



Reconsidering European Contributions to Global Justice

To Sanction or Not to Sanction?

Normative Dilemmas in the Promotion of LGBTI Human Rights

Johanne Døhlie Saltnes

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Abstract

A rights-based approach to development, a cornerstone of the European Union's (EU) development policy, can be interpreted as an attempt to govern development assistance through impartial rules and standards. Yet, such an approach might also run into a number of difficulties when introduced to a complex, real-world context. In this working paper, I emphasise that the practice of rights-based development policies is closely bound to the process of context-specific application. Through an examination of the path through which the EU and the United States decided on their approach to an anti-gay bill introduced in Uganda in 2014, I show that human rights conditionality is not applied in an automated fashion in accordance with impartial rules and standards. Rather, the path through which US and EU executives operate is weighing normative dilemmas connected to the unwanted consequences of human rights sanctions and public shaming. While these executives ultimately chose different responses, they arrive at their decision through weighing similar dilemmas. Accordingly, the paper highlights the importance of normative dilemmas for shaping and determining foreign policy decisions and calls for more research into this understudied phenomenon.

Keywords

Conditionality, EU, global justice, LGBTI human rights, rights-based approach, sanctions, Uganda, US

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Introduction¹

The European Union (EU), the world's altogether largest provider of development assistance, has voiced an ambition to conduct a rights-based development policy (Council of the EU 2014). Such an approach to development activities includes the promotion of legal rights and legal capacity building with the goal of empowering rights-holders (i.e. individuals) to claim their rights and duty-bearers (i.e. authorities) to meet their obligations (Broberg and Sano 2018: 636; Cornwall and Nyamu-Musembi 2004; Uvin 2004, 2007). The EU's approach can be viewed as an attempt to reduce the arbitrary wielding of power (domination) by subjecting development cooperation to human rights norms. This is not particular to the EU's development policy but rather follows from the founding principles of the EU: respect for human rights, democracy, good governance and the rule of law.² These principles constitute the backbone of the Union's foreign policy as well as its development policy.³ A prime example of the EU's approach is the practice of human rights conditionality—the inclusion of a clause that conditions aid and trade preferences on respect for human rights and democratic principles in beneficiary countries. This policy has resulted in the EU withdrawing development assistance as a result of human rights violations in beneficiary countries. Notable examples are Zimbabwe, Cote d'Ivoire and Madagascar.

However, the EU's high visibility approach on human rights promotion has been contested by third states, especially by partner countries in the Global South. Heads of states have criticised the EU for excessive use of 'hard' instruments such as sanctions and unnecessary finger-pointing. For instance, Rwandan President, Paul Kagame, told EU development Commissioner Neven Mimica 'You really need to stop this superiority complex nonsense about human rights' in a recent TV interview (France 24 2019). Western donors' ambition to promote and protect human rights of Lesbian, Gay, Bisexual, Transsexual and Intersexual persons (LGBTI) has been particularly resisted

¹ Previous versions of this paper have been presented at the 17th annual EUSA conference (Denver 2018), at the workshop 'Norms and Norms' at the Peace Research Institute Frankfurt (PRIF) (2019) and GLOBUS workshops in Dublin and Oslo. I thank the participants in these workshops for their valuable feedback. In particular I would like to thank Sonia Lucarelli, Erik Oddvar Eriksen, Helene Sjørusen, Katharina Meissner, Jennifer Erickson, Franz von Lucke, and Tine Johnsen Brøgger for valuable comments and suggestions on earlier drafts.

² Article 2 TEU (Lisbon Treaty) and the Charter of Fundamental Rights. The Charter is the first international document that explicitly prohibits discrimination on grounds of sexual orientation (Mos 2013).

³ Article 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'

in a number of African states. Aid-cuts, and threats thereof, made by Western leaders have been depicted as neo-imperial by partner states' authorities (Biriabayena 2014).

Critique of the EU's approach to human rights promotion has also been a prominent topic in the scholarly debate regarding the EU's global role. Scholars using interest-based perspectives have identified how the EU acts inconsistently on its rights-based goals and argue that the EU's various security and strategic interests account for this inconsistent behaviour (Carbone 2013; Crawford 2001; Smith 2014; Youngs 2010). Post-colonial scholars have, on their side, contributed to identifying the various ways in which domination of the Global South occurs as a result of development policies (Bhambra and Shilliam 2009; Fisher Onar and Nicolaidis 2013; Hansen and Jonsson 2014; Hurt 2003; Koshy 1999; Langan 2017; Mutua 2001; Rao 2015; Rutazibwa 2010).

While much of this literature is concerned with determining the extent to which such promotion is driven by donors' material interests, I will in this working paper take a different path. The starting point is the observation that the promotion of human rights abroad come with certain responsibilities, as well as dilemmas related to these responsibilities, which decision makers are forced to weigh. For instance, by continuing to provide development assistance to a government that engages in human rights violations, donors risk that such funds are misused to enforce or produce discriminatory policies. However, if donors decide to withdraw these funds, they risk that policies that support the basic rights of citizens are discontinued. Furthermore, affected groups risk being scapegoated by their own government due to a donor's decision to cut funding. Hence, donors must weigh their normative concerns against the potentially unwanted consequences of their decision to withdraw aid. Such consequences may include harming the donor's relationship with the recipient country's government as well as worsening the conditions for the affected groups on the ground.

In this paper, I look into how such normative concerns are weighed and handled in concrete situations of decision making. This may in turn add to the literature on donors' human rights policies, by illuminating that there might be reasons un-associated with material interests, which help to explain their choice to react differently to relatively similar situations. In the literature, normative considerations are often referred to by the catch-all category of 'altruistic motivations', yet seldom specified (Lumsdaine 1993; Stokke 1989). In an attempt to further nuance how normative dilemmas affect donors' human rights policies, I argue that the dilemmas donors' face mainly relate to the application of norms and the weighing of the consequences of their application, rather than the validity of the norms themselves. Notwithstanding human rights norms' validity, their application must be weighed against potential discord with other concerns, such as not putting human rights activists at risk. Accordingly, the process of weighing competing concerns and consequences of norm-based actions has to be factored in to understand how and why donors choose differentiated responses to human rights violations abroad.

I investigate the relevance of this argument through an in-depth case study of Western executives' responses to an anti-gay bill passed in Uganda in 2014. I ask, why Western donors with a similar ambition to protect LGBTI human rights abroad reacted differently to the Anti-Homosexuality Act (AHA) in Uganda—with a sanctions-based and diplomatic dialogue-based approach. The case of LGBTI human rights lends itself well to investigate whether possible normative dilemmas influence donors' choice of approach, due to the contested nature of such promotion on the African continent. LGBTI human rights is politicised within Uganda, and Ugandan authorities act as a contestator of Western donors' policies. Hence, LGBTI human rights is a most-likely-case of spurring norm collisions such as weighing rights promotion against scapegoating, putting activists in danger and contributing to increased politicisation of the issue as such. Adopting a most-likely case-study research design, this paper aims to trace the process in which Western donors decided on what measures to take after the AHA was passed in Uganda in 2014 and thereby shed light on the relevance of norm-collisions for our understanding of how donors chose to respond to human rights violations.

Analytical framework

The EU and the United States (US) Obama administration have been depicted as frontrunners in promoting LGBTI human rights in their foreign policy (Patalakh 2017). The EU and the US are also among the world's largest donors of development assistance, and they have tied the respect for LGBTI human rights to the provision of aid. A broad moniker, aid is generally understood to involve the transfer of resources from states or international organisations to sovereign beneficiaries with the goal of promoting social and sustainable economic development (Fabre 2018). It is a voluntary practice and does not involve an element of reciprocity (Hattori 2001). Aid normally comes in the form of grants, either directly dispersed to the beneficiary's budget (budget support) or provided to a specific sector or project (project aid). With the provision of aid comes the power to withhold this aid should the terms of agreement made with the beneficiary not be upheld, *ex ante* or *ex post*. Such sanctions are defended as a means to stop violations of an agreement, i.e. violations of human rights. Sanctions 'are meant to prevent those agents from so acting or to make it more costly for them to so act' (Fabre 2018: 29). So called aid conditionality regulates the terms on which aid can be withheld or terminated as a consequence of a violations of an agreement. While in principle, donors are free to withhold aid whenever they consider the agreement not to be fulfilled, conditionality clauses specifies and regulates how disputes on human rights should be resolved and how aid can be terminated as a result of such disputes.

However, both the EU and the US have received criticism for their ambition to promote human rights as part of their foreign policy, especially for conditioning aid on human rights principles. One prominent argument is that human rights discourse is mere window-dressing and will be acted upon only when *not* in conflict with the economic and security interests of states (Crawford 2001; Forsythe 2000; Smith 2014; Williams 2004). This has been a prominent argument in the literatures assessing the EU's global

role as well as the US' foreign policy. For instance, Forsythe (2000: 53) writes that 'The most notable feature of US foreign policy on human rights after the Cold War, whether multilateral or bilateral, is the desire to avoid significant costs of either blood or treasure'.

Furthermore, scholars that take a post-colonial perspective hold that rather than empowering rights-holders and building capacity for duty-bearers, human rights promotion from the wealthy and powerful 'amounts to granting Western culture the prerogative of imperialism, the right to define and impose on others what it deems good for humanity' (Mutua 2001, quoted in Donnelly 2007). 'The human rights arguments of many Western liberals and labor activists [...] are often complicitous with neocolonial domination in an international framework', argues Koshy (1999). Similarly, Ignatieff (2000: 19-20) writes that human rights are 'increasingly seen as the language of moral imperialism just as ruthless and just as self-devised as the colonial hubris of yesteryear'. In sum, post-colonial scholars have brought attention to how 'power enables and legitimises forms of domination and control' and the detrimental consequences and effects interventionist policies may have on less powerful states (Rutazibwa 2010).

These various critiques of the EU's and the US' human rights policies focus on Western powers' possibility to exploit their power surplus vis-à-vis developing countries, thereby illustrating how political conditionality affects the conditions for global justice. In essence, injustice—or dominance—can be defined as the 'subjection to the arbitrary wielding of power' (Eriksen 2016: 4). While a donor-recipient relationship is characterised by dependence of one actor on the other, this dependence does not necessarily amount to dominance. Dependency, however, becomes a form of dominance when the asymmetry between the parties is politically exploited through the use of power. Hence, the lack of reciprocity and donors' power surplus vis-à-vis beneficiaries make aid-relationships particularly vulnerable to dominating practices.

Notwithstanding the various critiques of the EU's and the US' policies, the ambition to bind development policy to human rights norms and rules can also be viewed as an attempt to reduce the arbitrary wielding of power. Through human rights conditionality, actors are bound by comparable rules and, accordingly, the space for taking advantage of power asymmetries is reduced. Simply put, actors are subject to rules and not to power. Such an *attempt* to reduce domination could be interpreted in line with the GLOBUS concept of 'justice as impartiality' (Eriksen 2016; Sjørnsen 2017).⁴ The central proposition is that strong institutions, both at the domestic and at the global level, are necessary to secure equal protection of individuals' human rights. Such powerful and impartial institutions can serve as arbitrators who operate on a 'neutral standard for dealing with colliding values and norms' (Eriksen 2016: 14). Detractors would oppose this view by objecting to conditionality on grounds that it lack respect for the beneficiaries or that it is only as a result of asymmetry that donors can include human rights conditionality in development agreements. A conception of justice as

⁴ GLOBUS – Reconsidering European Contributions to Global Justice' is a H2020-funded research project that critically examines the EU's contribution to global justice. See: www.globus.uio.no

impartiality, on the other hand, would reject those objections on the ground that impartial rules are needed to settle disputes. From the viewpoint of impartiality, human rights conditionality regulates dispute settlement on norm-violations and how and when aid can be terminated as a result of norm-violations. Hence, rather than being evidence of imposition and imperialism, as post-colonial scholars would argue, political conditionality could be interpreted in line with the ambition to reduce domination and donors' space to take advantage of their power vis-à-vis beneficiaries. Then, anchored in a concept of justice as impartiality, we can understand the move to make development cooperation conditional on respect for human rights as an attempt to mitigate domination.

Yet, such an attempt might also run into a number of difficulties when introduced to a complex, real-world context. While sanctions may be morally justified in situations of norm violations, there might be other competing concerns that suggest that sanctions are not the best way forward, after all. For instance, sanctions on homophobic legislation might in practice put LGBTI-rights activists in danger. Another obvious concern is that a budget support cut to a beneficiary government might lead to the same government deciding to close down services to its citizens, such as access to essential health-care or gay-friendly HIV clinics. Arguably, to understand how donors make decision in relation to particular situations, the context must be factored in.

Then, to analyse how context matters in decision making on donors human rights policies, I emphasise that the practice of human rights promotion is closely bound to the processes of norm application—in other words, the magnitude of different normative considerations that actors evaluate when making their choices on how to react to human rights violations. This is what Günther (1993)⁵ brings to the fore when he makes a distinction between applicatory and justificatory discourses. He argues that norms such as human rights are inherently indeterminate with reference to the situation they are applied to and therefore needs specification and adaptation in each situation. A discourse of justification refers to establishing a norm's universalisability—that is whether the norm is valid at a general level—and predicts that all situations are evaluated and treated according to a concrete moral standard. A discourse of application, on the other hand, characterises a situation where actors encounter several universal norms having conflicting content; actors identify and evaluate several normative perspectives and determine which course of action to take after considering all possibilities. The aim is to establish 'if a particular rule should be followed in the present circumstances, and in case of yes, how this should be done' (Eriksen and Weigård, 2003: 80).

⁵ Günther's distinction between applicatory and justificatory discourses has also been used by scholars to show that there are two main types of contestation. Discourses either contest the validity or the application of norms. Validity contestation questions whether the norm is righteous, while applicatory contestation concerns the question of whether a norm is appropriate in a given situation (Deitelhoff and Zimmermann 2013; Zimmermann, Deitelhoff and Lesch 2017).

Norms which are valid under unchanging circumstances can conflict with one another when all the circumstances of a situation are considered. In justification discourses we simply establish that there is no norm which, under unchanging circumstances, conflicts with the norm requiring justification. The conflict of norms would then be a problem of their appropriateness and not of their validity.

(Günther 1993: 212)

Accordingly, a norm's validity notwithstanding, it must be weighed against all considerations and competing norms that may be valid in the current circumstances. Such situations require prioritisations and that one of the competing concerns are set aside. Hence, the weighing of consequences resulting from a specific normative prioritisation must be taken into account when we analyse how actors evaluate and decide on how to act on their principled goals.

Methodology

This working paper seeks to shed light on the extent to which and how normative dilemmas have influenced donors' approaches to LGBTI human rights promotion abroad. To do so, I trace the process of how donors decided to approach to the Anti-Homosexuality Act (AHA), which was passed in Uganda in 2014. I identify 24 February 2014, when President Museveni signed the bill, as a critical juncture for donors, as this is the point in time when they had to decide whether and how to react to the President's action. From this critical juncture, I trace the process of how EU and US policymakers decided to react to the bill. I expect that donors' reach their conclusions through the process of weighing colliding normative concerns and land their response as a result of these considerations.

To test the expectations of my argument, I proceed in two steps: First, I shortly analyse the EU and the US policy commitment to promote human rights of LGBTI individuals through a review of the main documents outlining their policies. The aim of this review is to substantiate that these executives have a similar ambition to protect LGBTI human rights abroad. Second, to answer the question of why these executives with a similar commitment to LGBTI human rights chose different responses to the AHA, I rely on the method of process tracing. More concretely I apply theory-building process tracing to investigate the relevance of normative dilemmas for donor's responses to human rights violations. To do so I investigate whether the empirical evidence reflects the observable implications of the hypothesised causal mechanism (Beach and Brun Pedersen 2019). The aim is to shed light on the path through which these executives make their decisions. While the outcome is different—the US sanctioned Uganda and the EU did not—I expect the decision making process to be similar. Instead of an automated reaction, the expected theoretical mechanism through which these actors operate is the weighing of possible consequences (wanted and unwanted) of their alternative responses towards Uganda, what Eriksen (2018: 390) defines as 'learning'. 'Principles are interpreted methodologically as procedural directives for finding a

simultaneously appropriate and justified conflict resolution in concrete situations' (Günther 1993: 148). Norms and principles are not seen as fixed rules but 'methods or ways of seeing and of constructing responses to, complex moral situations' (Kohlberg, Levine and Hower 1984 quoted in Günter 1993).

The case of LGBTI human rights promotion was selected on the ground that it provides a most-likely case for the possibility of competing normative concerns being present. We know that there are specific vulnerabilities connected to these groups' fight for human rights. LGBTI rights activists have for instance been used as scapegoats for donors' withdrawal of aid and, as a result, homophobic governments have gained support for their cause. In addition, the killing of Ugandan LGBTI rights activist David Kato in 2011 after being identified in a Ugandan newspaper illustrates the security threat that LGBTI activists face.

Triangulation of sources has been important for this study. The mapping of EU and US executives'⁶ responses relies on systematic searches in EU and US official records of press releases and statements as well as search in press articles. This was combined with semi-structured interviews with 12 donor and civil society representatives as well as two e-mail exchanges with EU representatives (see list of interviewees at the end of this working paper). Furthermore, I conducted a search in US diplomatic cables in the WikiLeaks database, and I make use of the external dataset: 'Budget support suspensions (DBSS) 1999–2014' (Molenaers, Gagiano, and Smets 2016). Some of the data serve to map EU and US reactions while other parts serve to identify and synthesise donors' justifications for their response. I control for consistency by comparing justifications from different actors and by confirming whether words are followed through by actions. Furthermore, interviews were conducted under the promise of anonymity, giving respondents little reason to be dishonest about their motives.

EU and US LGBTI human rights policies

The paradox of Western countries' high-visibility approach on LGBTI rights promotion is evident: it was the Victorian laws of the British colonial government that first introduced criminalisation of homosexuality in a number of African states.⁷ In addition, there has been widespread reporting about American evangelical Christian involvement in anti-gay activities inter alia in Uganda. Such involvement includes assistance to a draft legislation that Western donors condemned and sanctioned in

⁶ With executives I mean the US government, and the EU Commission, Council and EEAS (EU delegation).

⁷ See inter alia (Felice 2016; Jjuuko 2013; Rao 2015) for discussions on this paradox.

2014.⁸ Regardless of the heritage of anti-gay laws from the colonisation period, the EU and the US have acted as global vanguards on LGBTI human rights activism in the last decade. While a commitment to promote human rights abroad can be traced back to the individual inceptions of their foreign policies, both actors have strengthened their ambition and commitment to promote LGBTI rights. These ambitions are codified in a number of policy statements released by the authorities of both actors. The relevant documents⁹ are listed in table 1 below. In addition to these official documents, the US strengthened its approach by appointing Randy Berry as a special envoy for human rights for LGBT persons and Todd Larson as US Agency for International Development (USAID) senior coordinator in leading the US government’s efforts to advance the human rights of LGBT persons.

Table 1 Official documents coding commitment to promote LGBTI human rights abroad

European Union ¹⁰	United States (Obama administration)
Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. (Council of the EU 2013)	Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons. (The White House 2011)
Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019. (Council of the EU 2015a)	FACT SHEET: Promoting and Protecting the Human Rights of LGBT Persons: A United States Government Priority. (The White House 2015)
Toolkit to promote and protect the enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People. (Council of the EU 2010)	LGBT Vision for action. Promoting and supporting the inclusion of lesbian, gay, bisexual and transsexual individuals. (USAID 2011)

⁸ The court case Sexual Minorities Uganda vs. Scott Lively concluded that there was no question that Pastor Scott Lively’s actions ‘in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda [constituted] violations of international law’ (Case 3:12-cv-30051-MAP, June 2017).

⁹ EU and US documents are not hard-law, but can rather be considered soft-law, or ‘political’ commitments. However, the ambition to promote the respect for human rights is codified in the EU’s treaties. The Treaty on European Union states that the Union’s actions on the international scene ‘shall be guided by the principles which have inspired its own creation [...] the universality and indivisibility of human rights and fundamental freedoms’ (Official Journal of the European Communities 2012). Furthermore, the Charter on fundamental rights is the first binding international human rights document which includes sexual orientation in its non-discrimination provisions, however, it is binding foremost for EU institutions when implementing EU legislation (Malmedie, 2015). The US commitment is more volatile, something which President Trump’s reversal of LGBTI human rights legislation has shown. President Trump’s reversals have mostly concerned the rights of transsexuals in the United States. So far he has not renounced support for LGBTI human rights as part of US diplomacy. Trump has, however, avoided appointing a new special envoy for LGBTI human rights. See for instance www.globalequality.org for reports on the Trump administration’s LGBTI policies. See also Patalakh (2017).

¹⁰ In the following the EU is used to denote the actions of the EU delegation on behalf of EU institutions. The EU member states’ bilateral decisions are denoted by country.

The EU and the Obama administration's LGBTI human rights policies are considered to be comprehensive and far-reaching (Malmedie, 2015; Patalakh, 2017). However, the formulation of these policies also have an inherent *ambiguity* connected to them. This ambiguity relates to how these actors' LGBTI human rights policies should be implemented and followed in practice. Arguably, as I will show below, there is significant room for manoeuvre with regards to how the aim of promoting LGBTI human rights might be pursued.

The EU focuses its promotion on strengthening the legal protection of human rights for LGBTI individuals. It has a strong focus on decriminalisation and actively condemning discriminatory laws. The EU 'should actively condemn discriminatory laws, policies and practices, including the criminalisation of consenting same-sex relations between adults [...]' (Council of the EU 2013: 9). Furthermore, the EU should promote equality and non-discrimination and 'denounce any form of discrimination that is contrary to these [equality and non-discrimination] fundamental principles' (Council of the EU 2013: 10). In addition, the EU commits to combat LGBTI-phobic violence and provide support to human rights defenders. At first sight, the EU's documents have a noticeable focus on public condemnation and de-criminalisation. However, the EU's documents also emphasise the need for context-sensitive solutions and wariness of vulnerabilities when promoting LGBTI human rights. Rather than linking the commitment to promote human rights for LGBTI individuals to the EU's streamlined human rights clauses, its official documents highlight that there is a 'need to be mindful of the particular sensitivities of LGBTI issues among interlocutors on the one hand and specific vulnerabilities of LGBTI persons on the other' (Council of the EU 2013: 3). In fact, the EU's guidelines state in several places that it will take into account 'local realities' in which LGBTI individuals realise their struggle for freedom. The EU is 'committed to advancing the human rights of LGBTI persons in a meaningful and respectful way' (ibid. p. 4) and give 'careful consideration, on a case by case basis, to the best way of promoting effectively the human rights of LGBTI persons' (ibid. p. 9) and 'is committed to 'consult and take into account the views of the LGBTI community in the countries concerned about the most appropriate ways to act and react' (ibid.). The concern for giving affected parties a due hearing is also visible in the EU's Action Plan on Human Rights and Democracy:

Continue to work at bilateral and multilateral levels with third countries, taking into account the views of civil society, towards the elimination of discrimination against LGBTI persons; increase awareness and proactive handling of LGBTI issues by staff in Headquarters, EU Delegations and Member State Embassies and step up support to local CSOs working on LGBTI issues.

(Council of the EU 2015a)

A similar concern can be traced in US documents. The policy is formulated in Obama's presidential memorandum where he directs all departments and agencies pertaining to the US government to combat criminalisation, protect LGBT refugees, provide assistance to advance non-discrimination and ensure 'swift and meaningful responses'

to human rights violations of LGBT persons (The White House 2011). Similar to the EU, there is a noticeable focus on combating criminalisation. The USAID's interpretation of the presidential memorandum provides more insight to the US approach. In addition to working through multilateral channels, the US has an ambition to combat LGBT-hostile policies in beneficiary states. In doing so, a centrally formulated principle is to 'account for country and cultural context' (USAID 2011: 8). 'Tailored, targeted solutions that are appropriate to individual country contexts preserve the "do no harm" principle that is a key underpinning of work with vulnerable groups in development and humanitarian assistance programming' (ibid).

Thus, the EU's and the US' emphasis on context-sensitive solutions stands in contrast to these actors' commitments to conduct a rights-based approach to development where a substantial element of political conditionality is envisaged. The US has taken a 'leading role' in committing US aid to human rights and good governance (Stokke 1995)¹¹ while the EU's political conditionality—as visible inter alia in Articles 9 and 96 of the Cotonou Agreement—can be characterised as the 'most comprehensive legal commitment to respecting human rights and democracy in an international agreement' (Saltnes 2018).

Following from the review of the EU's and the US' documents spelling out their commitment to promote LGBTI human rights abroad, it is reasonable to expect that policymakers will evaluate different concerns when considering how to best conduct a LGBTI human rights policy abroad. Not only are possible dilemmas evident, they are also clearly spelled out in these actors' official documents. In other words, the formulation of these actors' policies add to the expectation that LGBTI human rights is a most-likely case for normative evaluations to influence donors' decisions. In the section below, I trace the process of how such evaluations were made by EU and US policymakers in the case of Uganda passing a repressive anti-gay bill.

Responses to Uganda's 2014 anti-gay law

On 24 February 2014, the Ugandan President Yoweri Museveni signed the AHA which criminalised same-sex relations with life imprisonment. The bill was a modified version of the Anti-Homosexuality Bill (AHB), which had been tabled by Member of Parliament, David Bahati, on 13 October 2009 without success (Jjuuko and Mutesi 2018). Several donors made threats of aid-cuts when Bahati tabled the bill in 2009, including the UK and Sweden, which consequently received widespread counter-criticism of neo-colonial behaviour by prominent Ugandan politicians (Molenaers et al. 2016). Uganda was at the time an important development partner both to the US and the EU. Both actors provided relatively large amounts of development aid to Uganda and had a long-standing development partnership. Accordingly, the passing of AHA in

¹¹ Aid-withdrawals on grounds of human rights and good governance occurs under Section 508 of the Foreign Assistance Act (Crawford 2001).

2014 became a test case for the EU’s and the US’ ambition to promote the human rights of LGBTI individuals abroad.

After the signing of the AHA, all donors in the Global North reacted in some way or another. Public statements were made, and a few donors chose to cut aid immediately. This was the case in Norway, the Netherlands and Denmark (Molenaers, Gagiano and Smets 2016). Sweden and the US stated that they were considering aid cuts, and after a period of contemplation, they decided to redirect parts of their aid programmes from the government of Uganda to NGOs and civil society (Molenaers, Gagiano and Smets 2016; Interviews – 5, 11). The US, which altogether had the toughest reaction to the AHA, also cancelled a joint military exercise that was planned to be held on Ugandan soil and applied visa restrictions on the Ugandan officials that supported the bill (The White House 2014a). A third group of donors chose to *not* suspend its aid to Uganda. In this group we find the EU and many of its member states, including the UK and Ireland. All donors addressed the issue in political dialogue with President Museveni either bilaterally or in common meetings with other donors (Interviews – 1, 2, 5, 7, 11). Table 2 below summarises the EU’s, the US’ reactions to the AHA.

Table 2 Reactions to the AHA by the EU and the US

Donor	Public statements	Punitive measure	Behind the scenes diplomacy
EU	28.2.14 Common public statement 18.2.14 HR Ashton statement 4.3.14 Declaration by HR Ashton 20.12.13 HR Ashton statement	<i>European Parliament call for the use of Art. 96. Not supported by the Council of the European Union.</i>	Demarche Article 8 political dialogue meeting
US	16.2.14 Obama Statement 28.2.14 Common public statement	Redirection of aid after consultations with civil society, visa-bans and cancelling of a military exercise.	

Sources: (British High Commission 2014; EEAS 2013, 2014a, 2014b; Council of the EU 2015b; European Parliament 2014b; The White House 2014a, 2014b; Interviews – 1, 5)

The European Union

The EU’s reaction to the Anti-Homosexuality Act was two-fold.¹² First, the EU signed a common statement together with all European and North American donors present in Uganda, reminding the government of Uganda of its constitutional and international

¹² The EU did put future decisions on budget support on hold for a short period awaiting a political dialogue meeting between president Museveni, the EU head of delegation and the EEAS head of African affairs (European Parliament 2014a). Such a decision to put future suspension on-hold, that is, refusing to give it in the first place must be distinguished from the act of discontinuing aid that has already been provided (Fabre 2018: 79). Only the latter is in this paper considered to be a punitive measure. The EU’s decision cannot be considered an aid sanction, as it did not involve actually withdrawing funds.

human rights obligations (British High Commission 2014). It followed suit by issuing three statements from EU High Representative Catherine Ashton (EEAS 2013, 2014a, 2014b). Second, the EU also addressed the issue with Museveni in political dialogue meetings, including an enhanced Article 8 political dialogue meeting on 28 March 2014 (Council of the EU 2015b: 275; European Parliament 2014a; Interviews – 1, 2, 4, 8, 14) as well as meetings with the minister of foreign affairs, the minister of justice and with the Uganda Human Rights Commission (Bossuyt et al. 2014). The EU's choice to mainly react via soft instruments might be considered surprising given the EU's general human rights conditionality policy. Moreover, the EU had suspended budget support to Uganda in both 2010 and 2012 over corruption, something which makes it reasonable to expect that the EU would be willing to use such instruments towards the Ugandan government again (Molenaers, Gagiano and Smets 2016). Then, how did the EU land on the decision to not use sanctions or raise the issue in behind-the-scenes diplomatic instruments?

Donor coordination meetings between representatives of different embassies in Uganda were an important venue for discussion among donors at the time when the AHA was adopted. The EU delegation and EU member states which had embassies in Uganda met regularly to discuss and coordinate their policies towards Uganda. There were monthly Head of Mission meetings, and donors also met in the context of the Democratic Governance Facility programme and the Democracy and Human Rights working group (Interviews – 8, 11). These meetings served as a space for dialogue and coordination on issues that came up in the donors' work with Uganda. Donors' responses to the AHA were an important topic in these meetings. However, it was difficult to agree on a common response among European donors: 'We had a lot of discussions within the European family, but reaching a consensus was very difficult because of the difference in approaches of the member states [...] It was very difficult, it was very tough discussions that we had' (Interview – 11).

While some European countries—such as Denmark, Norway and the Netherlands—had announced aid-cuts immediately after the AHA was passed, the majority of donor countries spent some time in deciding on their response. Interviews with EU representatives reveal that it was not a given how the EU would react to the AHA, but rather a process of evaluating different concerns:

We had to take into consideration the other concerns that people had [...] we had to seek a deeper understanding [...] I don't think it is good to promote your views to gain political power at home. Who are you helping then?

(Interview – 8)

With this government and this president, having a hard line did not yield much...

(Interview – 4)

In this period of contemplation, the EU delegation consulted with other donors, relevant stakeholders and with Brussels and ultimately decided, as a first step, to

address the issue with the Ugandan government in political dialogue, which was held in the context of Article 8 of the Cotonou Agreement (Interviews – 4, 8, 14; Council of the EU 2015b). Justifications by EU policymakers substantiate the expectation that possible unwanted consequences of a sanction was a concern that influenced the final decision. In justifying their approach, EU representatives made reference to the concern for making sure that the EU's reactions did not contribute to fuelling contestation and politicisation of LGBTI rights in Uganda. In the EU's view, sanctions could risk counter-arguments from Ugandan actors which again would be harmful for LGBTI persons in the country. Europe's high-visibility approach to LGBTI rights promotion, often considered neo-colonially intrusive, has contributed to the domestic politicisation of LGBTI issues and populations in the past. Hence, the EU delegation considered it important to take a co-operative approach instead of a public and punitive approach in order to not further fuel such rhetoric, which could put pressure on the situation for LGBTI activists and damage EU–Ugandan development programmes (Interviews – 1, 3, 8, 13). These considerations illustrate that the dilemmas donors face relate to the application of human rights policies and not to the validity of LGBTI human rights.

The EU's strategy could be interpreted as an attempt to depoliticise LGBTI human rights in development policy, by decreasing the visibility of such conditional pressure. This was the main point of justification when the EU head of delegation, Christian Schmidt, spoke to local newspapers and Ugandan TV:

Europe is not here to exchange money for African values. This is not the nature of our partnership. Our partnership is one of equal partners – where what we do in the area of development cooperation is discussed and agreed with our Ugandan partners [...] The discussion we have on human rights are not conditional. That is why it is important to know that we are not threatening, we have not threatened with aid cuts during the process of legislative adoption of the bill. This is not how Europe operates.

(NVT Uganda 2014)

The ambassador's justification was corroborated by EU officials:

We issued no formal statement/press release after the meeting but spoke to some journalists at the time, only to reiterate an important message in the spirit of partnership, that while we were concerned about the developments then, it wasn't a carrot and stick kind of affair tying our development cooperation as a condition to scrapping the law.

(Interview – 13)

The biggest fear was that if we put too much pressure this could lead to more discrimination, more violence, or even more anti-gay laws.

(Interview – 1)

Head of delegation Schmidt's statement highlights that the EU, in this case, does not operate according to a logic of justice as impartiality. What mattered, in the eyes of EU

policymakers, were not to follow the impartial rules set out in their conditionality-policies, but rather to make sure that the consequences of their actions were not contributing to further damage to Ugandan citizens or result in even more repressive laws; what mattered was the context in which human rights norms was applied.

Yet, EU executives' choice to work behind the scenes did not go unnoticed. The European Parliament, which has acted as an advocate for human rights conditionality and an accountability-driven approach to human rights promotion, criticised the EU executives for not approaching the issue with more visible and hard-line instruments, as would be required under the EU's human rights clause. On 11 March 2014, the European Parliament passed a resolution with a request to the Council of the EU for 'launching consultations to suspend Uganda and Nigeria from the Cotonou Agreement in view of recent legislation further criminalising homosexuality' (European Parliament 2014b). Once again were EU executives put in a situation where they had to evaluate whether or not to impose 'harder' measures on Ugandan authorities. The resolution was not followed by the Council of the EU, and consultations under Article 96 were never initiated. When asked why a punitive measure was not taken, EU representatives highlighted that a prominent concern for them was that a punitive reaction could have negative consequences for Ugandan citizens, LGBTI persons or, in the worst case, contribute to a reverse effect (Interviews – 1, 2, 3, 4, 8):

The worst thing we could do to help them would be to come with loudspeakers and Hollywood stars to hammer the message in. That would simply put people's lives at risk.

(Christian Schmidt quoted in [Manzitti 2016])

When it is very sensitive ... when it is considered that openly talking about it can worsen the situation or have a reverse effect, then through our ambassador we can meet with the minister of justice or minister for human rights instead of public pressure... the Uganda case is a good example.

(Interview – 1)

One has to be especially thoughtful of the engagement one have when bringing up the issue of human rights for LGBTI persons, in order not to create further harm to the people. This is well known, well thought through. We tend to think twice and consult amongst ourselves an among others on how to best approach the issue.

(Interview – 4)

In summary, interviews with EU officials, as well as their statements to the press, substantiate the expectation that the weighing of unwanted consequences of a sanctions-based approach contributed to the EU's decision to approach the AHA in Uganda with diplomatic means. The statements show that the EU engaged in a process of weighing different concerns related to the consequences of a possible aid-cut to

Uganda. The process of deciding on what measures to counter LGBTI human rights violations is accordingly not automatic. Rather, different concerns connected to unwanted consequences of an aid-cut are weighed against the need to make a public stance by using high-visibility instruments. In the case of Uganda's anti-gay law, aid-cuts were considered but eventually dropped due to their expected negative consequence for affected persons and the possibility of further politicising the issue in the Ugandan public sphere.

The US, which I now turn to, reacted differently than the EU and chose to implement aid-cuts in addition to other punitive measures. However, is there evidence of normative dilemmas being weighed also among US policymakers?

The United States

The United States' approach to Uganda in 2014 differs on several grounds compared to that of the European Union. The US had a comprehensive relationship to Uganda at the time of the enactment of the AHA. They had a large development cooperation programme in place as well as a military partnership with Ugandan forces in South Sudan. Hence, Uganda was considered an important military ally and a central partner for USAID in development cooperation (Interviews – 5, 10). Yet, the US reacted by publicly condemning President Museveni's approval of the anti-gay bill. On 16 February, days before President Museveni signed the law, President Obama issued a statement including the following sentence: 'As we have conveyed to President Museveni, enacting this legislation will complicate our valued relationship with Uganda' (The White House 2014b).

The US eventually followed suit by issuing several punitive measures towards Uganda. US authorities redirected some of its aid, cancelled a military exercise and imposed visa bans on several key politicians in Uganda (The White House 2014a). The US' response clearly signalled that the president's signing of the AHA led to changes in the US-Ugandan relations. A senior US representative describes the situations as follows:

We refused to allow this to be business as usual... as long as this legislation continued to exist, and the government refused to address this that it raised a fundamental question about what kind of partnership we could have for the future.

(Interview – 5)

Hence, the US opted for a combination of symbolic condemnation, conditionality and harder sanctions in the form of cancelling military activities and issuing visa bans. At first sight, the US' response may seem indicative of a more automated reaction. In the foreign policy literature, the US is often conceptualised as a hard-power which is more prone to use hard-instruments such as sanctions. The EU, on the other hand, is regarded as a soft-power which more often rely on diplomatic means (Kagan 2003). Yet, the US' response was not a given in this case, and there was no automated turn to using

sanctions. Rather, the US' reactions were subject to a process of weighing different concerns, where the potential consequences of a punitive reaction were considered:

We had to do something, everybody agreed, but when it came to determining what to do that became a much greater challenge for everyone.

(Interview – 5)

I had a diverse array of people working for me, and we had varying views, and I needed to take into account the different things they said and melt them into a coherent and cohesive narrative about US engagement, priorities and values as we moved forward. Usually, you are able to do this without all that much challenge, but sometimes it gets tough and in this case it was.

(Interview – 5)

Nobody wanted there to be consequences even though there had to be consequences... it was a really long and laborious and difficult internal US bureaucratic practice and discussion to find out what those consequences would look like.

(Interview – 9)

The dilemma that policymakers faced was not connected to the validity of the norm itself, namely LGBT human rights: 'it was about fundamental rights, about respecting the rule of law and their constitution, much like our own constitution. We respect the right of all citizens that call for equal protection to justice and this legislation denied all of those things' (Interview – 5). The validity of LGBTI human rights notwithstanding, the US faced a dilemma with regard to how the norm LGBTI human rights should be applied in that particular situation. US policymakers' justifications reveal a tension between the concern for voicing a clear message to Ugandan authorities—that the bill was considered discriminatory and in breach of international human rights standards—and the concern for not harming people on the ground.

Civil society representatives, both in Washington and in Uganda, were actively used by the US as consultation partners in the process of determining their reactions.

We worked together with civil society ... the biggest concern that we all had was the safety of those people, making sure that we engaged with them but without putting them at risk.

(Interview – 7)

In October 2009, when the anti-gay bill first appeared before the parliament, Ugandan LGBTI activists established the organisation Civil Society Coalition on Human Rights and Constitutional Law (hereinafter 'the Coalition'). The aim of the Coalition was to coordinate and secure a common position among civil society organisations and to conduct advocacy against the then proposed anti-homosexuality bill. The Coalition made a choice to actively engage with advocacy towards the international community to gain support for their cause (Interviews – 10, 12). These efforts included bilateral

meetings with diplomats as well as advocacy trips to Europe and the US (Interview – 12; Mugisha 2014). The Coalition warned against the risk of framing LGBTI persons as the cause for reduced funding for development projects. This was particularly important in the health sector where donors were responsible for the majority of the HIV/AIDS treatment budget. LGBTI individuals could end up as scapegoats if aid were cut, and people could lose access to essential medicines. Tying aid-cuts or threats of aid-cuts to the struggle for human rights of LGBTI people would then have a reverse effect: ‘if your sanctions are targeted towards the violators, you are punishing every single Ugandan for a government that is imposing the law’ (Interview – 12). For these reasons the Coalition’s advice to donors was to act behind the scenes and engage in silent diplomacy with the president (Interviews – 10, 12) in the time period before the AHA was passed. There is also evidence that this message was registered and noted by US diplomats:

Mutunga, Gutegwa and Mugisha said supporters of the ‘anti-homosexuality’ legislation may portray international criticism of the bill as ‘cultural colonialism’. They encouraged international donors to stress the legislation’s inconsistency with internationally accepted human rights standards, and its potential impact on assistance programs, *through behind the scenes diplomacy* with members of Parliament and senior government officials.

(WikiLeaks 2009)

However, when the AHA was adopted in 2014, the Coalition changed their advice and advocated for donors to speak out against the law through public statements. ‘At that point, we had nothing to lose’, claimed one activist (Interview – 12). On 3 March 2014, the Coalition released a set of guidelines to national, regional and international partners on how to offer support:

Issue statements condemning the passage of the Bill into law. We need the government to know that they shall not get away with their actions. These statements should reflect the other human rights violations in the country, not just about LGBTI rights.

(Coalition 2014)

On the question of aid cuts, the Coalition was particularly clear. They urged donors to *not* make a general aid cuts and especially not linking them clearly to the AHA, however that targeted aid cuts was supported (Interviews – 6, 9, 10, 12).

The question of cutting Donor AID has arisen. Our position on this is very clear. We do not support General Aid Cuts to Uganda. We do not want the people of Uganda to suffer because of the unfortunate Political choices of our government. However, we support Strategic Aid Cuts to specific sectors, such as the Dutch Government’s decision to withdraw funding from the Justice Sector... We DO NOT support cuts in support to NGO’s and other civil society institutions that offer lifesaving health services or other important social services to the People of Uganda.

(Coalition 2014)

While US policymakers were well aware of the argument that aid-cuts could put activists at risk, consultations among US policymakers and civil society activists reveal that there were more nuanced counterarguments to the general concern of not harming activists:

There were sophisticated activists that said: we don't want to condition money, but we do think you need to restructure your investments. So they were supportive when USAID stopped funding and put that money through local NGOs... I call it conditionality light, you make sure that you are not harming anybody, but you don't put the blame on the LGBT community, but you also don't pretend that it is business as usual, you don't pretend that we continue to give money to the government in the same way as before. I think they [Ugandan civil society activists] were very clear about no conditionality... but they were also very clear on that they wanted consequences, and that those consequences would involve restructuring of investments.

(Interview – 9)

Hence, for the US, the dilemma related to how they could find a way to approach the issue without harming activists but also without pretending to carry on with business as usual (Interview – 5). In addition, there were also concerns about how to respond to domestic actors in Washington that were concerned that their interests could be hurt (Interviews – 5, 7, 9). Different agencies voiced concerns on how a punitive approach towards the AHA could hurt their interests and activities in Uganda. The US military was especially vocal since they were collaborating closely with the Ugandan military in its operation in Somalia:

People in Washington got very concerned [...] there were some in Washington saying... it will hurt our partnership... these relationships will be undercut.

(Interview – 5)

Frankly, the US military was shocked [...] that a human rights issue would impact our military relationship.

(Interview – 9)

However, the US embassy managed to gain support in Washington for their view of taking a confrontational approach: 'We never allowed our interests, or our other competing values to diminish our commitment to standing up on LGBTQ issues' (Interview – 5).

Altogether, the expectation that the donors' approach to Uganda was determined by the mechanism of weighing different normative concerns related to the application of LGBTI human rights norms is substantiated also in the case of the US. Notwithstanding the difference in outcome of the EU and US cases, the path through which US policy-makers landed their approach towards Uganda can be characterised as a process where the concern for marking disagreement with the law was weighted against the risk of putting affected persons at greater risk. The final decision to impose a redirection of aid from the government to NGOs was made in accordance with advice from local

activists who argued for the US to make a message to Ugandan authorities that their relationship could not continue as before.

The US reaction diverges from that of the EU, however, the causal mechanism through which these actors reached their decision is the same. EU and US policymakers weighed different concerns related to the application of LGBTI human rights norms in Uganda. While EU policymakers landed in favour of conducting a behind-the-scenes approach, US policymakers landed in favour of redirecting aid in a way that was acceptable to representatives from the affected parties. Accordingly, while demonstrating that the process was similar, the findings presented in this working paper also support the distinction between the EU as a co-operative and the US as a coercive promoter of democracy (Börzel and Risse 2009).

Conclusion

A foreign policy ambition to promote human rights abroad affects conditions for global political justice. Critics of human rights promotion argue that international enforcement of human rights threatens the integrity of the principle of state sovereignty. Consequently, human rights violations must be solved within state's own jurisdiction (Cohen 2004; Rawls 1999). However, this view risks putting individuals in a position of domination if states repeatedly engage in human rights violations. The case of harshly repressive anti-gay laws exemplifies this dilemma. Is there basis for intervention or public condemnation by the international community? And, if so, what type of 'interference' would be reasonable?

In this working paper I have investigated the hypothesis that donors' reactions to human rights violations in beneficiary countries are influenced by competing concerns regarding what constitutes appropriate behaviour. More specifically I hypothesised that a collision between normative concerns and donors' weighing of these concerns are a path through which executives make their decisions. By tracing the process of how US and EU decision makers decided on their reactions to the 2014 anti-gay bill in Uganda, the expectation that normative dilemmas contribute to form and determine donors' policies was substantiated. What implications does this finding have for our understanding of donor's human rights policies?

The paper adds to the literature on human rights promotion by shedding light on the under-researched phenomenon of normative dilemmas. While much of the literature on human rights promotion and conditionality is concerned with determining the extent to which such promotion is driven by donors' material interests, this paper has shown that also considerations that go beyond these interests are relevant when donors decide on their approach. The requirement of consistency might be difficult to reconcile with concerns relating to the well-being and security of affected parties. In particularly sensitive policy areas, such as that of LGBTI human rights, the concern for the particular experiences and interests of affected groups is important. For instance,

affected groups risk being scapegoated and blamed for donors' aid-cuts. However, the analysis also shows that donors consider that this risk might be worth taking if the affected activists are supportive of aid-withdrawals, as was visible in the case of the US. Accordingly, the paper also highlights the need for further research into how normative dilemmas contribute and shape foreign policy decisions.

In addition, the paper emphasises some challenges that actors may run into if they were to conduct development policy in line with requirements derived from a concept of justice as impartiality. In essence, a rights-based approach to development could be seen as an attempt to act in line with impartiality principles by subjecting development policy to human rights norms and not to power. Conventional objections to this approach have come from human rights minimalists. Such a minimalist understanding of human rights hold that states are the only actors that are entitled to human rights enforcement. Notwithstanding these democratically grounded objections, this paper has shed light on objections to human rights conditionality related to the need for recognising difference and context (Eriksen 2016). Human rights conditionality can be considered problematic due to its inherent expectation of consistency. A hard and visible approach to human rights promotion may prove inappropriate in some situations due to concerns for possible, unwanted consequences of a hard approach. In the case of LGBTI human rights norms, such competing normative concerns relate to the risk of scapegoating and the risk of putting activists in danger. Hence, the assumption that human rights norms lend themselves well as impartial tools for conflict resolution may be in need of specification.

Interviews

- Interview – 1: EEAS official, Brussels, 28.05.18
- Interview – 2: EEAS official; Brussels, 28.05.18
- Interview – 3: EU Council/EEAS official, Brussels, 30.05.18
- Interview – 4: EU Delegation official, Telephone, 07.09.18
- Interview – 5: US Embassy senior official, Telephone, 19.09.18
- Interview – 6: Civil society representative Europe, Oslo, 17.10.18
- Interview – 7: USAID senior official, Telephone 17.10.18
- Interview – 8: EU Delegation official, Telephone 20.10.18
- Interview – 9: Civil society representative US, Telephone, October 18
- Interview – 10: Civil society representative Uganda, Telephone October 18
- Interview – 11: EU member-state embassy senior official, Telephone, 31.10.18
- Interview – 12: Civil society representative Uganda, Telephone, 6.11.18
- Interview – 13: EU Delegation official, e-mail correspondence 16.11.18
- Interview – 14: EU Commission official, e-mail correspondence 16.11.18

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