territorial integrity and political independence of the State are inviolable, (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems, (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.
\textsuperscript{156} Nicaragua Case (Merits), \textit{ICJ Reports} 1986, para.188.
\textsuperscript{157} Ibid.
\textsuperscript{158} See, G.O.Gyandoh Jr., ”Human Rights and The Acquisition of National Sovereignty”,supra note 56.
\textsuperscript{159} Article 2(4) of the UN Charter and Article III(2) of the OAU Charter, for example. See, supra note 58.
4.4 Compatibility of Norms: Legal Impact

4.4.1 Introduction
What is involved in the issue of compatibility of norms with respect for the principle of state sovereignty?

4.4.2 State Parties and Obligation of Obedience
This issue relates to the compliance of states with international obligations, arising from legal norms. One example examined here is treaties, as “agreements” concluded between states in written form and governed by “international law”.

There is no disagreement with regard to the proposition that in international law, parties that do not sign and ratify the particular treaty in question are not bound by its terms. This general rule was illustrated in the North Sea Continental Shelf cases, in which West Germany had not ratified the relevant convention and was therefore under no obligation to heed its terms.

The treaty, like the global human rights covenants discussed later on in this study, establishes a system of norms designed to govern the conduct of states in an area of concern. These are legal norms, in that they embody which rules acknowledged in principle to be legally binding on states that ratify them. As such, they are the most unproblematic source of international law.

Consequently, the rule that every treaty in force is binding upon the parties to it and must be performed in good faith, as codified in Article 26 of the Vienna Convention on the Law of Treaties, has long been recognised as a fundamental background norm of international law. As Stanley Hoffman says:

“there can be no social order without pacta sunt servanda”.

The point being made here is that all State Parties are under obligation of obedience to a treaty norm. The obligation is two-sided. On the one hand,
the offending State Party has the obligation to fulfil its obligation under the treaty. On the other hand, the other State Parties to the treaty have the right to ensure that the offending state complies with this obligation. Both hold true with or without any external measures/actions being pressed upon them.

In the event of failure by a state to comply with its international obligation under a treaty, two models\textsuperscript{166} for ensuring compliance could legally be applied against it: the "enforcement model", e.g. military action or economic sanctions; or "the managerial model", which is co-operative in nature, emphasising dialogue. With respect to the main theme of this study, then, if an analysis should demonstrate that demo-conditionality has the support of a legal norm, it will be compatible with state sovereignty. The State Parties (donors) to the treaty have the right to reduce or cut off development assistance to the offending State Party.

The question, then, is: is there any provision in international law that stipulates how one can go about differentiating between a norm which is compatible with state sovereignty, and one which is not?

### 4.5 Article 2(7) of The United Nations Charter

#### 4.5.1 Introduction

The answer to the above question is: yes.

#### 4.5.2 Article 2(7) of The United Nations Charter

It is quite evident that the relationship between state sovereignty and international norms is embraced by Article 2(7) of the United Nations Charter, 1945.\textsuperscript{167} The basic rule of international law providing that states have no right to encroach upon the internal affairs of other states is a consequence of the equality and sovereignty of states and mirrored in this Article,\textsuperscript{168} which declares:

"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction

\textsuperscript{166} See, Chapter 13 of this study.

\textsuperscript{167} As to the legal status of the UN charter as a \textit{sui generis} constitutional instrument, See Belebachew Asrat, "Prohibition Of Use Under The UN Charter:A Study of Article 2(4).supra note 58.

of any state or shall require the members to submit such matters to settlement under the present Charter”.

The Article, intended as a practical restatement and reinforcement of domestic jurisdiction, has been constantly reinterpreted in the decades since it was first given due to disagreement over its language. Such interpretations regarding the content and scope of domestic jurisdiction provide clues as to how to differentiate the norms compatible with state sovereignty from those that are not. This can especially be seen when one examines the interpretations attached to Article 2(7) with regard to its content in the following two areas: matters expressly exempted from the domestic jurisdiction of States, and matters either falling or not falling within domestic jurisdiction.

4.5.3 Meaning of Article 2(7): Interpretations

Matters exempted from domestic jurisdiction:

What is quite clear from this Article is that certain matters are excluded from falling within the domestic jurisdiction of states. In this case, the international pursuit of such matters are covered by treaty, and therefore expressly compatible with state sovereignty.

The paragraph exempts the field of domestic jurisdiction of the State from competence of the United Nations, save cases of “action with respect to threat to peace, breaches of the peace and acts of aggression”.169

Matters which do fall or not within domestic jurisdiction: The question of this distinction is addressed by the statement that the United Nations is not authorised to intervene “in matters, which are essentially within the domestic jurisdiction of any State”. That original formulation expressed in the UN Charter has been subject to many different, and sometimes extreme, interpretations. One basis for comparison is the Covenant of the League of Nations. It is rather well known that in that Covenant (Art.15, paragraph 8), the conditions for domestic jurisdiction of States was more satisfactorily formulated, binding it to the resolution of disputes. It also excludes from the competence of the Council of The League, that ”which the international law leaves to the exclusive jurisdiction of one party” Comparing this formulation with Article 2(7) of The UN Charter, where ”matters which are essentially within domestic jurisdiction of every State” are exempted from the competence of UN organs, one can point out two respects in which the Charter could be viewed as less efficient from the standpoint of trying to make this determination: first, the sphere of international jurisdiction is less clearly defined in the wording; and second, it leaves the specific interpretation to States.

In the Charter, there is no mention of the adjective "exclusive"; only the term "domestic jurisdiction" is used. This qualification has deteriorated, as many maintain, due to the uncertain expression "essentially", which contributes to an even broader interpretation of that already very flexible notion. In the League of Nations Covenant, in contrast, the exclusive domestic jurisdiction of States is expressly indicated for certain affairs. This serves to somewhat narrow the scope of the notion, even though the precise determination of what falls within that area may remains disputable. Nevertheless, the specific determination is made according to international law, not by unilateral action of the State concerned. In the UN Charter, not only is the definition excessively broad, but the determination of what falls within its scope is not subject to rules of international law; it may be conceived, and even applied in practice, as being left to the States concerned.  

Do these apparent differences render Article 2(7) of the UN Charter useless in interpreting what should constitute the content of domestic jurisdiction of States, as provided in Article 2(7) of the UN Charter?  

The answer, stated simply, is no. The interpretation of domestic jurisdiction in Article 2(7) is, in fact, possible. For example, in stating that the United Nations is not authorised to intervene “in matters which are essentially within the domestic jurisdiction of any State”, the adverb “essentially” can substitute for “solely”, which had been contained in Article 15(8) of the League of Nations. Furthermore, commentators point out that in past interpretations of Article 2 Paragraph 7, attention had focused primarily on the meaning of the phrase “matters which are essentially within the domestic jurisdiction of any State”, taking for granted that the term “intervention” is synonymous with interference and any other kind of active concern with matters falling within that sphere – an assumption which is unwarranted.  

International Courts and Tribunals. As the World Court ruled in the Tunisia Nationality Decrees case, the question whether a certain matter is or is not solely within jurisdiction of a State is essentially a relative question, which depends upon developments in international relations. That Court found that in the present state of international law, questions of national jurisdiction are/were, in principle, within the reserved domain. Some other areas that also clearly fall within the sphere of internal affairs of state are the form of government, and the social, economic and cultural organisation of  

the State. Generally speaking, matters which are not subject to international obligations fall within the internal affairs of a State, which has the right to conduct them as it pleases. Again, it was found in the Interpretation of Peace Treaties Case, 1950, that a matter which is the subject of an international obligation cannot lie within the domestic jurisdiction of a State.

Writers. Several international legal scholars have provided their interpretations of Article 2(7) concerning the limits of domestic jurisdiction. In particular, their comments target respect for human rights and fundamental rights. The wording here has been compared to that used by the League of Nations. For example, in the opinion of one of the writers, this Article contains retrogressive elements that should be eliminated as soon as possible by an amendment to the Charter.

Reference can also be made to Article 1 of the resolution, The Determination of the “Reserved Domain” and Its Effects, adopted in Ix en Province on April 29, 1954 by the Institute of International Law. According to this resolution the term “essentially” was intended to delimit the competence of certain international organs in relation to the domestic jurisdiction. Many authors have attempted to minimise the significance of the term. Thus, according to Eek, very few questions fall exclusively within a State's jurisdiction, and therefore Article 2(7) only creates a prohibition against intervening in matters which are completely internal. The same author estimates that matters falling within the domain of the UN Charter, such as human rights, are outside the field of operation for domestic jurisdiction, and that based on United Nations practices, the word ”essentially” does not seem to have played an important part.

Korowicz maintains that a provision should not be interpreted contrary to its literal meaning. In addition, he argues, if a provision expresses the will of the Signatories in clear language, as is the case with Article 2(7) of the Charter, no interpretation is required. This is what is called is "Vattel’s principle of interpretation". Other writers have focused on the term “intervene”, attempting to interpret it in the sense of a "dictatorial interference", not in the usual dictionary-based sense. This debate, while it is a well known one, does not change the argument made just above, that the term should not be understood independently of its ordinary meaning.

In short, what these interpretations from the courts and writers demonstrate is that any affair that is the subject of an international obligation can-

\[173\] Ibid.
\[174\] Ibid.
\[175\] See discussion on the relationship between human rights and fundamental freedoms in Chapter 11 of this study.
\[176\] Cf.M.S.Korowicz, supra note 132.
\[178\] Ibid.
\[179\] Korowicz, supra note 132.
not fall within the domestic jurisdiction of a State. The logical conclusion is therefore that such subject matter is covered by treaties or customary international law (legal norms), and compatible with state sovereignty.

4.5.4 Who Decides: Matter is Within Jurisdictions?

Who decides whether a matter is within domestic jurisdiction?

Such an interpretation of Article 2(7) of the UN Charter, if possible, would mean an acknowledgement of the existence of an authority who could determine such an answer, and distinguish between domestic and international jurisdiction. It also means that such an authority should, from time to time, provide information as to which matters are within domestic jurisdiction. It is important to emphasise here that the text of reservation of 2(7) is silent on who should decide that a Matter is within domestic jurisdiction or not, and whether there is a specific set of criteria to be applied. This omission leads to a problem of choice.

The United Nations? Some writers have suggested that the United Nations should decide. 180 On the other hand, the International Court of Justice arguably should be the body to determine the content of domestic jurisdiction, since it is authorised by virtue of Article 36(2) of its Statute to decide "in all legal matters", provided that the parties concerned have accepted its jurisdiction. Article 4 of the 1954 Resolution "Determination of the Reserved Domain and its Effects" supports this view.

The will and apprehension of one State? Despite there being silence on this subject in the text of the reservation from paragraph 7 Art.2 of the UN Charter, it would hardly imply that the will and apprehension of one state could be competent. That would mean that in a controversial case, the same interested party would play the role of the decision-maker. This very practice of excluding itself from examination in general would violate the general principle of law: nemo judex in sua causa (re sua). As long as there is no authorised international organ to make this decision, the power clearly lies with the state concerned. But does this mean that the state, in determining the domain and content of domestic jurisdiction, may act according to whim?

To the contrary, Article 2(7) does not prejudice any particular issue as international or domestic jurisdiction by means of international agreements or customs. It simply deals with the question of the fundamental derogation of sovereignty. It is therefore possible that a particular issue may fall within domestic jurisdiction and international law at the same time, albeit in different ways and to varying degrees. In short, no useful conclusion can be drawn from Article 2(7) alone concerning the content of domestic jurisdiction, or the way in which its content is determined. From a different angle, however,

180 Korowicz, supra note 132.
this provision is very interesting, since it recognises that a matter may be “essentially” within domestic jurisdiction. This qualification is very important, and consistent with the idea that a matter could fall under domestic jurisdiction and international law simultaneously.

4.5.5 No Universal List

The next issue for interpretation involves whether there exists a universal list stipulating what subject matter belongs to international jurisdiction.

With regard to the question of determining what matter falls within the domestic jurisdiction of states according to Article 2(7) of the UN Charter, it is safe to draw the following sub-conclusion: that the domestic jurisdiction issue is essentially a relative question, that must take its content from the character of the prevailing atmosphere and aspirations. The well-known opinion of the Permanent Court of International Justice on this issue of relativity is worth quoting:

"The question whether a certain matter is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations".181

Bernardt, in a comment on this view, rightly believes it to be correct and that, as long as there is a need for the international community to increase the number of norms in order for modern society to function, the scope of matters falling within the domestic jurisdiction of States would continue to shrink.182

The sub-conclusion here is that international actions targeting matters which do fall within domestic jurisdiction, if such matters can be identified, are not compatible with state sovereignty. The opposite case is also legally correct: that any international actions targeted which do not fall within domestic jurisdiction, if identifiable, are compatible with state sovereignty.

4.6 Presumption in Favour of State Sovereignty?

Where does the burden of proof lie in the event of a claim that a norm is not compatible with state sovereignty; i.e., that it constitutes a violation of international law?

The correct legal position is that, should a particular state complain that an action of another state violates its state sovereignty, the burden of proof

182 Bernardt, ibid...
lies on the alleged offending state; i.e., "the owner of the action/project" must justify its action. This position finds support in the jurisprudence of international courts, and doctrinal trends. The International Court of Justice has consistently held that such a presumption exists. This was clearly demonstrated in the Lotus Case and in the Upper Savoy and the District of Gex,\(^{183}\) where the PCIJ ruled that in the case of doubt a limitation of Sovereignty must be construed restrictively. Very similar statements are found in the Asylum and the Right of Passage over Indian Territory Cases.\(^{184}\) The same view is also frequently recognised in doctrine. According to Delupis:

> “There is a presumption in favour of the full sovereignty of a State over its territory unless a title or a rule can be shown under which international law would restrict the sovereignty.”\(^{185}\)

As this author writes, there is a further consequence; namely, that the party claiming the existence of a rule restricting the sovereignty of another State has the burden of proof for establishing the existence of such a rule.\(^{186}\) The question is whether this is a watertight doctrine in international law.

Of course, there are exceptions to the above argument. Brownlie, for instance, states that there is no general rule; that in judicial practice issues are approached empirically,\(^{187}\) and the application of a presumption would lead to inconvenience or abuse.\(^{188}\) In the opinion of this distinguished scholar it is, rather, the nature of a problem that will determine "the incidence of a particular burdens of proof."\(^{189}\)

It seems difficult to contradict the dominant view supporting the presumption of *dubio pro suverenitata*. Nevertheless, there might be positive reasons to consider mitigating the application of this presumption, at least in certain cases where not only state sovereignty, but also other highly valued interests, deserve the protection of the law.

### 4.7 Conclusion

The main aim of this chapter was to clarify the issue of the relationship between state sovereignty and other norms in international law. The first area of discussion concerned the dogmas surrounding sovereignty that had dominated international legal theory for many years. Of these, two in particular have stood out in the discourse: sovereignty as both an absolute and relative


\(^{184}\) *ICJ Reports*, p.275 and ibid. 1960, p.6 respectively.


\(^{186}\) Ibid.


\(^{188}\) Ibid.

\(^{189}\) Ibid.
concept. The latter concept has been demonstrated to be most acceptable in modern international legal theory.

The second area of investigation was the recognition of state sovereignty by international law. It was revealed that state sovereignty is known to international law – that is, it is a part of general international law – because there are conventions and resolutions which cover it. But it is the UN Charter that is ultimately the founding document.

The third area of investigation concerned the issue of norms' compatibility with state sovereignty from the international law perspective. First, it was demonstrated that the compatibility issue is specifically related to State Parties' compliance with their international obligations that arise from legal norms, e.g. under treaty. It was revealed further that this obligation is two-sided; i.e., the offending state is under international obligation to comply with treaty norms. At the same time, however, other State Parties to the treaty have a corresponding international right to ensure that the offending state complies with its obligations without conditions. They are also entitled to demand compliance by applying one of two strategies: the "enforcement model", or the "managerial model".

The fourth issue concerned the relationship of state sovereignty to other norms. Here, the main issue was how to differentiate between norms that are compatible with state sovereignty and those which are not.

On all of these questions, the resolution depends upon the interpretation of the content and limits of domestic jurisdiction, as formulated in Article 2(7) of The UN Charter. Matters which fall within the domestic jurisdiction of states are not part of legal norms (treaty and customary international law). Hence, international actions targeting the implementation of such subject matter are incompatible with the principle of state sovereignty. Conversely, subject matter which does fall within international jurisdiction is covered by legal norms, treaties or customary international law. In these cases, international actions targeted at implementation are compatible with principle of state sovereignty. Finally, it has been revealed that one particular matter can both belong to domestic and international jurisdiction simultaneously, in which case its international pursuit is also compatible with state sovereignty.

Chapter 5 of this study will now examine whether there are any general treaties upon which demo-conditionality may be premised.
5 The Demo-Conditionality and General Treaty Law

5.1 Introduction

As was already indicated earlier in this study, one justification for demo-conditionality is that the donors predicate the conditionality's adherence to new treaty obligations on the parties’ observance of democratic norms. Here, we will take the specific example of the obligations arising from the International Civil and Political Covenant, 1966 in this context. The main objective of this chapter is to examine whether or not this Covenant, as a general treaty, can be invoked to justify the compatibility of demo-conditionality with state sovereignty in international law. This is what is also described in this study as a "Route 1" analysis.

5.2 The Civil and Political Covenant, 1966

5.2.1 Introduction

That international law, by way of treaty law, indicates the ways in which citizens choose their leaders finds support at the universal level; i.e., within the United Nations system. This is accomplished through the International Covenant on Civil and Political Rights, 1966. Thus, a provision requiring democratic elections and based upon the spirit of the Universal Declaration has been laid down in that treaty, which represents one component of the

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190 The Maastricht Treaty on European Union, supra note 12.
192 See, supra note 104 and infra note 196, for UDHR, 1948. For the discussion of Article 21 of the Declaration, see Chapter 2 of this study.
international body of law on human rights.\textsuperscript{194} The historical evolution of the ICCPR will not be discussed here.\textsuperscript{195} Instead, certain basic features of this Covenant are discussed below.

5.2.2 Certain Features of the Covenant

In this context, the first relevant feature is that the ICCPR is an expanded hard-law version of the 1948 Universal Declaration of Human Rights.\textsuperscript{196} Additionally, as Dominic McGoldrick stated, its most important feature is that “it is a universal instrument and contains binding legal obligations for the States parties to it”.\textsuperscript{197} This is reflected in its level of ratification. It entered into force in 1976 and is the most widely ratified treaty guaranteeing participatory rights.\textsuperscript{198} Thus, the State Parties to the ICCPR\textsuperscript{199} are from all “geo-political regions of the world, which renders it less susceptible to the criticism that it expresses only a Western, individualistic, or alien philosophy”\textsuperscript{200}

The third feature concerns the nature of State Parties’ obligations, which are mandatory and immediate.

**Mandatory:** Article 2(1) of the ICCPR rules that each State Party undertakes to respect and to ensure for all individuals within its territory and subject to its jurisdiction, the rights recognised in the Covenant without discrimination of any kind.\textsuperscript{201}

**Immediate:** There is the obligation to respect these rights immediately, i.e., from the date of entry into force of the Covenant for the State Party.

\textsuperscript{194} For the treaty instruments which embody the principle of respect for human rights, see also Chapter 10 of this study.


\textsuperscript{197} Dominic McGoldrick, The Human Rights Committee: Its Role In The Development of The International Covenant On Civil And Political Rights, supra note 23.

\textsuperscript{198} As of March 1999, there were already 144 States Parties to the Political Covenant. United Nations Treaties Deposited with Secretary-General, Status as of March 12,1999.Available at<www.un.org./depts/treaty/bible.htm>.

\textsuperscript{199} Ibid.

\textsuperscript{200} Ibid., McGoldrick, supra note 197, at 20.

This is to be distinguished from the corresponding provision of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[202] which is progressive in nature.

The fourth feature concerns derogation clauses. In the case of the ICCPR, a number of rights protected by the Covenant may not be derogated under any circumstances,[203] while others may be derogated. Thus, Article 4 of the ICCPR provides that the remaining articles may be derogated from[204] “in time of public emergency that threatens the life of the nation”. This is the case as long as such derogations are non-discriminatory, and proportionate to the existing threat. Derogation must also be immediately communicated to the other state parties through the intermediary of the UN- secretary-general, along with the reasons for doing so. The derogation clause feature impacts how the right to political participation is viewed against the hierarchy of the international human rights debate as a background.[205]

5.2.3 Relevant Article 25 of the Covenant: Formulation

Article 25 of the ICCPR, 1966 is most relevant one regarding free and fair elections and their various elements. But, how is Article 25 formulated? What are the interpretations attached to its scope and content? And, critically, does it in fact spell out the eight requirements of the right to free and fair elections already examined[206] in this study?

With respect to the formulation, the provision reads as follows:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2,[207] and without unreasonable restrictions:
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

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[202] Each Party to this Covenant, pursuant to Article 2(1), only undertakes to take steps, individually and through international assistance and co-operation – especially economic and technical – to the maximum of its available resources with a view to progressively achieving the full realisation of the economic, social and cultural rights recognised in the Covenant; in particular, the adoption of legislative measures.
[203] These rights are: Article 6(right to life); Article 7(freedom from torture, inhuman and degrading treatment); Article 8(1) and 29(freedom from slavery and servitude); Article 11(imprisonment for failure to meet a contractual obligation) Article 15 (non-retroactive penal law); Article 16 (right to recognition as a person) and Article 18(right to freedom of thought, conscience and religion).
[204] See, for example, Article 25 of the ICCPR which is the main provision studied here.
[205] For hierarchy of international human rights debate and the right to political participation, see Chapter 11 of this study.
[206] See Chapter 2 of this Study.
[207] Article 2 provides that all rights shall be respected “without distinction of any kind”. Explicitly prohibited distinctions include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other Status”. 
(b) right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) to have access, on general terms of equality, to public service in his country.”

Article 25 of the ICCPR therefore embodies the right to political participation, from which the right to free and fair elections is derived.

5.2.4 Meaning of the Provision: Interpretations

The interpretations of this specific Article with regard to the pillars of free and fair elections are derived from several procedures, which include travaux preparatoires, textual interpretation, and jurisprudence from the UN Human Rights Committee.

Travaux Préparatoires. The natural place to begin an interpretation is its travaux preparatoires. It seems that the drafters of this Article laid down the pillars of free and fair elections in the manner outlined below:

(a) Non-discrimination

The issue of discrimination is related to the discussion of the three electoral elements listed above. Article 25 provides that the rights it contains shall be enjoyed:

“without any of the distinctions mentioned in Article 2 of this Covenant and without unreasonable restrictions”.

What kinds of restrictions are forbidden? According to the drafters, Article 2 on the one hand forbids any restrictions that discriminate against citizens on the basis of an explicitly prohibited characteristic. On the other hand, it is understood in this context that the phrase "without unreasonable restrictions” implies that certain restrictions on participation not based on prohibited distinctions are not “unreasonable”, and therefore permissible. The drafters of the Political Covenant included this phrase in order to permit the denial of suffrage to minors, convicts, the mentally ill, and those not meeting residency requirements. It is also meant to permit the existence of certain limitations on the right to hold public office, such as the requirement of professional training. The drafters also apparently did not consider such “reason-

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208 Article 25 of the ICCPR is the successor to Article 21 of the UDHR, as can be discerned from Chapter 2 of this study.

able” restrictions to be “discriminatory”. However, they did not intend the
standard of reasonableness to sanction those egregious forms of discrimina-
tion set out in Article 2.

Article 25’s non-discriminatory language is directed explicitly to indi-
viduals. However, it may also be intended to prohibit states from discrimi-
nating against political parties which embrace a particular ideology.

(b) Taking part in public affairs

The right to take part in public affairs is another pillar of the right to political
participation, expressly mentioned by this Article and traceable to the draft-
ers. Paragraph (a) of Article 25 guarantees the right to “take part in public
affairs” directly or through freely chosen representatives”. Since paragraph
(b) requires genuine, periodic elections, paragraph (a) must contemplate
additional means of influencing public policy. While the earlier paragraph
does not identify the types of public bodies to which it applies, the drafters
are known to have rejected a proposal that would have applied it to “all or-
gans of authority”. Nevertheless, the Human Rights Committee has stated
that the Article:

“covers all aspects of public administration, and the formulation and imple-
mentation of policy at international, regional, national and local levels”.

(c) The right to vote at genuine periodic elections

Paragraph (b) guarantees the right to vote at genuine periodic elections,
which shall be effectuated by universal and equal suffrage and shall be held
by secret ballot, guaranteeing the free expression of the will of the electors”.
Although paragraph (b) presents some of the most difficult interpretative
questions in Article 25, the drafters spent little time discussing its central
terms.

Rights, 9th Sess., 364th mtg., (1953), p.6 (hereinafter Commission on Human Rights, 364th
Meeting); Summary Record of the 363rd Meeting, UN ESCOR Commission on Human
Rights, 9th Session, 363 mtg. (1953), pp. 12, 15, 16 (Hereinafter Commission on Human
Rights, 363rd Meeting).

210 See Commission on Human Rights, 363d mtg, ibid., p. 16 (statement of Mr.Jevremovic,
Yugoslavia delegate)(describing restrictions such as those based on mental deficiency as
“reasons of a non-discriminatory character”); Commission on Human Rights, 365th Meeting,
ibid., p. 13 (statement of Cassin, French delegate).

211 While the Human Rights Committee has been careful to describe Article 25 as providing
rights to individuals and not groups – evidently in an effort to distinguish its refusal to con-
sider similar claims of group entitlement under Article 1 of the Covenant – it has effectively
extended the non-discrimination requirement to parties as well. In the Committee’s view,
freedom of association is an “essential condition...for the effective exercise of the right to vote
and must be fully protected.” Human Rights Committee, General Comment No. 25 (Dec.7,
1996), infra note 224, para. 4.

212 See, supra note 209.
(d) Universal and equal suffrage and secret ballot

The drafters generally agreed that the requirements of universal and equal suffrage and secret ballot meant that each vote must be counted equally. However, they left to individual States the question of whether votes would have equal effect. This is based on the rationale that this is largely determined by whether a country follows a proportional representation or a simple majority electoral system. The drafters of the ICCPR also briefly discussed whether secrecy was appropriate for States with a high percentage of illiterate voters. The majority of the drafters concluded that ballot secrecy was a fundamental aspect of a fair election, and should be retained.

Genuine election: Given the Cold War tensions at the time, it is not surprising that the drafters failed to clarify whether the guarantee of a “genuine election” to establish “the free expression of the will of the electors” would require party pluralism. During the Cold War, this proved to be the most intractable point of disagreement in the application of Article 25. Thus, Western States have long maintained that single-party elections are incompatible with genuine choice, while Socialist States did not share this view.

During the Covenant’s long drafting process (1948-1966), this debate spread to other regions, involving several African leaders. The most prominent of these was the Tanzanian President, the late Julius Nyerere, who argued in the 1960s that the existence of multiple political parties was not a prerequisite for genuine electoral choice. Other leaders in the region ar-

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213 Ibid.
214 See, e.g. Commission on Human Rights, 364th mtg, supra note 209, pp. 8, 15 (statements of Mr. Cassin, the French delegate).
216 See Third Committee, 132d Meeting, ibid., p. 450 (statement of Mr. Sandifer, US delegate); ibid. P.459 (statement of Mr. Watt, Australian delegate); ibid., at p. 463 (statement of Pavlov, Soviet delegate). The UDHR provides in Article 21(3) for a secret ballot “or equivalent free voting procedures”. This language was not retained in the ICCPR, thus effectively establishing secret ballot as the sole method of voting.
217 For example, the Soviet delegate argued that “in his country, the bourgeois class had ceased to exist. There thus remained only workers and peasants, and the Communist Party by itself was capable of looking after their interests”. UN GAOR 3d Comm., 3d Sess., 134th mtg. 471. (1948) (hereinafter Third Committee, 134th Meeting) (Statements of Pavlov, Soviet delegate). He argued further that “under the prevailing system (in the Soviet Union), there was no justification for the creation of other parties”. Ibid. These statements occurred during the debate over the UDHR.
gued that multiple parties would bring violence, and perhaps civil war. This was thought to be particularly true in states where different ethnic groups, forced together by colonial-era boundaries, would seize upon competitive elections as a means of exploiting preexisting divisions.\(^{219}\)

The ICCPR’s *travaux préparatoires* barely addresses this issue. The only attempt to define a “genuine” election came late in the drafting process, from the Chilean delegate. He stated that the adjective “genuine” had been used to guarantee that all elections of every kind faithfully reflected the opinion of the population,\(^{220}\) and also to protect the electors against government pressure and fraud;\(^{221}\) the text itself supports this interpretation.

Accordingly, a parenthetical clause providing for universal and equal suffrage and secret ballot, and the phrase “guaranteeing the free expression of the will of the electors”, follow the requirement of “genuine periodic elections”. The latter phrase appears to be describing the first; i.e., a “genuine periodic” election is one which guarantees the “will of the electors”, freely expressed. Based on this clarification, if the electorate did not have the opportunity to express its opinion by casting a vote for a particular candidate or party, the election would not be “genuine”.\(^{222}\) This interpretation suggests that Article 25, as originally drafted, did not prohibit one-party States per se. Single-party elections would run afoul of the Chilean formula in only two situations, namely:

“(i) if public opinion in a State was actually divided on important political issues;
(ii) and if a single party did not permit candidates representing each faction to stand for election”.

\(^{219}\) See, e.g., Pius Mseka, The Doctrine of the One-Party State in Relation to Human Rights and the Rule of Law, in Human Rights in a One-Party State (London: Int’l Comm’n Jurists, 1978), pp. 22-23. Togo, for example, defended its one-party system in response to queries from the UN Human Rights Committee as follows: “Pluralism which had been instituted at the time of independence had rapidly degenerated, giving rise to a plethora of parties based on ethnic units, each serving its own interests. This had engendered a civil war mentality. The Togolese People’s Rally had proved to be the best means of achieving national unity and solidarity. The concept of ‘rally’ implied respect for the individual and for diversity of opinions, the single Party being a forum where citizens could engage in dialogue and freely express their points of view”. (Report of the Human Rights Committee, UN GAOR, 44th Sess., Supp.no.40, pp.60-61, (1989)(hereinafter Report to 44th Session).

\(^{220}\) Third Committee, 1096th Meeting p. 192.

\(^{221}\) Ibid.

\(^{222}\) The Inter-American Commission on Human Rights, for example, has concluded that an “authentic election” occurs when there exists “some consistency between the will of the voters and the result of the election”. Mexico Elections Decision Cases 9768, 9780, 9828, Inter-Amer.Comm.: H.R.97, 108, OEA/Ser.L/V/11.77, doc.7, rev.1 (1990). The Commission based this opinion upon the American Convention on Human Rights, whose provisions on participatory rights has been described as “fundamentally coinciding”with Article 25 of the ICCPR. Ibid. p. 107.
Thus, a single party of homogeneous views would accurately reflect “free expression of the will of the electors”, if there were no divisions in public opinion. Similarly, if divisions did exist but the various factions within a party gave voice to all major points of view, the presence of additional parties would be unnecessary.

The above interpretations regarding the elements of fair elections were confirmed by other instances, as demonstrated below.

Textual Interpretation. The second instance in which the interpretation of Article 25 has been undertaken is at the textual level.

(a) Non-Discrimination
First, as regards the right of persons to have access to public service in his or her country, the provision formulates a right and an opportunity of every citizen. This is done without any of the distinctions mentioned in Article 2 of the ICCPR and without unreasonable restrictions, and is intended is to enable them to take part in the conduct of public affairs directly or through freely chosen representatives.\(^\text{223}\) It is clear that the only way in which a person can participate in public affairs is through direct participation, for instance, as a voter in elections.\(^\text{224}\) The list already provided makes reference to the possibility of acting as a voter in elections. Thus, the role of elections in participation must be understood by the expression, "through freely chosen representatives", meaning persons who are authorised to decide issues on behalf of the citizens.

The manner in which these representatives shall be chosen, such that there is free expression of the will of the people, is established in paragraph (b) of Article 25. This paragraph can be understood as an operationalization of paragraph (a), that concerns direct participation in elections as voters; hence the reference to freely chosen representatives.

(b) Term elections and other election elements
This operationalization defines what the ICCPR actually understands by the term "elections". Thus, according to Article 25, there shall be the right and an opportunity:

"to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

\(^\text{223}\) Infra note 224.
The above provision contains at least two different features. First, it contains the necessary elements of elections. Secondly, it contains the idea of an electoral cycle or time-span during which the different elements of elections shall be implemented. With regard to these elements, the wording of paragraph (b) is most relevant. It provides the following: the right to vote, the right to be elected or stand as a candidate, genuine elections, periodic elections, universal suffrage, equal suffrage, secret ballot and the free expression of the will of the electors. Such a textual interpretation confirms explicitly that the electoral elements, the subject of this study, are embodied in this Article 25 of the ICCPR.

The United Nations Human Rights Committee. The ICCPR treaty (in its Article 28 of the ICCPR) establishes the UN HRC, with the task of monitoring the compliance of State Parties with their obligations under this treaty.\textsuperscript{225} It does so through study of the reports submitted by the State Parties to this Covenant, and within the framework of Article 40. It shall produce concluding observations for every state report.\textsuperscript{226} In order to facilitate the drafting of these reports, the Committee has adopted its own guidelines concerning the form and content of reports from State Parties, which are not legally binding on states.

The UN HRC adopts general comments on the interpretation of the provisions of the ICCPR. The Committee can also deal directly with individual complaints by virtue of the Optional Protocol to the ICCPR. The views adopted by the UN HRC are not legally binding. However, this does not mean that these exercises are legally worthless, since they enhance the determinacy and status of the electoral element they happen to deal with. This Committee has confirmed and provided its understanding with regard to some of the electoral elements under discussion, which include: genuine elections, universal suffrage, standing for elections, secret ballot and equal suffrage. The UN HRC, in some cases, has dealt with these issues in court.\textsuperscript{227}

(a) On genuine elections
The interpretation of Article 25(b) of the ICCPR by the UN Human Rights Committee in 1996 confirmed the existence of the element of genuine elections. It stated that:

"Person entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted by referendum or plebiscite, and free to support or oppose the government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector' will. Voters should be able to form opinions independently, free of vio-

\textsuperscript{225} Dominic McGoldrick, supra note 197.
\textsuperscript{226} Ibid.
\textsuperscript{227} For some of these cases, see Hanski, Raija, Scheinin; Martin, Leading Cases of the Human Rights Committee, \textit{Institute for Human Rights Åbo Akademi} 2003.
ence or threat of violence, compulsion, inducement or manipulative interference of any kind.\textsuperscript{228}

Along the same lines, this was confirmed by the UN HR Committee in its concluding observations on the initial report by Kyrgyzstan.\textsuperscript{229} Here, it expressed concerns about the National Communications Agency of that country. This Agency, attached to the Ministry of Justice, also has full discretionary power to grant or deny licenses to radio and television broadcasters. The UN HRC, among other things, stated clearly that delays in granting or denial of licences would result in serious limitations:

"in the exercise of political rights prescribed in Article 25, in particular with regard to fair elections".\textsuperscript{230}

(b) On universal suffrage

With regard to the existence of universal suffrage, the UN HRC has made it clear that it is unreasonable to restrict the right to vote on the ground of physical disability.\textsuperscript{231} It is also unreasonable to impose literacy, educational or property requirements.\textsuperscript{232} Party membership should never be a condition for eligibility to vote, nor a ground for disqualification.\textsuperscript{233}

Furthermore, the right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions.\textsuperscript{234}

(c) On Periodic Elections

The UN Human Rights Committee has dealt with the question of periodic elections in the second periodic report of the Republic of Guyana. It raised the issue that the members of Parliament of Guyana had not been elected, but instead were designated by the heads of the political parties. This took place after the election of the President; thus, members of Parliament had not consulted the voters in making these decisions. The Chairperson of the UN HRC Committee noted that such practices ran counter to the provisions of Article 25 of the ICCPR.\textsuperscript{235}

\textsuperscript{228} See Paragraph 19 of the General Comment on Article 25, supra note 224.
\textsuperscript{229} See UN doc.CCPR/CO/69/KGZ, 24 July 2000, para.21.
\textsuperscript{230} Ibid.
\textsuperscript{231} Infra note 252.
\textsuperscript{232} Ibid.
\textsuperscript{233} See Paragraph 10 of the General Comment on Article 25, supra note 224.
\textsuperscript{234} Paragraph 10 of the General Comment on Article 25, supra note 224. Paragraph 14 makes the point that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.
\textsuperscript{235} Paragraph 7 of the General Comment on Article 25 by the UN HRC. UN doc.ICCPR/C/SR.1806,at para.23).
(d) On standing for elections

The Committee dealt with this electoral element in only one case, Peter Bwalya v. Zambia.236 The facts of the petition were as follows. The party in which Bwalya had intended to contest elections was banned under Zambia’s one-party constitution. He alleged that the authorities had “prevented him from properly preparing his candidacy and from participating in the electoral campaign”.237 He alleged further that in retaliation for his candidacy, the authorities dismissed him from his job, expelled him from his home and ultimately detained him for thirty-one months on charges of belonging to the banned party.238 These actions, Bwalya claimed, violated Article 25 of the ICCPR.

The Committee agreed. In commenting on this case, the UN HRC touched upon several different electoral elements such as the right to stand for elections, genuine elections, etc. Ultimately, the Committee observed that restrictions on political activity outside the only recognised political party amounted to an unreasonable restriction of the right to participate in the conduct of public affairs.239 It also noted that Bwalya had been prevented from participating in a general election campaign, as well as from preparing his candidacy for this party. This amounted to an unreasonable restriction upon the author’s right to “take part in the conduct of public affairs”, which the State party had failed to explain or justify.240

Three years later, the Committee issued a General Comment on Article 25, which reiterated and expanded upon its earlier holding in the Bwalya case.241 It first noted the significance of the electoral processes outlined in Article 25 concerning an effective democratic system:

“Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant”.242

237 Ibid, para. 2.1.
238 Ibid, para. 2.3.
239 Ibid., para.6.6. For reasons that are unclear, the Committee located the violation of Article 25 in sub-section (a), addressing the general right to “take part in the conduct of public affairs”, rather than sub-section (b), which deals directly with elections.
240 Ibid.
242 General Comment 25, supra note 224, para. 1.
Given this link between popular consent and governmental authority, the Committee emphasised the need for electoral systems to minimise distortions of popular views. It acknowledged that Article 25 does not envision any particular form of electoral system. Nevertheless, it noted that:

“any system operating in a State party must guarantee and give effect to the free expression of the will of the electors”.

Having established broad electoral choice as a principle emanating from Article 25, the Committee proceeded to address restrictions on party activities from different perspectives. First, addressing the rights of voters, it stated that:

“party membership should not be a condition of eligibility to vote, nor a ground for disqualification”.

Second, with regard to candidates:

“the rights of persons to stand for elections should not be limited unreasonably by requiring candidates to be members of parties or of specific parties”.

(e) Other political rights for meaningful political participation

Finally, the UN HRC has laid out political rights that are necessary for meaningful political participation. In this context, the Committee stated that:

“the right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25”.

This is so, the Committee concluded, because:

“political parties and membership in parties play a significant role in the conduct of public affairs and the election process”.

The Bwalya case is not the only one in which the UN HRC has dealt with the standing of elections in the context of all of these electoral elements. Another is Alba Pietraroia v. Uruguay, where the complainant had been barred from taking part in the conduct of public affairs and from being elected for 15 years in accordance with an Act. That instrument created a

243 Ibid., para. 21.
244 Ibid, para. 10.
245 Ibid. para. 17.
247 Ibid.
general conduct which the UN HRC found to be unreasonable.\textsuperscript{248} It argued that the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified,\textsuperscript{249} which had not been done in this case.\textsuperscript{250}

Moreover, the UN HRC has stated that national laws should contain sufficient provisions concerning the registration of parties and candidates. This is in order that political parties and candidates of all political opinions and groupings will have equal opportunity without any distinctions; this is mentioned in Article 2 of the ICCPR. It also means that no unreasonable restrictions are permitted. All of these steps should be undertaken to officially ensure that participants are part of the electoral process which leads up to the election. In other words, registration procedures should not be so cumbersome and difficult as to inhibit one’s candidacy.

In Antonina Ignatane v. Latvia\textsuperscript{,251} the UN HRC identified language as one possible distinction of such a nature, at least if used in an arbitrary manner.\textsuperscript{252} The applicant Ignatane had first been granted a certificate of command of the Latvian language, which was required under national law. This certificate had been issued by a panel of five language experts. However, the Election Commission disqualified the applicant from the list of candidates for municipal elections as ineligible. Such decision was based upon the judgement of a single inspector, who had stated that the applicant’s command of the Latvian language was inadequate. The UN HRC stated that the results of the review had created a situation in which the applicant was prevented from exercising her right to participate in public life, in conformity with Article 25 of the ICCPR.

The case of Josfez Debreczeny vs. the Netherlands concerned restrictions on electors, whereby it is clearly stated\textsuperscript{253} that the will of the electors should not be unduly restricted, but instead encouraged. This is very important to the outcome of elections. However, it is also recognised that certain categories of persons under certain circumstances can be excluded from the right to stand for election. In the above case, it was alleged that the refusal to accept the credentials of an elected person for a seat of a local council would amount to a violation of Article 25 of the ICCPR. The UN HRC stated that

\textsuperscript{249} Ibid.
\textsuperscript{250} Ibid.
\textsuperscript{252} Thus, for example, in the Kenya Elections of 1979 candidates were subjected to sitting for Swahili examinations, yet the official language in Parliament was and is the English language. The effect of having such a test was that even University graduates who had studied in English throughout their lifetime were forced to sit for these so-called Swahili Tests.
\textsuperscript{253} See Prépôtéir’s textual interpretation already provided with regard to Article 25 of the ICCPR, 1966. See also, Bossuyt, supra note 195.
the restrictions were reasonable and compatible with the purpose of the law. The Committee observed that legal norms dealing with bias in, for example, Section 52 of the Municipalities Act, are not apt to cover the problem of balancing interests on the general basis. It further noted that:

"the restrictions on the right to be elected to a municipal council are regulated by law, and that they are based on objective criteria, namely: the electee’s professional appointment by or subordination to the municipal authority".254

(f) Universal suffrage
The UN HRC has touched upon this electoral element in the context of admissible restrictions on the right to vote. Thus it has noted, for example, that established mental incapacity may be a ground for denying a person the right to vote.255 Regarding registration as an aspect of universal suffrage, the UN HRC has expressed that States Parties are under the obligation to adopt positive measures. The Committee has also commented with regard to the aspect of voting itself, categorically stating that it is crucial, for example, for the voters to be able to present themselves at the polling stations.256

The UN HRC has dealt with some cases in the context of the right to vote. Regarding a complaint filed against Uruguay. The Committee adopted the view that the denial of the right to vote on the part of members of opposition parties for a period of 15 years amounted to a violation of Article 25 of the ICCPR.257 It has also taken a position regarding unreasonable restrictions. In its concluding observations on the State report of Paraguay, commenting on the exclusion of one group, the Committee wrote:

"the restriction on voting for students of military schools seems to be an unreasonable restriction on the article 25 of the ICCPR on the right to participate in public life". 258

Furthermore, concerning the time period for restriction of the right to vote of convicted persons, the UN HRC wrote:

"that laws depriving convicted persons of their voting rights for periods of up to 10 years may be disproportionate restriction of the rights protected by article 25".259

254 See supra note 253.
255 See General Comment 25, supra note 224, para.4.
256 See General Comment 25, supra note 224, para.12.
Another aspect dealt with by the UN HRC concerns discrimination against women. In this context, the Committee demanded the abolition of discrimination against women. Thus, in its concluding observation on the state report of Kuwait, it stated that:

"The State party should take all the necessary steps to ensure to women the right to vote and to be elected on an equal footing with men, in accordance with article 25 and 26 of the Covenant".  

(g) On secret ballot

The UN HRC, in its General Comment, has dealt with the element of secret ballot. It stated that amongst other requirements, States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. According to the Committee, this implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted. It also means that any unlawful or arbitrary interference with the voting process and waiver of these rights is incompatible with Article 25 of the ICCPR.

Moreover, with regard to the electoral element of the secret ballot, the idea that a situation of free choice must be created for the voter when he or she is about to fill the ballot paper found support from the UN HRC. This occurred when the Committee stated that such a situation of free choice can only be achieved if the act of voting is performed in secrecy. It also stated that waiver of these rights is incompatible with Article 25 of the Covenant.

(h) Equal suffrage

The UN HRC has also pronounced its position regarding equal suffrage as an electoral element, in its General Comment on Article 25 of the ICCPR. Thus, it stated that:

“the principle of one person, one vote, must apply, within the framework of a State's electoral system, the vote of one elector should be equal to the vote of another."
The UN HRC has also commented on the equality of the vote. This is illustrated by the report involving Hong Kong before its transfer to China, where The United Kingdom was criticised by the UN HRC. The Committee noted that it was aware of the reservation made by the United Kingdom that Article 25 of the Covenant does not require establishment of an elected executive or legislative council. However, it took the view that once an elected legislative council has been established, its election must conform to Article 25. Thus the Committee, amongst other statements, took the view that the electoral system in Hong Kong did not meet the requirements of Article 25, nor of articles 2, 3 and 26 of the Covenant.

(i) On Equal Suffrage

The UN HRC has also commented on equal suffrage as an election element, making it clear that it has no preference towards an electoral system as long as the principle of one-person, one vote is observed.

The Committee accepts that any electoral system that accepts pure proportional representation implies a distortion of the relationship between the votes and their translation into parliamentary seats. However, it excludes distorted distribution of seats. In this context, the Committee drew attention to the delimitation of the constituencies. It stated, inter alia, that although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors.

(j) Free Expression of the Will of the People

The last electoral element, free expression of the will of the voters, has also attracted some comments from the UN HRC. According to the Committee, the freely chosen representatives exercise governmental power and "are accountable through the electoral process for the exercise of that power".

Apart from the interpretations by the UN HRC concerning Article 25 of the ICCPR outlined above, is there any global human rights body which has dealt with participation and the elements of elections?

The Former Commission on Human Rights. The UN CHR received its mandate to investigate human rights violations from the 1235-Procedure,

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267 Ibid.
268 See General Comment No.25 supra note 224., paragraph 21.
269 Ibid. The Committee noted that "the principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of the citizens to choose their representatives".
270 Paragraph 7 of the General Comment on Article 25, supra note 224.
271 The United Nations Commission on Human Rights is hereinafter cited as UN CHR.
named after the number of the resolution of the Economic and Social Council. The work of the Commission was carried out by independent experts referred to "Special Rapporteurs" who were given the authority to investigate human rights situations in certain countries (also known as country mechanism), or to investigate the situation of certain human rights throughout the world. Procedure provides the possibility for individual communication concerning human rights violations, and is confidential. Should the violations show a consistent pattern, then the Commission is expected to carry out an investigation.

The UN CHR has dealt with several electoral elements, outlined below.

(a) The genuineness of elections
In this context, amongst other reports, reference is made to the Special Rapporteur of the Commission on Human Rights for the former Yugoslavia, who investigated and concluded in his periodic report that in Bosnia and Herzegovina there had been no conditions for the holding genuine elections in 1996. Some of the reasons cited included violations of the freedom of association, assembly, movement, and expression.

(b) The right to stand for election
The Commission expressed its concern concerning one particular aspect of the right to stand for election; namely, the lack of transparency in the admissibility of candidates for parliamentary elections. The former Iranian Heavy Industries Minister, Mr. Behzd Nabazi, demanded in an open letter that the Council publish the reasons for his rejection in the press. Hojjatole-slam Sadeq Khalkhali stated that he did not know why he was disqualified. Pohl, who investigated and produced the report, did not express any specific opinion on the matter. However it can be inferred from his inclusion of such information in the report that he wished to indicate that the situation was not without problems; therefore, it was most likely not in accordance with standards applied by human rights bodies.

(c) Equal suffrage and secret ballot
The Commission also dealt with equal suffrage as an electoral element, in conjunction with the element of secret ballot. In this context, the Special Rap-

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272 It is worth noting here that there was a proposal to establish a Special Rapporteur for elections, but this proposal was shot down. See, USA delegation proposal to the 1993 World Conference on Human Rights, Vienna, 1993. US Draft Human Rights Action Plan, 1993, p.2.

273 UN doc./CN.4/1997/5, para.33.

274 See, the Final Report on the situation of the Islamic Republic of Iran composed by Reynaldo Galindo Pohl, where he refers to the information he received as the Special Representative of The Commission on Human Rights on the lack of this kind of transparency. UN.doc.E/CN.4/1993/41, paras.190 and 191.
porteur on Equatorial Guinea indicated two practices in his reports.\textsuperscript{275} According to the country’s first practice regarding equal suffrage, the report pointed out that there is no guarantee to the principle of one person, one vote, if a voter can vote twice. Therefore, it recommended that measures be introduced to avoid double voting.\textsuperscript{276} Concerning the second practice, secrecy of the vote, the report criticised, amongst other things, the decision not to use indelible ink to identify voters.\textsuperscript{277} The transparency of this process was also challenged by the "exclusion of the representatives of the opposition from counting of votes and holding of a recount by the National Electoral Board".\textsuperscript{278}

The UN CHR dealt with universal suffrage in the context of the registration of voters. It is understood that a registration process is crucial, and should be inclusive. The Special Rapporteur, in her report, found this registration to have been problematic in Bosnia and Herzegovina in 1996.\textsuperscript{279} Thus, she stated in the report that:

\begin{quote}
"for those who intended to vote in person in the municipalities in which they were registered to vote 1991, there would, amongst other requirements, be no new voter registration process,..."
\end{quote}

It should be emphasised that the involvement with the interpretation of this Article 25 on the part of the former Human Rights Committee, United Nations Commission on Human Rights, Committee on Elimination of Racial Discrimination, and Committee on the Elimination of Discrimination Against Women has enhanced the determinacy and status of the requirements of democratic elections, as this discussion revealed.

5.4 Conclusion

The main aim of Chapter 5 was to examine the issue of whether demo-conditionality enjoys support from any general treaty, which consequently would justify its compatibility with the principle of state sovereignty. Here, one specific general treaty has been demonstrated to be relevant: Article 25 of the ICCPR, 1966. This Covenant embodies the human right to political

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{275} See UN doc./CN.4/1996/67, para. 43.
\item \textsuperscript{276} Ibid.
\item \textsuperscript{277} Ibid.
\item \textsuperscript{278} Ibid.
\item \textsuperscript{279} UN doc./CN.4/1997/5, para. 5.
\item \textsuperscript{280} Ibid. It also stated as follows: "For all other intending voters, such as refugees and displaced persons who wish to vote in absentia, a process of registration is under way, with a planned completion date may serve to disenfranchise those who are blocked from travelling to locations at which they intend to vote or who may be displaced at a time after the cut-off date for completion of the process of registration".
\end{itemize}
\end{footnotesize}
participation, from which the right to free and fair election is derived. Interpretations attached to that Article from various sources were studied with regard to the existence of the eight election elements mentioned above; indeed, the existence of these elements was revealed. The UN HRC body, created by the ICCPR, 1966, also revealed their existence, as did the Former Commission on Human Rights.\footnote{The United Nations Commission on Human Rights is hereinafter cited as UN CHR.}

An examination of the existence, if any, of single-issue human rights instruments which could provide legal support to Article 25 of the ICCPR, 1966 shall now be undertaken in Chapter 6 of this study.
6 Demo-Conditionality and Single-Issue Human Rights Treaties

6.1 Introduction

As stated earlier on, to justify demo-conditionality, certain human rights invoke Article 25 of the ICCPR, 1966, in support.282 The existence of such treaties would further enhance the legal status of demo-conditionality in terms of its relationship with the principle of respect for state sovereignty in international law. However, such instruments, if they exist, will not be discussed in the context of determining the compatibility of these two principles.

The issues of participation and election283 are addressed in single-issue human rights treaty documents.284 With regard to these two issues, the documents to be studied are the 1965 UN Convention on the Elimination of All forms of Racial Discrimination285 and the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women.286 Here, the central question is: do the provisions of each of the above-mentioned documents, confirm the gist of Article 25 of the ICCPR on participation and the electoral elements, or not?

282 See, Chapter 5 of this study for the discussion on Article 25 of the ICCPR, 1966.
283 See, Chapter 5 of this study on participation and election elements.
284 Reference is also made to these instruments in Chapter 10 of this study. One very important single-issue human rights instrument dealing with participation is the Right of The Child Convention. See, UNGA Resolution 44/25 of November 1989,1577 UNTS 3,which entered into force 2 September 1990. It is Article 12 of this Convention which addresses a child's right to participation, and which is analysed by Rebecca Stern "in her doctoral thesis: "The Child's Right to Participation- Reality or Rhetoric?", Uppsala,2006. This particular Convention is excluded from this discussion, because of its irrelevancy due to the fact that this study deals with participation in the context of parliamentary and presidential elections. Children are excluded from participation in these elections by nearly all states, depending on the definition each state attaches to the term "child".
6.2 Convention Against All Forms of Racial Discrimination

6.2.1 Introduction

This treaty\textsuperscript{287} has a provision relevant to the elements of participation and election embodied in Article 25 of the ICCPR.

6.2.2 Article 5(c) is the Relevant Article

In Article 5(c) of the CERD, it is provided that:

"States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee to everyone without any distinction the enjoyment of political rights, in particular the right to participate in elections through voting, and through opportunity to stand for elections on the basis of universal and equal suffrage".

Eligibility on the basis of equal conditions hence lies explicitly at the centre of Article 5(c) of the CERD. This document places great weight on non-discrimination, as evidenced in the wording of this Article. It also embodies a positive element when establishing a guarantee of the right to participation for everyone without distinction, as to race, colour, or national or ethnic origin. In this context, the CERD language reflects that seen earlier in Article 25 of the ICCPR. The non-discriminatory right to take part elucidated in the CERD is relevant to both government and public affairs, also using a language quite similar to Article 25 of ICCPR.

Article 5 of the CERD does not exclusively cover the right to participation, but should also be construed to embody the adjacent political rights: freedom of thought, freedom of expression and opinion, freedom of movement, and freedom of peaceful assembly and association. In accordance with this Article 5(c) of the CERD, the elimination of discrimination and guarantee of rights thus extend to these other civil rights as well. The CERD reinforces the possibility of maintaining the representational character of government in the context of the entire population. It targets modalities of self-determination in its internal aspects, supporting, for example, the position of certain groups who may be disadvantaged in their political life, e.g. ethnic minorities.

The sub-conclusion here, then, is that in Article 5 the CERD addresses the issue of participation and confirms the presence of the electoral elements under discussion.

6.2.3 The Committee on Racial Discrimination

The Committee was established by Article 8 of the Convention on the Elimination of All Forms of Racial Discrimination. States are under the obligation to submit periodic reports, as in the ICCPR. This Committee, just like the UN HRC, adopts general recommendations on the provisions of the Convention. Article 14 of this Convention makes an individual complaint procedure possible, just like Article 1 of the Optional Protocol to the ICCPR, 1966. Article 5 of the CERD has attracted comments by this human rights body, which is entrusted with the protection of the rights mentioned in the document.

So, has the CERD in fact confirmed the existence of electoral elements embraced by its Article 5, which serves as its equivalent to Article 25 of the ICCPR? The answer is yes: the comments address several of these elements under discussion. With respect to universal suffrage, this is demonstrated in the Committee’s comments regarding limitation of the rights of citizens to vote. Following the conclusions drawn by the UN HRC Committee, the CERD welcomes the fact:

"that the right to vote in local elections has been granted to all permanent residents, regardless of their nationality", in its concluding observations on the state report of Estonia.

This Committee has also commented on one particular aspect of the right to stand for elections, namely: participation in a public debate in an environment free of pressure and intimidation, and conducted through private entities, e.g., the media and political parties. This is with regard to General Recommendation No.20, which refers to the content of state obligations relative to article 5 of the CERD. According to Article 5, states are under a direct obligation even when acting through public institutions, and must ensure that private entities are not violating human rights. Although the Committee does not fully reveal its opinion on this matter, it makes a telling remark in its concluding observations on the state report of Iran, stating that:

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288 Hereinafter cited as CERD.
289 See Chapter 5 of this study.
290 See ibid.
291 See infra note 294, Recommendation No.20, para 3.
292 UN doc. CERD/C/304/Add.98 (200), para. 7.
293 Article 5 of the CERD states that: "protection of may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State Party concerned to ensure the effective implementation of the Convention". See General Recommendation 20, infra note 294, para.5.
"several of the civil and political rights listed in article 5(d) of the Convention such as…the freedom of opinion and expression, are enjoyed subject to certain restrictions". 294

The Committee has also made recommendations concerning the electoral elements of standing for elections and universal suffrage. Citizenship, for example, is a requirement mentioned in Article 5 of the CERD. At the same time, this Article contains the principle of equal suffrage. The co-existence of these potentially competing considerations suggests that citizenship, as a requirement, should be treated with great caution. Here, the Committee has made its position clear. In its General Comment No.20 on Article 5 of the CERD, concerning the right to stand for elections, it noted that this right is limited to citizens. 295 In this light, the recommendation in Article 5 can be interpreted as dealing with the issue of discrimination within a group of citizens in a state, and therefore the right to stand for elections is not universal.

The Committee has also commented on the problem of standing for elections among ethnic minorities, a common difficulty facing this group. This is particularly the case when individual members are attempting to utilise their right to stand for elections, e.g., language problems. In its concluding observations on the state report of Georgia, it expressed its concern,

"at the under-representation of ethnic minorities in Parliament. It expressed also its concern with the barriers to participation of minorities in political institutions, amongst other things, due to a lack of knowledge of the Georgian language".

The right, or lack of, to stand for election and citizenship has posed a considerable problem and attracted comments from CERD concerning several countries. The majority of the situations mentioned for several countries are not discussed here. Suffice it to state that the CERD regards citizenship as a condition for being entitled to stand for elections. It expressed its:

"concern by the fact that, in spite of efforts, the Government of Kuwait has not until now found a solution to the problems of Bedouins, the majority of whom are still stateless". 296

That problem, it was noted, also existed in the Syrian Arab Republic, about which the Committee states that it:

"is still concerned about the stateless status of a large number of persons of Kurdish origin". 297

294 See UN doc.CERD/C/304/Add.83 (2001), para.11.
296 See UN doc.CERD/C/304/Add.72 (1999), para.12.
While the principle of equal suffrage is recognised in Article 5 of the CERD, with regards to its implementation, the Committee is faced with a dearth of information supplied by state reports. Consequently, it fails to contribute to a common understanding on this element.

6.3 Convention on Discrimination Against Women

6.3.1 Introduction

The CEDAW addresses the issues of participation and confirms the election elements, but in the context of women. The question is whether the CEDAW is necessary when there already is Article 25 of the ICCPR.

6.3.2 Significance of this Convention

Article 25 of the ICCPR is addressed to "everyone", implying that participation and election issues concerning women are also covered; that is, women enjoy an equal right to participate in government or public affairs. The significance of CEDAW lies in the fact that it is a constant reminder to everyone, especially state authorities, of the fact that women are a part of the people. Why is this necessary?

It is fairly well-known that the position of women in relation to men in governmental structures, and even the private sector where the government are in partnership with other bodies, are not reflective of (women's) share of the population. Addressing this imbalance constitutes the main objective and aim of the CEDAW.

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297 See UN doc.CERD/C/304/Add.70 (1999), para.9.
298 This position is open to change, especially by feminists who point to their representation and strive for equality with men. See a recent doctoral thesis by Jenny Westerstrand, and the massive amount of feminist literature contained within it. *Mellan mäns händer*:kvinnors rättssubjectivitet, internationell rätt och diskurser om prostitution och trafficking.*, Uppsala universitet, November,2008.
6.3.3 Article 7 of this Convention

Article 7(a) of the CEDAW is particularly relevant in the context of participation and elections. It promotes the inclusion of women by prescribing eligibility for election to all publicly elected bodies. This inclusiveness is extended to cover paragraphs (b) and (c), concerning practical functioning in elective office, participation in non-governmental organisations, and associations concerned with the public and political life of the country. This can be used as a ground for special measures supporting the position of women in political life. Furthermore, women have the right to vote in all elections and public referendums on equal terms with men.

The questions to be responded to here, then, are as follows: has the Committee on the Elimination of Discrimination Against Women (CEDAW) dealt with Article 7 of the CEDAW? If so, how is this Article formulated with regard to matters concerning the elements of elections?

6.3.4 The Committee on Discrimination Against Women

The Committee on CEDAW is another human rights body within the United Nations system, similar to the ones discussed earlier, that is established by Article 17 of the CEDAW. According to its Article 18, States Parties to this Convention are under obligation to submit their report every four years on the measures adopted to give effect to the treaty provisions. This Committee, like the UN HRC, adopts concluding observations on the state reports, as well as general recommendations. The following are some of the electoral elements of elections dealt with by the Committee.

Genuineness of Elections. The Committee has dealt with genuineness of elections as an electoral element, identifying factors which impede the implementation of Article 7(a). In this context, it is stated that women frequently have less access than men to information about candidates, party platforms, and voting procedures. This is information that governments and political parties specifically have failed to provide to women. In order to facilitate women’s full participation in genuine elections, the Committee, in its concluding observations on the state report of Belarus, urged the government to improve certain conditions. These included taking all necessary steps to ensure an open and encouraging environment, so that women would have equal opportunity to express opinions and participate equally in all aspects of the political process and organizations of civil society.

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301 Hereinafter cited as CEDAW.
302 General Recommendation No.23, Report of the Committee on the Elimination of Discrimination against Women, UN doc.A/52/38/Rev.1, paras.20 (a) and (b).
There is yet further evidence that the Committee has definitively dealt with this electoral element in General Recommendation No.23, in which it identifies the two obstacles to the exercise of the right to vote by women. According to this Committee, these consist of illiteracy and a lack of knowledge on the part of women regarding the necessary link between registering and voting, and regarding the possibilities for improved living conditions that this right can confer. However, in its concluding observations on the state report of Guatemala, the Committee reported that it was satisfied:

"that illiterate women no longer being discriminated against their voting rights". Moreover, the Committee covers issues concerning elimination of discrimination against women in all spheres and in this context in non-discrimination of participation of women in the electoral process. Therefore, this Committee has commented on certain aspects of the electoral elements.

Political and public life. The Committee states that 7(a), which deals with equal rights for women regarding elections, are to be guaranteed in the legal provisions of States Parties (de jure) as well as fully implemented (de facto). The Committee is fully aware of the reality of certain restrictions upon women’s participation in the electoral process. With this in mind, it has made some recommendations regarding the removal of factors that, in some countries, inhibit women's involvement in the public or political lives of their communities.

For instance, the Committee demands the adoption of a quota system that places responsibility on political parties to ensure equal possibilities for women to be included in the lists of candidates. To this end, it has adopted a recommendation, which puts the burden of implementation on States Parties to the effect that:

304 General Recommendation No.23, supra note 302 para.20(a)
306 There is great interest to-day in Third World for the encouragement of women participation in electoral process, so it should not be strange if I find itself involved extensively with the work of this Committee.
308 General Recommendations No.23, ibid, para.20 (d).
309 The quota system recommended by the Committee was taken up, for example, in the case of Burkina Faso. Thus, the Committee "recommends that the State party implement temporary special measures ...and use a quota system in order to achieve a substantial improvement in the number of women in Parliament and increase their participation in political life and decision-making". For Burkina Faso, see Report of the Committee on the Elimination of Discrimination against Women , UN.doc/55/38, Part I, paras.239-286, at para.273. The Committee also takes up the issue of quota regulations within political parties in order to increase the number of female candidates for elected positions, in their concluding observations on the state report of Iraq. See, Ibid. Part II, paras.166-210, at para.195.
310 Ibid. para.22.
"States parties are under obligation to take all appropriate measures, including the enactment of appropriate legislation that complies with their Constitution, to ensure that organizations such as political parties, which may not be subject directly to obligations under CEDAW, do not discriminate against women and respect the principles contained in articles 7 and 8".  

In this context, the Committee does not consider special temporary measures aimed at accelerating the de facto equality between men and women to be considered discriminatory against men, as seen in Article 4(1) CEDAW.

The secrecy of the vote. According to the Committee:

"many men influence or control the votes of women by persuasion or direct action, including voting on their behalf".  

The Committee emphasises that these practices undermine the secrecy of the vote for women, based on the idea that the right to vote means also the right to cast one's own vote. It is important that women should be entitled to complete secrecy when voting, and also that they can have confidence that the vote will remain secret. Thus, in one report, it states:

"welcomes the elimination of proxy votes which had enabled a husband to vote in the place of his wife".

At this point, an examination of the rights of participation by minorities and indigenous peoples is also relevant and appropriate.

6.4 Participation: Minorities and Indigenous Peoples

The legal basis of the emerging law regarding the right of members of minorities and indigenous peoples to enjoy their distinct culture in commu-

311 Ibid. para.42. This approach by the Committee, as it notes itself, is rather far-reaching. Political parties are not party to the CEDAW and are not under obligation of the CEDAW.
312 See General Recommendation 23, supra note 303, 20 (c).
315 See Martin Scheinin,"The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land", in Theodore S.Orlin, Allan Rosas, Martin Scheinin (eds.), The Jurisprudence of
nity with other members of their group is grounded in Article 27 of the ICCPR.\textsuperscript{316} A fully detailed discussion of those rights is not undertaken here. Suffice it to state here that, as has already been stated earlier,\textsuperscript{317} it is important to underscore that international human rights law applies also to minorities and indigenous peoples, including the "right to democracy".\textsuperscript{318}

6.5 Conclusion

The aim of Chapter 6 was to demonstrate whether there are other global treaties which provide legal support for Article 25 of the ICCPR, 1966. The discussion shows that participation and the elements of elections are also dealt with by single-issue human rights treaty documents, including the 1965 UN Convention on the Elimination of All forms of Racial Discrimination (CERD), and the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), both of which address the issues of participation and elections. The provisions of each of these documents confirm the gist of Article 25 of the ICCPR regarding these areas. These instruments, for example the CERD and CEDAW treaties, embody a right to political participation from which the right to free and fair elections and its electoral elements are derived. Participation of National Minorities and Indigenous Peoples has also been examined, and confirms the same trend.

The very existence of these instruments further enhances the legal status of demo-conditionality with respect to its relationship with the principle of respect for state sovereignty in international law.

In Chapter 7, we shall proceed to examine the role of demo-conditionality with regard to development co-operation instruments.

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\textsuperscript{316} In this context, see, Athanasia Spiliopoulou Åkemark , who has adequately analysed this Article 27 of the ICCPR, supra note 114.

\textsuperscript{317} See, Chapter 2 of this study.

\textsuperscript{318} In this context, reference is made mainly to Article 25 of the ICCPR, which is the subject of this study.
7 Demo-Conditionality and 1945-1980 Development Co-operation Instruments

7.1 Introduction
Demo-conditionality has long been justified on the existence of development co-operation agreements. Therefore, the aim of this Chapter is to demonstrate whether there are instruments in development co-operation which expressively or implicitly advocate the inclusion of demo-conditionality. The existence of such instruments, depending on their legal quality and content, would have a definite legal impact as to the compatibility of demo-conditionality with the principle of state sovereignty. As indicated earlier, this represents “Route 2” of the analysis.

7.2 The Presentation of the Instruments
There are various instruments of diverse legal character in the field of development co-operation, which are relevant to the above context. Such instruments consist of international conventions and United Nations declarations and resolutions, as well as Declarations from United Nations-sponsored conferences. The approach adopted in discussing these instruments will be as follows. First, the instrument and its relevant provision is identified. Then, a textual interpretation is made of the provision’s content to ascertain whether or not it contemplates the inclusion of demo-conditionality. Here, this particular provision will either explicitly or implicitly advocate it inclusion, or reject it.

7.3 Treaty Instruments
7.3.1 Introduction
There are two treaties which concern the duty to co-operate for development: the UN Charter 1945, and the International Covenant on Economic, Social and Cultural Rights, 1966. What messages, if any, do they contain concerning the inclusion of demo-conditionality in development co-operation?
7.3.2 The United Nations Charter, 1945

The UN Charter, 1945 has specific provisions entrenching development co-operation in the economic field, namely: Articles 1, 55 and 56. Among the various missions of the United Nations listed in Article 1 of the Charter are the achievement of:

“International co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”

The duty of the international community, and developed countries in particular, to promote co-operation for development includes the following. First, there is the duty to remove the diverse set of restraints that continue to obstruct the attainment of development objectives. Second, it includes the duty to provide positive assistance, in order to promote the universal achievement of the human right to development.

On the issue of demo-conditionality in development co-operation, these provisions are silent. No direct mention of the term conditionality is made in these relevant Articles. The presence of conditionality usually constitutes discrimination in development co-operation. Thus, it can be interpreted that these articles do not anticipate conditionality of any kind in that regard. The UN Charter outlaws all discrimination on account of a State’s socio-economic system, including trade, economic, financial and cultural, and other boycotts or “sanctions”.

7.3.3 Economic, Social and Cultural Covenant, 1966

The International Covenant, Economic, Social and Cultural Rights, 1966, as a treaty, deals with co-operation for development. Article 2 (1) is the rele-

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319 For the discussion of these Articles 55 and 56, see also the upcoming Chapter 12 of this study. One of the well-known commentators on the UN Charter, who has analysed these Articles, is L.M. Goodrich, E. Hambro and A.P. Simmons, *Charter of the United Nations: Commentary and Documents* 373-74(1969).

320 UNGA.Res.3201(S-VI),para.3, resolution 2542 (XXIV) article 9, and resolution 32/130, preamble.


vant provision in the context of the claim to development assistance by poor countries. It reads as follows:

"2(1). Each State Party to the present Covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, including particularly the adoption of legislative measures."

This Article clearly recognises that States that do not have adequate resources (poor States), in order to fulfil these rights for their citizens, should expect to receive and claim development assistance from richer ones. This represents a solid foundation for the claim to development assistance by developing countries.

Another relevant provision in the context of this discussion is Article 11. It reads as follows:

"... The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent."

This Article makes clear that developing countries should expect development assistance from developed countries. But in this case, there is the emphasis that such co-operation is based upon free consent.

In regards to demo-conditionality, the ICESCR rules out any conditionality in development co-operation, as already indicated. Thus, it is significant that Article 2(2), states:

"States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

With this background information, the United Nations Declarations and Resolutions in the field of development co-operation are examined below.

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323 Article: 2(1). of the IESCR, 1996. For the ICESCR Covenant, see, supra note 193.
324 ICESCR,1966, ibid.
325 The italics are my own, and serve as a means of emphasising the significance of those words in defining whether there is a legal duty to cooperate for development. My understanding of free consent here is that richer countries are not legally bound to provide development assistance to poorer countries, as such. Conversely, the developing countries may also reject development assistance, if they so wish, if this is tied to any conditionality such as the inclusion of demo-conditionality.
7.4 Resolutions from United Nations General Assembly

7.4.1 Introduction

The United Nations General Assembly has made several pronouncements through the adoption of various resolutions and declarations on development co-operation. The appropriate place to begin this discussion is with the examination of the 1960s and 1970s United Nations General Assembly resolutions.

7.4.2 The 1960s Instruments

First was the Resolution on "Concerted Action for Economic Development of economically Less Developed Countries, 1960." The Assembly reiterated in this resolution that:

"a prime duty of the United Nations is to accelerate the economic and social advancement of the less developed countries of the world".

The second resolution was on "Accelerated Flow of Capital and Technical Assistance to the Developing Countries". It likewise expressed:

"The hope that the flow of international assistance and capital should be increased substantially ....... to approximately 1 per cent of the combined national income of the economically advanced countries".

Third, in the next regular session, the General Assembly took further steps to strengthen co-operation for development. The proclamation of the "United Nations Development Decade-A Programme for International Co-operation" is one such pronouncement.

Fourth, in another resolution, the General Assembly considered international trade as the primary instrument for economic development.

The issue of demo-conditionality’s presence in the 1960s and 1970s instruments will be examined at the very end of the discussion, together with the rest of the remaining UNGA resolutions and declarations.

326 Resolution 151(XV) of December 1960.
327 Ibid.
328 Infra 330.
329 Resolution 152(XV) of December 1960.
330 See Resolutions 1710(XVI) and 1715 (XVI) both of 19 December 1961, adopted with the same name.
331 UNGA Resolution (xv), of 19 December 1961, on "International Trade as a Primary Instrument for Economic Development".
7.4.3 The 1970s Instruments

During this period, there were two relevant sets of resolutions: those dealing with the UN Development Decades, and those relating to the New International Order Declarations.

The International Development Strategy Declarations. The proclamation of the "International Development Strategy for the Second United Nations Development Decade", adopted in 1970, implemented the former resolution in important aspects.332 This resolution enumerated the policy measures that would ensure the realisation of its goals and objectives. Such measures, amongst others, were associated with an increase in financial resources for development to developing countries. An overall appraisal of the progress made in implementing the "Development Strategy" would be made by the General Assembly through ECOSOC.333 A more just and rational world order "was contemplated in a passage of the General Assembly resolution proclaiming the Strategy for the Second Development Decade".334

Another important document is the 1970 Declaration and Co-operation among States in Accordance with Charter of the United Nations, expressed in the following terms:

"States should co-operate ...... States should also co-operate in the promotion of economic growth throughout the world, especially that of the developing countries."335

This is a very important instrument, used as a basis for interpreting the legal status of the duty to co-operate for development with respect to the UN Charter provisions outlined studied above.336

The New International Economic Order Instruments. The important documents in this context are: the Declaration and the Programme of Action on the Establishment of a New International Economic Order (NIEO),337 and the Charter of Economic Rights and Duties of States.338 These resolutions embody the basic tenets of NIEO.339

The “New International Economic Order” (NIEO) postulated a new normative order in international law as a precondition for the redistribution of

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332 Ibid.
333 See Resolution 262 5XXV), of 24 October 1970, on "International Strategy”, mentioned in the text.
334 See Paragraph 12 of the aforementioned Resolution 2625 (XXV), of 24 October, 1970.
335 UNGA Res.2625 (XXV) of 24 Oct.1970(Annex).Tunkin asserts that the principle of cooperation is one of the most important new principles of international law, and that compliance with this principle is a necessary condition for the normal functioning of the international system.;G.Tunkin,Law and Force in the International System,p.328.
336 See, discussion in Chapter 12 of this study.
337 UNGA Res.3201 (S-VI) and 3202 (S-VI) of May 1974, respectively.
339 NIEO Declaration and Programme of Action and CERDS.
wealth in favour of developing countries. Special and differential treatment of developing countries reflected institutionalised and legitimised obligations of the developed world to provide this treatment. Third World countries claimed that this was/is necessary in order to offset bias, promote growth and reduce income disparities resulting from unjust structural features of the world economy. The Declaration on NIEO and its Programme of Action contains provisions calling for development assistance to developing countries.\textsuperscript{340} The particular principles set out in the resolutions include, amongst others, item (vi) “The increased flow of development assistance”.\textsuperscript{341} The goals of the NIEO are summarised broadly in the Preamble to the CERDS that provides for the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and co-operation among States.\textsuperscript{342}

The 1960-1970s instruments and the factor of demo-conditionality, which led to the launching of international co-operation for development, was the process of decolonization; hence, the adoption of the Declaration of Decolonisation.\textsuperscript{343} Those instruments adopted during the earlier period of decolonisation pass on a clear message concerning conditionality in development co-operation. For instance, the General Assembly, in its resolution on technical assistance, declared that assistance should:

"(i) not be a means of foreign economic and political interference in the internal affairs of the countries concerned and shall not be accompanied by any considerations of a political nature".\textsuperscript{344}

In its resolution on the “International Development Strategy for the Second U.N. Development Decade”, the Assembly declared that:

"Financial and technical assistance. Should not in any way be used by the developed countries in the detriment of the national sovereignty of recipient countries”\textsuperscript{345}

Discrimination by international financial institutions based on a country’s political or economic system has also been proscribed.\textsuperscript{346} Furthermore, regarding technical assistance, the Secretary-General has been instructed:

\textsuperscript{340} See, ibid.
\textsuperscript{341} Ibid.Art.22.
\textsuperscript{342} CERDS preamble. For analysis of CERDS, see generally Brower and Tepe, the \textit{Charter of Economic Rights and Duties of States: A Reflection or Reflection of International Law?} 9 Int’l Law, 295(1975).
\textsuperscript{343} For the full text of the Declaration, see Resolution 1514(XV) of 14 December 1960.
\textsuperscript{344} Resolution 211(III), 1948, on ”Technical Assistance for Economic Development”.
\textsuperscript{345} Res. 2626 (XXV), par.48, 1970). Discrimination by international financial institutions based on a country’s political or economic system has also been proscribed.
\textsuperscript{346} See "Programme of Action for the Establishment of NIEO", Resolution 3202(S-VI), 1974,Chap.iii, par.2, b.
"It be provided, as far as possible in the form which the country concerned desires" 

The 1964 UN Conference on Trade and Development (UNCTAD I) stated as part of this principle that development assistance:

"Should not be subject to any political or military conditions",

and

"should flow to developing countries on terms fully in keeping with their trade and development needs". 347

With regard to the NIEO declarations and the CERD, this issue of conditionality did not even feature, due to the efforts of Third World countries with the aim of what they termed” total independence”.

The 1960s and 1970s instruments rule out demo-conditionality as such. Yet, as will be revealed later on, their legal significance is debatable. 348 During the 1980s, there was one instrument adopted in the field of development co-operation – the Declaration on the Right to Development, 1986 – discussed below.

7.4.4 The Declaration on Right to Development 1986

After lengthy and difficult preparations, the Assembly adopted the Declaration on the Right to Development in 1986. 349 This Declaration has received quite extensive commentary in the literature. 350 What message, if any, does the instrument send concerning the provision of development assistance, and the role of demo-conditionality in development co-operation?


348 They are simply UNGA Resolutions, whose legal effects are debatable. Moreover, they did not create a legal duty to co-operate for development as revealed later on in this discussion. During the 1980s, there was one instrument adopted in the field of development co-operation – the Declaration on the Right to Development, 1986 – discussed below.

349 General Assembly Resolution 41/128 of 4 December 1986, hereinafter cited as UN HRD Declaration. The Declaration was adopted by a vote of 146 to 1 (the United States) and 8 abstentions.

Relevant Articles and Interpretation. The precise meaning of the right to development is still in flux.\(^{351}\) However, it is still possible to identify its Articles dealing with the provision of development assistance and demo-

conditionality.

\((a)\) International Co-operation provisions
There is no doubt that the 1986 Declaration emphasises co-operation for development, and includes a provision for development assistance to poor countries. In this document, international co-operation for development is conceptualised in the context of rights and duties of states. The relevant Article is Article 3(3), which states as follows:

“States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realise their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realisation of human rights”.

Although this article is filled with UN platitudes, it undeniably reveals the following: first, the provision of development assistance to poor countries; second, a respect for the principle of state sovereignty in development co-operation; and third, the observation of encouragement of the observance and realisation of human rights. This last component is part of binding international law.\(^{352}\) Article 4 Paragraph 2 of the UN HRD Declaration is interpreted as withdrawing the provision of development co-operation from the ambit of charity. These provisions are interpreted as representing the right to development of developing states, which reflects the duty to create an NIEO as first stipulated in the NIEO and Programme of Actions of 1974, and in the CERDS. They represent claims by developing countries to development strategies\(^{353}\) and development assistance.\(^{354}\)

Anyone who listened to the NIEO debates in the UN in the 1970s would have little doubt that they concerned the duty on the part of the international community and developed states to create a NIEO, to enable developing States to realise their rights to equality and self-determination. To most people from the South, the international dimension of the right to development – i.e., NIEO – represents the most significant, if not the only, substance of the content of the right to development. Nevertheless, today as a special interest order the NIEO is now widely believed to be defunct.


\(^{352}\) See, Chapter 10 of this study.

\(^{353}\) P.Alston,“The Fortieth Anniversary of the Universal Declaration of Human Rights Time more for Reflection than for Celebration”, pp.8-10.

\(^{354}\) Ibid.Art.22.
(b) Democratisation of internal institutions

The 1986 Declaration, additionally, emphasises both national policies and programmes. The Articles above deal also with this second, national dimension, which concerns the duty of States in relation to people living under their jurisdiction. According to this duty, the right to development obligates developing countries to democratise their national institutions. Therefore, there is a correlative duty of all States to democratise national institutions which is related to the right to self-determination in international law. This right to self-determination, stated in Article 1 of both International Covenants on Human Rights, imposes on States the obligation to respect the rights of peoples under their jurisdiction. Such rights include the right to freely choose one’s political status and to freely pursue one’s economic, social and cultural development without discrimination based on race, religion or colour. Just as self-determination means above all people’s rights in relation to their own government, the right to development formulates rights for individuals, groups and people in the national dimension. Such formulation of obligations of States towards their own populations is a familiar concept in human rights law.

One further duty which attaches to States relates to the rights of national, ethnic, cultural, religious and other recognisable minority groups. According to the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the provision in Article 27 of the International Covenant on Civil and Political Rights has the effect that:

“persons belonging to such minorities shall not be denied the right ...to enjoy their own culture.”

This requires active and sustained measures from States.

It is clear, then, that there are obligations on the part of developing States implied by the right to development, as a consequence of its human rights characteristics. The first possible position concerning the UN HRD Declaration with regards to demo-conditionality in development co-operation is that it does not contemplate this nor any other conditionality. There are two lines

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355 The relevant Articles in this context are: 2(3),3(1),8(1) and 8(2).
356 In a nineteenth-century treatise on the Sphere and Duties of Government, Wilhelm von Humboldt emphasised the role of governments in fostering development: “The grand, leading principle, towards which every argument unfolded in those pages directly converges, is the absolute and essential importance of human development in its diversity”. Quoted by J.S.Hill, On Liberty (London, John W.Parker and Son, 1958), and p.1.
357 See Article 1 of ICCPR and ICESCR of 1966.
359 The concept of a “minority” has been discussed above, see also, Article 27 of the International Covenant on Civil and Political Rights. See, Athanasia Spiliopoulou Åkemark , supra note 114. See also the discussion in Chapter 6 of this study.
360 Ibid. Add.5, paras. 29-30.
of argument to support that position, the first being that the UN HRD Declaration does not mention the word "conditionality". The second line of argument is a reliance on the international dimension of the right to development, whereby by interpretation the emphasis is only on the NIEO concept which stresses overwhelmingly the primacy of state sovereignty in international relations. Such a reliance on the NIEO would exclude conditionality. The developing countries that had voted overwhelmingly for adoption of the UN HRD Declaration also embrace the first position. Yet there are others, especially among Western donor countries, that are not prepared to treat an NIEO as part of the content of the right to development according to the UN HRD Declaration.

The second possible position, whereby the Declaration does in fact contemplate demo-conditionality in development co-operation, finds support in two lines of argument. The first of these bases itself on the function of a right to development.\textsuperscript{361} In this context, it is viewed as a vehicle not only for specifying the relationship between furthering development and the protection of human rights, but for linking national and international dimensions of human rights.\textsuperscript{362}

In this context, the UN HRD Declaration makes the following proposition: that the

"person is the central subject of development" and the beneficiary of the right".\textsuperscript{363}

Here, it also uses the phrase “active, free and meaningful participation.”\textsuperscript{364} The Declaration speaks of a particular kind of development\textsuperscript{365} from which flow certain legal and moral obligations. In other words, it contemplates a person-centred development which retains a respect for human rights content.\textsuperscript{366} By using development as a multilateral instrument, the Declaration lays the legal (ethical) foundation for the obligations of States and the international community to promote development in poverty-stricken parts of the world; a basis which entails a reliance upon international human rights. It not only lays this foundation, but provides the elements most essential to the development process. This means that those involved in international development cannot ignore the central role that a respect for human rights (democracy) must play in that development process.

\textsuperscript{361} See, infra note 363.
\textsuperscript{362} See also Alston, “The Right to Development at the International Level”, in Re’ne-Jean Dupuy (ed.), The right To Development at The International Level, Hague Academy of International Law, Workshop 99-114,at 110 (Alphen a/d Rijn, 1980).
\textsuperscript{363} UN HRD Declaration Art.2 (1).
\textsuperscript{364} See UN HRD Declaration, Art.2.2.3. See also UN HRD Declaration, Arts.1.1. (Defining development), and 8.2. (Participation as a factor in development).
\textsuperscript{365} See ibid.
\textsuperscript{366} See ibid.
The second line of argument supporting a contemplation of demo-conditionality, as in the first case, relies upon the relationship between international and national dimensions of the right to development. Specifically, this argument states that in deciding whether or not an instrument permits demo-conditionality, other parts of the instrument must be taken into account. This represents a literal textual interpretation of a specific provision from the UN HRD Declaration – Article 9(1) of the UN HRD, adopted by UNGA in 1986 – which states:

“All aspects of the right to development set forth in the Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.”

This Article explicitly puts forward the idea that all parts of the UN HRD Declaration are indelibly linked.

It is evident that the international dimension of the right to development that targets the provision of development assistance by developed countries cannot be read in isolation, but is linked to the national context in which developing states are called upon to democratise their national institutions. This, in turn, means that in development co-operation promoting the right to development, donors who provide development assistance are entitled to address issues of democratic governance. Therefore, the conduct of international economic relations between developed and developing countries, if carried out within the framework of the UN HRD Declaration, does not rule out the inclusion of demo-conditionality. The sub-conclusion is that the Declaration implicitly contemplates demo-conditionality’s inclusion in development co-operation, despite not having expressly mentioned “conditionality”.

7.5 Conclusion

The aim of this Chapter was to demonstrate whether or not development co-operation instruments exist which advocate, expressly or implicitly, the inclusion of demo-conditionality in development co-operation. The existence of such instruments, depending on their legal quality, impact the compatibility of demo-conditionality with the principle of state sovereignty. It was revealed that there are, in fact, several such development co-operation instruments with differing legal values.

Additionally, the two most relevant treaties in this context – the UN Charter, 1945 and the ICESCR, 1966 – reveals an absence of the contemplation of demo-conditionality, or for that matter, any conditionality, in development co-operation. Several UN Declarations and Resolutions were also studied in this context, revealing in general that the UNGA Resolutions, between
them, do not contemplate any conditionality in development co-operation. All of this implies that the 1945-1970s instruments as a whole rule out demo-conditionality, or any other type of conditionality, in development co-operation. The UN HRD declaration does not expressly refer to demo-conditionality’s being included, which in itself could be interpreted to mean exclusion. However, in the interpretation of its various provisions, one can argue for such an inclusion.

Following the UN HRD, the United Nations also adopted a number of landmark declarations, which will now be examined in Chapter 8.
8 Demo-Conditionality and the Declarations from United Nations Conferences

8.1 Introduction
Several instruments invoked to justify demo-conditionality have emerged from the United Nations-sponsored international conferences: the Rio Declaration and Agenda 21 in 1992, the Vienna Declaration and Programme of Action in 1993, the Johannesburg Declaration in 2002, and the Millennium Declaration and Goals in 2004 and 2005. The aim of this Chapter is to examine whether or not these instruments may, in fact, be successfully invoked to justify demo-conditionality’s compatibility with state sovereignty. This can only be discovered by examining the content of these instruments, with an emphasis placed on whether they contemplate the inclusion of demo-conditionality in development co-operation.

8.2 The Rio Declaration and Agenda 21, 1992
8.2.1 Introduction
The Rio Declaration on the Environment and Development adopted at the UN Conference on Environment and Development in 1992, and its Agenda 21 embracing sustainable development,367 is currently the most important instrument with regard to development co-operation; as such, it deserves special attention. What message, if any, does it send regarding development assistance to developing countries? Does it contemplate the inclusion of demo-conditionality in development co-operation?

8.2.2 The Declaration: Significance
It is appropriate to begin by emphasizing the significance of the Rio Declaration. It is worth noting that today, development co-operation is wholly predicated upon the attainment of sustainable development. This topic represents the main thrust of the Declaration at the international law level.

367 For the definition of the concept of sustainable development, see, Chapter 2 of this Study.
International Dimension and Environment. Even with the adoption of the Rio Declaration, the notion of international environmental law has proven to be problematic. Recent years have witnessed an appreciable increase in the level of understanding as to the dangers that face the global environment.\textsuperscript{368} An extensive range of environmental problems are now the focus of serious international concern,\textsuperscript{369} including atmospheric pollution, marine pollution, global warming, zone depletion, nuclear and other extra-hazardous substances, and endangered life species.\textsuperscript{370} These issues impact the pursuit of development at an international level, in two obvious respects. The first – that environmental issues often transcend borders of individual countries – is demonstrated by the example in which pollution generated within one particular state has an impact upon other countries. Second it is now apparent that environmental problems cannot be resolved by states acting individually; a degree of co-operation between the polluting and the polluted state is necessary.

Legal Status. Certain areas of environmental concern have generated new international ”soft law”,\textsuperscript{371} in the sense of important but non-binding instru-


\textsuperscript{369} This may be measured by the fact that in July 1993, the International Court of Justice established a special Chamber to deal with environmental questions. It has thus far heard no cases. Concerning soft law, it is important to note that the use of such documents, whether these are termed recommendations, guidelines, codes of practice or standards, are significant in signalling the evolution and establishment of guidelines that ultimately may be converted into legally binding rules. They are important and influential, but do not in themselves constitute legal norms.

\textsuperscript{370} See in regards to endangered species, \textit{The WWF Environment Handbook},London,1990 and S..Lyster, \textit{International Wildlife Law}, Cambridge,1985. See also the Convention on International Trade in Endangered Species, 1973, covering animals and plants; and the Convention on Biological Diversity, 1992 which inter \textit{alia} calls upon parties to promote access by all parties on a fair and equitable basis, especially developing countries, to the results and benefits arising from biotechnologies that are based upon generic resources provided by contracting parties.

\textsuperscript{371} See , infra note 372.
ments. Given this fact, it is not surprising that the legal status of sustainable development would be debatable in international law. Some would like to treat the concept as a part of hard law, while others would treat it as soft law\textsuperscript{372} due to it being included in a United Nations General Assembly Declaration. What is clear, however, is that certain principles contained in the Rio Declaration function as hard law.\textsuperscript{373}

The Environment and Human Rights. There has also been an attempt to treat environmental instruments as a part of international human rights law. As a result of certain international developments with respect to the environment, the argument has been made that there now exists an international human right to a clean environment.\textsuperscript{374} This can be witnessed in the United Nations General Assembly’s adoption of a number of resolutions concerning the environment,\textsuperscript{375} and also includes a range of general human rights provisions that possibly are relevant to the field of environmental protection.\textsuperscript{376} However, when it comes to the specific reference to such a right, examples tend to be few and ambiguous.\textsuperscript{377} Mention of these rights in the Rio Declaration are similarly scarce.\textsuperscript{378} Such cases indicate that movement towards a


\textsuperscript{373} See , for example, the Convention on Biological Diversity 1992.,supra note 370.


\textsuperscript{375} See Resolutions 2398(XXII), 2997(XXVII); 34/188;35/18; 37/137/250; 42/187; 44/244; 44/228; 45/212 and 47/188.

\textsuperscript{376} Such as the right to life, right to adequate standard of living, right to health, right to food, and so forth.

\textsuperscript{377} For the instruments connecting human rights and the environment, see, e.g. the preamble to the seminal Stockholm Declaration of the UN Conference on the Human Environment 1972; and also Principle 1 Article 24 of the African Charter of Human and Peoples’ Rights 1981, 11 of the Additional Protocol to the American Convention on Human Rights,and finally, Article 29 of the Convention of The Rights of the Child 1989.

regime of international co-operation that conceptualises environmental issues in terms of human rights is moving forward, albeit cautiously.379

8.2.3 The Rio Declaration: Principles

Which Principles in the Rio Declaration, if any, are relevant to the provision of development assistance; and which if any are relevant to the issue of demo-conditionality?

Relevant provisions and textual interpretation. The three fundamental/pillars of sustainability were discussed earlier in the study.380 At this juncture, it is the social element of sustainability which is most relevant with regard to development assistance and demo-conditionality.

(a) International Co-operation

An implication of the principle of sustainable development is the general duty to co-operate. Thus, the question of whether sustainable development will ultimately be achieved is dependent upon solidarity among nations. There are several Principles of the Rio Declaration dealing with international co-operation.381 For example, Principle 7382 emphasises that:

“states shall co-operate in a spirit of global partnership to converse, protect and restore the health and integrity of the Earth's ecosystem”.

This simply reinforces a developing theme in international environmental law, founded upon general principles, relating to the requirement that states co-operate in dealing with transboundary pollution.383

The achievement of sustainable development, ultimately, will depend on an acknowledgement of the special responsibility of developed states with regard to the process of environmental protection. Thus, Principle 7 of the Rio Declaration further stipulates that:

“States have a common but differentiated responsibilities”.

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379 Association between the two areas of international law, human rights and environment, is moving caustiously forward. See, Andersson and Boyle, supra note, 374.
380 See, Chapter 2 of this study.
381 See, the following Principles of the Rio Declaration, 13,15,18,19
382 This Principle can be traced to Principle 24 of the Stockholm Declaration 1972, which noted that “international matters concerning the protection and improvement of the environment should be handled in a co-operative spirit”.
383 Thus, Principle 13 of the Rio Declaration also refers both to national and international activities in this field, stating that “states shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.” See also Principle 27.
In particular, it is emphasised that:

“developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the environment and of technologies and financial resources they command”.

Principle 7 should be read as reinforcing Article 3(1) of the Convention on Climate change, providing that parties should act to protect the global climate system “on the basis of equity and respective capabilities”, to ensure that developed countries would lead in combating climate change.

If solidarity in the context of intergenerational equity involves the provision of development assistance to poorer countries, then what does intergenerational equity mean specifically with respect to sustainable development? One way to describe this is that future generations will only be able to meet their own needs once intergenerational equity has been realised. The Bergen Ministerial Declaration on Sustainable Development in the ECE Region observes:

"Today destruction of the biosphere and its ecosystems, environmental degradation, population pressures, depletion of resources, and extinction of species threaten the quality of human life as well as human health and many of the earth's biological systems. Unsustainable patterns of production and consumption, particularly in industrialised countries, are at the root of numerous environmental problems, notably foreclosing options for the future generations by depletion of the resource base."³⁸⁴

The traditional approach in international environmental law was based on the "equitable use" principle, in an interpretation of the ILA Helsinki-Rules (1966).³⁸⁵ Such an interpretation of "equity" did not provide for environmental protection, since pollution was regarded as:

"a by product on an otherwise beneficial use of the waters of an international drainage basin", therefore" a general rule of abatement might result in undue hardship".

This reading, which concentrated on economic “maximum use”, could only satisfy national but not the regional needs of the community of riparian states. In taking such a short-term perspective, it completely ignored the rights of future generations.

Equitable use between generations means:

³⁸⁴ The Bergen Ministerial Declaration on Sustainable Development in the ECE referred to in „W.Lang (edn.) and”; Ginther , E.Denters and P. de Waart infra note 386.
"that the present generation may sometimes have to limit its own use of parks, cultural heritages, and other common patrimony in order to conserve access of future generations to an inequitable use of these resources, that they may not infringe on the rights of other members to use and benefit from the planetary resources, and that they may be obliged under circumstances to assist those who would otherwise be too poor to have reasonable access and use".

Here, not infringing on the rights of other members does not mean that the use of non-renewable resources is forbidden. Rather, the exhaustion of non-renewable resources is allowed only if compensated by an increase in some other resource – e.g., alternative energy sources – or energy conservation. Environmental assets that can not be replaced must be preserved.

The economic development of a specific region is sustainable if the total stock of resources (human capital, environmental resources and non-renewable resources) does not decrease over time. Presumably, to treat future generations fairly means to ensure that their potential average quality of life (in terms of material consumption, environmental quality, etc.) is at least as high as the average quality of life for this current generation. Since poverty tends to lead to the destructive use of environmental resources, sustainable development implies the fair treatment of members of future generations. This last point emphasizes the importance of financial compensation, technical transfers and funding for conservation programmes in developing countries.

Only intergenerational equity will make possible the long-term environmental planning and management that is necessary for sustainable development. For this reason, legal experts of the WCED drafted the following Article 2 and Article 3 (c) of their draft agreement, which state:

"States shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations (…) . States shall observe, in the exploitation of living natural resources and ecosystems, the principle of optimum sustainable yield."

However, according to the Rio Declaration and Agenda 21, solidarity alone – i.e., co-operation and intergenerational equity principles – is not sufficient for achieving sustainable development. There is yet another dimension, outlined below.

(b) The National Dimension

As in the implementation of UN HRD Declaration,\(^{386}\) whether sustainable development can ultimately be achieved will depend on not only interna-

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\(^{386}\) See on the national dimension of the right to development already discussed above in this same Chapter.
tional co-operation amongst states, but also a national dimension. This dimension has two aspects, explained below.

(i) Equity-National policies

The concept of sustainable development has evolved in a manner which circumscribes the competence of states to direct their own development. Principle 3 of the Rio Declaration notes that the right to development must be fulfilled so as to:

“equitably meet developmental and environmental needs of present and future generations.” Principle 4 at the same time states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process. But even this national component, in itself, is not yet sufficient to achieve sustainable development according to the Rio Declaration.

(ii) Good Governance: Constitutional Order

Whether sustainable development is ultimately achieved will also depend on the constitutional order, i.e. on the mode of governance. This formulation clearly establishes good governance as an element of sustainable development. However, the concept will not be defined here.

Support for Textual Interpretation. Interpretations of the principles contained in the Declaration have emanated from several areas.

(a) Publicists

Muldoon, has analysed the Stockholm Declaration (1972), the Nairobi Declaration (1982), and the World Charter for Nature (1982). He concludes


388 See also Principle 1 of the Stockholm Declaration 1972., infra note 393.

389 Note that Article 2(1)vii of the Agreement Establishing the European Bank for the Reconstruction and Development 1990 calls upon the Bank to promote “environmentally sound and sustainable development”.


391 See also Report on the Sixty-Seventh Conference, Helsinki,Finland of the International Law Association,infra note 4098.

392 See Chapter 2 of this study.

that there are at least two legal duties which result from the concept of eco-
development. The first is the duty to integrate environmental management into development policies. Second is the duty to improve environmental capabilities and assess the environmental impact of development. This latter duty is well-established, and can be found in several documents including the Stockholm Declaration, the International Development Strategy for the Third UN Development Decade, the World Conversation Strategy (1980), the World Charter for Nature and a few other agreements. A sustainable and environmentally sound development is also made a central grounding principle for the International Development Strategy of the Fourth Development Decade.

According to Singh, a Third World publicist, the true environmental implications and duties of that concept do not seem clear. According to another writer, however, it is possible to identify five environmental implications that are also reflected in the Rio Declaration and Agenda 21:

-Eco-development-conservation as an integral part of development;
-Planning and management of the environment;
-Co-operation, transfers and funding;
-Intergenerational equity/optimum sustainable yield;
-Realisation of the precautionary principle

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395 UN Res.35/36, ILM 20(1980), p.489, stressing the need "to ensure an economic development process which is environmentally sustainable over the long run and which protects the ecological balance".
396 ASEA Agreement on the Conversation of Nature and Natural Resources (1985), Article 2; cf. Also the African Convention on the Conversation of Nature and Natural Resources (1968), Article 14.
400 See Rio Declaration Principle 1 and Agenda 21 Section I: Social and Economic Dimensions at 2-8.54. See also Michael Decleris; supra note 388, Chapters 6 and Chapter 7.
401 See Rio Declaration Principle 1 and Agenda 21 Section II. Conservation and Management of Resources for Development at 9-22.9. See also Michael Decleris, Chapter 2, supra note 388, pp.22-38.
A number of other implications and duties, including those mentioned by Singh, have recently been discussed in detail by Michael Decleris.406

(b) Compendia

There are many compendia of principles derived from the concept “sustainable development” whose content appropriately, upon examination, covers roughly the same topics.407 Perhaps the most recent comprehensive attempt to identify and classify “principles and concepts of international law for sustainable development” was undertaken by the Expert Group, convened to advise the United Nations Commission on Sustainable Development in September, 1995.408 This Group’s report presents ”Principles and Concepts” under five substantive headings, as demonstrated below.

The first “Principle of Inter-relationships and Integration” forms the backbone of sustainable development, reaffirming a holistic approach to environmental issues.

Second, under the heading “Principles and Concepts dealing with Environment and Development”, the Report covers the ”right to development” and ”the right to a healthy environment”, and also covers the eradication of poverty, equity, sovereignty over natural resources, sustainable use of natural resources, prevention of environmental harm, and the ”precautionary principle.”

Third, under the heading, “Principles and Concepts of International Cooperation”, the Report deals with the notions of “common but differentiated responsibilities”, special treatment” for specified categories of countries, the ”common heritage" concept, and desirable features of co-operation in trans-boundary context.

Fourth, the Report deals with principles and concepts of “Participation, Decision-making and Transparency”, also covering public participation, access to information, assessment of environmental impact and informed decision-making

Fifth, under its last substantive heading, the Report covers principles relating to dispute avoidance and resolution, monitoring and compliance.

These concepts and principles, taken together, comprise an emergent philosophy that seeks to integrate and co-ordinate environmental action with the promotion of economic development. It is important to emphasize one point here, which is that these principles vary considerably in legal status. Some are more firmly established in international law, while others are only just

407 See, for example, the 22 Articles formulated by the Legal Experts Group associated with the Brundtland Commission in 1986 comprising 8 "General Principles” and 14 “Specific Principles"concerning natural resources and environmental interferences. Commission.
now in the process of gaining relevance in international law. In his dissenting Opinion Weeramantry, in citing the Stockholm Declaration and Rio Declaration as well as certain authors, referred to the principle of intergenerational equity, amongst the other three emerging principles, as “an important and rapidly developing principle of contemporary international law.”

We shall now move on to examine the issue of demo-conditionality in development co-operation.

8.2.4 The Issue of Demo-Conditionality

The first point to be made is the Rio Declaration and Agenda 21 clearly do not make explicit reference to demo-conditionality anywhere in the texts. Yet, it is interesting to note that they do address the issue of “new conditionality”. Agenda 21, at 33.13-(a) (iii), states:

“…Ensure access to and disbursement of funds under mutually agreed criteria without introducing new conditionality”.

How should this statement be interpreted? In general terms, it seeks to balance considerations relating to the sovereignty of the requesting state, and the interests of the international community in rendering assistance to it. Additionally, it is significant to note that this formulation acknowledges the presence of older conditionalities that should be included, without providing any list. Whether the statement rules out demo-conditionality is debatable, however. In this context, whether or not demo-conditionality is included or excluded in development co-operation must depend on the content of "good governance" mentioned in the Rio Declaration.

Another question is whether this good governance includes democracy and human rights. If it does, it this means that demo-conditionality does not fall into the same category as the new conditionalities being ruled out. Conversely, if it does not, then demo-conditionality is excluded from development co-operation.

The issue of sustainable development and good governance has been problematic. This is evident from the comments of the Members of the Subcommittee on Sustainable Development and Good Governance (SDGG), who presented on the idea of international economic law with a human

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410 See, from the Order of the International Court of Justice dated 22 September 1995, in the case Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgement of 20 December 1974 in the Nuclear Tests Case (New Zealand v. France)
Certain aspects relating to good governance and sustainable development were also reviewed in the context of four conferences: on population and development (1994), social development (Copenhagen, 1995), women (Beijing, 1995) and the revision of the Lome-IV convention (Mauritius, 1995) which resulted in the Lome-IV-bis agreement. It has been recognised that the Cairo Declaration and revised Lome-IV Convention explicitly refer to good governance and sustainable development, albeit in different contexts. The Copenhagen and Beijing Declarations also recognise the importance of good governance and sustainable development with respect to social development and the position of women, although any recognition of good governance was only implicit.

The Sub-Committee then analysed the aforementioned texts in terms of their significance to its areas of special concern. Here, it was struck by the fact that both implicit and explicit references to good governance recognised a linkage between this concept and democracy, human rights and the rule of law. The Committee, however, ultimately did not find those latter concepts to be essential elements of good governance, being of the opinion that it is unrealistic to speak of good governance in regards to states which are undemocratic, or demonstrate a structural disrespect for human rights and the rule of law.

It would appear from the above analysis that, in providing development assistance to implement sustainable development according to the Rio Declaration, demo-conditionality is indeed contemplated. The reference to good governance as an element of sustainable development makes it clear that the message of the Rio Declaration and Agenda 21 is similar to that of the UN HRD Declaration; this is based on the analysis linking the national and international dimensions, especially with regard to participation (democracy).

The sub-conclusion is therefore that demo-conditionality does not form part of the new conditionality mentioned by Agenda 21, and therefore, that

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411 At a seminar organised by Sub-Committee 3 in close co-operation with the European Institute of the University of Amsterdam and the Dutch ILA Working Group on Legal Aspects of Sustainable Development, held in May 1996 in Amsterdam., see supra note.. Compedia pp.285-289.
412 See for the Text of Lome IV-bis, 155 The Courier, January 1996. This document is also discussed in Chapters 11 and 12 of this study.
414 See, the same question raised in Chapter 1 of this study.
415 Ibid.
416 See Chapter 7 of this study for UN Declaration on the Right to Development.
any economic relations between developed and developing countries conducted through the framework of the Rio Declaration and Agenda 21 must contemplate its inclusion.

8.3 The Vienna Declaration, 1993

In June 1993, representatives of 171 States adopted the Vienna Declaration and Programme of Action, 1993 following a UN-sponsored World Conference on Human Rights. What message does this instrument carry regarding the provision of development assistance and demo-conditionality in development co-operation?

Development Assistance. The Vienna Declaration underlines that the existence of extreme poverty inhibits the full and effective enjoyment of human rights, and that its immediate alleviation and eventual elimination must remain a top priority. With this in mind, the World Conference urged the New Working Group on the Right to Development to formulate comprehensive and effective measures that would eliminate such obstacles to implementing the right to development. The Declaration does not merely reaffirm the right to development as a universal and inalienable right and integral part of fundamental human rights, but adds that:

"the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations." 420

It therefore relates human rights to good governance by pointing to the mutually reinforcing interrelationship of development, democracy and human rights. 421 As revealed earlier, the right to development alluded to in the UN HRD 422 involves both national and international levels, calling upon developed countries to provide assistance to developing countries while at the same time calling upon the recipient countries to democratise. 423

On demo-conditionality. The Vienna Declaration is formulated in an interesting manner, in the sense of being expressed in a spirit of contemplation, but not admitting conditionality; in particular, demo-conditionality. Thus, on the one hand, it expressly emphasises the interdependence and indivisibility of all human rights (including those related to democracy and development), which implies a linkage between these concepts. On the other

417 See, infra note 418.
420 Ibid. para.11, p.6.
421 Ibid. paragraph 74, p.25.
422 See, the discussion the UN HRD declaration, Chapter 5 of this study.
423 See Vienna Declaration and Programme of Action, supra note 419.
hand, it categorically rules out any conditionality in development co-operation. Here, one needs simply to refer to Paragraph 8.424

“Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”.

This paragraph, stating that “the promotion and protection of human rights and fundamental freedoms at national and international levels should be universal and conducted without conditions”, 425 speaks for itself: no form of conditionality is tolerated in development co-operation. The sub-conclusion is that if development co-operation between developed and developing countries is conducted under the Vienna Declaration and Programme of Action, demo-conditionality – or any conditionality for that matter – is not contemplated.

8.4 The Johannesburg Declaration, 2002

The commitment to the Rio Declaration Principles and the full implementation of Agenda 21 was strongly reaffirmed at the World Summit on Sustainable Development (WSSD), held in Johannesburg, South Africa from 26 August to 4 September 2002. 426 The emphasis in this conference was on implementation – i.e., "action" rather than "words" – of Agenda 21. With this in mind, the conference addressed such issues as poverty, patterns of production and consumption, hydropower, small developing island nations, issues of sustainability among Latin American countries, and development assistance action. 427 With regard to the issues of development assistance and conditionality, the results just discussed for the Rio Declaration are also applicable here.

424 Ibid., Paragraph 8.
425 *Italics* my own emphasis.
8.5 The Declaration on Millennium Declaration and Goals

The next important document in this context is the United Nations Millennium Declaration and Goals, adopted in Finland by various heads of State. What message, if any, do these two documents contain regarding demo-conditionality in development co-operation?

It would be accurate to describe the content of this Declaration as holistic, embodying the following intertwined concerns: development, poverty, health education, peace, security, environmental human rights, and democracy. The common pursuit of these areas reflects an aim of allowing the UN multilateral system to function. The Declaration also contains goals designed to ensure that the UN is equipped with instruments and resources sufficient for maintaining peace, security and development. Of these goals, most relevant to this discussion are the ones found in Paragraph 7 alluding to national environmental policies, including an explicit reference to good governance. Another place where these goals are mentioned is Paragraph 8, on developing a global partnership for development. These paragraphs speak for themselves as to the steps to be taken in order to attain Millennium development goals. The question now is: if donors provide development assistance to developing countries in accordance with the Millennium Declaration and its Goals, are they then entitled to insist upon demo-conditionality?

The significance of democratic governance to development is expressed by Kofi Annan, former Secretary-General of the United Nations:

“No state can truly be called democratic if it offers its people no escape from poverty; and no country can truly develop, so long as its people is excluded from power.”

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428 UNGA resolution 55/2.
429 Ibid.
430 These goals are referred to as Millennium Developments (hereinafter cited as MDGs). The other MDG mentioned in the Declaration includes the following: a commitment to arms control, humanitarian law, human rights conventions and the fight against terrorism. Conflict prevention, conflict management, peace keeping, humanitarian action, post-conflict peace building and reconstruction create conditions for development. See, Ibid.
431 See Http://www.un.org/millenniumgoals/
432 That paragraph states as follows: “Develop further an open paradigm and financial system that is ruled based, predictable and non-discriminatory, includes a commitment to good governance, development and poverty reduction-nationally and internationally* Address the lest developed countries' special needs. This includes tariff and quota-free access for their exports, enhanced debt relief for heavily indebted poor countries, cancellation of official bilateral debt, and more generous official development assistance for countries committed to poverty reduction”
Despite these words, one may still conclude that the Millennium Declaration and its Goals do not contemplate the inclusion of conditionality in development co-operation, since these instruments do not expressly admit or rule out the possibility.

A second and more accurate interpretation is that they do, in fact, contemplate demo-conditionality. First of all, the Declaration adopts a “holistic" approach to issues, which allows for a linkage between the pursuit of development and that of human rights (good governance.) Secondly, the Millennium Goals insist upon the implementation of "sustainable development", which we have already seen is associated with the contemplation of demo-conditionality in development co-operation.434 The sub-conclusion here, then, is that demo-conditionality is acceptable in the conduct of development co-operation within the framework of the New Millennium Declaration and Goals.

8.6 Conclusion

This chapter was a study of the Declarations from various United Nations Sponsored Conferences aimed at determining whether or not they contemplate the inclusion of demo-conditionality in development co-operation. Several instruments were studied in this context, including the Rio Declaration and Agenda 21, Vienna Declaration and Programme of Action, and Millennium Declaration and Goals.

Development assistance. It was demonstrated that all of these documents call for developed countries to provide development assistance to poor countries of the South.

Demo-conditionality. It was demonstrated that the Rio Declaration and Agenda 21 does not make any explicit pronouncement regarding a new conditionality. But its interpretation does confirm that the pursuit of such conditionality in development co-operation is acceptable. Meanwhile, it was revealed that the Vienna Declaration and Programme of Action rules out any conditionality whatsoever, let alone demo-conditionality in development co-operation. In the Millennium Declaration and Goals, the pursuit of demo-conditionality appears to be admissible.

Now, an examination of demo-conditionality in contemporary state practices will be undertaken in Chapter 9.

9 Contemporary State Practices

9.1 Introduction

The existence of adequate state practice has been invoked to justify democ-
conditionality. In such a light, the main aim of this chapter is to examine the
practice of donor States in reducing or cutting off development assistance to
recipient States that have defaulted in the holding of free and fair parlia-
mentary and presidential elections. This is especially true where these recipient
States are parties to Article 25 of the ICCPR, 1966.

There are several other international actions which can be invoked in the
name of internationally promoting democracy. The existence of such state
practices, if any, might be invoked to justify the compatibility of demo-
conditionality with customary international law. Apart from a brief mention,
however, these practices are not addressed in the present chapter.

9.2. Promotion of Democracy: Other Actions

International actions to promote democracy, among others, include the fol-
lowing:

(i) The provision and acceptance of electoral assistance in the form of elec-
tion observations missions for the monitoring of elections,
(ii) That there be a link between democratisation and the recognition of
new States and governments,
(iii) That the international community and third party states withhold devel-
opment assistance to States that are unwilling to pursue democratic re-
forms,
(iv) That the right to military intervention be recognised in cases where a
non-democratic regime has usurped power from a democratically
elected government, and the international community refuses to recog-
nise the new de facto government; in addition to withholding devel-

435 See Richard Juma-Nyabinda, juris lic., supra note 7.
436 See, ibid. 4.
437 For this see, the Maastricht Treaty on European Union, supra note 12.
438 Ibid.
opment assistance to that State, direct action by means of external armed force may follow.

All of these propositions find support from the right-oriented approach, first advanced by Thomas Franck and subsequently developed by others as well. The essence of the approach is that international law is beginning to embrace a “norm of democratic governance” or “global democratic entitlement”. As will soon be demonstrated, military intervention and economic sanctions are used as coercive measures to ensure States Parties’ compliance with their international treaty obligations in several fields.

So, to what extent can it be demonstrated that donor countries do in fact reduce and ultimately cut off development assistance to recipient countries that fail to hold free and fair elections?

9.3 The Demo-Conditionality: Theory

9.3.1 Introduction

To gain some insight into what demo-conditionality involves both in theory and practice, an examination of certain features of conditionality in general would be helpful.

9.3.2 Theory

Certain Aspects of Conditionality. As stated earlier, both donors and recipients generally agree in advance upon a clause elucidating the consequences should the latter fail to fulfil its part of the obligation. Therefore, it is relevant to reveal certain actions contemplated by donors through the exposure of certain aspects of aid conditionality. These include the following: forms of conditionality; possible uses of conditionality; and finally,

439 See, infra note 440.
441 Ibid.
442 Ibid.
443 The two belong to the "Enforcement Model". For models to ensure compliance, see Chapter 13 of this study.
444 See Ibid.
445 Refer back to the concept of “development contract” mentioned in Part I of this study. It must be hinted here that the donor is also expected to fulfil its part of the obligation; i.e., provide development assistance as agreed. But it is important to emphasise here that on the donor’s part, this is generally treated as sort of a “gentleman’s agreement” if one ignores the UN Declaration on the Right to Development, which remains highly controversial.
measures which can be taken into account in implementing aid conditionality.

**Forms of Conditionality:** Conditionality in general takes one of two forms: ex ante, or ex post. This is no exception in the context of free and fair elections. Ex ante conditionality means that certain conditions relating to the holding of free and fair elections, for example in the context of this study, should be fulfilled before entering into a given (often contractual) relationship.

Ex post conditionality refers to a situation where conditions appear subsequent to the parties’ having concluded a relationship. This latter practice has been criticised on the grounds that:

> “it is a contradiction in itself as conditions, by definition, can only be imposed in advance”. 446

Nevertheless, it represents the most common mode of expression for conditionality. Examining the main donors’ policies, Selverbik has confirmed a deliberate unwillingness to clearly state conditions ex ante. As a general rule, actors appear to be attempting to keep the situation ambiguous or vague. An ex ante specification of conditions would reduce their donors’ flexibility and scope for political maneuvering. Furthermore, conditions ex ante are far more sensitive. There are those who argue that spelling out conditions beforehand risks jeopardizing the co-operative relationship. 447

Another feature to be discussed is the ways in which development assistance conditionality can be employed by the donor as a tool.

The use of conditionality as stick or carrot. In the former case (as a stick), conditionality is regarded as a punitive 448 phenomenon which implies the discontinuation of aid to those governments responsible of systematic, lasting and gross violations of certain categories of human rights, especially involving the core group of fundamental civil and political rights. 449 In the context of this study, development assistance can be denied or cut off for

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447 Hilde Selverik, ibid. p.47.

448 The United States was the first bilateral donor to introduce conditionality into its development co-operation policy in the early 1970s. Gross violations of civil and political rights in recipient countries provoked the cutting-off or reduction of aid. Because the United States was the largest donor until the 1990s, it refused to recognise economic, social, and cultural rights as human rights, and systematically applied a punitive conditionality; the linkage between human rights and aid has routinely been identified with the US model. See Katharina Tomasevski, "Between Sanctions and Elections: Aid Donors and Human Rights” London, Pinter 1997,pp.9-10.

failure by a regime to hold free and fair elections. The same may be applied to a military junta that has overthrown a democratically elected government. Examples such as these have led to an automatic reflex of identifying conditionality with sanctions. To date, punitive measures have been used commonly used under the guise of so-called positive measures.

However, conditionality may encompass both incentives (the carrot) and negative measures (the stick). This distinction is not so clear-cut; it greatly depends upon the formulation, because the carrots of today may represent the sticks of tomorrow. For example, if a grant is awarded today for the promotion of human rights, the threat of its ceasing to be awarded tomorrow could constitute a stick of sorts.

In other respects, there is a sharp difference between carrots and sticks. In the first case, the overall approach is different; whereas the stick is based on the notion of threat, carrots are based on co-operation. The second difference lies in the means used. Carrots are active and co-operative schemes which inject oxygen into societies. Sticks tend to be passive or negative in emphasis (e.g. non-co-operation, cessation of economic relations), based on the belief that the goal will be better attained through coercive schemes.

Nuances aside, a carrot is a benefit which the actor is not obliged to award, but is given in response to the recipient’s positive human rights behaviour and/or with the aim of further improving this behavior. Carrots are quite representative of the characteristics of development co-operation, and to a certain extent overlap with this concept. Sticks, on the other hand, imply the withdrawal of a measure which had been currently benefiting the recipient, and had been a natural part of the original relationship: “if fair elections are not held, we will suspend the agreement”. Sticks are punitive by nature, and thus linked with the concept of criminal policy.

Which measures then, in terms of policy or action, can be defined as a stick or carrot? This is determined through a distinction between positive and negative conditionality.

The Measures: Positive and Negative Conditionality. Positive conditionality, or a policy of incentives, involves the promising of benefits should the recipient country meet the requisite conditions. These conditions, generally speaking, are the protection of human rights and, in the context of this study, the holding of free and fair elections on the part of a regime. Such benefits, inter alia, include the awarding of grants, loans, technical or finan-

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450 The case study of the USA and EU with Robert Mugabe's Zimbabwe. See, also Chapter 16 of this study dealing with EU/ACP relations.
451 See, ibid., i.e. EU/ACP relations, Chapter 16 of this study.
452 See, ibid. Chapter 16 of this study.
453 Positive conditionality is always the result of co-operation. It is always identified with the "Managerial Model" as opposed to the "Enforcement Model". For these models, see Chapter 13 of this study.
454 See, ibid.
cial aid, and the increasing or establishment of commercial ties. Also included is the establishment or maintenance of diplomatic ties or recognition in an international forum. Such benefits may be indirectly targeted at the promotion of economic, social and cultural rights, or civil and political rights. They may also be channelled through government or NGOs. In principle, however, the benefits would be addressed to or channelled through the country’s government since it is required to meet the specified conditions. In this regard, conditionality has an essentially inter-governmental nature. Thus, for example, positive conditionality is arguably implicit in human rights clauses that are included in both bilateral and unilateral regulations.  

The Council regulation(EC) of December 1994 allows trade preferences to be granted to beneficiary countries covered by the scheme, provided that they adopt and apply domestic legal provisions which incorporate the substance of standards established by two International Labour (ILO) Conventions. The Conventions quoted are those relating to the right to organise and bargain collectively, and to the minimum age for employment.  

Negative conditionality involves the reduction or suspension of benefits, should the recipient not comply with specified conditions. In the context of this study, that means the reduction or cutting off of development assistance in cases where a regime has refused to hold free and fair elections, or held falsified elections. This includes, for example, the suspension of commercial or diplomatic ties and the imposition of sanctions or embargoes. It also includes condemnation by international fora, the interruption of development co-operation, or the suspension of cultural co-operation schemes. These are part of a graduated scale of measures that a donor country may adopt, with the most serious measure being a trade embargo. While this negative conditionality initially applies to governments, once the negative measures have been applied, the main victim is often the general population. Generally speaking, negative conditionality represents a reactive as opposed to preventive policy. Actors react a posteriori once the damage has occurred. This implies an absence of strategic elements for prevention, as

455 See Chapter 16 of this study on EU-ACP partnership in this context.
457 Negative conditionality is always a result of the collapse of co-operation. Thus, there is the need for action to enforce the agreements between the parties in development co-operation, and therefore it is identified with the "Enforcement Model" as opposed to the "Managerial Model". For these models, see Chapter 13 of this study.
458 Chapter 16 of this study.
459 See ibid.
well as implying that the policy tends to be based on ad hoc as opposed to systematic approaches.

Dialogue. There is another important measure of conditionality which is difficult to define exclusively as a stick or a carrot, but is perhaps closer to the latter. Before aid is actually reduced or cut off, both donor and recipient countries hold consultations to exhaust the possibilities for resolving issues surrounding free and fair elections. Such dialogue is instrumental to the application of conditionality, cutting across various forms of the process, and may serve as an initial vehicle. One example that will be discussed later is the Cotonou Convention. In the second case, the application of conditionality can lead to neither negative nor positive measures, but to the opening of a dialogue on human rights.

In the third case, which is more complex, dialogue may exist as an incarnation or manifestation of conditionality itself. For instance, the Western policy toward China is characterised neither by the adoption of negative measures nor the awarding of incentives, but rather a dialogue on human rights which may not explicitly incorporate conditionality.

Let us now examine some case studies involving donors that reduce or cut off aid to regimes which have not held free and fair elections.

9.4 Reducing/Cutting Off Aid

9.4.1 Introduction

The detailed case studies undertaken in this Chapter, intended to demonstrate to what extent donors apply demo-conditionality in practice, should not be viewed in isolation. They are part and parcel to the case studies made in other parts of this study.

First, a review of Germany and its development partners is provided below.
9.4.2 Germany and Its Development Partners

Germany became an aid donor in the early 1960s. Its first attempt at political conditionality was linking diplomatic relations and development aid to a non-recognition of the German Democratic Republic (GDR). Its second attempt dates to the early 1980s, when development aid was first linked to human rights and democracy. In 1982, the federal parliament (Bundestag) stated in a unanimous resolution:

“In its development co-operation the Federal Republic of Germany regards the implementation of human rights as an essential goal of the federal government…those countries should be especially supported, which try to establish democratic structures.”

In states where despotism, intimidation and physical threats characterise the relationship between the government and the governed, the projects which could be supported were only those that directly benefit the oppressed population".467

Two years later, the Bundestag once again unanimously adopted guidelines for the federal government, stating that the goal of development co-operation should be to guarantee the dignity of human life (securing basic needs) and to contribute to a higher degree of civil and political rights in developing countries. Despite this, the Ministry for Economic Co-operation and Development largely did not respond to these resolutions, to a great extent leaving human rights policy to the Foreign Office. It was only five years later, when political reform seemed unavoidable in countries undergoing structural adjustment and especially after the collapse of the socialist states in Eastern Europe, that political conditionality and “help through intervention” were first discussed in Germany.468 Finally in October 1991, the Minister for Economic Co-operation and Development, Carl-Dieter Spranger, publicly announced five criteria for German development co-operation:

“respect for human rights, popular participation in the political process, observation of the rule of law, a market-friendly approach to economic development and the recipient government’s commitment to development.”469

The first three of these criteria represent a clear policy of political conditionality, based on respect for human rights and an orientation towards democ-

racy. Having embraced political conditionality, Germany began to implement its policy. After announcing the new criteria, Spranger appointed one of his two deputy ministers to the position of human rights co-ordinator. In a subsequent series of meetings, the ambassadors to developing countries were informed of this new criteria and new human rights orientation in German development policy. The co-ordination of these changes within the ministry was entrusted to the existing department that dealt with development policy; no separate human rights department was created. On the one hand, this could be interpreted positively since this department played a central function within the ministry and had thus far been very much engaged in the internal implementation of human rights-oriented policies. On the other hand, it had many other tasks, and limited manpower available for this implementation.

To ensure that the new criteria were applied to Germany’s aid allocation process, the development policy department developed a check list of indicators. Following the first three criteria, all indicators were based on internationally codified human rights including freedom from torture, equality before the law, and freedom of assembly; thus, no recipient country could object that it was being subjugated to German standards. In using this checklist, there was also a clear distinction made between the current status of human rights in a given country and the trend towards an improved human rights performance, the latter being considered more important to implementing policy in the context of recipient countries.

As a result, in the first budget of the Ministry for Economic Co-operation and Development, a remarkable shift in aid allocation could be observed once the new criteria had been introduced. This stands in contrast to the past, where there had been only very minor variations from year to year. The changes in aid were focused on one of three groups: regimes that were repressive, authoritarian, or whose reforms were fragile.

Cutting off Aid. In the context of the first group of repressive regimes, which included Haiti, Malawi, Togo and Zaire, development co-operation was halted due to the prevalence of very severe human rights violations and a complete obstruction of the development process. While withholding aid was not realistically expected to lead to reforms in the short term, it at least would avoid the appearance of propping up repressive regimes. Here “negative“ political conditionality was employed for the purpose of regime change.

Reducing aid. In the second group of countries such as China, Indonesia and Kenya, their respective allocations were substantially reduced on the basis of their human rights violations and suppression of the democratic process. However, their orientation to development was not questioned.

Here, “negative” political conditionality was designed to lead to political reforms in the respective countries.

Positive conditionality: aid allocations. The third group of countries, including Benin, El Salvador, Ethiopia, Namibia, Nepal and Zambia, benefited from a “positive” conditionality, with their aid allocations being substantially increased. Some of the countries at that time had just ended civil war, and were moving towards more democratic regimes. Others had successfully organised democratic elections and improved their human rights record.

In the context of all of the above countries, conditionality was not intended to coerce a government into policy change. Rather, it was intended to support a country which had already undergone a policy change, due to the many difficulties it would have in sustaining this course without increased assistance. This support was given, however, with the understanding that the government would not revert to its former authoritarian practices in the form of increased human rights violations.

Germany, as one of the donors, also reduced its development assistance to certain countries. The main ground for that action was institutionalisation by Arap Moi of a more repressive and corrupt one-party regime in Kenya, entrenching the power of the Kenyan African National Union (KANU). As its human rights record rapidly deteriorated more and more people became dissatisfied with their government, a reaction that coincided with the events in Eastern Europe. Even after being warned, for instance by Nordic countries, aid disbursements could be jeopardised, Arap Moi continued to ignore calls for more democracy. Finally, in November 1990, diplomatic relations with Norway were severed and new aid commitments suspended after the arrest of a political refugee who had formerly been a Norwegian resident.

The sub-conclusion to be drawn here is that Germany has applied both negative and positive conditions with its development partners, in the former case cutting off development assistance, and in the latter case provided some “carrots” in the form of aid flow.

9.4.3 The Case Study of USA and EU and Zimbabwe

Now, the case involving the United States, European Union, and Zimbabwe will be reviewed below.

Events in Zimbabwe under Robert Mugabe regime. Not to put too fine a point on it, de facto economic sanctions have been imposed by Britain and

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473 See, Ibid.

its allies since 2001. This a case where the stick, and not the carrot, has been employed throughout. The events in Zimbabwe that led to a cutting of aid by the EU and U.S., among other donors, have been and continue to be well covered in the press.

Robert Mugabe’s regime had always enjoyed good relations with the West. However, these relations began deteriorating as the 2000 elections, marking the end of his term, approached. When Mugabe had first called for elections, a multi-party system had still existed in the country. Now, there was fear on the part of major donors that he was not prepared to relinquish power at that time; and that the elections would be rigged. As the election neared, Mugabe suddenly decided to implement land “reforms”, confiscating land by force. He also instituted repressive measures that included the burning of major newspapers. Opposition members were followed and arrested on trumped-up charges. In short, the Mugabe regime institutionalised dictatorship in the process of holding elections. In this atmosphere, it was difficult to imagine how elections would possibly be free and fair.

Meanwhile, major donors had applied to monitor and supervise the elections. Robert Mugabe did not wholly accept this request. In the end, he decided to accept a few monitors but did not include the United States and European Union; in the latter case Pierre Schori of Sweden, who was supposed to represent the European Union, was sent packing at Mugabe’s orders. In response, the EU and U.S. boycotted the monitoring process in Zimbabwe, and elections were held in an atmosphere full of fear and violence. A expected, Mugabe’s party declared itself the winner, eliciting a response from the country’s donors.

The Action by European Union. The case of Zimbabwe constitutes one of the EU/ACP relationships under the Cotonou Agreement, Article 69. The human rights clause in this Agreement had been activated as standard procedure by the EU, which stated that relations with Zimbabwe had reached a “critical point”. Spearheaded by Britain, the EU condemned the violence associated with land reforms in Zimbabwe, and criticised the Mugabe gov-

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476 For the coverage of these events, see for example NA, December 2003, p.46; and NA, August/September 2004, 34-37 and AC April-December, 2001.
477 Ibid.
478 Ibid.
479 Ibid.
480 Ibid.
481 This happened again in the 2008 Elections, leading to discussions of a unique form of government based upon "power-sharing" between opposition and government. See, NA, August/September 2008, 34-37.
482 Ibid.
483 For the procedures see, Chapter 15 of this study.
ernment for its clampdown on journalists, judges and the opposition in general.

In early October 2002, the EU Foreign Ministers agreed to invoke Article 96 of the Cotonou Agreement governing relations between The European Union and its African, Caribbean and Pacific Partners. This move signalled a formal request to Zimbabwe on the part of the 15-nation EU to discuss issues such as land reform, ending political violence, ensuring press freedom and judicial independence, and allowing observers at next year’s presidential elections. During these early consultations, the Belgian foreign minister, Michel, said it was difficult to engage in constructive dialogue with Mugabe during the 90 minute talks. He told a news conference:

“We did not have the opportunity to have a constructive exchange of views. We hope it will be possible to have discussions with this country, we want to have a friendly relationship with Zimbabwe and we want to give a chance to constructive, to a positive exchange of views. But today it was not really easy to have this discussion, we just put on the table the issues and there was a brutal reaction”.

The delegation, which included EU Commissioner for Foreign Relations Chris Patten and EU Senior foreign policy representative Javier Solana—was in Harare as part of a six–nation tour aimed at boosting the peace process in the Democratic Republic of the Congo.

Patten said:

“All I can say is we did not have a meeting of minds with President Mugabe”.

Outcome of Consultations and Negative Conditionality. The EU maintained that if formal consultations with Zimbabwe were not held, the Union would then consider action, widely expected to include sanctions aimed at isolating Harare. The EU decision to invoke Article 96 followed Zimbabwe’s refusal to accept European election observers in next year’s presidential vote. Solana said:

“Unless the elections comply with certain minimum standards, it will be very difficult, not to say impossible to be recognised by the EU”.

The Belgian Foreign Minister Louis Michel, who headed the EU team also said:

486 See Ibid.
487 Ibid.
“Our relations are now at a critical point, we have to admit that, we have arrived at a critical point.”

Ultimately, after negotiations fully broke down in early 2002, the EU severed development assistance to Robert Mugabe’s regime at virtually the same time as the US and multilateral financial agencies. In addition, targeted sanctions were imposed upon Mugabe’s close associates.

Action by the United States of America. The United States had also cut off aid to Mugabe’s regime. In early October, ex-President George Bush told African journalists in Washington that he would not rest until there was a change of government in Zimbabwe. He also expressed a dissatisfaction with the state of the Zimbabwean economy, and his continued efforts to pressure neighbouring States for “regime change” in Harare, as reported by Ose Boateng.

At this point, the U.S., as the conditionality actor, proceeded to take action within the framework of its relations with the Mugabe regime, as the conditionality recipient.

(i) Zimbabwe Democracy and Economic Recovery Act-2001

The practical action of cutting off aid to Zimbabwe from the US is based on a bill, first introduced into Congress by the late Senator Jesse Helms in 2000. It sailed smoothly through Congress, and after its second reading in the Senate was referred to the Committee on Foreign Relations, with President Clinton still in power. On June 12, Senator Helms read the bill in the Senate with no amendment. Its implications were wide-ranging, but from the viewpoint of this study touches on one particular point of interest. The preamble simply stated:

“To restrict assistance to Zimbabwe until certain conditions are satisfied and support democratic and economic transition in Zimbabwe.”

According to its sponsors, the bill had become necessary, among other things, because:

"It is, therefore, the policy of the United States to support the people of Zimbabwe in their struggle to effect peaceful, democratic change, and restore the rule of law. As such no United States assistance may be provided for the government of Zimbabwe”.

And, it noted only that:

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"No indebtedness owed by the government of Zimbabwe to the US government may be cancelled or reduced, and the Secretary of the treasury shall instruct the US executive director to each international financial institution (of which USA is a member) to oppose and vote against- (a) any extension by the respective institution of any assistance of any kind to Zimbabwe, except assistance to meet basic human needs and for good governance; and (b) any cancellation or reduction of indebtedness owed by the government of Zimbabwe to that institution". 490

Both Zimbabwe and the South African Development Community (SADC) protested the bill, but their objections were brushed aside. Subsequently, Zimbabwe’s access to international credit was blocked. By December 2002, its access to international borrowing had completely dried up. The conditions for lifting of the American sanctions were then made contingent upon the President (George Bush) certifying to the appropriate Congressional committee that, among other things:

(a) The rule of law has been restored in Zimbabwe.
(b) Zimbabwe had held parliamentary elections, which are widely accepted by the participating parties and the duly elected are free to assume their offices.
(c) Zimbabwe has held a presidential election which is widely accepted by the participating parties, and that the president-elect is free to assume the duties of the office of the President.
(d) the government has sufficiently improved the pre-election environment to a degree consistent with international standards for security and freedoms of movement and association, amongst other things.”

What is the new trend today regarding relations between the U.S., EU, and Zimbabwe? For a long time, Zimbabwe has been subjected to comprehensive economic sanctions, while the ruling elite are also under "targeted" and "selective" sanctions. 491 A new record was set on July 1 when the British Parliament 492 devoted five hours to debating the events there. 493 In this debate Jack Straw, the British Secretary, enumerated three measures that Britain would not institute toward Zimbabwe, including that:

"...Second, we will not send in troops; and third, we will not play Mugabe’s game making this a “UK versus Zimbabwe issue". 494

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490 Ibid.
491 For "targeted" and "selective" sanctions, see Chapter 13 of this study. Thus, for example, 160 Zimbabweans including Mugabe have been under targeted sanctions, including arms embargo, travel bans and asset freezing. See Daily Nation 20-2-2007.
492 Zimbabwe was a colony of Great Britain; therefore the historical ties were emphasised in this debate.
493 See NA, August/September 2004, 34-35.
494 Ibid.
In 2008, Mugabe held a highly controversial set of parliamentary and presidential elections. In the first round, he lost to the opposition. The Constitution allows for a second round, which was also held. Mugabe claims to have won this time, despite the opposition’s having not participated. The results declaring him the winner have been condemned by most members of the international community, especially the West.\footnote{Since these elections, an attempt has been made to impose targeted sanctions\footnote{For the concept of targeted sanctions, see Chapter 13 of this study.} on members of his party through the UN Security Council, but this has failed. Currently, Mugabe has negotiated a coalition government with the opposition party.\footnote{See power-sharing government talks}} \footnote{This is evidenced by the fact that, having failed to imposed targeted sanctions on Mugabe and his party’s clique through the UN Security Council due to the veto by China and Moscow, the European Union has just recently agreed on targeted sanctions against 40 more of Mugabe's closest associates. \textit{Daily Nation}, 18-07-2008. As of this particular period in time, the USA and EU have joined calls for Mugabe to step down from power. Even under President Barrack Obama's Administration, the US has announced that there are no plans to shift policy on Zimbabwe; sanctions will remain. See the statement by Johnnie Carson, assistant Secretary of State for African Affairs, who said that more political, social and economic reforms were needed either before substantial US aid could kick in, or targeted sanctions against Mugabe be lifted. See, 5http://www.nation.co.ke/newsAfrica/-71066/608416/-7139x05Z/-7index.html.}

Whether this government, which Mugabe still heads, will lead to the reinstatement of development assistance by former donors is still an open question, but the reality seems to be that so long as Mugabe remains President of this country, Western donors will remain reluctant to resume development assistance.\footnote{497 See Daily Nation, May-July, 2008.} \footnote{496 See power-sharing government talks}

9.5 Conclusion

The main goal of this chapter was to determine whether donors, in practice, reduce or cut aid to regimes that have failed at or falsified presidential and parliamentary elections. It began by discussing certain features of what con-
ditionality entails as a concept, with an aim to provide an indication of what is involved in the practical application of demo-conditionality. In the context of practice, two main case studies were analysed: Germany and its development partners; and the USA, EU and Zimbabwe. The results reveal that the donors in question have reduced or even halted aid to the recipient country in question.

Now, in Part III of the study, we shall undertake an analysis of to what extent the pursuit of demo-conditionality is compatible with respect for the principle of state sovereignty.
PART III

DEMO-CONDITIONALITY AND STATE SOVEREIGNTY
10 Human Rights Conditionality and State Sovereignty

10.1 Introduction

It is in Part III, Chapters 11 and 12, where the main question of this study – namely, the compatibility of the demo-conditionality with the principle of state sovereignty – shall be determined. As has already been hinted, these two chapters constitute Routes 1 and 2 of the analysis of this relationship. However, before addressing that main theme, it is necessary to discuss one other issue: the compatibility of human rights conditionality with state sovereignty.499

As will soon be revealed, there is a definite relationship between the demo-conditionality premised upon Article 25 of the ICCPR 1966 (Route 2), and the human rights conditionality premised upon international human rights law;500 the Covenant is only one of those major human rights instruments.501 Therefore, the question of demo-conditionality’s502 compatibility with state sovereignty must be analysed in the context of the broader debate over the relationship between human rights503 and state sovereignty (domestic jurisdiction). In order to do so, we must revisit the earlier findings in this study; especially Part II Chapters 4,5,6,7,8 and 9.

10.2 The Results in Part II: Brief Overview

In Part II Chapter 4 of this study, it was demonstrated that the practicality of any argument declaring certain norms to be compatible with state sover-

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eignty rests on an assumption that it is possible to distinguish which norms are compatible with state sovereignty, from those that are not. The validity of such an assumption depends on whether a workable test has been or can be developed with which to make this determination. The difference between such norms was seen to lie in the legal fact that those compatible with state sovereignty are also backed by legal norms. This is because those legal norms modify the principle of domestic jurisdiction of states (Article 2(7) of The UN Charter, 1945).

A state, once again, cannot invoke its sovereignty as a defence against any international action which is based upon a legal norm. The converse is also legally true: other norms that are not or do not have the backing of legal norms are incompatible with state sovereignty, since they have not modified the principle of domestic jurisdiction of states. Therefore, a state still has the possibility of invoking sovereignty if the actions it contests are grounded in norms which have no legal backing. At the same time, it was demonstrated that there is no consensus as to a list of norms that are compatible with state sovereignty, and those that are not. Instead, the answer depends entirely on developments within the international legal system.

In Part II Chapters 5 and 6, it was demonstrated that Article 25 of the International Covenant, 1966, as a general treaty, is invoked as the major legal premise upon which enforcement of demo-conditionality is justified. Chapters 8 and 9 discuss the fact that there are development co-operation agreements upon which the enforcement of demo-conditionality could be/is justified. It therefore follows that the compatibility of human rights with conditionality depends upon one’s perspective on the status of human rights in international law. There are several potential approaches, explained below.

10.3 Human Rights and International Law

The starting point for analyzing the relationship between state sovereignty and human rights is with the rules of international law. These human rights instruments include the United Nations Charter, Universal Declarations, Political Covenant and single-issue human rights instruments, among others,\(^\text{504}\) which set the tone for “respect of human rights” in contemporary international society. This development represents a move towards the increased role of the individual in international law.\(^\text{505}\) This raises a question,

\(^{504}\) These documents have been discussed or referred, amongst others, in Chapters 2, 5 and 6 of this study.

however, as to whether the principle of domestic jurisdiction could be altered in such a way that a state would not be allowed to invoke its state sovereignty where breaches of human rights are concerned. To resolve this, an examination of the impact of those global human rights instruments on domestic jurisdiction (state sovereignty) occurs below.

### 10.4 The United Nations Charter

#### 10.4.1 Introduction

First, the UN Charter 1945 provision that is relevant to this discussion shall be examined.

#### 10.4.2 Human Rights in UN Charter?

The UN Charter contains a domestic jurisdiction provision in the form of Article 2(7). This provision has been flexibly interpreted over the years, to the point that human rights issues are no longer thought to lie solely within the domestic jurisdiction of states.

To begin with, let us ascertain what is indisputable in the first place. It is unquestionably evident, from the text of the provision itself, that this reservation is immaterial when human rights violations pose an actual threat to peace and security in the world at large; this fact is established in Article 39 of The UN Charter. In that case, the Security Council bases its competence upon Article 41 and 42. There is no possibility of the state’s violating human rights and then invoking a reservation on grounds of non-interference in internal affairs. This raises a complicated question as to whether the provision in Paragraph 7 Article 2 of the UN Charter is necessarily related to human rights at all.

There are a number of human rights provisions in the Charter. Article 1 includes, among the purposes of the organisation, the promotion and encouragement of respect for human rights and fundamental freedoms for all with-

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507 See formulation in Article 2(7) of the United Nations Charter, already discussed in Chapter 4 of this study.

508 Lauterpacht, supra note 505.

509 See Chapter 4 of this study on this matter.

out distinction as to race, sex, language or religion.\textsuperscript{511} Article 13(1) makes it the duty of the General Assembly to initiate studies and give recommendations designed to pursue the realisation of those rights. In Article 55, one of the UN’s functions is the promotion of universal respect for these rights and freedoms without discrimination.\textsuperscript{512} Another important provision is Article 56, which states that:

"All Member States of the UN pledge themselves to undertake separate or joint actions in co-operation with the UN Organisation for the achievement of the purposes set forth in article 55".\textsuperscript{513}

One of the main purposes of the trusteeship system described in Article 76 is, again, respect for the rights mentioned above. In the same vein, the administering powers under Article 73 of the Charter recognise as paramount the interests of inhabitants, and accept as sacred the obligation to promote their well-being. In spite of these examples, the Charter's provisions on human rights are general and vague. Moreover, no enforcement procedures are laid out. Given this fact, what is the role of domestic jurisdiction with respect to the obligations detailed in the international human rights instruments?

This ultimately depends on the position and legal significance of the category of human rights in the Charter. Some have argued that the term "pledge" in Article 56 has had the effect of converting the goals of Article 55 into legal obligations.\textsuperscript{514} The argument is as follows. An act such as the UN Charter is of constitutional character,\textsuperscript{515} giving some of its principles and rules a peremptory legal nature, which includes human rights in general. Therefore, the obligation is not simply an international legal obligation subject to amendments and revocation but constitutes a legal duty, from which there is no derogation. However, the above proposition is not without controversy,\textsuperscript{516} and has been disputed on certain occasions.\textsuperscript{517} What is the correct legal position?

Horatory language is used in the provisions, and the passage stipulating a respect for human rights stipulation does not identify any precise legal

\textsuperscript{511} See also Chapter 7 of this study on this Article.
\textsuperscript{512} See, Ibid.
\textsuperscript{513} Under Article 62, the Economic and Social Council has the power to make recommendations for the purposes of promoting respect for and observance of human rights.
\textsuperscript{515} See, B. Asrat, supra note 58.
\textsuperscript{516} See also, Chapter 7 and 8 of this study, on instruments of development co-operation.
rights. It would therefore be difficult to sustain the first proposition; i.e.,
that these legal obligations have been created by the UN Charter. Neverthe-
less, the controversy seems to have been put to rest by the decision of the
International Court of Justice in the Namibia case of 1971, where the Court
noted that under the UN Charter:

"The former Mandatory had pledged itself to observe and respect, in a terri-
tory having international status, human rights and fundamental freedoms for
all without distinction as to race. To establish instead and to enforce, distinc-
tions, exclusions, restrictions and limitations, exclusively based on grounds
of race, colour, descent or national or ethnic origin which constitutes a denial
of fundamental human rights is a flagrant violation of the purposes and prin-
ciples of the UN Charter". 519

It may be that this provision can only be understood in terms of the special
circumstances of that territory, but in light of the extensive practice since the
1940s in the general area of non-discrimination and human rights, the
broader interpretation – i.e., the first proposition – is preferred. 520 In this
case, states will have no possibility of invoking their domestic jurisdiction
where breaches of human rights are concerned, as provided and guaranteed
by the United Nations Charter. Thus, the sub-conclusion here is that human
rights conditionality premised upon the UN Charter is compatible with the
principle of state sovereignty.

The next instrument to be analysed below is the United Nations Declara-

10.4.3 The Universal Declaration on Human Rights 1948

The cornerstone of the UN’s activity is undoubtedly the Universal Declara-
tion on Human Rights, 1948 (UNDHR), 521 which has some important fea-
tures. First, it was approved without a single dissenting vote. 522 Second, as a

518 See D.Driscoll, "The Development of Human Rights in International Law" in Laqueur and
Rubin, The Human Rights Reader, pp.41,43.
519 ICJ Reports, 1971, pp.16,57; 49 ILR, pp.3,47. See, also I.Brownlie, Principles of Public
International Law, supra note 1; E.Schwelb, "The International Court of Justice and the Human
520 See infra note 521.
521 Oppenheim, supra note 31, p.1001; M.Whiteman, Digest of International
supra note 104; J. Kunz, "The United Nations Declaration of Human Rights", 43 AJIL, 1949,
p.316; E.Schwelb, "The Influence of the Universal Declaration of Human Rights on Interna-
tional Law", PASIL, 1959, p.217; A.Verdoost, Naissance et Signification de la Declaration
522 For the literature on UDHR, 1948, see, ibid
resolution, it is not intended as a legal document as such but instead, as its preamble proclaims:

“a common standard of achievement for all peoples and nations”.

Third, its thirty articles cover a broad range of rights, unlike the UN Charter which did not specify any.

Although the Declaration is clearly not a legally enforceable instrument as such, a question arises as to whether it has subsequently become binding either through custom\footnote{Note that Foreign and Commonwealth Office, in a document issued in January 1991 on "Human Rights in Foreign Policy", took the view that although the Declaration was "not in itself legally binding, much of its content can now be said to be part of customary international law", UKMIL, 62 BYIL, 1991, p.592.} or through general principles of law. This is raised in the specific context of whether the UNDHR has become binding through subsequent practice, or by virtue of its interpretation of the UN Charter itself.\footnote{See, e.g. Oppenheim, supra note 31.} Here, two prominent views dominate the debate. On the one hand, there are those who maintain the view that it is not binding, even from the perspective of its being customary international law. On the other hand, there are those who maintain that it is binding as customary international law, and even as general principles of law.

The first view advances several lines of argument, the main one being that the establishment of customary international legal rules requires the existence of general, uniform and consistent practices of states. This is accompanied by an \textit{opinio juris}; i.e., a conviction or belief by States in the obligatory nature of such a practice.\footnote{See Dixon, Martin, \textit{Textbook on International Law}. Second edition. London: Blackstone Press Limited 2007, pp.24-33.} Thus, for instance, writers point to the worldwide violations of human rights that occurred both before and after 1948 as having signalled a failure to satisfy the condition of general, uniform and consistent state practice.

Again, even scholars holding this view would submit that the so-called binding customary nature of the Declaration is underlined by the absence of opposition to its principles on the part of States, as reflected in their constitutions and official government statements.\footnote{For instance, see the arguments of Kiss, Alexandre, The Role of the Universal Declaration of Human Rights in the Development of International Law, pp. pp.47-49, in \textit{Bulletin of Human Rights Special Issues: Fortieth Anniversary of the Universal Declaration of Human Rights}. New York: United Nations, (1988), who in addition attributes to the principles proclaimed in the Declaration a rank of “higher rules”.
} Still, however much these scholars acknowledge the logic of such an argument, they point out that the decisive factor in the formation of a custom is the actual practice of a government, and not lofty statements often coloured with hypocrisy; what matters
are the deeds, and not the words. 527 Therefore, some writers reach the conclusion that by having adopted the Declaration, Members of the United Nations have made a political commitment to implement the rights contained therein. 528 This would imply that a human rights conditionality premised upon the UDHR 1948 is incompatible with state sovereignty.

Yet as already indicated, there are scholars who hold the opposite view and advance several arguments in support. One line of argument is that the UDHR is a binding norm as either customary law or general principles of law, as a consequence of the interpretation of the UN Charter and by subsequent practice. 529 They point to the Declaration’s legal, not to mention political, influence at national and universal levels.

At the national level, they point out several developments and tangible achievements which illustrate the legal significance of the Declaration. As a universally accepted normative reference, the Declaration permeates the domestic legal systems of numerous States through the incorporation of its provisions into national constitutions and other legislative instruments. 530 They also point out the fact that non-governmental organisations 531 refer to the contents of this Declaration, as well as domestic courts who refer to it in developing their case law on human rights issues. 532 All in all, the Declaration’s domestic impact has been much wider than might be expected of a non-binding instrument.

The scholars argue, secondly, that at the universal level the Declaration has established the very first international catalogue of rights as a “common standard of achievement for all peoples and all nations”. This modern catalogue, which is absent from the UN Charter, 533 may be said to play an impor-

527 On the emphasis upon “action rather than words” in the process of formation of a custom, see the case law of the International Court of Justice referred to by Harris, 1991, pp.26-29.
528 See D.W.Bowett, supra note 191. Stevens&Sons(1982),p.239. This author is one of those writers who minimizes the significance of the Declaration by noting its “purely moral value”. Dixon, supra note 525, points out that the precise effect of the Declaration was to “urge States to establish procedures for future protection of human rights”.
529 See e.g. Oppenheim, supra note 31, p.1002.
530 In several newly independent states (e.g. in Africa), the Universal Declaration was included as whole or extensive parts of their constitutions. Moreover, in the new constitutions of several new European democracies (e.g. Romania), there are explicit references to the Declaration as a reference system.
531 23GAOR, A/Conf.32/42. See also the non-governmental Montreal Statement,9 Review of The International Commission of Jurists, 1968, p.94.
533 For this view, see Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary.Kehl: N.P.Engel, (1993,p. XVII) rightly pointed out that the Declaration was of
tant role in the definition of human rights, and may thus safely be treated as a “quasi-authentic” interpretation of the human rights provisions of the UN Charter. Furthermore, the legal importance of that function of the Declaration has been further strengthened through its adoption by the United Nations General Assembly, in which it was approved without a dissenting vote.\(^{534}\)

Thirdly, the universal message contained in the Declaration is emphasized by the fact that some of its provisions constitute general principles of law or represent fundamental assumptions about humanity.\(^{535}\) Thus, its adoption has served as the basis for additional international law in the field of human rights.\(^{536}\) Such an impact can be identified not only in the direct references to the Declaration, which are usually contained in preambles, but above all, in the actual formation of specific rights and freedoms. This last set of points leads to a sub-conclusion that the codification and progressive development of human rights in international law was facilitated, in part, by the adoption of the Declaration.

Fourthly, the argument for the Declaration as binding relies upon its significance in creating opportunities to develop international procedures and mechanisms for the specific implementation of human rights. Thus, within the United Nations, it has become the main basis and reference for the establishment of communication and investigative procedures.\(^{537}\) The Declaration’s status as a resolution and not a treaty, which is adopted by the General Assembly, makes it applicable to all members.\(^{538}\) If the text of the Declaration had been adopted as a treaty, scholars argue, its binding force and applicability would have been more limited.

The significance of the implementation of the Declaration has been directly emphasized at regional levels in the Preamble of ECHR\(^{539}\), Final Act

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\(^{534}\) It was Byelorussian USSR, Czechoslovakia, Poland, Ukrainian, USSR, Yugoslavia and Saudi Arabia that abstained.

\(^{535}\) For this view, see, Brownlie, Ian, *Principles of Public International Law*, supra note 1.

\(^{536}\) This contribution not only includes the programme of the International Bill of Rights, but also includes the adoption of both the ICCPR and ICESCR, 1966. The Declaration exerted a great impact on the content and scope of other human rights instruments adopted within the United Nations and a number of regional international organisations. Thus, it should be pointed out that it was already acknowledged in 1977 that the direct or indirect influence of the Universal Declaration may be identified in about 50 international treaties and declarations, see Vasak, Karel, A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, *The UNESCO Courier*, November (1977), p.29-30.

\(^{537}\) In mind, are: Resolutions 1235 and 1503 of the Economic and Social Council.


\(^{539}\) For the discussion of ECHR and its Protocol, and ACHPR, see, Richard Juma, supra note 7.
of Helsinki (1975), and ACHPR 1981,\textsuperscript{540} as well as in other documents at both global and regional levels. At the global level, the 1968 Proclamation of Tehran, created at the conclusion of the UN sponsored International Conference on Human Rights, stressed that the Declaration constituted “an obligation for the members of the international community”. Mention should also be made of the last International Conference in Vienna, at which a reference was made to this Declaration.\textsuperscript{541}

The debate over the legal status of the Universal Declaration has been explored here at great length, with the sub-conclusion being that one cannot underrate its legal significance. Despite lacking sanctions to be applied in the event of non-fulfilment, and having been originally intended as “the ideal for achieving”, the Declaration cannot be considered as deprived of any legal value. In fact, legal theorists conclude, in the more than fifty years since the United Nations General Assembly first adopted this Declaration listing a series of political and social rights, virtually all states have endorsed it. Arguably, then, it has acquired the status of customary international law.\textsuperscript{542} As provided and guaranteed by the UDHR 1948, states will have no possibility of invoking their domestic jurisdiction where breaches of human rights are concerned. Therefore, human rights conditionality is compatible with principle of state sovereignty.

The next instrument of human rights to be examined is the Covenants and Protocol, 1966.

10.5 The Covenants and Protocol, 1966

The process of developing recognition and respect for human rights at an international level is further enhanced by the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{543} and the International Covenants on Economic, Social and Cultural Rights (ICESCR),\textsuperscript{544} both of which are binding

\textsuperscript{540} Regional instruments as discussed by Richard Juma--Nyabinda, supra note 7. See also the references to these regional documents in Chapter 14 of this study.

\textsuperscript{541} The Vienna Declaration and Programme of Action, adopted on 25 June 1993 at the UN Conference on Human Rights, referred to the Declaration as the “source of inspiration” and the “basis for the United Nations in making advances in standard setting as contained in the existing human rights instruments”, 32 ILM, 1993, pp.1661, 1663.


\textsuperscript{543} For ICCPR, 1966, see, supra note 194. See also the discussion in Chapter 5 of this study with regard to the ICCPR, 1966.

upon the signatories. This study is primarily concerned with the former instrument, rather than the latter.

The Covenants and Protocol are precisely tailored for the purpose of bringing individual breaches of human rights before international organisations. This means that the UNO organs can now consider such breaches, and therefore, have a more far-reaching legal force owing to the formal aspect of a treaty, as well as to the specified rules and the competencies of the organs contemplated for action and decision-making).

The sub-conclusion reached here is as follows. The nature of States Parties obligations under ICCPR was revealed in Chapter 5 to be mandatory and immediate. States have no possibility of invoking their domestic jurisdiction in connection to breaches of human rights, as provided and guaranteed by the Covenants and Protocol. Therefore, a human rights conditionality premised upon the ICCPR, 1966 and its Protocol is compatible with state sovereignty.

10.6 Single-Issue Instruments and United Nations Declarations

A number of important international conventions dealing with selected human rights issues have been adopted, including the Convention on the Elimination of Racial Discrimination and the Convention Against All Forms of Discrimination Against Women. Apart from those single-issue

U.N.T.S. 3(entered into force 3 Jan.1976(hereinafter cited as ICESCR).See also the discussion on Chapter 7 of this study.

545 For the ICCPR, see supra 194; and (ICESCR) ibid.

546 The legal status of the ICCPR has been exhaustively discussed earlier on in this study, see Part II, Chapter 4 of this Study.

547 This issue is discussed in greater detail in Parts III and IV of this study.

548 See also the discussion in Chapter 6 of this study with regard to the single-issue human rights instruments.


human rights instruments, there is also the Vienna Declaration,\(^\text{551}\) adopted by a consensus of 171 States participating in the 1993 World Conference.\(^\text{552}\) The Vienna Declaration and Programme of Action,\(^\text{553}\) adopted by 177 governments and heads of State, emphasised all human rights as being universal, indivisible and interdependent and interrelated.\(^\text{554}\) For better or worse, then – and in most regards, for better – these treaties and declarations have shaped the meaning of “respect for human rights” in contemporary international society.

10.7 Is Human Rights Conditionality Compatible with State Sovereignty?

Every international lawyer would agree that the gradual internationalisation of human rights issues in recent years was initiated by international concerns leading to treaty obligations, which were aimed at modifying the traditional principle of exclusive jurisdiction by States over their subjects. In this context, what is the actual legal position concerning the compatibility of human rights conditionality with state sovereignty?

There are at present two different ways of interpreting the role of the Sovereign State vis-a-vis the Individual, which are worthy of mention here. In the words of Quincy Wright:

"Interpret the State as sovereign, protecting or punishing individuals in its own interest under such guidance as it chooses to accept from international law. But it is also possible to interpret the individual as a jural personality. In which case he has rights under international law which he can only pursue through the agency of his State and with duties under international law which the society of nations can enforce only through the agency of the State with jurisdiction over him".\(^\text{555}\)

Wright points out that the first interpretation was generally accepted during the nineteenth century, while the second interpretation reflects state principles adopted during the past generation that were inspired by general treaties specifying the rights of aborigines, minorities, workers, women, children, and other potentially oppressed categories.\(^\text{556}\) In any case, the point is that individuals are increasingly influential to international affairs in relation to states. The state, in other words, may be construed not as a sovereign entity

\(^{551}\) See debate on the legal status of UN Declaration in Chapter 12 of this study.
\(^{552}\) See Vienna Declaration and Programme of Action, see Chapter 8 of this study.
\(^{553}\) Ibid.
\(^{554}\) See the discussion on the universality, interdependence and indivisibility of all rights in the upcoming Chapter 11 of this study.
\(^{555}\) Infra note 557.
\(^{556}\) Wright, Contemporary International Law, infra note 557., p.21.
valuable in itself, but as an agent; on the one hand an agent of individuals, and on the other hand, an agent of the universal society embracing all of humanity.557 This, too, points to the conclusion that human rights conditionality is compatible with state sovereignty.

However, there is also another view, revealed in Chapter 11, which reflects a statist approach to human rights. Here, it is important to keep in mind Bin Cheng’s reminder that:

“The international legal system is still basically a legal system established and maintained by States to regulate their mutual relationship”.558

Such a reading would imply the idea that human rights conditionality is, in fact, incompatible with state sovereignty. So: what is the contemporary view on this subject?

Currently, legal trends favour the latter view, based upon several lines of argument. The principle of international respect for human rights concerns rights which are both civil and political in nature, in addition to economic, social and cultural rights. The universality, interdependency and indivisibility of these categories have already been acknowledged.559

With respect to sovereignty/domestic jurisdiction, the main interest of this study, some observations can be made. In an earlier era, when states were the sole subjects of international law, their sovereign supremacy was absolute. Now, the situation is dramatically changed,560 and the growth of the human rights field reflects a trend towards limiting the sovereignty of states, in the interest of mankind. According to Partnogic, sovereignty is now conceived in a new way – namely, as a function of the protection of human rights – and "should not be invoked as an obstacle to the realisation of human rights."561 Through its increasing importance to the international community, human rights has been elevated into an international issue, and as such, cannot lie fundamentally within the domestic jurisdiction of states. In view of the immense efforts which the UN and the international community have generally put forth in their preserving and promoting respect for human

559 See, Chapter 8 of this study for The Vienna Declaration and Programme of Actions 1993.
560 Lauterpacht, International Law and Human Rights, supra note 170, at p.131.
rights throughout the world, Bernardt, like some other scholars, 562, has con-
cluded:

"The first and very simple statement therefore is: the protection of human
rights is no longer exclusively within the domestic jurisdiction of States" 563

It is for the same reason that the former OAU Secretary, General Salim A.
Salim, has advocated that there be an interpretation of the non-intervention
concept in the OAU Charter that excludes human rights from it. 564 Finally,
Teson stated categorically, in forthright terms, that:

"even the rights of states derive from human rights and consequently wars in
defence of human rights are just" 565

10.8 Conclusion
The aim of this chapter was to demonstrate whether or not the principle of
human rights conditionality is compatible with the principle of state sover-
eignty in international law. The discussion undertaken in this chapter has
covered several documents on human rights and analysed their respective
legal strength. These include the UN Charter 1945, UDHR 1948, ICCPR
1966, single-issue instruments, and even UN Declarations. The conclusion to
be drawn is that the international body of law surrounding human rights con-
ists of legal norms that are part and parcel of international law, having been
created through treaty and even customary international law. Thus, the pro-
tection of human rights is no longer exclusively within the domestic jurisdic-
tion of states, and by implication, to pursue a respect for human rights condi-
tionality is compatible with respect for the principle of state sovereignty.

Now, in the next chapter, we shall investigate the compatibility of demo-
conditionality with the principle of state sovereignty, according to the per-
spective established by Article 25 of the ICCPR, 1966.

; Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention:Its
563 Bernardt, supra note 181, p.206.
intervention by African States.
565 Fernando R.Teson, Humanitarian Intervention: An Inquiry Into Law and Morality, supra
note 57, at p.245.
11 The Demo-Conditionality and State Sovereignty

11.1 Introduction
The main aim of Chapter 11 is to examine the relationship between demo-conditionality and state sovereignty. The starting point here should be to make a justification of demo-conditionality, premised upon “Route 1” of the overall analysis.

11.2 Compatibility's Two Positions
The conclusion from preceding chapters is that human rights conditionality premised upon international human rights law (especially the ICCPR, 1966) is compatible with the principle of state sovereignty. Therefore, there ought to be a general consensus among the scholars supporting this position that the demo-conditionality premised upon Article 25 of the ICCPR, 1966 is likewise compatible with state sovereignty. Yet, it was revealed in Chapter 10 that not all international lawyers agree on the former. These diametrically opposed positions have found their way into the parallel controversy over demo-conditionality and state sovereignty. These positions, in turn, are reflected by two schools of thought regarding this debate. What is described in this discourse as "The First School of Thought" maintains the incompatibility of demo-conditionality and state sovereignty in international law, whereas the "The Second School of Thought" assumes their fundamental compatibility. Now, the various arguments supporting each of them will be examined.

11.3 The First School of Thought
11.3.1 Introduction
The First School of Thought grounds its position on the premise that a reading of Article 25 of the ICCPR does not indicate any strong norm of interna-

566 See, Chapter 10 of this study.
tional law. Thus, that provision would not imply a specific category of decision making\(^{567}\) and international action.\(^{568}\) In support of this, two lines of argument that reflect two different approaches, statist and hierarchy, are adopted in the debate.

11.3.2 Statist Approach

The statist approach to human rights maintains that the principle of domestic jurisdiction of states has not been modified by the human rights laid down by the UN Charter, the UDHR – and in this case – the ICCPR.\(^{569}\) Such a non-flexible attitude in international legal theory is the outcome of an excessive statist predicated upon an absolute conception of state sovereignty.\(^{570}\) Statism found its ultimate expression during the eighteenth and nineteenth centuries, conceiving nations as autonomous moral beings which, in the selection of their leaders, gave expression to their national personalities.\(^{571}\) One famous writer, Mattel, who conceived of political societies as morally engaged, described the national sovereign as the “moral person” of his state.\(^{572}\) Once chosen, a sovereign became:

"the depository of the obligations relative to government and other persons, while not "absolutely ceasing to exist in the nation, act thence wards only in him and by him."\(^{573}\)

To condemn the process of choosing a leader would therefore be to impugn the character of the nation itself. Statism as a legal doctrine has also been embraced by Marxist/Socialist countries. To these nations, especially the former Soviet Union, it was not basic rights and freedoms of the individual that was most important to international peace and security, but the state’s role. Indeed, the state was viewed as the ultimate source of human rights principles. Tunkin wrote that content of the principle of human rights in international law might be expressed in the form of three propositions:

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\(^{568}\) Such international action has been discussed in Richard Juma-Nyabinda, supra note 7.

\(^{569}\) See Chapter 10 of this study.

\(^{570}\) See Chapter 4 of this study on the concept of sovereignty as absolute.

\(^{571}\) *Ibid*, at p.132("Every State, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. Among these is that establishing, altering, or abolishing its own municipal constitution of government"). Professor Teson has termed this view the "Hegelian Myth". Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988), pp.53-76."


\(^{573}\) Ibid.
"(1) All states have a duty to respect the fundamental rights and freedoms of all persons within their territories;
(2) states have a duty not to permit discrimination by reason of sex, race, religion, or language;
(3) states have the duty to promote universal respect for human rights and to co-operate with each other to achieve this objective." 574

In other words, the focus was not upon the individual but solely upon the state, and human rights were not directly regulated by international law. Nor were individuals subjects of international law. Instead, human rights were implemented by the state, as matters which were essentially within domestic jurisdiction.

Thus, Tunkin emphasised:

"conventions on human rights do not grant rights directly to individuals". 575

Having stressed the central function of the state, he made the point that international human rights obligations were themselves to be defined solely by the state according to the degree of socio-economic advancement. Thus, the nature and context of those rights would vary from state to state depending upon the social system in question; it was that particular state’s socio-economic system that would determine the concrete expression of an international human rights provision. 576 This, again, reflects how the supremacy and central position of the state are key to such a statist model. 577

11.3.3 Hierarchy of Human Rights Approach

The second line of argument adopted by the First School of Thought is the hierarchy of international human rights. 578 This involves assigning a higher

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575 See Tunkin, ibid, Theory, p.83.
576 See Tunkin, ibid, Theory, p.82-3.
577 Ibid.
value to certain categories of human rights than others, based upon both objective and subjective valuations of them. Such an approach departs from the statist approach in accepting that certain rights, i.e. "fundamental human rights", trump state sovereignty while others, i.e. "ordinary rights", do not.

According to this School of Thought, the human right to political participation recognised in Article 25 of the ICCPR, 1966 does not trump the principle of state sovereignty. Hence, the demo-conditionality premised upon this Article is incompatible with that principle. The immediate question this raises is whether there is any indication that the ICCPR, 1996 could contribute such a hierarchy of rights, as claimed.

Some Features of Rights in the Civil and Political Covenant. The formulation of certain rights in the ICCPR do, in fact, reveal certain features which may provoke debate over hierarchy of human rights.

Derogation clauses. Certain rights may not be derogated in this instrument (and in various regional human rights instruments), even in the event of war or other public emergency threatening the nation. These non-derogable rights may constitute evidence that the right concerned is part of jus cogens, and are regarded as possessing a special place in the hierarchy of rights.

Limitation and claw-back clauses. Many rights are subject to limitation or claw-back clauses whereby the absolute right provided will not operate in certain situations. This may result in rights not so limited being regarded as having a higher value.

Customary international law. On the same note, in many international and regional treaty provisions, certain human rights may be regarded as


339-380.


580 Means that any action undertaken to enforce these rights is compatible with state sovereignty. Those rights that do not trump state sovereignty are not compatible with state sovereignty.

581 See Article 4 of the ICCPR, 1966.


583 See rights with claw-back clauses, in the African Charter on Human Peoples Right, Articles 4,6,9, etc.

having entered into the regime of customary international law in light of current practice. Included here are rights such as the prohibition of torture, genocide and slavery, and the principle of non-discrimination.586

**Erga omnes.** Human rights established under treaty may constitute obligations erga omnes for the states parties. 587

**Article 25 of the ICCPR, 1966 and derogation clause.** In the context of the current discussion, it is important to point out that Article 25 of the ICCPR 1966 has a derogation clause.588 The very existence of this clause might lend support to those who insist upon using the feature to attach lower value to the right of political participation, and attach higher value to rights that are not derogated despite appearing in the treaty. In any case, it is important to point out that these features found in ICCPR, 1966 are not the only factors to lend credence to the hierarchy of rights doctrine; writers seem to recognise this hierarchy as well.

**Writers.** As will soon be made clear, international or regional human rights do not explicitly speak of a distinction between ”fundamental human rights and freedoms” and “ordinary Rights”.589 It is only in the literature on international human rights that certain writers maintain this distinction. Professor van Boven, alluding to the term ”fundamental human rights” in the Charter, emphasises the “supra-positive” character of these rights,590 suggesting that they are based on natural law. Whether this term brings any significance to bear upon the question of a hierarchy of norms in positive international law, however, is not clear. Regarding the claim made by other writers that the principle of non-discrimination on grounds of race has been “up-
graded” on the hierarchical scale of human rights, he agrees but qualifies it adding, “in so far as there is any such scale”.  

At the United Nations level. The distinction between fundamental as opposed to ordinary rights has also found expression at the UN level. Thus, in discussing derogations from human rights, a United Nations document has also spoken of the “intangibility of certain fundamental human rights”. The former Secretary-General complained of South Africa’s denial of the “most fundamental human rights”.  

International Courts and Tribunals. A recognition of the distinction has also found expression through the pronouncements of the International Court of Justice, which has even provided a provisional list of those rights and related features. The Court gave currency to the idea of a hierarchy in its ruling in the Barcelona Traction case, in which it provided what can be considered an authoritative guide to the characteristics of a “fundamental human right” by suggesting, in a famous dictum, that “basic rights of the human person create obligations erga omnes.”  

Upon further scrutiny, one can indeed find an indication that the Court intended to distinguish between human rights in general, and basic rights of the human person. The Court seems to suggest that while on the one hand, basic rights of the human person give rise to obligations erga omnes and are appropriate for protection by states regardless of the nationality of the victim, ordinary human rights, on the other hand, can be espoused under agreements embodying such rights only by the state representing the nationality of the victim. This pronouncement has obviously created some additional complexity when deciding whether to characterise human rights as ordinary or basic. Most observers would probably agree that the protection of an arbitrary denial of the right to life, and protection of the human person from torture or egregious racial discrimination, are fundamental human rights. Perhaps they would also agree that the small number of (irreducible core) rights that are deemed non-derogatable under the ICCPR/Political Covenant and the European and the American Conventions constitute fundamental and perhaps even peremptory norms.

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591 Ibid.  
595 Id., at 32. In The United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), the Court referred to the “fundamental principles enunciated in the Universal Declaration of Human Rights”, 1980 ICJ 3,42 (Judgement of May 24). In the Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution, 276(1970), the Court stated that the “denial by South Africa of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”. 171 ICJ Rep. 16,57 (Advisory Opinion of June 21.)  
However, one point is clear, which is that the Court’s reference to a body of general international law and to universal or quasi-universal agreements suggests that a fundamental right must be firmly rooted in international law. This implies that mere claims or goals, important as they may be, would not qualify for such as status. The question, then, is the following: based on the distinction between “fundamental human rights” and ”ordinary human rights”, is there any evidence to show that a universal list of fundamental rights and freedoms exists, as such? If so, does the right to political participation appear in this list?

As indicated above, the irreducible core comprises only four rights: the right to life, prohibition of slavery, torture, and retroactive penal measures. The prospects for a consensus reaching beyond this select group are apparently not forthcoming. At least according the Barcelona case, it is evident that the human right to political participation does not appear in that list of fundamental human rights.

So: does the First School of Thought find any support for its position that demo-conditionality is incompatible with state sovereignty?

11.3.4 Support for the First School of Thought

Support for the hierarchy of international human rights comes from writers, the United Nations level, and even some states.

Writers. James Crawford is one famous publicist who lends support to such an approach. In particular, he is sceptical as to whether the right to democracy is such a right (i.e., "fundamental human right") that it can trump the principle of state sovereignty. This line of argument can be followed in his paper, “Democracy in international law-a reprise”.

According to Crawford:

“The international normative system seeks to advance at the same time with a range of partly incompatible goals—international peace and security (as a minimum the absence of armed conflict between or on a large scale within States), non-intervention, human rights, security transactions, and many other, and to do so as far as possible on a universal basis. In such a system, not very many rights trump, and those that do are of limited and largely negative kind—such as the right not to be subject to genocide or aggression”

Crawford clearly does not treat the right to democracy as a” fundamental human right”; this is reflected in his arguments. To demonstrate this, among other arguments, he advances two reasons which go some distance towards undermining the standing of right.

598 See in “Democratic Governance and International Law” eds.,by Gregory H.Fox and Brad R. Roth” Cambridge Press,2000,pp.91-123
Articulation of the right to democracy at the international level. While he admits that Article 25 proclaims democracy to be a fundamental right, there has been little follow-up at the international level. 599

Articulation of democratic rights in state practice. Crawford also takes issue with the level of articulation regarding democratic rights in state practice. He points out that in the past, Article 25 of the ICCPR has been honoured more in breach than in practice. However, he also acknowledges the fact that today, the balance favors liberal democratic states. 600

The United Nation General Assembly Resolutions. There is increasing unanimity over the impact of the provision for correct implementation of election elements established, among other instruments, in Article 25 of ICCPR as a matter of treaty law. At the same time, there is still controversy at the level of international politics concerning the ways in which the international community and various states can promote the principle of periodic and genuine elections.

This controversy has resulted in the promulgation of two sets of conflicting resolutions by the United Nations General Assembly. 601 One set falls under the rubric of The UNGA Resolutions on "Emphasising Respect for State Sovereignty", 602 And the other, under the rubric of The UNGA Resolutions on "Enhancing of the Effectiveness of the Principle of Periodic and Genuine Elections". 603 These resolutions primarily concern the provision for

599 Ibid.
600 See, Richard Juma-Nyabinda, supra note 7.
602 The first type of resolutions, in this context, have state sovereignty as an object. These General Assembly resolutions on "the respect for the principles of national sovereignty and non-interference in the internal affairs of states in the electoral processes" are responses to the resolutions on periodic and genuine elections. For some of these resolutions, see, General Assembly Resolutions 44/147 (15 December 1989); 45/1518 (December 1990); 46/130 (17 December 1991); 47/130 (December 1995); 52/119 (12 December 1997);vote:96-58-12, and 54/173 (1999). See Appendix 1 typical of their formulations.
603 The General Assembly resolutions "on the enhancing of the effectiveness of the principle of periodic and genuine elections", the second type, have their roots in the resolutions adopted with regard to South Africa. For some of these resolutions, see General Assembly Resolutions 43/157(8 December 1988); 44/146(15 December 1989); 45/150 (18 December 1990); 46/137 (17 December 1991); 47/138 (18 December 1992); and 48/131 (20 December 1993). From 1994 on the resolutions are called "strengthening the role of the United Nations." Resolution 49/190 (23 December 1994); 50/185 (22 December 1995); 52/129 (12 December 1997);vote 157-0-15; and 54/173 (17 December 1999). see Appendix 2 typical of their formulations.
international election observers. The legal basis of this provision, as in demo-conditionality, is to promote democracy.

The First School finds support from the first set of UNGA resolutions\textsuperscript{604} in the content, which conveys an overall message that electoral assistance is incompatible with the principle of state sovereignty. Their main focus is thus on the relative nature of the right to vote, which is subject to the specific circumstances of the country.\textsuperscript{605} In essence, the resolutions attempt to introduce a counterargument to the protection of political rights embodied in the international human rights instruments.\textsuperscript{606} This is in line with earlier resolutions, where electoral assistance was regarded as interference in the internal affairs of states and a violation of state sovereignty.

States. This initial set of UNGA resolutions, passed in 1977, were supported by the same countries that had abstained from voting on the matter of the so-called "Enhancing Democracy Resolution".\textsuperscript{607} These included non-Western and non-Democratic countries, especially from the Third World, as well as Marxist regimes.\textsuperscript{608} This voting pattern should not be surprising; it demonstrates their ideological approach to international human rights law.

The Third World approach to human rights is a combination of both Western and Marxist views,\textsuperscript{609} characterized by a concern for the equality and sovereignty of states which is coupled with a recognition of the importance of social and economic rights. Countries that voted against this so-called "Respect of National Sovereignty" resolution included Western countries and countries that had already democratised, or that were well along the path towards democracy.\textsuperscript{610}

\textsuperscript{604} See ibid.
\textsuperscript{605} General Assembly Resolution 44/147 (15 December 1989), Preamble. See also the other resolutions from 1990 to 1997.
\textsuperscript{607} See the second set of UNGA resolutions, Appendix 2.
\textsuperscript{608} Brunei Darussalam, China, Cuba, Democratic Peoples' Republic of Korea, Democratic Republic of Iran, Democratic Republic of the Congo, Lao's Democratic Republic, Libya, Myanmar, Sudan, Syria, Uganda, United Republic of Tanzania, Vietnam and Zimbabwe.
\textsuperscript{610} Respect for the principles of national sovereignty and non-interference in internal affairs of States in their electoral processes, General Assembly Resolution 52/19 (12 December 1997) vote: 96-58-12., see Appendix 2.
11.4 The Second School of Thought

11.4.1 Introduction

The Second School of Thought is grounded upon the recognition that a reading of Article 25 of the ICCPR does in fact indicate a strong norm of international law, and in addition, that the provision implies a specific category of decision making and international action. Hence, the conditionality premised upon Article 25 of the ICCPR, 1966 is compatible with state sovereignty. In supporting this position, two different models are adopted: the individual as a legal subject of international law; and the universality, interdependence and indivisibility of all human rights.

11.4.2 The Individual as Subject of International Law

The Second School of Thought recognises the individual as a legal subject of international law. In doing so, it acknowledges a respect for human rights as recognised in treaty law, i.e. of both a civil and political nature, in addition to economic, social and cultural rights. Additionally, it acknowledges that the gradual process of internationalisation with respect to human rights issues has been initiated by international concerns and treaty obligations, the result being to modify the traditional principle of exclusive jurisdiction by States over their subjects. In other words, the internationalisation of human rights proceeded not by restricting the sovereignty of States, but rather through a mutually agreed-upon restriction of the exercise of sovereignty, and can therefore be viewed as a reflection of the anthropocentrism of modern international law.

As a consequence, human rights issues no longer fell essentially within the domestic jurisdiction of States – which would have prohibited intervention under Article 2(7) of the UN Charter – but within the domain of international law. This effectively challenged the statist approach to human rights and its corresponding limitations on their international protection. Even in the Soviet Union, which had long been based on the notion of the supremacy

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611 See Jane Lindbland and Markku Suski, supra note 567.
612 Such international actions have been discussed, see Richard Juma-Nyabinda, supra note 7.
613 For the discussion on the universality, interdependence and indivisibility of all human rights, see, supra note 578.
614 See Chapter 10 of this study.
615 See Part III, Chapter 10 of this study, on the treaty instruments for the principle of international respect for human rights.
616 Kelsen, Hans,"Principles of International Law. Second Edition, revised edited by R.W.Tucker.New York: Holt, Rinehart and Winston, Inc.1967, p.301.He (Kelsen) has characterised the second of these trends more comprehensively "as the increasing inclination to internationalize the law, to determine the content of the norms of national by international law, or to replace national by international law created by treaties".
617 See, Chapter 10 of this study.
of the State and where human rights obligations were themselves defined solely according to socio-economic considerations of the State, such a system was abandoned. Instead, a new approach to the question of international human rights began to emerge by the end of the 1980s. As Vereshchetin and Mullerson observe, in this new system, human rights activity was one of the most important components of a comprehensive system of international security, giving the individual a primary role in the process. In particular, it is stated:

“Soviet legal scholarship has always emphasised that international human rights treaties obligate signatories to ensure the applicable rights and freedoms. However, until now, Soviet scholars have unjustifiably advocated that these documents do not represent rights directly enforceable by the individual. This approach has been exclusively legalistic. A citizen of a state based on the rule of law has the right to demand that state agencies observe voluntarily adopted international obligations which directly affect the individual's interests. Human rights treaties establish state obligations to citizens, not just to other state parties to the international agreements.”

The Second School of Thought, unlike the First School, does not accept a hierarchy of international human rights, as demonstrated below.

11.4.3 Universality, Interdependency and Indivisibility Approach

The Second School embraces an approach whereby all human rights are viewed as universal, interdependent and indivisible. If this represents the new trend in international human rights law, then what are its roots, and what does this approach involve?

Roots of this Approach. Such an approach can be traced back to The Universal Declaration of Human Rights, 1948, in which the international community collected all categories of human rights — civil and political, as well as economic, social and cultural rights — under one instrument. The principle also found official recognition in the resolutions of the International Conference on Human Rights in Tehran in 1968, Resolution 32/130 of

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619 Ibid. Note also that on 10 February 1989, the USSR recognised the compulsory jurisdiction of the International Court of Justice with regard to human rights treaties, including the Genocide Convention 1948; the Racial Discrimination Convention 1965; the Convention on Discrimination against Women 1979 and the Torture Convention 1984.
620 For the literature on the universality, interdependency and indivisibility, supra note 611.
621 See, Chapter 10 of this study.
622 For the UDHR, supra note 193. See also discussion in Chapter 10 on this instrument.
the United Nations General Assembly in 1977, and most recently, the Vienna World Conference on Human Rights, 1993. However, it is ultimately due to this Declaration that the universality, interdependency and indivisibility of all human rights is so firmly entrenched today.

What this Approach Involves. Two levels of interpretation are relevant here. First is a more integrative, holistic approach to human rights which regards them as comprising an indivisible whole, in which certain rights are not to be given priority over others. Instead, they complement each other despite their differences; the realisation of one type largely depends upon the enjoyment of the other, and there is no distinction between "fundamental" and "ordinary" human rights. Second, such an interdependence and indivisibility applies to democracy as well, and this relationship between democracy and human rights can be traced to the Vienna Document. In short, the Second School maintains that violations of human rights no longer belong to the "reserved domain" of States, irrespective of Article 2(7) of the UN Charter. Instead, they may be taken up not only with the UN, but in other multilateral or bilateral relations between states.

What support, if any, exists for this Second School of Thought?

11.4.4 Support for the Second Position

Such support for this position comes from various writers, the UN level, and states.

Writers. Certain writers maintain that the right to democracy is one which trumps the principle of state sovereignty. One such person is the famous international law publicist, Gregory H. Fox, in his contribution, "The Right

624 See the discussion of Vienna Declaration and Programme of Action 1993, in the context of "conditionality" in development co-operation, infra Chapter 10 of this study.
626 See, infra note 627.
627 See, for Paragraph 8 of the Vienna Declaration and Programme of Action, 1993, discussed in detail in Chapter 12 of this study.
628 This relationship has been recognised even by writers. Thus, one writer described the relationship between democracy and human rights graphically as being like that of "Siamese twins", see Allan Rosas, "Democracy and Human Rights", p.17-57, in Allan Rosas and Jan Helgesen (eds.), Human Rights in a Changing East/est Perspective. London; Pinter Publishers, 1990.
629 See Part II Chapter 4 of this study.
Fox begins by dismissing the myth he believes to be perpetuated by the UNGA resolutions on "Respect for the Principle of State Sovereignty". Here, he states that those who regard human rights, and in this context, participatory rights, as inherently beyond the reach of international law, are legally incorrect; there is indeed such a thing as international human rights law. Furthermore, there is a major human rights instrument which includes an article on political participation. On this view, it is the critics who carry the considerable burden of showing that rights concerning elections cannot become the subject of treaty obligations. In supporting this, he relies upon the International Court's ruling in the Nicaragua case:

"The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field".

Fox, furthermore, supports the modern trend favouring the universality, indivisibility and interdependency of all human rights. According to him, international human rights conventions create binding obligations to States parties, applicable to all human rights, with no distinction made between "basic", "fundamental", or any other. It is therefore difficult, he argues, to understand how any argument for sovereign discretion in regard to participatory rights would not apply to the other human rights norms as well, since they all find expression in the same binding instruments, and using the same mandatory language of obligations. Nothing in the text or travaux préparatoires of the political Covenant, for example, suggests that the drafters had intended obligations related to elections to be any less binding or immediate. In his view, both sets of rights (basic and fundamental) address the

631 See, supra note 601 and Appendix 1.
632 See these regional human rights in Richard Juma-Nyabinda"The Requirements of Democratic Elections in International Law",supra note 7.
633 Military and Paramilitary Activities(Nicar.v.US),1986 ICJ 4,131(June 27).
634 The Spanish delegate noted in the final Debate over the Political Covenant that "some people considered that the principle of universal and equal suffrage should be introduced gradually because of the low educational level in some countries", but argued that gradual enforcement was "unacceptable and should not be included in a legal instrument such as the draft Covenant" 3rd Committee,1096th Meeting,supra note 22,p.180.No provision on gradual implementation was included. According to one commentator, "nothing in Article 25 or in other text of the Covenant justifies a distinction between the clarity or immediacy of a State’s duties under that Article and, say, its duty to refrain from torture. Citizens of a party to the Covenant would have a valid claim under international law if their government had seized power and abolished elections". See, Henry J.Steiner,"Political Participation as a Human
relationship that governments hold with their citizens. Both are subject to compliance review by multilateral bodies. And, both find justification in conceptions of individual dignity and autonomy that are routinely invoked by a broad range of international bodies.

Another way of interpreting Fox’s argument is that it places more value on certain ICCPR rights than others, based on "subjectivity “rather than "objectivity". Markku Suski advocates the same position:

“Article 25 of the ICCPR, through its legally binding nature, gives a justification and a standard for international election observation (……..)".

By extension, Markku Suski would extend this argument to include conditionality in the context of the requirements for free and fair elections in development co-operation. The Second School of Thought, in short, would support any action which was taken to promote the right to democracy, including the tying of development assistance to free and fair elections.

United Nations General Assembly Resolutions. This position finds support at the international level through the second set of UNGA Resolutions, "Enhancing of the Effectiveness of the Principle of Periodic and Genuine Elections". First, the resolutions make reference to the UDHR and the ICCPR as the legal basis for electoral assistance, employing “rights language” in the process. By implication, then, sovereignty is not absolute in this context. Even where the UDHR or ICCPR are not explicitly referenced, the UNGA does not expressly mention sovereignty’s delimiting electoral assistance.

Second, it is through these resolutions that the UNGA provides an indication of the link between human rights and elections. Between 1993 and 1997, it consistently recalled the Vienna Declaration and Programme of Action, whose entrenchment of an interdependent and indivisible conception of human rights helped to highlight the link between elections and human rights.

Right”, Harv. Hum. Rts. Y. B.1(1988), p.77,p.131. In the Mexican cases, the Inter-American Commission concluded that gradual implementation of participatory Rights “would condition the existence of human rights on 'the circumstances and situation of each country’, leaving the whole legal system in precarious state”.

With this kind of remark, it may not be unreasonable to point out that Gregory is adopting the following line of argument: while it is true that the determination of the “greater importance” of certain obligations should be the function of the international community as suggested by the ILC, in the absence of effective institutional procedures for making such a determination, and given the continued elusiveness of international consensus, the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance.


See supra note 603 and Appendix 2.
rights. The result is that no relativistic approach to political rights can be invoked to prevent the establishment of a democratic model. States. The Second School of Thought also finds support from Western countries and countries currently undergoing the process transition to democratic rule, which voted in favour of the UNGA Resolutions on “the Enhancement…” already analysed above and by countries aspiring at democracy. This was based on the fact that the resolutions reflected their ideological and cultural perspectives.

11.5 An Appraisal: The Arguments from the Two Schools of Thought

11.5.1 Introduction
The main challenge here is to determine whether the lines of argument advanced by these two Schools of Thought are legally sustainable.

11.5.2 The First School of Thought's Arguments
As demonstrated, the First School’s position is that demo-conditionality is compatible with state sovereignty, based upon the fact that Article 25 of the ICCPR, upon which this demo-conditionality is based, is not part of a binding international legal norm. The two supporting arguments can be described, respectively, as statism and the hierarchy of international human rights. Neither of these are legally sustainable. In the first case, the existence of an international human rights law based upon treaty law, including Article 25 of the ICCPR which embodies the human right to political participation, has rendered such a statist approach outdated in this context. In the second case, the current tendency towards viewing all human rights as universal, interdependent and indivisible makes the international hierarchy of rights argument ineffective in legally sustaining the First School’s position.

11.5.3 The Second School of Thought's Arguments
The Second School of Thought advances two alternative arguments to the ones of the First School. These are, respectively, the recognition of the individual as a subject of international law and the universality, interdependency and indivisibility of all rights. According to the first argument, recognition of

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639 See Ibíd., on the debate over the hierarchy of international human rights in this chapter.
640 See, Appendix 2.
the individual as a subject of international law has become essential, and there exists an international human rights based upon treaty law which supersedes the statist model. Similarly, the new approach stressing the universality, interdependency and indivisibility of all rights has replaced the former approach that stressed the hierarchy of international human rights.

This position has received support at the international level in the form of the second set of recent UNGA (Enhancement) resolutions. Moreover, the number of countries voting for these latest UNGA resolutions is on the increase, indicating the emergence of a general agreement regarding electoral assistance as a means of internationally implementing Article 25 of the ICCPR, without raising the issue of state sovereignty. The Second School of Thought is therefore legally sustainable on the basis of the two lines of argument it uses. Given this, the question now is the correct legal position with respect to demo-conditionality’s compatibility with state sovereignty?

11.5.4 Compatibility: Correct Legal Position

The legal sustainability of the Second School’s arguments means that Article 25 of the ICCPR does indicate a strong norm of international law, and in addition that this provision would imply certain international actions, such as the demand for demo-conditionality in this particular case. Meanwhile, neither global nor regional human rights instruments mention the terms “fundamental human rights” or “ordinary rights”, let alone draw a distinction between them. These concepts do not exist at the global level; one needs only to refer to relevant instruments and their provisions to confirm this point. Here, the terms “human rights”, “freedoms”, “fundamental human rights”, “fundamental freedoms”, “rights and freedoms”, and most commonly, “human rights and fundamental freedoms”, appear in general to be used interchangeably. This suggests that there is no substantive or definable legal difference between these terms, and that at least in these instruments, “human rights” are equivalent to “fundamental” rights and freedoms.

In further evidence for this equivalency, the tentative proposal submitted by the United States to the Dumbarton Oaks Conference (1944) referred to "basic human rights", a term that was subsequently replaced by "human

641 The latest UNGA Resolution in the category of "Enhancing ......." UNGA Res. 58/180 of 17 March, of 2004 received support from 164 Member states out of the present 199, without a negative vote
642 Ibid.
643 See, namely: the UN Charter (Preamble, Articles 1(3), 13(b), 55(c), 62(2), 76(c), the Universal Declaration of Human rights (Preamble, Article 2,29(2), 30), the International Covenant on Civil and Political Rights (Political Covenant) Articles2 (1), 3,5(1), 5(2), the International Covenant on the Elimination of All Forms of Discrimination Against Women (Preamble, Article 2,3).
rights and fundamental freedoms". Interpreting the latter term, Kelsen found that “freedoms” are human rights. Thus, even at the regional level this term does not exist, and regional instruments on human rights do not indicate fundamental rights to be privileged in any way over ordinary rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms names various rights and freedoms throughout its body, though the title and Preamble refer to “fundamental freedoms”. The American Convention on Human Rights speaks of the obligation of State parties to respect various rights and freedoms, as opposed to fundamental rights. Meanwhile, the African Charter on Human and Peoples Rights, mentions fundamental human rights that “stem from the attributes of human beings” in its Preamble, but simply refers to rights and freedoms in its body. Thus, although writers and even the International Court of Justice have drawn this distinction, there is room for the possibility that this “fundamental human rights”/ “ordinary rights” distinction could still be treated as a matter of subjectivity.

Based on the earlier discussion, then, it is legally sustainable to hold that the pursuit of demo-conditionality in development co-operation, that is premised upon Article 25 of the ICCPR, 1966, is compatible with the principle of state sovereignty. This constitutes the conclusion for Route 1 of this analysis, and is further enhanced by the existence of the single-human rights treaties that are reflective of Article 25 of the ICCPR, 1966.

11.6 Conclusion

The main aim of this chapter was to demonstrate whether the pursuit of demo-conditionality premised upon Article 25 of the ICCPR is compatible with the principle of state sovereignty in international law. It was revealed

644 See, amongst others, L.Goodrich, E.Hambro And A.Simmons, Charter Of The United Nations, supra note 318. In an important study, Professor Sohn has pointed out that the reference to “basic human rights” in the US Tentative Proposals of 1944 was preceded by other references, e.g., that of President Roosevelt in his 1941 "Four Freedoms" message to "four essential freedoms". The United States Bill of Rights of 1942 and the Declaration of 1943 spoke of “human rights”. See Sohn, A Short History of United Nations Documents on Human Rights, in Commission to Study the Organization of Peace; the United Nations and Human Rights: Eighteenth Report 44-47(1968).


646 213 UNTs 221.


649 See Chapter 5 of this study.
that the issue remains controversial, with the debate dominated by two major Schools of Thought. On the one hand, the First School of Thought finds demo-conditionality to be incompatible with state sovereignty. On the other hand, the Second School of Thought maintains that it is compatible.

An analysis of each position’s supporting arguments was made, revealing that the First School of Thought relies upon the two principles of statism and hierarchy of human rights. Likewise, the Second School of Thought rests on two arguments: the individual as a subject of international law, and the universality, interdependency and indivisibility of human rights. Finally, a critical evaluation was made as to which of these supporting arguments is legally valid, revealing that the First School of Thought does not reflect contemporary human rights discourse. Statism has become obsolete, as has the hierarchy of human rights. It was demonstrated that the Second School of Thought reasoning reflect the current trend in human rights discourse, according to which the individual is accepted as a subject of international law; therefore, there is an international law of human rights. Meanwhile, the modern trend in the field of international human rights law is an acceptance of the universality, interdependency and indivisibility of all of these rights.

From all of these considerations, it can therefore be concluded that Article 25 of the ICCPR, 1966 is a binding international law rule, and that the demo-conditionality premised upon it is compatible with the principle of state sovereignty. Such a position, it was also reiterated, is further enhanced by the existence of the single-right treaties that reflect the ICCPR, 1966.

In Chapter 12, the relationship between state sovereignty and international development co-operation is examined, with the main question to be addressed as follows: is demo-conditionality compatible with state sovereignty, if only based upon the global co-operation development instruments discussed earlier?
12 Demo-Conditionality and State Sovereignty

12.1 Introduction
The main aim of this Chapter is to further clarify the issue of the compatibility of demo-conditionality with the principle of state sovereignty, this time, in relation to the development co-operation instruments already studied. This will constitute Route 2 of the overall analysis of this relationship.

12.2. Starting Point
In the context of instruments for development co-operation, there are two main determinants of the outcome to this analysis. First, there is the question of whether or not a legal duty to co-operate over development results from one or more of the development co-operation instruments mentioned earlier. And second, if so, it then needs to be determined whether the content of the instrument creating such a legal duty explicitly or implicitly contemplates the inclusion of demo-conditionality in development co-operation. If the combination of these instruments did not create that legal duty, then the pursuit of demo-conditionality has no support from a legal norm. In that case, it would not matter if these instruments contemplated demo-conditionality in the context of development co-operation; the conclusion would still be that it was incompatible with state sovereignty.

Also legally sustainable is the alternative scenario where one or more of these development co-operation instruments do create a legal duty to co-operate, implying that the pursuit of demo-conditionality has the support of a legal norm. Here, it would remain relevant that the content of the instrument(s) contemplates the inclusion of demo-conditionality in development co-operation. The conclusion, in that case, would be that the pursuit of demo-conditionality is compatible with principle of state sovereignty.

12.3 A Legal Duty to Co-operate for Development?

12.3.1 Introduction

The natural place to begin is with the treaties already studied: specifically, in this context, the legal status of the UN Charter provisions discussed in Chapter 7.

12.3.2 Treaties

The United Nations Charter. As already indicated, Articles 55 and 56 of the UN Charter are the ones relevant here. The legislative history of the two provisions is clear as to the nature and scope of the obligations they contain. In this context, a distinction should be drawn between the duty to co-operate on the part of the United Nations and that of developed countries; the former, which involves Article 55, is not the concern of this inquiry. Instead, our focus is on the duty to co-operate between developed countries and developing Member states. Here, the resolutions from competent UN organs and inter-State practices are more helpful than the Charter provisions in making this determination.

The nature of legal obligation. One piece of evidence that sheds light on the nature and scope of this duty to co-operate under Article 56 is found in the "Declaration on Principles of International Law Concerning Friendly Relations and co-operation among States in Accordance with the Charter".

This Declaration proclaims "the duty of States to co-operate with one another in accordance with the Charter". As the Secretary-General has remarked, in its formulation it reinstates and specifies the duty of States to co-operate in order to further the UN objectives in general.

However, when it comes to economic, social and cultural co-operation, and especially co-operation "in the promotion of economic growth throughout the world, especially those of developing countries", the tone shifts: the hortatory "should" is used in place of the obligatory "shall" which had been used up to that point. In other words, when referring to the maintenance of peace and security, the Declaration views the duty to co-operate as a legal obligation. But when it refers to development, it views the duty in the sense of Article 56; that is, that States "should" co-operate in that field. This sug-

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651 See Chapter 1 of this study.
652 For the experts who have commented on these provisions of the UN Charter, see S. L.M. Goodrich E. Hambro and A. Simons, supra note 319.
653 This study's focus is on inter-State relations. For international relations, see Robert Jackson and Georg Sorensen, "Introduction to International Relations, Theories and Approaches", Oxford University Press, 2007, 3rd ed.
654 UNGA Res. 2625 (XXV) 1970.
655 Supra note 317.
gests that no legal duty to co-operate for development is created by the UN Charter provisions.

Inclusion of demo-conditionality in development co-operation. It has also been revealed that the Charter provisions do not contemplate any conditionality in development co-operation. Therefore, any pursuit of the demo-conditionality premised upon it would be incompatible with state sovereignty.

The International Covenant on Economic, Social and Cultural Rights, 1966. This is a general treaty, which does carry provisions for co-operation over development. In the context of these provisions, is there an actual legal duty to co-operate?

Legal duty to co-operate for development. Although the ICESCR is a treaty and should be binding on States’ Parties, the wording of Article 11 undermines the existence of any such duty, stating categorically – and this must be emphasized – that international co-operation is based on free consent.

Demo-conditionality. Moreover, its provisions do not contemplate the inclusion of any conditionality, let alone demo-conditionality, in development co-operation.

Therefore, the sub-conclusion here is that the pursuit of demo-conditionality premised upon the ICESCR, 1996 is incompatible with state sovereignty. The remaining instruments to be used in determining the relationship of these two doctrines are primarily UN resolutions and declarations.

12. 3.3 The United Nations Resolutions and Declarations

The 1945-1970 instruments. Is there a legal duty to co-operate for development, by virtue of these development co-operation instruments? The legal effect of UNGA resolutions has received adequate treatment in literature, and there is no detailed discussion here. Rather, the approach to the debate is to emphasise the content of these resolutions; that is, whether or not they state an intention to create a legal duty to co-operate for development.

The International Development Decades resolutions. Under this resolution, the "Governments designate the 1970s as the Second United Nations Development Decade and pledge themselves, individually and collectively,

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656 See Chapter 7 of this study on UN Charter on this point.
657 See Chapter 7 of this study.
658 See Chapter 7 of this study.
659 The italics are my own, emphasising the significance of those words in defining whether there is a legal duty to co-operate for development.
660 See Ibid. See also Chapter 7 of this study.
661 See, literature on this subject, supra note 601.
662 See Ibid.
to pursue policies designed to create a more just and rational world economic and social order in which equality of opportunities should be as much a prerogative of nations as of individuals within a nation.

They subscribe to the goals and objectives of the Decade and resolve to take the measures to translate them into reality. These aims and measures are set out in the following paragraphs.\textsuperscript{663}\[should font be italics like below, or normal?\]

Also:

"Animated by a spirit of constructive partnership and co-operation, based on the interdependence of their interests and designed to promote a rational system of international division of labour, and reflecting their political will and collective determination to achieve these goals and objectives, governments, individually and jointly, solemnly resolve to adopt and implement the policy measures set out below."\textsuperscript{664}

In spite of the notable progress made through the above resolutions, it must be inquired to what extent, and in what manner, their provisions affect the duty of co-operation on the part of developed countries? Certainly, a literal interpretation of the wording of these commitments sheds little light, despite the more explicit and categorical definitions of goals and objectives as compared with previous resolutions. Still, the commitments themselves fall short of becoming legally binding obligations.

Statements made at the time of the adoption of the "Strategy" leave no room for doubt in this respect. Canada, for instance, declared that it did not consider the resolution to be a "legally binding document". Yet another developed country, the USA, attached a reservation to the aforementioned paragraphs 12 and 19, alleging that they "embodied a legal commitment, which does not really exist". Finally, even developing countries admitted in a joint declaration that under said paragraphs the Governments:

"only had assumed the moral and political commitment to apply the policy measures necessary to reach the goals and objectives of the Decades"\textsuperscript{665}

One expert on this topic, Virally, who has thoroughly studied the nature of the commitments emanating from the "Strategy", is also of the opinion that they are "moral and political", and not "juridical". However, he still highlights the importance and significance that such commitments have in international relations.\textsuperscript{666} Meanwhile, there was no apparent change in the nature

\textsuperscript{663} Paragraph 12.
\textsuperscript{664} Para.19
\textsuperscript{665} See Annex to the Report of the Second Committee (where the text of the declarations are found), doc. A/8.124/Add.1, 20 October 1970, pp.16-34 and 5, respectively.
of the commitments emanating from the 1980 General Assembly resolution, that launched the Third Development Decade.667

The sub-conclusion, based upon the wording in these instruments, is that there is indeed a legal duty created to co-operate for development. Was there any substantial legal impact on developed countries’ duty to co-operate specifically from the General Assembly’s adoption of instruments concerning the establishment of NIEO?

The instruments concerning the establishment of NIEO. No substantial change was made regarding the nature of this duty.

The Declaration states that "international co-operation for development is the shared goal and common duty of all countries". One of the principles enunciated in Paragraph 4 of the Declaration, "on full respect for which the new order should be founded", also reiterates such a statement.668 The Programme of Action, in referring to its goals and objectives, uses the phrase "all the efforts should be made" (or a similar phrase).669

The Charter of Economic Rights and Duties of States is the instrument intended to provide the legal structure of the NIEO. The Charter reiterates that "international co-operation for development is the shared goal and common duty of all the countries", adding in the same Article 17:

"Every State should co-operate with the efforts of the developing countries to accelerate their economic and social development... ".

The sense in which the verb "to co-operate" is similarly conjugated in the subsequent articles of the Charter provides for specific steps and measures of co-operation expected from developed countries.

In a different context, it must be recalled that the developing countries, acting as the "Group of 77", agreed, in its perambulator paragraph (c), to replace the word "obligations" used in the draft Charter submitted by the Group with the word "provisions".670 This particular episode in the Charter’s legislative history seems especially relevant in regards to the present question. Even here, however, the sub-conclusion is that there is a legal obligation to co-operate for development created by these instruments.

Declaration on the Right to Development, 1986 and Other Instruments from United Nations Conferences. Does a duty to co-operate development come from these instruments?

The UN HRD Declaration. The status of the right to development is still in flux. As noted earlier on, the 1986 UN HRD Declaration is not a legally binding document and is outside the group of States bound by the

668 UNGA res. 3201(S-VI) 1974.
669 UNGA Res. 3202(S-VI) 1974.
670 In this respect, see 29 U.N.GOAR, Second Committee (1647 Mtg.) 432 UN Doc.A/C.2/SR.1647,at 433.
It is questionable, to say the least, whether the right to development can be considered a human right recognised under existing law. Instead of a specific right, the Declaration on the Right to Development should perhaps be seen as an instrument embracing an umbrella concept and programme, rather than a specific right. It may be of particular relevance as a summary and guide to the human rights dimensions governing development co-operation, including the notion of “human rights impact statements”.

Rio Declaration. With regard to the Rio Declaration and Agenda 21, it had already been hinted that the implication and duties concerning inter-generational equity is de lege ferenda.

Other Declarations. The same legal position holds with regard to the remaining Declarations, i.e., the Vienna Declaration and Programme of Action, and the New Millennium Declaration and Programme of Action. Although signed by a majority of the UN Member States representing many regions of the world, the requirement to co-operate for development is also embodied in the use of the term "should", which is simply not intended to create legal obligations. Even in the context of these instruments, it is not plausible to argue that a legal duty of co-operation for development has truly been created.

Have inter-state practices created such a legal duty?

12.3.4 In the Context of Inter-State Practices

The argument periodically put forth, according to which development co-operation has become a legal duty in the case of developed countries, merits consideration. This view can be presumed to be based on inter-State practice.

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671 For The African Charter on Human and Peoples Rights, See literature in Chapter 13 of this study.
672 G.Alfredsson,"The Right to Development: Perspectives from Human Rights Law”, in L.A. Reholf and C.Gulmann (eds), Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries, 1989, p.84, states that “it may be fair to conclude that the right to development, at least as presented in its entirety in the UN HRD (Declaration on the right to development) does not yet exist as a legally binding obligation on States”. Compare. E.g. S.R.Chowdhury and P.I.L.M de Waart, "The Significance of the Right to Development: An Introductory View”, in S.R. Chowdhury et al. (Des). The Right to Development in International Law, 1992, p.10, who "without any convincing arguments) speak of the right to development as’’ a principle of international (human rights) law”.
673 See Chapter 8 of this study.
674 In the debates at the Thirty-Third Session of the U.N. Commission on Human Rights, several representatives stressed that "action to promote development is a legal obligation of the international community, and particularly of the industrialised countries". See the Secretary-General's Report, The International Dimensions of the Right to Development as a Human Right, etc., U.N. Doc.E/1334(2 January 1979) at 29, quoting from ESCOR, Sixty-Second Sess., Supp.No.6 (E/5927), para.41.
675 The author of a thorough study of this practice – considered the most important factor in the creation of international law – is of the view that such practice reveals the essential ele-
There has already been a certain degree of development assistance systematically granted to developing countries in the form of financial or technical support and preferential treatment in trade; sometimes this is accomplished through bilateral and multilateral treaties or other agreements. This has led to a well-developed set of expectations that a true, genuine right, the "right to development", is being recognised for those countries. Nevertheless, the fact that the mere practice of international organisations with respect to development assistance creates expectancies does not suggest, in turn, that a true legal "duty to co-operate for development" is also being admitted.\textsuperscript{676} The "right to development" has been viewed as a right in \textit{statu nascendi}.\textsuperscript{677} However, the "duty to co-operate for development", which is the correlative duty to the said right, can be viewed only as a potential expectant legal obligation of developed countries. It would certainly be legally risky to go further to define obligation in the strict sense, beyond that stipulated in treaties and agreements concluded by the States concerned. This is even more true for commitments contained in the resolutions of the UN General Assembly or other international organs that lack decision-making powers, and especially the case if such commitments were entered into with an understanding that they do not create legally binding obligations, as with the commitments stated in the "Strategy" and the subsequent instruments of the "NIEO".

The question is not only whether resolutions of international organs have legal validity or binding force. As shown,\textsuperscript{678} the intention behind those resolutions was precisely not to create any legally binding obligation for developed countries. In contrast, however, in bilateral conventional instruments between States, assistance and preferential treatment become a formal (legal) commitment for the developed countries concerned and a true (legal) right for the developing countries. This same legal situation is created by multilateral conventional instruments.

Reference can be made to the regimes governing exploration and exploitation of the so-called "international commons", such as that regarding the deep seabed under the 1982 Law of the Sea Convention. This regime "has its main feature of the legal obligation to co-operate".

An analogous situation holds where co-operation for development is being institutionalised; i.e., where programmes of financial, technical or other assistance have been agreed upon at the level of international organisations.

\textsuperscript{676} On this point, see the analytical study by A.P. Mutharika, "The Principle of Entitlement of Developing Countries to Development Assistance", \textit{in} UNITAR/DS/6, at 172-74.

\textsuperscript{677} See Abi-Saab's contribution to The Hague Workshop held in 1978 under the auspices of The Hague Academy of International Law and the United Nations University, \textit{The Right to Development at the International Level} at 162. (ed. by R.J. Dupuy 1979).

\textsuperscript{678} See Chapters 7 and 8 of this study.
In this case, developing countries meeting the conditions set forth in the programmes will be entitled to assistance.

12.4. The Contents of Co-operation Instruments

The second area of assessment with respect to compatibility of demo-conditionality with state sovereignty relates to the content of the development co-operation instruments; in particular, whether or not they contemplate the inclusion of demo-conditionality in development co-operation.

These documents, like those in the first area explored, are not uniform with regard to the issue of conditionality. The NIEO documents are explicitly opposed to the inclusion of any conditionality. Even the Vienna Declaration and Programme of Action, from as recently as 1993, rejects any form of conditionality in development co-operation. Still others, like the UN HRD Declaration, 1986, are silent regarding conditionality. Yet, it is also possible to read an acceptance of demo-conditionality into those documents. The Rio Declaration and Agenda 21, the most current instrument on co-operation for development and the environment, contemplates good governance conditionality based on this study’s interpretation of good governance as including democracy and human rights.

Since all issues relating to ongoing development co-operation between North and South are discussed under the rubric of "implementation of sustainable development", the implication is for any contemplation of demo-conditionality to be projected far into the future, so long as this co-operative development is still being conducted under a sustainable paradigm. It must be emphasized that given the nature and scope of the duty to co-operate that was exposed above, the precise nature of how these instruments are to be used as a basis for pursuing future conditionality remains ambiguous.

Now, we turn to the issue of the compatibility of conditionality with state sovereignty.

12.5 The Issue of Compatibility

12.5.1 Introduction

This assessment is conducted at two levels: the legal duty to co-operate for development, and the specific context of the instruments studied here.

12.5.2 In the Context of Duty to co-operate for Development?

For all legal and practical purposes, the "duty to co-operate for development" is a matter which is uniformly defined, in which developed countries have
pledged themselves to co-operate with developing countries and the United Nations. The specific manner in which to comply with such a duty, however, is a different matter. This depends on the terms by which both groups of countries agree with respect to development assistance or preferences, or the co-operation undertaken by developed countries the organisation. The former Secretary-General of the UN has rightly stated:

"duty to co-operate for development" is "at most ...a duty or obligation to negotiate with the viewing to defining more precisely the target to be reached and the ways and means of reaching them". 679

Based upon this line of reasoning, the duty under consideration takes on the nature of *pactum de contrahendo*. This means that the relationship of demo-conditionality to state sovereignty has not been completely settled, and that the former can still be questioned by recipient countries; thus, conditionality is part of international soft law. 680

### 12.5.3 In the Context of Contents of Co-operation Instruments

Two issues have been addressed in the earlier subsection: the duty to co-operate for development with regard to the inclusion or not of demo-conditionality 681 in development co-operation.

In the context of a duty to co-operate for development. The sub-conclusion here is based on a situation in which the sum of these instruments does not create a legal duty to co-operate for development. This means, then, that the pursuit of demo-conditionality based upon these instruments finds no support from a legal norm, and that it does not matter whether all of the instruments contemplate the inclusion of demo-conditionality in development co-operation. Therefore, the pursuit of demo-conditionality is incompatible with the principle of state sovereignty.

This represents the conclusion reached by following Route 2 of the general analysis. Now, there will be a brief comparison of the pursuit of the demo-conditionality as expressed through Routes 1 and 2; namely, through development co-operation agreements as opposed to Article 25 of the ICCPR.

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681 See Chapters 7 and 8 of this Study.
12.6 Pursuit of Demo-Conditionality: Route 1 or Route 2?

12.6.1 Introduction

The next question to be addressed is what the safest route is for pursuing demo-conditionality in development co-operation, where the consideration is a respect for state sovereignty. Is it through reliance upon the instruments of development assistance already studied, or the International Covenant on Civil and Political Rights, Article 25 of the ICCPR?

12.6.2 Appraisal of the Two Paths

*Development Co-operation Agreements.* The main drawback of these instruments is their individual and collective failure to create a legal duty for development co-operation; neither donors nor recipients have any binding obligation. This is the main determinant factor in making the comparison between Routes 1 and 2. As stated earlier, the UN Charter, 1945 and the ICESCR, 1966 cannot be relied upon for the pursuit of demo-conditionality. Neither involve any legal duty to co-operate for development, nor do they permit conditionality of any kind in such co-operation.

*The UNGA Declarations.* The commitments made by developed and developing countries concerning development co-operation have led to a strong international norm. Some might regard these agreements as soft law, while others have stated that they are "a gentleman's agreements only". The legal fact is that developed countries do not accept, and are under, no legal obligation to provide development assistance to developing countries. This implies in turn, that there is no legal right to development, i.e., no right of developing countries to development assistance.

*International Covenant of Civil and Political Rights.* The safe legal path for the pursuit of demo-conditionality, when and if developed countries are inclined to provide development assistance, is Article 25 of ICCPR, 1966. This is not to suggest that such a path does not have its problems, as was revealed earlier. But there are two main reasons why the Article 25 of ICCPR provides a legally safe route when tying development assistance to...

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682 For idea of soft law, see Jan Klabbers, The Redundancy of Soft Law”(1996) 65 Nordic JIL,381-91. And by the same author,”The Undesirability of Soft Law”(1998) 67 Nordic JIL,381-91. See also K.C.Wellens and and G.M. "Soft Law in European Community Law”(1989)14 14 ELR,267-321. But soft law may not be all that legally ineffective. Many have observed that non-legally binding instruments may be just as effective (or ineffective) as legally binding ones. For this view, see amongst others,Benedict Kingsbury"The Concept of Compliance as a Function of Competing Conceptions in International Law".in Edith Brown Weiss(ed.) *International Compliance with Non-binding Accords*(Washington 1979, pp.49-80. 683 See, Chapter 11 of this study.
free and fair elections. Firstly, it is a universal treaty which is binding on States' Parties, and ratified by approximately 145 Member States of the United Nations. And, Article 25 embodies the right to political participation, from which the right to free and fair elections can be traced.684

The second reason is the support that the Article enjoys from other treaties. The single-issue human rights instruments studied in Chapter 6 reinforce the right to political participation along the lines of the ICCPR, 1966, lending more legal weight to the pursuit of demo-conditionality in development co-operation. Article 25 is reflected in regional treaty instruments685 as well. Article 3 of the First Protocol of the European Convention 1950, Article 23 of the American Convention 1960, and Article 13 of the African Charter and the CIS Convention are all regional treaties, which recognise electoral democracy and enjoy a high level of ratification. The obligations of States’ Parties, intended to protect the rights mentioned, are expressed in mandatory and immediate form. Moreover, by virtue of these global treaties and related provisions, the elements of free and fair elections are well-elaborated. These are as follows: periodic elections, genuine elections, the right to stand for elections, universal suffrage, voting in elections on the basis of the right to vote, equal suffrage, secret vote, and free expression of the will of the voters.686

12.7 Conclusion

The main aim of this Chapter was, first, to clarify whether or not the pursuit of demo-conditionality, when premised upon instruments of development co-operation instruments, is compatible with the principle of state sovereignty; and, second, to compare this path in terms of legal safety to the path that relies upon Article 25 of the ICESCR, 1966. An analysis was carried out as to the legal status of these instruments, and also regarding the precedent they set in regards to the inclusion of demo-conditionality in development. In this context, the treaties studied were the UN Charter and ICESCR, 1966. Several UNGA resolutions are also analysed in this context.

Treaties. The results indicate that the UN Charter, although a treaty, does not create a legal duty to co-operate for development. At the same time, it does not contemplate any conditionality in development co-operation. The ICESCR, 1966, likewise, does not specifically create such a legal duty, and also rules out any conditionality in development co-operation.

684 See, Richard Juma-Nyabinda, supra note 7.
685 Ibid.
UNGA resolutions. The legal status of the UNGA resolutions studied is that of international soft law. Some completely rule out conditionality – e.g., the NIEO resolutions – while others such as the Rio and the New Millennium resolutions, implicitly contemplate demo-conditionality in development co-operation.

The general conclusion made here is that the compatibility of demo-conditionality with state sovereignty remains quite debatable. Such a compatibility is possible from the perspective of certain countries, especially recipient countries that question the legitimacy of demo-conditionality which is premised upon development co-operation instruments in international law. On the question of which of the two paths is legally safer, to base compatibility upon these instruments remains legally problematic, due to their collective failure to create a legal duty to co-operate in development. Article 25 of the ICCPR, 1966 is more legally safe in this regard, as a treaty to which both the recipient and donors are signatories.

In Chapter 13, based on the reasoning just given, the different models for ensuring compliance with treaty obligations (in this context, demo-conditionality) will be discussed.
13 The "Enforcement Model" or "Managerial Model"?

13.1 Introduction

In Chapter 12, it was demonstrated that demo-conditionality is compatible with the principle of state sovereignty. This means, on the one hand, that recipient countries which are Parties to Article 25 of the ICCPR, 1966 are under international treaty obligations to hold free and fair parliamentary and presidential elections. On the other hand, donors of development assistance to these countries have a corresponding right – based on international law – to ensure that the recipient countries comply with those obligations without conditions. Additionally, donors are entitled – should a recipient country fail to hold a free and fair election – to insist on conditionality; i.e., impose economic sanctions to ensure compliance. Finally, they have the option of holding intensive consultations/dialogue\(^{687}\) with a defaulting recipient country to ensure compliance. The latter two options could be described as representing two different models, which fall under the following two rubrics of the "enforcement model" and the "managerial model".

The main aim of this Chapter is to critically analyse and compare these models as to their effectiveness in ensuring compliance by State Parties with their international treaty obligations, which in the context of this study means the holding of free and fair elections. Specifically, what does each of these models involve? What kind of benefits or criticisms, if any, are levied against each? And finally, which one of them is more effective in ensuring compliance?

13.2 The "Enforcement Model"

13.2.1 Introduction

First, the discussion addresses the "enforcement model". What does this model involve?

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\(^{687}\) See, Chapters 15 and 16 of this study.
13.2.2 Coercive Enforcement Measures

Those supporting the enforcement model seek treaties with "teeth"; that is, coercive enforcement measures. Thus, this model may involve military action or economic sanctions.

13.2.3 The Benefits and Criticisms

The Benefits. The 1997 Report on the Work of the United Nations by former Secretary General Kofi Annan, where he stressed the importance of economic sanctions, is relevant:

"The Security Council's tool to bring pressure without recourse to force."

The fear of being targeted by economic sanctions is a powerful motivating force for obtaining compliance. Yet, it is also due to sanctions that the "enforcement model" has been criticised as being a less effective way of ensuring the compliance of State Parties with treaty obligations.

The Criticisms. Those who criticise the enforcement model, and advocate the alternative managerial model, point out the liabilities of sanctions related to their costs, legitimacy, and treatment of the concept of sovereignty.

The Costs Criticism. Critics point out that the cost of military sanctions are measured in lives, and therefore should not be incurred except under the most urgent circumstances that are clearly related to primary national interests. The costs of economic sanctions are high not only to the state receiving the sanctions, where the brunt of the harm is borne by the weakest and most vulnerable, but also to the state imposing the sanctions. Thus, Kofi Annan in the same report expresses his concern over the harm that sanctions inflict on vulnerable civilians, and the collateral damage incurred to third states. He acknowledges:

"[i]t is increasingly accepted that the design and implementation of sanctions mandated by the Security Council need to be improved, and their humanitarian costs to civilian populations reduced as far as possible."

Many query whether the costs of sanctions are truly worth the results. In response, practitioners and scholars have sought ways of fine-tune sanctions so as to direct their force primarily against those in power.

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691 Ibid.
"Targeted" sanctions. With this in mind, the concept of "targeted sanctions" has been developed. Here, it is useful to draw a distinction between "targeted" and "selective" sanctions, where the latter, which are less extensive than comprehensive embargoes, involve restrictions on particular products or financial flows. "Targeted" sanctions, meanwhile, are focused on certain groups or individuals in the target country, and aim to direct impact these groups; specifically, the leaders, political elites and powerful elements of society believed to responsible for objectionable behaviour. The hope is that this will reduce collateral damage to the general population and third countries.

The Legitimacy Criticism. The second criticism of the "enforcement model" concerns legitimacy of norms. The legitimacy of a norm (or norm system or regime) invokes characteristics broadly related to "fairness", that enhance the prospects for compliance. It thus depends on the extent to which the norm is applied equally and without invidious discrimination. What does "equal application without invidious discrimination involve?

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692 Targeted sanctions are described at times as "smart sanctions", like "smart bombs". They are meant to focus on certain groups or individuals in the target country. Such sanctions aim to have a direct impact on leaders, political elites, and segments of society believed responsible for objectionable behaviour (in this case those that have failed to hold free and fair elections) while reducing collateral damage to the general population and third countries. For a discussion on "targeted sanctions, see http://www.smartsanctions.se/ for "the Special Program on the Implementation of Targeted Sanctions (SPITS)", which was initiated as the "Stockholm Process" by the Swedish Ministry for Foreign Affairs together with the Department of Peace and Conflict Research at Uppsala University in November 2001. The Stockholm Report "Making Targeted Sanctions Effective" was also delivered to the Security Council on February 25, 2003. See, for literature on "targeted sanctions": Ian Cameron, "Targeted Sanctions and Legal Safeguards", http://www.jur.uu.se/repository/5/PDF/staff/sanctions.pdf.; Kimberly A. Elliott. "Analysing the Effects of Targeted Financial Sanctions." Paper prepared for the 2nd Interlaken Seminar on Targeted United Nations Financial Sanctions, March 1999, and Kofi Annan. "Report of the Secretary-General on the Work of the Organization - 1998". For the relevance of targeted sanctions in this study, see, Chapter 10.

693 For more detailed discussion of this point see: Ibid., Kimberly A. Elliott. "Analysing the Effects of Targeted Financial Sanctions." Paper prepared for the 2nd Interlaken Seminar on Targeted United Nations Financial Sanctions, March 1999. As has already been revealed in Chapter 9 of this study, Mugabe and his close associates in government are subject to "selected" sanctions.

694 Growing emphasis on the individual accountability of those in power for the unlawful acts of states (highlighted by the Pinochet case and the Bosnian war crimes trials), has made the concept of targeted sanctions all the more attractive.

695 For a detailed discussion of legitimacy of norms, see Richard Juma-Nyabinda, supra note 7.
The essence of law is often said to be to treat like cases alike.\textsuperscript{696} The difficulty, however, lies in deciding which cases are alike. Much of the process of norm interpretation and application is devoted to this question. The problems of equality and discrimination are noticeable in the context of decision rules, voting arrangements, and membership criteria for international organisations.\textsuperscript{697} Weighted voting schemes, such as in the Security Council, provide a good example.

To fully understand the legitimacy criticisms levied against economic sanctions, it is necessary to first understand the significance of the legitimacy of norms. A norm’s claim to obedience is based in significant part on its legitimacy. In this context, legitimacy is related to the issue of cost. According to critics, since the political costs are high efforts to impose sanctions will be intermittent and ad hoc, responding less to the need for reliable enforcement of treaty obligations than to political exigencies in the sanctioning states. This may lead to an inconsistent situation where some countries who fail to hold free and fair elections do not face economic sanctions, while others do.\textsuperscript{698}

With regard to this issue of bias, it has been emphasised by participants at an international symposium:\textsuperscript{699}

"that the human rights aspects should involve an equal scrutiny of all states so as to avoid selectivity and bias."

Thus, an ad hoc effort cannot be systematic and even-handed, and like cases are not treated alike. This will render any effort to ensure compliance with treaty obligations fatally deficient in legitimacy.

The observation to be made at this juncture is that in the context of economic sanctions, the legitimacy of norms criticism is valid. To mitigate it, donors ought to apply economic sanctions to all aid-recipient countries that do not hold free and fair elections as required by treaty law. Yet, this can only be accomplished if they are able to get rid of the problems related to equality and discrimination in the international system. With respect to

\textsuperscript{696} Frank Michelman sets out the requirement more carefully in the context of judicial decision: "Decision according to law involves generalisation over cases, a course of reasoning in which the immediate case is assimilated under an at least somewhat general class of cases, to which the categorically framed norm can then be applied with prescriptive force". Michelman, "Justification and (Justifiability) of Law in a Contradictory World", p.73. It is also worth noting that modern U.S. constitutional review has been marked by the flowering of Equal Protection Clause jurisprudence, the heart of which is the prohibition of invidious discrimination.

\textsuperscript{697} Franck Thomas, "The Principle of Fairness in International Law and Institutions". Oxford University Press, 1995.

\textsuperscript{698} For example, Third World countries, especially in Africa in comparison with China, when latter was a recipient of aid from Western donors.

\textsuperscript{699} See, Report of the Dag Hammarsjöld Symposium, supra note 689.
these problems, there is clearly a great deal of concern, reflected, for instance, in the outcome of a recent international symposium held in Uppsala. In the context of human rights issues, it was observed:

"that the human rights aspects should involve an equal scrutiny of all states so as to avoid selectivity and bias...".

Such a statement provides the hope that with some concerted effort and good will from the international community, the problem of equality and discrimination in the international system can be overcome. Nevertheless, its potential to undermine the legitimacy of economic sanctions is likely to remain for at least some time.

Nebulous and aspirational criteria. The more practical view is that equal application without invidious discrimination is admittedly nebulous and aspirational as a criterion; no existing legal system fully meets it. As Thomas Franck says:

"Legitimacy is a matter of degree."

It can be stated here that the international system has elevated the "sovereign equality" principle to a supreme status; hence, even weighted voting no longer seems acceptable in new agreements. This principle speaks to formal equality, yet in the daily conduct of treaty relations, that means very little. It cannot erase the various differences in power, economic position, or cultural and political orientation among states. In the symposium "On the Rule of Law", it was discussed and noted that at the international level, the claim to the rule of law "to treat equals equally" did not correspond to the realities of the international system.

Sovereignty. Another criticism of the "enforcement model" is that it promotes or enhances an absolute conception of state sovereignty in international relations, that emphasises inter-state relations based upon the independent state. The presumption of the sovereignty approach is that in theory, the sovereign state is entitled to pursue its agenda undisturbed, without regard to the reactions of others. But, as one publicist has stated:

"As a practical matter, however, this expedient is not open in contemporary international law there are several actors in the present international system.

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700 See ibid.
701 See, Report of the Dag Hammarsjöld Symposium on Respecting international Law and International Institutions, supra note 689.
703 The issue is illustrated in the debate over the voting rules for the Executive Committee of the multilateral Ozone fund. See Benedick, Ozone Diplomacy, p.185.
704 This term is borrowed from Professor Richard Falk’s summarised deliberation in that symposium, see supra note 689.
705 See, ibid.
706 On state sovereignty, supra note 132.
707 See, definition of sovereignty, Chapter 2 of this study.
When a state's conduct is challenged as inconsistent with a legal norm or otherwise as a questionable conduct, the state almost of necessity, must respond".\footnote{708}

The reality, as will soon be made clear, is that an approach to sovereignty which excludes justificatory efforts is not conducive to compliance with international norms.

13.3 The "Managerial Model"

13.3.1 Introduction

Those who are opposed to the "enforcement model" of ensuring compliance advocate the alternative "managerial model".\footnote{709} This relies primarily on a cooperative, problem-solving approach, instead of a coercive one.\footnote{710} With regard to this model, general assumptions are made as to certain specific features of the international system, which are described and explained below.

13.3.2 The "Managerial Model" and its Assumptions

The international system has received ample treatment in the literature.\footnote{711} The following unique features\footnote{712} of this system are worthy of mention here.

First, the structure of this system is recognized as being horizontal, consisting of all United Nations Member states. These states are regarded as equal in legal theory (in that they all possess the characteristics of sovereignty), with no single authority recognized.\footnote{713}
Second, international law only exists between states; furthermore, it is those states that themselves create, obey or disobey it.\textsuperscript{714} This of course has profound repercussions as regards the sources of law, as well as the means for enforcing them.

Third, that the negotiations, adoption and implementation of treaties are matters of foreign policy for each State. There is an understanding that in an increasingly complex and interdependent world, international agreements constitute a major element of the foreign policy activity of every state.

Fourth, the main focus of treaty practice has shifted to that of multilateral regulatory agreements addressing an array of economic problems which require cooperative action amongst states over time. Chief amongst these are problems related to environment degradation, monetary policy, security, and human rights.

Lastly, if treaties are at the centre of the co-operative regimes through which states and their citizens seek to regulate common problems, there must be some means of assuring that the parties perform these obligations at an acceptable level.

\textbf{13.3.3 The "Managerial Model": Contents}

Those who advocate this model maintain that when the main source of non-compliance is not wilful default or disobedience, but a lack of capability, clarity or priority, then coercive enforcement is as misguided as it is costly. Instead, a more complicated strategy which directly addresses these deficiencies is needed to deal with the bulk of compliance problems. It is important that the stakeholders of development co-operation efforts recognise and work toward solving these problems.

It is not easy to provide a vivid and satisfying description of the precise content of this alternative model.\textsuperscript{715} However, it is suggested that the "managerial strategy", also sometimes referred to as the "co-operative strategy", is made up of disparate elements\textsuperscript{716} which include transparency, dispute settlement, and capacity building.\textsuperscript{717} According to one publicist,\textsuperscript{718} these elements converge in a broader process of "jaw-boning"; i.e., the effort to persuade the miscreant to change its ways. This is a characteristic method by which international regimes seek to induce compliance. The main point, in any case, is

\textsuperscript{714} This leads Roseanne to refer to international law as a law of coordination, rather than subordination, as in internal law,"\textit{Practice and Methods of International Law}," Dordrecht,1984,p.2.

\textsuperscript{715} See, Abraham Chayes and Antonia Hander Chayes, "\textit{The New Sovereignty Sovereignty: Compliance with International Instruments}"\textsuperscript{,} supra note 6.

\textsuperscript{716} See, the hint of content of this model,Chapter 15 and 16 of this study.

\textsuperscript{717} Abraham Chayes and Antonia Hander Chayes, "\textit{The New Sovereignty Sovereignty: Compliance with International Instruments}"\textsuperscript{,} supra note 6.

\textsuperscript{718} See, ibid.
to emphasize the significance of argument, exposition, and persuasion in influencing state behaviour.

It is not possible here to fully explain in each of the elements comprising the managerial model. However, brief comments will be made about each of these elements.

(i) Ensuring transparency

As one author puts it:

"Transparency involves consultations between the parties. Therefore, transparency\(^{719}\) is an almost a core element of cooperative strategy. It influences strategic interplay among parties to the treaty in the direction of compliance. It is also the main key to reassurance, and thus compliance."\(^{720}\)

Thus, in this context, transparency provides reassurance to actors whose compliance with norms is contingent on similar actions by other participants (i.e. stakeholders in the partnership), that they are not being disadvantaged.\(^{721}\)

In the context of this study, this specifically means that donors hold consultations with recipient countries that have defaulted in holding free and fair elections. The latter have a chance to justify their actions, while the former has the opportunity to reiterate the legal implications of the development cooperation agreements signed between them.

(ii) Dispute settlement

In certain situations, stakeholders’ understanding as to what is expected of them may differ, thereby cause leading to non-compliance with international agreements. Where such a misunderstanding arises over ambiguity in treaty language that creates compliance problems, the traditional prescription is for dispute settlement machinery in the form of an arbitration body. The views of the arbitrators/conciliators are likely to carry weight with both the parties in general, and he disputants. Even so, the niceties of sovereignty are still observed and the parties not forced to accept the decision.\(^{722}\)

In the context of EU/ACP partnership, there is no such mechanism involving an arbitration body. This does not mean that the two parties are always left to their own devices in resolving disputes. Intervention by third parties, including other interested donors such as the USA, UN and even African Union, is possible.\(^{723}\) These third parties, also having their own respective

\(^{719}\) Transparency in this context, for example, is reflected in consultations procedures applied in EU/ACP relations. See Chapter 15 and 16 of this study.


\(^{721}\) See EU/ACP relations discussed in Chapters 15 and 16 of this study.


\(^{723}\) See, the coming Chapter 16 of this study.
interests in seeing that a defaulting ACP country will hold free and fair elections, provide their opinions regarding the situation, which facilitate dispute settlement.\textsuperscript{724}

(iii) Capacity building

The failure of one party to fulfil the terms of a treaty, e.g. the holding of free and fair elections, may be due not so much as an outright refusal as other factors beyond its control. A shortage of technical assistance, bureaucratic capability and financial resources (“capacity building”, in the current jargon)\textsuperscript{725} is often the real setback. These factors serve to hinder the domestic enforcement of measures that would be necessary in order for certain states to comply with their treaty obligations. For example, such a shortage has been recognized as an obstacle in the area of international environmental obligations.\textsuperscript{726} In the context of EU/ACP relations, some of the latter countries have defaulted in their obligations to hold free and fair elections, pleading a lack of resources.\textsuperscript{727} In some of these cases, the EU has promised or offered financial resources to facilitate the holding of free and fair elections, and/or financed the drafting of new democratic constitutions for those countries.\textsuperscript{728}

In practice, such capacity-building as a form of aid has carried a certain tacit conditionality, but the Montreal Protocol, in a possibly unprecedented effort, expressly provides for technical assistance as an affirmative device for enabling countries to comply with both the reporting and control requirements of the treaty.\textsuperscript{729}

In adopting “jaw-boning”, how do advocates of this model expect to induce states to comply with their international treaty obligations?

13.3.4 Methods for Inducing Compliance

Differences between the two models. First, it is important to point out the major difference in process with regard to the two models. The managerial model is a process which can be usefully described as management, rather

\textsuperscript{724} Ibid. See, for example, Victor Mosoti, "Dispute Resolution Under the ACP-EU Cotonou Agreement: A Need for Reform?", \textit{Trade Negotiations Insights}, ECDPM, ICTSD, vol. 2, Issue No. 1, February 2003.

\textsuperscript{725} See, Chapters 16 of this study, for the kind of capacity building which EU provides to ACP countries during the consultations procedures, in order to facilitate the holding of free and fair elections by the defaulting regime, e.g. election financing and even paid election monitors.

\textsuperscript{726} See, Rio Declaration and Programme of Action, discussed in Part II, Chapter 8 of this study.

\textsuperscript{727} See, Chapter 16 of this study.

\textsuperscript{728} See, ibid.

\textsuperscript{729} Montreal Protocol on Substance That Deplete the Ozone layer, 26 ILM 1541, EIF Jan. 1, 189, p Art. 10, 2.
than enforcement. The predominant atmosphere is one of actors/stakeholders engaged in a co-operative venture. What this means, essentially, is that performance that seems for some reason unsatisfactory represents a problem to be solved by mutual consultation and analysis, rather than an offence to be punished as it would under the enforcement model. So, what are these principal methods through which the defaulting partner is encouraged to comply with its treaty obligations?

The Principal Methods for Inducing Compliance. There are three factors shaping the way in which the development and elaboration of norms operates to influence state behaviour: the role of justification in international life, the complexity and interdependence of contemporary international life, and the important role of international organizations. The impact of these principal methods can be summed up in the assumptions made by the advocates of this model with regard to the international system:

"The central position is that the interpretation, elaboration, application, and ultimately, enforcement of international rules is accomplished through a process (mostly verbal) interchange among the interested parties".

A detailed discussion with regard to these three principal methods for inducing states’ compliance with norms is not possible here, but they will be mentioned briefly. First, there is justification and international discourse. The justificatory effort, as one writer says of legal reasoning in general:

"is neither a logical nor an empirical demonstration, but an effort to gain assent to value judgement on reasoned rather than idiosyncratic grounds".

Thus, justification is persuasion. In other words, crucial to the process by which international norms operate to control conduct is that, as a matter of international practice, questionable action must be explained and justified; not only in advance, but definitely and without exception after the fact. Thus:

"Accountability......is a critical rule-and norm-enforcement mechanism. The fact that people are ultimately accountable for their decisions is an implicit or explicit constraint on virtually everything they do. Failure to behave in ways for which one can construct acceptable accounts leads to varying degrees of

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731 See, on the international system, supra note 711.
732 For role of justification, see supra note 11.
734 Ibid.
censure—depending of course on the gravity of the offence and norms of the organisation." 735

As one author has stated, it is also important that international relations are conducted:

"in large part through diplomatic conversation-explanation and justification, persuasion and discussion, approval and condemnation." 736

Consequently, States are under the practical necessity to give reasons and justifications 737 for any suspect conduct. For example, it almost always represents a ground for disapproval if an action has violated the norm. No state wishes to be in the constant position of justifying its actions. Thus, in its most advanced form, this justificatory discourse is expressly recognised as a principal method of inducing compliance.

A second element which serves to induce compliance is the complexity and interdependence of contemporary international life, which makes compliance feel necessary to States who wish to avoid acting unilaterally and in isolation from the rest of the international system. This, in itself, exerts enough pressure to make a State change its behaviour and fulfil its obligations under a treaty. The advocates of the managerial model point to the fact that:

"contemporary developments in the field of international relations impose new demands for complex co-operative activity among States and other international actors, extending over time." 738

In other words, according to their argument, it has become increasingly clear that no single state, no matter how small, large or powerful, can consistently achieve its objectives through unilateral action or ad hoc coalition 739 This condition, termed the new sovereignty, 740 describes a need:

"to operate in a multifaceted, interacting and interdependent international environment with relatively diffuse power which tends to lengthening the time horizon of states and lead them to take account of long term consequences".741

Thus, compliance with norms is not so much a curb on the will or preferences of a state, as it is a condition for realizing the full range of its objectives.742

The third factor facilitating compliance is international organisations' role in legal discourse. Every state is quite aware that there are several types of benefits (including financial) to be derived from its participation with an international organization such as the WTO, IMF or World Bank. The desire not to be excluded from participation in these organisations promotes a propensity to comply with norms. As one writer has acknowledged, contemporary international life is marked by what is called "the move to institutions",743 and international relations today takes place within the framework of these international organizations. It is significant to note that:

"With increasing frequency and over a broadening range of international affairs, international organizations have therefore become a central instrument for management of international affairs and in particular for actualizing international legal norms."744

Therefore, there is no doubt that:

"a constitutional framework is essential to advanced collective arrangements, given of course levels of scale and complexity which preclude purely "informal organizations".745

It is evident that the presence of a formal organization with responsibility for administering a treaty alters the issue of compliance in important ways, by carrying the new significant consideration that international organizations "are a focused and intensified arena of public justification". In doing so, they intensify the legal content of the discourse and highlight the importance of legal norms.

741 Ibid.
742 Ibid.
745 See, Young, Ibid.
13.3.5 The "Managerial Model": Benefits and Criticisms

The criticisms. Does the "managerial model" have any weaknesses with regard to undermining State Parties' compliance with their international treaty obligations?

As will be pointed out in upcoming pages, given that the "managerial model" is based upon dialogue between parties, a protracted period of delay presents a serious problem that can represent a great disadvantage, especially when there is a life-threatening situation taking place under a dictatorial regime. In such situations, the threat of economic sanctions or the sanctions themselves, especially if targeted, or mild military action, could change the direction of events. An avowed dictator who is made aware of these consequences may well change his attitude and decide to hold a free and fair elections.

The benefits. Having made reference to the criticisms relating to humanitarian and third party costs, it is important to clarify that such criticisms are not applicable to this model, especially where human lives are concerned; the same cannot be said of military or broad-based economic sanctions. Likewise, the criticism surrounding the legitimacy of norms and jaw-boning is not possible to apply to the managerial model, where consultations are open to all parties; moreover, reducing donor bias is not as costly as economic sanctions.

Issue of Compliance and Sovereignty. Another aspect of the managerial model that can regarded as an advantage is that it relieves tension in the debate over sovereignty. Unlike the "enforcement model" discussed above where sovereignty is treated as something "isolated and always to be defended at any cost", the approach here is different.

Sovereignty. From the standpoint of the "managerial model", sovereignty ultimately means status, viewed as the vindication of a state's existence as a member of the international system. In such a setting, the only way for most states to realize and express their sovereignty is by participating in the various regimes that populate the international system. Becoming isolated from the pervasive international context would mean that the state's potential for economic and political influence is not realised. Here, a state’s integration with the rest of the world and political capacity as an actor within the international system are more important than any benefits of compliance obtained from international agreements per se.

The question to be answered is now: which of these two models is preferred in this study for the purposes of achieving the objective of Article 25 of the ICCPR?

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746 See, Chapter 16 of this study.
747 See, the legitimacy of norms criticism already discussed above.
13.4 "Enforcement Model" or "Managerial Model"?

13.4.1 Introduction

Let us begin by evaluating the criticisms and benefits of the "enforcement model", especially with regard to "targeted sanctions.

13.4.2. Appraisal of Both Models

In the context of the "enforcement model". It should be noted that the legitimacy criticism continues to apply to the "enforcement model". It is also acknowledged that the conception of sovereignty involved in this model is not conducive to enhancing compliance with international obligations, instead leading to conflicts. With regard to the cost criticism, it is acknowledged that monetary and humanitarian costs can be very high, especially in cases where the entire population of a targeted country become victims.

When it comes to benefits of the enforcement model, the positive development of targeted sanctions should be acknowledged. It is important to point out that these sanctions are not an end in themselves. Instead, they have historically been applied either as a "warm-up" for broader measures, or as the supposed "knockout" punch. However, targeted sanctions are not toothless; they present an opportunity to substantially reduce criticisms of excessive cost. They may satisfy the need on the part of the donor states to "do something", by assuaging humanitarian concerns and helping to unify fraying coalitions. Yet, it must also be stated here that these sanctions are not a magic bullet for achieving foreign policy goals.

A quotation from the former UN Secretary General is relevant here:

"The international community should be under no illusion: these humanitarian and human rights policy goals cannot easily be reconciled with those of a sanctions regime. It cannot be too strongly emphasized that sanctions are a tool of enforcement and, like other methods of enforcement, they will do harm. This should be borne in mind when the decision to impose them is taken, and when the results are subsequently evaluated."

Nevertheless, the threat or practical application of economic sanctions against targeted States holds a great potential when it comes to inducing

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748 UK and UN sanctions against Rhodesia illustrate the "warm-up" approach. An asset freeze, arms embargo and selective export bans did not persuade Ian Smith to allow majority rule in Rhodesia. By 1968, the UN Security Council resorted to a comprehensive embargo. In neither Haiti nor Rhodesia were the targeted measures successful.

749 The episode of sanctions against Haiti illustrates the "knock-out" approach. Initial trade sanctions by the Organization of American States were followed by more comprehensive sanctions imposed by the UN Security Council. Only after these sanctions failed to bring change, were targeted measures imposed that were aimed directly at the Haitian military.

750 Taking into account the impact of such sanctions as already described in this study.
such a state to comply with its international treaty obligations. The sub-
conclusion here is that targeted sanctions, taking into account their conse-
quences,\textsuperscript{751} are more effective than the "managerial model".

In the context of the "managerial model". Clearly, negotiations can take a 
long time to attain the required results, not to mention their presumption that 
the parties engaged in them would be acting in good faith. Such a presump-
tion overlooks the fact that there are deceptive cynics\textsuperscript{752} who engage in these 
negotiations even as they are aware that they will not change their behaviour. 
Thus, the "managerial model" brings with it risks which can undermine its 
objectives.

However, these objectives can be achieved more quickly and effectively 
where all parties involved are co-operative and willing to change behaviour. 
Moreover, the treatment of sovereignty here serves to avoid conflict, enhanc-
ing the potential for achieving compliance.

13.5 Which Model? A Combination of Both

The preferred position of this study is as follows. Although cost and legiti-
macy criticisms cannot be levied against the "managerial model" to the same 
degree as the "enforcement model", both systems should be used to comple-
ment one another in order in order to maximize states’ compliance with in-
ternational treaty obligations. Thus, where the "managerial model" has been 
applied without producing any results, the "enforcement model" should be 
applied.

In the context of this study, it has been revealed that the reducing or cut-
ting of aid to recipient countries does not take place all at once. It is a proc-
ess which begins with dialogue, in the form of "jaw-boning".\textsuperscript{753} By the time 
donors actually cut aid to any recipient country (i.e. "the enforcement 
model"), the co-operative process intended to make the recipient state 
change its behaviour has been exhausted, especially so where a form of 
treaty exists which regulates the relationship between the donors and recipi-
ent.\textsuperscript{754} Therefore, both models should be on the table to ensure the greatest 
possible degree of compliance. This synergistic approach has, for example, 
proven effective in the relationship between EU and ACP countries, success-
fully altering the behaviour of ACP countries that have previously defaulted 
in holding free and fair elections.\textsuperscript{755}

\textsuperscript{751} Ibid.
\textsuperscript{752} Reference, for example, is made here to the negotiations between Robert Mugabe and 
Tsvangari to form a government based on power sharing, which have taken nearly six months.
\textsuperscript{753} See, Chapter 9 of this study.
\textsuperscript{754} See, Chapters 14,15 and 16 of this study on the EU-ACP partnership.
\textsuperscript{755} See, Chapter 16 of this study.
13.6 Conclusion

The aim of this Chapter was to identify which of the two models for ensuring compliance – the "enforcement model" or the "managerial model" – seems more effective in the context of this study; namely, to ensure that recipient countries begin to hold free and fair elections. The conclusion reached here is that both models should be on the table as a course of action for donors, to be applied as needed in achieving this objective. Their future prospects for continuing to induce state compliance with international obligations, particularly in regards to the holding of free and fair elections, is discussed later in this study.

Now, we proceed to Part V of the study where an examination of the issue of demo-conditionality in the partnership between European, African, Caribbean and Pacific countries shall be discussed.
Part V

THE EUROPEAN UNION, AFRICAN, CARIBBEAN AND PACIFIC PARTNERSHIP AND DEMO-CONDITIONALITY
14 Background Information

14.1 Introduction

The main aim of this chapter is to examine whether or not demo-conditionality is a feature of the EU and ACP partnership.

14.2 The Development Partnership: Features

The first feature to be discussed is the fact that historically, the ACP countries have what in diplomatic language is called "traditional relations" with some of the original countries from today’s EU. By this, it is meant that some members of the European Union were once colonial masters of the African, Caribbean and Pacific countries.

The second important feature is that these two groups of countries have committed themselves to democratic government. In theory and practice, then, the inclusion of a free and fair election clause in the development contract between them should not be contestable. In this context, democracy features in the global development co-operation agreements already been dealt with in this study, as well as through agreements entered into between those two groups of countries just listed. To an even greater extent, a commitment to democratic government is also entrenched in other agreements to which they were parties. Thus, for example, these countries are Parties to the ICCPR as a general treaty. This means that they are under an

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756 This study adopts the same position with regard to the use of terminologies, EEG, EG and EU, see Andreas Moberg, Villskor Klausuler. Om avtals Klausuler som utrikespolitiskt instrument, p25 http://hdl.handle.net/2077/18910, supra note 3.
757 E.g. France, Britain, and Portugal, amongst other countries.
758 For a more detailed discussion of this historical relationship, see Chapter 15 of this study dealing with the development of demo-conditionality in EU/ACP relations. It is also necessary to state here that not all the EU countries colonised the ACP, e.g. the Nordic Countries did not. Taking into account the extended membership of the EU, also the former East European Countries did not colonise the ACP countries.
759 See, Chapters 7 and 8 of this study.
760 See, Lome and Cotonou Agreements in Chapters 14, 15 and 16 of this Study.
761 For the number of countries which have ratified the ICCPR, 1966 Treaty, see Richard Juma-Nyabinda, supra note 15. The list shows ACP and EU as being States Parties to ICCPR.
obligation to obey its provisions, including the holding of free and fair elections as demanded by Article 25 of the treaty.\textsuperscript{762} The countries are signatories to regional human rights instruments whose provisions reflect those contained in Article 25.\textsuperscript{763} For example, the African countries are signatories to Article 13 of the African Charter on Human and Peoples Rights, 1981 and its Article 13.\textsuperscript{764} The other remaining countries in the ACP contingent are signatories to the American Convention on Human Rights and its Article 23.\textsuperscript{765} The EU countries are signatories to the European Convention on Human Rights 1950 and its various Protocols, where Protocol I Article 3\textsuperscript{766} is the one most relevant with regard to elections. Moreover, these countries have committed themselves to democracy through other regional political documents as well. In the European context, the Organisation

\textsuperscript{762} The requirements of this Article 25 of the ICCPR on participation through elections and their ingredients have been analysed in Chapter 5 of this study.

\textsuperscript{763} For a recent detailed analysis of these regional treaty provisions, see Richard Juma-Nyabinda, "The Requirements of Democratic Elections in International Law", supra note 7.


for Security and Co-operation in Europe (OSCE) has adopted three documents containing lengthy and highly detailed provisions on participatory rights.767

Concerning the elements of democratic elections, there is only one which is relevant here: the Copenhagen Document of 29 June 1990, titled the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe(1990).768 The sections specifically relating to elections in this particular document are Paragraphs 5769 and 7.770 The Copenhagen Document is quite similar in content to Article 21 of UDHR.

It should also be mentioned that the other two remaining OSCE documents simply reinforce that document. Thus, the Charter of Paris of 21 November 1990, apart from endorsing participatory rights appearing in that Charter,771 also creates an institutional structure to oversee their implementation by establishing an Office for Free Elections.772 The Moscow Document of October 1991, apart from endorsing participatory rights,773 dramatically strengthens the normative force of the standards. Drafted following the attempted Soviet coup, this document condemns:

“(i) Unreservedly forces which seek to take power from representative government of a participating State against the will of the people as expressed in free and fair elections” 774
(ii) it further states that in the event of a coup against an elected regime, the Document directs the member States not to recognise the usurping powers.775
(iii) This commitment appears to repudiate the time-long honoured de facto control test, under which any government in control of a nation is recognised by other States.”

In their place, the Moscow document envisions a Wilsonian notion of democratic legitimacy.

767 See, infra notes, 771,774 and 776.
769 See, Paragraph 5.
770 See, Paragraph 7.
771 Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, 30 ILM (Nov.2, 1990), pp.190, 193(preamble): The Charter succinctly provides that signatories “undertake to build, consolidate and strengthen democracy as the only system of government of our nations”.
774 Ibid., Para.17.1, 30 ILM, p.1677.
775 See, Ibid.
The declaratory instruments within the OAS and African regions are also worthy of mention. For OAS, the focus on representative institutions is reiterated in the Inter-American Democratic Charter, adopted by the General Assembly of the OAS in 2001. According to Article 3 of this Charter, the essential elements of representative democracy include, amongst other things:

"Respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic elections free and fair elections based on secret balloting and the universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organisations, and the separation of powers and the independence of the branches of government".  

The wording of this document confirms the requirements of democratic elections already enumerated here. In this case, however, elections are embedded in a broader constitutional context. As a result of this rhetorical support for democracy, practical steps have been taken by states to establish democracy as a form of internal governance.

In the context of the African region, the relevant document is the New Partnership for Development (NEPAD). The content of NEPAD was also one of the topics of discussion in the dialogue convened by the African Team, Activities and Programmes Branch, Office of the High Commissioner for Human Rights in Geneva. The NEPAD unambiguously places at its centre concerns related to human rights, democratic governance, the rule of law, the creation of environments for sustainable economic development, and the attainment and maintenance of peace and security. In the context of the African Continent, a document on democracy has also recently been adopted.

Most of the declaratory instruments listed above embody political commitments only. Yet, their legal value cannot be underrated because they are rooted in binding instruments of international law.
The third relevant feature in the relationship between these two groups of countries is the international supervision and monitoring of elections. The EU\textsuperscript{782} is one of the major actors to send election observation teams to regions of the world where this is required.

In the context of EU/ACP relations, it is virtually taken for granted that the EU will send their team of election observers any time that these ACP countries are holding national elections, and that this country will always accept such missions\textsuperscript{783} despite past problems associated with them.

Given that the EU is the donor in its relationship with the ACP, it is now important to examine how it functions as an actor in its development co-operation with those countries.

14.3 The European Union and Development Co-operation

14.3.1 Introduction

Regarding inclusion of conditionalities, and in this specific context demo-conditionality in international relations, it is the role of the donors that is most important. Therefore, the discussion here revolves primarily around the EU as a donor within the international community, its external competence to involve itself in international relations, and its Adoption and application of political conditionality.

14.3.2 As a Prominent Donor

The EU\textsuperscript{784} is of one of the most significant donors of development assistance to developing countries. Taken together, its Member States currently provide
more than half of all global development aid. The lion’s share is currently still furnished bilaterally, but this could change as the EU deepens its integration process. Community development co-operation represents around 15 per cent of total joint efforts.785

The policy developed and implemented at the European level, however, is of greater importance than this modest percentage would suggest. In the first place, for certain (groups of) developing countries the Union is by far the most important partner. This applies, for example, to a number of Sub-Saharan African Countries that have maintained a preferential co-operative relationship with the EU since their independence.786 In general, the Union and its Member States have traditionally prioritized Africa; six out of the ten countries receiving the greatest amount of this aid are African. Then, in the 1990s, economic and development co-operation received a major boost in Asia and South America, and to an even greater degree in the Southern Mediterranean and former Central and Eastern Europe, received a major boost. In recent years these relationships have intensified, a trend that may continue for some time.

Additionally, the Title on development co-operation in the Maastricht Treaty specifically calls for coordinated development co-operation policies and consultation on aid programmes between the Union and the Member States (Article 130x). This idea was initially questioned because of the separate bilateral development co-operation policies carried out by individual Member States. But today it is a success story: the European countries have grown closer to one another as their objectives and strategies have begun to converge.788 The result is that a greater degree of coherence has been realised.789


786 In other words, African countries involved in EU/ACP development co-operation.


These considerations reveal the potential impact that Union development co-operation currently holds for certain countries or regions, and the prospects for stronger co-ordination of Union and bilateral policies in the near future. Given that the EU-ACP relationship is based on agreements between the parties, there should be an examination of the framework for the EU’s external relations.

14.3.3 The Distinction: “Legal” / “Political” Aspects

Is it possible to draw a distinction between the “legal” and “political” aspects of the EU? 

Distinction possible. Some argue that, to a certain extent, the Treaty on the European Union (TEU) appears to make a distinction between legal and the political aspects of the European Union (EU). Thus, legal elements can be found in the treaty on the European Community (TEU), as amended by the Amsterdam and Nice treaties, that are enforceable. Meanwhile, political elements are provided under the second pillar of the TEU, the provisions of Common Foreign and Security Policy, and fall outside the jurisdiction of the European Court of Justice (the Court).

Distinction not clear-cut. Despite the evidence above, the distinction is not clear-cut. It would be unrealistic and inaccurate to draw an unequivocal distinction between the legal and political aspects of the EU’s external policy. On the one hand, this second pillar also contains legal instruments: inter alia, common strategies and common positions. On the other hand, since the establishment the European Economic Community (EEC), its external relations have invariably been characterized by the pursuit of political objectives. To separate these two pillars would hardly result in an obvious division between legal and political action.

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791 However, the Court may take CFSP commitments into account when interpreting Community law.


793 Koen Lenarerts & Piet van Nuffel have argued that “the legal split between the Community and the CFSP action on the part of the Union does not square with what really happens at the international level: economic decisions taken by States or organisations are often the
Distinction in field of human rights. In the field of human rights, this distinction between legal and political aspects becomes even more blurred. The simple fact that human rights, international embargoes or sanctions may be similarly considered in the context of Common Foreign and Security Policy, or justice and home affairs, does not preclude the presence of these areas within the sphere of the EC Treaty. Both first and second pillars contain provisions which allow for the pursuit of human rights policies; thus, decisions are made at both levels. The field of human rights cuts across several pillars, representing a bona fide sphere in which legal and political aspects are completely intermingled. The TEU as amended by the Amsterdam and Nice Treaties acknowledges this inter-linkage, with Article 3 providing that the Union shall ensure the consistency of its external relations, security, economic and development policy.

In this paper, the legal aspects of external EU policy are provided in the absence of an in-depth study of Foreign and Security Policy instruments. This is because throughout the thesis, emphasis is placed upon the network of bilateral relationships that the EU maintains, and the unilateral and autonomous measures that it enacts including agreements and regulations. Some of these CFSP instruments are legally binding, as the discussion will make clear.

A brief discussion of the EU’s external competences proceeds below.

14.3.4 External Competencies

Is the European Union a legal person with the international capacity to make binding agreements with other legal persons, e.g. third party states, within the international legal community?

reasons for or a consequence of political decisions. By the same token, Community external relations have invariably pursued political objectives”. See the Authors, ”Constitutional Law of the European Union”, Sweet and Maxwell, 1999, p.663.


As we shall see, the answer to that question is in the affirmative.\textsuperscript{796} This is clarified by the entrance into force of the Lisbon treaty.

Textual interpretation. The three Treaties establishing the European Communities (EC) approach the issue of international capacity in different ways. On the one hand, both the Treaty establishing a European Coal and Steel Community (ECSC) and the Euratom Treaty were explicit on the matter of international capacity.

Thus, the first (ECSC) provided in Article 6 that:

\begin{quote}
\begin{quote}
“in international relations, the Community shall enjoy the legal capacity it requires to perform its function and attain its objectives”.\end{quote}
\end{quote}

The second (Euratom) provides in Article 101(1) that:

\begin{quote}
\begin{quote}
“the Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third state, an international organisation or a national of a third state”.
\end{quote}
\end{quote}

On the other hand, the Treaty of Rome (the EC Treaty) contained no clear provision on the matter with the exception of commercial policy. Reference can be made to the former Article 210 (new Article 281, as amended by Amsterdam) which stated tout court that:

\begin{quote}
\begin{quote}
“the Community shall have legal personality”.
\end{quote}
\end{quote}

This was followed by Article 211 (new Article 282, as amended by Amsterdam) dealing with the Community capacity within the Member States. The former provision seemed to suggest a legal personality in the international arena, since internal capacity was already recognised explicitly by former Article 210 (new 282). This interpretation gave meaning to the former Article 210. In addition, certain Articles of the EC Treaty gave the Community

\begin{quote}
\begin{quote}
competence to enter into agreements with third countries or international organisations in specific policy areas.797

The Court interpretation. Court reached the conclusion that Article 282, in combination with the other provisions mentioned above, indicated that the Community had wide external capacity. According to the Court, ”this provision (former Article 210) placed at the head of Part Six of the Treaty devoted to general and final provisions, means that, in its external relations, The Community enjoys capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty which Part Six of the Treaty supplements”.798

One publicist, Pescatore, thus concluded that the Court had considered Article 210:

“as being not only a statement on the civil capacity of the Community, but also a claim to international personality”.799

After the Reparations Injury case, decided by the International Court of Justice (ICJ), it was beyond doubt that international organisations endowed with a certain degree of autonomy must be awarded international capacity, even if their statutes did not explicitly provide for that capacity. Consequently, some might argue, the wording of Article 281 was tauological in light of the competences awarded by the Treaty.800 Thus, a generous interpretation was necessary in order to give meaning to this provision. In addition, the Court brought the provisions of the Treaty of Rome in line with its two counterparts, the Euratom Treaty and the ECSC Treaty.

Issue of international personality. A more controversial issue is whether the Union should enjoy an international personality. The TUE, as modified by Amsterdam and the Nice Treaties, remains silent on this question; this silence is interpreted by many as an explicit denial of any such possibility.801

On the eve of the signing of the Amsterdam Treaty, the Irish president presented a proposal aimed at endowing it with legal personality. Following this, the Dutch president went even further in proposing a single legal personality for the Union as a whole, which would have assimilated all existing personalities of the Communities. Despite these proposals, ultimately there is

798 C-227/70 ERTA (1971),para.13 and 14.
799 P.Pescatore, ”External Relations in the case-law of the Court of Justice of the European Communities”, CMLR, No.16, 1979, p.641.
800 Advisory Opinion, ICJ Reports 1949.
801 Koen Lenaerts & Pieter van Nuffel, in supra note 793, p.613. The authors argue that ”this is evidenced by the fact that the Union has no powers on its own and can achieve its objectives only through actions taken by the Community and the Member States, either in accordance with the rules of the Community law or in the form of action by the Member States and the Community institutions in accordance with the rules of title VI of the EU Treaty”.
no allusion made to the legal personality of the Union in the Treaty of Amster-
dam. It is a well-known fact, moreover, that some Member States were
manifestly reluctant to award such personality to the Union.802

One might also argue the contrary position, using the principal argument
that an international organisation can have a legal personality which derives
implicitly from the competences and powers of the organisation, even if this
is not explicitly claimed by its status or founding treaty. Legal personality
thus derives from the full scheme of the treaty, and in particular, from the
degree of autonomy that the parties have conferred upon it. Alan Dashwood
has pointed out that:

"the Amsterdam Treaty could not actually have given the Union international
legal personality, since the existence of such personality is a matter for inter-
national law itself".803

Some might argue that if one applies the Criteria enunciated by the ICJ in
the Reparation for Injuries case, there are grounds for regarding the Euro-
pean Union as being endowed with international legal personality, at least
with respect to the Foreign and Security Policy.804 Furthermore, the TEU, as
amended by Amsterdam, introduced a new provision (Article 24) which
allows the Council to negotiate and conclude agreements necessary for im-
plementation of the CFSP.805 However, Article 24 by itself is not sufficient to
grant legal personality to the Union. Koen Leanerts and Eddy de Smijter
have argued that since Member States are not necessarily bound by such
international agreements:

"Article 24 does not so much give European Union the possibility to con-
clude international agreements, but rather aims to facilitate the conclusion by
the Member States".806

802 See, "Memorandum on Europe after Maastricht", House of Commons, Foreign and Com-
monwealth Affairs Committee, 1992.
803 Allan Dashwood, "The External Relations Provisions of the Amsterdam Treaty", CMLR,
804 According to Dashwood, the main indicators of this personality are to be found in the
ambitious scope and objectives of the CFSP as defined by Article J.1, which can only be
realised effectively through action on the international plane. See Dashwood, ibid.. For a
similar view, see Dominic McGoldrick "International Relations Law of the European Un-
ion"., Longman 1997,p.37.
805 Article 24 of the TUE as amended by Amsterdam, which states that, "when it is necessary
to conclude an agreement with one or more States or international organisations in implement-
ation of this title, the Council acting unanimously, may authorise the Presidency, assisted by
the Commission as appropriate to open negotiations to that effect. The Council acting unani-
mously on a recommendation from the Presidency (…) shall conclude such agreements".The
Treaty of Nice, accordingly. has modified Article 24 of the TEU; the unanimity rule is limited
to these cases"…when the agreement covers an issue for which the unanimity is required for
the adoption of internal decisions". (See new Article 24(2)).
806 Koen Lenarerts & Eddy de Smijter, "The European Union as an Actor under International
Law" YEL., 1999-2000.The authors argue that in comparison with Article 300(former 228),
It is stated here that even though Article 24 is not sufficient to endow the Union with legal personality, at the very least it represents a first step in such a direction.

The question of the Union’s legal personality is therefore a “hot” issue, hardly exempt from complexity. It is necessary to reconcile the apparent lack of will on the part of some Member States and resultant silence of the Treaties with relevant international case law. The Reparations for Injuries case demonstrates that the question of legal personality is a relative one, which depends upon the nature and extent of the powers and competences conferred to the organisation, insofar as those reveal any intention on the part of the Contracting Parties to confer legal personality. There was no agreement amongst the Member States regarding the granting of legal personality. Nevertheless, Article 24 arguably represents a first step in the direction of a personality, which the Union may be granted in the near future.

Recognition of legal personality in the international sphere implies the capacity to bear legal rights and duties under international law. Even if the Court has recognised a broad principle of international capacity, that does not determine the scope and limitations of its competences. As a consequence, the EU enjoys a right of active and passive legation. It can enact autonomous acts in pursuit of its objectives, may be held liable under international law if it has breached its obligations, and may take action itself where its rights are infringed.

At the same time, the EU has power to conclude both multilateral and unilateral agreements; this is the most significant consequence of its international capacity. While this capacity is governed by international law, the division of powers between the EU as a whole and the individual Member States is a matter of EU law.

The next issue to be addressed here concerns competences in the bilateral sphere, with special attention to the EU-ACP partnership. What are these competences?

14.3.5 The Bilateral Sphere: Competences

From the structural point of view, the most significant aspect of external relations is the power to enter into international agreements, i.e., treaty-

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Article 24 is very short and does not elaborate on which agreements may be negotiated and concluded on behalf of the European Union. In addition, Member States are not necessarily bound by these international agreements; a simple declaration is enough for a State not to be bound by the agreement in question. But this declaration does not, of course, prevent the agreement from coming into force provisionally for the Member States. The authors are of the opinion that TEU, as amended by Amsterdam, does not grant the Union legal personality.

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808 Koen Lenaerts & Eddy de Smijter, supra note 806.
making power. Here, emphasis is placed on bilateral agreements as opposed to multilateral relations, given that Part IV of this study is devoted to bilateral external relations and in particular, bilateral agreements between the EU and ACP countries.

The Treaties explicitly bestow upon the EC powers to enter into certain kinds of agreements with third countries. Agreement, here, is to be understood broadly as "any undertaking entered into by entities subjected to international law, which has binding force, whatever its formal designation".809

This formulation was undoubtedly inspired by the 1969 Vienna Convention of the Law of the Treaties. In Article 2(1), the 1969 Convention states that an agreement must be interpreted as such when concluded by subjects of international law, whether it is:

"embodied in a single instrument or in two or more related instruments and whatever its particular designation".810

In other words, an agreement must be analysed and interpreted in its entirety; i.e. as a whole.811 It is necessary to take into consideration its essential objective rather than individual clauses of an altogether subsidiary or ancillary nature.812 The provisions of an agreement must be interpreted in light of its object and purpose, as well as its wording. In Opinion 1/91, the Court stated that:

"an international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives."

Article 31 of the Vienna Convention of the Law of Treaties stipulates, in this respect, that "a treaty must be interpreted in good faith in accordance with ordinary meaning to be given to its terms in their context and in the light of its objects and purpose".813 Thus, any comprehensive interpretation of an agreement must encompass a literal, contextual and teleological analysis.814

810 Article 2(1) (a) of the Vienna Convention on the Law of the Treaties of 1969. The case law of the International Court of Justice is also relevant; in particular, the judgement of 1 July 1994 in the case concerning maritime delimitation and territorial questions between Qatar and Bahrain (jurisdiction), ICJ Reports 1994, p.112.
811 See, ibid.
812 Opinion 1/78 on the Rubber Agreement, (1979) ECR 1-2871.
813 Opinion 1/91 (1991) ECR 1-6079 point 14. This view had been stated by the Court in another case C-270/80b, Plydor (1982) ECR 1-329.
814 The contextual application is somewhat complex. Authors such as Kuijper have criticised the Court for not following the guidelines of Article 31(2) of the Vienna Convention of the Law of Treaties when applying contextual application. The latter provision states that the text of a treaty includes its preamble and annexes, as well as any agreement or instrument made in connection with the conclusion of the treaty or accepted as such. In the Plydor case, however, the Court refers to the context of the objective of the Community and adduces its own
Finally, it is important to recall that bilateral agreements bind the European Union. From the moment the treaties enter into force, it becomes “an integral part of the Community legal order”. The treaties are binding upon the institutions of the European Union, as well as the Member States. In some cases, bilateral agreements are “prolonged” by the decisions made by joint decision-making bodies (such as association councils) that were established by these agreements. Such decisions are, in the words of Alan Dashwood, an “additional way of making European Law law”. Furthermore, it is well stated that the same guidelines on the interpretation of agreements, and in particular the criteria of Article 31 of the Vienna Convention, are fully applicable.

As demonstrated above, the institutions of the EU and Member States are bound by agreements concluded by the Council, which in turn must be negotiated and concluded under the conditions set by Article 300 of the Treaty. This Article does not confer power on the European Union to act internationally, but establishes the proper procedure by which the Community can enter into an agreement in which power is shared among various institutions. What are these requisite conditions?

The general rule is as follows: the Commission conducts the negotiations, the Council concludes the agreement, and the Parliament is consulted. In some cases, however, the Parliament must give its consent.

A few brief comments regarding the typology of framework agreements are made below.

case law on the new legal order created by the EC Treaty in such a context. The author argues that "thus this (incorrect) application of the contextual element of treaty interpretation becomes a kind of Von Munchhausen trick: just as the famous Baron drew himself from the quicksand by his own hair, the Court lifts itself from the (self-imposed) restrictions of ordinary treaty interpretation by its own case-law". See Polydor case, bid.


In particular, C-192/89 S.Z.Sevince v Staatsecretaris van Justitie (1990) ECR 1-363 paragraph 9. These decisions may also have direct effect, provided that the provision contains a clear and precise obligation which is to be subjected to implementation.


This power derives from Article 281, as stated above.

14.3.6 Typology: Framework Agreements

The typology of (bilateral) agreements will be drafted according to the rationale of the legal basis for those agreements. 821 This question becomes extremely important, given that the legal basis used may swing the balance of power from one institution to another.

The Court has stated that, independently of the form of action used to conclude an agreement, the legal basis has to be specified. 822 Any international agreement must specify a dual legal basis which consists of the procedural legal basis – the paragraphs of Article 300 used to negotiate and conclude the agreement – and the substantive legal basis. Agreements as such as Trade and Commercial Agreements are not discussed in this study; rather, the Association and Agreements on Development Co-operation are the ones most relevant to understanding the relationship between the EU and ACP.

Association Agreements. Article 310 of the EC Treaty (ex-Article 238) provides the legal basis for the European Union to conclude:

“with one or more States or international Organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.”

An association agreement is to be distinguished from the ordinary procedure of signing agreements under Article 133 on common commercial policy, often complemented by Article 308 and Article 181 on development co-operation. Inasmuch as the conclusion of such agreements is influenced by political considerations, the legal basis (and thus, whether to use Article 310) is also determined by these political motives. 823 In the Demirel case, the Court defined association agreements as those which “create special, privileged links with a non-member country, and which must at least to a certain extent take part in the Community system”. 824

In the field of international law, the term “association” refers to a type of legal relationship between subjects of international law whereby States are members to a special arrangement. A third State or international organisa-

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821 There are other manners of division amongst bilateral agreements; for instance, whether an agreement is a pure Community agreement or a mixed agreement.
823 Koen Lenaerts & Piet van Nuffel, “Constitutional Law of the European Union”, Robert Bray (ed.), supra note 793, p.636. See also Maresceau and Montaguti, “The Relations Between the European Union and Central and Eastern Europe Legal Appraisal”, Common Market Law Review, No.32, 1995, p.1341 and 1342. The authors compare the different legal basis between the Europe Agreements (Article 310) and the Partnership and Co-operation agreements concluded with the countries of the former Soviet Union (Articles 133 and 308). The authors argue “The PCAs are thus not association agreements. Clearly this difference in legal basis is not a matter of procedure but of substance or rather of politics(…).”
824 See, Case C-12/86 Demirel v. Stadt Swäbisch Gmund (1987) 1 ECR 3719 para.9.7
tion has an affiliation to the aims and/or the functioning of the international organisation without becoming a full member.

Following this line of reasoning, the Court recognised that when the European Union concludes an association agreement with a third country, it is setting up a special relationship and sharing of the aquis communautaire with this country. As an example, Dashwood has held that conditions favourable to human rights can be legitimately furthered by association agreements (even if the relationship is with a developed country), as the clauses are already part of the Community system of development cooperation.

Article 310 states that association agreements shall provide for reciprocal rights and obligations. Reciprocity does not, however, imply equality of contractual obligations. Such an agreement often encompasseses one-sided privileges; for instance, the European Union’s removing tariffs from goods which come from those associated countries, or provisions awarding the countries technical or financial assistance.

It has already been said that one of the characteristics of association agreements is that they are aimed at creating permanent or durable links. Consequently, an institutional structure is set up to enable associated states to make decisions necessary to the institution’s effective functioning, and a chapter on political dialogue is included. There are at least three types of association agreements that should be distinguished:

(i) association as a special form of development assistance;
(ii) association as a preliminary to membership of the EC;
(iii) and association as a substitute for membership.

The first type is of special interest to this study. Concerning this category, association as a special form of development assistance, the Mediterranean

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829 However, agreements concluded under a basis other than Article 310 may have an institutional framework.
830 It has been argued that because political dialogue is a matter falling outside the competence of the Community, the inclusion of a title on political dialogue implies that the Member States of the Union must be contracting parties to this type of agreement. So the agreements are mixed agreements. See Koen Lenaerts & De Smijter, "The European Community", in supra note 806, p.24.
Agreements\textsuperscript{831} and the Cotonou Agreement\textsuperscript{832} (formerly Lome IV Agreement, and the subject matter of this discussion) are representative examples. Instead of relying upon the legal basis that the Treaty provides for concluding agreements on development co-operation, the European Union has preferred to stress the rationae personae[legal term?], and the importance of forming connections with those countries by concluding association agreements. For instance, the Cotonou Convention is, according to Article 1, intended to promote the economic, social and cultural development of the ACP states. Yet, it bases its results on Article 310 exclusively. It is thus difficult to avoid the conclusion that political considerations shape, to a minor or major extent, decisions about the legal basis on which the agreement is concluded.

Agreements on Development Co-operation. The Treaty of Maastricht included, for the first time, an explicit legal basis on which to conclude agreements aimed at development co-operation. This provision simply confirms the policy long pursued by the European Union, which traditionally had been pursued through the Lome Conventions (initiated by the signing of the so-called Yaounde Convention, in 1969). Accordingly, it is explicitly stated that the new provisions should not affect co-operation with ACP.

Prior to the Treaty of Maastricht, it had often been the case that measures aimed at development co-operation were integrated into the field of common commercial policy; this was made possible by the Court’s generous interpretation of its definition.\textsuperscript{833} Today the same practice is followed, albeit using a new legal basis. Nearly all co-operation agreements concluded with developing countries presently combine two legal bases: Article 133 and Article 182.\textsuperscript{834}

\textsuperscript{831} These agreements were concluded around 1978. See agreement with Algeria in OJ L 263/3 of 27.9.1978; Morocco in OJ L 264/2 of 27.9.1978; Tunisia in OJ L 265/2 of 27.9.1978; Egypt in OJ L 266/2 of 27.9.1978; the Lebanese Republic in OJ L 267/2 of 27.9.1978; Jordan in OJ L 268/2 of 27.9.1978 and Syria in OJ L 269/2 of 27.9.1978. These agreements are being substituted by the so-called Euro-Mediterranean agreements, where the new legal basis is Article 310. See for instance "Euro-Mediterranean agreement establishing an association between the European Communities and their Member States, of one part and the Republic of Tunisia,of the other part” in OJ L 97/2 of 30.3.1998.This new generation of agreements derive from the so-called “Barcelona Declaration” which was signed between the European Union and twelve Mediterranean countries on the 28th November 1995.This Declaration creates a framework for political, economic and cultural and social ties between the parties. See Bull EC 11-1995,p.2.3.1.

\textsuperscript{832} "Agreement amended by the Fourth ACP /EC Convention of Lome signed in Mauritius on 4th November 1994" in OJ L of 29.5.1998.

\textsuperscript{833} Opinion 1/78 International Agreement on National Rubber (1979) ECR 1-2871.

\textsuperscript{834} These agreements are intended both to promote commercial links and to contribute to development. These are inter alia the Co-operation Agreements with India(OJ L 223/24 of 27.08.1994);the Co-operation Agreement with Sri Lanka (OJ L 85/33 of 19.04.1995);the Co-operation Agreement with South Africa(OJ L 341/61 of 30.12.1994), and the Co-operation Agreement with Vietnam(OJ L 136/28 of 7.06.1996).
Koen Lenaerts and Eddy De Smijter have argued that the Treaty defines the EU’s development co-operation objectives quite broadly, implying that an ample variety of specific matters can fall under that heading.\textsuperscript{835} One example is Article 177(2), which provides that:

“Community policy in this area (development co-operation) 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”.

This provision implies that human rights clauses may legitimately be included in agreements with third countries.\textsuperscript{836} Other objectives pursued by such a policy are the fostering of economic and social development of third countries, smooth and gradual integration of developing countries into the world economy, and to sustain the campaign against poverty in developing countries.

In contrast to Lenaerts and Smijter, it is argued here that the objectives pursued by Article 177 are by no means broad in scope, but merely a reflection of normal standards in international relations. To put it somewhat differently, development co-operation, generally speaking, pursues the (broad) objective of eradicating poverty. This implies, for instance, contributing to human rights or promoting developing countries’ integration into the world economy in order to speed development. Thus, broadly speaking, the elements mentioned in the provision are appropriate in the context of development co-operation. The strategy papers[documents] of some of the major Member States that actively engage in development co-operation illustrate this point.\textsuperscript{837}

14.3.7 The ACP Conventions as EU Co-operation Agreement

In this study, the ACP Conventions provide a good example of EU development co-operation agreements and therefore form a great part of the discussion in this chapter, with the Lome Conventions featured most prominently. These Conventions are the main instruments of Community Development


\textsuperscript{836} C-268/94, Portugal v. Council (1996) ECR 1-6177. In Paragraph 26 of the judgement the Court said that, under this provision, the Community was enabled to condition its co-operation policy upon respect for human rights and democratic principles.

They bring together the twenty-seven members of the European Union and most of the developing countries in Africa, the Caribbean and the Pacific (ACP) in a preferential co-operative relationship of trade and development. Because they have undergone a clear process of maturation through the years, the Conventions present a very interesting and instructive case study for North-South co-operation.

Since the first version (Lome I was concluded in 1975), their approach, coverage and content have changed considerably. This is partly due to the changing circumstances under which the Conventions had to operate, necessitating different approaches to and modalities of international economic cooperation. Some of the experiences and problems encountered in implementing the Lome Convention have resulted in modifications being made in the course of regular renegotiations between the States Parties.

Such changes have remained part of the agenda of a formally secured ACP-EC dialogue, taking place under the joint institutional framework established by the Conventions and consisting of a joint Council of Ministers, joint Committee of Ambassadors, and joint (parliamentary) Assembly. The relationship has served as a kind of test ground for assessing the impact, if any, of a negative human rights record by a particular ACP recipient country on its co-operation with the Community. The dialogue and joint management in this field occur over a long period of time, providing a degree of experience which makes this process relatively more valuable than less structured forms of North-South co-operation.

In the most recent instrument to govern the EU/ACP partnership, the Cotonou Convention, the human rights clause is contained in Article 9.

14.4 Conclusion

The main aim of this Chapter was to expose certain important features of the EU/ACP relationship, in order to provide some insight into the process of
development co-operation between these two sets of countries. The birth of the EU-ACP partnership was examined in the context of the fact that these countries have longstanding historical ties, sometimes referred to as "traditional relations". Also examined was the commitment to democratic government characterizing the EU/ACP partnership, confirming that both EU and ACP countries are States Parties to human rights treaties on democracy, e.g. Article 25 of the ICCPR 1966. Therefore, they are under both universal and regional obligations to hold free and fair elections. Finally, it was revealed that the EU is a major player in development, and has legal external competence to enter into binding agreements with other subjects of international law, i.e. individual states or groups of states. In its relations with other states or groups of states, the EU has various kinds of agreements to serve its own interests in development co-operation.

The conclusion is that EU/ACP partnership is very well-institutionalised, and based on consent by both parties. Chapter 15, will examine the issue of whether EU has embraced political conditionality in its dealings with development co-operation partners.
15 The European Union and Political Conditionality

15.1 Introduction
The main aim of this study is to examine the EU’s inclusion of second-generation (political) conditionality, i.e. democracy/human rights and good governance, in its external dealings; in particular, with ACP countries.

15.2 The Evolution of the Union's Co-operation
15.2.1 Introduction
The evolution of development co-operation on the part of the EU illuminates how it has embraced political conditionality. The focus here is on the actual policymaking process at the Union level, rather than the ad hoc approach that was characteristic of its activities in this sphere up to the mid-1970s.

15.2.2 The European Communities’ Agenda
Gradually, the issue of development co-operation become part of the agenda of what was then called the European Communities’ Council of Ministers, and a clearer Community policy began to emerge on the matter. In March 1977, it was decided that the Council of Development Ministers should meet

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842 See infra note 843
at least once year for general discussion of issues relating to relations with developing countries. The Commission of the European Communities played an important role in inspiring and initiating this transition through its communication with the Council of Ministers of the Community, and later the European Parliament, with respect to problems of development and proposed Community responses.\footnote{E.g. Commission Memorandum Concerning a Community Policy with Regard to Development Co-operation, Bulletin of the European Communities (Bull.EC), vol.4, Supplement 5,1971;Communication on Development Aid: Fresco of Community Action Tomorrow, Bull.EC, Vol.7, Supplement 8,1974.}

Undoubtedly, the content and approach of this new policy were very much determined by the economic, geo-political and socio-cultural circumstances and priorities at the time of formulation. From the mid-1970s onwards, problems encountered in the sphere of commodities\footnote{The oil crisis forced Europe to acknowledge its vulnerability in the field of energy and raw materials. Step by step, a policy was developed on the one hand, to secure a steady supply, and on the other hand, to reduce dependency and increase energy efficiency. Developing countries had to face ever decreasing or at least strongly fluctuating export earnings from commodities, because of the occurrence of dramatic price drops.} created issues around raw materials, energy, and international trade in developing countries receiving major attention from the Community. The enormous famine and food security issues in countries such as Ethiopia, Sudan, Mali, Mauritania, Niger, Chad, Angola and Mozambique led to a greater focus on food supply and security, as well as agricultural and rural development in Community development policy during the late 1970s and early 1980s.\footnote{Bull.EC, Vol.14, No.9, 1981,points 1.2.1. -1.2.8:Bull.EC, Vol.16, No.3, 1983, points 1.1.8-1.1.23; EC, Vol.18, No.10, 1985,points 1.4.1-1.4.11.}

The prevailing development discourse during that period also emphasized the necessity of fulfilling basic needs, self-reliant development and self-efficiency.\footnote{Commission Memorandum on the Community’s Development Policy, Bull.EC, Vol. 15,Supplement 5, 1982.} In the mid-1980s, development and environmental issues became more closely linked, resulting in an increasingly important role for the environment in Community development co-operation activities.\footnote{Bull. EC, Vol.18, No.11, 1985, pp.22-27.} Toward the end of the 1980s, the negative social impact of structural adjustment programmes and the burden of debt for many developing countries, in particular in sub-Saharan Africa, became apparent, provoking a (modest) Community policy response. Since that time, a “structural adjustment support” has been adopted which attempts to mitigate the harshest effects of these factors on living conditions for the majority of the population in these countries.\footnote{Commission (Directorate-General for Development), The Role of the Commission in Supporting Structural Adjustment in ACP States, Luxembourg, 1992.}

Finally, since about 1991, a largely new set of priorities has emerged in Community development co-operation which consisted of human rights,
democracy, and the rule of law and good governance. This will be dealt with in greater detail in the next sub-section. The evolution of these policies culminated in the Title (XVII) on Development Co-operation from the 1992 Maastricht Treaty. Until then, no general strategy of objectives and goals had existed for Community development co-operation policy. The Maastricht Treaty created its first general constitutional basis. According to Article 130u:

“1. Community Policy in the sphere of development co-operation, which shall be complementary to the policies pursued by the Member States, shall foster: The sustainable economic and social development of the developing countries, and more particularly of the most disadvantaged among them; their smooth and gradual integration into the world economy;
2. 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”.

With that background, it can be stated that the EU has embraced political conditionality in its co-operation with development partners. How does such political conditionality manifest itself?

15.3 The Union's Human Rights Clause
15.3.1 Introduction
Political conditionality, as adopted by the EU, manifests itself through the Human Rights Clause contained in agreements signed between the EU and any recipient country; here, its essential elements and definitions are provided. These elements are composed of a cocktail of all three ingredients of political conditionality: democracy, human rights and good governance.

It is often the case that all of these elements are intertwined. Accordingly, they are often demanded together in the development contract, only varying in their relative degrees of priority. However, it is important to note that some of these elements only appear in specific development agreements and not others.

Since the central theme of this study is democracy, it is appropriate to examine its definition as one element of the EU human rights clause.

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851 See, Treaty on European Union, op.cit. Article 130(1) and (2).
852 For the definition of human rights, see Chapter 2 of this study.
853 This element has also been hinted at in Chapter 2 of this study.
15.3.2 Democracy/Democratic Principles

Most human rights clauses refer to the need to respect democratic principles; in a handful of cases, however, the clauses refer to a respect for democracy. What do these terms involve? It is beyond the scope of this study to provide a detailed definition of these terms as applied to EU relations with other countries, and they are only briefly explained here.

On democracy. In general, in a European context, it has been authoritatively stated that democracy includes the following:

(i) Respect for human rights as defined in the Basic Law, in particular the right to life and free development of the personality;
(ii) The sovereignty of the people, the separation of powers, the government’s responsibility to Parliament;
(iii) The principle that administrative acts are governed by the rule of law, the independence of the courts, the plurality of political parties;
(iv) Equal opportunity to all political parties;
(v) The right to found an opposition and to contend with those in power, in accordance with the Constitution.

This definition is also used in the context of EU/ACP relations.

On democratic principles. Any attempt to ascertain the difference between the EU’s concept of democratic principles and that of democracy presents a complex task. The definition seems to be applied on a piecemeal basis, vis-à-vis a particular country or a group of countries; this individualized approach is a major characteristic of EU policy.

EU/CIS and democratic principles. The first example of democratic principles as defined by the EU concerns those which are binding upon the CIS. Evidence for these is found in the OSCE documents to which the human rights clauses included in the framework of these CIS agreements refer. General guidelines can be drawn from the document of the OSCE Copenhagen meeting in June 1990, even though this document is not, as such, cited by the human rights clauses. More specifically, the clauses refer to the Charter of Paris for a New Europe. Other agreements, such as the one concluded with the former Central and Eastern European countries, also refer to the Charter of Paris, but in relation to democratic principles.

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854 Exceptions are the PCA agreements with Russia and Ukraine, which refer to democratic principles.
856 See, Chapter 16 concerning the case studied.
857 See Document of the Copenhagen Meeting of the Conference of Human Dimension of the OCSCE, supra note 771.
858 See, Charter of Paris, supra note 774.
859 Provided that this is the concept of democracy, hesitation remains as to whether it can be transposed to other countries outside Europe. The concept of democracy which applies to Central and Eastern Europe and the CIS is very particular, for several reasons. The first obvi-
EU-ACP relations and democratic principles. When it comes to the EU-ACP relationship under discussion, the following must be noted with regards to democratic principles.

Regarding the definition of democratic principles, the Commission affirms that it has opted to invoke democratic principles (as opposed to democracy) in order to highlight democracy’s dynamic process. This implies a recognition of the fact that foreigners cannot impose democracy, and that each country should be free to choose and develop its own model. Democratic principles are the ones which enable a true democracy to flourish. The 1998 communication justifies the Commission’s choice in the following manner:

"(…) Article 5 of the Lome IV sought to emphasise the universally recognised principles that must underpin the organisation of State whilst leaving each country and society free to choose and develop its own model (…). The concept of democratic principles also serves to accentuate the dynamic process which must take into account of a country’s socio-economic and cultural context”.

A tentative conclusion, then, would be that when the Community speaks of democracy, it intending to send a stronger signal. However, when defining democratic principles, it prefers to highlight the three fundamental characteristics of legitimacy, legality and effective application. Here, legitimacy refers to the foundation of the state’s authority, and encompasses free and fair elections. Legality means the existence of rules (constitutional and legisla-
tive) that are applicable to all citizens and include the recognition of human rights and fundamental freedoms.

Finally, effective application of democratic principles requires a specific set of elements. These, amongst others, include:

"- the promotion and protection of fundamental human freedoms, which are the very purpose of a democratic system, since that system exists to uphold the freedoms of individuals and groups against the power of the State;
- the separation of powers, which curbs the powers of the State and relates specifically to:
  - the independence of the legislative and judicial powers from the executive power;
  - the effective exercise of three powers."

The sub-conclusion, in considering these elements, is that a degree of difficulty exists in identifying a clear distinction between respect for democracy and respect for democratic principles. Furthermore, one might argue that some elements included in the definition of democratic principles are quite far-reaching and go beyond the notion of democracy as provided by the OSCE documents. These are, for instance, the necessity for consultations (referendums) on major questions, or the recognition of the public nature of acts. The definition provided by the Commission, while comprehensive, is at the same time not firmly grounded in reality.

It is quite likely that ACP countries and the Community itself both fail to respect some, if not many, of the elements mentioned. Furthermore, it seems highly improbable that once one of these elements is lacking, the Commission can be expected to react. Thus, compliance with all of these points can only be a long-term goal.

Missing elements in the definition of democratic principles. Despite the broad nature of the definition, there are notable gaps as well. Democratic principles necessarily imply the participation of all members of society in decisions that concern them; as such, it must be an inclusive concept. Democratic principles must also incorporate and protect the role of women in the process. Several financial regulations, such as the Council regulation on integration of equality in development co-operation[capitalized?], reflect this concern. Another example is provided in the form of regional financial regulations such as TACIS, which state that when designing or implementing programs, there shall be proper regard for the promotion of equal opportunities for women in recipient countries. But the Commission’s communication seems to have neglected this element.

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Is the imposition of aid conditionality between donors and recipients a novel development? Or, does demo-conditionality simply reflect a change in the nature of conditionality?

15.3.3 Aid Conditionality in General

The more recent emphasis on political conditionality suggests, generally speaking, that in earlier periods development aid was given with no strings attached. Nothing could be further from the truth. In fact, it would be more correct to say that aid has always been subject to a battery of conditions. What has changed, instead, is not the principle of conditionality as such, but the nature of this conditionality; this fact applies to the EU just as much as any other donor country.

For instance, the geopolitical and military conditions which have motivated and to some extent shaped development aid in the past— in spite of the appalling development records of certain recipient countries—may be considered to represent a particular type of political conditionality. The end of the Cold War and the pursuit of macro-economic conditionality in the 1980s led most donors into a new type of political conditionality, more benign than the previous one, that was associated with “soft” values like human rights, democracy and good governance.

How has the EU's conditionality manifested itself with regard to ACP relations?

15.3.4 The Union's Conditionality and the African, Caribbean and Pacific Partnership

Aid conditionality in EU/ACP relations has quite a long history, which can be summarized below.

It is important to note that the Community development co-operation policy with ACP Countries has its roots in the colonial past. In this sense, the EU imposed its “association” upon these countries. The birth of that policy is marked by the signing of the Rome Treaty, establishing the European Economic Community, in 1957. This Treaty included a special section on “association” of the so-called overseas countries and territories with EEC members, in order that these former colonies could avoid the loss of the preferential treatment, economic and otherwise, previously extended to them by their mother countries during the colonial era. The passage specifically provided for preferential trade relations and development assistance.

The purpose of such an association was to promote the economic and social development of those overseas countries and territories, and establish

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861 For this see, Chapter 14 of this Study.
862 The 1957 EEC Treaty, Part IV, Articles 131-136a.
close economic relations between them and the Community as a whole. It was also intended to further the interests and prosperity of the countries’ inhabitants:

"in order to lead them to the economic, social and cultural development to which they aspire". 

Here, the substance and form of these associations were simply imposed upon the associates, who had no say in the matter. Eventually, a further stage developed in the process that involved a new voluntary co-operative framework laid down in separately negotiated treaties. Consequently, the coercive relationship that had characterized the Community’s associations with countries in the South became less relevant in the course of decolonization. However, while the earlier associative relationship was no longer applicable to newly independent States, both the Community and its former associates sought to continue their preferential relationship. This resulted in a new cooperation framework laid down in a separate treaty, The Yaoundé Convention, signed in 1963 in Yaoundé, Cameroon. 

This marked the beginning of a long series of negotiated, preferential trade and development co-operation treaties between the Community and an ever-increasing circle of developing countries. Included were countries from Africa, and later, the Caribbean, Pacific, Asia and Latin America (e.g., the subsequent Yaoundé Conventions, Arusha Conventions, Lome Conventions, and numerous bilateral co-operation agreements). However, it was not until the 1970s that significant preferential treatment and development assistance was extended to non-former colonies as well. This trend dates to 1971, when the Community introduced the Generalised System Preferences (GSP) providing tariff reductions or exemptions on imports from a wide range of developing countries. 

Dialogue in development co-operation framework. As will be discussed in detail, the emphasis placed on dialogue directly reflects the "management" model. One of the most interesting aspects of the Community’s approach to development co-operation is the emphasis placed upon dialogue...
and joint management of the instruments mutually agreed upon by the Community and its developing country partners.

As early as 1963, when the first Yaounde Convention came into existence to regulate development relations of EEC and 18 AASM (Association of African States and Malagasy) countries, joint institutions were established to guide its implementation. This practice has continued up to the present day in the direct successors to the Yaoundé Conventions, including the Lome IV and Cotonou Conventions, and has been extended to other (groups of) developing countries as well. It has become common practice to set up joint committees or other institutions to correspond to each important international co-operation relationship on the part of the Community, for the purpose of shaping a formal framework and procedure to govern discussion and joint decisions on matters arising from the agreement.

Even in 1982, the notion of a policy dialogue between the Community and its developing co-operation partners was introduced as a possible way of making Community development assistance more effective, and ensuring its incorporation into local requirements. This dialogue, according to the Commission, addressed the effectiveness of policies for which Community support was sought, and the relevance of those policies to more general objectives of Community development policy. Since that time, this idea has been further reinforced, and policy dialogue has become a regular feature of the EU’s external relations with respect to its activation of the human rights clause.

However, in the case that one of the ACP countries has defaulted in the holding of a free and fair election, does the EU reduce or cut off its development assistance immediately upon recognising this fact? Or, is there a specific procedure that must be followed before economic sanctions can be imposed upon the State?

15.3.8 Procedural Rules

One point that should be made clear is that in the event that any ACP country has not lived up to the EU human rights clause, certain procedural rules are to be followed before the EU ultimately cuts off its development assistance. What are these procedural rules, and what are they meant to achieve?

The Role of Procedural Rules. Procedural rules favour implementation and provide the legal justification for an action. In the EU-ACP development co-operation relationship, there are many such procedural rules to be followed for the implementation of the ACP-EU Partnership Agreement.

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868 Commission Memorandum on the Community’s Development Policy, p.16.
869 See, Chapter 13 of this study on the role of justification.
870 Hereinafter cited as the Internal Agreement, see infra note 875.
Which instruments embody the procedurales rules in EU/ACP development co-operation?

The sources for these procedures are the Lome IV and 2000 Cotonou Agreements. The agreement amending the Lome IV, signed in Mauritius in November 1995, included a “non-execution clause” which was far more developed than ordinary clauses.\(^{871}\) This agreement has now been replaced by the 2000 Cotonou Agreement.\(^{872}\) However, it is also important to analyse the procedural rules of the amended Lome IV Agreements because the “non-exception clause” has been applied in an important number of cases, addressed below. The same is true of the 1999 Council decision “on the procedure for implementing Article 366a of the Fourth ACP-EEC Convention”,\(^{873}\) stipulating the internal procedure to follow, which expired after the Cotonou Agreement’s entry into force.

The 1999 Council decision was later replaced by a so-called:

“Internal Agreement between the representatives of the governance of the Member States, meeting within the Council, on measures to be taken and the procedures to be followed for the implementation of the ACP-EC Partnership Agreement”.\(^{874}\)

This latter Cotonou Agreement has not substantially changed the internal procedures enshrined in the previous 1999 decision. Neither has it dramatically modified the procedural rules of Lome; it merely includes a few additional elements. As amended, it contains an essential element clause in Article 5. This clause is extensive, and divided into three long paragraphs.\(^{875}\) It goes far beyond ordinary or standard clauses by insisting on the intimate relationship between development co-operation and human rights, the principle of non-discrimination, and the need to focus on positive measures.

In the Cotonou Agreement, the human rights clause is included in Article 9 and divided into four different paragraphs (one devoted to good governance). The distilled essential element clause states that:

\(^{871}\) Agreement Amending the Fourth ACP-EC Convention of Lome signed in Mauritius on 4 November 1995 in OJ L 156 of 29.05.1998,pp.3-106. The 1989 Lome IV Convention, as is well-known, did not contain any suspension mechanism.

\(^{872}\) This agreement was signed in Cotonou (Benin) on 23 June 2000.


\(^{874}\) Ibid.

\(^{875}\) Last paragraph of Article 5.1 reads as follows, "respect for human rights, democratic principles and the rule of law, which underpins relations between ACP States and the Community and all the provisions of the Convention, and governs the domestic and international policies of the contracting Parties, shall constitute an essential element of the Convention".
“Respect for human rights, democratic principles and the rule of law underpin the ACP-EU partnership shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.” 876

When can the consultation procedure be activated?

Activation of Consultation Procedure. This procedure will be activated in the event that one Party considers the other Party to have violated one of the “essential elements” of the agreement. These elements in the amended Lome IV agreement were, as already indicated above: 877 human rights, democratic principles, and the rule of law. The Cotonou Agreement adds a new dimension: “good governance, which is not literally said to be “essential element”, but a” fundamental element”. In practice, however, the difference exists only in the wording. The violation of good governance or its equivalent in the agreement, including serious cases of corruption, may also activate the consultation procedure. 878

The reason that good governance is not included as an “essential element” stems from ACP reluctance regarding this additional condition, and its search for a compromise. The concept seems to have become associated with the possibility of suspending the agreement. 879 Ultimately, the compromise

876 Article 9(2) of the Cotonou Convention. Para. 1 of the provision provides a definition of good governance. Article 9(3) second paragraph provides that “good governance, which underpins the ACP-EC Partnership, shall underpin the domestic and international policies of the parties and constitute a fundamental element of this Agreement”.

877 See, Ibid.

878 Article 9(3) of the Cotonou Convention. Para. 1 of the provision provides a definition of good governance. Accordingly, “in the context of a political and institutional government that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural economic, and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources, and the capacity building for elaborating and implementing measures aimed in particular at preventing and combating corruption”. Para.2 seems to confine Community interpretation of violation of good governance to grave cases of corruption: ”good governance, which underpins the ACP-EU partnership, shall underpin the domestic and international Policies of the Parties and constitute an essential element of this agreement. Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption as defined in Article 97, constitute a violation of that element”.

879 Summary of the Post-Lome EU-ACP Ministerial Negotiations, held in Brussels on 29 and 30 July 1999. See The Courier No.177 of October–November 1999, pp.8-9.According to the words of Ms. Satu Hassi, president of the Development Council, ”good governance has been another difficult issue. The EU has proposed to have this included in the essential elements of the Convention. Our ACP partners have rejected this because the “essential elements” can lead to sanctions (…”)’. Another view is that of Mr. Adamou Salou, Minister in charge of development for Niger “neither the ACP nor the EU States are against good governance. The main concern concerns its inclusion as an essential element in future agreement (…) none of the ACP countries want to see good governance become an essential element, which if violated would trigger the non-execution clause and potentially lead to sanctions. Indeed, there is
found was to call the element “fundamental” as opposed to “essential”, and to state explicitly that the Community would only react to grave cases of corruption. A separate non-execution clause (but with similar legal effect) would be included for use in the event of corruption.880

The 1999 Council decision on the procedure for implementing Article 366a of the IV ACP-EC Convention stated that the decision to begin consultations would be taken by the Council, acting by qualified majority, following a proposal by the Commission or by a Member State.881 The Internal Agreement leaves this provision intact.882 The 1999 decision thus consolidates the two initiatives – that of the Commission to propose consultations and the Member State’s initiative as Lome IV – as a mixed agreement. Although the Commission possesses this right of initiative, it has never acted autonomously, but has waited for the appropriate political signal (a declaration by the Council at the CFSP level) to propose consultations.

The Consultations Round. The principle of consultations is a relevant feature of all non-execution clauses. However, in the case of the Cotonou Agreement and the Lome IV Convention, this is made a central element of the procedure. Consultations are indeed more highly emphasised here than in ordinary cases, representing an attempt to find a solution before having to adopt appropriate measures. This possibility for having resort to “special urgency” is made a real exception, and a consultation committee set up where both parties are equally represented.

The clauses of the Lome IV Agreement, as amended, and those of the Cotonou agreement insist more than usual upon the necessity of holding consultations. The first difference exists at the literal level, as the ordinary non-execution clause provides:

“If either party considers that the other party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing except in cases of special urgency, it shall supply the association council with

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880 Article 97 is curiously to as “consultation procedure and appropriate measures as regards corruption”. It only refers to cases in which the Community is a significant partner in terms of financial support. In this context, serious cases of corruption should give rise to consultations amongst the parties. According to Article 97(39 “if the consultations do not lead to a solution acceptable to both parties, or if consultation is refused, the Parties shall take the appropriate measures. In all cases, it is above all incumbent on the Party where serious cases of corruption have incurred to take the measures necessary to remedy the situation immediately. The measures taken by either Party may be proportional to the seriousness of the situation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of the last resort”.


882 However, it adds the case of corruption. See point 1 of the “Internal Agreement between Representatives”, see supra note 877.
all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties”. 883

The Lome IV Convention as amended in Article 366a directly referred to the obligation to hold consultations:

“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, remediying it”. 884

The Cotonou Agreement further stipulates that the consultation procedure should be considered only in the event that a question could not be solved through regular dialogue. 885 According to Article 96(2) a:

“If, despite the political dialogue conducted regularly amongst the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of 9, except in cases of special urgency, supply the other party and the Council of Ministers with 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”. 886

The main feature of the Lome and Cotonou clauses, in comparison to the ordinary “on-execution clauses”, is that the immediate consequence of an alleged breach is the opening of consultations. In other words, the possibility of taking appropriate measures is essentially toned down, because it is placed at the end of the paragraphs describing the consultation procedure. In the Cotonou Agreement, appropriate measures could only be taken:

“If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in case of special urgency, appropriate measures

883 For instance, Article 118(2) of the “Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part”, in OJ L 358/3 of 31.12.1994.
884 Second paragraph of Article 366a of the Lome Convention, as amended.
885 Thus, in principle, the parties will try to solve the disputes through regular political dialogue. New Article 8 of Title II of the Convention is focused on political dialogue. Article 8(1) states that the parties shall regularly engage in a comprehensive, balanced and deep political dialogue leading to commitment of both sides”. Article 8(4) provides that “the dialogue should focus on political issues of mutual concern or of general significance for the attainment of the objectives of this agreement such as the arms trade (…) the dialogue shall also encompass a regular assessment of the developments concerning respect of human rights, democratic principles, the rule of law and good governance”.
may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared”.

The possibility of taking appropriate measures is in the latter case a measure of last resort: the provision is placed at the end of the consultation procedure, with the possibility arising only when a solution has not been found or the consultation is refused. This further limits the discretionary powers of the Community. The second textual difference worth mentioning is that in ordinary non-execution clauses, the aim of the consultations is to analyse the situation and find a solution acceptable to the parties. In addition, in the Lome and the Cotonou clauses, the consultation procedure is upgraded to a forum in which the parties will try to “remedy the situation”, a phrase which arguably implies a greater degree of involvement than that required in “searching for a solution acceptable to the parties”.

Any resultant strengthening of the principle of consultations certainly represents a fortunate development. On the one hand, it permits the Community to apply additional pressure. On the other hand, it reinforces the notion of partnership with the ACP countries, replacing the need to take appropriate measures to a secondary level. It also opens the possibility that these consultations will ultimately result in the most positive measure possible for remediying the situation. Finally, a strengthening of the principle of consultations indicates that the two parties have successfully negotiated the wording of the human rights clause.

The ordinary joint interpretations provide that, for purpose of interpretation of the agreement, a case of material breach is equivalent to a violation of an essential element. Therefore, should one party make use of the special urgency provision, the other party may request consultations. So far, the Community has granted itself the discretion to determine whether there is special urgency, and thus, whether or not it wishes to launch a round of consultations with the other Party. This flexibility, however, comes to an end in the case of the Lome IV Convention, and in particular, the Cotonou Agreement. Cases of special urgency are no longer treated as equivalent to violations of essential elements; on the contrary, they are granted an exceptional character.

The joint interpretation attached to the Lome IV Convention as amended provides the following:

“1. In the practical application of this Convention, the Contracting Parties will not have recourse to the provision of “special urgency” in Article 366a, other than in exceptional cases of particularly serious and flagrant violations that, because of the response time required, render prior consultation impossible.

2. In the event that either Contracting Party has resort to this measure, the relevant party undertakes to make arrangements to consult with the other ex-
peditiously with a view to assessing the situation in detail and, if necessary, remedying it”.

The Cotonou Convention includes a similar provision, but this is made in the body of the agreement and not in the joint interpretation. The Cotonou provision does not modify the meaning of “special urgency”, but uses the same qualifications to emphasise its exceptional character. It adds only one element, an obligation in principle to inform the other party and Council of Ministers of the fact that it has resorted to the special urgency procedure. This is expected in the event that the Party hasn’t had the time to do so.887

The 1989 Lome IV Convention, which was the first to include a human rights clause, did not contain a suspension mechanism, due to the fact that the Community had been unprepared at that time. Six years later, the Lome IV Convention was amended in Mauritius. During the negotiations for the Convention’s renewal, the Community made clear to its partners that the moment for inclusion of a suspension mechanism had arrived.888

However, it is not difficult to imagine a lack of enthusiasm on the part of ACP countries at the prospect of transitioning from an agreement lacking a suspension mechanism to one including it. In an ACP-EC Council meeting in Kingston, the ACP representatives proposed that decisions on suspension should be adopted jointly by the ACP/EC committee.889 The EU did not accept this proposal, but in its place, was required to negotiate a compromise solution, for which the ACP side was to be consulted before the decision. The compromise also implied a certain active involvement by the ACP/EC

887 See, Article 96(b) second paragraph of the Cotonou Agreement. This paragraph is indeed different from its equivalent in the joint interpretation of the Lome IV Convention, as amended. In the latter, in the case of resort to the special urgency procedure, the relevant party undertakes to make arrangements for consultations in order to assess the situation in detail. The Cotonou Agreement clarifies this provision. It provides for a principle of information both to the party concerned and to the Council of Ministers, which can be expected in the event that there is not time to do so. Article 96(c) second paragraph provides that in the event that those measures have been taken in cases of special urgency, the other Party and the Council of Ministers shall be notified of them (a posteriori). Notification must be immediate, and lead to consultations requested by the party concerned.

888 On the one hand, the Commission was preparing a communication in order to consolidate the practice of including a human rights clause; both the essential element and non-execution clause, in the newly negotiated agreements (See COM (95) 216). On the other hand, given the difficulties experienced in the case of Haiti, the Community wished to grant itself a flexible suspension mechanism that would allow it to react to serious violations of human rights and democracy. Finally, in 1995, the clause with its suspension mechanism attached had already become a standard feature of all newly negotiated agreements.

889 Annual Meeting ACP-EC held in Kingston, 20-22 May 1992. The ACP side proposed that decisions on suspension should be taken in the form of a decision by a committee, on the European side, composed of the President of the Council, President of the ACP group and Member of The Commission dealing with ACP relations; and from the ACP side, the President of the ACP group, President of the Committee of Ambassadors and the Secretary General of the ACP. The Portuguese Presidency of the EU expressly refused this solution at the time.
joint committee in assessing the situation, albeit where the final decision would still be made by one party (the Community).

The reason that the principle of consultations was more emphasised in the Lome and Cotonou cases than in ordinary cases is because this was the specific result of a compromise between the parties. The ordinary suspension clause in bilateral agreements is identical in all cases (with minor exceptions), and makes little insistence on consultations since it was not the result of a negotiation process. In contrast, for the Lome clause the ACP representatives were actively involved in negotiation, and this is reflected in the compromise ultimately reached in which consultations would be held between the two parties.

In the consultations, as requested in Kingston by the ACP, a joint committee would be involved. Article 366a of the Lome IV Convention spells out the composition of each of the two parties in the joint committee. On the one hand, the EU side would be represented by its President and assisted by the former President, the upcoming President (troika), and the Commission. On the other hand, the ACP side would be represented by a troika (co-Presidents), together with two members of the ACP Council of Ministers chosen by the parties concerned. The rationale here is that by bringing five ACP States into the consultation procedure, the Community would lower the risk of poor decision-making since it would be exposed to a range of views. In addition, the weaker party is to be granted assistance in the consultation process.890

Another advantage of bringing ACP states to the consultation is that they potentially play a role of mediators. Even if they represent the ACP side at the end of the day, the dispute does not directly relate to them. Instead, these countries would certainly be in a position to contain both sides in striving for a compromise. Of course, the mediators would inevitably need to demonstrate a certain degree of commitment to the democratic process vis-à-vis the EU partners. At the same time, they could try to convince the latter not to impose tough sanctions that would directly harm the population. With regard to the violator country, the other ACP states would try to convince it to comply with the essential elements of democracy enumerated earlier. In all likelihood, any compromise would result in ACP countries placing additional pressure on the "undemocratic state" to comply.

The Cotonou Agreement, however, decidedly does not retain this formulation. One of its provisions states that "the consultations shall be conducted at the level and in the form considered most appropriate for finding a solution". A second provision in Article 98 states that any dispute arising upon the interpretation or application of the agreement shall be submitted to the

Council of Ministers. The Internal Agreement provides that in the consultations, the Community shall be represented by the Presidency of the Council and the Commission. Thus, on the one hand, representation by the troika is no longer foreseen; on the other hand, there is no legal provision to specify the composition of the ACP side. One might expect that the ACP would continue to be represented by the troika of co-presidents and two additional members appointed by the party concerned, as a crystallisation of previous practice. Nonetheless, the new Cotonou provisions introduce an element of uncertainty whereby it is not stated whether the earlier composition will be maintained.

Outcome of the Consultations. The Lome IV agreement, as amended, provided a timetable for the holding of consultations. They “shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days”. The idea was to establish clear and short delays, which would allow the Community to make a prompt decision. In addition, the provision was intended to circumvent the consultation requirements of Articles 65-68 of the Vienna Convention on the Law of Treaties. In this case, however, the framework was inflexible and often proved insufficient. Consequently, the new Cotonou Convention has expanded the time frame of the framework and introduced an element of flexibility: “(the consultations) shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall not last any longer than 60 days”.

The amended Lome IV Convention provided that, in the event that at the end of the period of consultations no solution has been found, the party who invoked the failure may take appropriate steps. These include the partial or full suspension of the Convention, although it is understood that suspension should be a measure of last resort. As for the internal procedure of implementing these steps, according to the 1999 Council decision, appropriate steps including partial suspension will be determined through qualified majority rule. Full suspension, in contrast, will be decided by unanimity. The Internal Agreement leaves this provision unchanged. The Cotonou Convention clarifies the meaning of “appropriate measures”, providing that these measures must be taken both in accordance with international law and in proportion to the violation. Article 96(c) provides that suspension will be a measure of last resort, and that priority must be given to the measures that are less disruptive to the agreement.

As a final point, the 1999 Council decision provided that the appropriate measure will be in force for the length of time specified by the decision, or until the Council has enacted a new decision revoking them. Measures should be revised every six months, and any decision published in the OJ. This aspect of the Internal Agreement remains unchanged. In addition, the

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891 Ibid., p.94.
Cotonou Agreement ensures that the measures should be revoked as soon as the reason for enacting them has disappeared.

15.4 The Procedures and the "Management Model"

The consultation procedure discussed above mirrors the "managerial strategy", also sometimes referred to as the "co-operative strategy." This approach, as revealed earlier, is comprised of disparate elements – transparency, dispute settlement, and capacity building – all of which are to be found in some regimes, and in the context of the Lome and Cotonou Conventions can be considered a part of management strategy. It is most accurately described as a process of management, as opposed to enforcement, in which the predominant atmosphere is one of actors engaged in a co-operative venture. This means that performance which for some reason seems unsatisfactory represents a problem to be solved through mutual consultation and analysis, rather than an offence to punished, as in the enforcement model.

Viewed from the perspective of EU/ACP relations, if one of the ACP countries fails to hold free and fair elections, the EU does not simply reduce or cut aid immediately. Instead, the first stage is one of consultations/dialogue, in which the offending state is expected to participate together with the EU. The donor, in this case the EU, attempts through these consultations to convince the offending regime to comply with its obligations to hold free and fair elections. Ideally, there are three factors by which the development and elaboration of norms operate to influence state behaviour, with the goal of impacting the offending regime. These are: the role of justification in international life, the enormous complexity and interdependence of contemporary international life, and the increasing importance of international organizations.

If the offending regime refuses to change its behaviour, i.e. fails to hold free and fair elections, then at that point development assistance is reduced or cut off.

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892 See, Chapter 13 of this Study.
893 See, Ibid.
894 For the role of dialogue, see, Chapters 8 and 12 of this study.
895 See, Chapter 13 on the elaboration of three principles for inducing compliance: (i) The role of justification in international life, (ii) the enormous complexity and interdependence of contemporary international life, and (iii) the increasing importance of international organizations.
15.5 Conclusion

The main aim of this chapter was to examine whether or not the EU has embraced second generation (political) conditionality – democracy, human rights and good governance – in its external dealings with other countries; in particular, ACP countries. The chapter also sought to explain the way in which EC conditionality manifests itself.

First, the evolution of the European Union policy of development cooperation was examined with regard to its inclusion of political conditionality. It was demonstrated that after a long transitional process, the EU ultimately embraced political conditionality. Thus, in May 1995, the Council of the European Union decided to accept the Commission’s proposal to include a political conditionality clause in all draft negotiating mandates for external agreements. As a result, democracy and respect for democratic principles are now strong ingredients of the EU’s relationships with its development partners. This is evidenced by the inclusion of a clause allowing parties to suspend and in some cases terminate the agreement if the other party violates democratic principles (human rights and the rule of law), is now entrenched in EU co-operation with other development partners; namely, the ACP countries.

As to the issue of how the EU manifests this political conditionality with its development partners, the following was revealed. First, the EU has its own Human Rights Clause, which it uses as yardstick in its relationship with development partners. In the context of the EU/ACP partnership, it is the former's Human Rights Clause by which the ACP countries must abide, in terms of demonstrating respect for human rights and democracy, in order for them to receive aid. This chapter showed that the EU’s conditionality manifests itself through the activation of the Human Rights Clause. Moreover, there is a special procedure which the EU and any ACP country considered to have defaulted must undergo before any reduction or outright cutting off of development assistance takes place. This procedure primarily involves dialogue, and closely resembles the "managerial model" already described in Chapter 12.

The conclusion reached in this Chapter, then, is that the EU/ACP partnership is very institutionalised, and based upon a properly documented procedure to be followed before aid can be reduced or cut off. Now, in Chapter 16, some case studies will be examined in which the EU has, in fact, reduced or cut off aid to certain ACP countries due to their failure to hold free and fair elections.
16 The Cases Studied

16.1 Introduction

The EU is engaged in contractual relations that contain such an "essential element" clause with approximately 150 states.\textsuperscript{896} This conditionality clause has only been applied within the context of Lome Convention and The Cotonou Agreements, and within the framework of the ACP-EU partnership. Moberg remarks that between 1995 and 2006, political conditionality (demo-conditionality) has been applied on 17 separate occasions. in the context of different countries.\textsuperscript{897}

This thesis restricts itself to six cases in which the EU has reduced or cut off aid to ACP countries for their failure to hold free and fair elections. These cases were selected on the basis of being the first to mark a new trend in the EU/ACP partnership: that of the cutting or reduction of aid by the European Union to ACP countries. Unlike Moberg, this thesis will not discuss events that occurred subsequent to this cutting of aid.\textsuperscript{898}

First, however, the definition of “democracy” as applied to this particular issue – reducing aid to ACP countries – must be clarified.

16.2 The Cases Studied and Democracy

We have seen that the human rights clause contains a broad definition of democracy.\textsuperscript{899} The case studies discussed below, however, demonstrate that the clause has only been activated in response to violations of more limited obligations. Democratic principles have been reduced to fraudulent elections or coups d’etat. This limited application contrasts with the expansive definition provided by the Commission.\textsuperscript{900}

\textsuperscript{896} See, Andreas Moberg, supra note 3.
\textsuperscript{897} Ibid.
\textsuperscript{898} The recent cases with regard to demo-conditionality in the EU and ACP partnership include Guinea and Mauretania. They are not presented here for the reason that the same procedure that applied in the earlier cases also was recently applied to them. Amongst other recent cases, Moberg has covered them extensively, See, ibid, pp.451-481.
\textsuperscript{899} See, Chapter 14 of this study
\textsuperscript{900} See, Ibid.
16.3 Adherence to the Consultation Procedures

As will be seen, the EU has followed the established consultation procedure before reducing or cutting off aid to the regimes under study.\(^{901}\) In a handful of cases, the Commission has proposed to the Council the opening of consultation procedures under Article 366a of the Lome IV Convention, as amended.\(^{902}\) This consultation procedure, as mentioned above, concerns alleged violations of democratic principles; specifically those surrounding military coups and electoral fraud.

As a common factor in all of these case studies, the Commission has waited for an appropriate political signal before proposing consultations, which come in the form of a Council statement condemning the coup or other violations of democratic principles. Following the entry into force of the Cotonou Agreement, the consultation procedure has also been opened under Article 96 in reference to several countries.\(^{903}\) The effective application of this procedure has received a boost in recent years, facilitated by the existence of clear procedural rules.

The first case to be examined will be that of the EU and Togo.

16.4 Togo

16.4.1 Introduction

What were the events which led to Togo’s being targeted by the EU?

16.4.2 The Events

The case of Togo concerned a violation of the election elements discussed earlier in the study,\(^{904}\) and in particular, a flawed electoral process. This represents the first time that the Community had made use of Article 366a.\(^{905}\) The reason cited was the reported violation of Article 5 of the Convention, in particular, the democratic principles contained therein.

At the request of the Togolese government, the Community had set up a programme to support and monitor the presidential elections in that country, whose measures included an electoral mission[check term] of observation. This mission found serious irregularities, inter alia, that related to problems

\(^{901}\) See, Chapter 13 and 15 comparing these procedures with the "Managerial Model" for ensuring compliance by States Parties to treaty obligations.

\(^{902}\) As is soon to be revealed in Chapter 15 of this study. See also on Togo, Utrikespolitiska Institutet,Togo,www.landguiden.se.

\(^{903}\) See, Ibid.

\(^{904}\) See, Part I, Chapter 2 of this study on the elements of participation through elections.

and delays in the revision of electoral rolls and distribution of voting cards. In addition, election results were announced before the counting of ballot papers had been completed.\textsuperscript{906} As a consequence, the EU decided to initiate action against Togo, beginning with a consultation procedure.

16.4.3 The Consultation Procedure

The Council, following a proposal from the Commission, decided to initiate the consultation procedure. The Commission was quite confident of its entitlement in submitting this proposal, for the obvious reason that the Lome agreement was a Community legal act and the Commission was required to follow ordinary Community procedures (first pillar). The proposal took the form of a communication in which it was stated that:

"the aim of the consultations is to reaffirm the importance which the Union attaches to respecting the essential elements referred to in Articles and to find out the Togolese government’s intentions regarding compliance with one of the elements”.

This formula for consultation procedure became standard in the course of the clause’s further application. Despite there being no mention of the goal of placing pressure on a party for compliance, at the end of the day this seems to be the statement’s implication.

As explained earlier,\textsuperscript{907} the Consultations provide an instrument which allows the Community to listen to the arguments provided by the other side. They are also an opportunity to reaffirm that human rights and democratic principles have a place in its external policy. If even after a better understanding of the situation, the Community is not satisfied with the other side’s arguments, the ultimate function of the consultations will be to put genuine pressure to comply on the party in question.

In this case, the Commission communication included two genuine letters: one to be sent to the President of the ACP council, and the second to the Togolese government. The parties would then be invited to hold consultations. Immediately, the Parliament issued a resolution supporting the Commission initiative.\textsuperscript{908} Five days later the Council endorsed the proposal and decided to hold the consultations.\textsuperscript{909}

The consultations were held on July 30, 1998, but were a failure. The EU side declared that:

\textsuperscript{906} Bulletin EU.7/8-1989 point 1.4.150.
\textsuperscript{907} See, Chapter 15 of this study.
\textsuperscript{908} Resolution of the European Parliament “sur la situation au Togo” B4-0725; 0744; 0761 et 0773/98.
\textsuperscript{909} The Council adopted the proposal on July 1998. See Bull.EU 7/8-1989, point 1.4.150.
despite all efforts for the contrary, no solution has been found to remedy the failure to meet obligations under Article 5 of the Convention. 910

The Commission enacted a second communication, this time proposing to conclude the consultations. In its view, the explanations given by the Togolese government had been unsatisfactory, and differed considerably from the account given by EU observers in Togo. In addition, the Union had formally requested written details from the Togolese government regarding the practical measures taken or planned to remedy the situation. Again, however, the response was considered to be insufficient and unsatisfactory. 911 Consequently, the Council followed the Commission proposal in deciding to close consultations with Togo, and not to resume co-operation with that country. 912

16.4.4 Outcome of Consultations and Subsequent Action

At this juncture, it would appear that the major advocate of restrictive measures was the Commission; perhaps because it wished to assert its role more forcefully, or perhaps because based on the belief that appropriate measures meant, in fact, negative measures. 913 In any case, the Council followed the proposal, affirming that the Togolese government had failed to provide proof that concrete measures were taken to remedy the irregularities associated with the presidential elections. It suspended existing co-operation with Togo, but also balanced this stick with a carrot: the Council affirmed that it would support any initiative intended to facilitate Togo’s compliance with the essential elements of Article 5 of The Convention. This may be a subtle indication that the Council deviated from the Commission by equating appropriate measures with incentives and positive measures, in the belief that these might in some cases prove more effective than restrictive ones. In addition, political dialogue would continue, signifying that the Community could use this particular channel to place gradual pressure on the country concerned, with co-operation resumed only when the reasons leading to suspension no longer existed. 914

It is difficult to appraise the manner in which the consultations were conducted as there is little public evidence, with the exception of the Commission briefing in the second communication, on the conclusion of the consul-

910 Bull.EU 11-1998 point 1.3.1333.
912 The Council decision was adopted on 14 December 1988 and countersigned by the Commission. See Bull.EU 12-1998, point 1.3.140.
913 For negative measures, see Chapter 9 of this study.
914 Mielle Bulterman,”Human Rights Dimension of the Lome Convention”, NQHR, No.1, 1999, p.83. The Council also affirmed that it would endeavour, as far as possible, not to penalise the civil society in Togo.
isations. Nonetheless, the ACP representatives did not seem completely satisfied with the way in which this process unfolded. The ACP countries had put forward the argument that all options for political dialogue had not been explored:

“in all cases the ACP group felt that there was a lack of meaningful dialogue between the partners” 915

In 2005, a military coup of sorts had taken place in Togo. 916 Subsequently, after the death of President Gnassingbe Eyadema, who had ruled the country for 38 years, his son Faure Gnassinghe was handed power by the military high command, headed by Brigadier-General Zakary Nadjia, and given the mandate to serve the remaining three years of his father’s tenure.

The reaction against this military coup on the part of other countries was swift and decisive. The leaders of the Economic Community of West African States (ECOWAS), who had sworn never again to allow an unconstitutional change of government in the region, hastily met in Cotonou, asking the son and his supporters to return Togo to proper constitutional rule, i.e., allow the Speaker of Parliament to act as President and organise free and fair elections in 60 days time. The African Union joined in supporting this position. And finally, the European Union also stated clearly that they would support the African Union’s demands. This considerable pressure upon the son eventually led to his resignation and the calling of elections as required. 917

16.5 The Comoros
16.5.1 Introduction
What events took place in Comoros which led the EU to target the country in this context?

16.5.2 The Events
The case concerned a military coup that occurred in the Comoros Islands in May, 1999. The legitimate government was overthrown, and the dissolution of the Constitution and related legal institutions announced. In response, Article 366a was invoked for a second time. The Presidency of the EU was the first to react, in the form of a CFSP statement severely condemning the

917 Ibid.
military’s actions. The statement affirmed that the EU would re-examine all co-operations, which had been conditional upon compliance with essential elements of Article 5 of the Lome IV Convention.918

By this time, the disputed 1999 Council decision (so-called draft decision) was already in force.919 Thus, for the first time, the Council’s statement made direct reference to the use of Article 366a. The procedural steps, from this point, were clear. The Commission immediately responded to the “governmental call” and issued a proposal for consultations. As had been decided after Togo, the proposal took the form of a communication providing a short analysis of the situation.

The Commission attached two draft letters: one to the party concerned, and the other to the President of the ACP group. Both letters were to be undersigned by both the Council and Commission.920 The Council endorsed the proposal, deciding to conduct consultations:

“with a view to assessing the situation of the country in detail and, if necessary to remedying it”.921

16.5.3. The Consultation Procedure

The Consultations took place on 26 July 1999. In the Commission’s proposal for concluding consultations, they were qualified as “frank and constructive”.922 In this instance, both the EU’s approach and the Comoros reaction were quite different from the case of Togo. Here, the European Union reacted strongly in issuing four points. First, it clearly emphasized the importance that both itself and ACP representatives attach to democratic principles. Second, it restated its belief that an illegitimate government imposed by the military, which concentrates all three powers in one person, cannot govern a country. Third, it expressed its doubts as to the feasibility of the scheduled elections. And, fourth, it issued the “threat” that should democracy not

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918 For events in Comoros, see Utrikespolitiska Institutet, Comorerna, www.landguiden.se. Thus, the Statement of the Presidency on behalf of the European Union “on military coup in the Comoros of the 7th May 1999”, Bull.EU 5-1999. See also Council press release. Nr.8007/99, press.137.
921 The formula adopted is a literal transcription of the last part of the sentence of Article 366 Paragraph 2. The decision on opening consultations was adopted by the Council on 12 July 1999. See Bull.EU /8-1999, point 1.4.162.
be rapidly restored, appropriate measures including partial or total suspension of the Convention could be taken.

In response to the Comoro delegation’s request for financial aid, the EU responded that any such aid given during the transition period would strictly be limited to measures directly aimed at helping the people.923

16.5.4 Outcome of Consultations and Subsequent Action

During the consultations, the Comoros delegation committed itself to meeting the EU’s expectations by taking necessary measures. In particular, it committed itself to the tasks of preparing a new Constitution and organizing democratic elections in the near future. However, the team of experts sent by the EU raised serious doubts as to the feasibility of guaranteeing compliance within the time frame set by authorities, given the extremely complex political situation; this was reflected in the tentatively worded “appropriate measures” proposed by the Commission. The latter entailed a gradual resumption of co-operation tied to certain conditions, but with an emphasis upon positive measures.924 Thus, during the transition to democracy, a package of positive measures would be granted including support for the electoral process,925 humanitarian aid, and decentralised co-operation.

Second, once the democratic process was under way, there would be further assistance to benefit local communities. Third, full co-operation and implementation in connection with development projects would not be resumed until real elections were held. And, fourth, the Commission would make an updated assessment at a later date.

16.6 Niger

16.6.1 Introduction

What events took place in Niger to cause that country to be targeted in this context?

16.6.2 The Events.

As with Togo, the case in Niger was triggered by a military coup, in 1999. Article 366a was applied for the third time in response to this coup, which had been preceded by the assassination of its democratically elected President. Following a statement of condemnation by the Presidency of the EU,

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923 Ibid.p.3.
924 For positive measures, see chapter 9 of this study.
925 Some sort of capacity building, see Chapter 13 of this study.
the Commission proposed the opening of the consultation procedure, and described the circumstances in detail: the Constitution’s suspension, the dissolution of democratic institutions, and the annulment of local elections. Subsequently, the EU decided to initiate consultations with the Niger ruling elite.

16.6.3 The Consultation Procedure

The Council endorsed the Commission proposal, and consultations took place in Brussels on 18 May 1999. The EU delivered a declaration requesting that Niger respect several points. Aside from human rights and democratic principles, the demands also specifically included the drafting of a timetable for return to democracy. The time-table included the following: the holding of transparent, free and fair elections; the setting up of a civil (not military) power; non-eligibility for participation in elections among members of the coup; and finally, a full investigation into the president’s assassination. In addition, regular progress reports would be prepared.

One might observe, in comparing this to previous cases, an overall trend which involves a progressive strengthening of demands on the part of the EU that reflected an increased assertiveness. During the negotiations, the ACP group played the effective role of mediator by explicitly requesting that EU not suspend development co-operation with Niger. On the one hand, it argued that such a measure would only punish an already impoverished population, and would represent a step backwards in the journey to democracy. On the other hand, ACP insisted that the Niger delegation commit itself to a prompt return to democracy, and produce a timetable for that purpose.

16.6.4 Outcome of Consultations and Subsequent Action

The delegation from Niger affirmed that democracy would be re-established and power handed over to a democratically elected president at the end of 1991. A transition plan was proposed, together with a timetable for elections. All in all, the military government of Niger made a considerable number of

926 For Niger, see Utrikespolitiska Institutet, Niger, www.landguiden. Also see communication from the Commission to the Council, ”on the opening of consultations with Niger pursuant to Article 366a of the Lome Convention”, COM (1999) 204 final, Brussels 26.04.1999. The communication repeated what is already traditionally accepted: ”The aim of the consultations is to underline the importance attached by the European Union to respecting the essential elements referred to in Article 5 of the Lome Convention and to find out Niger’s intention regarding compliance with them”(see page 2).

927 Communication from the Commission to the Council “on conclusion of consultations with Niger pursuant to Article 366 of The Lome Convention and taking appropriate measures”, in Com(1999).
political commitments to meet the EU’s demands. The EU, for its part, had sent an evaluation mission to Niger which concluded that basic civil and political rights were being respected, and that proper measures were in place to prepare for the transition.

Accordingly, when the Commission proposed the conclusion to the consultations, this included a package of positive measures that would serve as “appropriate measures” to apply during the transition period. This indicates that the EU has begun to consider the possibility that these appropriate measures could also constitute positive measures under 366a. The Niger case presents an outstanding example of this trend.

The case is also fortuitous because it represents perhaps the first time in the history of the clause’s application in which there was a minimal degree of strategy behind the action. Firstly, programs that had already been approved would continue to be implemented as scheduled. Secondly, during the transitional period, aid would focus on support for elections and actions directly benefiting the population: humanitarian aid, food security, health, and education. Ultimately, the objective was to gradually resume normal cooperation at the end of the transitional period, provided that the progress reports indicated Niger’s respect for its commitments. The unique feature in this case was that development cooperation, instead of being suspended, was replaced by a package of positive measures directed at restoring democracy and benefiting the poorest element of the population.

While this tendency toward positive measures can be observed, from the EU’s perspective it is imperative that the authorities concerned are cooperative and acting in good faith. In the case of Togo, development cooperation was simply suspended, and financial aid proposed only for the purpose of conducting elections. Even this election aid was dependent upon a plan previously drafted by the Togolese authorities. The approach with respect to Niger was different, inasmuch as it was pro-active instead of reactive and was based on a definite strategy: aid would not be suspended but re-channellled in order to meet the EU’s objective; namely, a restoration of democracy.

The strategy proved successful. Six months later, Niger had fully restored democracy in accordance with the schedule. In response, the Presidency issued a statement in which it stated that now “the EU is ready to support

928 These included: an official inquiry into the circumstances of assassination of President Brainpower extended to the civilian government; organisation of free and fair elections according to the schedule; separation of power including an independent judiciary; pluralism and transparency to be respected including freedom of press; respect for the National Reconciliation Council’s decision that its members will not be eligible for the forthcoming elections; good governance and preparation of monthly progress reports during the transition. Ibid., p.3.
929 Draft Letter attached to the Commission communication, ibid.
Niger in its efforts to promote economic and social development for the well-being of its peoples”.  

It is necessary to comment here that those who believe inter alia that Article 366a is primarily a sanctioning mechanism, and base this on the grounds of Council decisions, are likely to be disappointed. The tendency has traditionally been to view Article 366a as having an almost exclusively punitive character, based on its conception as an active mechanism rather than a proactive (preventive) one. However, the EU currently seems to be advancing towards a more mature stage in which positive measures will be taken to redress a situation. Although Article 366a does not explicitly envisage such measures, nothing in its wording prevents them either.

16.7 Ivory Coast

16.7.1 Introduction

What transpired in the Ivory Coast which led the European Union to target her in this context?

16.7.2 The Events

Following the other examples, the case of Ivory Coast concerned a military coup. Following this, the EU issued a statement condemning the situation and recalling the conditions established under Article 366a of the Lome Agreement. In that statement, the EU adhered to a decision recently adopted by the Organisation of the African Unity (OAU), which generally condemned military coups and resolved to isolate any government that had come to power by force.

16.7.3 The Consultation Procedure

First Round of Consultations. The Commission immediately issued a proposal for consultations. As was now the practice in EU/ACP relations, this proposal provided a brief analysis of the situation: the head of state had been deposed, and the democratic institutions (Constitutional Assembly and Su-

931 For the Ivory Coast see, Utrikespolitiska Institutet,Elfenbenkusten.landguiden.se. See also, Bulletin EU 12-1999,point 1.4.12. See also Declaration by the Presidency on behalf of the European Union “on the military coup in Ivory Coast” Brussels 07.01.2000,Nr.14234/1/1999,press 422.
932 Communication from the Commission to the Council ”on the opening of consultations with Cote d’Ivoire under Article 366 of the Lome Convention” COM (1999) 899 final, Brus-

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preme Court) dissolved. In its communication, the Commission took also into account the condemnations that had already been issued by European (France, Germany) and Western (US and Canada) countries, as well as other African countries, regarding the coup.

Inspired by these condemnations, the Commission adopted a tougher approach, for the first time suggesting that provisional restrictive measures be taken before the consultations:

“in the meantime, no new financial commitment will be made for Cote d’Ivoire apart from possible humanitarian projects or projects directly benefiting the poorest sections of the population”. 933

One question to be answered is whether the Commission was recommending that the matter be treated as a case of special urgency, in which the proposed measures –immediate, but transitional934 – were to be adopted before the consultations. It is also possible that the Commission interpreted the Council’s statement of condemnation as an invitation to impose restrictive measures. However, as mentioned, it has increasingly adopted a more positive reading of the clause.

Ultimately, the Council endorsed the Commission’s proposal.935 It is unclear whether it had accepted the transitional restrictive measures; it appears that it wished not to take such a “tough” approach before the Consultations.936 At the latter, held in Brussels on 7 February 2000, the EU seemed satisfied with the pledges made by the government of Ivory Coast. The authorities, inter alia, made the following commitments: respect for a timetable on the holding of elections and adoption of the Constitution; separation of powers; guarantee of free press; and assurances of transparency in decision-making. As part of the usual practice, the authorities would submit regular progress reports to the EU.937 The most important feature here was that parliamentary and presidential elections would soon take place, with The Heads of Mission (HoM)938 in charge of the follow-up.

933 Ibid.,p.2.
934 There is no doubt that the Commission was feeling more and more assertive as it was undertaking certain practices of the application of 366a. In the extreme, this assertiveness would be equivalent to the Commission proposing measures which go beyond the Council’s declaration.
935 It endorsed the proposal on 14 January 2000.
936 The Council of Ministers meeting in the ACP group had enacted a declaration, which significantly affirmed that the decision to open consultations did not at all determine that the EU could not adopt certain conclusions afterwards. One important course of action was therefore to open the consultations in order to fully assess the situation; another was to decide afterwards whether or not there would be appropriate measures. See ACP 5 of the Council, 13 January 2000,doc.5259/00.
938 Ibid., p.2.
16.7.4 Outcome of Consultations and Subsequent Action

The outcome of consultations and subsequent EU actions in this particular case study continued to change. First, the Commission proposed an end to the consultations, echoing the Council’s conclusions. Ambiguously, it stated:

“but (the European Union) would not be taking any decision whether to suspend the development co-operation for the time being.”

The final decision was then postponed in light of the numerous commitments made by the Victorian authorities. In the meantime, it seemed that the EU would continue co-operation as usual. In the proposal, the Commission suggested that the HoMs would closely monitor the situation and report at a later stage on the authorities’ compliance with the commitments made.

Despite having postponed the final decision, the Commission in the meantime proposed a package of appropriate measures. These resembled “positive measures”, in that they would help support democracy during the transitional period. Here, the focus was placed on the run-up to elections. On the one hand, measures would be awarded that were directly aimed at supporting a full restoration of democracy, rule of law, good governance, civil society and humanitarian aid. In the meantime, existing co-operation and humanitarian aid would not be altered. On the other hand, with respect to programmes for which the financial agreement had not yet been signed, a gradual and conditional approach would be followed.939

The Second Round of Consultations. Consultations were re-opened one year later, on the basis of the Ivorian authorities’ alleged failure to honour some of the previous commitments. The EU had issued two declarations during December 2000, expressing its intention to re-open consultations.940 This time, they were launched under Article 96 of the Cotonou Agreement.941 The Commission reported that residential and parliamentary elections during the transition period had not been sufficiently open, and that the transition to democracy had been marked by atrocities against the civilian population.

939 Ibid.
940 2327th Council meeting, General Affairs, Brussels 22-23 January 2001,Nr.5279/01,press 19, p.15. This statement was preceded by a number of declarations by the Presidency of the EU, condemning the instability of the political situation in Ivory Coast. See, inter alia, Declaration by the Presidency on behalf of the European Union "concerning the situation in Cote d’Ivoire”, Brussels 10.07.2000,Nr.10173/00,press release 250;Declaration by the Presidency on behalf of the European Union “on Cote d’Ivoire” Brussels 25.10.2000., Nr 12743/00,press 396 and Declaration by the Presidency on behalf of the European Union “on Cote d’Ivoire”, Brussels 7.12.2000,Nr.14005/000,press 471. In this last declaration, the Presidency deplored the restrictions imposed on voters’ freedom of choice by the Supreme Court’s decision barring a candidate from standing in the parliamentary elections”.
941 The Cotonou Agreement signed in Cotonou (Benin) on June 2000 was put into anticipated application by Decision 1/2000 of the ACP-EC Council Misters (OJ L 31/8 of 15.12.2000).
Consequently, the consultations were re-launched, taking place in February 2001 in Brussels. The Ivorian delegation made a number of commitments, inter alia: they promised to ensure the system’s openness to all forms of opinion, and to conduct a transparent investigation into the atrocities committed during the military regime. The EU seemed satisfied with these results. To forestall the failures of the previous agreement,

this time, both the Commission and Presidency engaged the authorities in an intensive three-month round of explanatory dialogue regarding the various controversial points. At the end of this innovative dialogue, the Commission felt confident enough to enact a new communication which, after having comprehensively analyzed the situation, proposed a conclusion to consultations.

On the one hand, the authorities had undertaken encouraging measures in the course of the dialogue; for instance, local elections were held and were open to all parties. On the other hand, important shortcomings remained: the political system was not yet open to the full spectrum of political opinion, nor had a judicial investigation been launched into the atrocities committed. Because the entire picture was not yet clear, the Commission proposed the adoption of appropriate measures that would balance the carrot with the stick: “the Commission therefore proposes to support its process by gradually resuming Community co-operation on conditional basis”.

The EU, first, was prepared to financially support a number of measures relating to social issues, support for institutional building and the private sector. In this context, the EU would also support measures carried out by the authorities in the fulfilment of their commitments. This has become a characteristic of the EU approach: it directly contributes to restoring democracy through the use of financial aid. This strategy can be quite helpful.

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942 In its periodical review of the common position 98/350/CFSP “on human rights, democratic principles and the rule of law and good governance in Africa” the Council declared that “these consultations, which took place on 15th February 2001 in Brussels, were held in an open and constructive spirit. The European Union noted the Ivorian authorities’ willingness to remedy the problems and in particular, to do all within their power to ensure that the political system is opened to all shades of political opinion in the country” (Luxembourg 25.06.2001, Nr.10245/01, press 267).

943 Consultations with the ACP side concerning Cote d’Ivoire pursuant to Article 96 of the Cotonou Agreement in Brussels 15.02.2001, Nr.5930/01, press 49. According to the decision taken “the Presidency and the Commission will engage in an intensive dialogue with the Ivorian authorities in Abidjan on the various points raised, following which an assessment will be made on the situation on the basis of which the consultations will be closed and the Union will decide on the appropriate measures.”


945 For the carrot and stick, see Chapter 9 of this study.

946 Ibid.
where it implies the identification of joint strategies. In the case of Ivory Coast, the Commission decided that once substantial progress had been made, aid would be rolled out progressively. Eventually, when the specified undertakings had been fulfilled, full co-operation would be resumed.947

Even if appropriate measures are awarded gradually and tied to conditions, this does not necessarily translate into restrictive measures. The tendency to impose conditionality in a gradual manner inevitably entails that the EU will have to monitor the situation. Conditionality thus transforms itself into an ongoing process.

With regard to Ivory Coast (the world's top cocoa grower) it must be pointed out that the situation in this country has changed drastically. In September 2002, internal strife set in and the country slid into war when rebels tried to oust President Gbagbo and seize the northern part of the country. Through President Mbeki of South Africa, a peace deal between the two rival parties was eventually brokered. The two sides pledged to stop fighting, disarm militias and hold presidential elections in October 2005.948

16.8 Fiji
16.8.1 Introduction
Which events led to the EU’s targeting Fiji in this context?

16.8.2 The Events
A democratically elected government was illegally overthrown. Therefore, the development partners, including the EU, had to respond. Following the overthrow of the democratically elected government and repeal of the Constitution in Fiji, the EU President issued two statements condemning the situation.949 In a third statement, it enumerated conditions – including the restoration of the rule of law, respect for political rights of all people, and the election of a democratic government – which if not be restored, would lead the EU to consider appropriate measures. This would imply the application of Article 366a of the Lome IV Convention.950

948 Ibid.
949 Brussels 4.08.2000, Nr. 10765/00, press 280.
950 Declaration by the Presidency on behalf of the European Union “on the development in Fiji”, Brussels 25.07.2000, Nr. 10578/00, press release 272. The Presidency qualified the situation in Fiji as “unconstitutional, unstable and precarious”.

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16.8.3 The Consultation Procedure

The Commission reacted immediately, proposing to open consultations with Fiji. In its proposal, it acknowledged that it was too early to impose sanctions on Fiji but that:

"(...) various forms of sanctions are being considered and prepared, should this attempt to overthrow democracy in Fiji succeed in resulting in a racially biased Constitution and Government".  

Consultations were held amongst the two parties on 19 October 2000, in Brussels. The Fiji Delegation made a number of commitments including to draft a timetable for constitutional revision, hold democratic elections within the following 18 months, and bring those responsible for the coup to justice.

16.8.4 Outcome of Consultations and Subsequent Action

One of the aspects of applying Article 96 of the Cotonou Convention is that after the consultations, the President of the EU makes a statement giving a preliminary assessment of the dialogue’s results. In this case, he seemed satisfied with Fiji’s commitments, stating that these commitments had been made in a constructive and positive atmosphere. In the meantime, the Council provided that dialogue and regular contact would continue between the two parties for the purposes of assessment, with an ambiguous reference to “appropriate measures” that would be considered, if necessary. Here, there was a perception that additional developments were imminent; consequently, the EU preferred to follow a “wait and see” kind of approach as opposed to proposing measures immediately. 

In its proposal to conclude the consultations, the Commission acknowledged the commitments made by Fiji authorities, but strongly reacted to the present government’s lack of plans to reinstate the democratically-elected parliament. To deal with this, the Commission identified a number of benchmarks and proposed appropriate measures: amongst them, that a Constitution should be drafted by June 2001. This constitution would be based on nationwide consultations, and would guarantee respect for civil, political, economic and social rights. The other benchmarks mentioned were contin-

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952 It seems clear that the EU had not undertaken any action following the round of consultations. In the press statement it was said that, "the European Union will continue its contact with the ACP side as regards further proceedings. See "Consultations with the ACP side concerning Fiji, pursuant to Article 96 of the Cotonou Agreement", Brussels 26.10.2000.Nr.12476/00,press 399.
gent upon the commitments made by the authorities, but according to a clear timetable that was imposed.\textsuperscript{953}

The “appropriate measures” proposed by the Commission contained two striking features. First, they would expire at the end of September 2002. In addition, however, the Commission wished to reserve the option of taking additional measures, if necessary. The decision regarding appropriate measures, most of them punitive, is striking in light of the previous Presidential statement (preliminary conclusions) issued immediately after the consultations. Then, the Council had made clear its preference to closely monitor ongoing developments, and to “wait and see”.

However the Commission did not see the situation in the same manner. It proposed, first, that the Council suspend financing of all investment projects under the 6th, 7th and 8th National Indicative Programmes (NIP) of the European Development Fund (although a so-called rural primary education micro-project would be maintained). Second, regarding projects for which financing agreements still needed to be signed, a gradual approach would be adopted in accordance with achievement of the various benchmarks. Third, notification of financing by 9th European Development Fund would be postponed until developments had occurred. Finally, the Commission proposed that it support positive measures for the restoration of democracy and rule of law during the transition period, as well as maintain trade preferences and humanitarian co-operation.

As one might expect, this time around the Council failed to follow the Commission’s proposal in its entirety. The Fiji authorities had undertaken some additional positive steps since conclusion of the consultations, which coincided with their commitments. Amongst these steps were the restoration of the Constitution revoked by the coup, and the announcement of elections.\textsuperscript{954} Taking this into account, the Council followed the Commission’s proposal in some but not all of the points. For instance, it agreed that a democratic government should sign the 9th NIP, and that new programmes under the NIP would be postponed until the holding of elections, while ongoing projects would be implemented as planned. However, the final decision did not establish a specific deadline, but provided that measures would

\textsuperscript{953} Accordingly general, free and fair elections should be held no later than the end of June 2002; judicial procedures against Speight and his associates and adoption and promulgation of a new constitution after popular referendum not later than December 2001. See proposal for Council Decision "concluding consultations with Fiji under Article 96 of Cotonou Agreement", in http://euro itself.

\textsuperscript{954} There was a judgement of the Court of Appeal of Fiji on 1 March 2001 stating that the 1997 Constitution remains the supreme law of Fiji. In addition, the authorities of Fiji decided to hold elections under the constitution beginning on 27 August 2001. It is significant, in this regard, to note the positive tone of the Declaration made by the Presidency on behalf of the EU on Fiji, "the EU will continue to closely monitor progress towards elections and is desirous to pursue the co-operation with Fiji on the basis of the Cotonou Agreement", Brussels 22.03.2001 ,Nr.7359/01, press 117.
be revoked once free and fair elections had taken place in conditions ensuring respect for human rights and the rule of law.\textsuperscript{955}

This case illustrates that even if both the Council and Commission participate in the consultations, the assessment made by each institution may differ considerably. The Commission exhibits a certain preference for punitive measures, based on its belief that this is the aim of Article 69. The Council, to the contrary, opts for a somewhat more flexible approach. In this instance, the Council spelled out appropriate measures in a rather positive tone: “the notification of the 9th ED allocation will be made once free and fair elections have taken place”. Moreover, it did not impose tough sanctions nor suspend existing co-operation, but merely postponed the allocation of future funds until expected developments had taken place.

16.9 Haiti

16.9.1 Introduction
What triggered the EU’s involvement with Haiti?

16.9.2 The Events
The human rights clause has been applied to the case of Haiti, with the application of tough measures as in Togo. This reaction was triggered by evidence that electoral laws in Haiti had not been respected during the parliamentary and local elections. The members of the so-called “provisional electoral council” in charge of the counting had been victims of threats and intimidation. The situation, after being assessed by electoral observers of the Organisation of American States (OAS), was condemned by the international community and various internal organisations of Haiti. The Council also condemned the situation and stated that it would review its aid policy to Haiti, immediately requesting consultations\textsuperscript{956} to be held in Brussels on 26 September 2002.


16.9.3 The Consultation Procedure

The consultations with Haiti’s delegation, led by its Minister of Foreign Affairs, appeared unsuccessful. In the so-called “provisional conclusions”, the Presidency of the EU noted the Haitian authorities’:

"refusal to take into account the remarks made by the international election observation mission together with the premature publication of the elections result and the failure to act upon an appeal made by the opposition".957

16.9.4 Outcome of Consultations and Subsequent Action

In response, the Commission proposed to conclude the consultations with a handful of appropriate measures. These measures were the toughest enacted thus far and were accepted by the Council in their entirety, with a few minor changes not substantially affecting the content. These measures pointed to the fact that during the consultation procedure, the Haitian authorities had not followed the EU’s recommendations; in particular, a recount of the votes. This can be witnessed in the Commission’s avoidance of the usual statement, made on other occasions, to the effect that "consultations were held in a frank and constructive atmosphere.”. Instead, the Commission stated that ”in its provisional conclusions the EU noted the point of view of the Haitian authorities, but regretted that they had not taken into account of its remarks and concerns as to the legitimacy of the process”.958 This illustrates the fact that no agreement could be reached between the parties, and furthermore, that the Haitian authorities did not display any commitment to remedy the situation.

At that point, the EU simply applied the stick. The Council closed the consultations with adoption the following “appropriate measures”:

“(a) not making available the second PIN trance of the EDF of the EURO 44,4 million;
(b) Suspension of direct aid budgets. This mainly affects structural adjustment programmes and food security.
(c) Redirection of the remaining funds of the first PIN trance of the eighth EDF to projects that are of direct benefit to the Haitian people and to strengthen the civil society and the private sector, and are liable to support democratisation and underpin the rule of law.
(d) Preparations for the 9th EDF programming by the Commission delegation in Haiti which will consult the Haitian government if necessary. Un-

957 "Consultations with Haiti under Article 96 of the Cotonou Agreement", Brussels 28.09.200,Nr.1176/00, press 342.
The following observation should be made regarding the case of Haiti. While it is certainly understandable that the EU opted for the stick, given the lack of commitment from Haitian authorities, it is also striking that Haiti received the toughest measures imposed to date, resembling those used with Zimbabwe. This contrasts with the previously discussed cases in which military coups had taken place, which arguably should have been treated more seriously than the Senate voting irregularities. The case of Haiti illustrates that a subjective assessment made by parties to the consultation procedure may have influence, at the end of the day, than the objective gravity of the situation.

There were two determining elements in the present case: the evidence of electoral fraud, provided by international observers; and the immaturity of democratic institutions, demonstrated by the intimidation experienced by the national electoral commission. This evidence was compounded by the passive attitude of the authorities. Whereas in the cases previously analysed the authorities were generally eager to co-operate with the EU, often issuing a number of commitments, in the case of Haiti there is no evidence of this.

It can be argued that in the context of consultations, once authorities have made credible commitments, co-operation should gradually be resumed. This may also coincide with authorities’ taking steps that are characterized by conditionality. In the context of such commitments, positive measures may also be enacted. On the contrary, when the authorities have made no commitments or the EU considers them insufficient or inappropriate, then tough and direct measures may be imposed. In this latter case, there is no purpose in following a gradual approach, as this is normally based on a firm timetable of commitments.

At this stage, it is important to note that much depends on the attitude of the parties to the consultations. Specifically, the particular assessment made by the EU may well contain subjective elements. According to the Presidency’s preliminary conclusions in the case of Fiji, "(...) full co-operation by the Fijian authorities is vital if it is to continue to support Fiji’s effort to ensure economic and social development of the country.”

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959 Council Decision of 29 January 2001,"Concluding the consultation procedure with Haiti under Article 96 of the ACP-EC Partnership Agreement” in OJ L 48 of 17.02.2001,pp.31-32. In its conclusions, the Council gave some additional evidence to the fact that the consultations had been a failure. According to the annex letter addressed to the government of Haiti, "this exchange of views did not, however, lead to progress in finding a satisfactory solution to the issues raised by the Union, which then drafted provisional conclusions expressing its regret that its concerns had not been taken into account and envisaging the possibility of appropriate measures as defined in the ACP-EC Agreement”, in annex letter,p.2.

960 See, Chapter 9 of this study.

961 Ibid.
16.10 Conclusion

The main aim of this chapter was to demonstrate why the EU has reduced or cut off aid to a number of ACP countries. It was also to determine whether the EU followed the existing procedures that were discussed in Chapter 14. The investigation began by clarifying the definition of “democracy” applied by EU when reducing or cutting off aid. It was revealed that as the conditionality actor, the EU defines democracy narrowly, where its absence is equated with “election fraud” and “military coups”. This finding is confirmed by Moberg’s investigation of the conditionality clause. However, before the EU can act to reduce development assistance to these countries, it must activate the human rights clause involving the following well-defined procedural rules that are centered around dialogue. It was also demonstrated that the consultation procedure mirrors the "managerial model" where jawboning is the core ingredient. After the rules have been followed, i.e., after the conditionality recipient has been given an opportunity to change its behaviour, the EU proceeds to reduce or ultimately cut off development assistance to the recipient country. ACP countries where this has occurred include, amongst others: Togo, Fiji; Haiti, Comoros Islands, and Niger.

The conclusion reached here, then, is that the EU is indeed prepared to cut its aid to dictators within ACP countries, both in theory and practice. In this EU/ACP partnership, both a “managerial model” and "enforcement model" are applied.

It is now time to provide a brief summary and conclusions with respect to the present inquiry which, it should be recalled, is titled: An Inquiry into the Compatibility of the Demo-Conditionality with State Sovereignty in International Law: With Special Focus to the Relations between the European Union and the African, Caribbean and Pacific Countries.

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962 See Andreas Moberg, Villkorsklausuler-om avtalsklausuler som utrikespolitiskt instrument, Iusjus 2009.
PART V

SUMMARY AND CONCLUSION
17 Summary and Conclusion

17.1 Introduction
The main aim of this study was to clarify the extent to which demo-conditionality was compatible with state sovereignty in international law. With this ultimate goal in mind, this final Chapter provides an overall summary of what has been covered.

17.2 Starting Point and Relevant Questions
Starting point. As stated at the beginning, the practicality of any argument declaring certain norms to be compatible with state sovereignty rests on an assumption that it is possible, in the first place, to distinguish which norms are compatible from those that are not. The validity of this assumption, in turn, depends on whether a workable test has been developed for making such a determination.

Relevant Questions. The following questions were deemed especially relevant to this study. The broadest question was: is demo-conditionality compatible with the principle of state sovereignty? However, before that could be answered, certain related details needed to be clarified. How does one go about differentiating between the norms which are compatible with state sovereignty, and the ones which are not? Does a universal test for drawing this distinction exist? And, if so, what are the requirements of this test?

17.3 Delimitations
The scope of this study has been delimited in several respects. The main delimitation worthy of mention is that the analysis of demo-conditionality’s compatibility with state sovereignty needed to be tested using two different pathways (routes): the general treaty law, and the development co-operation instruments adopted over the years.
17.4 Methodology

The methodology involved a legal analysis, i.e., undertaken within the confines of the sources of international law. Although there has always been controversy among international lawyers as to what constitutes sources of international law and the process by which rules of international law emerge,\textsuperscript{963} it is Article 38(1) of the International Court of Justice that is widely recognised as the most authoritative statement on this question. It mentions the following as sources:

\begin{itemize}
  \item[(a)] international conventions, whether general or particular; establishing rules expressly recognised by the contesting parties;
  \item[(b)] international custom, as evidence of a general practice accepted as law;
  \item[(c)] principles of laws;
  \item[(d)] subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nation; as subsidiary means for the determination of rules of law.
\end{itemize}

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, applies these sources. However, the list above is hardly conclusive; other sources such as the United Nations General Assembly resolutions were also consulted in the course of this study.

Apart from delimitating the subject matter to be discussed, certain terminological clarifications were made that were relevant to the tools applied during this study. Thereafter, the analysis targeted the relationship between state sovereignty and international norms; and specifically, the possible legal premises of the demo-conditionality in Part II of the Study.

17.5 State Sovereignty and Justification for Demo-Conditionality

In Part II, the two issues of state sovereignty and justification for demo-conditionality were analysed over six chapters – 4, 5, 6, 7, 8 and 9. The first area of interest was the starting point with regard to the compatibility of international norms with state sovereignty in modern international law and its relationship to other norms. That investigation was in undertaken Chapter 4, “On State Sovereignty”. The discussion began with a brief description of sovereignty, including its history and theory. It was seen that in connection with sovereignty, two distinct dogmas have historically dominated international legal theory: "absolute" and "relative" sovereignty. It indicated how

these two concepts impact the main theme of this study in terms of the debate over the relationship between state sovereignty and international norms. Then, the chapter proceeded to a discussion about the recognition of the principle of State sovereignty under international law, confirming that this principle is part of general international law, covered by conventions and resolutions.

At this point, there was an examination of the relationship between state sovereignty and international norms in the context of the specific key questions provided above. The study revealed that in international law, it is the interpretations attached to Article 2(7) of the United Nations Charter, 1945 that provide the answers to the three main issues: how to differentiate between norms which are compatible with state sovereignty and ones which are not; whether or not there is a universal test; and any requirements of this test. With regard to the content and limits of domestic jurisdiction as formulated in Article 2(7) of The UN Charter, it was confirmed that matters which are not the subject of customary international law or treaty law fall within the domestic jurisdiction of the state in question; thus, in the event of any conflict, there would be a presumption in favour of state sovereignty.

The next level of discussion in Part II was directed towards an examination of the legal premises of demo-conditionality, according to “Route 1” of the methodology. Therefore, Chapter 5, “The International Covenant on Civil and Political Rights, 1966”, examined this general treaty which embodies the right to free and fair elections, upon which the enforcement of demo-conditionality is premised. More specifically, Article 25 of the ICCPR embodies the right to political participation from which the requirements of free and fair elections are derivable. A textual interpretation of Article 25 revealed that free and fair elections have eight elements: (i) periodic elections; (ii) genuine elections; (iii) standing for elections (iv); universal suffrage; (v) right to vote; (vi) equal suffrage; (vii) secret vote; and (viii) free expression. This interpretation also found support from the UN Human Rights Committee, as a body attached to this treaty. The conclusion reached was that demo-conditionality finds support in a general treaty premised upon Article 25 of the ICCPR, 1966.

Chapter 6 examined whether or not there are other global treaties which support Article 25 of the ICCPR, 1966 since, if this were the case, it would further enhance the legal status of demo-conditionality. The discussion revealed that participation and election are embodied in several documents. The 1965 UN Convention on the Elimination of All Forms of Racial Discrimination (CEDR) and the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) address the issues.

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965 1249 UNTS 13. Adopted in 1979, entry into force in 1981. See the literature on this treaty, ibid.
of participation and elections. The Participation of National Minorities and Indigenous Peoples also was examined, confirming the same trend. The provisions in each of these documents were ultimately found to fulfill the spirit of Article 25 of the ICCPR on participation and electoral elements. Thus, for example, the CERD and the CEDAW treaties embody the right to political participation, from which the right to free and fair elections and its electoral elements are derivable. The conclusion reached was that demo-conditionality finds support from the single-issue human rights treaties under discussion, and that the latter are binding human rights instruments in international law.

The second level of analysis was directed at examining “Route 2”, i.e., development co-operation as practiced over the years through specific agreements, in order to demonstrate whether or not demo-conditionality might be premised upon any of them. Thus, in Chapter 7 development co-operation instruments from the period 1945-1980 were examined. The results revealed several instances of development co-operation, reflecting differing legal values. The 1945-1970[1980?] instruments rule out the inclusion of demo-conditionality, or any conditionality for that matter, in development co-operation. Thus, the UN Charter, 1945 and the ICESCR, 1966 do not contemplate demo-conditionality, nor the UNGA resolutions. However, the UN HRD, while not expressly mentioning it, does attest to demo-conditionality’s inclusion according to an interpretation of its provisions. The conclusion reached here is that some of these instruments explicitly rule out demo-conditionality in development co-operation, while others either explicitly or implicitly contemplate it.

Chapter 8 examined certain resolutions with respect to the same question as Chapter 7. The resolutions studied were the Rio Declaration and Agenda 21, 1992; the Vienna Declaration and Programme of Action, 1993; The Johannesburg Declaration 2002; and the Millennium Goals, 2005. In conclusion, an interpretation of the Rio Declaration and Agenda 21 confirmed that the pursuit of the conditionality in development co-operation is acceptable, even though it does not make any explicit pronouncement to this effect. However, when it comes to the Vienna Declaration and Programme of Action, no conditionality is acceptable. With the Millennium Declaration and Goals, the pursuit of the demo-conditionality is, indeed, admissible.

Chapter 9, “Contemporary State Practices” sought to determine whether donors have reduced or cut off development assistance to recipient states that defaulted in the holding of free and fair elections, as required by Article 25 of the ICCPR, 1966 or the development cooperation agreements studied. The case studies examined were those of Germany and its Development Partners; and, the United States, European Union and Zimbabwe under the Mugabe regime (2000-2008). The conclusion reached was that in practice, donors are ready and willing to reduce or even cut off aid to those countries that default in holding free and fair elections; this was especially demonstrated in the case of Zimbabwe.
17.6 Demo-conditionality’s Compatibility with State Sovereignty in International Law

In Part III of the study, an analysis was undertaken regarding the central theme of the study, the compatibility of demo-conditionality with state sovereignty. Here, it was possible to follow two main routes: general treaty law, in this case Article 25 of the ICCPR, 1966; or, the development co-operation instruments already studied. These routes would be covered in Chapters 11 and 12. First, however, it was deemed necessary to discuss the compatibility of human rights and state sovereignty in Chapter 10 of the same title. This was relevant because the debate over the compatibility of demo-conditionality based upon Article 25 of the ICCPR, 1966 is part and parcel of the broader controversy surrounding the former. This investigation revealed that the gradual internationalisation of human rights issues has been fuelled by specific international concerns and treaty obligations, with its ultimate goal being to modify the traditional principle of States’ exclusive jurisdiction over their subjects. With this in mind, an extensive study of existing international human rights instruments was undertaken, finding that in light of these instruments, the individual is now a recognised subject in international law. Hence, human rights issues are not matters solely within the domestic jurisdiction of states under modern international law, and the pursuit of human rights conditionality is therefore compatible with the principle of state sovereignty.

Chapter 11, “Route 1: Article 25 of the International Civil and Political Rights, 1966”, analysed the compatibility of demo-conditionality with state sovereignty according to the methodology of Route 1; namely, from the perspective of Article 25 of the ICCPR. An investigation was launched with a view to knowing whether different positions on this subject existed; and if so, what they were. It was revealed in this context that there are two main Schools of Thought, representing different positions. The essence of the difference between the positions related to the question of what some international lawyers, and even states, perceive should be the legal status of Article 25 of the ICCPR, 1966 in international law; that is, whether it is part of binding international law.

The First School of Thought's position is that demo-conditionality is incompatible with state sovereignty. This conclusion was reached by applying the arguments of statism and priorities, and hierarchies of rights. First, the statist position was clarified to mean that state sovereignty triumphs over the pursuit of all human rights issues. Then, the principle of hierarchy of rights was discussed, whereby more value is attached to certain categories of human rights than others. In this specific case, only a certain category of human rights qualify for international action by the international community and third party states in the event of their violation. Here, the distinction between rights is made based upon subjective valuations, with the considera-
tion of “fundamental human rights” as opposed to “ordinary” human rights having become especially dominant in recent years. The former category, it was explained, has attained the status of *erga omnes* because it has become part of customary international law; some other would even argue for its *jus cogens* status. Such fundamental human rights were described as including protection from genocide, torture, prohibition of slavery and torture, and racial discrimination, although this is not easy to definitively confirm. Using this line of argument, the human right to political participation, recognised by Article 25 of ICCPR, 1966, would not qualify as a fundamental human right; for example, it is not listed as one of the *erga omnes* rights.

It was shown that according to the First School of Thought, any right that is not a fundamental human right is not strong enough to trump state sovereignty as an international legal norm. Therefore, any international action undertaken to implement it is not compatible with state sovereignty, and thus, generally speaking, demo-conditionality is incompatible with state sovereignty as well. However, the arguments advanced by First School of Thought were also revealed to be highly problematic, and ultimately, discredited. Statism is out of touch with recent developments in international law whereby the individual is now an international subject. Examples of global and regional human rights already adopted attest to this development. The hierarchy of human rights was also discredited for failing to recognise the modern trend according to which all human rights are universal, interdependent and indivisible.

The position advanced by the Second School of Thoughts – that demo-conditionality is compatible with state sovereignty – was then analysed. This School was understood to adopt the following lines of argument, diametrically opposed to the First School of Thought: it accepts the individual as a subject in international law; and it emphasizes the universality, interdependency and indivisibility of rights. The first argument implies that human rights is now part of a set of binding legal norms, and therefore, that the human right to political participation, i.e. Article 25 of the ICCPR, 1966, is binding to State Parties. The general conclusion, then, was that the pursuit of demo-conditionality premised upon Article 25 of the ICCPR, 1966 is compatible with state sovereignty.

The second aspect of the universality-interdependency-indivisibility of all rights was demonstrated to be a relatively modern interpretation, which regards all human rights as an indivisible whole where certain rights are not given priority over others. Here, categories of rights are complementary. This indicates the growing influence of a more integrative, "holistic" approach, which can be traced back to the Universal Declaration of Human Rights, 1948 which collected all human rights – civil, political, economic, social, and cultural – under one instrument. The principle found its official recognition in the resolutions of the International Conference on Human Rights in Tehran in 1968, and Resolution 32/130 of the United Nations Gen-
eral Assembly in 1977. More recently, it has been recognized in the Vienna Declaration and Programme of Action on Human rights 1993. The universality, interdependency and indivisibility of rights was also revealed to go hand in hand with a broader approach to state obligation under human rights treaties, whereby any human rights treaty creates a corresponding obligation of a state. In other words, in the context of state sovereignty, any international action to remedy human rights violations should include all categories of human rights. On this view, human rights no longer belong to the "domain reserve" of states and may be taken up not only with the UN but in other multilateral or bilateral relations between states. Therefore, states no longer consider Article 2(7) of the UN Charter to represent a barrier to international concerns when it comes to internal human rights situations.

The chapter’s conclusion was to state quite confidently, despite arguments to the contrary from former socialist states, that the investigation, discussion and condemnation of human rights violations within a state has become compatible with the principle of state sovereignty. This holds true independent of whether international peace and security is affected. Thus, the Second School of Thought takes the general position that demo-conditionality based upon Article 25 of the ICCPR is compatible with state sovereignty; this is ultimately the position adopted by this study as well.

Chapter 12, “Compatibility Route 2: From Development Co-operation Instruments Perspective”, analysed the compatibility of demo-conditionality with state sovereignty using the alternate methodology of various development co-operation agreements as a possible legal premise for demo-conditionality. In this context, it was necessary to find out whether these instruments met the requirements of the test for a norm’s compatibility with sovereignty.966 Here, it was clarified that there were two major determinants. First, it depended upon the current legal status of the duty to co-operate for development. Second, it depended on the content of the instruments in question; that is, whether they contemplated the inclusion of demo-conditionality in development co-operation. The study demonstrated that there are several such development co-operation agreements, in which developed states have agreed or been urged to provide development assistance to developing countries.

The legal value of these instruments was assessed, revealing several treaties that could potentially imply a legal duty to co-operate for development. In the case of one such treaty, the ICESCR, 1966, examination of the wording revealed that development co-operation is not legally binding, but based upon the consent of parties. With respect to the other remaining instruments, UN declarations and resolutions, the duty to co-operate for development was shown to have only a soft law nature, leaving the central question somewhat ambiguous. Regarding the second consideration, whether the instruments

966 See, mainly, Chapter 4 on this test.
contemplate demo-conditionality, it was found that the UN Charter does not address the issue of conditionality, and thus does not contemplate demo-conditionality as well. Of the other instruments, the majority of them – including the primary one, ICESCR, 1966 – declared demo-conditionality to be legally unacceptable. However, in some of the instruments there is a more implicit acceptance of demo-conditionality.

The safest conclusion, then, according to Route 2 of the analysis, was that even with regard to development co-operation instruments, state sovereignty is still privileged over demo-conditionality, and the latter is incompatible. A consequence is that donors cannot rely legally upon the global instruments which govern development assistance, in their pursuit of demo-conditionality in development co-operation. Instead, they must resort to another path. This dilemma is the focus of Chapter 13, titled under the rubric: “Route 1 or Route 2?” In this chapter, a comparative analysis is made between the pursuit of demo-conditionality premised upon Article 25 of the ICCPR, 1966, and the development co-operation instruments discussed earlier. The ultimate aim was to demonstrate which route would be the legally safer one to take in the pursuit of demo-conditionality.

A comparative assessment was made with regard to the relative legal value of Article 25 of the ICCPR, 1966 and the Development Co-operation Agreements, and whether demo-conditionality was contemplated in development co-operation. The conclusion was that the safest route to follow is that of Article 25 of the ICCPR, 1966. The advantage of treaty law over soft law in this regard was reemphasized.

Having demonstrated that demo-conditionality is compatible with the principle of state sovereignty, this study took up the issue of ensuring the compliance of States Parties with their treaty obligations. In Chapter 14, The "Enforcement Model" or "The Managerial Model?", two available models through which donors ensure recipient countries’ compliance with their international treaty obligations were compared. This discussion was necessary since the "enforcement model" associated with demo-conditionality is highly criticised in certain quarters for failing to prevent State Parties from defaulting on the holding of free and fair elections. The study explained some of the reasons for this criticism, such as both monetary and humanitarian costs, the legitimacy problem, and its approach to sovereignty. Its benefits were also discussed; namely, that the threat of reducing or cutting aid is a powerful incentive that can be effective in making a targeted state hold free and fair elections.

The "managerial model", also sometimes referred to as the "co-operative strategy" was then discussed as an alternative to sanctions, in terms of potential criticisms and benefits. Ultimately, it was more difficult to provide a vivid and comprehensive description of this particular model. The strategy is comprised of the disparate elements of transparency, dispute settlement, and capacity building, all of which are found in certain regimes as parts of man-
agement strategy. The coalescing of these elements into a broader process by which the miscreant is persuaded to change its ways, described by one commentator as "jaw-boning", was described, with an emphasis on the roles of argument, exposition, and persuasion in influencing state behaviour. It was also demonstrated that with respect to the strategy of persuasion, there are three principal methods for inducing states into compliance with norms. These are the role of justification in international life; complexity and interdependence of contemporary international life; and the important role of international organizations. It was suggested that the interpretation, elaboration, application and ultimately, enforcement of international rules is accomplished through a dialogue among the interested parties. The observation was made that the criticisms levied against the "enforcement model" relating to costs and legitimacy do not apply to this model. Instead, the most likely criticism is "delay", i.e., the extended time frame for negotiations. Ultimately, it was explained, the advantage of the "managerial model" is to relieve tension in the debate over sovereignty between development partners. Whereas in the "enforcement model" sovereignty is treated as something to be "isolated and always to be defended at any cost," in the "managerial model" approach every decision is arrived at by consent, and the offending State is completely involved. Therefore, state sovereignty is therefore not emphasized.

This study concluded that the two models should be used to complement one another in practice, in order to induce compliance by State Parties to international treaty obligations; in this case, redirecting a state to hold free and fair elections. First the "managerial model" would be applied, and if this was not effective, then the "enforcement model" would be applied. Thus, demo-conditionality does not appear all at once, but is a process beginning in dialogue in the form of "jaw-boning". The donors would only cut off aid to a recipient ("the enforcement model") once the more co-operative process has been exhausted; this is especially true where a treaty exists regulating the relationship between donor and recipient.

Finally, as a special focus, this study proceeded to examine specific cases of demo-conditionality in development cooperation among the European Union and particular African, Caribbean and Pacific Countries. Here, the aim was to confirm whether the European Union, as a donor, actually follows the practice of reducing or cutting development assistance to recipient regimes of (ACP) that have failed to promote democracy through the holding of free and fair elections.

967 See, Chapter 7 of this study.
968 See, Chapter 13, 14 and 15 of this study on EU-ACP relations.
17.7 Part IV: Special Focus: The European Union and African, Caribbean and Pacific Partnership and Demo-Conditionality

In Chapter 14, “Background Information”, relevant features of the partnership between the European Union and the African, Caribbean and Pacific Countries is discussed with respect to development co-operation. EU/ACP relations was shown to have a long history in which some of the original EU countries held “traditional relations” with ACP. The EU’s role as a major player in development was discussed, whereby it has legal external competence to enter into binding agreements with other subjects of international law, e.g., individual states or groups of states. This was relevant to the specific context of the study, in which the European Union as a major donor derives its legal capacity to engage in development co-operation with other countries. It was observed that in its relations with other states, the EU employs various agreements to serve its own interests in development co-operation. The conclusion is that the EU/ACP relationship is very well-institutionalised, and based on consent by both parties.

Chapter 15, “The European Union and Political Conditionality”, dealt with two issues: whether (and how) the European Union has embraced political conditionality; and the manifestation of demo-conditionality as practiced by the EU. To begin, the chapter discussed the evolution of development co-operation by the EU in the context of how it incorporated political conditionality. The analysis revealed that development co-operation between the EU/ACP countries has been a long process, but ultimately formalised through treaty agreements. Since then, the EU has followed a trend of adopting political conditionality in its relations with this group of countries. Its adoption of the Human Rights Clause in development co-operation was also discussed, as well as the procedure, based on the “managerial model”, required before the actual reduction or cutting of development assistance may occur. The conclusion reached in the chapter was that the EU/ACP relationship is very institutionalised, and based upon a proper documented procedure to be followed before the reduction or cutting off of aid.

Finally, this study proceeded to examine some classic case studies in which the EU has ended up reducing or cutting off aid to ACP countries for the latter’s failure to hold free and fair elections. Chapter 16, “The Special Cases Studied”, examined the cases of six countries: Togo, Ivory Coast, Fiji, Haiti, Comoros Islands, and Niger. It was seen that in EU/ACP development co-operation, there is a commitment by both partners based on the EU human rights clause included in their agreements. The EU was shown, as a conditionality actor, to define democracy quite narrowly as “election fraud” and “military coups” in deciding to cut assistance. Moreover, the human rights clause must first be activated, following certain well-defined proce-
dural rules before aid can be cut; this reflects an application of the "Managerial Model". The consultations procedure provides the targeted ACP state with an opportunity to justify its behaviour. According to the chapter, ACP countries that have had the human rights clause activated against them and aid flows cut, and even reinstated, include Togo, Ivory Coast, Fiji, Haiti, and Niger.

The conclusion here was that the issue of compatibility of demo-conditionality with the principle of state sovereignty in EU-ACP relations is not at all problematic. This relationship is based upon the agreements signed by both Parties; in this case, the Lome Convention (which has been replaced by the Continuo Agreement). Thus, it is based upon the free consent of the donor (EU) and recipient (ACP country). In both theory and practice, the EU is prepared to cut off its aid to dictatorial regimes in ACP countries. In short, there is overwhelming evidence to demonstrate that the tying of development assistance to free and fair elections as a norm is being taken seriously.

In sum, this study has fulfilled its main aim of demonstrating the compatibility of demo-conditionality with the principle of state sovereignty. It has also shown, through case studies, that EU applies this finding to its policy of reducing or cutting off aid to any ACP country that defaults in the holding of free and fair elections.

17.8 Prospects for the Future

One final issue to be commented upon here concerns future prospects regarding the application of various models, in ensuring that States Parties to Article 25 of the ICCPR 1966 will implement their international treaty obligations. Here, the study should be viewed as being intimately bound up with the concerns of international pro-democracy and human rights interventions. This field remains imbued with a great deal of controversy, characterized by the refusal to accept liberal democracy as a model of governance, as well as a debate over the models used to best achieve the goal of establishing democratic governments. Concerning the first problem, this study has provided adequate evidence as to the ongoing proliferation of democracy worldwide, which is expected to continue in the face of remaining pockets of resistance. With respect to the models employed in pursuit of democratic goals, there are two relevant parameters: the presence or absence of conditionality; and the two models already discussed above, a “hardball” and “softball” approach whereby the former relies upon military intervention, and the latter upon non-military means, for promoting democracy.

From the point of view of this study, any future research on the promotion of democracy must be focused on determining which of these alternate strategies is most effective in ensuring compliance. At a bare minimum, it
must be accepted that the international community has moved away from the ineffective practice of doing nothing in response brutal and dictatorial regimes where flagrant and gross violations persist. The use of military action as an "enforcement model" also remains problematic.\textsuperscript{969} However, the "managerial model" and later, the use of economic sanctions as part of an "enforcement model", should remain on the table for donors. With respect to the latter model, "targeted sanctions" is currently regarded as the most effective method for ensuring that States Parties comply with their international obligations under Article 25 of ICCPR, 1966, to hold \textit{free} and \textit{fair} elections.

Appendices

Appendix 1 - The First Group of Resolutions Labelled “Respect for the Principles of Sovereignty and Non-interference in the Internal Affairs of States in their Electoral Processes”.

The general emphasis of these resolutions is on the principle of non-intervention, as opposed to the desirability of electoral process. They include, inter alia, the following paragraphs, which are quite revealing as to the concerns of the majority of the Member States of the United Nations:

1. “Recognising that the principles of national sovereignty and non-interference in the internal affairs of any State should be respected in the holding of elections. Also recognising that there is no single political system or single model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors”.
2. Reaffirms that it is the concern solely of peoples to determine methods and establish institutions regarding the electoral process, as well as to determine the ways for its …

Appendix 2 - The Second Group of Resolutions entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections”.

In most of these Resolutions, the General Assembly:

“Stresses its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights”.

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Each Resolution also:

“Declares that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, as provided in national constitutions and laws“.

But at the same time, these Resolutions underline several caveats:

“Recognising that there is no single system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.”
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